IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	Case No. 05-2299-KHV
	)	
Plaintiff,	)	
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

RESPONSE OF DEFENDANTS NEOFORMA, INC. TO PLAINTIFF'S MOTION TO SUBSTITUTE

This response is submitted on behalf of defendants Neoforma, Inc. to the "Motion to Substitute Defendant Under Rules 17(a)."

I. THE MOTION SHOULD BE DENIED BECAUSE IT IS PREMATURE

Plaintiff's motion seeks to substitute a company known as GHX, Inc. for defendant Neoforma, Inc., on the grounds that the two parties have announced that GHX will acquire Neoforma. As plaintiff states in paragraph number "1" on the first page of its motion, this is only a *proposed* acquisition. Similarly, the article upon which plaintiff premises its motion states clearly that it is merely a proposed acquisition. *It is not an acquisition that as yet has taken place*. It might never take place. Since it has not taken place, the motion to substitute GHX as the new owner of the business is entirely premature.

Although citing rules 17(a) and 15(a) as well, the basic rule under which plaintiff apparently moves is Rule 25(c), pertaining to substitution of parties when there has been a transfer of interest. That Rule states in pertinent part:

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

As all the pending motions to dismiss demonstrate, none of the defendants should be in this action, including defendant Neoforma. But if Neoforma is to be a defendant, then it is the real party in interest because the proposed acquisition has never taken place—that is, there has been no transfer of interest. The rule requires that the transfer of interest have actually taken place (*Montecatini Societa Generale v. Humble Oil*, 261 F.Supp. 587, 591 (1966)), not that it be a possible future event.

That the acquisition at this point is only proposed is clear from plaintiff's own motion papers and the article it cites. Were there any doubt, the Court could take judicial notice of the relevant filings concerning the proposed transaction filed with the Securities and Exchange Commission. A summary, part of Schedule 13D, and the agreement, may be found at http://www.sec.gov/Archives/edgar/data/1096219/000119312505205012/dsc13d.htm and http://www.sec.gov/Archives/edgar/data/1096219/000119312505205012/dex992.htm respectively. As can be seen by a review of the documents, this is a future transaction with a future closing date, and subject to a number of contingencies. Since the event upon which plaintiff relies in making its motion has not yet taken place and may never take place, the motion should be denied as premature.

II. EVEN WERE THE MOTION TIMELY, SUBSTITUTION WOULD NOT BE PROPER

Plaintiff fails to mention to the Court that the form of the proposed transaction will result in Neoforma continuing as the surviving corporation, as a subsidiary of GHX. As explained in Item 4 of the Section 13D filing:

> On October 10, 2005, GHX, Leapfrog Merger Corporation, a Delaware corporation that is a wholly-owned subsidiary of GHX ("Merger Sub"), and Neoforma entered into an Agreement and Plan of Merger (the "Merger Agreement"). Pursuant to the Merger Agreement, Merger Sub will be merged with and into Neoforma (the "Merger") with Neoforma continuing as the surviving corporation (the "Surviving Corporation") and a wholly-owned subsidiary of GHX.

Thus even were the motion not premature, it would be improper because the interest would not have been transferred to GHX, but rather would remain with Neoforma, the surviving subsidiary. Absent some extraordinary circumstance such as an alter ego, the separate relationship of parent and subsidiary will not be ignored (*Mobil Oil Corp. v. Linear Films, Inc*., 718 F.Supp. 260, 263-272 (D. Del. 1989)), and that means that a motion to substitute a parent for a subsidiary under Rule 25(c) should be denied (*id*. at 272-273). No such extraordinary facts have been suggested, nor could they be since the acquisition has not take place.

III. RULE 17(A) DOES NOT PROVIDE ANY BASIS FOR THE MOTION

Plaintiff also purports to move under Rule 17(a), pertaining to actions being prosecuted in the name of the real party in interest. That rule pertains to parties plaintiff, and is simply inapplicable. But even were a motion under 17(a) proper, it would still be subject to the prematurity problem discussed above, and the fact GHX as a parent corporation would not be a proper party.

IV. RULE 15(A) DOES NOT PROVIDE ANY BASIS FOR THE MOTION

Finally, plaintiff purports to bring the motion under Rule 15(a). Apparently, plaintiff is treating this as a motion to amend its complaint.

First, such an amendment would be improper as a mechanism for substituting a defendant because of a transfer of interest. The relief plaintiff wants is to change defendants, not amend the complaint, and Rule 25 is the proper place to do that.

There is a vague suggestion that plaintiff thinks it should have sued GHX in the first place, perhaps in addition to or instead of Neoforma. Seemingly, plaintiff is trying to use the law that permits amendment due to discovery of different facts. But plaintiff does not show it knows of different facts and ask to plead them; it merely says that something entitles it to substitute one party for another. In any event, the "facts" plaintiff talks about in its motion relate to some perceived conspiracy involving GE and GHX. But those are not newly discovered facts, because plaintiff says it knew all about it at the time of a prior lawsuit, long since dismissed. Nor does it say how they relate in any way to Neoforma. When alleged new facts are substantially the same as originally known ones, a motion to amend should be denied. *Equity Group Ltd. v. Painewebber, Inc.,* 839 F.Supp. 830, affirmed 48 F.3d 1285 (D.D.C. 1993.)

The plaintiff also suggests the amendment should be allowed because of mistake by plaintiff in drafting the original complaint. But since plaintiff says it knew all about the claimed evidence at the time of a prior action, there was no showing of any mistake.

The fundamental problem is that Neoforma is attempting to respond coherently to an incoherent motion, and there are already numerous motions before the Court dealing with the

same problem. Neoforma itself has filed a Rule 8 motion, because the complaint is incoherent; other defendants have filed extensive motions to dismiss for lack of subject matter and personal jurisdiction. In the midst of this, plaintiff's attorney has been suspended in Kansas and improperly wants to substitute plaintiff's shareholder as a party so plaintiff can represent itself without counsel. Adding another defendant to such a circumstance will not advance the litigation. While Neoforma would be delighted if plaintiff were to dismiss Neoforma from the action, doing so by adding another defendant to the case is not the proper methodology, and simply means that one more entity would have to incur the expense of dealing with plaintiff's frivolous claims.

V. CONCLUSION

For all of the above reasons it is respectfully requested that the motion be denied. Even if proper, the motion would be premature, and it would not be a proper motion if brought timely. Adding yet one more party to the matter would not be appropriate, when the underlying complaint should be dismissed anyway.

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ATTORNEYS FOR NEOFORMA, INC.

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 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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