

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:05-cv-2299-KHV-GLR
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	

NOVATION, LLC, VHA INC.,  
UNIVERSITY HEALTHSYSTEM CONSORTIUM  
ROBERT BAKER AND CURT NONOMAQUE'S  
RENEWED MOTION TO DISMISS COMPLAINT  
FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants Novation, LLC ("Novation"), VHA Inc. ("VHA"), University Healthsystem Consortium ("UHC"), Robert Baker, and Curt Nonomaque (collectively, "Defendants") respectfully request that the Court dismiss Plaintiffs Complaint with prejudice pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

1. In this lawsuit, Plaintiff is asserting claims that have already been dismissed twice by this Court in two prior lawsuits presided over by Judge Murguia. Plaintiff tried to avoid a third dismissal by crossing state lines and bringing these claims in the U.S. District Court for the Western District of Missouri. When Defendants moved for transfer of the case to this Court, Plaintiff contended that transfer was improper because Kansas was a lawless state and that the Kansas judiciary was complicit in a scheme to harass and intimidate witnesses. Rejecting that groundless argument and Plaintiff's attempts to forum shop based on a dissatisfaction with the

EXHIBIT  
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PENGAD-Bayonne

outcome of the prior cases, the U.S. District Court of Missouri has transferred this case back to this Court.

2. During the period of time this case was pending in the U.S. District Court for the Western District of Missouri, Defendants sought transfer of this case to this Court and, in the alternative, a dismissal of the complaint for failure to state a claim. Because the U.S. District Court for the Western District of Missouri granted Defendants' request for transfer, it did not reach the Motion to Dismiss. Thus, Defendants now file this renewed Motion to Dismiss for Failure to State a Claim.

3. Plaintiffs 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.

### **PRIOR ACTIONS**

4. 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 (10th Cir. 2004).

5. 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). The 10th Circuit recently affirmed the dismissal of that complaint and held that Rule 11 sanctions against Plaintiff were appropriate because the Complaint alleged frivolous claims against an individual officer of GE without any allegations that the officer had any connection to Plaintiff's injury. *See Medical Supply Chain v. General Elec. Co., et al.*, Case No. 04-3075 (10th Cir. July 26, 2005) (attached as Exhibit 3).

### GROUND S 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:

- 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.
- Plaintiffs 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: (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.

#### **PRAYER**

WHEREFORE, for all of these reasons, Defendants request that the Court dismiss with prejudice Plaintiff's Complaint and granting Defendants all other relief to which they are entitled.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power

John K. Power, # 70448  
1200 Main Street, Suite 1700  
Kansas City, MO 64105  
Telephone: (816) 421-4800  
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION,  
LLC, VOLUNTEER HOSPITAL ASSOCIATION,  
CURT NONOMAQUE, UNIVERSITY  
HEALTHSYSTEM CONSORTIUM, ROBERT 1.  
BAKER

**CERTIFICATE OF SERVICE**

I hereby certify that on August 9, 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::

Andrew M. DeMarea  
Jonathan H. Gregor  
Kathleen Ann Hardee  
Bret D. Landrith  
Mark A. Olthoff

ademarea@stklaw.com  
jgregor@stklaw.com  
khardee@stklaw.com  
landrithlaw@cox.net  
molthoff@stklaw.com

/s/ John K. Power  
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HUSCH & EPPENBERGER, LLC

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John K. Power, # 70448  
1200 Main Street, Suite 1700  
Kansas City, MO 64105  
Telephone: (816) 421-4800  
Facsimile: (816) 421-0596

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

**CERTIFICATE OF SERVICE**

I hereby certify that on August 9, 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::

Andrew M. DeMarea  
Jonathan H. Gregor  
Kathleen Ann Hardee  
Bret D. Landrith  
Mark A. Olthoff

ademarea@stklaw.com  
jgregor@stklaw.com  
khardee@stklaw.com  
landrithlaw@cox.net  
molthoff@stklaw.com

/s/ John K. Power  
John K. Power