IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

MEDICAL SUPPLY CHAIN, INC., Plaintiff,	)	
v.	)	Case No. 05-CV-0210-CV-ODS
NOVATION, LLC, et a!., Defendants.	)	

NOVATION, LLC, VHA INC., AND
UNIVERSITY HEALTHSYSTEM CONSORTIUM'S
MOTION TO TRANSFER VENUE OR ALTERNATIVELY MOTION TO DISMISS
COMPLAINT FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants Novation, LLC ("Novation"), VHA Inc. ("VHA"), and University Healthsystem Consortium ("UHC") (collectively, "Defendants") respectfully request that the Court transfer this case to the District Court of Kansas pursuant to 28 U.S.C. § 1404(a), or alternatively dismiss Plaintiffs Complaint with prejudice pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

1. Plaintiff s Complaint seeks several billions of dollars in damages arising from Plaintiffs inability to lease desired office space, to obtain financing, and to establish escrow accounts allegedly necessary to enter into the market to provide hospital supplies in e-commerce. Plaintiff asserts that these harms flowed from a vast conspiracy involving, *inter alia*, various entities and individuals in the nationwide hospital supply market, venture capital firms, a bank, a law firm, the owner of an office building, and a magistrate of the U.S. District Court for Kansas .

EXHIBIT
A

PRIOR ACTIONS

2. This is not the first time Plaintiff has raised these claims. Indeed, this lawsuit is substantially similar to claims asserted in two prior suits, both of which were dismissed on the pleadings. Plaintiff originally filed a lawsuit against many of these same defendants in the United States District Court for the District of Kansas in 2002, styled *Medical Supply Chain, Inc.* v. *US Bancorp, NA, et al.,* Civil Action No. 02-2539-CM (Judge Carlos Murguia) (the "US Bancorp Case"). In that case, Plaintiff asserted virtually identical claims arising out of the same transactions and same set of operative facts as are alleged here even though Plaintiff was warned by the District Court in its order dismissing the complaint in that case "to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *See* Memorandum and Order, at p. 11 (attached as Exhibit 1). Indeed, the district judge noted, with regard to Plaintiffs USA Patriot Act violations (which are also made here) that "plaintiffs allegation [is] so completely divorced from rational thought that the court will refrain from further comment .... " *See* Exhibit 1 at pp. 14-15. The Tenth Circuit affirmed the District Court's dismissal. Because the Tenth Circuit concluded that Plaintiffs appeal was not supported by the law or the facts, it ordered Plaintiff and its counsel to show cause why it should not be sanctioned for filing a frivolous appeal. *Medical Supply Chain, Inc.* v. *US Bancorp, NA, 2004* WL 2504653, *1 (lOth Cir. 2004).

4. In June of 2003, Plaintiff filed suit in the District Court of Kansas against many of the GE-related parties alleged to be unnamed co-conspirators in this action. That case was styled *Medical Supply Chain, Inc.* v. *General Electric Company, et al.,* Civil Action No. 03-2324-CM (Judge Carlos Murguia) (the "GE case"). That case also involved many of the same factual and legal allegations as alleged here. In the District Court's order dismissing that suit, the Court

noted that the federal antitrust claims failed "at the most fundamental level." *See* Memorandum and Order, at p. 5 (attached as Exhibit 2).

TRANSFER OF VENUE

5. Defendants join in the motion to transfer venue of this proceeding to the U.S. District Court in Kansas pursuant to 28 U.S.C. § 1404(a) filed by Defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare, and Andrew S. Duff. Because the Kansas District Court has already twice-dealt with this Plaintiff and these allegations, it is the most efficient use of judicial resources for that court to consider this case. Further, transfer to Kansas ensures that Plaintiff cannot forum shop his deficient Complaint to this Court in an effort to avoid incurring additional sanctions imposed by the Kansas court for filing frivolous and harassing lawsuits.

GROUNDS FOR DISMISSAL

6. Undeterred by the Tenth Circuit's and the Kansas District Court's admonitions regarding Plaintiffs attorney's Rule 11 responsibilities, that same attorney has now filed this Complaint which is substantially similar to his defective actions in the US Bancorp and GE cases. The Complaint is incoherent, *e.g.* Complaint at p. 114 (seeking an injunction during the "pungency [sic] of this action" and damages for Plaintiffs stakeholders including the town of Blue Springs, Missouri and "the injury of the 2000 hospitals loosing [sic] money due to high supply costs"), and irrational, *e.g.* Complaint at ~ 89 (blaming the deaths of "at least 41,206 Americans" on the increasing health care costs due to the Defendants' actions in foreclosing Plaintiffs entry into the market).

7. What is clear upon a reading of the Complaint, however, is that it states no legally viable claim. In fact, the new Complaint repairs none of the fundamental legal defects and

pleading insufficiencies of the prior cases, and adds some new ones. Moreover, many claims are now foreclosed by collateral estoppel grounds. As is explained further in the accompanying Suggestions in Support of Novation, LLC, VHA, Inc., and University Healthsystem Consortium's Motion To Dismiss Complaint For Failure To State A Claim, Plaintiffs claims should be dismissed by this Court with prejudice on the following grounds:

- Plaintiffs federal and state antitrust claims should be dismissed because: (l) Plaintiff is collaterally estopped from asserting such claims; (2) Plaintiff wholly fails to allege concerted action; (3) Plaintiff fails to sufficiently allege monopoly power or the elements of attempt to monopolize; (4) Plaintiff fails to adequately allege harm to competition, rather than merely harm to Plaintiff, a single competitor; (5) Plaintiff lacks standing to assert the claims; and, (6) Plaintiff fails to plead any of the required elements for a claim for interlocking directors.

- Plaintiff fails to plead the existence of a misleading statement or omission made by Defendants to Plaintiff; therefore, Plaintiff s fraud claim should be dismissed.

- Plaintiff fails to plead that Defendants knew about or intentionally interfered with the contracts with which Plaintiff claims Defendants tortiously interfered.

- Plaintiff s allegations actually contradict the basis for recovery under the theory of prima facie tort.

- Plaintiff s RICO claim fails due to the lack of a viable claim of a racketeering act or pattern and an injury that can be remedied under RICO.

- Plaintiffs USA Patriot Act claim against Defendants must be dismissed because: (l) there is no private right of action under the USA Patriot Act; (2) that claim is barred by principles of collateral estoppel; and, (3) Plaintiff has failed to plead facts sufficient to show that Defendants had any involvement with or knowledge of a filing under that statute.

INSUFFICIENCY OF SERVICE OF PROCESS

8. Plaintiff filed Return of Service forms with this Court purporting to establish valid service of process on Defendants. However, service of process was ineffective to obtain jurisdiction over Defendants because: (l) service by mail is insufficient under the Federal Rules of Civil Procedure and the Missouri Rules of Civil Procedure unless the defendant returns the acknowledgement form (that Plaintiff failed to include in the served papers); and, (2) the mailing was not directed at the appropriate officer or agent of Defendants. Nevertheless, counsel for Defendants contacted Plaintiff s counsel, noted the deficiency in service, and offered to execute waiver of service forms as is contemplated by Federal Rule of Civil Procedure 4. Plaintiffs counsel rejected that offer, stating instead that this is a "bloody battle" for which no agreements can be considered. Rather than delay consideration of the patent insufficiency of this Complaint by resting on a challenge to service of process, Defendants are now filing their Rule 12(b)(6) motion according to the deadline that would have applied if service had been proper.

PRAYER

WHEREFORE, for all of these reasons, Defendants request that the Court transfer this case to the U.S. District Court in Kansas, or alternatively enter an Order dismissing with

prejudice Plaintiffs Complaint and granting Defendants all other relief to which they are entitled.

REQUEST FOR ORAL ARGUMENT

Defendants Novation, LLC, VHA Inc., and University Healthsystem Consortium hereby requests oral argument on its Motion to Transfer Venue or Alternatively Motion to Dismiss Complaint for Failure to State a Claim.

HUSCH & EPPENBERGER, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2005, I electronically filed the foregoing with the clerk of the court by using the CMlECF system which will send a notice of electronic filing to the following: :

Bret D. Landrith landrithlaw@cox.net
Attorney for Plaintiff

lsI John K. Power
John K. Power

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	CIVIL AcrION
v.	)	
	)	No. 02-2S39-CM
	)	
US BANCORP, NA, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Pending before the court is defendants' Motion to Strike Plaintiffs Answer to Defendants' Reply (Doc. 30). Also before the court are defendants' Motions to Dismiss (Docs. 21, 23, and 25), plaintiffs Response to defendants' Motions to Dismiss (Doc. 27), and defendants' Reply in Support of all Motions to Dismiss (Doc. 28). As set forth below, defendants' Motions to Dismiss are granted. Defendants' Motion to Strike is dismissed as moot

I. Background'

1. The Parties

. pJaintiff is a Missouri corporation which has developed a health care supply strategist certification program. According to plaintiff, defendant US Baneorp NA (hereinafte!' 'CUS Bancorp") is a bank holding corporation headquartered in Minnesota and is the parent company of the employees and subsidiaries named as co-defendants. Defendant US Baneorp operates banks in several states under the name US Bank.

"Ihe court exercises jurisdiction under 28 U.S.c. §§ 1331 and 1337.

Defendant Private Client Group, Corporate Trust, Institutional Trust and Custody, and Mutual Fund Services, LLC (hereinafter "defendant LLC',), is a subsidiary of defendant US Bancorp, also headquartered in Minneapolis. Defendant LLC is 100divisionofdefendant US Bancorp that is responsible for escrow accounts for health care systems. Defendant US Bancorp Piper Jaffiay, Inc. is the investment banking subsidiary of defendant US Bancorp, and is headquartered in Minneapolis. Ithas w:xleawriting and investllK'nt relationships with heahheare suppliers. Defendant Unlmown Healthcare Entity is "believed to be a supplier or purchasing organization who has connmmicated with US Bancorp, its employees or its subsidiaries about plaintiff for the purpose of obstrocting or delaying plaintift's entry into commerce," Jeny A Gnmdhofer is President and CEO of defendant US Bancorp. Defendant Andrew Cesere is Vice Chainnan of the US Baneorp trust division. Defendant Susan Paine is the supervisor for US Bank's St Louis, Missouricorporate trust office. Defendant Lars Anderson is the customer acquisition manager for US Bank's St Louis, Mi.ssowi corporate trust office. Defendant Brian Kabbes is Vice President of Corporate Trusts for US Bank.

B. Plaintiff's Claims

plaintiff contends defendants engaged inconductviolating(l) 100ShermanAntitmst Act; (2) the Clayton Antitrust Act; and (3) the Hobbs Act PJaintiffalso alleges defendants (4) "fail[ed] to properly train [their] employees on tbe USA PATRIOT Act or to provide a compliance officer"; (5) misused "authority and excessive use of force as enforcement officers under 100USA PATRIOT *Act';* and (6) violated "criminallaws to influence policy under section 802 of the USA PATRIaf Act" The complaint further charges defendants with (7) misappropriation of trade secrets, under state law; (8) tortious interference with prospective contracts; (9) tortious interference with contracts; (10) breach of contract; (11) promissory estoppel; (12) fraudulent misrepresentation; and (13) violation of the covenant of good faith and fair dealing. Plaintiff seeks ov~ $943

million ili damages and declaratory relief.[2] Defendants request dismissal of the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(bX6) on 1be grounds that plaintiffhas failed to state a claim for which relief can be granted.

On March 12, 2002, plaintiff's President and CEO, Sam Lipari, began a process of selecting a national bank to provide services irduding nationwide chreking, escrow services, credit facilities, and other banking services. Mr. Lipari opened a corporate account with US Bank on or about April 15, 2002. On October 1, 2002, plaintiff contacted a US Bank employee at the Noland Road, Independence, Missomi branch of US Bank. Plaintiffrequested the bank to provide escrow services, Defendants ultimately denied plaintiff's request, and plaintiff claims it was damaged as a result

B. Legal Standard for Motionsto Dismiss

The comt will dismiss a cause of action for fiUlw'eto state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of 1be theoIY of recovery that would entitle him or her to relief; *Conley* v, *Gibson*, 355 U.S.4I, 45-46 (1957); *Maher* v, *Durango Metals.Inc.*, 144 F.3d 1302, 1304 (lOthCir.1998), or when an issue of law is dispositive. *Neitzkev. Williams*, 490 U.S. 319,326(1989). The court accepts as true all well-pleaded facts, as distinguished from ~lusoly all~ *Maher*, 144 FJd at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Swanson* v. *Bixler*, 750 F.2d 810, 813 (lOIh Cir, 1984). The issue inresolving a motion such as this is not whether the plaintiffwill u1timate1yprevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer* v, *Rhodes*, 416 U.S. 232,236 (1974), *overruled on other grounds*, *Davis* v. *Scherer*, 468 U.S. 183 (1984).

200 Janwuy 9,2003, the Tenth Circuit affirmed this court's order denying plaintiff's requests for pre1iminaryinjumion

m, Analysis

A. Sherman Act (Count I)

In Count I of1he Amended Complaint, plaintiffalleges defendants have violated sections I and 2 of tile Shennan Act, 15 U.S.C. §§ 1 and 2.

1. Section 1

A plaintiff nmst plead three elements to state a claim under § I of the Sherman Act: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. 15 U.S.C. § 1; *TV Communications Network. Inc. v. Turner Network Television, Inc.,* 964 F.2d 1022, 1027 (lOth Cir. 1992); I llving Scher, et *aL,Antitrust Adviser* (4th ed. 2001) § 1.04.

Withregard to § 1, plaintiff states defendants are a "vt'ltically integrated" entitythat exercises IDOIXlpOly power over "the specific market" of companies seeking to supply new prodacts, services, am technology in the field of health care, because new entrants into the marlcet "are dependent" upon defendants' approval and endorsement Plaintiff alleges that defendants violated Section 1 by stating that defendants "are believed to be the largest holder of health care supplier equity issues"; that defendants US Bancorp ، US Bank, and defendant LLC, as well as US Bancorp Piper are "alter egos" of each other whichhave, *inter alia,* "complete1ydominated and controlled each other's assets, operations, policies, procedures, strategies, and tactics"; that defendants use "anticompetitive sole source contracts between their client health care suppliers and health care oPOs [sic] the defendants have developed" inorderto inflate the value of equityshares that defendants marlcet; that defendants "operate a conspiracy among their subsidiaries and parentcompanies"fortbe purpose ofrestrainingcommerce; that defmdants rejected plaintiff's application for escrow accounts in order to prevent plaintifPs entry into the

marlcet; and that defendants have acted in furtherance of the conspiracy through a refusal to deal, denial of services, and boycotting or withholding of critical facilities in order to exclude plaintiff from the marlcet.

a. Contract, Combination, or Conspiracy

plaintiff alleges thatdefendants have conspired to prevent plaintiff's entry into the market through refusal to deal, denial of services, and boycotting or withholding critical facilities. Defendants contend pIaintiffhas failed to allege the existence of an agreement among defendants, and that plaintiff cannot show that two or more independent actors were present Accepting the allegations contained in the complaint as true, the court finds pIaintiffhas fililed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1.

First, the court finds that plaintiff has not demonstrated that a plurality of actors existed among defendants. In the complaint, plaintiff states that all individuals named as defendants are officers or employees of defendant US Bancorp, and that all business entities named as defendants are subsidiaries of defendant US Bancorp. Officers, directors, and employees of the same company cannot conspire with each other to violate § I, because they cannot comprise the plurality of actors necessary for a conspiracy. As the Supreme Court held in *Copperweld Corp.* v. *Independence Tube Corp.:*

> [A]n internal "agreemenf'to implemall a single, unitary fum's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single fum are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously p.usuing divergent goals. Coordinationwitbin a fum i; as likely to result from an effi>rt to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise i; to compete effectively. For these reasons, officers or employees of the same fumdo not provide the pluralityofactors imperative for a § 1 conspiracy.

467 U.S. 752, 769 (1984). Likewise, a parent corporation is incapable of conspiring with its wholly owned subsidiaries:

> [TJhe coordinated activityofa parent and its wIDUy owned subsidiary must be viewed as that of a single enterprise for pwposes of § I of the Shennan Act A parent and its wIDIly owned subsidiary have a complete unity of interest. 'Ibejr objectives are cormnon, notdisparate; 1beir general corporate actions are guided or detennined not by two separate corporate consciousnesses, but one . . . . Ifa parent and a wholly owned subsidimydo "agree"to a course of action, there is no suddenjoining of economic resources that had previously served different interests, and there is no justification for § 1 scmtiny.

Id. at 771; *see also In re Indep. Servo Orgs. Antitrust Litig.*, 85 F. Supp. 2d 1130, 1149 (D. Kan. 2000) (following *Copperweld* in fiOOingthat coordinationamong mv&(D ofa corporationdoes not violate Shennan Act).

Second, the court finds that even if the allegations of conspiracy alleged in plaintiff's complaint encompassed a plurality of actors, plaintiffhas failed to state a claim for relief Here, plaintiff has not pled the existence of a pricing agreement, or agreement of any kind, among the defendants in restraint of trade. "AItlnJgh the modern pl<*ling requirements are quite libelal, a pJainliff must do more than cite relevant antitrust language to state a claim forrelie£" *TV Communications Network, Inc.*, 964 F.2d at 1024 (citing *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir, 1980». A plaintiffmust allege sufficient facts to support a cause of action Wlder the antitrust laws. *Id.; see also Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10111 Cir. 1979) (holding that to survive a motion to dismiss, a complaint stabng violations of the ShennanAct "rnubt allege facts sufficient, ifthey are proved, to allow the court to conclude that claimant has a legalrigtt to relief'). Conclusory allegations that the defendant violated those laws are insufficient

Id. (citing *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 299 (2d Cir. 1965». The court grants deferxlants' motion to dismiss pJaintifJ's claim uOOer § 1 of the Sherman Act.

2. Section 2

Section 2 of the Sherman. Act prohlbits monopolies in interstate trade or commerce. 15 U.S.C. § 2 C'EveIy person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States ... shall be deemed guiltyofa felony."). Conduct violates this section when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in filir competition. *United States v. E.l du Pont de Nemours & Co.*, 351 U.S. 377,389-90, *(1956);lnstructionaISys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987).

PlainIi:ff states defendants "have violated Section 2," and that they "have acquired, maintained and extended their monopoly power through improper means, including attempting to extort healthcare technology companies into using US Bancorp as tM underwriterofcapitalization against securities reguJatiom and inde.nying [pJaintift] the escrow accounts it required to capitalize its entry into commerce through extortion under tM color of official right - the USA PATRIor Act" Fwther, plaintiff alleges defendants' "vertical integration is part of a calculated scheme to gain control over the $1.3 trillion health care supplier and distribution segment of the health care industry and to restrain or suppress compe1ition," and that defendants "engage inpredatory tactics arxl dirty tricks iJx:1uding •.• extortion [and] 'laddering' schemes to fraudulently inflate equity values of competitors they own interests in." Plaintiff claims defendants "invest in and promote engage in [sic] anticompetitivc predatory sole source contract agreements." Inaddition, according to plaintiff defendants have

gained "the power to control prices of health care supplies ... that are higher than those negotiated directly by hospitals."

Witbregard to the effects of defendants' alleged actions, plaintiff states, without elaboration, that "new technologies have been prevented from entering the health care market," resulting "in the unavailability of superior products and services that would have been able to save lives and alleviate suffering." FU11her, plaintiff contends "[t]he public i; being severely injW'ed by defendants' actions" and that plaintiff "has been severely injured and is in danger of further injury."

The court construes plaintiffs complaint as attempting to state a claim of combination or conspiracy to monopolize. It is unclear whether plaintiff claims that actual or attempted monopolization occurred. Applying all three theories of recovery, the comt finds that plaintiff has fitiled to state a claim under § 2.

"Ibe offense of monopoly Wlder § 2 of~ Shennan Act has two elements: (I) the possession of monopoly power in the relevant market and (2) the wiDful acquisition or maintenance of that power as dislinguished fromgrowthor development as a consequence ofa superior product, business acumen, or historic accident." *United States* v, *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In the Tenth Circuit, "monopoly power is defined as the ability both to control prices and exclude competition." *Tarabishi* v. *McAlester Reg 'I Hosp.*, 951 F.2d 1558, 1567 (10"' Cir. 1991). Further, "determinationof1he existence of monopoly power requires proof of relevant product and geographic markets." *Id.*

Here, plaintiff has failed to allege that defendants both controlled prices and excluded competition. Further, pIaintiffhas not pled the existence of a relevant product market or geographic market pJaintiffhas mt stated that defendants' alleged marlcet power stems fromdefendants' willful acquisition or maintenance oftbat

power rather thanfromdefendants' development "ofa superiorproduct, business acumen, or historic accident." The court finds plaintiffhas failed to state a claim of monopoly Wlder § 2.

To state a claimfor attempted monopolization under § 2, the plaintiff must plead: "(1) relevant marlcet (irdudinggeographic marketandreIevant product marlcet); (2) dangerous probabilityofsuccess inm:mpolmng the relevant marlret; (3) specific intent to monopolize; and (4) conduct infurtherance of such an attempt." *Full DrawProds. v. Easton Sports, Inc.,* 182 FJd 745, 756 (10th *Cir.1999){citingTVCommunications'/nc.,* 964 F.2d at 1025). "Factors to be considered in determining dangerous probability include the defendant's marlcet share, 'the munber and strength of other competitors, market trends, and entry barriers.'" *[d.* (citing *Bacchus Indus; Inc. v. Arvin Indus.; Inc.,* 939 F.2d 887, 894 (10tb Cir. 1991). PlainIiffh8J; neither adequately pled the existence of a relevant market nor alleged that defendants have a "dangerous probability" of success inIDOIlqx>Jization. The court finds plaintiffhas not stated a claim for attempted monopolization under § 2.

With regard to combination or conspiracy to monopolize, '1a] plaintiffmust show conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy." *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass 'n 0/ Kan.,* 891 F.2d 1473, 1484 (lOth Cir. 1989) *{citing Perington Wholesale,* 631 F.2d at 1377; *Baxley-Delamar Monuments, Inc. v. Am. Cemetery Ass 'n,* 843 F.2d 1154, 1157 (81b Cir. 1988». As with § I, the court finds that plaintiff cannot state a claim for conspiracy because plaintiffhas not alleged a plurality of actoIs and has made oolyvery conclusory allegations of conspiracy. TIms, the court finds pJainliffhas not stated a clahn for combination or conspiracy to monopolize. Count I of the complaint is dismissed.

B. Clayton Act (Count m

Plaintiff contends that defendants' refusal to provide escrow account services was a denial of a critical facility in violation of the Robinson-PatmanAct, located at 15 U.S.C. § 13 of tile Clayton Act. The Robinson-Patman Act, in part, makes it '\mIawfu1 for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought forresale, with or without processing, bycontractingto furnish or furnishing, or by contributing to the furnishing of: any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms," § 13(e) (emphasis added).

The court fiOOs plaintiff cannot state a claim under the Robinson-Patman Act, because the act proIn'bits only the sale of connnodities. *As* numerous courts have held, the Act does not concern the sale of services, io::hxting financial services as provided by defendants in 1his case. *E.g., Metro Communications Co.* v. *AmeritechMobile Communications, Inc.*, 984 F.2d 739, 745 (6th Cir. 1993); *Norte Car Corp.* v. *FirstBank Corp.*, 25 F. Supp. 2d 9,18 (D.P.R. 1998). Count n is dismissed.

C. Hobbs Act (Count III)

Plaintiffstates defendants violated the Hobbs Act's provision against racketeering, 18 U.S.C. § 1951(bX2), "by preventing plaintiff's entry into commerce under color of official right." The court is persuaded bytbe ~ of other comts which have determined that no private right of action exists to enforce the Hobbs Act. *See Wisdom* v. *First Midwest Bank of Poplar Bluff,* 167 F.3d 402, 408-09 (8th Cir. 1999) (citing cases and holding that "neither the statutoI)' language of 18 U.S.C. § 1951 nor its legislative history retlect an intent by Congress to create a private right of action").

Evenifsuchanaction were authorized, there is ıı) sOOwing that defendants - private parties - acted with the requisite "official color of right"

> In general, proceeding against private citizens on an official right theory is inappropriate undC2' the Act, irrespective of the actual control that citizen pwports to maintain over govemmental activity. Private persons have been convicted of extortion WJder color of official right, but these cases have been limited to ones in which a person masqueraded as a public official, was in the process of becoming a public official, or aided and abetted a public official's receipt of money to which he was not entitled.

35C.J.S.Extortion § 12. The complaint contains no contention that defendants presented themselves as public officials or acted in any DJaIlJla' connected with a public official. Plaintiff carmot state a claim under the Hobbs Act Count m is dismissed.

D. USA PATRIOT Act aaims (Counts IV-VI)

Prior to analyzing plaintiff's legal argmnents, the court reminds plainti1rs counsel that, by signing the complaint and any other paper submitted to the court, he has certified, to the best of his belief and after a reasonable inquiIy, that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfiivolous argument for the extension, modification, or reversal of existing law or the establishment ofnew law." Fed. R Civ. P. 11 (b)(2). Plaintiffs counsel is advised to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts.

Plaintiff seeks to bring claims that defendants failed to properly train their employees on the USA PAmar Act (hereinaftez "Patriot Act") or provide a compliance officer related to the Act, violating section 352 of the Act, codified at 31 U.S.C. § 5318 (Count IV); "misused their authority" and engaged in excessive use of force as "enforcement officers" under the Act (Count V); and "violated criminal laws to influence public policy" under the Act (Count VI). The Act states, in relevant part,

> (h) Anti--money laundering programs.-
> (1) In geoeral.-In order to guard against money laundering through financial institutions, each financial institution shall establisb. anti-money laundering programs, including, at a

minimum-
(A) the development of internal policies, procedures, and controls;
(B) the designation of a compliance officer;
(C) an ongoing employee training program; and
(D) an independent audit function to test programs.

31 U.S.C. § 5318 (h).

First, withregard to Count IV, the court finds plaintift1acks standing. The court it obligated to raise the issue of staOOing *sua sponte* to ensure that an Article m case or controversy exists. *PeT A, People for the Ethical Treatment of Animals* v. *Rasmussen,* 298 F.3d 1198, 1202 (lOth Cir. 2002). '1'0 establishArticle m standing, the plaintiff must show injury in fact, a causal relationship between the injwy and the defendan1S' challenged acts, and a likelihood that a favorable decision wiR redress the *iQjmy."Id. (citingLujan* v, *Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). InIUling on amotion to dismiss for lack ofstanding, the comt "must accept as true all material allegations of the complaint, and must constme the complaint in favor of the complaining party." *Ward* v, *Utah,* 321 F.3d 1263, 1266 (10th Cir. 2003) (citing *Warth v. Seldin,* 422 U.S. 490, 501, (1975».

Here, the court finds plaintiffIacks standing because it has failed to allege a redressable iQjwy. Even if defendants failed to train their employees in order to guard against money laundering and also failed to designate a compliance officer as required by the Act, plaintiff has not pled that it was injured due to such omissions. Moreover, there is no basis to conclude that any order from the court directing defendants to comply with the Act could redress plaintiffs grievance that defaxian1S denied plaintiff escrow services.

Second, the court :6nds that, evenifCount IV were justiciable, oo private right of actionexists to enforce the Patriot Act As a result, Counts IV, V, and VI fail to state a claim for which relief can be granted. plaintiff

has not identified a provision oftbe Patriot Act expressly autIDizing enforcement by private citizms. In its response to the motion to dismiss, plaintiff states that the failure to train and excessive use of force claims are actionable under 42 U.S.C. § 1983.

Section 1983 provides a cause of action against any person who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." § 1983 (emphasis added). The complaint has failed to allege that defendants acted under color of state law, an essential element ofa § 1983 suit *E.g., Sooner Prods. Co.* v. *McBride,* 708 F.2d 510, 512 (10th Cir.1983). Al1houghplaintiff later states in its response that defendants acted "as an agent for the Department of the Treasury"3 and that § 1983liabilitymayextend to private ilxtiviWaJs ifthey engage injoint action with state officials, these allegations do not appear in the complaint and are, nevertheless, so coeclusory that they cannot state a claim. *See, e.g., Hunt* v. *Bennett,* 17 F.3d 1263, 1268 (lOth Cir. 1994); *Sooner Prods. Co.,* 708 F.2d at 512. ("When a plaintiff in a § 1983 action attempts to assert the necessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conelusory allegations with no supporting factual avennents are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action."). *InBiessing v. Freestone,* the Supreme Court explained the factors courts must consider indetmniningwhether a statute gives rise to a right enforceable under § 1983:

> In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal Jaw. We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have

3plaintiff's argwnent implicates action 1.JDdez color of federal rather than state law, thus giving rise to an action under *Bivens* v. *Six Unknown Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971), rather than § 1983.

> intended that the provision in question benefit the plaintifE Second, the plaintiff must demonstrate that the right assertedly protected by the statute il not so '\rague and ammphous" that its enforcement would strainjudicialcompetence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. 329,340 (1997) (citatiom omitted). PIaintiffhas not alleged the existence of any of these necessary elements.

Further, pJaint.iffhas not attempted to state a claim that an implied private right of action exists under the Act "A plaintiff asserting an implied right of action under a federal statute bears the relatively heavy burden of demonstratingtbatCongress afIinnativelycontemplated private enfon:ement whenit passed the statute. Inother words, he DUJSt overcome the familiar preswnption that Congress did not intend to create a private rigk of action." *Casas* v. *Am. Airlines, Inc*.• 304 F.3d 517, 521 (5th Cir. 2002); *see also Cort v. Ash*, 422 U.S. 66, 78 (1975) (setting forth the four-factor test for whether a statute creates an implied private right of action as (1) whether plaintiff is a member of the class for whose benefit the statute was passed; (2) whetheE there il evidence oflegislative intmt, ei.ther eJq)licit or implicit, to create or deny a private remedy; (3) whether it is consistent with the 1egis1ative scheme to irq>ly a private remedy; (4) whether the cause of action [is] one 1raditionally relegated to state law so that implying a federal right of action would be inappropriate). The complaint alleges none of these elements.

Finally, with regard to Count VI in particular, in which plaintiff actually contends defendants "are preventing [plaintifi]'s entJy into commerce in violation of Section 802 of the USA Patriot Act which creates a federal crime of 'domestic terrorism' that broadly extends to 'acts dangerous to human life that are a violation of the criminal laws," the court finds plaintiff's allegation so completely divorced from rational thought that the

court will refiain from further comment mtil such time as federal aiminalproceedings are commenced, ifindeed they ever are.

Counts IV, V, and VI are dismissed.

E. State Law Claims (Counts VII-XDI)

Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only ~lemented state claims, the most commonresponse has been to dismiss the state claim or claims without prejudice." *United States* v. *Botefuhr,* 309 F.3d 1263, 1273 (10'" Cir. 2002) (quotation marks, alterations, and citation omitted). If the parties have already expended "'a great deal oftirre and el1Q'gy on the state law claims,' it i; appropriate for the district court to retain supplemented state claims after disrni.UJg all federal questions." *Vllalpando* v. *Denver Health & Hosp. Auth.;* 2003 WL 1870993, at·5 (10th Cir. 2003) (citing *Botefuhr,* 309 F.3d at 1273). Here, the court finds no compelling reason to retainjurisdiction over the state law claims, and dismisses them without pn-Judice.

IV. Order

IT IS THEREFORE ORDERED TIlAT defendants' Motions to Dismiss (Docs. 21, 23, and 25) are granted.

IT IS FURTHER ORDERED THAT defendants' Motionto StrikePlaintifI'sAnswerto Defendants' Reply (Doc. 30) is dismisserl as moot

IT IS FURTHER ORDERED TIIA T this case is hereby dismissed.

Dated this 16th day of June 2003, at Kansas City, Kansas.

/s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	No. 03-2324-CM
GENERAL ELECTRIC COMPANY, et aI.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

P1ainti1fMedical Supply Chain (MSC) brings this action against defendants General Electric Company (GE), General Electric Capital Business Asset FWlding Corporation (GE Capital), General Electric Transportation Systems Global Business Signaling (GETS), am Jeffiey R. Imrnelt, Chief Executive Officer of GE. Plaintiff alleges that GE, GE Capital, GETS, and Imme1t violated federal antitrust laws and Missouri conunon law by refusing to sublease a building or provide finmx:ing to plaintiff. This matter is before the court on defendants' Motion to Dismiss Amended Complaint (Doc. 8), plaintiffs Request for Extension of Time Under Local Rule 6.1 (Doc. 10), am defendants' Motion for Rule 11 Sanctions (Doc. 13).

I. Plaintiff's Request for Extension of Time Under Local Rule 6.1

On August 21,2003, defendants filed their Motion to Dismiss Amended Complaint (Doc. 8). On September 9, 2003, plaintiffrequested an extension of time in which to answer defendants' motion. The

court hereby grants plaintiff's request for an extension of time. Accordingly, the cowl will consider plaintiffs response brief, which was tiled on October I, 2003.

D. Motion to Dismiss Amended Complaint

A. Standards

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Maherv. Durango Metals, Inc.,* 144 F.3d 1302,1304 (10th Cir. 1998), or when an issue of law is dispositive, *Neitzke v. Williams,* 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher,* 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff; *Witt v. Roadway Express,* 136 F.3d 1424,1428 (lOth Cir. 1998). TheissueinresolvingamotionmJChas this is not whether the plaintiff will ultimately prevail, but whedtec he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (l974), *overruled on other grounds, Davis v. Scherer,* 468 U.S. 183 (1984).

B. Background Facts

1. The Parties

As alleged, plaintiff spent ten years developing technology and has spent the last three yeers completing the research and development for commercialization of an Intemet-based service to manage strategic data and provide direct support to buyers and sellers that make up the healtbcare supply chain. This service is designed to pennit plaintiff to provide "hospital supplies through e-commeree,"

plaintiff alleges that defendant GE distnbutes equipment, parts. and credit services to hospitals. Plaintiff does not allege that GE provides any service (Intemet-based or otherwise) relating to the healthcare supply chain or that it competes in the business of selling "hospital supplies through e-commerce," GE is a shareholder of Global Heal1hcare Exchange (GHX), which plaintiff alleges is an "electronic mmketp1ace promising online distnbution at lower prices to hospitals" that competes in the mmket to provide hospital supplies through e-commerce. GE's share of the ownership of GHX is not alleged, and GHX is not a named defendant in this action

Defendant Immelt is currently the Chief Executive Officer of GE. Previously, as President of GE Medical Systems, defendant Immelt oversaw GE's capitalization of GHX in 2000. Plaintiff alleges that defendant Immelt allied GHX with the other Internet marketplace, Neofonna, Inc. (also not a party to this action), to control8()o~ of the existing hospital supply e-commerce marlcet.

Defendant GE Capital is a GE subsidiary peafonning GE's COIIlDlelCiallending operations. GE Capital is not alleged to provide hospital supply chain services or compete in providing hospital supplies through e-commerce,

Defendant GEl'S, a GE subsidiaIy, is a global supplier of ground transportation products. GEl'S 8SSlD1led a lease on a building at 1600 N.E. Coronado Drive, Blue Springs. Missouri (the "Blue S~ Building") when it bought Hannon Industries, Inc., a railroad signal company. Like GE and GE Capital, GETS is not alleged to provide hospital supply chain services or compete in hospital supplies through e-commerce,

2. The Dispute

On or about June 1,2002, Samuel Lipari, Chief Executive Officer ofpJaintiffMSC, contacted a leasing agent regarding the Blue Springs Building. Lipari was interested in sub-leasing a portion of the building wherein plaintiff could conduct its hospital e-comrnerce business. The leasing agmt indicated to Lapari that the building aIready was leased and that the existing lessee only would sub-lease the entire building. GETS was the existing lessee at the time.

Lipari contacted the building owner, who agreed to sell plaintiff the building for the remaining balance of GETS's seven-year lease ($5.4 million). The building owner provided Upari with a letter of intent to sell the building to plaintiff

As alleged, plaintiffwas unable to obtain financing from a national bank to purchase the building. On or about May 15, 2003, plaintiffwrote a letter to George Fricke, a property manager at GE, offering to release GE from its remaining lease obligations on the building provided that GE pay plaintiff at closing for the remainder of'the 2003 lease ($350,000). Pursuant to the tenns of the offer, GE Capital would provide plaintiff a twenty-year mortgage ($6.4 million), with a Jmratoriwn on the first full year of mortgage paymmts. In closing the letter, plaintiff sought the name of a contact person at GE Capital.

On May 15,2003, Fricke left a voice mail message stating that "we will accept that transaction," and on the same day he followed up with an e-mail stating that "GE will accept your proposal to tenninate the existing lease." Several days later, GETS representatives provided Lipari a walk-through of the property. Lipari also provided GE Capital representative Doug McKay with a loan package, which included plaintiff's financial infmmation.

Ultimately, GE Capital chose not to finance plainti1rs purohase of the building and, as alleged by plaintiff, repudiated the parties' contract. As a consequence, plaintiff filed this suit for damages under the federal antitnJst laws and state common law.

C Discussion

1. Federal Antitrust Claims

Counts I through 4 of plaintiff's Amended Complaint are based on Section 1 of the Sherman Act, 15 U.S.c. § 1. In order to withstand a motion to dismiss a Section 1 claim, a plaintiffmust allege an agreement between two separate entities. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984). Counts 5 through 9 allege violations of Section 2 of the Shennan Act, 15 U.S.C. § 2. A plaintiff is required to establish a relevant market to prevail on a monopolization or attempted monopolization claim under Section 2 of the Shennan Act *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (Ioth Cir. 2002).

Defendants set forth a variety of argwnents why this case should be dismissed. However, the court need not address each and every argmnent because, at the most fimdamentalleve~ plaintiff's antitnJst claims fail.

"[A]ntitIUst law is concerned with abuses of power by private actors in the markelplace. Therefore, before we can reach the larger question of whether [a defendant] violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market." *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1572 (11^{1h} Cir. 1991). "Markets are defined in terms of two separate dimensions: products and geography." *Id.* Plaintiffrefers to a relevant mmket of "hospital supplies delivered through e-conunerce in North America." (Am. CompI. ~ 37.).

PIamtiff never alleges that any o,f the named defendants either possess or are attempting to possess ID81ket power in the relevant market of "hospital supplies delivered through e-commerce in North America." The fact that defendant GE owns an interest in GHX, the percentage of which plaintiff does not allege, does not make defendant GE Oet alone the other defendants) a competitor in the market in which GHX allegedly competes. For example, in *Spanish Broadcasting System, Inc.* v. *Clear Channel Communications, Inc.*, 242 F. Supp. 2d 1350 (S.D. Fla, 2003), the defendant did not compete in the alleged relevant market, but did own 26% of a finn that did compete. The court dismissed the plaintift's antitrust claims, holding that this ownership interest did not convert the defendant into a competitor in the relevant market *Id.* at 1363. *Accord Invamed, Inc. v. Barr Labs; Inc.*, 22 F. Supp. 2d 210,219 (S.D.N.Y. 1998) ("that the [defendants] possess marlcet power through their alleged ownership interests in [a market participant], standing alone, does not satisfy the pleading requirements of a monopolization or attempted monopolization claim',).

Because plaintiff does not allege that any of the named defendants compete in the market of "hospital supplies delivered through e-commerce in North America," the court turns to whether plaintiffhas alleged an agreement with a market participant who does compete in that market,

In the Amended Complaint, pIamtiff alludes to an agreement between defendants and "other heal1hcare suppliers" and agreements with "other suppliers and electronic rnarketpIaces." (Am. CampI. ", 33, 36.) As such, even if the Amended Complaint adequately alleged an agreement between any defendant and GHX, or any defendant and Neofonna, Inc., it would be a vertical agreement, because no defendant is alleged to compete with either of these companies. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485* U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been

denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distn'bution as vertical restraints.").

With that in mind, a vertical agreement in which finns agree that they will deal only with each 0lher (or not deal with each others' competitors) is considered an "exclusive dealing arrangement" *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468,473 D.2 (3n! Cir. 1992). Exclusive dealing arrangements, like other non-price vertical restraints, are analyzed under the rule of reason. *Jefferson Parish Hosp. Dist. No.2 v. Hyde*, 466 UiS. 2,44-45 (1984).

Among *other* ~ this means a plaintiff seeking to challenge an exclusive dealing arrangement must demonstmte the defendant possesses market power, as this is a prerequisite to being able to restrain trade unreasonably. *Reazin* v. *Blue Cross & Blue Shield of Kan., Inc.*, 663 F. Supp. 1360, 1478 (D. Kan. 1987). In other words, the exclusive dealing ammgement is unlawful only if the defendants have market power, which is defined as "the power to control prices or the power to exclude competition." *Westman Comm 'n Co.* v. *Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 n.3 (10[111] Cir. 1986).

As previously stated, plaintiff never alleges that any of the named defendants either possess or are attempting to possess market power in the relevant market of "hospital supplies delivered through e-commerce in North America." Rather, plaintiff's antitrust claims are based upon defendants' denial of corporate financing and its refusal to transfer real property to plaintiff As such, the market that the court must consider in detennining whether defendants engaged in anti-competitive conduct is the commercial real estate market and the related market of potential financiers.

Defendants are by no means the only holders of commercial real estate in Blue Springs, Missouri, and in no way control the commercial real-estate financing market Even more importantly, plaintiff does 001

allege such facts. It appears from the Amended Complaint that plaintiff sought and was denied financing fiom other financial institutions. However, plaintiff cmmot sustain an antitnJst claim against defendants - the final party to deny financing - absent an allegation that defendants possessed marlcet power such that defendants' denial of financing left plaintiff with no alternative and kept plaintiff from entering the c> COIIIIICICe hospital supply market. Plaintiff's inability to obtain financing could be due to a variety offactors and does not, in itself, give rise to an anti1rust claim against a potential investor who may have decided to either avoid risk: or to expend its resources elsewhere. Defendant GE Capital's refusal to extend credit on tenns that plaintiff itself alleges to be "unusual," which included a below-marlcet interest rate, an Wlusually lengthy term, and forbearance on interest payments for one year, does not constitute anti-competitive conduct

There simply exists no allegation that deferxlants had the ability, through their denial of financing or the lease of office space, to lessen or destroy competition in the marlcet of hospital supplies through e-commerce. *Coastal Fuels* v. *Caribbean Petroleum Corp.*, 79 F.3d 182, 196 (PI Cir. 1996) ("To determine whether a party has or could acquire monopoly power in a market, 'cowts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that marlcet'") (quoting *Spectrum Sports, Inc.* v. *McQuillan,* 506 U.S. 447,456 (1993». Accordingly, even assmning as true the facts alleged in the Amended Complaint, the cowt concludes that defendants' conduct was not unlawful under the federal antitrust laws.

3. Robinson-PatmanAct Claim

Count 10 of the Amended Complaint alleges that defendants have violated Section 2(e) of the Robinson-Patman Act. Section 2(e) makes it unlawful for a seller to:

> Discriminate in favor ofone purchaser against another purchaser or purchasers of a *commodity bought for resale* ... by ... furnishing ... any services or facilities counected with the processing, harxDing, sale, or offering for sale of such *commodity* so purchased upon terms not accorded to all purchasers on p1q)Ortionally equal terms.

15 U.S.C. § 13(e) (emphasis added).

As a threshold matter, the Robinson-Patman Act only bars price discrimination in the sale of commodities. *See, e.g., FTCv. Fred Meyer. Inc.*, 390 U.S. 341, 355-57 (1968). PlaintifIasserts that defendants have discriminated in the supply of a real estate lease or financing, but neither is a "commodity' within the ambitofSection2(e). *See Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319,1328 (6th Cir. 1983) ("[D]iscriminatory practices in the extension of credit ... are beyond the scope of either § 2(d) or § 2(e»; *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251,252 (6th Cir. 1970) (lease is not a commodity); *Valerio* v. *Boise Cascade Corp.*, 80 F.RD. 626, 652 (C.D. Cal. 1978) ("It suffices to say that real estate and intangIbles are not commodities within the meaning of the Act,"), As such, the court dismisses plaintiff claim under the Robinson-Patman Act

4. State Law Claims

Federal district comts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only the supplemental state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States* v. *Botefuhr*, 309 F.3d 1263, 1213 (IQth Cir. 2002) (quotation marks, alterations, and citation omitted). If the parties have already expended "'a great deal of time and energy on the stale law claims,' it is appropriate for the district cowt to retain supplemented state claims after dismissing all federal questions." *Villalpando* v. *Denver Health & Hosp. Auth.*, 2003 WL

1870993, at *5 (lOth Cir. 2003) (citing *Botefuhr,* 309 FJd at 1273). This court finds no compelling reason to retain jwisdiction over the state law claims and dismisses them without prejudice.

ill. Motion for Rule 11 Sanctions

Defendants move for sanctions tmder Federal Rule of Civil Procedure 11, based on their contentions that plaintiff filed its Amended Complaint for pmposes ofbarassment am that plaintiff's claims were fiivolous and based on neither law nor fact

The court recognizes that in a related case entitled *Medical Supply Chain, Inc. v. US Bancorp, NA,* this court reminded plaintiffs counsel, Bret landrith, of his obligations under Fed. R. Civ. P. 11 and cautioned him "to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." No. Civ. A. 02·2539-CM, 2003 WL 21479192, at *6 (D. Kan. June 16, 2003). Notwithstanding, the cowt is Wlwilling at this juncture to conclude that plaintiff's Amended Complaint was so meritless or otherwise fiivolous that sanctions are W8lT811ted. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412,421, (1978) (district court must resist the "understandable temptation" of concluding that the action was unreasonable or without foundation simply because the plaintiff did not ultimately prevail). Moreover, the court dismissed plaintiffs state law claims, thereby leaving open the question of whether or not those claims have a basis in law or fact The court denies defendants' motion for sanctions.

IT IS THEREFORE ORDERED that plaintiff's Request for Extension of Time Under Local Rule 6.1 (Doc. 10) is granted; defendants' Motion to Dismiss Amended Complaint (Doc. 8) is granted, and defendants' Motion for Rule 11 Sanctions (Doc. 13) is denied. This case is hereby dismissed.

Dated this 29 day of January 2004, at Kansas City, Kansas.

51Carlos Mu[JUia
CARLOS MURGUIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-CV-0210-CV-ODS**
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	

NOVATION, LLC, VHA INC., AND
UNIVERSITY HEALTHSYSTEM CONSORTIUM'S
MOTION TO TRANSFER VENUE OR ALTERNATIVELY MOTION TO DISMISS
COMPLAINT FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants Novation, LLC ("Novation"), VHA Inc. ("VHA"), and University Healthsystem Consortium ("UHC") (collectively, "Defendants") respectfully request that the Court transfer this case to the District Court of Kansas pursuant to 28 U.S.C. § 1404(a), or alternatively dismiss Plaintiff's Complaint with prejudice pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

1. Plaintiff's Complaint seeks several billions of dollars in damages arising from Plaintiff's inability to lease desired office space, to obtain financing, and to establish escrow accounts allegedly necessary to enter into the market to provide hospital supplies in e-commerce. Plaintiff asserts that these harms flowed from a vast conspiracy involving, *inter alia*, various entities and individuals in the nationwide hospital supply market, venture capital firms, a bank, a law firm, the owner of an office building, and a magistrate of the U.S. District Court for Kansas.

PRIOR ACTIONS

2. This is not the first time Plaintiff has raised these claims. Indeed, this lawsuit is substantially similar to claims asserted in two prior suits, both of which were dismissed on the pleadings. Plaintiff originally filed a lawsuit against many of these same defendants in the United States District Court for the District of Kansas in 2002, styled *Medical Supply Chain, Inc. v. US Bancorp, NA, et al.*, Civil Action No. 02-2539-CM (Judge Carlos Murguia) (the "US Bancorp Case"). In that case, Plaintiff asserted virtually identical claims arising out of the same transactions and same set of operative facts as are alleged here even though Plaintiff was warned by the District Court in its order dismissing the complaint in that case "to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *See* Memorandum and Order, at p. 11 (attached as Exhibit 1). Indeed, the district judge noted, with regard to Plaintiff's USA Patriot Act violations (which are also made here) that "plaintiff's allegation [is] so completely divorced from rational thought that the court will refrain from further comment . . . ." *See* Exhibit 1 at pp. 14-15. The Tenth Circuit affirmed the District Court's dismissal. Because the Tenth Circuit concluded that Plaintiff's appeal was not supported by the law or the facts, it ordered Plaintiff and its counsel to show cause why it should not be sanctioned for filing a frivolous appeal. *Medical Supply Chain, Inc. v. US Bancorp, NA*, 2004 WL 2504653, *1 (10th Cir. 2004).

4. In June of 2003, Plaintiff filed suit in the District Court of Kansas against many of the GE-related parties alleged to be unnamed co-conspirators in this action. That case was styled *Medical Supply Chain, Inc. v. General Electric Company, et al.*, Civil Action No. 03-2324-CM (Judge Carlos Murguia) (the "GE case"). That case also involved many of the same factual and legal allegations as alleged here. In the District Court's order dismissing that suit, the Court

noted that the federal antitrust claims failed "at the most fundamental level." *See* Memorandum and Order, at p. 5 (attached as Exhibit 2).

TRANSFER OF VENUE

5. Defendants join in the motion to transfer venue of this proceeding to the U.S. District Court in Kansas pursuant to 28 U.S.C. § 1404(a) filed by Defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare, and Andrew S. Duff. Because the Kansas District Court has already twice-dealt with this Plaintiff and these allegations, it is the most efficient use of judicial resources for that court to consider this case. Further, transfer to Kansas ensures that Plaintiff cannot forum shop his deficient Complaint to this Court in an effort to avoid incurring additional sanctions imposed by the Kansas court for filing frivolous and harassing lawsuits.

GROUNDS FOR DISMISSAL

6. Undeterred by the Tenth Circuit's and the Kansas District Court's admonitions regarding Plaintiff's attorney's Rule 11 responsibilities, that same attorney has now filed this Complaint which is substantially similar to his defective actions in the US Bancorp and GE cases. The Complaint is incoherent, *e.g.* Complaint at p. 114 (seeking an injunction during the "pungency [sic] of this action" and damages for Plaintiff's stakeholders including the town of Blue Springs, Missouri and "the injury of the 2000 hospitals loosing [sic] money due to high supply costs"), and irrational, *e.g.* Complaint at ¶ 89 (blaming the deaths of "at least 41,206 Americans" on the increasing health care costs due to the Defendants' actions in foreclosing Plaintiff's entry into the market).

7. What is clear upon a reading of the Complaint, however, is that it states no legally viable claim. In fact, the new Complaint repairs none of the fundamental legal defects and

pleading insufficiencies of the prior cases, and adds some new ones. Moreover, many claims are now foreclosed by collateral estoppel grounds. As is explained further in the accompanying Suggestions in Support of Novation, LLC, VHA, Inc., and University Healthsystem Consortium's Motion To Dismiss Complaint For Failure To State A Claim, Plaintiff's claims should be dismissed by this Court with prejudice on the following grounds:

- Plaintiff's federal and state antitrust claims should be dismissed because: (1) Plaintiff is collaterally estopped from asserting such claims; (2) Plaintiff wholly fails to allege concerted action; (3) Plaintiff fails to sufficiently allege monopoly power or the elements of attempt to monopolize; (4) Plaintiff fails to adequately allege harm to competition, rather than merely harm to Plaintiff, a single competitor; (5) Plaintiff lacks standing to assert the claims; and, (6) Plaintiff fails to plead any of the required elements for a claim for interlocking directors.

- Plaintiff fails to plead the existence of a misleading statement or omission made by Defendants to Plaintiff; therefore, Plaintiff's fraud claim should be dismissed.

- Plaintiff fails to plead that Defendants knew about or intentionally interfered with the contracts with which Plaintiff claims Defendants tortiously interfered.

- Plaintiff's allegations actually contradict the basis for recovery under the theory of prima facie tort.

- Plaintiff's RICO claim fails due to the lack of a viable claim of a racketeering act or pattern and an injury that can be remedied under RICO.

- Plaintiff's USA Patriot Act claim against Defendants must be dismissed because: (1) there is no private right of action under the USA Patriot Act; (2) that claim is barred by principles of collateral estoppel; and, (3) Plaintiff has failed to plead facts sufficient to show that Defendants had any involvement with or knowledge of a filing under that statute.

INSUFFICIENCY OF SERVICE OF PROCESS

8. Plaintiff filed Return of Service forms with this Court purporting to establish valid service of process on Defendants. However, service of process was ineffective to obtain jurisdiction over Defendants because: (1) service by mail is insufficient under the Federal Rules of Civil Procedure and the Missouri Rules of Civil Procedure unless the defendant returns the acknowledgement form (that Plaintiff failed to include in the served papers); and, (2) the mailing was not directed at the appropriate officer or agent of Defendants. Nevertheless, counsel for Defendants contacted Plaintiff's counsel, noted the deficiency in service, and offered to execute waiver of service forms as is contemplated by Federal Rule of Civil Procedure 4. Plaintiff's counsel rejected that offer, stating instead that this is a "bloody battle" for which no agreements can be considered. Rather than delay consideration of the patent insufficiency of this Complaint by resting on a challenge to service of process, Defendants are now filing their Rule 12(b)(6) motion according to the deadline that would have applied if service had been proper.

PRAYER

WHEREFORE, for all of these reasons, Defendants request that the Court transfer this case to the U.S. District Court in Kansas, or alternatively enter an Order dismissing with

prejudice Plaintiff's Complaint and granting Defendants all other relief to which they are entitled.

REQUEST FOR ORAL ARGUMENT

Defendants Novation, LLC, VHA Inc., and University Healthsystem Consortium hereby requests oral argument on its Motion to Transfer Venue or Alternatively Motion to Dismiss Complaint for Failure to State a Claim.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power
John K. Power, # 35312
Joel K. Goldman, #40453
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION, LLC, NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J. BAKER

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2005, I electronically filed 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::

Bret D. Landrith landrithlaw@cox.net
Attorney for Plaintiff

/s/ John K. Power
John K. Power

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 02-2539-CM**
	)	
US BANCORP, NA, et al.,	)	
	)	
Defendants.	)	
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MEMORANDUM AND ORDER

Pending before the court is defendants' Motion to Strike Plaintiff's Answer to Defendants' Reply (Doc. 30). Also before the court are defendants' Motions to Dismiss (Docs. 21, 23, and 25), plaintiff's Response to defendants' Motions to Dismiss (Doc. 27), and defendants' Reply in Support of all Motions to Dismiss (Doc. 28). As set forth below, defendants' Motions to Dismiss are granted. Defendants' Motion to Strike is dismissed as moot.

I. Background[1]

1. The Parties

Plaintiff is a Missouri corporation which has developed a health care supply strategist certification program. According to plaintiff, defendant US Bancorp NA (hereinafter "US Bancorp") is a bank holding corporation headquartered in Minnesota and is the parent company of the employees and subsidiaries named as co-defendants. Defendant US Bancorp operates banks in several states under the name US Bank.

[1]The court exercises jurisdiction under 28 U.S.C. §§ 1331 and 1337.

Defendant Private Client Group, Corporate Trust, Institutional Trust and Custody, and Mutual Fund Services, LLC (hereinafter "defendant LLC"), is a subsidiary of defendant US Bancorp, also headquartered in Minneapolis. Defendant LLC is the division of defendant US Bancorp that is responsible for escrow accounts for health care systems. Defendant US Bancorp Piper Jaffray, Inc. is the investment banking subsidiary of defendant US Bancorp, and is headquartered in Minneapolis. It has underwriting and investment relationships with healthcare suppliers. Defendant Unknown Healthcare Entity is "believed to be a supplier or purchasing organization who has communicated with US Bancorp, its employees or its subsidiaries about plaintiff for the purpose of obstructing or delaying plaintiff's entry into commerce." Jerry A. Grundhofer is President and CEO of defendant US Bancorp. Defendant Andrew Cesere is Vice Chairman of the US Bancorp trust division. Defendant Susan Paine is the supervisor for US Bank's St. Louis, Missouri corporate trust office. Defendant Lars Anderson is the customer acquisition manager for US Bank's St. Louis, Missouri corporate trust office. Defendant Brian Kabbes is Vice President of Corporate Trusts for US Bank.

B. Plaintiff's Claims

Plaintiff contends defendants engaged in conduct violating (1) the Sherman Antitrust Act; (2) the Clayton Antitrust Act; and (3) the Hobbs Act. Plaintiff also alleges defendants (4) "fail[ed] to properly train [their] employees on the USA PATRIOT Act or to provide a compliance officer"; (5) misused "authority and excessive use of force as enforcement officers under the USA PATRIOT Act"; and (6) violated "criminal laws to influence policy under section 802 of the USA PATRIOT Act." The complaint further charges defendants with (7) misappropriation of trade secrets, under state law; (8) tortious interference with prospective contracts; (9) tortious interference with contracts; (10) breach of contract; (11) promissory estoppel; (12) fraudulent misrepresentation; and (13) violation of the covenant of good faith and fair dealing. Plaintiff seeks over $943

million in damages and declaratory relief.[2] Defendants request dismissal of the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiff has failed to state a claim for which relief can be granted.

On March 12, 2002, plaintiff's President and CEO, Sam Lipari, began a process of selecting a national bank to provide services including nationwide checking, escrow services, credit facilities, and other banking services. Mr. Lipari opened a corporate account with US Bank on or about April 15, 2002. On October 1, 2002, plaintiff contacted a US Bank employee at the Noland Road, Independence, Missouri branch of US Bank. Plaintiff requested the bank to provide escrow services. Defendants ultimately denied plaintiff's request, and plaintiff claims it was damaged as a result.

II. Legal Standard for Motions to Dismiss

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

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[2]On January 9, 2003, the Tenth Circuit affirmed this court's order denying plaintiff's requests for preliminary injunction.

III. Analysis

A. Sherman Act (Count I)

In Count I of the Amended Complaint, plaintiff alleges defendants have violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

1. Section 1

A plaintiff must plead three elements to state a claim under § 1 of the Sherman Act: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. 15 U.S.C. § 1; *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992); 1 Irving Scher, et al., *Antitrust Adviser* (4th ed. 2001) § 1.04.

With regard to § 1, plaintiff states defendants are a "vertically integrated" entity that exercises monopoly power over "the specific market" of companies seeking to supply new products, services, and technology in the field of health care, because new entrants into the market "are dependent" upon defendants' approval and endorsement. Plaintiff alleges that defendants violated Section 1 by stating that defendants "are believed to be the largest holder of health care supplier equity issues"; that defendants US Bancorp , US Bank, and defendant LLC, as well as US Bancorp Piper are "alter egos" of each other which have, *inter alia*, "completely dominated and controlled each other's assets, operations, policies, procedures, strategies, and tactics"; that defendants use "anticompetitive sole source contracts between their client health care suppliers and health care GPOs [sic] the defendants have developed" in order to inflate the value of equity shares that defendants market; that defendants "operate a conspiracy among their subsidiaries and parent companies" for the purpose of restraining commerce; that defendants rejected plaintiff's application for escrow accounts in order to prevent plaintiff's entry into the

market; and that defendants have acted in furtherance of the conspiracy through a refusal to deal, denial of services, and boycotting or withholding of critical facilities in order to exclude plaintiff from the market.

a. Contract, Combination, or Conspiracy

Plaintiff alleges that defendants have conspired to prevent plaintiff's entry into the market through refusal to deal, denial of services, and boycotting or withholding critical facilities. Defendants contend plaintiff has failed to allege the existence of an agreement among defendants, and that plaintiff cannot show that two or more independent actors were present. Accepting the allegations contained in the complaint as true, the court finds plaintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1.

First, the court finds that plaintiff has not demonstrated that a plurality of actors existed among defendants. In the complaint, plaintiff states that all individuals named as defendants are officers or employees of defendant US Bancorp, and that all business entities named as defendants are subsidiaries of defendant US Bancorp. Officers, directors, and employees of the same company cannot conspire with each other to violate § 1, because they cannot comprise the plurality of actors necessary for a conspiracy. As the Supreme Court held in *Copperweld Corp. v. Independence Tube Corp.*:

> [A]n internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.

467 U.S. 752, 769 (1984). Likewise, a parent corporation is incapable of conspiring with its wholly owned subsidiaries:

> [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Id. at 771; *see also In re Indep. Serv. Orgs. Antitrust Litig.*, 85 F. Supp. 2d 1130, 1149 (D. Kan. 2000) (following *Copperweld* in finding that coordination among divisions of a corporation does not violate Sherman Act).

Second, the court finds that even if the allegations of conspiracy alleged in plaintiff's complaint encompassed a plurality of actors, plaintiff has failed to state a claim for relief. Here, plaintiff has not pled the existence of a pricing agreement, or agreement of any kind, among the defendants in restraint of trade. "Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief." *TV Communications Network, Inc.*, 964 F.2d at 1024 (citing *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir. 1980)). A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. *Id.*; *see also Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979) (holding that to survive a motion to dismiss, a complaint stating violations of the Sherman Act "must allege facts sufficient, if they are proved, to allow the court to conclude that claimant has a legal right to relief"). Conclusory allegations that the defendant violated those laws are insufficient.

Id. (citing *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 299 (2d Cir. 1965)). The court grants defendants' motion to dismiss plaintiff's claim under § 1 of the Sherman Act.

2. Section 2

Section 2 of the Sherman Act prohibits monopolies in interstate trade or commerce. 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."). Conduct violates this section when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389-90, (1956); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987).

Plaintiff states defendants "have violated Section 2," and that they "have acquired, maintained and extended their monopoly power through improper means, including attempting to extort healthcare technology companies into using US Bancorp as the underwriter of capitalization against securities regulations and in denying [plaintiff] the escrow accounts it required to capitalize its entry into commerce through extortion under the color of official right - the USA PATRIOT Act." Further, plaintiff alleges defendants' "vertical integration is part of a calculated scheme to gain control over the $1.3 trillion health care supplier and distribution segment of the health care industry and to restrain or suppress competition," and that defendants "engage in predatory tactics and dirty tricks including . . . extortion [and] 'laddering' schemes to fraudulently inflate equity values of competitors they own interests in." Plaintiff claims defendants "invest in and promote engage in [sic] anticompetitive predatory sole source contract agreements." In addition, according to plaintiff, defendants have

gained "the power to control prices of health care supplies . . . that are higher than those negotiated directly by hospitals."

With regard to the effects of defendants' alleged actions, plaintiff states, without elaboration, that "new technologies have been prevented from entering the health care market," resulting "in the unavailability of superior products and services that would have been able to save lives and alleviate suffering." Further, plaintiff contends "[t]he public is being severely injured by defendants' actions" and that plaintiff "has been severely injured and is in danger of further injury."

The court construes plaintiff's complaint as attempting to state a claim of combination or conspiracy to monopolize. It is unclear whether plaintiff claims that actual or attempted monopolization occurred. Applying all three theories of recovery, the court finds that plaintiff has failed to state a claim under § 2.

"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In the Tenth Circuit, "monopoly power is defined as the ability both to control prices and exclude competition." *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1567 (10th Cir. 1991). Further, "determination of the existence of monopoly power requires proof of relevant product and geographic markets." *Id.*

Here, plaintiff has failed to allege that defendants both controlled prices and excluded competition. Further, plaintiff has not pled the existence of a relevant product market or geographic market. Plaintiff has not stated that defendants' alleged market power stems from defendants' willful acquisition or maintenance of that

power rather than from defendants' development "of a superior product, business acumen, or historic accident." The court finds plaintiff has failed to state a claim of monopoly under § 2.

To state a claim for attempted monopolization under § 2, the plaintiff must plead: "(1) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt." *Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999) (citing *TV Communications, Inc.*, 964 F.2d at 1025). "Factors to be considered in determining dangerous probability include the defendant's market share, 'the number and strength of other competitors, market trends, and entry barriers.'" *Id.* (citing *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991). Plaintiff has neither adequately pled the existence of a relevant market nor alleged that defendants have a "dangerous probability" of success in monopolization. The court finds plaintiff has not stated a claim for attempted monopolization under § 2.

With regard to combination or conspiracy to monopolize, "[a] plaintiff must show conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy." *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kan.*, 891 F.2d 1473, 1484 (10th Cir. 1989) (*citing Perington Wholesale*, 631 F.2d at 1377; *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n*, 843 F.2d 1154, 1157 (8th Cir. 1988)). As with § 1, the court finds that plaintiff cannot state a claim for conspiracy because plaintiff has not alleged a plurality of actors and has made only very conclusory allegations of conspiracy. Thus, the court finds plaintiff has not stated a claim for combination or conspiracy to monopolize. Count I of the complaint is dismissed.

B. Clayton Act (Count II)

Plaintiff contends that defendants' refusal to provide escrow account services was a denial of a critical facility in violation of the Robinson-Patman Act, located at 15 U.S.C. § 13 of the Clayton Act. The Robinson-Patman Act, in part, makes it "unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers **of a commodity** bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." § 13(e) (emphasis added).

The court finds plaintiff cannot state a claim under the Robinson-Patman Act, because the act prohibits only the sale of commodities. As numerous courts have held, the Act does not concern the sale of services, including financial services as provided by defendants in this case. *E.g.*, *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739, 745 (6th Cir. 1993); *Norte Car Corp. v. FirstBank Corp.*, 25 F. Supp. 2d 9, 18 (D.P.R. 1998). Count II is dismissed.

C. Hobbs Act (Count III)

Plaintiff states defendants violated the Hobbs Act's provision against racketeering, 18 U.S.C. § 1951(b)(2), "by preventing plaintiff's entry into commerce under color of official right." The court is persuaded by the findings of other courts which have determined that no private right of action exists to enforce the Hobbs Act. *See Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 408-09 (8th Cir. 1999) (citing cases and holding that "neither the statutory language of 18 U.S.C. § 1951 nor its legislative history reflect an intent by Congress to create a private right of action").

Even if such an action were authorized, there is no showing that defendants - private parties - acted with the requisite "official color of right."

> In general, proceeding against private citizens on an official right theory is inappropriate under the Act, irrespective of the actual control that citizen purports to maintain over governmental activity. Private persons have been convicted of extortion under color of official right, but these cases have been limited to ones in which a person masqueraded as a public official, was in the process of becoming a public official, or aided and abetted a public official's receipt of money to which he was not entitled.

35 C.J.S. *Extortion* § 12. The complaint contains no contention that defendants presented themselves as public officials or acted in any manner connected with a public official. Plaintiff cannot state a claim under the Hobbs Act. Count III is dismissed.

D. USA PATRIOT Act Claims (Counts IV-VI)

Prior to analyzing plaintiff's legal arguments, the court reminds plaintiff's counsel that, by signing the complaint and any other paper submitted to the court, he has certified, to the best of his belief and after a reasonable inquiry, that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11 (b)(2). Plaintiff's counsel is advised to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts.

Plaintiff seeks to bring claims that defendants failed to properly train their employees on the USA PATRIOT Act (hereinafter "Patriot Act") or provide a compliance officer related to the Act, violating section 352 of the Act, codified at 31 U.S.C. § 5318 (Count IV); "misused their authority" and engaged in excessive use of force as "enforcement officers" under the Act (Count V); and "violated criminal laws to influence public policy" under the Act (Count VI). The Act states, in relevant part,

> **(h) Anti-money laundering programs.--**
> **(1) In general.**--In order to guard against money laundering through financial institutions, each financial institution shall establish anti-money laundering programs, including, at a

minimum–
(A) the development of internal policies, procedures, and controls;
(B) the designation of a compliance officer;
(C) an ongoing employee training program; and
(D) an independent audit function to test programs.

31 U.S.C. § 5318 (h).

First, with regard to Count IV, the court finds plaintiff lacks standing. The court is obligated to raise the issue of standing *sua sponte* to ensure that an Article III case or controversy exists. *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1202 (10th Cir. 2002). "To establish Article III standing, the plaintiff must show injury in fact, a causal relationship between the injury and the defendants' challenged acts, and a likelihood that a favorable decision will redress the injury." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In ruling on a motion to dismiss for lack of standing, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003) (citing *Warth v. Seldin*, 422 U.S. 490, 501, (1975)).

Here, the court finds plaintiff lacks standing because it has failed to allege a redressable injury. Even if defendants failed to train their employees in order to guard against money laundering and also failed to designate a compliance officer as required by the Act, plaintiff has not pled that it was injured due to such omissions. Moreover, there is no basis to conclude that any order from the court directing defendants to comply with the Act could redress plaintiff's grievance that defendants denied plaintiff escrow services.

Second, the court finds that, even if Count IV were justiciable, no private right of action exists to enforce the Patriot Act. As a result, Counts IV, V, and VI fail to state a claim for which relief can be granted. Plaintiff

has not identified a provision of the Patriot Act expressly authorizing enforcement by private citizens. In its response to the motion to dismiss, plaintiff states that the failure to train and excessive use of force claims are actionable under 42 U.S.C. § 1983.

Section 1983 provides a cause of action against any person who, **under color of state law**, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." § 1983 (emphasis added). The complaint has failed to allege that defendants acted under color of state law, an essential element of a § 1983 suit. *E.g.*, *Sooner Prods. Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983). Although plaintiff later states in its response that defendants acted "as an agent for the Department of the Treasury"[3] and that § 1983 liability may extend to private individuals if they engage in joint action with state officials, these allegations do not appear in the complaint and are, nevertheless, so conclusory that they cannot state a claim. *See, e.g.*, *Hunt v. Bennett*, 17 F.3d 1263, 1268 (10th Cir. 1994); *Sooner Prods. Co.*, 708 F.2d at 512. ("When a plaintiff in a § 1983 action attempts to assert the necessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action."). In *Blessing v. Freestone*, the Supreme Court explained the factors courts must consider in determining whether a statute gives rise to a right enforceable under § 1983:

> In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law. We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have

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[3]Plaintiff's argument implicates action under color of federal rather than state law, thus giving rise to an action under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), rather than § 1983.

> intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. 329, 340 (1997) (citations omitted). Plaintiff has not alleged the existence of any of these necessary elements.

Further, plaintiff has not attempted to state a claim that an implied private right of action exists under the Act. "A plaintiff asserting an implied right of action under a federal statute bears the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the statute. In other words, he must overcome the familiar presumption that Congress did not intend to create a private right of action." *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 521 (5th Cir. 2002); *see also Cort v. Ash*, 422 U.S. 66, 78 (1975) (setting forth the four-factor test for whether a statute creates an implied private right of action as (1) whether plaintiff is a member of the class for whose benefit the statute was passed; (2) whether there is evidence of legislative intent, either explicit or implicit, to create or deny a private remedy; (3) whether it is consistent with the legislative scheme to imply a private remedy; (4) whether the cause of action [is] one traditionally relegated to state law so that implying a federal right of action would be inappropriate). The complaint alleges none of these elements.

Finally, with regard to Count VI in particular, in which plaintiff actually contends defendants "are preventing [plaintiff]'s entry into commerce in violation of Section 802 of the USA Patriot Act which creates a federal crime of 'domestic terrorism' that broadly extends to 'acts dangerous to human life that are a violation of the criminal laws,'" the court finds plaintiff's allegation so completely divorced from rational thought that the

court will refrain from further comment until such time as federal criminal proceedings are commenced, if indeed they ever are.

Counts IV, V, and VI are dismissed.

E. State Law Claims (Counts VII-XIII)

Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only supplemented state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (quotation marks, alterations, and citation omitted). If the parties have already expended "'a great deal of time and energy on the state law claims,' it is appropriate for the district court to retain supplemented state claims after dismissing all federal questions." *Vllalpando v. Denver Health & Hosp. Auth.*, 2003 WL 1870993, at *5 (10th Cir. 2003) (citing *Botefuhr*, 309 F.3d at 1273). Here, the court finds no compelling reason to retain jurisdiction over the state law claims, and dismisses them without prejudice.

IV. Order

IT IS THEREFORE ORDERED THAT defendants' Motions to Dismiss (Docs. 21, 23, and 25) are granted.

IT IS FURTHER ORDERED THAT defendants' Motion to Strike Plaintiff's Answer to Defendants' Reply (Doc. 30) is dismissed as moot.

IT IS FURTHER ORDERED THAT this case is hereby dismissed.

Dated this 16th day of June 2003, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	
Plaintiff,	
v.	**CIVIL ACTION**
	No. 03-2324-CM
GENERAL ELECTRIC COMPANY, et al.,	
Defendants.	

MEMORANDUM AND ORDER

Plaintiff Medical Supply Chain (MSC) brings this action against defendants General Electric Company (GE), General Electric Capital Business Asset Funding Corporation (GE Capital), General Electric Transportation Systems Global Business Signaling (GETS), and Jeffrey R. Immelt, Chief Executive Officer of GE. Plaintiff alleges that GE, GE Capital, GETS, and Immelt violated federal antitrust laws and Missouri common law by refusing to sublease a building or provide financing to plaintiff. This matter is before the court on defendants' Motion to Dismiss Amended Complaint (Doc. 8), plaintiff's Request for Extension of Time Under Local Rule 6.1 (Doc. 10), and defendants' Motion for Rule 11 Sanctions (Doc. 13).

I. Plaintiff's Request for Extension of Time Under Local Rule 6.1

On August 21, 2003, defendants filed their Motion to Dismiss Amended Complaint (Doc. 8). On September 9, 2003, plaintiff requested an extension of time in which to answer defendants' motion. The

court hereby grants plaintiff's request for an extension of time. Accordingly, the court will consider plaintiff's response brief, which was filed on October 1, 2003.

II. Motion to Dismiss Amended Complaint

A. Standards

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff, *Witt v. Roadway Express*, 136 F.3d 1424, 1428 (10th Cir. 1998). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984).

B. Background Facts

1. The Parties

As alleged, plaintiff spent ten years developing technology and has spent the last three years completing the research and development for commercialization of an Internet-based service to manage strategic data and provide direct support to buyers and sellers that make up the healthcare supply chain. This service is designed to permit plaintiff to provide "hospital supplies through e-commerce."

Plaintiff alleges that defendant GE distributes equipment, parts, and credit services to hospitals. Plaintiff does not allege that GE provides any service (Internet-based or otherwise) relating to the healthcare supply chain or that it competes in the business of selling "hospital supplies through e-commerce." GE is a shareholder of Global Healthcare Exchange (GHX), which plaintiff alleges is an "electronic marketplace promising online distribution at lower prices to hospitals" that competes in the market to provide hospital supplies through e-commerce. GE's share of the ownership of GHX is not alleged, and GHX is not a named defendant in this action.

Defendant Immelt is currently the Chief Executive Officer of GE. Previously, as President of GE Medical Systems, defendant Immelt oversaw GE's capitalization of GHX in 2000. Plaintiff alleges that defendant Immelt allied GHX with the other Internet marketplace, Neoforma, Inc. (also not a party to this action), to control 80% of the existing hospital supply e-commerce market.

Defendant GE Capital is a GE subsidiary performing GE's commercial lending operations. GE Capital is not alleged to provide hospital supply chain services or compete in providing hospital supplies through e-commerce.

Defendant GETS, a GE subsidiary, is a global supplier of ground transportation products. GETS assumed a lease on a building at 1600 N.E. Coronado Drive, Blue Springs, Missouri (the "Blue Springs Building") when it bought Harmon Industries, Inc., a railroad signal company. Like GE and GE Capital, GETS is not alleged to provide hospital supply chain services or compete in hospital supplies through e-commerce.

2. The Dispute

On or about June 1, 2002, Samuel Lipari, Chief Executive Officer of plaintiff MSC, contacted a leasing agent regarding the Blue Springs Building. Lipari was interested in sub-leasing a portion of the building wherein plaintiff could conduct its hospital e-commerce business. The leasing agent indicated to Lapari that the building already was leased and that the existing lessee only would sub-lease the entire building. GETS was the existing lessee at the time.

Lipari contacted the building owner, who agreed to sell plaintiff the building for the remaining balance of GETS's seven-year lease ($5.4 million). The building owner provided Lipari with a letter of intent to sell the building to plaintiff.

As alleged, plaintiff was unable to obtain financing from a national bank to purchase the building. On or about May 15, 2003, plaintiff wrote a letter to George Fricke, a property manager at GE, offering to release GE from its remaining lease obligations on the building provided that GE pay plaintiff at closing for the remainder of the 2003 lease ($350,000). Pursuant to the terms of the offer, GE Capital would provide plaintiff a twenty-year mortgage ($6.4 million), with a moratorium on the first full year of mortgage payments. In closing the letter, plaintiff sought the name of a contact person at GE Capital.

On May 15, 2003, Fricke left a voice mail message stating that "we will accept that transaction," and on the same day he followed up with an e-mail stating that "GE will accept your proposal to terminate the existing lease." Several days later, GETS representatives provided Lipari a walk-through of the property. Lipari also provided GE Capital representative Doug McKay with a loan package, which included plaintiff's financial information.

Ultimately, GE Capital chose not to finance plaintiff's purchase of the building and, as alleged by plaintiff, repudiated the parties' contract. As a consequence, plaintiff filed this suit for damages under the federal antitrust laws and state common law.

C. Discussion

1. Federal Antitrust Claims

Counts 1 through 4 of plaintiff's Amended Complaint are based on Section 1 of the Sherman Act, 15 U.S.C. § 1. In order to withstand a motion to dismiss a Section 1 claim, a plaintiff must allege an agreement between two separate entities. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984). Counts 5 through 9 allege violations of Section 2 of the Sherman Act, 15 U.S.C. § 2. A plaintiff is required to establish a relevant market to prevail on a monopolization or attempted monopolization claim under Section 2 of the Sherman Act. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir. 2002).

Defendants set forth a variety of arguments why this case should be dismissed. However, the court need not address each and every argument because, at the most fundamental level, plaintiff's antitrust claims fail.

"[A]ntitrust law is concerned with abuses of power by private actors in the marketplace. Therefore, before we can reach the larger question of whether [a defendant] violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market." *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991). "Markets are defined in terms of two separate dimensions: products and geography." *Id.* Plaintiff refers to a relevant market of "hospital supplies delivered through e-commerce in North America." (Am. Compl. ¶ 37.).

Plaintiff never alleges that any of the named defendants either possess or are attempting to possess market power in the relevant market of "hospital supplies delivered through e-commerce in North America." The fact that defendant GE owns an interest in GHX, the percentage of which plaintiff does not allege, does not make defendant GE (let alone the other defendants) a competitor in the market in which GHX allegedly competes. For example, in *Spanish Broadcasting System, Inc. v. Clear Channel Communications, Inc.*, 242 F. Supp. 2d 1350 (S.D. Fla. 2003), the defendant did not compete in the alleged relevant market, but did own 26% of a firm that did compete. The court dismissed the plaintiff's antitrust claims, holding that this ownership interest did not convert the defendant into a competitor in the relevant market. *Id.* at 1363. *Accord Invamed, Inc. v. Barr Labs., Inc.*, 22 F. Supp. 2d 210, 219 (S.D.N.Y. 1998) ("that the [defendants] possess market power through their alleged ownership interests in [a market participant], standing alone, does not satisfy the pleading requirements of a monopolization or attempted monopolization claim.").

Because plaintiff does not allege that any of the named defendants compete in the market of "hospital supplies delivered through e-commerce in North America," the court turns to whether plaintiff has alleged an agreement with a market participant who does compete in that market.

In the Amended Complaint, plaintiff alludes to an agreement between defendants and "other healthcare suppliers" and agreements with "other suppliers and electronic marketplaces." (Am. Compl. ¶¶ 33, 36.) As such, even if the Amended Complaint adequately alleged an agreement between any defendant and GHX, or any defendant and Neoforma, Inc., it would be a vertical agreement, because no defendant is alleged to compete with either of these companies. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been

denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.").

With that in mind, a vertical agreement in which firms agree that they will deal only with each other (or not deal with each others' competitors) is considered an "exclusive dealing arrangement." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 473 n.2 (3rd Cir. 1992). Exclusive dealing arrangements, like other non-price vertical restraints, are analyzed under the rule of reason. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 44-45 (1984).

Among other things, this means a plaintiff seeking to challenge an exclusive dealing arrangement must demonstrate the defendant possesses market power, as this is a prerequisite to being able to restrain trade unreasonably. *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 663 F. Supp. 1360, 1478 (D. Kan. 1987). In other words, the exclusive dealing arrangement is unlawful only if the defendants have market power, which is defined as "the power to control prices or the power to exclude competition." *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 n.3 (10th Cir. 1986).

As previously stated, plaintiff never alleges that any of the named defendants either possess or are attempting to possess market power in the relevant market of "hospital supplies delivered through e-commerce in North America." Rather, plaintiff's antitrust claims are based upon defendants' denial of corporate financing and its refusal to transfer real property to plaintiff. As such, the market that the court must consider in determining whether defendants engaged in anti-competitive conduct is the commercial real estate market and the related market of potential financiers.

Defendants are by no means the only holders of commercial real estate in Blue Springs, Missouri, and in no way control the commercial real-estate financing market. Even more importantly, plaintiff does not

allege such facts. It appears from the Amended Complaint that plaintiff sought and was denied financing from other financial institutions. However, plaintiff cannot sustain an antitrust claim against defendants – the final party to deny financing – absent an allegation that defendants possessed market power such that defendants' denial of financing left plaintiff with no alternative and kept plaintiff from entering the e-commerce hospital supply market. Plaintiff's inability to obtain financing could be due to a variety of factors and does not, in itself, give rise to an antitrust claim against a potential investor who may have decided to either avoid risk or to expend its resources elsewhere. Defendant GE Capital's refusal to extend credit on terms that plaintiff itself alleges to be "unusual," which included a below-market interest rate, an unusually lengthy term, and forbearance on interest payments for one year, does not constitute anti-competitive conduct.

There simply exists no allegation that defendants had the ability, through their denial of financing or the lease of office space, to lessen or destroy competition in the market of hospital supplies through e-commerce. *Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196 (1st Cir. 1996) ("To determine whether a party has or could acquire monopoly power in a market, 'courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.'") (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)). Accordingly, even assuming as true the facts alleged in the Amended Complaint, the court concludes that defendants' conduct was not unlawful under the federal antitrust laws.

3. Robinson-Patman Act Claim

Count 10 of the Amended Complaint alleges that defendants have violated Section 2(e) of the Robinson-Patman Act. Section 2(e) makes it unlawful for a seller to:

> Discriminate in favor of one purchaser against another purchaser or purchasers of a *commodity bought for resale* . . . by . . . furnishing . . . any services or facilities connected with the processing, handling, sale, or offering for sale of such *commodity* so purchased upon terms not accorded to all purchasers on proportionally equal terms.

15 U.S.C. § 13(e) (emphasis added).

As a threshold matter, the Robinson-Patman Act only bars price discrimination in the sale of commodities. *See, e.g., FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 355-57 (1968). Plaintiff asserts that defendants have discriminated in the supply of a real estate lease or financing, but neither is a "commodity" within the ambit of Section 2(e). *See Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1328 (6th Cir. 1983) ("[D]iscriminatory practices in the extension of credit . . . are beyond the scope of either § 2(d) or § 2(e)); *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970) (lease is not a commodity); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 652 (C.D. Cal. 1978) ("It suffices to say that real estate and intangibles are not commodities within the meaning of the Act."). As such, the court dismisses plaintiff claim under the Robinson-Patman Act

4. State Law Claims

Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only the supplemental state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (quotation marks, alterations, and citation omitted). If the parties have already expended "'a great deal of time and energy on the state law claims,' it is appropriate for the district court to retain supplemented state claims after dismissing all federal questions." *Villalpando v. Denver Health & Hosp. Auth.*, 2003 WL

1870993, at *5 (10th Cir. 2003) (citing *Botefuhr*, 309 F.3d at 1273). This court finds no compelling reason to retain jurisdiction over the state law claims and dismisses them without prejudice.

III. Motion for Rule 11 Sanctions

Defendants move for sanctions under Federal Rule of Civil Procedure 11, based on their contentions that plaintiff filed its Amended Complaint for purposes of harassment and that plaintiff's claims were frivolous and based on neither law nor fact.

The court recognizes that in a related case entitled *Medical Supply Chain, Inc. v. US Bancorp, NA*, this court reminded plaintiff's counsel, Bret Landrith, of his obligations under Fed. R. Civ. P. 11 and cautioned him "to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." No. Civ. A. 02-2539-CM, 2003 WL 21479192, at *6 (D. Kan. June 16, 2003). Notwithstanding, the court is unwilling at this juncture to conclude that plaintiff's Amended Complaint was so meritless or otherwise frivolous that sanctions are warranted. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, (1978) (district court must resist the "understandable temptation" of concluding that the action was unreasonable or without foundation simply because the plaintiff did not ultimately prevail). Moreover, the court dismissed plaintiff's state law claims, thereby leaving open the question of whether or not those claims have a basis in law or fact. The court denies defendants' motion for sanctions.

IT IS THEREFORE ORDERED that plaintiff's Request for Extension of Time Under Local Rule 6.1 (Doc. 10) is granted; defendants' Motion to Dismiss Amended Complaint (Doc. 8) is granted, and defendants' Motion for Rule 11 Sanctions (Doc. 13) is denied. This case is hereby dismissed.

Dated this 29 day of January 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge