United States Court of Appeals

For the Tenth Circuit

Docket No. 03-3342 (10th Cir.)

Case No.: 02-2539-CM (Kans. Dist. Ct.)

Medical Supply Chain, Inc.

v.

US Bancorp, NA;US Bank; Private Client Group, Corporate Trust, Institutional Trust And Custody, And Mutual Fund Services, LLC.; US Bancorp Piper Jaffray; Jerry A. Grundhofer; Andrew Cesere; Susan Paine; Lars Anderson; Brian Kabbes; and Unknown Healthcare Supplier

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Appeal from the United States District Court
for the District of Kansas
Hon. Judge Carlos Murguia

MOTION FOR EN BANC REHEARING

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MOTION FOR REHEARING EN BANC

Medical Supply, seeks reconsideration of this court's affirmation of the Kansas District Court ruling, adopting it through incorporation by reference and without independent judicial inquiry. The appellate panel's opinion overlooks fundamental misstatements of law and misapprehends Medical Supply brief argument that it pled the required two or more actors in combination or conspiracy and that the opinion is in clear error, the USA PATRIOT Act expressly provides for numerous private causes of action and regardless, the court misapprehends Medical Supply's argument that it can enjoin the US Bancorp defendants from making a malicious suspicious activity report as a Sherman 2 violation of false petition not excepted by the *Noer* Doctrine[1] even if no private right existed. These important questions of law conflict with other Circuit Courts of Appeal and the U. S, Supreme Court.

Medical Supply Chain, Inc. (Medical Supply) brought the present action to seek injunctive relief to prevent the defendants from breaching their contract to provide escrow accounts Medical Supply required to capitalize its entry in the hospital supply market. Medical Supply has been unsuccessful in obtaining timely preliminary relief at the trial court level and in interlocutory appeal and has suffered the injuries this action has sought to prevent including the $350,000.00 the escrow accounts were required for along with the theft of intellectual property.

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[1] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 141, 81 S.Ct. 523, 531, 5 L.Ed.2d 464

Evidence also now exists the defendants have filed a malicious suspicious activity report against Medical Supply. Medical Supply's injuries are no longer speculative and can now be proved with certainty. Medical Supply will bring claims in a federal district court (either Kansas or the Western District of Missouri) for monetary damages on the transaction that prompted the present injunctive relief attempt and the present decision deprives the parties of any issue preclusion.

Findings of the Appellate Panel

The appellate panel's entire determination on the merits of the issues raised by the plaintiff upon appeal is contained solely within the following fifty words excerpted from the panel's November 8th, 2004 Order and Judgment:

> "Having reviewed the briefs, the record, and the applicable law pursuant to the above-mentioned standard, we conclude that the district court correctly decided this case. We therefore AFFIRM the challenged decision for the same reasons stated by the district court in its Memorandum and Order of June 16, 2003. Appellant's Motion to Amend Complaint on Jurisdictional Grounds is DENIED." See Attachment 1 pg. 19

In adopting the Memorandum and Order of the trial court without additions or changes, the appellate panel gave no indication of independent judicial review[2] and has ruled in conflict with Tenth Circuit published opinions and the U.S. Supreme Court on each of the Sherman Antitrust Act claims of the plaintiff and in

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[2] "Judicial opinions are the core workproduct of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic." *Bright v. Westmoreland County*, No. 03-4320 at pg.4 (Fed. 3rd Cir. 8/24/2004) (Fed. 3rd Cir., 2004)

conflict with the U.S. Supreme Court on the issue whether Congress may expressly grant private rights of action through enactment of the USA PATRIOT Act. The panel upholds the dismissal of Medical Supply's Sherman 1 and Sherman 2 claims because the plaintiff failed to allege two or more independent actors (see trial court's Memorandum and Order, pg.5) when the complaint clearly has an independent actor defendant-the Unknown Healthcare Supplier and unnamed co-conspirators identified. The court also dismissed the complaint for having alleged no agreement to exclude Medical Supply or to raise prices (see *id*, pg.6) when clearly the complaint alleges many agreements to exclude Medical Supply and to increase prices in the relevant markets of healthcare capitalization and Hospital supplies. Finally, neither the trial court or the appellate panel ever read the USA PATRIOT Act or Medical Supply's pleadings explaining it before their now infamous ruling on this hot issue of law, became de facto published on official court internet sites, shaming all of us who practice in this circuit.

The Erroneous Affirmation of a Hyperpleading Standard

The appellate panel's decision raises an important question of law by creating conflict with a trilogy of recent Supreme Court decisions reflecting the Court's renewed determination to ensure that district judges properly defer to the pleading party in deciding Rule 12(b)(6) motions to dismiss. See *Swierkiewicz v. Sorema N.A*., 534 U.S. 506 (2002); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). In seeking to protect a bank or its representation from the inconvenience of answering an antitrust victim, the

appellate panel has made an embarrassing ruling with little indication it performed any of its own analysis. The decision also reverts back to prohibited barriers against antitrust actions where all the evidence is in the hands of the defendants:

> "In the aftermath of Leatherman, antitrust heightened pleading has certainly been curtailed. Finding the Leatherman rationale applicable to antitrust, many lower courts have re-embraced notice pleading and Rule 8 as the appropriate pleading standard in antitrust cases. The Seventh Circuit is illustrative. Soon after Leatherman, the court made clear that the "nascent movement" to add judge made exceptions to notice pleading was now precluded. Consequently, antitrust plaintiffs were not required to plead with particularity. Moreover, the court denounced pre-Leatherman cases applying heightened pleading as no longer authoritative." [footnotes omitted] Fairman, Christopher M., The Myth Of Notice Pleading Arizona Law Review pgs. 1018-19, Vol. 45:987 (2003).

Mistaken Points of Law Affirmed By Appellate Panel

Each of the trial court's Sherman Act and USA PATRIOT Act decisions were made on fundamental errors in established law. Medical Supply's pleadings and brief have gone unread in the mistaken belief that some critical element was under pled and therefore cannot be recognized. Especially tragic is the reputation of the Circuit lost in the statement there is no private right of action under the USA PATRIOT Act when the pleadings where there to inform the court. See Attachment 5 pgs. 42-46 contradicting the trial court's admonishment.

Two or More Actors Medical Supply's complaint satisfied the two or more independent actors requirement for a Sherman 1 prohibited combination. To prove a § 1 violation, a plaintiff must demonstrate: (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade. See *Tops Mkts*., 142 F.3d at 95; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc*., 996 F.2d 537, 542 (2d Cir.

1993).

Neither the trial court nor the court of appeals addressed the issues of the separate defendant Unknown Healthcare Supplier or the unnamed coconspirators identified in the complaint that independently met the requirements for two or more actors. Instead of reviewing their own neglect, both the trial court and appellate panel repeatedly admonished Medical Supply's counsel and threatened him with sanctions. See Attachment 1 pg. 19

The Unknown Healthcare Supplier Separate Defendant. A legally separate entity-Unknown Healthcare Supplier was named in the caption, in the description of parties, the statement of facts and in the antitrust claims of Medical Supply's amended complaint. See Attachment 3 pg. 29. The plaintiff is still within the four year statute of limitations for antitrust claims. The trial court denied preliminary injunctive relief including an order sought by the plaintiff to obtain information about the named defendants and granted the dismissal just before the plaintiff appeared for the scheduled pretrial conference over the parties' proposed discovery plan.

The Tenth Circuit recognizes complaints against unknown defendants, i.e. *Gaylor v. Does*, 105 F.3d 572 (C.A.10 (Colo.), 1997). More specifically, the Tenth Circuit condemns dismissal when the identity of an unknown defendant can be obtained through discovery:

> "Dismissal against unknown defendants is proper "only when it appears that the true identity of the defendant cannot be learned through discovery

> or the court's intervention." *Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir.1985)."

Krueger v. Doe, 162 F.3d 1173 (C.A.10 (Okla.), 1993).

The Tenth Circuit On Unnamed Defendants in Antitrust The trial court and now the appellate panel have ignored Medical Supply's arguments based on substantial authority that it need not name every conspirator as a defendant. Both courts ignored Healthcare Group Purchasing Organizations or "GPOs" including Premier all of which are distributors of hospital supplies competitors of Medical Supply, described as coconspirators in the combine. Attachment 3 pg. 26,28,29,33. Also ignored are the direct competitors of Medical Supply as a hospital supply electronic market place Commerce One and Medibuy averred to be in agreement to increase healthcare capitalization prices (shares) with the named defendants and exclusive dealing agreements with the GPOs. See Attachment 3 pg. 28.

In adopting the trial court's ruling, the appellate panel contradicts clear Tenth Circuit authority on this precise issue. In *Olsen v. Progressive Music Supply, Inc*., 703 F.2d 432, per se Sherman 1 liability was held for concerted refusal to deal or group boycott charges against Progressive and unnamed defendants, just as Medical Supply claimed against the US Bancorp defendants and Unknown Healthcare Supplier and other companies not identified or named as defendants:

> "A further complaint on behalf of Olsen was that Progressive conspired **with certain unnamed co-conspirators, for example, George Best, CBS Musical Instruments (CBS) and Bobbie Herger (owner and operator of Herger's Music Store in Provo, Utah), in violation of Section 1 of the Act.** Olsen asserts that Progressive conspired with Best to cause Olsen to lose franchises, to destroy his credit and business reputation, to take over

his business location and terminate his corporate charter, to fix prices, and to cause manufacturers to boycott his business."

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983). As the case was developed, the trial court found, like Medical Supply has alleged, that the refusal to deal or boycott was for the purpose of keeping the plaintiff from selling goods cheaper than the defendants and their unnamed coconspirators:

"The trial court found that Progressive had conspired with CBS and Bobbie Herger to boycott Olsen, whereby he would not be able to obtain CBS products. This boycott was an element of the price fixing conspiracy also allegedly engaged in by Progressive and Herger. The trial court said, "it was necessary to boycott Olsen in order that the high prices set by Progressive and Herger could be maintained and not be undercut by Olsen."

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 at pg. 435 at 438 (C.A.10 (Utah), 1983). And like Medical Supply has averred in its complaint against the US Bancorp defendants and Unknown Healthcare Supplier, no pro competitive justification could exist:

"In this case there is evidence that there was a boycott which was "clearly exclusionary or coercive in nature." *Gould v. Control Laser Corp.*, 462 F.Supp. 685, 691 (M.D.Fla.1978), aff'd, 650 F.2d 617 (1981). Thus, the case differs from those in which "courts have circumvented the rigidity of the per se rule by reasoning that the need for its application 'depends not upon a finding that * * * [a restraint] constitutes a "boycott" but upon an analysis of its purpose and competitive impact.' " Note, The Facial Unreasonableness Theory: Filling the Void Between Per Se and Rule of Reason, 55 St. John's L.Rev. 729, 750 n. 155 (1981) (quoting Gould, supra, at 691). Pro-competitive impacts or motives within the trial court's findings are difficult to see. For instance, Herger boycotted Olsen because "she had an independent prejudice against giving competitive dealers large discounts." In addition, Progressive harbored a "predatory intent toward competing dealers."

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 at pg. 435 at 438-9 (C.A.10 (Utah), 1983). There is a conflict among district courts in the Tenth Circuit if the trial court ruling in Medical Supply's case is allowed to stand with the appellate panel's unpublished opinion:

> "Section 1 of the Sherman Act, by its language, does not prohibit solely unilateral conduct, regardless of its anti-competitive effects. *City of Chanute*, 955 F.2d at 650. Beacon's complaint, however, clearly alleges a conspiracy to restrain trade or commerce between two actors: Birtcher and Valleylab. Beacon specifically points to the licensing agreement entered into by Birtcher and Valleylab which restricts Valleylab's ability to purchase handpieces from outside sources. **The fact that Beacon pursues only one of the contracting parties does not limit its ability to obtain relief**. Accordingly, I conclude that claims 1-4, 7, 8-11, and 14 should not be dismissed for failure to allege a conspiracy to restrain trade or commerce between two or more actors." [emphasis added]

Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F.Supp. 1350 at 1363 (Colo., 1996)

The Misapprehension of the Plaintiff's Named Defendants The complaint names US Bancorp NA, US Bank and Piper Jaffray as being in a combination with the Unknown Healthcare Supplier and describes in detail the separate acts of each in a common agreement to prevent Medical Supply from entering the market for hospital supplies. The named defendants are horizontal to each other and at the same market level where Medical Supply was creating its own financial investment program through the escrow accounts and while that was not an essential requirement for per se Sherman 1 liability, the lesser standard that concerted activity, even at another market level than the distribution of hospital supplies had been met:

> "To establish that a group boycott is per se illegal in this Circuit, "there must be an agreement among conspirators whose market positions are horizontal to each other." *Westman Com'n Co. v. Hobart Intern., Inc*., 796 F.2d 1216, 1224 n. 1 (10th Cir.1986). "**While the competitors need not be at the same market level as the plaintiff, there must be concerted activity between two or more competitors at same market level**." *Key Financial*, 828 F.2d at 641." [emphasis added]

Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F.Supp. 1350 at 1363 (Colo., 1996).

***Copperweld* Does Not Exclude Parent Liability.** Judge Nottingham in the District of Colorado's ruling in *Nobody in Part. Presents v. Clear Channel Communs.*, 311 F.Supp.2d 1048 (D. Colo., 2004) ruled consistently with Medical Supply's brief arguments regarding the potential of US Bancorp to by liable for the acts of its subsidiaries US Bank and US Bancorp Piper Jaffray and their officers in combination or conspiracy with Unknown Healthcare Supplier:

> "[T]he Supreme Court has suggested that direct liability may exist for parent corporations under the Sherman Act. *Copperweld*, 467 U.S. at 777, 104 S.Ct. at 2744-2745 (stating in dicta that "[a]ny anticompetitive activities of corporations and their wholly-owned subsidiaries meriting antitrust remedies may be policed adequately without resort to the intra-enterprise conspiracy doctrine.... The enterprise is fully subject to § 2 of the Sherman Act ...."). **Additionally, lower courts have recognized that *parent corporations can be held directly liable for independently participating* in the antitrust violations of their subsidiaries**. *Reading Int'l, Inc. v. Oaktree Capital Mgmt., LLC*, 2003 WL 22928728 (S.D.N.Y. Dec. 10, 2003) (slip copy); *Carl Hizel & Sons, Inc. v. Browning-Ferris Indus., Inc.,* 590 F.Supp. 1201, 1202 (D.Colo.1984)." [emphasis added]

Nobody in Part. Presents v. Clear Channel Communs., 311 F.Supp.2d 1048 at 1069-70 (D. Colo., 2004). The Tenth Circuit is now in conflict over this point with *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, No.

02-9222 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004) where Sherman 1 and 2 conspiracy claims against defendants with mutual ownership were challenged: "there was no "unity of purpose or a common design" between ACIC/Brantford and Barr. *Copperweld*, 467 U.S. at 771, 104 S.Ct. 2731" *Geneva Pharmaceuticals Tech. v. Barr Laboratories*, 201 F.Supp.2d 236 at 275 (S.D.N.Y., 2002) and the Second Circuit reinstated the Sherman 1 and 2 claims.

Agreement The defendant U.S. Bank was in contract with Medical Supply Chain, Inc. to provide escrow accounts. U.S. Bank broke the contract, Medical Supply Chain, Inc.'s complaint (written shortly after to obtain emergency injunctive relief and avoid the resulting irreparable harm[3]) alleged the breaking of the contract was a result of exclusive dealing agreements between the defendants which included Unknown Healthcare Supplier. See Amd. Cmplt ¶¶81,82,86.(Attachment 3 pg. 27,28,29, 31) "[T]he exclusive dealing arrangement itself satisfies the § 1 requirement of coordinated action." *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, No. 02-9222 at pg. 45 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004). Medical Supply's Amended Complaint pled agreements to raise prices in the relevant market of healthcare capitalization. See Amd. Cmplt. ¶81, Amd. Cmplt. pg. 34-5, Amd. Cmplt. pg. 10-12,.

In *Covad Communications*, the breaking of the agreement between the

[3] The defendant US Bancorp Piper Jaffray's adverse admission of economic research reveals that a web based electronic marketplace for hospital supplies like Medical Supply Chain, Inc. would eliminate 83 billion dollars in inefficiency. Plaintiff's Amended Complaint ¶27.

plaintiff and the monopolist alone become adequate to state a claim. "[A]llegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws." *Covad Communications Co. v. Bellsouth Corp*., at ¶63 2002 C11 260 (USCA11, 2002), reversed on other grounds. The US Supreme Court recently stated this point of law, which the panel's decision now surprisingly conflicts with:

> "The leading case imposing § 2 liability for refusal to deal with competitors is *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U. S. 585, in which the Court concluded that ***the defendant's termination of a voluntary agreement with the plaintiff*** suggested a willingness to forsake short-term profits to achieve an anticompetitive end." [emphasis added]
>
> *Verizon Communications Inc. v. Law Offices of Trinko*, 540 U.S. ___ (U.S. 1/13/2004) (2004).

Private Causes of Action Under USA PATRIOT Act Public Law 107–56 ''Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001'' contains at least two private rights of action [4]; SEC. 223. CIVIL LIABILITY FOR CERTAIN UNAUTHORIZED DISCLOSURES and the plaintiff's often averred malicious reporting to which there is a private right in SEC. 355 which states ''(3)

[4] Additional private rights of action are communicated in sections that immunize "good faith" disclosure of information from third parties. The qualifying of immunity to third parties' causes of action for civil liability are expressions of Congressional intent for private rights of action; *i.e*. § 215 of USA Patriot amends FISA § 501(e) (as amended): "A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production."

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].

In paragraphs 115-132 (Attachment 4 pgs. 35-41) of the Amended Complaint, Medical Supply alleges that the defendants threat of "bad faith" USA PATRIOT Act' suspicious activity reporting is being used to prevent Medical Supply from entering the market for hospital supplies. It is beyond refute that the defendants used the USA PATRIOT Act as a pretext to break their contract with Medical Supply to provide escrow accounts. The act did not even go into effect over bank trust accounts. See Attachment 4 pgs. 35-41.

The Likely Reason For the Court's Disregard

A judicial antagonism uncommunicated in the record, where neither district court preliminary relief trial decision was given a written decision and the appellate panel has declined to state its reasoning, exists against Medical Supply for continuing to seek injunctive relief. The likely erroneous basis of the antagonism of the trial court now, repeated by the hearing panel is that a new competitor like Medical Supply, prevented from entering the market by US Bancorp in an agreement with the defendant Unknown Healthcare Supplier has no injury and therefore no remedy of law.

Like the trial court in case *World of Sleep's* conclusion that World of Sleep's lost profits from potential sales to the licensee stores were too speculative because "there is no history at all of any profit or loss on these dealings during the years involved in this case *World of Sleep, Inc. v. La-Z-Boy Chair Co*., 756 F.2d 1467 at 1478 (C.A.10 (Colo.), 1985). This error contradicts established Tenth Circuit and US Supreme Court law:

> "If proof of a profit and loss history were required, no plaintiff could ever recover for losses resulting from his inability to enter a market. However, such recoveries are clearly available under section 4 of the Clayton Act. See, e.g., *Zenith*, 395 U.S. at 129, 89 S.Ct. at 1579. (*Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 123-24, 89 S.Ct. 1562, 1576-77, 23 L.Ed.2d 129 (1969))"

World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467 at 1478 (C.A.10).

Medical Supply was the Victim of a Conspiracy To Inflate Prices Through Hospital Group Purchasing Organizations (GPOs) Allied With the Defendants

The appellate panel's decision upholding the trial court and attacking the appeal for being frivolous and sanctionable was shared with the members of the U.S. Senate Judiciary Committee. It was a discussion between a chief expert witness and the Antitrust Sub Committee's counsel that led to seeking this rehearing. 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.

A Rehearing is required for Any Preclusion on the Issues Raised

Now that Medical Supply has experienced its damages and suffered additional overt acts by the defendant conspiracy, Medical Supply will bring its claims for monetary damages to a federal district court, likely the Western District of Missouri if no remand issues, "…if future damages are unascertainable, a cause of action for such damages does not accrue until they occur. *Zenith*, 401 U.S. at 339, 91 S.Ct. at 806." *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc*., 872 F.2d 931 at FN4 (C.A.10 (Kan.), 1989). See *also Barnosky Oils Inc., v. Union Oil Co.*, 665 F.2d 74, 82 (6th Cir. 1981). US Bank was still attempting to perform the financing part of the contract after Medical Supply filed its injunctive relief. If "the initial refusal is not final, each time the victim seeks to deal with the violator and is rejected, a new cause of action accrues. *See Pace Indus*., 813 F.2d at 237-39; *Midwestern Waffles, Inc. v. Waffle House, Inc*., 734 F.2d 705, 714-15 (11th Cir.1984)."*Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc*., 872 F.2d 931 at 933-4 (C.A.10 (Kan.), 1989).

Medical Supply now has evidence the malicious suspicious activity report, a sham petition[5] was filed. “Some courts have held that, where a plaintiff alleges that a lawsuit was brought in bad faith (a sham petition) to suppress competition, the operative overt act for purposes of the antitrust limitations statute is the filing of the sham lawsuit. See, e.g., *Al George, Inc. v. Envirotech Corp*., 939 F.2d 1271, 1274-75 (5th Cir. 1991); *Korody-Colyer Corp. v. General Motors Corp;*”*In re Relafen Antitrust Litigation* at pg. 6 (Mass., 2003).

The amended pleading for now ripe monetary damages in Kansas District Court or a new filed action in some other federal district court would suffer no issue preclusion on Sherman 1 or 2 claims. *Oltremari v. Kansas Social & Rehabilitative Service*, 871 F.Supp. 1331 (Kan., 1994). The failure of either the trial court or the appellate panel to address the use of the USA PATRIOT Act suspicious activity reporting as a sham petition completes the lack of preclusive effect of this panel decision.

Conclusion

Whereas for the above stated reasons, Medical Supply respectfully requests a rehearing en banc is granted, or in the alternative that the matter is remanded back to the trial court overruling the dismissal allowing amending for damages .

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[5] The "sham" exception to the *Noerr* doctrine “This exception encompasses situations in which persons use the governmental process itself—as opposed to the *outcome* of that process—as an anticompetitive weapon.” *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512, 92 S.Ct. 609, 612, 30 L.Ed.2d 642

Respectfully Submitted

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Certificate of Service

I certify I have served two copies of this pleading upon opposing counsel listed below via U.S. Mail on November 10th, 2004.

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