

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.	)	

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

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## INTRODUCTION

Although Plaintiff's spurious and outlandishly expansive Complaint defies easy summary, the gist of Plaintiff's claims is that various health care supply related entities, venture capital, real estate and banking firms, a law firm, and a federal magistrate have conspired to prevent Plaintiffs' entry into the health care supply market by obstructing Plaintiffs' efforts to obtain financing, office space in a particular building in Missouri, and escrow services. Plaintiff seeks \$3 billion in damages and asserts claims under the federal and state antitrust statutes, the USA Patriot Act, RICO, and various common law theories.

Plaintiff's Complaint, full of irrelevant and unsupported allegations, lacks the factual allegations necessary to plead a right to recovery under any of Plaintiffs' theories of liability. Plaintiff's state and federal law claims fail to state a claim upon which relief may be granted and are barred, in large part, by the doctrine of collateral estoppel. **In** fact, under the facts set forth in the Complaint, no cognizable claim is stated against Novation, LLC ("Novation"), VHA Inc. ("VHA"), and University Healthsystem Consortium ("UHC") (collectively, "Defendants"). Thus, the Complaint should be dismissed with prejudice and without an opportunity for re-pleading because of the patent frivolousness of Plaintiffs' claims, and because Plaintiffs' two substantially similar complaints have already been dismissed by a Kansas District Court and the Tenth Circuit.<sup>1</sup>

Plaintiff originally filed a similar lawsuit against many of these same defendants in the United States District Court for the District of Kansas in 2002. *See Medical Supply Chain, Inc. v. US Bancorp, NA, et al.*, Civil Action No. 02-2539-CM (Judge Carlos Murguira) (the "US Bancorp Lawsuit") (Ex. 1 to Defendants' Motion to Transfer Venue or Motion to Dismiss).

<sup>1</sup> Because of these two prior, similar lawsuits, Defendants join in the motion of the US Bank defendants to transfer venue to the District Court of Kansas in accordance with 28 U.S.C. § 1404(a).

Subsequently, in June 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. *See Medical Supply Chain, Inc. v. General Electric Company, et al.*, Civil Action No. 03-2324-CM (Judge Carlos Murguira) (Ex. 2 to Defendants' Motion to Transfer Venue or Motion to Dismiss). In *US Bancorp*, not only did the Tenth Circuit affirm the dismissal of Plaintiffs Complaint on the pleadings, it remanded the case to the district court to impose sanctions against Plaintiff and its counsel for the prosecution of a frivolous appeal. *See* Compl. ¶¶ 104-05 ("[T]he Tenth Circuit panel ordered that Medical Supply's counsel receive its most serious sanction for a frivolous appeal") Likewise, *GE* was dismissed on the pleadings, in part because Plaintiffs antitrust claims-repeated here-failed "at the most fundamental level." *See* Ex. 2. Further, *US Bancorp* resulted in adverse findings on several issues relevant to this case; as a consequence, collateral estoppel bars many of Plaintiff's claims here.

### **ARGUMENT**

#### **I. PLAINTIFF'S FEDERAL AND STATE ANTITRUST CLAIMS SHOULD BE DISMISSED**

Plaintiff alleges claims for damages and injunctive relief under Sections 1 and 2 of the Sherman Act, Section 8 of the Clayton Act, and the analogous sections of the Missouri antitrust statutes. None of these claims are legally viable and Plaintiff is barred from asserting most of them under the doctrine of collateral estoppel.

##### **A. Plaintiff's Sherman Act Section 1 Claim Should Be Dismissed**

"To establish a claim under § 1 of the Sherman Act, a plaintiff must demonstrate: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *See Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 5

F.Supp.2d 694, 703 (D. Minn. 1998), *aff'd*, 208 F.3d 655 (8th Cir. 2000). The "contract, combination, or conspiracy" element "requires that defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* Although Plaintiff repeatedly states that Defendants acted in concert, it does not allege any facts concerning a common scheme relating to any action against Plaintiff or other unlawful objective. There are no facts relating to any contact or communication between Novation, VHA, and UHC on the one hand and the defendants and other parties alleged to have deprived Plaintiff of its financing, real estate, and escrow services. The Complaint alleges no facts suggesting that Novation, VHA, or UHC had any knowledge of the events relating to Plaintiff.

Moreover, the Complaint fails to allege facts sufficient to plead an agreement or concerted action relating to group boycott, allocation of customers, price restraints, or tying agreements. Further, even if an agreement among defendants had been pled, Plaintiffs Complaint contains no factual allegations suggesting that Defendants' agreement unreasonably restrained competition-as opposed to allegedly injuring one competitor (Medical Supply)-in the relevant market. Instead, Plaintiff merely asserts-without factual elaboration-that "the defendants have foreclosed competition in the market for hospital services." Compl. ¶206.

"[A] plaintiff must do more than cite relevant antitrust language to state a claim for relief." *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992). A complaint must "provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place." *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213,221 (4<sup>th</sup> Cir. 1994) (citation and internal quotation omitted). The Complaint completely fails this requirement. Plaintiff does not - and cannot consistent with Fed. R. Civ. P. 11 - allege that the Defendants



agreed with anyone to harm Plaintiff. Plaintiff never elaborates on the alleged conspiracy other than to simply assert that such an agreement exists. Because of Plaintiffs failure to allege any of the required particulars, "[d]ismissal of [this] 'bare bones' allegation of antitrust conspiracy without any supporting facts is appropriate." *Id*

Moreover, Plaintiff lacks standing to recover damages for Defendants' alleged cartel that fixes prices of medical supplies sold to hospitals at above-market prices. Compl. ¶ 424 ("The purpose of these agreements [among defendants] was to injure the hospital supply consumers with artificially inflated prices.") Even if such price fixing occurred-which it did not-Plaintiff, as a competitor of the alleged cartel (Compl. ¶ 439), would benefit by any agreement to charge high prices, because it could either undercut the price to win business or profit from the cartel's pricing "umbrella." The case law is unequivocal that Plaintiff lacks standing to complain of Defendants' alleged price-fixing. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990) (holding that a firm has not suffered antitrust injury where competitors have agreed to fix prices); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (same).

Thus, Counts I and II of the Complaint must be dismissed.'

**B. Plaintiffs' Sherman Act Section II Claim Should Be Dismissed**

As a threshold matter, Plaintiffs' Section II claim is barred by the doctrine of collateral estoppel. Collateral estoppel bars relitigation of an issue if the same issues were actually litigated in a prior action and determined by, and essential to, a valid and final judgment in that action. *See, e.g., In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213,219

<sup>2</sup> Plaintiffs' state antitrust claims should also be dismissed. The Missouri Antitrust Act closely parallels the Sherman Act. *Defino v. Civic Center Corp.*, 718 S.W.2d 505, 510 (Mo. Ct. App. 1986). Missouri state antitrust claims are "construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." Mo. REV. STAT. § 416.141; *Fisher, Etc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310,313 (Mo. 1979) (*en banc*). Thus, Plaintiffs' analogous claims under the Missouri antitrust laws (Counts VI and VII) must also be dismissed for the same reasons that Plaintiffs' federal antitrust claims fail.

(8th Cir. 1977). Here, the district court in *U.S. Bancorp* already held that Plaintiffs' allegations regarding the relevant product and geographic market were legally deficient. *See* Exhibit 1, at p. 8. Plaintiffs' Complaint should therefore be dismissed because proper allegation of a relevant market is a prerequisite of a Sherman Act Section 2 claim. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir. 2002); *see generally Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) ("Without a definition of that market there is no way to measure [a defendant's] ability to lessen or destroy competition.").

Even apart from the issue of collateral estoppel, Plaintiffs' pleadings with regard to relevant market are insufficient. A relevant market consists of all products or services that are reasonably interchangeable. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). **In** this case, Plaintiff variously alleges that the relevant market is "the nationwide hospital supply market" or the "nationwide e-commerce hospital supply market." A market definition, however, must be plausible to survive a motion to dismiss. *See TV Communications*, 964 F.2d at 1028 (affirming dismissal because the plaintiff "did not allege a relevant product market which [the defendant] was capable of monopolizing, attempting to, or conspiring to monopolize in violation of section 2 of the Sherman Act."); *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (to survive a motion to dismiss, the plaintiff "must allege a relevant market that includes all [products or services] that are reasonably interchangeable"). Plaintiffs' pleading of a relevant market is defective for at least two reasons.

First, the market cannot be limited to "hospital supplies through e-commerce" simply because that is the only way that Plaintiff plans to sell hospital supplies. "[A]n antitrust plaintiff may not define a market so as to cover only the practice complained of, this would be circular or at least result-oriented reasoning." *Adidas Am.*, 64 F. Supp. 2d at 1102. Rather, the market

alleged in a complaint must be justified through application of the relevant legal principles for market definition. As Judge VanBebber noted:

'Where [an antitrust] plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiffs favor, the relevant market is legally insufficient and a motion to dismiss may be granted.'

*Adidas Am.*, 64 F. Supp. 2d at 1102 (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430,436-37 (3d Cir. 1997) and collecting cases).

Second, a plaintiff claiming monopolization must allege that the defendant possesses "monopoly power in the relevant market," and a plaintiff claiming attempted monopolization must allege that the defendant has a "dangerous probability of success in monopolizing the relevant market." *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999). Specifically, "[i]n order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a *particular defendant*." *HL. Hayden Co. of New York, Inc. v. Siemens Med Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (emphasis added) (rejecting attempt to show dangerous probability of success by aggregating shares of two defendants). Plaintiff does not allege that Novation, VHA, or UHC has market power or the dangerous probability of acquiring market power. Rather, Plaintiff alleges only that when the market share of Novation and one of its competitors Premier is aggregated, those entities enjoy a 70% share. Compl. ¶ 120. However, only the shares of the individual Defendants can be used to establish a violation of Section 2. Because the market share of Novation and Premier cannot be aggregated for purposes of establishing a Section II claim, Counts III, IV, VIII, and IX must be dismissed for failure to state a claim.

C. Plaintiffs' Interlocking Directorates Claim Should Be Dismissed

Plaintiff claims damages for interlocking directorates in purported violation of 15 U.S.C.A. § 19. That provision of the Clayton Act prohibits a person from serving as a director and officer of two corporations (other than certain banking entities and trust companies) that are engaged in commerce and "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws" but only if each of the corporations meet certain capital, surplus, and profit benchmarks set forth in the statute. *See* 15 U.S.C.A. § 19(a)(1). There are also certain exceptions to the prohibition against such dual service based on the amount of competitive sales of the companies. *Id.* at (2).

However, the Court need not parse the criteria for a violation and the exceptions in order to dismiss this patently deficient claim. Plaintiff fails to plead who the interlocking directors are, on which companies' boards they serve, and the requisite facts to show that the companies are competitors under this section of the Clayton Act. Plaintiffs' allegations in Count V of its Complaint, which do nothing more than cite the statute and announce its violation in conclusory terms, do not even attempt to set forth the required factual elements of a claim under this provision. Count V should be dismissed.

**II. PLAINTIFF FAILS TO ALLEGE THE REQUIREMENTS FOR A LEGALLY VIABLE FRAUD CLAIM**

Plaintiff asserts a claim for fraud and deceit against Defendants. The elements of fraudulent misrepresentation are: (1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and

(6) proximate injury. *Premium Financing Specialists, Inc. v. Hullin*, 90 S.W.3d 110, 115 (Mo. App. W.D. 2002).

The Court need not go further than the first requirement in order to dismiss this claim against Defendants. Nowhere in the Complaint is there an allegation that Defendants made any statement, false or otherwise, to Plaintiff. Plaintiff thus completely fails to satisfy basic pleading requirements, let alone the more stringent pleading requirements for fraud claims under Rule 9(b). See *In re Lifecore Biomedical, Inc. Sec. Litig.*, 159 F.R.D. 513, 516 (D. Minn.1993) ("To pass muster under Rule 9(b), the complaint must allege the time, place, speaker and sometimes even the content of the alleged misrepresentation.") Thus, Plaintiffs fraud claim fails at the threshold.

### **III. PLAINTIFF FAILS TO ALLEGE THE REQUIREMENTS FOR A LEGALLY VIABLE CLAIM OF TORTIOUS INTERFERENCE**

Plaintiff claims that Defendants tortiously interfered with "trust accounts with U.S. Bank" and some unknown putative sale or lease arrangement with "General Electric Transportation Co." Compl. ¶ 530. Tortious interference with a contract or business expectancy requires plaintiff to plead the following elements: "(1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) an intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; and (5) damages." *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 408 (Mo. App. E.D.1996).

Even assuming there were a valid contract or business expectancy involved, Plaintiff wholly fails to allege that Defendants knew about it or intentionally interfered with such contract or business expectancy. Indeed, the Complaint is devoid of any facts to justify an inference of knowledge or intention. Instead, Plaintiff impermissibly relies on its conclusory and improperly

pled allegations that Defendants acted in conspiracy with each other with regard to all the conduct in the Complaint in order to try tie Defendants to banking and real estate transactions between Plaintiff and other parties that Novation, VHA, and UHC had nothing to do with.

**IV. PLAINTIFF'S COMPLAINT CONTRADICTS THE BASIS FOR A RECOVERY FOR PRIMA FACIE TORT; THAT CLAIM THEREFORE SHOULD BE DISMISSED**

Plaintiff wholly fails to adequately plead the elements of a *prima facie* tort. The specific elements of a *prima facie* tort claim are: (1) an intentional lawful act by the defendant; (2) an intent to cause injury to the plaintiff; (3) injury to the plaintiff; and (4) an absence of any justification or an insufficient justification for the defendant's act. *Rice v. Hodapp*, 919 S.W.2d 240, 245-46 (Mo. 1996) (en bane); *Lohse v. St. Louis Children's Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. Ct. App. 1987); *Wiltv. Kansas City Area Transp. Authority*, 629 S.W.2d 669, 672 (Mo. App. W.D. 1982). Failure to plead that the defendant committed an intentional lawful act is fatal to a claim *for prima facie* tort. *Bradley v. Ray*, 904 S.W.2d 302, 315 (Mo. Ct. App. 1995).

The thrust of a *prima facie* tort claim is the intentional undertaking of an otherwise lawful act, which is done with the intent to cause injury to the plaintiff, and which is without any recognized justification. Here plaintiff failed to allege action by the defendants which is both intentional and lawful. In fact, plaintiff specifically alleges the "acts and activities of defendants are still *unlawful and fraudulent*." Compl. ¶ 564 (emphasis added).

**V. PLAINTIFF HAS FAILED TO STATE A COGNIZABLE CLAIM UNDER THE RICO STATUTE**

In order to recover under the Racketeering Influenced Corrupt Organizations Act (RICO), the plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402, 406 (8th Cir. 1999) (citing *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985)). Plaintiff has failed to

establish the predicate acts of racketeering and the pattern elements of the statutory requirements and, consequently, does not come close to asserting a viable RICO claim. Furthermore, Plaintiff fails to adequately allege an injury to business or property as a result of the alleged RICO violation. This Court should dismiss Count XV of the Complaint.

A. Plaintiff's Allegations Regarding the Racketeering Activity are Frivolous

First, Plaintiff attempts to establish a pattern of racketeering by alleging predicate acts under statutes that have nothing to do with the conduct alleged in the Complaint. Plaintiff claims it was injured by a violation of 18 U.S.c. § 1503, which prohibits threats against and intimidation of "any grand or petit juror, or officer in or of any court of the United States, in the discharge of his duty" or the injury to such juror or judicial officer. Compl. 'if 584. Plaintiff claims that Defendants violated this statute by "implicitly ratif[ying]" Shughart Thompson & Kilroy's filing of a "facially void ethics complaint" against Plaintiffs counsel Bret Landrith. Compl. 'if'if 582, 585. (There are no specific allegations suggesting that Novation, VHA, or UHC had anything to do with the ethics complaint.) Not only does an ethics complaint not equate to the threats, force or intimidation made criminal by this statute, Plaintiff more fundamentally errs by ignoring the limitation of the scope of the statute to jurors and officers of the court of the United States. Mr. Landrith is a private attorney. In construing a similarly worded statute, the U.S. Supreme Court has defined the term officer of the Court to exclude private attorneys, noting that "an attorney was not an 'officer' within the ordinary meaning of that term" in the manner in which marshals, bailiffs, court clerks or judges are. *Cammer v. U'S*; 350 U.S. 399, 405 (1956). "Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word 'officer' as it has always been applied to

lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term." *Id.*

Similarly, Plaintiff cites 18 U.S.C. § 1513, which proscribes retaliation against a witness, victim, or informant for providing any law enforcement officer truthful information about a federal offense or the attendance of a witness or party to an official proceeding. Compl. ¶ 586. Again, Plaintiff alleges this statute was violated by the ethics complaint lodged against Mr. Landrith. However, there are no factual allegations that Mr. Landrith or Plaintiff was a witness, victim, or informant who provided a law enforcement officer information relating to a commission of a federal offense or attended an official proceeding related thereto. This statute, therefore, does not apply.

Plaintiffs Hobbs Act claim (18 U.S.C. § 1951) is similarly frivolous. Plaintiff claims that U.S. Bancorp's threat of filing a USA Patriot Act suspicious activity report ("SAR") against Plaintiff in connection with Plaintiff's attempt to procure banking services from US Bank is prohibited by the Hobbs Act which applies to a person who "obstructs, delays, or affects commerce . . . by robbery or extortion or . . . commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation" of the statute. This claim is obviously defective. First, Plaintiff fails to allege that Novation, VHA, or UHC had any involvement in threatening to file a SAR against Plaintiff. Second, filing a SAR is obviously not violent. As the Hobbs Act defines extortion, it must either involve "force, violence or fear or under color of official right." 18 U.S.C. § 1951(b). Third, there is no allegation that Defendants acted under "color of official right." Defendants are private parties. "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 (2002) (citing *Us. v. Tomblin*, 46 F.3d 1369 (5th Cir. 1995); *Us. v. McClain*, 934 F.2d 822, 829-830 (7th Cir. 1991)). There are no such allegations in this case.

Finally, Plaintiff claims that certain alleged thefts of "business plans, algorithms, confidential proprietary business models, customer and associate lists" from Plaintiff in 2002 and from an entity called Medical Supply Management in 1995 and 1996 constituted a criminal infringement of copyright. Compl. ¶¶587-88. There are numerous defects in Plaintiffs pleading with regard to this predicate act. First, the alleged infringement in 1995 and 1996 is outside the limitations period for RICO. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987) (holding that civil RICO actions are governed by a four-year statute of limitations). Second, the alleged criminal infringements in 1995 and 1996 were not even alleged to have been suffered by Plaintiff, but rather by a separate entity not party to this proceeding. Finally, and perhaps most fundamentally, Plaintiffs have not alleged facts regarding the subject of the alleged thefts that would show that they are the type of literary, musical, dramatic, choreographic, pictorial, motion picture, sound, or architectural works that are the subject of copyright law, *see generally* 17 U.S.C. § 102, or that Novation, VHA, or UHC had any connection to the alleged theft of this information.

B. Plaintiff Has Not Adequately Pleaded the Pattern Element of a RICO Violation

Plaintiff has also failed to allege the pattern required for a RICO claim. The Supreme Court has held that "to prove a pattern of racketeering activity a plaintiff ... must show that the racketeering predicate acts are related and that they amount to or pose a threat of continued criminal activity." *H J, Inc. v. Northwestern Bell Co.*, 492 U.S. 229, 239 (1989). "It is this factor of continuity plus relationship which combines to produce a pattern." *Id.* (citation

omitted). Relatedness may be established if the acts have the "same or similar purposes, results, participants, victims, or methods of commission." *Id.* at 240. Continuity, in turn, requires either "a closed period of repeated conduct" or "past conduct that by its nature projects into the future with a threat of repetition." *Id.* Thus, a plaintiff in a RICO action must allege either an "open-ended" pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future criminal conduct) or a "closed-ended" pattern of racketeering activity (i.e., past criminal conduct "extending over a substantial period of time"). Even if the Court were to accept Plaintiffs allegations of racketeering conduct, they are insufficient to establish either an open-ended or closed-ended pattern. Not only are the individual predicate acts pled by Plaintiff not related, but there is no allegation connecting Novation, VHA, or UHC to each of the alleged predicate acts.

C. Plaintiff Has Not Plead an Injury that Can be Redressed by the RICO Statute

Finally, Plaintiff does not adequately allege an injury redressable under RICO. Courts have construed the requirement that a plaintiff establish an injury to business or property to require a showing of a concrete, financial loss. *See e.g., Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992) (rejecting a RICO claim where "the facts alleged do not establish proof of 'concrete financial loss,' let alone show that money was paid out as a result of [defendant's] alleged racketeering activity."); *Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3rd Cir. 2000) ("[T]he injury to business or property element of section 1964(c) can be satisfied by allegations and proof of actual monetary loss, i.e., an out-of-pocket loss."); *Sheperd v. American Honda Motor Co.*, 822 F. Supp. 625, 629 (N.D. Cal. 1993) (noting that "the requirement of a concrete financial loss proximately caused by the wrongful conduct of RICO defendants is not easily met" and dismissing car dealers' allegations of reduced profits resulting from manufacturer's wrongful refusal to supply them with popular vehicle models); *Oscar v. University Students Co-operative Ass'n*, 965 F.2d 783, 785 (9th Cir.1992) (en bane) (injuries to

property are not actionable under RICO unless they result in "tangible financial loss" to plaintiff). Plaintiff's fanciful allegations about billions of dollars in alleged lost profits fall far short of satisfying the pleading requirement of "concrete financial loss." Plaintiffs' RICO claim should be dismissed.

## VI. PLAINTIFF'S USAPATRIOT ACT CLAIMS FAIL AS A MATTER OF LAW

The Tenth Circuit and the District Court in *US Bancorp* have previously dismissed Plaintiffs' Patriot Act claim because there is no private right of action under that statute. *See* Exhibit 1, at p. 12. The law has not changed since then.' .

Moreover, the District Court in *US Bancorp* concluded that, even if a private right of action existed under the statute, Plaintiff had suffered no injury under that statute. *See* Exhibit 1, at p. 12. Thus, collateral estoppel bars the reassertion of a claim that Plaintiff has suffered an injury cognizable under the Patriot Act. In any event, Plaintiff alleges absolutely no facts relating to any involvement on the part of Novation, UHC, or VHA in any filing or report under the Patriot Act." For all of these reasons, Count XVI must be dismissed.

## PRAYER

WHEREFORE, for all of these reasons, Defendants request that the Court transfer this case to the District Court of Kansas or alternatively dismiss Plaintiff's Complaint with prejudice and grant Defendants all other relief to which they are entitled.

<sup>3</sup> Not only does the USA Patriot Act fail to provide for a private right of action for its violation, it actually provides a person who makes a report under the statute immunity from liability under other law. *See* 31 U.S.C. § 5318. This provides yet another reason demonstrating the facial invalidity of Plaintiffs' claim.

<sup>4</sup> Plaintiff also seems to assert that an entirely separate statute, 18 U.S.C. § 1030, which provides damages for unauthorized access into protected computer systems (i.e. "computer hacking"), bolsters Plaintiffs' Patriot Act claim. Compl. ¶¶ 597-99. That contention is frivolous; this case does not involve computer hacking and a private right of action under the computer hacking law has nothing to do with the Patriot Act.

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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 CMIECF system which will send a notice of electronic filing to the following: :

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

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

**SUGGESTIONS IN SUPPORT OF NOVATION, LLC, VHA INC. AND UNIVERSITY  
HEALTHCARE CONSORTIUM'S MOTION TO TRANSFER VENUE OR  
ALTERNATIVELY MOTION TO DISMISS  
COMPLAINT FOR FAILURE TO STATE A CLAIM**

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## **INTRODUCTION**

Although Plaintiff's spurious and outlandishly expansive Complaint defies easy summary, the gist of Plaintiff's claims is that various health care supply related entities, venture capital, real estate and banking firms, a law firm, and a federal magistrate have conspired to prevent Plaintiff's entry into the health care supply market by obstructing Plaintiff's efforts to obtain financing, office space in a particular building in Missouri, and escrow services. Plaintiff seeks \$3 billion in damages and asserts claims under the federal and state antitrust statutes, the USA Patriot Act, RICO, and various common law theories.

Plaintiff's Complaint, full of irrelevant and unsupported allegations, lacks the factual allegations necessary to plead a right to recovery under any of Plaintiff's theories of liability. Plaintiff's state and federal law claims fail to state a claim upon which relief may be granted and are barred, in large part, by the doctrine of collateral estoppel. In fact, under the facts set forth in the Complaint, no cognizable claim is stated against Novation, LLC ("Novation"), VHA Inc. ("VHA"), and University Healthsystem Consortium ("UHC") (collectively, "Defendants"). Thus, the Complaint should be dismissed with prejudice and without an opportunity for re-pleading because of the patent frivolousness of Plaintiff's claims, and because Plaintiff's two substantially similar complaints have already been dismissed by a Kansas District Court and the Tenth Circuit.<sup>1</sup>

Plaintiff originally filed a similar lawsuit against many of these same defendants in the United States District Court for the District of Kansas in 2002. *See Medical Supply Chain, Inc. v. US Bancorp, NA, et al.*, Civil Action No. 02-2539-CM (Judge Carlos Murguira) (the "US Bancorp Lawsuit") (Ex. 1 to Defendants' Motion to Transfer Venue or Motion to Dismiss).

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<sup>1</sup> Because of these two prior, similar lawsuits, Defendants join in the motion of the US Bank defendants to transfer venue to the District Court of Kansas in accordance with 28 U.S.C. § 1404(a).

Subsequently, in June 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. *See Medical Supply Chain, Inc. v. General Electric Company, et al.*, Civil Action No. 03-2324-CM (Judge Carlos Murguira) (Ex. 2 to Defendants' Motion to Transfer Venue or Motion to Dismiss). In *US Bancorp*, not only did the Tenth Circuit affirm the dismissal of Plaintiff's Complaint on the pleadings, it remanded the case to the district court to impose sanctions against Plaintiff and its counsel for the prosecution of a frivolous appeal. *See* Compl. ¶¶ 104-05 ("[T]he Tenth Circuit panel ordered that Medical Supply's counsel receive its most serious sanction for a frivolous appeal.") Likewise, *GE* was dismissed on the pleadings, in part because Plaintiff's antitrust claims—repeated here—failed "at the most fundamental level." *See* Ex. 2. Further, *US Bancorp* resulted in adverse findings on several issues relevant to this case; as a consequence, collateral estoppel bars many of Plaintiff's claims here.

### **ARGUMENT**

#### **I. PLAINTIFF'S FEDERAL AND STATE ANTITRUST CLAIMS SHOULD BE DISMISSED**

Plaintiff alleges claims for damages and injunctive relief under Sections 1 and 2 of the Sherman Act, Section 8 of the Clayton Act, and the analogous sections of the Missouri antitrust statutes. None of these claims are legally viable and Plaintiff is barred from asserting most of them under the doctrine of collateral estoppel.

##### **A. Plaintiff's Sherman Act Section 1 Claim Should Be Dismissed**

"To establish a claim under § 1 of the Sherman Act, a plaintiff must demonstrate: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *See Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 5

F.Supp.2d 694, 703 (D. Minn. 1998), *aff'd*, 208 F.3d 655 (8th Cir. 2000). The “contract, combination, or conspiracy” element “requires that defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective.” *Id.* Although Plaintiff repeatedly states that Defendants acted in concert, it does not allege any facts concerning a common scheme relating to any action against Plaintiff or other unlawful objective. There are no facts relating to any contact or communication between Novation, VHA, and UHC on the one hand and the defendants and other parties alleged to have deprived Plaintiff of its financing, real estate, and escrow services. The Complaint alleges no facts suggesting that Novation, VHA, or UHC had any knowledge of the events relating to Plaintiff.

Moreover, the Complaint fails to allege facts sufficient to plead an agreement or concerted action relating to group boycott, allocation of customers, price restraints, or tying agreements. Further, even if an agreement among defendants had been pled, Plaintiff’s Complaint contains no factual allegations suggesting that Defendants’ agreement unreasonably restrained competition—as opposed to allegedly injuring one competitor (Medical Supply)—in the relevant market. Instead, Plaintiff merely asserts—without factual elaboration—that “the defendants have foreclosed competition in the market for hospital services.” Compl. ¶ 206.

“[A] plaintiff must do more than cite relevant antitrust language to state a claim for relief.” *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992). A complaint must “provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place.” *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4<sup>th</sup> Cir. 1994) (citation and internal quotation omitted). The Complaint completely fails this requirement. Plaintiff does not – and cannot consistent with Fed. R. Civ. P. 11 – allege that the Defendants

agreed with anyone to harm Plaintiff. Plaintiff never elaborates on the alleged conspiracy other than to simply assert that such an agreement exists. Because of Plaintiff's failure to allege any of the required particulars, "[d]ismissal of [this] 'bare bones' allegation of antitrust conspiracy without any supporting facts is appropriate." *Id.*

Moreover, Plaintiff lacks standing to recover damages for Defendants' alleged cartel that fixes prices of medical supplies sold to hospitals at above-market prices. Compl. ¶ 424 ("The purpose of these agreements [among defendants] was to injure the hospital supply consumers with artificially inflated prices.") Even if such price fixing occurred—which it did not—Plaintiff, as a competitor of the alleged cartel (Compl. ¶ 439), would benefit by any agreement to charge high prices, because it could either undercut the price to win business or profit from the cartel's pricing "umbrella." The case law is unequivocal that Plaintiff lacks standing to complain of Defendants' alleged price-fixing. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990) (holding that a firm has not suffered antitrust injury where competitors have agreed to fix prices); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (same).

Thus, Counts I and II of the Complaint must be dismissed.<sup>2</sup>

B. Plaintiff's Sherman Act Section II Claim Should Be Dismissed

As a threshold matter, Plaintiff's Section II claim is barred by the doctrine of collateral estoppel. Collateral estoppel bars relitigation of an issue if the same issues were actually litigated in a prior action and determined by, and essential to, a valid and final judgment in that action. *See, e.g., In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213, 219

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<sup>2</sup> Plaintiff's state antitrust claims should also be dismissed. The Missouri Antitrust Act closely parallels the Sherman Act. *Defino v. Civic Center Corp.*, 718 S.W.2d 505, 510 (Mo. Ct. App. 1986). Missouri state antitrust claims are "construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." MO. REV. STAT. § 416.141; *Fisher, Etc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. 1979) (*en banc*). Thus, Plaintiff's analogous claims under the Missouri antitrust laws (Counts VI and VII) must also be dismissed for the same reasons that Plaintiff's federal antitrust claims fail.

(8th Cir. 1977). Here, the district court in *U.S. Bancorp* already held that Plaintiff's allegations regarding the relevant product and geographic market were legally deficient. *See* Exhibit 1, at p. 8. Plaintiff's Complaint should therefore be dismissed because proper allegation of a relevant market is a prerequisite of a Sherman Act Section 2 claim. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10<sup>th</sup> Cir. 2002); *see generally Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) ("Without a definition of that market there is no way to measure [a defendant's] ability to lessen or destroy competition.").

Even apart from the issue of collateral estoppel, Plaintiff's pleadings with regard to relevant market are insufficient. A relevant market consists of all products or services that are reasonably interchangeable. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). In this case, Plaintiff variously alleges that the relevant market is "the nationwide hospital supply market" or the "nationwide e-commerce hospital supply market." A market definition, however, must be plausible to survive a motion to dismiss. *See TV Communications*, 964 F.2d at 1028 (affirming dismissal because the plaintiff "did not allege a relevant product market which [the defendant] was capable of monopolizing, attempting to, or conspiring to monopolize in violation of section 2 of the Sherman Act."); *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (to survive a motion to dismiss, the plaintiff "must allege a relevant market that includes all [products or services] that are reasonably interchangeable"). Plaintiff's pleading of a relevant market is defective for at least two reasons.

First, the market cannot be limited to "hospital supplies through e-commerce" simply because that is the only way that Plaintiff plans to sell hospital supplies. "[A]n antitrust plaintiff may not define a market so as to cover only the practice complained of, this would be circular or at least result-oriented reasoning." *Adidas Am.*, 64 F. Supp. 2d at 1102. Rather, the market

alleged in a complaint must be justified through application of the relevant legal principles for market definition. As Judge Van Bebber noted:

‘Where [an antitrust] plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff’s favor, the relevant market is legally insufficient and a motion to dismiss may be granted.’

*Adidas Am.*, 64 F. Supp. 2d at 1102 (quoting *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997) and collecting cases).

Second, a plaintiff claiming monopolization must allege that the defendant possesses “monopoly power in the relevant market,” and a plaintiff claiming attempted monopolization must allege that the defendant has a “dangerous probability of success in monopolizing the relevant market.” *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999). Specifically, “[i]n order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a *particular defendant*.” *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (emphasis added) (rejecting attempt to show dangerous probability of success by aggregating shares of two defendants). Plaintiff does not allege that Novation, VHA, or UHC has market power or the dangerous probability of acquiring market power. Rather, Plaintiff alleges only that when the market share of Novation and one of its competitors Premier is aggregated, those entities enjoy a 70% share. Compl. ¶ 120. However, only the shares of the individual Defendants can be used to establish a violation of Section 2. Because the market share of Novation and Premier cannot be aggregated for purposes of establishing a Section II claim, Counts III, IV, VIII, and IX must be dismissed for failure to state a claim.

C. Plaintiff's Interlocking Directorates Claim Should Be Dismissed

Plaintiff claims damages for interlocking directorates in purported violation of 15 U.S.C.A. § 19. That provision of the Clayton Act prohibits a person from serving as a director and officer of two corporations (other than certain banking entities and trust companies) that are engaged in commerce and “by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws” but only if each of the corporations meet certain capital, surplus, and profit benchmarks set forth in the statute. *See* 15 U.S.C.A. § 19(a)(1). There are also certain exceptions to the prohibition against such dual service based on the amount of competitive sales of the companies. *Id.* at (2).

However, the Court need not parse the criteria for a violation and the exceptions in order to dismiss this patently deficient claim. Plaintiff fails to plead who the interlocking directors are, on which companies' boards they serve, and the requisite facts to show that the companies are competitors under this section of the Clayton Act. Plaintiff's allegations in Count V of its Complaint, which do nothing more than cite the statute and announce its violation in conclusory terms, do not even attempt to set forth the required factual elements of a claim under this provision. Count V should be dismissed.

**II. PLAINTIFF FAILS TO ALLEGE THE REQUIREMENTS FOR A LEGALLY VIABLE FRAUD CLAIM**

Plaintiff asserts a claim for fraud and deceit against Defendants. The elements of fraudulent misrepresentation are: (1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and



(6) proximate injury. *Premium Financing Specialists, Inc. v. Hullin*, 90 S.W.3d 110, 115 (Mo. App. W.D. 2002).

The Court need not go further than the first requirement in order to dismiss this claim against Defendants. Nowhere in the Complaint is there an allegation that Defendants made any statement, false or otherwise, to Plaintiff. Plaintiff thus completely fails to satisfy basic pleading requirements, let alone the more stringent pleading requirements for fraud claims under Rule 9(b). *See In re Lifecore Biomedical, Inc. Sec. Litig.*, 159 F.R.D. 513, 516 (D. Minn.1993) (“To pass muster under Rule 9(b), the complaint must allege the time, place, speaker and sometimes even the content of the alleged misrepresentation.”) Thus, Plaintiff’s fraud claim fails at the threshold.

### **III. PLAINTIFF FAILS TO ALLEGE THE REQUIREMENTS FOR A LEGALLY VIABLE CLAIM OF TORTIOUS INTERFERENCE**

Plaintiff claims that Defendants tortiously interfered with “trust accounts with U.S. Bank” and some unknown putative sale or lease arrangement with “General Electric Transportation Co.” Compl. ¶ 530. Tortious interference with a contract or business expectancy requires plaintiff to plead the following elements: “(1) a contract or valid business expectancy; (2) defendant’s knowledge of the contract or relationship; (3) an intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; and (5) damages.” *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 408 (Mo. App. E.D. 1996).

Even assuming there were a valid contract or business expectancy involved, Plaintiff wholly fails to allege that Defendants knew about it or intentionally interfered with such contract or business expectancy. Indeed, the Complaint is devoid of any facts to justify an inference of knowledge or intention. Instead, Plaintiff impermissibly relies on its conclusory and improperly

pled allegations that Defendants acted in conspiracy with each other with regard to all the conduct in the Complaint in order to try tie Defendants to banking and real estate transactions between Plaintiff and other parties that Novation, VHA, and UHC had nothing to do with.

**IV. PLAINTIFF'S COMPLAINT CONTRADICTS THE BASIS FOR A RECOVERY FOR PRIMA FACIE TORT; THAT CLAIM THEREFORE SHOULD BE DISMISSED**

Plaintiff wholly fails to adequately plead the elements of a *prima facie* tort. The specific elements of a *prima facie* tort claim are: (1) an intentional lawful act by the defendant; (2) an intent to cause injury to the plaintiff; (3) injury to the plaintiff; and (4) an absence of any justification or an insufficient justification for the defendant's act. *Rice v. Hodapp*, 919 S.W.2d 240, 245-46 (Mo. 1996) (en banc); *Lohse v. St. Louis Children's Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. Ct. App. 1987); *Wilt v. Kansas City Area Transp. Authority*, 629 S.W.2d 669, 672 (Mo. App. W.D. 1982). Failure to plead that the defendant committed an intentional lawful act is fatal to a claim for *prima facie* tort. *Bradley v. Ray*, 904 S.W.2d 302, 315 (Mo. Ct. App. 1995).

The thrust of a *prima facie* tort claim is the intentional undertaking of an otherwise lawful act, which is done with the intent to cause injury to the plaintiff, and which is without any recognized justification. Here plaintiff failed to allege action by the defendants which is both intentional and lawful. In fact, plaintiff specifically alleges the "acts and activities of defendants are still *unlawful and fraudulent*." Compl. ¶ 564 (emphasis added).

**V. PLAINTIFF HAS FAILED TO STATE A COGNIZABLE CLAIM UNDER THE RICO STATUTE**

In order to recover under the Racketeering Influenced Corrupt Organizations Act (RICO), the plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402, 406 (8th Cir. 1999) (citing *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985)). Plaintiff has failed to

establish the predicate acts of racketeering and the pattern elements of the statutory requirements and, consequently, does not come close to asserting a viable RICO claim. Furthermore, Plaintiff fails to adequately allege an injury to business or property as a result of the alleged RICO violation. This Court should dismiss Count XV of the Complaint.

A. Plaintiff's Allegations Regarding the Racketeering Activity are Frivolous

First, Plaintiff attempts to establish a pattern of racketeering by alleging predicate acts under statutes that have nothing to do with the conduct alleged in the Complaint. Plaintiff claims it was injured by a violation of 18 U.S.C. § 1503, which prohibits threats against and intimidation of “any grand or petit juror, or officer in or of any court of the United States, in the discharge of his duty” or the injury to such juror or judicial officer. Compl. ¶ 584. Plaintiff claims that Defendants violated this statute by “implicitly ratif[ying]” Shughart Thompson & Kilroy’s filing of a “facially void ethics complaint” against Plaintiff’s counsel Bret Landrith. Compl. ¶¶ 582, 585. (There are no specific allegations suggesting that Novation, VHA, or UHC had anything to do with the ethics complaint.) Not only does an ethics complaint not equate to the threats, force or intimidation made criminal by this statute, Plaintiff more fundamentally errs by ignoring the limitation of the scope of the statute to jurors and officers of the court of the United States. Mr. Landrith is a private attorney. In construing a similarly worded statute, the U.S. Supreme Court has defined the term officer of the Court to exclude private attorneys, noting that “an attorney was not an ‘officer’ within the ordinary meaning of that term” in the manner in which marshals, bailiffs, court clerks or judges are. *Cammer v. U.S.*, 350 U.S. 399, 405 (1956). “Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word ‘officer’ as it has always been applied to

lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term.” *Id.*

Similarly, Plaintiff cites 18 U.S.C. § 1513, which proscribes retaliation against a witness, victim, or informant for providing any law enforcement officer truthful information about a federal offense or the attendance of a witness or party to an official proceeding. Compl. ¶ 586. Again, Plaintiff alleges this statute was violated by the ethics complaint lodged against Mr. Landrith. However, there are no factual allegations that Mr. Landrith or Plaintiff was a witness, victim, or informant who provided a law enforcement officer information relating to a commission of a federal offense or attended an official proceeding related thereto. This statute, therefore, does not apply.

Plaintiff’s Hobbs Act claim (18 U.S.C. § 1951) is similarly frivolous. Plaintiff claims that U.S. Bancorp’s threat of filing a USA Patriot Act suspicious activity report (“SAR”) against Plaintiff in connection with Plaintiff’s attempt to procure banking services from US Bank is prohibited by the Hobbs Act which applies to a person who “obstructs, delays, or affects commerce . . . by robbery or extortion or . . . commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation” of the statute. This claim is obviously defective. First, Plaintiff fails to allege that Novation, VHA, or UHC had any involvement in threatening to file a SAR against Plaintiff. Second, filing a SAR is obviously not violent. As the Hobbs Act defines extortion, it must either involve “force, violence or fear or under color of official right.” 18 U.S.C. § 1951(b). Third, there is no allegation that Defendants acted under “color of official right.” Defendants are private parties. “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 (2002) (citing *U.S. v. Tomblin*, 46 F.3d 1369 (5th Cir. 1995); *U.S. v. McClain*, 934 F.2d 822, 829-830 (7th Cir. 1991)). There are no such allegations in this case.

Finally, Plaintiff claims that certain alleged thefts of "business plans, algorithms, confidential proprietary business models, customer and associate lists" from Plaintiff in 2002 and from an entity called Medical Supply Management in 1995 and 1996 constituted a criminal infringement of copyright. Compl. ¶¶ 587-88. There are numerous defects in Plaintiff's pleading with regard to this predicate act. First, the alleged infringement in 1995 and 1996 is outside the limitations period for RICO. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987) (holding that civil RICO actions are governed by a four-year statute of limitations). Second, the alleged criminal infringements in 1995 and 1996 were not even alleged to have been suffered by Plaintiff, but rather by a separate entity not party to this proceeding. Finally, and perhaps most fundamentally, Plaintiffs have not alleged facts regarding the subject of the alleged thefts that would show that they are the type of literary, musical, dramatic, choreographic, pictorial, motion picture, sound, or architectural works that are the subject of copyright law, *see generally* 17 U.S.C. § 102, or that Novation, VHA, or UHC had any connection to the alleged theft of this information.

**B. Plaintiff Has Not Adequately Pleaded the Pattern Element of a RICO Violation**

Plaintiff has also failed to allege the pattern required for a RICO claim. The Supreme Court has held that "to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicate acts are related and that they amount to or pose a threat of continued criminal activity." *H. J., Inc. v. Northwestern Bell Co.*, 492 U.S. 229, 239 (1989). "It is this factor of continuity plus relationship which combines to produce a pattern." *Id.* (citation

omitted). Relatedness may be established if the acts have the "same or similar purposes, results, participants, victims, or methods of commission." *Id.* at 240. Continuity, in turn, requires either "a closed period of repeated conduct" or "past conduct that by its nature projects into the future with a threat of repetition." *Id.* Thus, a plaintiff in a RICO action must allege either an "open-ended" pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future criminal conduct) or a "closed-ended" pattern of racketeering activity (i.e., past criminal conduct "extending over a substantial period of time"). Even if the Court were to accept Plaintiff's allegations of racketeering conduct, they are insufficient to establish either an open-ended or closed-ended pattern. Not only are the individual predicate acts pled by Plaintiff not related, but there is no allegation connecting Novation, VHA, or UHC to each of the alleged predicate acts.

C. Plaintiff Has Not Plead an Injury that Can be Redressed by the RICO Statute

Finally, Plaintiff does not adequately allege an injury redressable under RICO. Courts have construed the requirement that a plaintiff establish an injury to business or property to require a showing of a concrete, financial loss. *See e.g., Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992) (rejecting a RICO claim where "the facts alleged do not establish proof of 'concrete financial loss,' let alone show that money was paid out as a result of [defendant's] alleged racketeering activity."); *Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3rd Cir. 2000) ("[T]he injury to business or property element of section 1964(c) can be satisfied by allegations and proof of actual monetary loss, *i.e.*, an out-of-pocket loss."); *Sheperd v. American Honda Motor Co.*, 822 F. Supp. 625, 629 (N.D. Cal. 1993) (noting that "the requirement of a concrete financial loss proximately caused by the wrongful conduct of RICO defendants is not easily met" and dismissing car dealers' allegations of reduced profits resulting from manufacturer's wrongful refusal to supply them with popular vehicle models); *Oscar v. University Students Co-operative Ass'n*, 965 F.2d 783, 785 (9th Cir.1992) (en banc) (injuries to

property are not actionable under RICO unless they result in “tangible financial loss” to plaintiff). Plaintiff’s fanciful allegations about billions of dollars in alleged lost profits fall far short of satisfying the pleading requirement of “concrete financial loss.” Plaintiff’s RICO claim should be dismissed.

## **VI. PLAINTIFF’S USA PATRIOT ACT CLAIMS FAIL AS A MATTER OF LAW**

The Tenth Circuit and the District Court in *US Bancorp* have previously dismissed Plaintiff’s Patriot Act claim because there is no private right of action under that statute. *See* Exhibit 1, at p. 12. The law has not changed since then.<sup>3</sup>

Moreover, the District Court in *US Bancorp* concluded that, even if a private right of action existed under the statute, Plaintiff had suffered no injury under that statute. *See* Exhibit 1, at p. 12. Thus, collateral estoppel bars the reassertion of a claim that Plaintiff has suffered an injury cognizable under the Patriot Act. In any event, Plaintiff alleges absolutely no facts relating to any involvement on the part of Novation, UHC, or VHA in any filing or report under the Patriot Act.<sup>4</sup> For all of these reasons, Count XVI must be dismissed.

### **PRAYER**

WHEREFORE, for all of these reasons, Defendants request that the Court transfer this case to the District Court of Kansas or alternatively dismiss Plaintiff’s Complaint with prejudice and grant Defendants all other relief to which they are entitled.

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<sup>3</sup> Not only does the USA Patriot Act fail to provide for a private right of action for its violation, it actually provides a person who makes a report under the statute immunity from liability under other law. *See* 31 U.S.C. § 5318. This provides yet another reason demonstrating the facial invalidity of Plaintiff’s claim.

<sup>4</sup> Plaintiff also seems to assert that an entirely separate statute, 18 U.S.C. § 1030, which provides damages for unauthorized access into protected computer systems (i.e. “computer hacking”), bolsters Plaintiff’s Patriot Act claim. Compl. ¶¶ 597-99. That contention is frivolous; this case does not involve computer hacking and a private right of action under the computer hacking law has nothing to do with the Patriot Act.

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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 CM/ECF system which will send a notice of electronic filing to the following::

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/s/ John K. Power  
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