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

MEDICAL SUPPLY CHAIN, INC.,	)
To be Substituted by Samuel K. Lipari	)
Plaintiff,	)
v.	) Case No. 05-2299-KHV
NOVATION, LLC	) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	) Attorney Lien
To be Substituted by Global Health Exchange, LLC	)
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.	)

MOTION TO SUBSTITUTE DEFENDANT UNDER F.R.C.P. RULES 17(A)

Comes now the plaintiff Medical Supply Chain, Inc. and makes the present motion to substitute the defendant party Neoforma, Inc. with the corporation's purchaser Global Health Exchange, LLC (GHX). GHX is identified in the current case and both preceding action as a coconspirator with the defendants. GHX is aware of Medical Supply's claims and the possibility it will be named as a defendant. GHX is the real party in interest under the facts of the complaint. The plaintiff is entitled to the substitution under Federal Rules of Civil Procedure Rules 17(A), 15(A) AND 25(A). The plaintiff respectfully requests the substitution for the following reasons.

STATEMENT OF FACTS

1. On October 11th, 2005, Neoforma, Inc. a publicly traded company announced in a corporate press release today that it is being purchased by GHX. See Exhibit 1.

2. This event was foreshadowed in the plaintiff's complaint as a step the defendants will take to monopolize the market for hospital supplies distributed through the internet.

> "40. Originally there were over a hundred e-commerce electronic marketplaces for hospital supplies. Now there are just two, Neoforma, Inc. the web based supplier controlled by Novation and

> GHX, LLC a web based supplier controlled by Premier and other members in a joint venture of formerly competing hospital manufacturers and suppliers."
>
> Plaintiff's complaint in the present action at ¶ 40 on page 7

3. The plaintiff's complaint also alleged GHX would acquire Neoforma, Inc. to conceal the laundering of hospital funds converted by the defendants Novation, VHA and UHC.

> "420. The purpose of the merger is to restrain trade in the e-commerce market for hospital supplies and increase the market power of both companies, which is 80% to the entire control of the single company GHX. A second purpose of the merger is to conceal the loss of funds belonging to Novation's member hospitals in the Neoforma venture."
>
> Plaintiff's complaint in the present action at Section 15, ¶ 420 onpage 83.

4. Global Health Exchange LLC (GHX) is headquartered at 11000 Westmoor Circle, Suite 400 Westminster, Colorado 80021.

5. GHX is the subject of many averments of facts in the plaintiff's complaint as a co-conspirator of the named defendants. See Exhibit 2.

6. GHX's chief counsel communicated with Medical Supply's counsel via telephone when Medical Supply was preparing to file its complaint against GE. It was GHX's counsel who suggested the action be filed in Missouri. A suggestion Medical Supply followed in the present action.

7. Novation employees have turned over internal documents to the US Department of Justice revealing hospital funds were laundered and converted through Neoforma, Inc. where they were falsely represented as investment in electronic marketplace technology while being returned to Novation executives.

8. GHX's purchase of Neoforma's outstanding stock for $10 a share while distributing back shares to the defendants VHA and UHC does aid the redress of the cartel's conversion of customer hospital funds in the electronic marketplace for hospital supplies and is required to redress antitrust injury to consumers in the national hospital supply market.

9. GHX's renegotiation of an electronic marketplace agreement ending VHA and UHC unreasonable ten year exclusive contract with Neoforma at above competitive market rates is a necessary step toward ending the restraint of trade in the nation's market for hospital supplies.

10. GHX, VHA, UHC, Novation and Neoforma along with their corporate officers would not have taken this action to alleviate some of the harm caused by their unreasonable restraint of trade if Medical

Supply and its counsel had not persevered in three antitrust actions while having to seek a federal injunction to restrain State of Kansas officials from taking Medical Supply's counsel's license to practice law and to defend his license and reputation in state court at the instigation of the defendants in this action.

MEMORANDUM IN SUPPORT OF SUBSTITUTION

The plaintiff is entitled to the substitution under Federal Rules of Civil Procedure Rules 17(A), 15(A) AND 25(A).

Fed.R.Civ.P. 25(c) provides for the substitution of parties upon transfer of interest:

> "In the case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party...."

A district court may, in its sound discretion, substitute a party where a transfer of interest has occurred. *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 154 (6th Cir.1992), cert. denied, --- U.S. ----, 113 S.Ct. 194, 121 L.Ed.2d 137 (1992); *Bauer v. Commerce Union Bank, Clarksville, Tenn.*, 859 F.2d 438, 441 (6th Cir.1988), cert. denied, 489 U.S. 1079, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989*); Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 743 (7th Cir.1985); *Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1324 (10th Cir.1978).

GHX would still be liable as a successor in interest if not joined.

In *Panther Pumps & Equipment Co., Inc. v. Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir.1977), cert. denied sub nom. *Beck v. Morrison Pump Co., Inc.*, 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed.2d 395 (1978), the Court held that Rule 25(c) could be invoked to substitute a successor in interest who had obtained the assets of the corporation against whom judgment had been rendered. It defined successor as "one who succeeds or takes the place of another." *Id.* at 24. It quoted Moore's Federal Practice:

> Rule 25 has application only to actions pending in the district courts. But this should not preclude substitution after judgment has been rendered in the district court * * * for the purpose of subsequent proceedings to enforce * * * a judgment.
>
> 3B Moore's Federal Practice p 25.03, at 25-101 (2d ed. 1977), footnote omitted.

Substitution of GHX Meets The Requirements Under Rule 15

There are two basic requirements for substitution:

> "First, both complaints must arise out of the same conduct, transaction, or occurrence. Second, the additional defendant must have been omitted from the original complaint by mistake. Third, the additional defendant must not be prejudiced by the delay. *Soto v. Brooklyn Corr. Facility*, 80 F.3d 34, 35-36 (2d Cir. 1996)."

VKK Corp. v. Nat'l Football League, 244 F.3d 114 at 128 (2nd Cir., 2000). The VKK court als dealt with the issue of a party identified in the first complaint but not named as a defendant. The court found the omission to qualify as a mistake under Rule 15:

> "TJI was omitted from the original complaint because of a "mistake concerning the identity of the proper party." m(3)(B). The district court concluded that TJI was strategically omitted and TJL was sued because it was the recipient of the "payback" franchise. *VKK Corp.*, 187 F.R.D. at 499. But in its original complaint, VKK describes its interactions in the spring of 1991 with an entity that it calls "Touchdown Jacksonville, Ltd." At that time, however, TJI was the only Touchdown Jacksonville entity extant, and TJI was concededly the entity whose actions are described in the complaint. TJL was not created until the fall of 1991. We see no plausible reason for VKK purposefully to claim negotiations with and ascribe actions to a company that did not exist. We have found nothing in the extensive record on appeal to support the district court's theory as to VKK's strategy."

VKK Corp. v. Nat'l Football League, 244 F.3d 114 at 128 (2nd Cir., 2000). Medical Supply's complaint against GE identified the confusion over whether GHX was an instrumentality or a legitimate corporation in explaining why it was identified as a coconspirator but unnamed. The earlier complaint in the action against GE did however aver that GHX was the incorporated agreement to restrain trade created by GE for the purpose of organizing the cartel refusing to deal with Medical Supply and artificially inflating healthcare prices. The Tenth Circuit found insufficient allegations that GHX was GE's instrumentality but did not address GHX's role or nature as the embodiment of the agreement among the cartel members to restrain trade.

Both the trial and circuit court confused GHX with Global Exchange, identified in the complaint against GE as a separate electronic marketplace created by GE and one that distributed hospital supplies via the Web or internet at Jeffrey Immelt's control. GHX's internal chief counsel's communication with Medical Supply and with the separate entity GE Medical, Inc.'s legal counsel about the antitrust action against GE for GHX's operation as an agreement to restrain trade among hospital suppliers, distributors and GPO's demonstrates GHX had sufficient notice that it was a proper defendant for Medical Supply's action. *Peterson v. Sealed Air Corp.*, 902 F.2d 1232, 1237 (7th Cir. 1990) (finding that a corporation might receive notice within the meaning of Rule 15(c) if "its president reads about the suit in The Wall Street Journal and recognizes that his firm is the right defendant" and that "[a] complaint naming GM that went on and on about the plaintiff's Thunderbird would alert Ford's agent that Ford was the right party."*); William H. McGee & Co. v. M/V Ming Plenty*, 164 F.R.D. 601, 606 (S.D.N.Y. 1995) (holding that "[t]he

misidentification of similarly named or related companies is the classic case for application of Rule 15(c) relation back.").

> "Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed — in both maritime and nonmaritime cases. See *Levinson v. Deupree*, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed.2d 1319 (1953); *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C.Cir.1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made."

Lans v. Gateway 2000, Inc., 84 F.Supp.2d 112 at 119 (D.C., 1999)

GHX would not be prejudiced by being substituted as a defendant.

The VKK court describes the circumstances of an ongoing relationship among a defendant and substitute defendant similar to that between Neoforma, Inc. and GHX, including partial transfers of assets and interest over time and found the relationship negated any prejudice from the substitution:

> "Third, the amended complaint also meets the "no prejudice" requirement. TJI "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against" it. Fed. R. Civ. P. 15(c)(3)(B). TJI and TJL had an ongoing relationship. Both were created to accomplish the same goal bringing an NFL football franchise to Jacksonville, Florida and in October 1991, TJI transferred some its assets to TJL in order to help accomplish that goal."

VKK Corp. v. Nat'l Football League, 244 F.3d 114 at 128 (2nd Cir., 2000).

Issue Preclusion Does Not Attach To Ghx

Under Tenth Circuit authority regarding substitution of a party at this stage prior to trial that was involved in related litigation where no discovery or finding of facts were made, the prior actions would not control the present action against the substituted party or Novation and its codefendants. In *Prop-Jets, Inc. v. Chandler* the court addressed the preclusive effect of its earlier decision in the related case *Interceptor Corporation. R. J. Enstrom Corp. v. Interceptor Corp.*, 555 F.2d 277 (10th Cir. 1977). The court concluded even the findings on whether Interceptor had been acquired in an arm's length transaction could be altered by the later action when evidence was developed:

> "Although it is contended by Prop-Jets that it is the continuation of the partnership in corporate form, there has been no finding by any court to that effect. Consequently, this Court's previous decision in *R. J. Enstrom Corp. v. Interceptor Corp.*, supra, does not necessarily control the trial court's action. If that earlier decision were to be regarded as controlling, it would be a final judgment (as we understand to be Prop-Jets' contention.) As a final judgment it would be subject to a motion under Fed.R.Civ.P. 60(b). 2 In that posture it is significant that although Enstrom's motion was made under Rule 25(c), the assertions recited in support of the motion would demonstrate sufficient mistake, new evidence, or perhaps even fraud that would allow the trial court under Rule 60(b) to relieve Enstrom from our previous affirmation of its holding that as a matter of law Interceptor Company was not a successor to Interceptor Corporation. Under the law the district court retains the

power to act on a Rule 60(b) motion after this Court has resolved a matter upon appeal, and there is no necessity that a petition requesting permission to exercise such authority be filed with this Court. *Standard Oil Co. of California v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976); *Wilkin v. Sunbeam Corporation*, 405 F.2d 165 (10th Cir. 1968). Thus treated as a Rule 60(b) motion the trial court has authority to reopen this matter."

Prop-Jets, Inc. v. Chandler, 575 F.2d 1322 at 1323-24 (C.A.10 (Okl.), 1978)

CONCLUSION

Whereas for above stated reasons, the plaintiff Medical Supply respectfully requests that the court substitute Global Health Exchange, LLC for Neoforma, Inc. as a defendant in this action, Making GHX the responsible defendant for all conduct alleged against Neoforma, Inc., the corporate defendant in the above captioned action.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on October 11th, 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:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122 (also local counsel for the General Electric Defendants and Jeffrey Immelt)

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

I also verify I have sent via certified mail on October 12th a copy of the above to:

Michael Mahoney,
chief executive officer
Global Healthcare Exchange, LLC

11000 Westmoor Circle, Suite 400
Westminster, Colorado 80021

S/Bret D. Landrith
Bret D. Landrith