No. 06-3331

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MEDICAL SUPPLY CHAIN, INC,
Plaintiff - Appellant,

v.

NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTH SYSTEM CONSORTIUM, ROBERT J. BAKER, U.S. BANCORP N.A., U.S. BANK NATIONAL ASSOCIATION, JERRY A. GRUNDHOFER, ANDREW CECERE, PIPER JAFFRAY COMPANIES, ANDREW S. DUFF, SHUGHART THOMSON & KILROY, WATKINS BOULWARE, P.C., and NOVATION, LLC
Defendants - Appellees,

Appeal from the United States District Court for the
District of Kansas, District Court Case No. 05-CV-2299CM
Hon. Carlos Murguia

ANSWER BRIEF OF APPELLEES U.S. BANCORP N.A., U.S. BANK NATIONAL ASSOCIATION, JERRY A. GRUNDHOFER, ANDREW CECERE, PIPER JAFFRAY COMPANIES, ANDREW S. DUFF, NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTH SYSTEM CONSORTIUM, ROBERT J. BAKER, NOVATION, LLC, and SHUGHART THOMSON & KILROY, WATKINS BOULWARE, P.C.

ORAL ARGUMENT NOT REQUESTED

MARK A. OLTHOFF U.S. KS Ct. #70339
SHUGHART THOMSON & KILROY, PC
1700 Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
SHUGHART THOMSON & KILROY, PC
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR APPELLEES
U.S. BANCORP N.A., U.S. BANK NATIONAL ASSOCIATION, JERRY A. GRUNDHOFER, ANDREW CECERE, PIPER JAFFRAY COMPANIES, AND ANDREW S. DUFF

STEPHEN N. ROBERTS
JANICE VAUGHN MOCK
NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP
50 California Street, 34th Floor
San Francisco, California 94111

JOHN K. POWER
HUSCH & EPPENBERGER
1200 Main Street
Suite 1700
Kansas City, Missouri 64105

ATTORNEYS FOR APPELLEES
NEOFORMA, INC. AND ROBERT J. ZOLLARS

KATHLEEN BONE SPANGLER
VINSON & ELKINS, L.L.P.
1001 Fannin Street
Suite 2300
Houston, Texas 77002-6760

JOHN K. POWER
HUSCH & EPPENBERGER
1200 Main Street
Suite 1700
Kansas City, Missouri 64105

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

WILLIAM E. QUIRK
KATHLEEN A. HARDEE
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929

ATTORNEYS FOR APPELLEE
SHUGHART THOMSON & KILROY,
WATKINS BOULWARE, P.C

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CORPORATE DISCLOSURE STATEMENT

1. Appellee U.S. Bancorp does not have a parent corporation, and 10% or more of its stock is not owned by a publicly held corporation.

2. Appellee U.S. Bank National Association ("U.S. Bank") is a national banking association, and it is wholly owned by U.S. Bancorp.

3. Appellee Piper Jaffray Companies is a wholly-owned subsidiary of Piper Jaffray Co., Inc., and 10% of more of Piper Jaffray Co., Inc.'s stock is not owned by a publicly held corporation.

4. Appellee Neoforma, Inc., at the time of the filing of the underlying Complaint, was an independent corporation. Subsequently, Neoforma was acquired by GHX, LLC and is now a wholly owned subsidiary of GHX. No owner of more than 10% of GHX, LLC is a public corporation.

5. Volunteer Hospital Association, Inc. ("VHA") does not have a parent corporation, and 10% or more of its stock is not owned by a publicly held corporation.

6. University Health System Consortium ("UHC") does not have a parent corporation, and 10% or more of its stock is not owned by a publicly held corporation.

7. Novation, LLC is wholly owned by VHA and UHC, and 10% or more of its stock is not owned by a publicly held corporation.

8. Shughart Thomson & Kilroy, P.C. does not have a parent corporation, and 10% or more of its stock is not owned by a publicly held corporation.

STATEMENT OF PRIOR/RELATED APPEALS

Appellant Medical Supply Chain, Inc.'s ("Medical Supply") statement of prior or related appeals presents a much expanded discussion of its litigation history, only some of which is germane to this appeal. Nevertheless, the statement is inclusive of what defendants would disclose.

JURISDICTIONAL STATEMENT

The district court's jurisdiction existed under 28 U.S.C. § 1331 in that the Complaint alleged federal statutory causes of action. Medical Supply relies upon 28 U.S.C. § 1291 as the jurisdictional basis for this appeal. For the reasons discussed herein, defendants disagree that this Court has appellate jurisdiction due to the untimely filing of the Notice of Appeal on September 8, 2006.

STATEMENT OF THE ISSUES

1. Did Medical Supply file its Notice of Appeal within the time required by Fed. R. App. P. 4 where the Notice was not filed within thirty days of the dismissal of its Complaint, the "motion for reconsideration" was stricken as

improperly filed and, in any event, the Notice was not filed within thirty days of the order striking the motion?

2. Did the district court abuse its discretion in denying motions to substitute parties and to amend filed by non-party Samuel Lipari where no attorney of record adopted or filed the pleadings?

3. Did the district court correctly dismiss Medical Supply's Complaint because (1) Medical Supply's federal claims were barred by *res judicata* and/or collateral estoppel by reason of the district court's judgment in *Medical Supply Chain, Inc. v. US Bancorp, et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004), *cert. denied*, 126 S. Ct. 259 (2005); (2) the allegations of the Complaint failed to state legally cognizable causes of action; or (3) the allegations in Medical Supply's Complaint violated Fed. R. Civ. P. 8?

4. Did the district court correctly award sanctions against Medical Supply and its former counsel for violations of Fed. R. Civ. P. 11 and 28 U.S.C. § 1927?

STATEMENT OF THE CASE

A. Nature of the Case

Medical Supply sued defendants below alleging multiple federal and state law claims. Medical Supply brought this suit after its earlier lawsuit, which

alleged substantially similar claims, was dismissed by the district court, a dismissal that this Court affirmed as it sanctioned Medical Supply for filing a frivolous appeal. Medical Supply now appeals the denial of its "motion to reconsider" the dismissal of its Complaint, the denial of motions to amend and to substitute plaintiff, and the award of sanctions against it.

B. Course of Proceedings

On October 22, 2002, Medical Supply filed a Complaint in the United States District Court for the District of Kansas alleging numerous claims arising from the alleged refusal of U.S. Bank to provide certain escrow account services. (Aplt. App. 53, "*Medical Supply I*.") Shortly thereafter, Medical Supply amended its Complaint and added claims for the violation of the Sherman and Clayton Acts, the Hobbs Act, the USA Patriot Act, and certain state law claims seeking injunctive and declaratory relief as well as hundreds of millions of dollars in alleged damages. (Aplt. App. 1964-2034.)

On June 16, 2003, the district court dismissed the *Medical Supply I* Complaint. *Medical Supply Chain, Inc. v. US Bancorp, et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003). This Court affirmed and ordered Medical Supply's counsel to show cause why he should not be sanctioned. 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished). On December 30, 2004, this Court found that Medical

Supply's counsel had filed a frivolous appeal and remanded the matter to the district court for a determination of the sanctions amount. (Aplee. Supp. App. 9.)[1]

While the district court was considering the sanctions issue in *Medical Supply I*, *see* 2005 WL 2122675 (D. Kan., May 13, 2005), Medical Supply filed this action in the United States District Court for the Western District of Missouri. (Aplt. App. 36-151, "*Medical Supply III*".) The *Medical Supply III* Complaint reasserted Medical Supply's previously dismissed federal and state law claims. The Missouri federal court transferred this action to Kansas. (Aplt. App. 345-47.) On March 7, 2006, the district court granted renewed motions to dismiss, denied the motion to substitute plaintiff as moot and issued sanctions jointly against Medical Supply and its former counsel. 419 F. Supp.2d 1316, 1335-36 (D. Kan. 2006). On August 7, 2006, the district court struck the "motion for reconsideration" and motion to amend the Complaint that had been filed by Samuel Lipari. (Aplt. App. 1866.) The district court also entered attorney fee awards. (Aplt. App. 1875, 1885.)

STATEMENT OF FACTS

Defendants disagree with Medical Supply's Statement of Facts.[2] Instead of stating the factual background of the proceedings below, Medical Supply simply

[1] Medical Supply had also filed a lawsuit asserting similar causes of action against other parties. The district court likewise dismissed that suit and this Court affirmed. *See Medical Supply Chain, Inc. v. General Elec. Co.*, 2004 WL 956100 (D. Kan., Jan. 29, 2004), *aff'd in part, rev'd in part*, 144 Fed. Appx. 708 (10th Cir. 2005). This suit is referred to herein as "*Medical Supply II*."

summarizes the conclusory allegations of its Complaint. Defendants thus provide the following brief recitation of the allegations and events:

A. Identity of Parties

Medical Supply is the same entity that filed *Medical Supply I*, *II* and *III*. (Aplt. App. 40, 53, 2255.)

In *Medical Supply I*, Medical Supply sued U.S. Bancorp, U.S. Bank, Piper Jaffray, Andrew Cecere and Jerry Grundhofer. (Aplt. App. 1964, 1971, 1972, 1976, 1977.) These defendants also were sued in *Medical Supply III*, along with Andrew Duff (CEO of Piper Jaffray). (Aplt. App. 40-41.) Medical Supply also joined in its *Medical Supply III* Complaint the law firm representing these entities and individuals. (*Id*. 41.) Neoforma, Inc. and Novation, LLC, while not parties in *Medical Supply I*, were identified in previous cases. (Aplt. App. 40; 1973, 1975; *see also Medical Supply II* Complaint, Aplt. App. 2259, 2261-62, 2274.) Robert Zollars, VHA, Curt Nonomaque, UHC and Robert Baker are newly joined parties in *Medical Supply III*. (*Id*. 40.)

B. Medical Supply's General Allegations of Failure to Contract are Identical to *Medical Supply I*

As in *Medical Supply I*, Medical Supply claimed it sought escrow accounts at U.S. Bank in the fall of 2002, when it contacted a bank employee at an

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[2] Medical Supply has attempted to argue matters outside the record of the district court. (Aplt. Br. at pp. 31-32.) Because this appeal pertains to the sufficiency of the allegations contained in the *Medical Supply III* Complaint, the extraneous matters should be stricken or ignored.

Independence, Missouri branch. (Aplt. App. 264; 1983.) Ultimately, U.S. Bank declined to provide escrow account services and Medical Supply alleges that the basis for the denial was the USA Patriot Act. (Aplt. App. 275; 1987.) Medical Supply further alleged that they reached an agreement for the escrow account services but that U.S. Bank later changed its mind and refused to open the accounts. (Aplt. App. 92-93; 1989-90.)

In addition, Medical Supply alleges it contacted Piper Jaffray to be considered as a venture capital candidate. (Aplt. App. 86; 1980.) Medical Supply asserted that it sent its business plan and financial projections to Piper Jaffray, but received no response. (*Id.*) It also alleged that Medical Supply spoke to U.S. Bank concerning the "need for a business line of credit" (Aplt. App. 90; 1985-86) and that Medical Supply provided its business plan to U.S. Bank in order to apply for the line of credit (Aplt. App. 90; 1986).

Virtually all of the allegations concerning the alleged escrow accounts and financing in the *Medical Supply I* Amended Complaint (Aplt. App. 1978-1996) also appear in the *Medical Supply III* Complaint (Aplt. App. 85-98).

C. Medical Supply's Allegations of Anticompetitive Conduct in *Medical Supply III* Are Not New

Medical Supply previously alleged that it markets certain supply chain management technology or software it had developed and provides educational instruction for healthcare supply chain managers. (Aplt. App. 1965, 1978.) It also

claimed to offer a "certification" program in healthcare strategic management for the healthcare supply chain. (*Id*.) In *Medical Supply III*, Medical Supply says it provides a "healthcare supply chain empowerment program" (Aplt. App. 86), "supply chain management technology" (*id*. at 88), and a "healthcare supply chain certification" (*id*.).

Medical Supply claims that the supposed relevant "markets" were: (1) hospital supplies, (2) e-commerce hospital supply, and (3) upstream healthcare technology company capitalization. (Aplt. App. 42-43.) Similarly, the *Medical Supply I* Complaint variously referenced hospital supplies, an electronic marketplace and capitalization. (Aplt. App. 1968, 1975, 1997, 2001, 2003.) The persons or entities that supposedly had suffered "harm" due to the anticompetitive actions are described as: (1) hospitals, nursing homes and home health care providers, (2) purchasers of prescription drugs, (3) consumers who had filed bankruptcy because they were unable to pay medical bills, (4) the Medicare system, (5) the Medicaid system, (6) consumers whose lives were lost, (7) Medical Supply's "stakeholders, associates, suppliers and customers," and (8) Medical Supply. (Aplt. App. 46-52.)

The defendants are variously described as companies and individuals (Aplt. App. 40-41) that allegedly conspired to violate the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (*see generally* Aplt. App. 122-139). Medical Supply admits to

filing similar antitrust claims in *Medical Supply I*. (Aplt. App. 53-54.) A substantial number of the allegations are either the same as were filed in *Medical Supply I* and *Medical Supply II* or were "facts" available to Medical Supply at the time judgment was entered in *Medical Supply I*. (*See*, *e.g.*, Aplt. App. 63-69, 78-84, 85-98, 99-107; *compare*, *e.g.*: Aplt. App. 63 *with* 2003; 85-98 *with* 1978-96; 100-03 *with* 2264-69.) Plaintiffs' § 1 claims assert various violations of group boycott, allocation of customers, horizontal price restraint, vertical price restraint, and tying. (Aplt. App. 122.)

In its § 2 claim, Medical Supply asserted that the defendants collectively monopolized or conspired to monopolize the sale of hospital supplies, sale of hospital supplies in e-commerce and the capitalization of healthcare technology companies. (Aplt. App. 131.) Medical Supply also raised similar allegations in *Medical Supply I*. (*Id*. 132-134; 2002-04.)

As in *Medical Supply I*, the Complaint sought substantial damages and equitable relief. (*Compare* Aplt. App. 1968-69, 2023-30 *with* 131, 134-35, 149-50.) Medical Supply contended that it (and the others on whose behalf it was also suing) had lost and would lose income because of the defendants' alleged wrongful acts. (*Compare* Aplt. App. 2023-2026 *with* 56-52, 149.)

Finally, in its Clayton Act claim (Count V) Medical Supply alleged that the defendants had engaged in unlawful interlocking directorates, 15 U.S.C. § 19,

without specifying who held what positions on the boards of what companies. (Aplt. App. 135.) Medical Supply had also alleged interlocking directors in its *Medical Supply I* case. (Aplt. App. 1998.)

D. Patriot Act Claim Allegations Were Made in *Medical Supply I*

In Count XVI of the Complaint, Medical Supply attempts to make a claim under the USA Patriot Act with respect to alleged suspicious activity reporting. (Aplt. App. 146-49.) Medical Supply alleged this same claim in *Medical Supply I*. (Aplt. App. 2010-13.) Count XVI also references the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030, but no separate cause of action is asserted. (Aplt. App. 146-47.)

E. RICO Claim Allegations

In Count XV, Medical Supply purports to allege a RICO claim, 18 U.S.C. §§ 1962(c), (d), relying primarily on the same Hobbs Act allegations, 18 U.S.C. § 1951, that were dismissed in *Medical Supply I*. (*Compare* Aplt. App. 2007-2010 *with* 145-46.) Medical Supply also asserted violations of 18 U.S.C. § 1503 (influencing or injuring an officer or juror), 18 U.S.C. § 1513 (retaliating against a witness), 17 U.S.C. § 506 (criminal copyright infringement) and 18 U.S.C. § 2313 (same). (Aplt. App. 144-45.) In large part, these RICO allegations concern the disciplinary proceedings involving Medical Supply's former counsel, Bret Landrith. (Aplt. App. 143-45.)

F. Facts Relating to the Sanctions Awarded

In its December 30, 2004 Order, this Court assessed attorneys' fees and double costs against Medical Supply's counsel as a sanction pursuant to Fed. R. App. P. 38. (Aplee. Supp. App. 9.) The district court thereafter awarded $23,956.00 pursuant to the Order. (2005 WL 2122675.)

During the pendency of the attorneys' fee motion, Medical Supply filed this case realleging the same purported "facts" and many of the same claims already dismissed by the district court and affirmed by this Court. (Aplt. App. 36-151.) Medical Supply, through its counsel and, later, its shareholder Samuel Lipari, filed multiple pleadings in the case. (*See generally* Aplt. App. 19-35.) Due to the duplicative nature of the suit, the prior sanctions and court admonitions, and the multiplicity of filings, several defendants served notice under Fed. R. Civ. P. 11 that the pleadings violated federal rules and statutes. (Aplt. App. 320-333, 430-40.) Medical Supply ignored the warnings and, in its order dismissing this case, the district court again awarded sanctions–this time jointly against Medical Supply and its attorney. 419 F. Supp.2d at 1335. (Aplt. App. 1875, 1885.)

SUMMARY OF THE ARGUMENT

The district court's judgment should be affirmed. The record establishes that Medical Supply filed its Notice of Appeal outside the time required in Fed. R. App. 4. Moreover, even if the appeal is timely, the judgment should be

affirmed because Medical Supply's claims are barred by *res judicata* or collateral estoppel and otherwise fail to state legally viable causes of action. Finally, the district court acted well within the bounds of its discretion sanctioning Medical Supply and its (former) counsel.[3]

STANDARD OF REVIEW

Medical Supply's Jurisdictional Statement claims to appeal "the trial court's August 7th 2006 order striking Lipari's Motion for Reconsideration of the court's earlier dismissal order." (Aplt. Br. 17.) With respect to this issue, the Court reviews whether the district court had abused its discretion when it struck the "motion for reconsideration." *McLeod v. Arrow Marine Transport, Inc.*, 258 F.3d 608, 617 (7th Cir. 2001). This abuse of discretion standard also applies to the review of the district court's orders denying substitution of plaintiff, *Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1324 (10th Cir. 1978); awarding sanctions against Medical Supply and its former counsel, *Medical Supply Chain, Inc. v. General Electric Co.*, 144 Fed. Appx. 708 (10th Cir. 2005); and dismissing the Complaint under Fed. R. Civ. P. 8(a), *Huggins v. Hilton*, 180 Fed. Appx. 814 (10th Cir. 2006). In addition, the district court's denial of the motion for leave to amend a Complaint is generally reviewed under an abuse of discretion standard. *Gohier v. Enright*,

[3] The district court also granted motions to dismiss for lack of personal jurisdiction filed by Robert Zollars, Curt Nonomaque and Robert Baker. 419 F. Supp.2d at 1335. Medical Supply has not appealed the grant of those motions.

186 F.3d 1216, 1218 (10th Cir. 1999); *see also McLeod*, 258 F.3d at 617 (reviewing order striking pleadings under abuse of discretion standard).

The district court's separate ground for dismissal under Fed. R. Civ. P. 12(b)(6) is reviewed *de novo* by this Court. *Frazier v. Jordan*, 2007 WL 60883 *6 (10th Cir., Jan. 10, 2007). The district court's application of *res judicata* is likewise reviewed *de novo*. *Koch v. Potter*, 177 Fed. Appx. 785 (10th Cir. 2006).

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE MEDICAL SUPPLY'S NOTICE OF APPEAL WAS UNTIMELY.

Medical Supply filed its Notice of Appeal on September 8, 2006, more than 150 days after the dismissal of its Complaint and over thirty (30) days after the order striking the "motion for reconsideration" was entered. Medical Supply's filing was untimely and this appeal should be dismissed.

On March 7, 2006, the district dismissed Medical Supply's Complaint and granted motions for sanctions filed by several appellees. On March 14, 2006, Mr. Lipari, who was neither a party nor an attorney representing a party, purported to file on behalf of himself and Medical Supply a "motion for reconsideration" of the March 7 Order. (Aplt. App. 1522.) Significantly, the March 7 decision had denied Medical Supply's motion for substitution of plaintiff as moot; the district court never recognized Lipari's "entry of appearance" in place of or to represent the interests of Medical Supply. Moreover, no attorney ever filed a motion to substitute following the March 7, 2006 decision, and no attorney ever executed the "motion for reconsideration" or filed a pleading to adopt it.[4]

On August 7, 2006, the district court struck Mr. Lipari's "motion for reconsideration." The court held that Lipari was not a proper party to the action

[4] Medical Supply's former counsel was disbarred in December 2005. *In re Landrith*, 124 P.3d 467 (Kan. 2005). Medical Supply's counsel on this appeal did enter his appearance in the district court (on February 7, 2006 (Aplt. App. 1360)) but did not file or adopt the "motion for reconsideration."

and that he could not represent Medical Supply. (Aplt. App. 1868-69.) The district court further noted that Medical Supply "has a history of filing frivolous lawsuits and motions, for which the court has sanctioned plaintiff on several occasions" and warned that "[f]uture attempts to resurrect this case could result in the court imposing additional sanctions." (Aplt. App. 1870.)[5]

Under Fed. R. App. P. 4(a)(1)(A), the Notice of Appeal must be filed "within 30 days after the judgment or order appealed from is entered." If a motion of the type contemplated in this Rule is filed, then the time period for filing the Notice of Appeal is tolled during the pendency of that motion, but the Notice of Appeal must then be filed within 30 days of the "entry of the order disposing of the last such remaining motion." *Id*. at 4(a)(4)(B)(ii).

Medical Supply's docketing statement indicates that it appeals from the March 7, 2006 dismissal Order, yet it did not file its Notice of Appeal until September 8, 2006. If the improperly filed "motion to reconsider" did not toll the time period for the appeal, then Medical Supply's Notice of Appeal was filed 185 days after the Order dismissing the appellant's Complaint, which is 155 days too late. *Cf. Acevedo-Villalobos v. Hernandez*, 22 F.3d 384, 386-87 (1st Cir. 1994). Accordingly, this appeal should be dismissed.

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[5] Notably, the district court's local rules do not permit the filing of "motions to reconsider" dispositive rulings. Kan. D. Ct. R. 7.3(a). Moreover, Mr. Lipari had been warned over six months earlier that pleadings must be filed by counsel of record. (Aplt. App. 1358.)

Perhaps recognizing its predicament, Medical Supply states in its Jurisdictional Statement that it is appealing "the trial court's August 7th, 2006 order striking Lipari's Motion for Reconsideration of the court's earlier dismissal order." (Aplt. Br. 17.) In its conclusion, however, Medical Supply asks this Court to "reinstate its prosecution" of the dismissed claims. (Aplt. Br. 71.) Medical Supply cannot seek reinstatement of the dismissed claims if it does not (and could not) appeal the dismissal itself. *See Fisichelli v. City Known as the Town of Methuen*, 884 F.2d 17 (1st Cir. 1989) (holding that an appeal of a denial of a motion to reconsider does not have a "Lazarus-like effect" and allow consideration of the underlying merits of the original motion). Courts have rejected attempts to address the propriety of a judgment via an appeal of a Rule 59 or Rule 60 motion. *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n. 7 (1978) ("an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review").

However, even if: (1) Mr. Lipari's "motion for reconsideration" did toll the time period for Medical Supply's filing of its Notice of Appeal under Rule 4, or (2) Medical Supply can be deemed to be appealing the August 7 Order striking the "motion for reconsideration," the appeal is still untimely because the Notice of Appeal was not filed within 30 days of the order striking the "motion for reconsideration." Under Fed. R. App. 4(a)(4)(B)(ii), Medical Supply's Notice of

Appeal was due to be filed on September 6, 2006, yet it did not file the Notice until September 8, 2006. *Cf. Acevedo-Villalobos*, 22 F.3d at 387.

Appellate jurisdiction only exists if the Notice of Appeal is timely filed. *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1239 (10th Cir. 2006). The 30-day deadline under Fed. R. App. P. 4 is both "mandatory and jurisdictional." *Browder v. Director, Dep't of Corrections of Illinois*, 434 U.S. 257, 264 (1978). Because the Notice of Appeal was not filed within 30 days of either the March 7 dismissal of this case or the August 7 order striking the motion for reconsideration, it is untimely and this Court lacks jurisdiction over the appeal. The entire appeal should thus be dismissed, and there is no need for the Court to consider any of Medical Supply's arguments on the merits.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MEDICAL SUPPLY'S MOTIONS TO SUBSTITUTE PARTIES AND TO AMEND.

A. The District Court Correctly Denied Substitution of Parties.

1. Medical Supply's Motion to Substitute Plaintiff was Moot.

On October 19, 2005, Medical Supply's former counsel filed a motion to substitute Lipari, Medical Supply's sole shareholder, as the party-plaintiff. In December 2005, the Kansas Supreme Court disbarred Medical Supply's counsel. *In re Landrith*, 124 P.3d 467 (Kan. 2005), *cert. denied*, 127 S. Ct. 107 (2006). Shortly thereafter, the district court issued an order of disbarment (*see* Aplt. App. 1357) and held that, because the motion to substitute had been filed by a disbarred

attorney, Medical Supply must retain new counsel should it wish to pursue the motion (*id*. 1358). Instead of complying with this Order, Lipari attempted to enter his "appearance" and proceed in the district court *pro se*. (Aplt. App. 1518-21.) At no time did any attorney for Medical Supply renew or refile a motion to substitute party-plaintiff. Moreover, the district court cautioned Lipari concerning his filing of pleadings in the case. (Aplt. App. 1358, 1868-69.) Because no legal effect could be given to the motion to substitute parties, the district court correctly ruled that the motion was moot.

Medical Supply's arguments in support of its position are unconvincing. First, the district court found that there was a party here–Medical Supply. As discussed below, the supposed legal basis for Lipari to be "substituted" is wrong. Moreover, the cases Medical Supply cites, *e.g.*, *Director of Revenue, State of Colo. v. United States*, 392 F.2d 307 (10th Cir. 1968) and *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422 (10th Cir. 1979), do not condone the "appearance" Lipari sought to make. *Director of Revenue* merely indicates that a court can consider a misnamed *pleading* and *Dietrich* involved a class counsel whose fees were in issue, clearly a proper subject of review. Neither case is even minimally relevant.

2. The Alleged Basis for the Motion Did Not Compel Substitution.

Medical Supply sought to substitute Lipari as the plaintiff because (1) the repeated sanctioning of its counsel for "correctly pleading the law" would hinder Medical Supply's ability to retain substitute counsel in the event Medical Supply is deprived of its counsel (Aplt. App. 1205, ¶ 6); (2) Medical Supply cannot represent itself in the event it is deprived of its current counsel because it is a corporate entity (*id*. at ¶ 7); (3) Lipari is the "real party in interest" as Medical Supply's founder, chief executive and sole owner of registered stock (Aplt. App. 1204); (4) Medical Supply's state law claims "are based on contracts Samuel K. Lipari personally made and was personally subject to" (Aplt. App. 1205, ¶ 4); (5) Lipari would "forfeit his rights against the defendants unjustly should a dismissal with prejudice result from Medical Supply's deprivation of counsel" (*id*., ¶ 8); and (6) Medical Supply "could not have known of the existence of a doctrine opposing the enforcement of federal antitrust laws in the Kansas District Court and the Tenth Circuit Court of Appeals or a secession from the rule of law over this market" (Aplt. App. 1206). As discussed below, none of the arguments are proper grounds for obtaining the substitution sought.

3. Judicial Estoppel Bars the Substitution.

Medical Supply previously sued many of the same defendants named here and asserted almost identical claims. *See Medical Supply Chain, Inc. v.*

US Bancorp, 2003 WL 21479192 (D. Kan. 2003), *aff'd*, 112 Fed. Appx. 730 (10th Cir. 2004). Throughout the course of that previous litigation, Medical Supply was the only plaintiff claiming to have been harmed by defendants. *Id*. After Medical Supply's first lawsuit was dismissed, it brought this nearly identical lawsuit again asserting claims and injury as a result of defendants' allegedly illegal conduct. Only after Medical Supply foresaw the eventual disbarment of its counsel did it fabricate the argument that Lipari is somehow the "real party in interest." The district court properly rejected this contrivance because Medical Supply is judicially estopped from making this spurious claim.

Judicial estoppel is a discretionary remedy invoked "to prevent improper use of judicial machinery." *Autos, Inc. v. Gowin*, 330 B.R. 788, 794 (D. Kan. 2005) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). The rule ordinarily applies to inconsistent positions assumed by a party in the course of the same judicial proceeding or in subsequent proceedings involving identical parties and questions. *Id*. (citing *In re Johnson*, 518 F.2d 246, 252 (10th Cir. 1975).) "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Johnson v. Lindon City Corp*., 405 F.3d 1065, 1069 (10th Cir. 2005) (citation omitted). In *Johnson*,

this Court reviewed factors typically used to determine when to apply judicial estoppel, stating:

> First, a party's later position must be 'clearly inconsistent' with its earlier position. . . . Moreover, the position to be estopped must generally be one of fact rather than of law or legal theory. . . . Second, whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance in a later proceeding would create the perception that either the first or second court was misled. . . . The requirement that a previous court has accepted the prior inconsistent factual position ensures that judicial estoppel is applied in the narrowest of circumstances. . . . Third, whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. (citations and internal quotation marks omitted.)

This test compels rejection of Medical Supply's request to substitute.[6] First, that request sought to reverse Medical Supply's long-held position that it is the proper plaintiff in this case by substituting Lipari as the "real party in interest." No claims have been asserted on behalf of Lipari individually in either action, nor has Medical Supply claimed that Lipari was a party to any alleged contract. On the brink of losing yet again, Medical Supply now argues *Lipari* is actually the "real

[6] Among its discernible arguments for seeking substitution, Medical Supply asserted that the lawsuit was based upon contracts Lipari "personally made and was personally subject to . . . ."; Lipari is in privity with Medical Supply and would forfeit his rights if a dismissal with prejudice is entered as a result of Medical Supply being deprived of its counsel; and Lipari would suffer "irreparable loss because the State of Kansas lacks the resources to compensate him" for the harm he has suffered at the hands of state officials' abuse of process and denying him access to federal courts. (*See* Aplt. App. 1205.) However, Medical Supply never explains how substituting Lipari as plaintiff would resolve any of these "issues."

party in interest," that he "personally made and is subject to" the purported contracts that form the basis of plaintiff's claims and has been and will be harmed in the future unless Lipari is substituted as plaintiff. Medical Supply's current position is contrary to its prior and long-held position that Medical Supply is the proper party to bring these claims.

Second, Medical Supply's prior position that it is the proper party, asserted for over three years, has been accepted by the Court. Substitution of Lipari as the plaintiff would create the perception that Medical Supply has misled the courts regarding the proper party to bring these claims.

Third, the defendants clearly would suffer undue prejudice and impairment if Lipari is allowed to prosecute the claims *pro se*. Despite the dismissal of its earlier litigation, Medical Supply brought this *Medical Supply III* lawsuit in Missouri in a blatant but unsuccessful attempt to forum shop its baseless claims. Appellees should not have to defend against the same baseless claims asserted by Lipari.[7]

[7] On the other hand, Medical Supply is not prejudiced by denial of the motion. *Medical Supply* sought substitution because it lost its counsel and, as a corporate entity, it cannot represent itself. Nothing, including the sanctions imposed on Medical Supply's former counsel, prevents it from obtaining new counsel (just as it did in this appeal). Medical Supply's contention to the contrary is baseless.

4. Even if the Merits of the Motion to Substitute Are Reviewed, the Order Medical Supply Sought is Unavailable.

Lipari has separately suggested that substitution is necessary because Medical Supply, a Missouri corporation, no longer exists. However, Missouri law states that a dissolved corporation may continue business in the name of the corporation to wind up its business and affairs. *See* R.S.Mo. §§ 351.476, 351.486. In fact, Missouri law prohibits a sole shareholder from bringing a cause of action that was held by the dissolved corporation. In *Hutchings v. Manchester Life and Cas. Management Corp.*, 896 F. Supp. 946 (E.D. Mo. 1995), the *pro se* plaintiff, who was the sole shareholder of the corporation, attempted to bring claims belonging to that dissolved corporation. The court held that a shareholder cannot maintain suit on behalf of a corporation because a shareholder does not have legal ownership of corporation property. *Id*. at 947. Because the suit was brought in the plaintiff's personal capacity rather than as a trustee acting on behalf of the dissolved corporation, the court dismissed the plaintiff's action. *Id.*; *see also Gunter v. Bono*, 914 S.W.2d 437, 440-41 (Mo. App. E.D. 1996); *Mabin Constr. Co. v. Historic Constr., Inc.*, 851 S.W.2d 98, 103 (Mo. App. W.D. 1993).

This Court reached a similar conclusion in *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006), *cert. denied* 127 S. Ct. 1334 (2007). In *Tal*, this Court affirmed the district court's denial of the corporate officer's attempt to represent corporations under Oklahoma law. *Id*. at 1254-55. Moreover, in *Tal*, just as here,

the district court had a local rule requiring that only attorneys may appear for corporations. *Id*. at 1254; Kan. D. Ct. L.R. 83.5.1.

Even assuming *arguendo* that Mr. Lipari could be substituted for Medical Supply, the Complaint should still have been dismissed. Medical Supply acknowledges that Lipari was "at all times in privity" with it. (Aplt. App. 1205, ¶ 8.) Mr. Lipari's privity with the company is fatal to the Complaint under *res judicata*. *See Gospel Missions of America v. City of Los Angeles*, 328 F.3d 548, 556-57 (9th Cir. 2003); *see also Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1275 (10th Cir. 1995).

B. The District Court Properly Struck Lipari's Motion to Amend.

The district court ruled that Medical Supply should not be permitted an opportunity to amend its Complaint. That ruling should be affirmed.

Medical Supply overlooks the fact that Lipari did not move to amend until *after* the district court had dismissed Medical Supply's lawsuit. (Aplt. App. 1572, 1576.) Lipari, a non-lawyer whose "appearance" had been rejected by the district court, filed the motion *pro se* and as an "interested party." (Aplt. App. 1572.) Such an improper motion has no effect. In addition, the motion ran afoul of the district court's rule 15.1 by failing to either set forth a concise statement of the proposed amendment or attach a copy of the proposed pleading. (*Id*.) *See*

Calderon v. Kansas Dep't of Social and Rehab. Servs., 181 F.3d 1180, 1186 (10th Cir. 1999).

In any event, Rule 15 did not require the district court to grant leave to amend. Medical Supply sought little more than an opportunity to rewrite the Complaint after the district court ruled on the "motion for reconsideration." It did not offer any explanation of how it would assert legally viable claims. As the Seventh Circuit Court of Appeals stated recently: "District Judges are not mind readers, and should not be required to explain to parties whether or how their complaints could be drafted to survive a motion to dismiss." *James Cape & Sons Co. v. PCC Constr. Co.*, 453 F.3d 396, 401 (7th Cir. 2006).

The district court clearly set forth the reasons why dismissal and sanctions were appropriate. Based upon the litigious and sanctionable conduct of Medical Supply and its counsel, the district court further found that amendment was not permissible.[8] Lipari's belated, unauthorized motion did not compel a different result. There was no abuse of discretion and the judgment should be affirmed.

[8] Independent of striking Lipari's unauthorized motion to amend, the district court did not err in failing *sua sponte* to permit amendment before dismissal. Medical Supply chose to stand on its Complaint even in the face of Rule 11 notices and the dismissal motions. *See United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 241-42 (1st Cir. 2004).

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT MEDICAL SUPPLY FAILED TO PLEAD LEGALLY SUFFICIENT CAUSES OF ACTION.

A. Medical Supply's Claims are Barred by the Doctrines of *Res judicata* or Collateral Estoppel.

As discussed above, Medical Supply is precluded from appealing the merits of the district court's dismissal of its claims. Even if this Court did have jurisdiction to consider that issue, it should affirm. The district court properly held that Medical Supply's claims, which were based upon the same operative facts alleged and rejected in *Medical Supply I*, are barred by *res judicata* or collateral estoppel.

Federal law governs the collateral estoppel and/or *res judicata* effect of an earlier federal judgment based on federal law. *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1332 (10th Cir. 1988); *Poe v. John Deere Co.*, 695 F.2d 1103, 1105 (8th Cir. 1982). Because only the federal claims were dismissed with prejudice in *Medical Supply I* and here, federal law governs.[9] Collateral estoppel bars the relitigation of factual or legal issues that were determined in a prior court action, and applies to bar relitigation in federal court of issues previously determined. *In re Scarborough*, 171 F.3d 638, 641 (8th Cir.

[9] This lawsuit was transferred between districts under 28 U.S.C. § 1404(a), thus the law of the transferee forum applies. *Hill's Pet Prods. v. A.S.U., Inc.*, 808 F. Supp. 774 (D. Kan. 1992). Dismissal here, however, was based upon federal not state law. *See Hartline v. Sheet Metal Workers Nat'l Pension Fund*, 201 F. Supp.2d 1 (D.D.C. 1999).

1999). The preclusion principle of *res judicata* prevents "the relitigation of a claim on grounds that were raised or **could have been raised** in the prior suit." *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990) (emphasis added); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980). Under federal law, the doctrine of *res judicata* bars relitigation of a claim if: "(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases." *Lane*, 899 F.2d. at 741; *see also Wilkes v. Wyoming Dept. of Employment*, 314 F.3d 501, 504 (10th Cir. 2003).

The district court and this Court fully considered and rejected Medical Supply's federal antitrust claims in *Medical Supply I*. As such, Medical Supply's identical Sherman Act claims in *Medical Supply III* (Counts I-IV) are barred completely by *res judicata* or collateral estoppel. *See Allen*, 449 U.S. at 94. Additionally, Medical Supply's claim under the Clayton Act, 15 U.S.C. § 19 (Count V) is barred by collateral estoppel and/or *res judicata* because it "could have" been raised in the prior suit. In fact, Medical Supply specifically alleged in *Medical Supply I* that the defendants violated antitrust laws by participating in interlocking directorates. (Aplt. App. 1998, ¶ 82.)

The district court and this Court also considered and rejected Medical Supply's claim under the USA Patriot Act in *Medical Supply I*, thus barring the

current Patriot Act claim (Count XVI). (Aplee. Supp. App. 7.) Additionally, Medical Supply's RICO claim (Count XV) was properly dismissed under collateral estoppel and/or *res judicata*. Medical Supply previously maintained that its Amended Complaint in *Medical Supply I*, asserting violations of the Hobbs Act, was sufficient to state chargeable conduct actionable under RICO. (Aplt. App. 2073.) Notably, Count III in the *Medical Supply I* Amended Complaint was styled "VIOLATIONS OF THE HOBBS ACT AGAINST RACKETEERING." (Aplt. App. 2007.) The district court dismissed the Hobbs claim outright, a dismissal this Court affirmed.

Despite the substantial weight of authority and the record against it, Medical Supply argues that *res judicata* or collateral estoppel do not bar its claims. First, Medical Supply argues mistakenly that the district court decision that this Court affirmed in *Medical Supply I* was not a "judgment" (Aplt. Br. at pp. 18-19, 35-38) and only the sanctions awarded in *Medical Supply I* can truly be designated a "judgment" for *res judicata* or collateral estoppel purposes. Appellant is plainly wrong because the previous rulings on the merits of its claims were obviously "judgments." (*See* Aplt. App. 2047.) Medical Supply's reliance on *AVX Corp. v. Cabot Corp.*, 424 F.3d 28 (1st Cir. 2005) is misplaced. Unlike the dismissal of the entire Complaint here, in *AVX* the court had dismissed only two counts (leaving

others pending) and the parties subsequently filed a joint stipulation of dismissal without prejudice.

Second, Medical Supply argues that the defendants "seek to contradict" *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), and its progeny. That argument is equally meritless. In *Lawlor*, the Supreme Court held that a prior judgment "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id*. at 328. Unlike *Lawlor*, however, collateral estoppel and/or *res judicata* bar the *Medical Supply III* claims because *no* transactions or conduct resulting in the assertion of new claims are alleged to have arisen since the entry of the previous judgment. The earlier lawsuit was based upon the same operative facts or sets of transactions at issue here. (*See*, *supra*, pp. 6-10.) That Medical Supply may have "repackaged" some of the alleged conduct into different theories or causes of action does not shield it from dismissal through application of *res judicata* and/or collateral estoppel. *See Banks v. Int'l Union*, 390 F.3d 1049, 1052 (8th Cir. 2004); *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 8 (1st Cir. 1992).

Third, Medical Supply's assertion that its earlier case involved only claims for injunctive or declaratory relief prior to any "breach" or damages were incurred is contrary to the language in the *Medical Supply I* Complaint which alleged that a breach had occurred and that millions of dollars of damages were at stake. The

relief sought both in *Medical Supply I* and here requested substantial damages, treble damages, punitive damages and attorneys' fees for the same alleged conduct. (*Compare* Aplt. App. 131, 134-35, 149-50 *with* 1968-69, 2023-30.) [10]

Despite the dismissal in *Medical Supply I*, as well as admonitions from the district court and this Court, Medical Supply reasserted many of the same causes of action in the Missouri federal court based upon the same alleged conduct. Accordingly, all of Medical Supply's claims, those which are simply reasserted and those which may have been repackaged into different claims and causes of action, were correctly dismissed. The judgment should be affirmed.

B. The District Court Correctly Dismissed the Complaint for Failure to State a Claim Under Fed. R. Civ. P. 12(b)(6).

Separately, the district court analyzed the merits of Medical Supply's factual allegations to determine whether cognizable federal claims had been raised. Because, as the district court correctly found, the allegations are fatally deficient,

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[10] Medical Supply's assertion that it did not know of its damages until January 21, 2005 when federal Magistrate O'Hara testified in its former counsel's disciplinary hearing (Aplt. App. 149, ¶ 613) is completely belied by the fact that the same damage claims were filed in the earlier lawsuit. Moreover, it is clear from reviewing the allegations of the Complaint that many of the factual assertions are virtually identical to those in *Medical Supply I*; to the extent any of the allegations made respect dates that followed the filing of *Medical Supply I*, nothing among them purports to create any new causes of action. Medical Supply's alleged foreclosure from the "market" is not some type of continuing wrong that would support its claim; its alleged "damages" were known over four years ago. Medical Supply's reliance on *Cellar Door Productions, Inc. v. Kay*, 897 F.2d 1375 (6th Cir. 1990) is thus in error.

the district court's judgment dismissing the claims may be affirmed for these independent reasons.

1. Medical Supply Failed to State a Claim Under Sherman Act § 1.

Medical Supply's allegations of anticompetitive conduct under Sherman Act § 1 are unavailing. "[A] plaintiff must do more than cite relevant antitrust language to state a claim for relief. . . . Conclusory allegations that the defendant violated [the antitrust] laws are insufficient." *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992). The use of "antitrust 'buzzwords'" is not enough. *Id.* at 1026. Medical Supply's Complaint, filled as it is with mere "textbook" references and legal conclusions, fails to state any cognizable claim.

(a) Medical Supply Has Not Alleged Antitrust Injury.

In order to sustain a claim under the antitrust laws, a plaintiff must show both "but-for" causation and "antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Tal*, 453 F.3d at 1253. Medical Supply did not and could not allege either element here.

In order to show "but-for" causation, a plaintiff must first show "there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage . . . ." *Sharp v. United Airlines, Inc.*, 967 F.2d 404, 407 (10th Cir. 1992) (quoting *Reibert*

v. Atl. Richfield Co., 471 F.2d 727, 731 (10th Cir. 1973)). In other words, the plaintiff must show that "'but for' the violation, the injury would not have occurred." *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993). "[L]ack of causation in fact is fatal to the merits of any antitrust claim. Consequently, an essential element in plaintiffs' claim is that the injuries alleged would not have occurred but for [the defendant's] antitrust violation." *Argus, Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 41 (2d Cir. 1986) (internal citation omitted). Medical Supply's Complaint was properly dismissed because it does not allege that defendants' actions were the cause in fact of Medical Supply's inability to compete in the relevant market(s). Medical Supply alleges it is in the business of providing educational instruction or marketing certain software technology (Aplt. App. 86, 88). There are no allegations even suggesting these defendants are or were in those lines of business.

In addition to the "but for" test, an antitrust complaint must allege "antitrust injury," which is to say, "injury of the type that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489; *see also Tal*, 453 F.3d at 1253. An antitrust complaint must be dismissed "absent allegations that [the defendant's] conduct hampered [the plaintiff's] ability to compete." *Classic Communications, Inc. v. Rural Tel. Serv. Co., Inc.*, 995 F. Supp. 1185, 1187 (D. Kan. 1998). Although Medical Supply might have wanted financing or escrow

accounts from U.S. Bank, for example, unless the failure to provide such services or loans impaired Medical Supply's ability to compete in the relevant market, those defendants cannot have violated the antitrust laws. *See*, *e.g.*, *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 759 (2d Cir. 1972) (affirming dismissal of complaint where "the anticompetitive acts alleged in the complaint have not lessened [the plaintiff's] ability to compete.").

The case of *Association of Washington Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696 (9th Cir. 2001) mandates dismissal. There, the plaintiffs, public hospital districts, sued various tobacco companies and organizations on a variety of claims including violations of antitrust laws. In affirming dismissal of the claims, the court of appeals held that the plaintiffs–like Medical Supply here–had failed to allege antitrust injury. *Id.* at 704. In particular, the court recognized that the plaintiffs did not participate in the same market as the alleged wrongdoers: "Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *Id.* at 705 (quoting *Am. Ad Mgmt., Inc.*, 190 F.3d at 1057). Medical Supply's alleged "injury," if any, was in the education or healthcare supply management technology market, yet Medical Supply did not allege that all defendants participate in those markets. Moreover, the supposed acts of the defendants are alleged to have impacted markets other than the business of Medical Supply:

"hospital supplies," e-commerce, and capitalization. *See Tal*, 453 F.3d at 1258 (only participants "in the defendants' market are within the target of the antitrust laws") (citations omitted).

Medical Supply's alleged injuries simply do not flow "from that which makes defendants' acts unlawful." *Greater Rockford Energy and Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 401 (7th Cir. 1993) (quoting *Brunswick*, 429 U.S. at 489); *see Federal Prescription Serv., Inc. v. Am. Pharmaceutical Ass'n*, 663 F.2d 253, 268-72 (D.C. Cir. 1981) (holding that mail-order prescription service would have incurred the same costs regardless of defendant's alleged anticompetitive conduct); *Hodges v. WSM, Inc.*, 26 F.3d 36, 39 (6th Cir. 1994) (finding no antitrust injury where plaintiff suffered due to defendant's rightful exercise of property rights, not defendant's alleged anticompetitive behavior). Supposed grand conspiracy theories aside, there is no basis to assert "antitrust injury" here. Medical Supply's vague claims of "antitrust injury" are speculative and plainly meritless. *See SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1100 (10th Cir. 1991); *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 99-100 (5th Cir. 1988).

(b) Medical Supply Also Lacks Antitrust Standing Under Sherman Section 1 as an Alleged "Competitor."

Assuming *arguendo* it competed with defendants, Medical Supply lacks standing to recover damages for defendants' alleged cartel that fixes prices of

medical supplies sold to hospitals at above-market prices. (Aplt. App. 119, ¶ 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–Medical Supply, as a potential competitor of the alleged cartel, 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." Medical Supply lacks standing to complain of the 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).

(c) Medical Supply Failed to State a Claim Under § 1 of the Sherman Act.

As shown above, Medical Supply's failure to allege either "but for" causation, "antitrust injury," or standing in its Complaint is a defect sufficient to support the dismissal of Medical Supply's Complaint. However, Medical Supply also failed to meet its burden of properly pleading a claim under § 1 of the Sherman Antitrust Act. Medical Supply's primary § 1 theory is that the defendants allegedly were or are involved in a price fixing scheme. However, there must be some type of agreement as to pricing. *TV Communications Network, Inc.*, 964

F.2d at 1027. Yet, Medical Supply's Complaint does not allege the existence of a pricing agreement of any kind.

Medical Supply also argues that there exist both "vertical" and "horizontal" conspiracies or combinations in violation of § 1. Without any basis, Medical Supply also asserts that defendants have an agreement to "restrain trade." These cursory and conclusory statements do not sufficiently identify the nature of the agreements alleged and therefore fail to state a claim. *See Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387-88 (10th Cir. 1980); *see also 42nd Parallel North v. E Street Denim Co.*, 286 F.3d 401, 404 (7th Cir. 2002).

In *Mountain View Pharmacy*, the plaintiff alleged twenty-eight defendants had engaged in tying arrangements and price fixing in violation of § 1 of the Sherman Act, but did not specify which defendants were the conspiring parties. 630 F.2d at 1388. Despite the fact that the conspiracy allegation was limited to the named parties in the suit, the court affirmed dismissal, holding that "[a] blanket statement that twenty-eight defendants have conspired to fix prices . . . to thirteen plaintiffs does not provide adequate notice for responsive pleading." *Id*. at 1388.

Medical Supply's Complaint never elaborates on the alleged conspiracy other than to simply assert that such an agreement must exist because hospitals, nursing homes and insurers are overpaying for hospital supplies and these parties are responsible for it. Due to Medical Supply's failure to allege any of the required

particulars, "[d]ismissal is appropriate." *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994); *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992) ("Conclusory allegations that the defendant violated [the antitrust] laws are insufficient.").

The Sherman § 1 claim was properly dismissed.

2. Medical Supply Failed to State a Claim Under the Sherman Act § 2.

It is well settled that the Sherman Act does not generally restrict the right of a private business person to exercise his own discretion as to parties with whom he will deal. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). In order to state a claim under § 2 of the Sherman Act, Medical Supply must allege and sufficiently describe the relevant geographic and product markets *and* that the defendants possessed a monopoly and willfully acquired or maintained it. *Id.* As discussed below, Medical Supply has failed to do so and the district court properly dismissed the § 2 claims.

(a) Medical Supply Has Not Alleged the Existence of a Relevant Market.

A plaintiff is required to establish a relevant market to prevail on a monopolization or attempted monopolization claim under § 2 of the Sherman Act.

Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1024 (10th Cir. 2002); *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."). A proper 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); *HDC Medical, Inc. v. Minntech Corp.*, 474 F.3d 543, 547 (8th Cir. 2007). Medical Supply alleges generally the geographic market is "national" and the markets are "hospital supplies," "hospital supplies delivered through e-commerce" and "the capitalization of healthcare technology companies." (Aplt. App. 42-43.) However, Medical Supply's proposed market definitions fail as a matter of law.

A market definition must be plausible to survive a motion to dismiss. *See TV Communications Network*, 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"). In *Adidas America*, the district court dismissed a complaint alleging monopolization of a market for "NCAA promotional rights" where the

plaintiff "failed to explain or even address why other similar forms of advertising . . . are not reasonably interchangeable." 64 F. Supp.2d at 1102. Medical Supply's Complaint suffers from the same defect. The allegations of the Complaint also reflect that Medical Supply's business or market, *i.e.*, educational training and marketing of software (Aplt. App. 86, 88), is something quite different from what it alleges as the "market."

Even giving Medical Supply the benefit of all inferences, the relevant market cannot be limited to "hospital supplies."[11] "[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 the court 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).

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[11] This Court has rejected previously Medical Supply's allegation of a healthcare capitalization market. (Aplee. Supp. App. 5.) The supposed "e-commerce hospital supply" market also is ill-defined and Medical Supply–given its educational objectives–was not a participant in such a market.

Medical Supply's relevant market argument also fails because it is both too broad and too narrow. Medical Supply's "hospital supplies" market is too broad because Medical Supply fails to address how the market could be broad enough to include all hospital supplies, from janitorial supplies to bandages to CT scanners. (*E.g.*, Aplt. App. 42, ¶ 34.) A broom or bandage is obviously not "reasonably interchangeable" with a CT scanner. And Medical Supply's market is too narrow because the Complaint fails to explain why the market may be limited to "hospital supplies." Moreover, just as the complaint in *Adidas America* was dismissed because the plaintiff failed to explain why other forms of advertising were not substitutes, 64 F. Supp.2d at 1102, Medical Supply's Complaint was properly dismissed because it fails to explain why other ways of marketing hospital supplies (such as selling through telemarketing, catalogs or a direct sales force) are not reasonable substitutes for "e-commerce" hospital supply sales.

Finally, Medical Supply argues that the markets are "nationwide." Even if they were, however, the collection of possible sources for hospital supplies or capitalization sources must be viewed "nationwide" as well. Medical Supply makes no allegations concerning whether it was prevented from these supposed markets in every state or city in the country. The absurdity of Medical Supply's argument demonstrates the invalidity of its claims. In *Apani Southwest, Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620 (5th Cir. 2002), the Fifth Circuit upheld

dismissal of plaintiff's antitrust claims (under the Clayton Act) because the plaintiff had not sufficiently alleged a geographic market. *Id*. at 633 (stating "the alleged geographic market [for bottled water] did not correspond to the commercial realities of the industry and was not economically significant."). The district court here, recognizing similar pleading deficiencies, properly dismissed Medical Supply's allegations.

(b) Even if a Market is Adequately Alleged, Defendants Cannot Monopolize or Attempt to Monopolize a Market in Which They do not Compete.

Even if a proper product market is alleged, Medical Supply's Complaint is fundamentally flawed. 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); *see also Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004). The defendant's market share is a key factor in determining whether it has either monopoly power or a dangerous probability of obtaining such power. *Id*. Monopolization generally requires a share of 70% or more, *Colorado Interstate Gas v. Natural Gas Pipeline*, 885 F.2d 683, 694 n.18 (10th Cir. 1989), while establishing an attempt to monopolize generally requires a share of at least

30%, and shares less than 50% rarely support a claim for attempted monopolization. *See*, *e.g.*, *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) ("a market share of 30 percent is presumptively insufficient to establish the power to control price"); *U.S. Anchor Mfg. Co. v. Rule Indus.*, 7 F.3d 986, 1001 (11th Cir. 1993) ("[B]ecause [defendant] possessed less than 50% of the market . . . there was no dangerous probability of success as a matter of law.").

"[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) (rejecting attempt to show dangerous probability of success by aggregating shares of two defendants). Medical Supply made no allegations of the market shares held by any participants in the hospital supply market, e-commerce market or capitalization of technology market. Its only obscure references are that Novation and a nonparty "control" the products available to 70% of the nation's hospitals (Aplt. App. 42, ¶ 36), Neoforma and a nonparty (if they merged) would have 80% of the market in e-commerce for hospital supplies (Aplt. App. 118-19, ¶ 420) and several legal conclusions of "controlling market share" (Aplt. App. 122-23, ¶ 438), none of which is sufficient to survive a motion to dismiss. *See Endsley v. City of Chicago*, 230 F.3d 276, 282 (7th Cir. 2000). Moreover, only the shares of the individual market participants

can be used to establish a violation of § 2. Whatever may be the shares of any participants, they cannot be attributed to any other party because of some unknown promotional or investment relationship. *H.L. Hayden Co.*, 879 F.2d at 1018.

Moreover, merely because a company provides services to or may have investments in other companies does not make them joint competitors in the market. (*E.g.* Aplt. App. 81, ¶ 234; 124, ¶ 442.) In *Spanish Broadcast System, Inc. v. Clear Channel Communications, Inc.*, 242 F. Supp.2d 1350 (S.D. Fla. 2003), *aff'd* 376 F.3d 1065 (11th Cir. 2004), 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 § 2 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) ("[T]hat 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.").

The district court properly dismissed the Sherman § 2 claims for monopolization and attempted monopolization.

3. Medical Supply Failed to State a Claim for Violation of the Clayton Act, § 19.

Medical Supply claims damages for interlocking directorates in purported violation of 15 U.S.C.A. § 19. 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 meets 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 affirm the dismissal of this patently deficient claim. Medical Supply 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. (Aplt. App. 135.) Medical Supply'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. *Cf. Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006); *see also Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1561 (10th Cir. 1984).

Count V was properly dismissed.

4. Medical Supply's USA Patriot Act Claim Was Properly Dismissed Because There is No Private Right of Action for Alleged Violations of the Act.

Medical Supply realleges that it is endangered because of supposed reporting under the Patriot Act. (Aplt. App. 132-33, 146-48.) Even if such a "report" had been made, which it was not, the Act itself provides that there is no civil liability for making such reports. Patriot Act § 351(a)(3) (31 U.S.C. § 5318(g)(3)(A)); *see also Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999).

This Court and the district court in *Medical Supply I* previously dismissed Medical Supply's Patriot Act claims because there is no private right of action under that statute. (Aplee. Supp. App. 7.) The law has not changed since then.[12]

Medical Supply 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 its Patriot Act claim. 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.

Moreover, the district court in *Medical Supply I* concluded that, even if a private right of action existed under the statute, Medical Supply had suffered no

[12] Not only does the USA Patriot Act fail to provide for a private right of action for its violations, 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 the claim.

injury under that statute. 2003 WL 21479192 *7. Thus, collateral estoppel bars the reassertion of a claim that Medical Supply has suffered an injury cognizable under the Patriot Act. For all of these reasons, Count XVI was correctly dismissed.

5. Medical Supply Has Failed to State a Cognizable Claim under the RICO Statute.

In order to recover under RICO, Medical Supply 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)); 18 U.S.C. § 1962(c). Because Medical Supply has failed to establish the predicate acts of racketeering and the pattern elements of the statutory requirements, the Complaint does not come close to asserting a viable RICO claim. Furthermore, Medical Supply fails to adequately allege an injury to business or property as a result of the alleged RICO violation.

(a) Medical Supply's Allegations Regarding the Racketeering Activity are Frivolous.

First, Medical Supply attempts to establish a pattern of racketeering by alleging predicate acts under statutes that have nothing to do with the conduct alleged in this Complaint. Medical Supply 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. (Aplt. App. 144, ¶ 584.) It claims appellees violated this statute by "implicitly ratif[ying]" the law firm's filing of a "facially void ethics complaint" against Medical Supply's former counsel Bret Landrith. (*Id.*) Not only does an ethics complaint not equate to the threats, force or intimidation made criminal by this statute, Medical Supply 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 statutes, 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).

Similarly, Medical Supply 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. (Aplt. App. 144, ¶ 586.) Again, Medical Supply alleges this statute was violated by the ethics complaint lodged against Mr. Landrith. However, there are no factual allegations that Mr. Landrith or Medical Supply 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 does not apply.

Medical Supply's Hobbs Act claim (18 U.S.C. § 1951) is similarly frivolous. It argues that the threat of filing a USA Patriot Act suspicious activity report ("SAR") against Medical Supply in connection with its attempt to procure banking services from U.S. 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 patently wrong. First, as above, this claim has already been decided adversely to Medical Supply. Second, filing a SAR is not violent. As the Hobbs Act defines extortion, it must either involve "force, violence or fear under color of official right." 18 U.S.C. § 1951(b). 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, Medical Supply argues that certain alleged thefts of "business plans, algorithms, confidential proprietary business models, customer and associate lists" from it in 2002, and from an entity called Medical Supply Management in 1995 and 1996, constituted a criminal infringement of copyright. (Aplt. App. 78, ¶ 219; 145, ¶¶ 587-88.) There are numerous defects in Medical Supply'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 Medical Supply but, rather, by a separate entity not party to this proceeding. Finally, and perhaps most fundamentally, Medical Supply has 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.

(b) Medical Supply Has Not Adequately Pleaded the Pattern Element of a RICO Violation.

Medical Supply 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.*; *Tal*, 453 F.3d at 1267-68. 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 or racketeering activity (*i.e.*, past criminal conduct "extending over a substantial period of time"). Even accepting as true Medical Supply's allegations of racketeering conduct, they are insufficient to establish either an open-ended or closed-ended pattern.[13]

(c) Medical Supply Has Not Pleaded an Injury that Can Be Redressed by the RICO Statute.

Finally, Medical Supply has not adequately alleged 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.

[13] Because Medical Supply's § 1962(c) claim is fatally deficient, its § 1962(d) claim must also fail. *Tal*, 453 F.3d at 1270.

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).[14] Medical Supply's fanciful allegations about billions of dollars in alleged lost profits (to itself and others) fall far short of satisfying the pleading requirement of "concrete financial loss."

Medical Supply's RICO claim was properly dismissed.

6. Medical Supply's Complaint Violated the Mandate of Fed. R. Civ. P. 8, Thus Permitting Dismissal.

As an alternative ground for dismissal, the district court properly concluded that the Complaint violated the pleading standards under Fed. R. Civ. P. 8(a).

[14] Moreover, there must be allegation of proximate cause that the "alleged violation led directly to the plaintiff's injuries." *James Cape & Sons Co. v. PCC Constr. Co.*, 453 F.3d 396, 403 (7th Cir. 2006) (citing *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1998 (2006)). Medical Supply's claims fail for the same reasons as in *Anza* and *James Cape*.

Given the prolix and rambling nature of the Complaint, the district court acted well within its discretion. *See Huggins v. Hilton*, 180 Fed. Appx. 814 (10th Cir. 2006). As the district court recognized, Medical Supply was given ample notice under Fed. R. Civ. P. 11 and yet refused to take any action to remedy the deficiencies in its pleadings. 419 F. Supp.2d at 1332. As a result, the district court appropriately dismissed Medical Supply's Complaint under Rule 8.

Rule 8 requires a "short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). This requirement is echoed in subsection (e) as well. Fed. R. Civ. P. 8(e) (pleading must be "simple, concise and direct"). The purpose of Rule 8 is to allow for a simplified pleading system that focuses litigation on the merits of a claim. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). Under Rule 10(b), paragraphs should generally address only a single set of circumstances and claims should be stated in separate counts to state "the clear presentation of the matters set forth." Fed. R. Civ. P. 10(b).

A complaint may be dismissed when, because of its length, repetitiveness, and inclusion of irrelevant material, it becomes unintelligible. *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 439 (8th Cir. 1983) (complaint containing 144 paragraphs and 98 pages was properly dismissed when "[t]he style and prolixity of these pleadings would have made an orderly trial impossible.");

McHenry v. Renne, 84 F.3d 1172, 1177-1178, 1180 (9th Cir. 1996) ("Something labeled as a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity . . . fails to perform the essential functions of a complaint").

Here, Medical Supply's 115-page disconnected and incoherent Complaint is anything but simple, concise, short and plain, and does not meet the standards of precision required in an operative pleading. Rather, it contains a hodgepodge of claims, evidence and conclusory statements, none of which identify clearly what causes of action are being asserted against which defendants, or the evidence that supports those causes of action.

For example, the Complaint purports to invoke the Court's jurisdiction under the Declaratory Judgment Act (Aplt. App. 39, ¶ 1), yet neither the counts asking for relief nor the paragraphs in the prayer seem to ask for a declaration. In addition, for reasons unexplained, Medical Supply quotes the President of the United States, various governors, and a purported venture capital expert from the *New York Times*. (*Id*. 43-48.) While these statements may reflect Medical Supply's views of desirable healthcare policy, they are not part of a proper pleading. Further, the Complaint wanders on into unrelated tangents regarding alleged harm to third-party groups such as nursing homes and the insurance system. (*Id*. 46, 48.) It also includes a diatribe about an apparent insult by a

federal magistrate, and it complains about attorneys in prior litigation matters. (Aplt. App. 114-18.)

Paragraphs 107 and 108 seem to be a legal brief, citing numerous cases and railing against decisions of the district court and this Court, but not part of any cognizable pleading. (Aplt. App. 54-55.) Another legal brief on contract law is at paragraphs 356-358 discussing parties not named in this lawsuit. (*Id*. 104-05.)

Further, Medical Supply identifies fourteen defendants in the Complaint, yet it does not clearly specify which defendants are the subject of its separate causes of action. (*See*, *e.g.*, Aplt. App. 131-32, 134-35.) Every defendant is lumped together into far-reaching conspiracies. This defect in the Complaint renders it fatally uncertain.

Dismissal under Fed. R. Civ. P. 8 was more than justified, particularly given the history of frivolous pleadings and claims that Medical Supply has filed and pursued. There was no abuse of discretion here.

IV. THE DISTRICT COURT PROPERLY AWARDED SANCTIONS AGAINST MEDICAL SUPPLY AND ITS COUNSEL.

The district court granted the motions for sanctions, 419 F. Supp.2d at 1334-35, and entered orders sanctioning Medical Supply and its former counsel in amounts over $100,000 due to violations of Fed. R. Civ. P. 11 and 28 U.S.C.

§ 1927[15]. (Aplt. App. 1875, 1885.) These sanctions followed several warnings to Medical Supply and its counsel with respect to their obligations under court rules. Based upon the history of this litigation, the district court acted well within its discretion in awarding sanctions.

A. Rule 11 Standards.

Rule 11(b), which applies to pleadings, motions and other papers, provides in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
>
> (1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) 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;
>
> (3) the allegations an other factual contentions have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

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[15] Medical Supply does not contest the amount of the awards in this appeal, merely that sanctions should not have been entered. Medical Supply's prior (disbarred) counsel had opposed the sanctions motions (Aplt. 348, 759) but no legal representative re-filed or adopted those pleadings. In its August 7, 2006 order, the district court struck Lipari's "Motion to Strike" the fee applications (Aplt. App. 615) finding that the motion was filed improvidently (Aplt. App. 1869).

Rule 11 is "intended to be vigorously applied by district courts to curb widely acknowledged abuse resulting from the filing of frivolous pleadings and other papers." *Perkins v. General Motors Corp.*, 129 F.R.D. 655, 658 (W.D. Mo. 1990) (quoting *Adduono v. World Hockey Ass'n.*, 824 F.2d 617, 621 (8th Cir. 1987)). The Rule grants the Court discretion to sanction a party with "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2).

The party or its attorney need not act in subjective bad faith or with malice to trigger a violation of Rule 11. *Perkins*, 129 F.R.D. at 658. "Rather, an objective standard applies and the party or his attorney cannot argue 'that their subjective 'good faith' (i.e., ignorance of the law or legal procedures) somehow excuses their actions." *Id.* (citing *Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987)); *White v. General Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1990) ("A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances."). Moreover, "[a]n empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating." *In re Cascade Energy & Metals Corp.*, 87 F.3d 1146, 1151 (10th Cir. 1996) (quoting *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986)); *see also Monument Builders of*

Greater Kansas City, Inc. v. American Cemetery Assn. of Kansas, 891 F.2d 1473, 1484-85 (10th Cir. 1989) ("Rule 11 imposes an obligation on the signer of a pleading to conduct a reasonable inquiry into whether the pleading is legally frivolous or factually unsupported.").

Once the Court has found a Rule 11 violation, "imposition of sanctions is mandatory." *Perkins*, 129 F.R.D. at 658 (citing *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988)). Moreover, upon finding a violation, the Court may sanction the lawyer, the client, or both. *White*, 908 F.2d at 679 (citation omitted). Under Rule 11, Medical Supply and its counsel were provided notice of this filing and an opportunity to withdraw the objectionable pleading. (Aplt. App. 328, 431.) However, they refused.

B. Multiplication of Proceedings.

Title 28 U.S.C. § 1927 further provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Sanctions under § 1927 are discretionary, unlike those under Rule 11, and may be imposed by this Court if it finds that plaintiff's counsel acted either in subjective bad faith or that counsel's conduct was objectively vexatious. *Perkins*, 129 F.R.D. at 657 (citations omitted); *see also Tenkku v. Normandy Bank*, 348 F.3d

737, 743 (8th Cir. 2003) ("Section 1927 warrants sanctions when an attorney's conduct 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'") (quoting *Perkins*). As the *Perkins* decision notes, sanctions under § 1927 have been held appropriate in a variety of circumstances. *Id*. (citing *Taylor v. Belger Cartage Service, Inc.*, 102 F.R.D. 172 (W.D. Mo. 1984) (union member's attorney unreasonably and vexatiously multiplied proceedings by filing and pursuing the case)); *see also Tenkku*, 348 F.3d 743-44 (where the Eighth Circuit affirmed the district court's imposition of sanctions, but imposing them on plaintiff's counsel instead of plaintiff, after the trial court noted that plaintiff's counsel's own motion for sanctions "while frivolous of its own accord, is the latest example of a pattern of unnecessary and hostile pleadings the court has been forced to review in this matter," all of which "created unnecessary and protracted delays in discovery."); *Lee v. First Lenders Ins. Services, Inc.*, 236 F.3d 443 (8th Cir. 2001).

C. Medical Supply and its Counsel Violated These Well-Recognized Prohibitions.

Medical Supply and its counsel violated both Rule 11 and § 1927 when they filed this lawsuit. Defendants were properly awarded sanctions under Rule 11 and their attorneys' fees under § 1927 in this action because Medical Supply unreasonably and vexatiously multiplied proceedings by filing and pursuing this case after many of the same claims had been dismissed previously by the Kansas

District Court, with an express admonition to appellant's counsel that he was to take greater care to ensure that the claims he brings on his client's behalf are supported by the law and facts. *See* 2003 WL 21479192 *6 (citing Rule 11(b)(2)). This Court affirmed, echoing the district court's cautionary language to Medical Supply's counsel in its November 8, 2004 Order and later imposing sanctions for filing a frivolous appeal. 112 Fed. Appx. 730 (10th Cir. 2004).[16]

Despite these clear admonitions and the imposition of sanctions, Medical Supply filed essentially the same lawsuit against these defendants. The additional claims are as devoid of factual or legal support as those previously dismissed. This lawsuit represents just the latest example of a pattern of frivolous and legally and factually baseless pleadings. Such conduct is exactly the type Rule 11 and § 1927 were designed to redress.

Finally, Medical Supply resorted to filing a RICO claim and even ratcheted up its conduct by asserting claims against the law firm representing several of the defendants. (Aplt. App. 142-46.) Included among plaintiff's allegations against the law firm are that, by defending the lawsuit and purportedly creating and

[16] Unfortunately, Medical Supply and Mr. Lipari have failed to heed any of the advice given by the district court or this Court in *Medical Supply I*, *Medical Supply II* or *Medical Supply III*. Although it has not currently reasserted its federal claims, Mr. Lipari has nevertheless continued its pursuit of these frivolous claims. *See Lipari v. U.S. Bancorp, et al.*, Case No. 06-1012-CV-W-FJG (W.D. Mo.); *Lipari v. General Elec. Co.*, Case No. 0616-CV-07421 (Cir. Ct. Jackson Cty., Mo.). The *Lipari v. U.S. Bancorp* case recently was transferred to the District of Kansas.

arranging for ethics complaints to be prosecuted by the Kansas Disciplinary Administrator, the firm engaged in racketeering. *Id*. Even if these bizarre allegations were taken as true, they are insufficient to state a RICO claim. The claims are wholly spurious.

If that was not enough, Medical Supply also implicated a federal magistrate as a participant in the conduct it now claims constitutes racketeering activity. Specifically, Medical Supply alleged that Magistrate James P. O'Hara, a former partner with the defendant law firm, provided "false and misleading testimony" to the Kansas Disciplinary Administrator against its counsel, Bret Landrith. (*Id*. 143.) Not surprisingly, Medical Supply did not identify how the testimony was "false and misleading."[17]

In *KPERS v. Reimer & Koger Assoc., Inc.*, 165 F.3d 627, 630 (8th Cir. 1999), the Eighth Circuit Court of Appeals affirmed an award of attorneys' fees and costs under § 1927 on the ground that plaintiff's counsel had unreasonably and vexatiously multiplied the proceedings in filing a subsequent action asserting claims identical to those already rejected in an earlier suit. As in *KPERS*, Medical Supply and its counsel were appropriately sanctioned and ordered to pay defendants' attorneys' fees and costs.

The judgment for sanctions should be affirmed.

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[17] Medical Supply's counsel ultimately was disbarred. *In re Landrith*, 124 P.3d 467 (Kan. 2005).

CONCLUSION

The district court's judgment should be affirmed. While Medical Supply's Notice of Appeal is plainly untimely, even if the Court considers the arguments, Medical Supply's appeal is unavailing. *Res judicata* or collateral estoppel bars this action. Moreover, Medical Supply's allegations fail to state a claim. Finally, the award of sanctions should be affirmed in light of Medical Supply's conduct.

ORAL ARGUMENT NOT REQUESTED

Oral argument is unnecessary in this appeal. Prior related appeals have been decided without oral argument. This appeal does not raise any new or novel issues about which oral argument may be beneficial to the Court.

/s/ Mark A. Olthoff
MARK A. OLTHOFF U.S. KS Ct. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361

ATTORNEYS FOR APPELLEES
U.S. BANCORP N.A., U.S. BANK NATIONAL ASSOCIATION, JERRY A. GRUNDHOFER, ANDREW CECERE, PIPER JAFFRAY COMPANIES, AND ANDREW S. DUFF

/s/ Stephen N. Roberts
STEPHEN N. ROBERTS
JANICE VAUGHN MOCK
NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP
50 California Street, 34th Floor
San Francisco, California 94111

JOHN K. POWER
HUSCH & EPPENBERGER
1200 Main Street
Suite 1700
Kansas City, Missouri 64105

ATTORNEYS FOR APPELLEES
NEOFORMA, INC. AND ROBERT J.
ZOLLARS

/s/ Kathleen Bone Spangler
KATHLEEN BONE SPANGLER
VINSON & ELKINS, L.L.P.
1001 Fannin Street
Suite 2300
Houston, Texas 77002-6760

JOHN K. POWER
HUSCH & EPPENBERGER
1200 Main Street
Suite 1700
Kansas City, Missouri 64105

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

/s/ William E. Quirk
WILLIAM E. QUIRK
KATHLEEN A. HARDEE
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929

ATTORNEYS FOR APPELLEE
SHUGHART THOMSON & KILROY,
WATKINS BOULWARE, P.C

CERTIFICATE OF COMPLIANCE

PURSUANT TO RULE 32(a)

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/s/ William E. Quirk
ATTORNEY FOR APPELLEES

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the above and foregoing was delivered via United States mail, postage prepaid, this 9th day of April, 2007, to:

Ira Dennis Hawver, Esq.
6993 Highway 92
Ozawkie, KS 66070

Attorneys for Appellant

Stephen N. Roberts, Esq.
Janice Vaughn Mock, Esq.
Nossaman, Guthner, Knox & Elliott, LLP
50 California Street, 34th Floor
San Francisco, CA 94111

John K. Power, Esq.
Husch & Eppenberger
1200 Main Street
Suite 1700
Kansas City, MO 64105

Attorneys for Appellees Neoforma, Inc. and Robert J. Zollars

Kathleen Bone Spangler, Esq.
Vinson & Elkins, L.L.P.
1001 Fannin Street
Suite 2300
Houston, TX 77002-6760

John K. Power, Esq.
Husch & Eppenberger
1200 Main Street
Suite 1700
Kansas City, MO 64105

Attorneys for Appellees Novation, LLC, Curt Nonomaque, Volunteer Hospital Association, University Healthsystem Consortium and Robert J. Baker

William E. Quirk, Esq.
Kathleen A. Hardee, Esq.
Shughart Thomson & Kilroy, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, MO 64105-1929

Attorneys for Appellee Shughart Thomson & Kilroy, Watkins Boulware, P.C.

/s/ William E. Quirk
Attorney for Appellees U.S. Bancorp, U.S. Bank National Association and Piper Jaffray Companies