United States Court of Appeals

For the Tenth Circuit

Docket No. 06- 3331 (10th Cir.)

KS Dist. Court Case No.: 05-2299
Formerly W.D. MO. Case No. 05-0210

MEDICAL SUPPLY CHAIN, INC., SAMUEL K. LIPARI

v.

NOVATION, LLC, NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J. BAKER, US BANCORP, NA;US BANK; JERRY A. GRUNDHOFER; ANDREW CECERE; THE PIPER JAFFRAY COMPANIES; ANDREW S. DUFF; SHUGHART THOMSON & KILROY; WATKINS BOULWARE, P.C.

Appeal from
the United States District Court
for the District of Kansas

Hon. Judge Carlos Murguia presiding

Brief Of The Appellant

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT UNDER F.R.A.P. 26.1

Medical Supply Chain, Inc. (now dissolved) has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PRIOR OR RELATED LITIGATION

Medical Supply Chain, Inc. v. US Bancorp, NA, et al, case no. 02-2539-CM ("*Medical Supply I*") Case 2:05-cv-02299-CM-GLR (All federal claims dismissed, state claims expressly dismissed without prejudice. No discovery or evidentiary hearings. Medical Supply's counsel admonished for failing to research facts or law, including asserting an express private right of action under the USA PATRIOT Act.)

Medical Supply Chain, Inc. v. US Bancorp, NA, et al 112 Fed. Appx. 730 (10th Cir. 2004) (Medical Supply's counsel sanctioned double attorney's fees and costs $23, 956.00 for asserting the existence of an express private right of action under the USA PATRIOT Act and asserting co-conspirators identified in the complaint need not be named defendants.)

Medical Supply Chain, Inc. v. General Electric Company, et al., KS Dist. case no. 03-2324-CM ("*Medical Supply II*") (All federal claims dismissed, state claims expressly dismissed without prejudice. No discovery or evidentiary hearings. Medical Supply's counsel admonished for failing to research facts or law

including asserting that co-conspirators identified in the complaint need not be named defendants.)

Medical Supply Chain, Inc. v. General Electric Company, et al. 144 Fed. Appx. 708 (10th Cir. 2005) (Trial court overturned for ruling against sanctions based on merits of state contract claims.)

In re Landrith, 124 P.3d 467, 485-86 (Kan. 2005) (Medical Supply's counsel disbarred for taking *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129 at 1145 (10th Cir., 2006) to federal court and for representation James Bolden's witness David Price.)

Bolden v. City of Topeka, Kan., 441 F.3d 1129 at 1145 (10th Cir., 2006) (Trial court overturned on dismissal of federal civil rights claims after Bret Landrith is disbarred.)

In the Matter of Bret D. Landrith Kansas District Court reciprocal disbarment action continued at request of the respondent until *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129 (10th Cir., 2006) and *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05-2299 were decided. The Kansas District court reciprocally disbarred Bret D. Landrith after the trial court ordered dismissal and sanctions in *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05-2299 without waiting for the Tenth Circuit decision in *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129.

Samuel Lipari v. *General Electric Company, et al.* 16th Cir Mo. Case no. 0616-CV07421. (Defendant's Motion for Dismissal overruled, then removed to W.D. of Missouri by defendants.)

In Re Samuel K. Lipari, (Petition for Writ of Mandamus to require remanding of *Samuel Lipari* v. *General Electric Company, et al.* Denied), (8th Cir. 2006)

Samuel Lipari v. *General Electric Company, et al.* W.D. MO. Case no. 06-0573-CV-W-FJG Remanded for lack of federal jurisdiction.

Samuel Lipari v. *US Bancorp, NA, et al*, 16th Cir Mo. Case no. 0616-CV32307. (Defendants removed to W.D. of Missouri asserting diversity.)

Samuel Lipari v. *US Bancorp, NA, et al*, United States District Court, Western District of Missouri Case No. 06-1012-CV-W-FJG. (Plaintiff has petitioned for remand arguing removal is improper due to existence of diversity when the same claims were filed under supplementary jurisdiction in *Medical Supply Chain, Inc. v. Neoforma et al* W.Dist. of MO Case No. 05-0210- CV-W-ODS which are now *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05-2299.)

Rochester v. C.R. Bard, Inc., Tyco International Inc., Tyco Healthcare Group LP, Novation LLC, VHA Inc., Premier and Premier Purchasing. United States District Court, Eastern District of Texas Civil Action No. 304 CV 060, (A lawsuit brought by hospital supply manufacturer Rochester. C.R. Bard settled for

$49 million dollars. Premier has been dismissed from the antitrust claim in an agreement to pay Rochester $8.8 million dollars.)

STATEMENT OF APPELLATE JURISDICTION

"The district court had original jurisdiction over the antitrust claims pursuant to 28 U.S.C. § 1337, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367. We have jurisdiction under 28 U.S.C. § 1291." [footnote omitted] *Full Draw Prod. v. Easton Sports Inc*., 182 F.3d 745 at 749 (10th Cir., 1999).

The appeal is from the trial court's August 7th, 2006 order striking Lipari's Motion for Reconsideration of the court's earlier dismissal order.

BRIEF OF THE APPELLANT

STATEMENT OF THE CASE

Medical Supply, having lost a prospective injunctive relief action against a subset of alleged hospital supply co-conspirators brought the present action for damages against the same and additional co-conspirators resulting from their subsequent conduct, including conduct to interfere with Medical Supply's litigation.

STATEMENT OF FACTS

Medical Supply's complaint begins with a three-page outline that states the specific numbered sections where averments of facts supporting the required elements of Medical Supply's claims are stated.

At ¶¶107-108 aplt. app. at pgs. 36-39 Medical Supply states the controlling case law giving legal jurisdiction for Medical Supply's current action for damages after earlier failing to obtain prospective relief.

Medical Supply's current action does not seek to undo orders made in *Medical Supply I*.

No final judgment on Medical Supply's claims was entered in *Medical*

Supply I, the earlier action for prospective relief. Pg. 1952.

The trial court in *Medical Supply I* expressly dismissed supplemental Medical Supply claims related to contract and theft of trade secrets without prejudice and those claims were brought in Missouri state court by Samuel Lipari pro se and were subsequently removed by the defendants to Western District of Missouri, the court where they were previously filed as part of the current claim or controversy. Aplt. App. at 2432.

Lipari is seeking remand based on the argument removal was improper. Aplt. App. at 2511.

The trial court dismissed Medical Supply's current federal claims for failing to sufficiently plead the elements. No discovery has been granted in this or the preceding actions.

The following is an incomplete set of averments from the complaint (Aplt. App. at 36-151) that are listed relative to the subheadings identified by controlling precedent as the elements for sufficiently pleading the underlined claims:

Sherman Act § 1:

(1) a contract, combination, or conspiracy among two or more indep. actors;

Medical Supply's complaint alleges with detailed facts the formation of a cartel in the combination of the former competitors Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association and University Healthsystem Consortium for the purpose of creating Exclusionary Contracts and Loyalty Agreements to restrain trade in ¶¶178-220 pgs. 86-95.

(2) that unreasonably restrains trade;

In ¶¶ 255 –309 pgs. 86-109 Medical Supply's complaint describes the defendants' concerted refusal to deal in denying the agreed escrow accounts Medical Supply and the Independence, Missouri US Bank branch had planned to capitalize Medical Supply's entry into the hospital supply market (alleged to be group boycott a *per se* unreasonable restraint of trade).

In ¶¶ 337-369 pgs. 98-107 Medical Supply's complaint describes the defendants' concerted refusal to deal in concerted effort with the non defendant alleged co-conspirators GE And GHX, LLC to act against their own short term profit interest and in knowing coordination with Neoforma, Inc. in an intentional effort to deprive Medical Supply in June 2003 of its contracted or bargained for capitalization of $350,000.00 to enter the market for hospital supplies (alleged to be group boycott a *per se* unreasonable restraint of trade).

In ¶¶ 203-210, pgs. 74-76 ¶¶ 386-396 pgs. 112-113 Medical Supply's complaint describes the defendants' product tying arrangements (alleged illegal product tying arrangements a *per se* unreasonable restraint of trade).

In ¶¶ 419-422 pgs. 118-119 Medical Supply's complaint describes the defendants' plans to merge the direct competitors Neoforma with GHX LLC to monopolize all of the product market for hospital supplies delivered though electronic supply chain systems in the nation (alleged to be combination to restrain trade horizontally a *per se* unreasonable restraint of trade).

(3) is in, or substantially affects, interstate commerce

Medical Supply's complaint alleges a substantial harm to consumers, hospitals, nursing homes, state governments, national health insurance plans and thousands of lost lives from decreased access to healthcare resulting from artificially inflated prices, ¶¶59-89 pgs. 46-51.

Sherman Act § 2: Monopolization

(1) the possession of monopoly power

Medical Supply Chain's complaint at ¶¶ 380, 438 pgs. 111, 122 alleged power over a controlling market share of hospital supplies, ¶ 455 pg. 127 power through long term exclusive dealing contracts to maintain higher prices.

Medical Supply Chain's complaint at ¶¶ 36, 50, 502 alleged power to dominate early stage capitalization.

Medical Supply Chain's complaint at ¶¶ 420, 467, 502 alleged power over 80% of hospital supplies through supply chain systems by merging Neoforma with GHX LLC.

a. ability to control prices

Medical Supply Chain's complaint at ¶¶ 122, 208, 216 alleged power to extract kickbacks.

Medical Supply Chain's complaint at ¶¶ 116, 120, 129, 137, 139, 149, 152, 161, 221, 365, 380, 438, 455 alleged power to maintain higher prices.

b. exclude competition

Medical Supply Chain's complaint at ¶¶ 56, 148, 181, 208 386, 387, 434 alleged power to exclude competition.

Medical Supply Chain's complaint at ¶207 alleged power to force tying arrangements .

(2) in the relevant market

Medical Supply Chain's complaint under heading # 2 "The Relative Markets" at pg. 41 identified two relevant product markets and the upstream capitalization services market:

i. relevant products

Medical Supply's complaint alleges the first relevant product market in ¶¶ 33-36 pg. 24 as goods in the 1.8 trillion dollar hospital supply market.

Medical Supply's complaint alleges the second relevant product market in ¶¶ 37-41 pg. 24 as hospital supply products distributed through artificial intelligence enhanced supply chain systems utilizing the internet.

Medical Supply's complaint alleges the third relevant product market in ¶¶ 42-46 pg. 43 as capitalization services for new technology companies seeking to finance entry into the hospital supply market.

ii. geographic markets

Medical Supply's complaint alleges all three relevant product markets to be national; sub heading a and ¶¶ 33, 36 on pg. 42 for the first relevant market of hospital supplies and sub headings b, c and ¶¶ 46 on pg. 43 for the second and

third relevant markets of hospital supplies through electronic supply chain management systems and new healthcare technology companies respectively.

(2) the willful acquisition or maintenance of that power

Medical Supply alleges ongoing conduct to acquire and maintain monopoly power through anticompetitive practices by the defendants nationwide in the three identified relevant product markets in ¶¶ 47-56 pgs. 43-45 through a scheme to falsely state price savings to member hospitals annually to conceal increased costs from kickbacks that originated October 24,1979 and continues to the present ¶¶ 109-133 pgs.55-60; through a marketing scheme by the named defendants using commercial bribes through remunerations to healthcare systems under contracts in violation of the federal Anti-Kickback Act, 42 U.S.C. § 1320a-7b ¶¶ 134-145; through combination and conspiracies among the defendants to exclude competitors from the market for hospital supplies and the market for hospital supplies through electronic supply chain systems; through using the data obtained to enforce the cartel's increased prices among suppliers allowed in to the cartel's distribution network ¶¶ 146-151; through syndicates to make markets in initial offerings to capitalize healthcare technology companies, control which firms would be allowed into the distribution network and consequently be attractive to stock investors, to extort equity from new firms entering the hospital supply market and to force the management of Neoforma to compromise the interests of its investors, violate its prospectus and not to compete with Novation, VHA and

UHC ¶¶ 151-161 pgs.45-47; and illegal tying arrangements ¶¶ 203-210, ¶¶ 386-396.

Sherman 2 Unilateral refusal to deal ¶¶ 492-495;

Sherman Act § 2: Conspiracy to Monopolize

(1) a combination or conspiracy to monopolize;

Medical Supply alleged specific agreements in paragraphs ¶¶ 178-218 to combine forces between competitors in a conspiracy to monopolize hospital supplies, hospital supplies delivered through electronic supply chain systems and the upstream capitalization of new technology suppliers entering the market for hospital supplies.

(2) overt acts done in furtherance of the combination or conspiracy;

Medical Supply alleged specific acts in paragraphs ¶¶ 455-465 to further the conspiracy or combination.

(3) an effect upon an appreciable amount of interstate commerce;

Medical Supply alleged a staggering effect on interstate commerce from the monopolization in paragraphs ¶¶ 47-94.

(4) a specific intent to monopolize

Medical Supply alleged a specific intent to monopolize in ¶¶ 419-422 describes the planned merger between Neoforma and GHX LLC to monopolize hospital supplies distributed through electronic supply chain systems.

Section 8 of the Clayton Act, 15 U.S.C. § 19

(1) one person serves as a director of two or more corporations;

Medical Supply alleged specific information about exchange of directors. Including the in ¶176 non defendant co-conspirator (defendant Novation subsidiary ¶378) Cardinal Health, Inc.'s Robert Zollars, and joined Neoforma, Inc as CEO (¶13). In ¶ 235 Medical Supply's complaint describes the defendants' placement of defendant VHA designees on two of the seven seats on the defendant Neoforma board of directors, ¶ 368 describes US Bancorp's interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX LLC the Defendant Novation and Premier, ¶ 372 describes how the defendants through The Piper Jaffray Companies subsidiary Piper Jaffray Ventures actively participated in and held seats on the boards of directors of their client companies, facilitating the monopolization of the markets for hospital supplies and hospital supplies in e-commerce, ¶ 424 describes how The Piper Jaffray Companies exchanged directors with Novation.

(2) the combined capital of any corporation exceeds $1 million;

Medical Supply's complaint at ¶ 55 states that two of the companies the complaint alleges defendants exchanged directors with Premier and Novation negotiated contracts worth more than $30 billion, ¶376 states Novation does $36 billion dollars in sales annually, ¶372 states that Piper Jaffray Ventures had $225 million dollars under management, ¶377 states that Neoforma has $10 billion in sales and receives $ 62 Million a year from Novation. Subheading 11 states

Neoforma is worth $150 Million dollars. Subheading 11 states Piper Jaffray is worth $750 Million dollars.

(3) each corporation is engaged in whole or in part in interstate commerce;

Medical Supply's complaint alleges the defendants engage in interstate commerce ¶¶ 33, 36 and sub headings b, c and ¶ 46 sub heading f , ¶ 376.

(4) the corporations compete with one another

Medical Supply's complaint describes the defendants' elimination of competition amongst each other after exchanging directors in ¶¶ 40, 147, 378, 150, 181, 191, 376, 378, 455, 457, 458, 464, 466, 500.

18 U.S.C. § 1962(c) (RICO)

(1) participated in the conduct

Medical Supply's complaint alleges at ¶¶430, 488, 507, 573, 574, that specifically named defendants participated in the operation and management of the hospital group purchasing enterprise to artificially inflate prices paid by Medicare, Medicaid and Champus. The complaint alleges that the defendants created agreements through unlawful acts and that Shughart Thomson & Kilroy later became part of that enterprise ¶512.

(2) of an enterprise

Medical Supply's complaint alleges at ¶¶151-152, 159-161 that US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff took over Neoforma, Inc. and ran it counter to Neoforma's business plan and prospectus and against the interests of its investors for the purposes of

furthering the RICO enterprise scheme to overcharge government and private insurers for hospital supply costs.

(3) through a pattern

Medical Supply's complaint alleges more than two predicate acts in furtherance of the Defendants' enterprise. Over 14 acts are listed *infra*:

(4) of racketeering activity:

i. 18 U.S.C. § 1962(c) Hobbs Act Prohibited Extortion

Medical Supply's complaint alleges theft of trade secrets at ¶¶297, 316-322 theft of trade secrets to obstruct Medical Supply's entry into the hospital supply market in violation Hobbs Act.

Medical Supply's complaint alleges extortion at ¶¶171, 180, 198, 210, 211, 213, 215, 219, 368, 369, 399-406, 414, 416-418, 479-482-485, 488, 490.

i. 18 U.S.C. § 1962(c) Commercial Bribery

Medical Supply's complaint alleges commercial bribes ¶¶ 141-143 (HRDI scheme)184, 210, 211.

In ¶143 Medical Supply's complaint alleges Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC have made use of payments to a third party in which hospital CEO's are stakeholders in order to conceal the commercial bribe nature of the payments through Healthcare Research and Development Institute ("HRDI")

ii. 18 U.S.C. § 1962(c) Fraud based Allegations subject to Rule 9

Medical Supply pled fraudulent RICO predicate acts describing who, what, where and when misrepresentations were made and how they materially deceived to further the enterprise and injure Medical Supply in ¶ 268 Fraudulent failure to reveal US Bancorp's ownership of the treasury fund selected for escrow accounts, despite fiduciary relationship; ¶¶275, 278 Fraud pretext of USA PATRIOT ACT; and ¶¶392-396 Novation's creation and use of a fraudulent Surgical Instrument savings calculator software program, ¶ 126 Novation's inflated system wide savings report for 2005.

In ¶ 152 the complaint identified US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff benefit from Piper Jaffray's false recommendations on Neoforma that US Bancorp and Piper Jaffray were fined and paid $32.5 million fine to settle these securities fraud charges brought by with the SEC, NASD, NYSE, NASAA, and the New York Attorney General for the fraudulent research.

Association in Fact Enterprise

(1) union or group of individuals associated in fact although not a legal entity

The group purchasing enterprise alleged was different than the defendants' corporate and subsidiary relationships and included the companies Novation LLC, Neoforma, Inc. VHA and UHC that had partial ownership in each other, but also included US Bancorp, US Bank and the Piper Jaffray companies which were independent legally of the first set of companies. Medical Supply also alleged the enterprise to include General Electric, HRDI and Shughart Thomson & Kilroy

which had no common ownership with the other entities. See ¶¶ 141-143, 151-153, and 365-369.

(2) some type of organizational structure

Medical Supply at ¶¶147-153 describes the organizational structure of the group purchasing enterprise. Each defendant's role in the group purchasing enterprise is described throughout the complaint.

(3) operation and control of the Enterprise

Medical Supply's complaint alleges at ¶¶580-581 that Shughart Thomson & Kilroy created the plan to retaliate against Medical Supply outside of the courtroom and implemented the plan, carrying out operations to assist in accomplishing the group purchasing enterprise's objectives.

18 U.S.C. § 1962(d) (RICO) Conspiracy:

(1) independent violation of subsections (a), (b), or (c)

Medical Supply's complaint alleges the above independent violations of 18 U.S.C. § 1962(c) theft of trade secrets at ¶¶297, 316-322 theft of trade secrets to obstruct Medical Supply's entry into the hospital supply market in violation Hobbs Act. Medical Supply's complaint alleges extortion at ¶¶171, 180, 198, 210, 211, 213, 215, 219, 368, 369, 399-406, 414, 416-418, 479-482-485, 488, 490. Medical Supply's complaint alleges commercial bribes ¶¶ 141-143 (HRDI scheme)184, 210, 211.

(2) conspiracy to violate

Medical Supply's complaint alleges conspiracy to violate RICO at ¶¶ 347, 370, 374, 398, 404-407, 428, 430, 487, 549.

(3) knowing participation

Medical Supply's complaint alleges knowing participation at ¶¶ 410, 425, 427, 430, 488, and 549.

(4) at the direction of defendant co-conspirators:

Medical Supply's complaint alleges conduct directed by coconspirators at ¶¶ 405, 413, and 488.

(5) specificity what the agreement was,

Medical Supply's complaint alleges specifically the agreement or scheme- the over arching plan to illegally inflate hospital supply costs to overcharge government and private health insurers was at ¶¶ 109-130, 430, 573.

(6) who entered into the agreement,

Medical Supply's complaint alleges what persons and entities entered into the agreement at ¶¶ 141-143, 151-153, 365-369, and at ¶¶ 410, 425, 427, 430, 488, and 549.

(7) the agreement commenced,

Medical Supply's complaint alleges at ¶ 573 that "The Defendants targeted Medical Supply's founder in 1995 and targeted Medical Supply upon its incorporation in 2000" and that the coconspirators renewed their agreement commencing at ¶ 430 "…in the period from December 14, 2004 to February 3rd, 2005."

(8) what actions were taken in furtherance of it

Medical Supply's complaint alleges actions in furtherance of the conspiracy at ¶¶ 413-418, 580-592.

Medical Supply's supplemental state law claims against GE from Medical Supply II were improperly removed from Missouri 16th Circuit State Court at Independence, Missouri to the Western District of Missouri court of Hon. Judge Fernando J. Gaitan, Jr. whose disclosure stated was on the board of St. Luke's Healthcare System, a Lee's Summit Missouri hospital that co-owns the defendant VHA and the defendant Novation. See pg. 2523.

Hon. Senator Mike DeWine, the chair of the US Senate Judiciary Committee's Antitrust Subcommittee hearing that during the fourth year of antitrust hearings on the defendant Novation's anticompetitive conduct in the hospital supply market concluded Novation's abuses could be better corrected with private antitrust litigation than with new legislation ¶95 on pg.52. Senator Mike DeWine lost his re-election on November 4, 2006. The senator from Missouri, Hon. Jim Talent also lost his seat in part because of the healthcare issue. See KC Star Buzz Blog Sept 29, 2006 CAMPAIGN AD BUZZ | McCaskill criticizes Talent on Medicaid.

On December 12, 2006 Hon. Judge Fernando J. Gaitan, Jr. remanded the action back to state court for lack of federal jurisdiction. A jury trial is scheduled for October 29th, 2007.

President George Bush who has observed that there is an absence of competition in healthcare (¶47 on pg.43) came to St. Luke's Health System in Lee's Summit, Missouri with Secretary of Health and Human Services Michael Leavitt, two days after the State of the Union speech to personally initiate the administration's plan to make healthcare affordable. Office of the President, January 25, 2007 press release.

Governor Matt Blunt described in the complaint ¶85 at pg. 50 as having to cut Missouri citizens from Medicaid because of hospital supply cost increases, made healthcare the central priority of his State of the State speech but on January 25th chose to speak about healthcare at other Missouri communities rather than appear with President George Bush in Lee's Summit. Office of the President, January 25, 2007 press release Comments of Secretary Leavitt.

On the same day, the New York Times reported that the Attorney General for the State of Connecticut, Richard Blumenthal reached a settlement with H.R.D.I. that Medical Supply identified as a co-conspirator but did not name as a defendant over the commercial bribes given to hospital administrators ¶¶ 141-143 pg. 61. H.R.D.I. agreed to end operations as a for profit company. "Group Settles Health Sales Conflict Case", NY Times Jan. 25, 2007

US Bancorp and US Bank NA removed the supplemental state claims in the present action to the Western District of Missouri court of Hon. Judge Fernando J. Gaitan, Jr.. Medical Supply filed a timely motion for remand alleging improper removal which is awaiting a decision. See pg. 2511.

SUMMARY OF ARGUMENTS

Medical Supply and Samuel Lipari argue that earlier litigation prior to the breach of the contracts with US Bank had no claim preclusion effect on the current claims for damages under clearly established Tenth Circuit applications of Restatement (Second), Judgments § 24 Transactional Analysis to pre-breach litigation. Medical Supply and Samuel Lipari also argue each required element of each count was pled and that Samuel Lipari had standing to seek reconsideration pro se as the assignee of a dissolved Missouri corporation.

I. Whether The Trial Court Erred By Failing To Apply Transactional Analysis And Lawlor To Determine If Medical Supply And Lipari's Claims Were Precluded By *Medical Supply I*.

Standard of Review. "We apply a de novo standard of review to questions of res judicata." *May v. Parker-Abbott Transfer and Storage, Inc*., 899 F.2d 1007 (C.A.10 (Colo.), 1990).

At page 20 of the trial court Memorandum and Order pg. 1508, the trial court states Medical Supply's claims summarily as causes of action by statute number without examining the different transactions the claims are based on.

The clear error of the court is strikingly revealed in the court's concise recitation of ***causes of action*** the court had dismissed in the earlier *Medical Supply I* action simply because they are again ***causes of action*** in the present complaint. The court was mistaken over the third element of Claim Preclusion that while still using the language "cause of action" has been refined in the Tenth Circuit to reflect The Restatement (Second), Judgments § 24 and cannot be satisfied unless

the subject *transactions* themselves are identical. The memorandums of the defendants were of no aid to the court in that they consistently failed to refute Medical Supply's argument that transactional analysis and *Lawlor* controlled the issue of Claim Preclusion or identity of causes of action. "The confusion may stem from the fact that the Restatement (Second) of Judgments employed the same evidence test until 1982, when it adopted the transactional test." *Agriserve, Inc. v. Belden*, 643 N.E.2d 1193, 268 Ill.App.3d 828 special concurrence at pg. 1199 (Ill. App. 4 Dist., 1994).

The Requirements For Claim Preclusion

The Tenth Circuit court has adopted the transactional approach of the Restatement (Second) of Judgments in determining what constitutes identity of the causes of action. *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1335-36 (10th Cir. 1988). The Restatement (Second), Judgments § 24, comment (f), p. 203 (1982) and illustrations 10 and 12 to the Restatement incorporate the holding of *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 327-28, 75 S. Ct. 865, 99 L. Ed. 1122 (1955) (prior conspiracy action does not preclude second conspiracy action against same defendant where plaintiff relies on conspiratorial acts postdating judgment in first action)

Restatement (Second) of Judgments, section 24, comment f (1982), reads:

> " Material operative facts occurring after the decision in an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first."

Illustrations 10 and 12 of the Restatement provide examples as to how section 24, comment f, operates:

> "10. A brings an action against B to set aside a transfer of land on the ground that it was procured by fraud. A fails to prove the fraud and judgment is given for the defendant. A is not precluded from maintaining an action to recover the land on the ground that **since judgment was rendered B has forfeited the land to the plaintiff for breach of a condition** in the conveyance.
>
> * * *
>
> 12. The government **fails in an action against a defendant under an antitrust statute for lack of adequate proof that the defendant participated in a conspiracy to restrain trade. The government is not precluded from a second action against the same defendant in which it relies on conspiratorial acts post-dating the judgment in the first action, and may rely also on acts preceding the judgment insofar as these lend significance to the later acts**." [Emphasis added]
>
> *Id.*

Transactional Approach Applied to Contracts

The Tenth Circuit has clearly established that the transactional approach specifically contradicts the trial court. The Tenth Circuit has determined actions filed before the breach of a contract do not have a res judicata or claim preclusive effect on a later action filed for damages after the breach. See *Petromanagement*, 835 F.2d at 1336 (citing Restatement of Judgments Sec. 62 comment h, at 250 in finding a contract is a transaction and that preclusion of claims related to the breach applies only if the breaches antedated the original action), also see *May v. Parker-Abbott Transfer and Storage, Inc.*, 899 F.2d 1007.

(1) no final judgment on the merits in an earlier action

Medical Supply entered court in *Medical Supply I* prior to being injured and for the purpose of obtaining injunctive relief under § 16 of the Sherman Act against prohibited antitrust misconduct (*Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 130, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 152 F.3d 588, 592 (7th Cir.1998)") and for declaratory relief regarding the defendants' repudiation of US Bank's contract to provide escrow accounts and financing. Medical Supply has continuously litigated its state contract and intellectual property based claims which the defendants US Bank and US Bancorp have removed to Western District of Missouri. There has not yet been a decision on the merits regarding the supplemental state law based claims.

> "The Supreme Court has expressly stated that injunctive relief under § 16 is "available even though the plaintiff has not yet suffered actual injury." *Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 130, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 152 F.3d 588, 592 (7th Cir.1998)."

B-S Steel of Kansas, Inc. v. Texas Industries, 439 F.3d 653 at 667 (10th Cir., 2006).

Medical Supply has not sought to undo the denial of injunctive relief in *Medical Supply I* and the court expressly dismissed Medical Supply's state contract and trade secret based claims without prejudice. The defendants did not appeal this determination of dismissal without prejudice and the Tenth Circuit upheld dismissal of the state claims without prejudice. The relief sought in the current action does not contradict the earlier rulings.

In *Medical Supply I*, the trial court did not make findings of fact or law relevant to many of the antitrust claims in the current action. "[A] dismissal with prejudice unaccompanied by findings has no preclusive effect on any issue. See *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *InterDigital Technology Corp. v. OKI America*, 866 F. Supp. 212 (E.D. Pa. 1994) (issue preclusion inapplicable to issue dismissed in earlier litigation without factual findings or conclusions of law). Nor does a dismissal of an action with prejudice unaccompanied by findings preclude subsequent litigation involving a different cause of action. *Connaghan v. Maxus Exploration Co*., 5 F.3d 1363 (10th Cir. 1993)." *Reid v. Pyle* (Colo. Ct. App., 2002).

Most striking of all however is that the record reveals there has never been a final judgment in *Medical Supply I* as required under Fed.R.Civ.P. 58 and the doctrine of Claim Preclusion is inapplicable. The only judgment in the case is a June 9th, 2005 entry limited to the attorney fees of $23,956.00 awarded as a sanction against Medical Supply's former counsel Bret Landrith. Document 64 on the appearance docket See pg. 2407 and pg. 1952 This judgment does not resolve any of the claims in Medial Supply's complaint or Amended Complaint.

The only judgment in *Medical Supply I* occurred on June 9th, 2005 *after* Medical Supply had filed the current complaint on March 9, 2005.

The first requirement for claim preclusion-- see Restatement (Second) of Judgments § 13 & cmt. g—is that there be a final judgment in the prior case. *Id*. §§ 13, 18-19. For purposes of determining the finality of an order, it must dispose of

all claims. (Ordinarily, a judgment is not final unless it disposes of all claims against all parties) *Avx Corp. v. Cabot Corp*., 424 F.3d 28 (Fed. 1st Cir., 2005). The Supreme Court case most often cited for preclusion effect of a prior 12(b)(6) dismissal was a dismissal in entirety:

> "2. The Rule 12(b)(6) dismissal that was the source of the Supreme Court's oft-cited footnote in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), stating that "[t]he dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a `judgment on the merits,'" id. at 399 n. 3, 101 S.Ct. 2424, was likewise a dismissal of "all of the actions `in their entirety,'" *id*. at 396, 101 S.Ct. 2424."

Avx Corp. v. Cabot Corp., 424 F.3d 28 at fn 2 (Fed. 1st Cir., 2005). By dismissing Medical Supply's state claims without prejudice in *Medical Supply I,* a determination not opposed or appealed by the defendants, the trial court elected not to make a preclusive final judgment: "A final judgment embodying the dismissal would eventually have been entered if the state claims had been later resolved by the court." *Avx Corp. v. Cabot Corp*., 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). As a non-final judgment, the *Medical Supply I* dismissal was a mere interim order. *Id*.

In the Western District of Missouri where the present action was first filed and where the US Bancorp defendants have now removed the original supplemental state law contract and trade secret claims, it was clearly established law that the plaintiff was not subject to claim preclusion. An interim order that is not accompanied by an express entry of final judgment "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights

and liabilities of all the parties." Fed.R.Civ.P. 54(b); see also, e.g., *United States v. Arkansas*, 791 F.2d 1573, 1576 (8th Cir.1986).

(2) no identity of the parties in the two suits

When a complaint is examined with sufficient particularity to resolve whether there is an identity of parties, the differences of conduct averred and roles of common parties can prevent a finding of identity. *Andersen v. Chrysler Corp*., 99 F.3d 846 at 854 (C.A.7 (Wis.), 1996).

The principal authority on whether subsequent conduct by a set of defendants that include additional parties in the antitrust context is *Lawlor*. Medical Supply's former counsel was given the Tenth Circuit's harshest sanctions (resulting in $23,956.00 and a state ethics prosecution on US Bancorp's counsel Andrew DeMarea's complaint pg. 1098) for appealing correctly under controlling US Supreme Court precedent that the trial court erred in finding that *Medical Supply I* had failed to identify independent coconspirators. *Medical Supply I*, 2003 WL 21479192, at *3 (D. Kan. June 16, 2003), aff'd, 112 Fed. Appx. 730 (10th Cir. 2004) ("Accepting the allegations contained in the complaint as true, the court finds plaintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1.")

The court and reviewing panel made this finding because the independent coconspirators in the complaint identified and described in antitrust conspiratorial agreement with the defendants were themselves not named as defendants, contradicting Medical Supply's use of *Lawlo*r: ("It has long been the rule that it is

not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.") *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 329-330, 75 S.Ct. 865, 869, 99 L.Ed. 1122 (1955); *Bigelow v. Old Dominion Copper Mining & Smelting Co*., 225 U.S. 111, 132, 32 S.Ct. 641, 644, 56 L.Ed. 1009 (1912). This rule is current law:

> "Even if a plaintiff's right to relief arises from what is realistically viewed as a single episode, **if it is a right against multiple parties—joint tortfeasors, if the right arises under tort law—he needn't join them in one suit**, *Airtite v. DPR Ltd. Partnership*, 265 Ill.App.3d 214, 202 Ill.Dec. 595, 638 N.E.2d 241, 247 (1994); *Northern Assurance Co. of America v. Square D Co*., 201 F.3d 84, 88-89 (2d Cir.2000), unless there is privity among those parties, *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 330, 75 S.Ct. 865, 99 L.Ed. 1122 (1955)." [emphasis added]

Manicki v. Zeilmann, 443 F.3d 922 at 926 (7th Cir., 2006).

The present defendants have not asserted that they were in a form of privity with the *Medical Supply I* defendants that would give preclusive effect to the earlier case.

The new defendants did not control or participate directly in the earlier *Medical Supply I* so are therefore not in privity for purposes of identity of parties. *St. Louis Baptist Temple, Inc. v. Federal Deposit Ins. Corp*., 605 F.2d 1169 (C.A.10 (Colo.), 1979).

(3) no identity of the cause of action in both suits

Under controlling Tenth Circuit case law since *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1335-36 (10th Cir. 1988) adopting the transactional analysis Rest. 2nd § 24, Medical Supply's current action for

damages is not barred by the failed attempt in *Medical Supply I* to enjoin the US Bancorp defendants from a future breach of contract which was alleged to be motivated by the US Bancorp defendants' desire to protect their interests in the hospital supply cartel.

i. The failure to use the Transactional Approach

See the requirement under Restatement (Second) of Judgments, section 24, comment f (1982) at pg. 34 s*upra* missed by the trial court.

ii. The failure to apply the Rule in *Lawlor*

Lawlor was an antitrust violation case filed by lessors of advertising posters against the manufacturer and distributor of posters and movie producers. There had been a previous settlement and a dismissal "with prejudice" involving a number of the parties involved in the second suit. The defendants sought to have the second suit dismissed on the ground of res judicata. Although both suits were based on the same wrongful conduct, the Court held that the second suit was not precluded because it was based on conduct that occurred subsequent to the previous settlement, named new defendants, and asserted new violations. *Lawlor*, 349 U.S. at 327-28, 75 S.Ct. 865; *Minarik Elec. Co. v. Electro Sales Co., Inc*., 223 F.Supp.2d 334 at fn 10 (D. Mass., 2002)

Medical Supply's new case meets each of the qualifications the Eighth Circuit (where the present action was filed) has recognized defeat res judicata under *Lawlor v. Nat'l Screen Services*, 349 U.S. 322 (1955), "the conduct presently complained of was all subsequent to the . . . [previous] judgment." *Id*. at

328, 330. Moreover, additional defendants were named (*Id.* at 325) and new antitrust violations were alleged. *Id*. at 328. In *Lawlor*, five new defendants were added, Medical Supply has added eight, seven of whom were without recognizable privity with any of the prior defendants. See also *Wilford Banks v. International Union Electronic, Electrical*, No. 03-3982 at pg. 5-6 and fn 2 (Fed. 8th Cir. 12/3/2004) (Fed. 8th Cir., 2004)(distinguished from *Lawlor* on other grounds) and *Engelhardt v. Bell & Howell Co*., 327 F.2d 30 at pg. 36 (C.A.8 (Mo.), 1964).

Bindit Corp. v. In-Flight Advertising Inc. at 1464 (2001) stated "cf., *Lawlor v. National Screen Serv. Corp*., 349 US 322, 328 ["While the 1943 judgment precludes recovery on claims arising prior to its entry, it 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"]". *St. Pierre and Que-Van Transport v. Dyer*, 208 F.3d 394 at 400 (2nd Cir., 1999) states: "Further, while a previous judgment may preclude litigation of claims that arose "prior to its entry, it 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." *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955)."

The Tenth Circuit citing *Lawlor* has overruled the Kansas District Court for failing to recognize new claims in a later action:

> "See *Lawlor v. National Screen Serv. Corp*., 349 U.S. 322, 328, 75 S.Ct. 865, 868, 99 L.Ed. 1122 (1955) (holding that while a judgment may preclude recovery on claims arising prior to its entry, "it 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"); *Commissioner of*

> *Internal Revenue v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948) ("Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding...."); Restatement (Second) of Judgments § 24 cmt. f. (1982) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may ... be made the basis of a second action not precluded by the first.").”

Phelps v. Hamilton, 122 F.3d 1309 at 1321(C.A.10 (Kan.), 1997).

The continuing monopolization of the hospital supply market through price fixing and pricing information control, long term exclusionary contracts and kickbacks alleged by Medical Supply in the new complaint are continuing antitrust violations that create new independent claims every day:

> “A state is obligated to comply continuously with the provisions of a SIP until removal or revision of those provisions is approved by the EPA. See supra at 9-11. Thus, every day of violation constitutes a new violation of the law—i.e., a new wrong—and not just a compounding of injuries caused by earlier violations. This Court finds the Supreme Court's analysis in Lawlor to be persuasive. Just as the public has a strong interest in the "vigilant enforcement" of antitrust laws, it also has a strong interest in the vigilant enforcement of the Clean Air Act. See *Lawlor*, 349 U.S. at 329, 75 S.Ct. 865 (antitrust laws); CBE I, 731 F.Supp. at 1454(CAA). As the Supreme Court noted, "Acceptance of the respondents' novel contention [that a prior judgment should bar subsequent claims] would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws [or Clean Air Act] nor the doctrine of res judicata."12 *Lawlor*, 349 U.S. at 329, 75 S.Ct. 865.”

Bayview Hunters Point v. Metropolitan Transp., 177 F.Supp.2d 1011 (N.D. Cal., *2001*).

The defendants’… “counsel completely ignored controlling Supreme Court precedent that was contrary to his position. *Szabo Food Serv., Inc. v. Canteen Corp*., 823 F.2d 1073, 1081-82 (7th Cir.1987), cert. dismissed, 485 U.S. 901

(1988) by failing to address *Lawlor* which was even expressly included in the plaintiff's complaint as a basis for bringing the present action for damages after the failure to obtain injunctive relief in *Medical Supply I*.

The defendants' and the court treated the new medical Supply complaint as the same set of facts in Medical Supply I and therefore the same claim even though most of the averments are about conduct occurring after the complaint was filed in Medical Supply I. This conclusion violates the US Supreme Court determination in *Lawlor*:

> "7. In *Lawlor*, for example, the Court insisted (1) that the question of whether the two suits could be said to involve "essentially the same course of wrongful conduct" was not "decisive" and (2) that the first action would not act as a bar to the second regardless of "whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort". *Lawlor*, at 327 and 328, 75 S.Ct. at 868."

Intermedics, Inc. v. Ventritex, Inc., 804 F.Supp. 35 at fn 7 (N.D. Cal., 1992). In law antitrust conduct creates claims with each act furthering the monopoly:

> "Each time the arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Therefore, as in Lawlor and Cream Top, those causes of action that arose subsequent to the 1983 dismissal are not barred by res judicata. Accordingly, we must reverse the District Court's order granting summary judgment in favor of appellees."

Cellar Door Productions, Inc. of Michigan v. Kay, 897 F.2d 1375 (C.A.6 (Mich.), 1990).

However, the most striking result of the trial court's failure to apply transactional analysis is that the Tenth Circuit has repeatedly shown that it leads to

the opposite result from the trial court's ruling when the earlier case precedes the breach of contract:

> "Under this approach, **this circuit also recognizes that "a 'contract' is generally considered to be a 'transaction,' so that all claims of contractual breach not brought in an original action would be subject to bar of claim preclusion, so long as the breaches antedated the original action."** *Petromanagement*, 835 F.2d at 1336 (citing Restatement of Judgments Sec. 62 comment h, at 250 "[empasis added]

May v. Parker-Abbott Transfer and Storage, Inc., 899 F.2d 1007 at 1010 (C.A.10 (Colo.), 1990).

> "By our holding, we do not go as far as the district court, which barred appellant's attempt to enforce its audit rights even as to the months April through June 1984; the period following the commencement of the lawsuit and preceding the termination of the collective bargaining agreement. **As explained above, this circuit considers separate claims of contractual breach to constitute a single "transaction" only so long as the breaches antedate the original action.** Parker-Abbott's failure, if any, to accurately compute the amounts of contributions made after the inception of the lawsuit could not have "antedated" the first lawsuit and thus would not come within the scope of our rule. **Accordingly, the district court's bar of appellant's efforts to audit Parker-Abbott's records for this limited time period is reversed. Additionally, appellee's request for fees and costs is denied."** [empasis added]

May v. Parker-Abbott Transfer and Storage, Inc., 899 F.2d 1007 at 1011 (C.A.10 (Colo.), 1990)

> "As explained above, this circuit considers **separate claims of contractual breach to constitute a single "transaction" only so long as the breaches antedate the original action.**"[empasis added]

May v. Parker-Abbott Transfer and Storage, Inc., 899 F.2d 1007 at 1011 (C.A.10 (Colo.), 1990).

While the contract as a transaction issue has been clearly addressed by the Tenth Circuit, the rulings are in keeping with the widely accepted controlling legal principle that a second action on subsequent conduct is not precluded by the first: "The doctrine of res judicata does not bar a party from bringing a claim that arose subsequent to a prior judgment involving the same parties." *American Home Assur. Co. v. Chevron, USA, Inc*., at pg. 272 and fn 22 400 F.3d 265 (5th Cir., 2005).

There is no preclusive effect of a denied injunction under federal law where the finding was merely to permit US Bank to continue its conduct without intervention. This principal was indirectly realized by this court in its ruling on a case that figures in Medical Supply's allegations:

> "Mr. Bolden filed suit in federal district court claiming numerous civil-rights violations by the City and the individual defendants arising from the destruction of his buildings. He did not ask the district court to overturn the state-court judgment. Indeed, all the state-court judgment did was permit the City to demolish Mr. Bolden's buildings—it did not require their demolition. He can be content to let stand the state court's denial of his request for injunctive relief."

Bolden v. City of Topeka, Kan., 441 F.3d 1129 at 1145 (10th Cir., 2006) and by the Kansas District in its ruling on a res judicata show cause order upon remand. *Bolden v. City of Topeka*, Case No. 02-2635-KHV (D. Kan. 2006).

Lawlor expressly addresses the failure to obtain injunctive relief in the earlier action and states it is not a bar to a later action:

> "There is no merit, therefore, in the respondents' contention that petitioners are precluded by their failure in the 1942 suit to press their demand for

> injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. **Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws** nor the doctrine of res judicata." [emphasis added]

Id. at pg. 329.

The Full and Fair Opportunity to Litigate Exception

Collateral estoppel cannot be applied against Medical Supply unless the plaintiff had an opportunity to "fully and fairly" present and argue its claims in the prior proceeding. *Smith Machinery Co. v. Hesston Corp*., 878 F.2d 1290, 1293 (10th Cir.1989), cert. denied, 493 U.S. 1073, 110 S.Ct. 1119, 107 L.Ed.2d 1026 (1990). "The fairness of the process is determined by examining any procedural limitations, the party's incentive to fully litigate the claim, and whether effective litigation was limited by the nature or relationship of the parties." *Nwosun v. General Mills Rests., Inc.*, 124 F.3d 1255, 1257-58 (10th Cir.1997).

Medical Supply's complaint extensively avers conduct of the defendants that materially interfered with the ability to fully and fairly present its claims or indeed even get a meaningful hearing or review of those claims. Those averments clearly describe conduct after the filing of *Medical Supply I* and should provide for the appellant the opportunity to obtain discovery and to present evidence of the averred misconduct which was clearly designed to prevent the plaintiff from fully and fairly presenting and arguing its claims.

II: Whether The Trial Court Erred In Finding Medical Supply And Lipari Failed To State Antitrust Claims

Standard of Review: The legal sufficiency of a complaint under Rule 12(b)(6) is a question of law which this Court reviews de novo. Id.; *S. Disposal, Inc. v. Tex. Waste Mgmt*., 161 F.3d 1259, 1261-62 (10th Cir.1998).

The trial court found as it did in *Medical Supply I* that the plaintiff had failed to sufficiently plead any claim under any Sherman I or II count and it also found the plaintiff failed to sufficiently plead interlocking directors under Clayton Act, 15 U.S.C. § 19. The court imposed an erroneously heightened pleading standard for antitrust claims that failed to follow *Swierkiewicz v. Sorema N.A*., 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (citing *Leatherman*), The Tenth Circuit sanctioned Medical Supply's former counsel in *Medical Supply I* for making this "frivolous argument" (aplt. app. at pgs. 2184) that later became the opinion in the Second Circuit in *Twombly v. Bell Atlantic Corp.,* 425 F.3d 99 at 107 (Fed. 2nd Cir., 2005) and even the Kansas District court rule in *In re Urethane Antitrust Litigation*, 409 F.Supp.2d 1275 at 1282-1283 (D. Kan., 2006).

The references to the complaint in the Appellant Brief Statement of Facts *supra* reveals the trial court's clear error in finding Medical Supply had failed to allege the three elements required to plead 15 U.S.C. § 1 in *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992) and 1 Irving Scher, et al., *Antitrust Adviser* (4th ed. 2001) § 1.04.

There is no heightened pleading standard for conspiracy or antitrust conspiracy. A conspiracy may consist of any mutual agreement or arrangement,

knowingly made, between two or more competitors. *Law v. Nat'l Collegiate Athletic Ass'n* 185 F.R.D. 324, 336, n.19 (D. Kan. 1999). The plaintiff has met the burden of pleading a conspiracy by "identif[ying] the co-conspirators and describ[ing] the nature and effect of the alleged conspiracy." *Alco Standard Corp. v. Schmid Bros*., 647 F.Supp. 4, 6 (S.D.N.Y.1986).

Medical Supply's Sherman 1 claims do not warrant dismissal. See *Eastman Kodak Co. v. Image Tech. Servs. Inc*., 504 U.S. 451, 478, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) ("The alleged conduct — higher service prices and market foreclosure — is facially anticompetitive and exactly the harm that antitrust laws aim to prevent."); *United States v. VISA U.S.A., In*c., 344 F.3d 229, at 241-43 (2d Cir.2003) (rules for vendor participation causing reduction in output and consumer choice had anticompetitive effect); *Primetime 24 Joint Venture v. National Broadcasting Co*., 219 F.3d 92, 103-04 (2d Cir.2000) (refusing to dismiss where complaint alleged agreement resulting in denial of a necessary input to a competitor).

The references to the complaint in the preceding statement of facts reveals the trial court's clear error in finding Medical Supply had failed to allege the 15 U.S.C. § 2 elements for Monopoly in *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) including "monopoly power is defined as the ability both to control prices and exclude competition." *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1567 (10th Cir. 1991) and averment of a relevant product and geographic markets. *Id.*

Medical Supply clearly alleged a national market, the correct geographic market for addressing Group Purchasing Organization("GPO") restraint of trade:

> "[T]he Eighth Circuit Court of Appeals elaborated on the Supreme Court's analysis, determining that the relevant geographic market is the area "to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir.1994), cert. denied, 513 U.S. 1150, 115 S.Ct. 1100, 130 L.Ed.2d 1068 (1995). The geographic market need not be identified with "scientific precision," *United States v. Connecticut National Bank*, 418 U.S. 656, 669, 94 S.Ct. 2788, 41 L.Ed.2d 1016 (1974), or "by metes and bounds as a surveyor would lay off a plot of ground." *United States v. Pabst Brewing Co*., 384 U.S. 546, 549, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966) (citations omitted). Nonetheless, the relevant geographic market must be sufficiently defined so that the Court understands in which part of the country competition is threatened."

Federal Trade Com'n v. Cardinal Health, Inc., 12 F.Supp.2d 34 at pg. 49 (D.C., 1998).

It is a settled issue that the defendant Novation, the largest GPO in the history of the industry conducts itself and the practices Medical Supply has complained of in a national market, like Novation's subsidiary Cardinal Health was determined to do for the pharmaceutical sub product market of hospital supplies:

> "National Market: …GPOs negotiate contracts with several wholesalers, making the same prices available throughout the country to all of their members —local, regional, or national. See *United States v. Grinnell Corp*., 384 U.S. 563, 575, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) (determining that the relevant geographic market was national where defendants had "a national schedule of prices, rates, and terms, though the rates may [have been] varied to meet local conditions.").

Federal Trade Com'n v. Cardinal Health, Inc., 12 F.Supp.2d 34 at pg. 50 (D.C., 1998).

The complaint adequately alleges a Conspiracy to Monopolize, a claim separate from Monopolization under 15 U.S.C. § 2. To establish such a claim, plaintiff must plead and prove (1) a combination or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize. *Multistate Legal Studies. Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc*., 63 F.3d 1540, 1556 (10th Cir. 1995). See Aplt. Brief at pg. 19-24 *supra*.

Section 8 of the Clayton Act, 15 U.S.C. § 19

The references to the complaint in the Appellant Brief Statement of Facts *supra* reveals the trial court's clear error in finding Medical Supply had failed to allege the 15 U.S.C. § 19 elements for a claim of interlocking directors.

Medical Supply's complaint alleged which of the competitors had directors that interlocked with which other defendant coconspirators and identified the names of co-conspirators that were not named as defendants. The complaint identified what competitors were served by the interlocking directors and how these companies are actual competitors. The trial court was in error on elements that are not required to sufficiently plead 15 U.S.C. § 19. The essential elements of a Sec. 8 Clayton Act claim are that (1) one person serves as a director of two or more corporations; (2) the combined capital, surplus and undivided profits of any one of the corporations exceeds $1 million; (3) each corporation is engaged in whole or in part in interstate commerce; and (4) the corporations compete with one

another. *Bankamerica Corp. v. United States*, 462 U.S. 122, 124, 103 S.Ct. 2266, 2268, 76 L.Ed.2d 456 (1983); *American Bakeries Co. v. Gourmet Bakers, Inc.*, 515 F.Supp. 977, 979 (D.Md.1981).

Medical Supply identified the anticompetitive effects resulting from the interlocking directors and therefore is entitled to discovery and the right to present evidence to a jury for damages under 15 U.S.C. § 19.

Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555 (C.A.10 (N.M.), 1984) ruled that a claim for damages under Section 8 of the Clayton Act [15 U.S.C. § 19] must state (1) there were interlocking directors (no requirement was stated that they be named) and (2) that there be anticompetitive effects from the interlocking directors. Both of which the statement of facts reveals were clearly averred in Medical Supply's complaint.

The fact that Medical Supply identified the corporations who delegated or put directors on the board of their competitors is adequate to state a claim:

> "At the outset, it must be recognized that the Clayton Act, by its own terms, defines a "person" as including corporations. 15 U.S.C. § 12. There is thus no ground for disputing that corporations are subject to the prohibitions of section 8. This is hardly unusual usage in legal contexts: the notion of corporate personhood has long been a settled convention in our law. See *Clinton v. City of New York*, 524 U.S. 417, 428, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) ("Although in ordinary usage both `individual' and `person' often refer to an individual human being ... `person' often has a broader meaning in the law."). Since a corporation may act only through its human agents, see *Suez Equity Investors, L.P. v. Toronto-Dominion Ban*k, 250 F.3d 87, 101 (2d Cir.2001), the statutory language clearly admits an interpretation broader than that proposed by the defendants."

Reading Intern. v. Oaktree Capital Management LLC, 317 F.Supp.2d 301 at

331(S.D.N.Y., 2003).

III: Whether The Trial Court Erred In Finding Medical Supply And Lipari Failed To State 18 U.S.C. § 1962 (RICO) Claims

Standard of Review: The legal sufficiency of a complaint under Rule 12(b)(6) is a question of law which this Court reviews de novo. *Id*.; *S. Disposal, Inc. v. Tex. Waste Mgmt*., 161 F.3d 1259, 1261-62 (10th Cir.1998).

The Tenth Circuit in described the pleading requirement for 18 U.S.C. § 1962(c) in *Tal v. Hogan*:

> "18 U.S.C. § 1962(c) makes it illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." To survive a Rule 12(b)(6) motion, a civil RICO claim must allege the defendants (1) participated in the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Cayman Exploration Corp*., 873 F.2d at 1362; see *Sedima, S.P.R.L*., 473 U.S. at 496, 105 S.Ct. 3275. The Supreme Court has adopted the "operation or management" test to determine whether the defendant has conducted or participated in the conduct of the enterprise by having some part in directing the affairs of the enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). "For liability to be imposed under that test, the defendants must have participated in the operation or management of the RICO enterprise," *BancOklahoma Mortgage Corp*., 194 F.3d at 1100, "although it is not necessary for the participant to have significant control." *Resolution Trust Corp*., 998 F.2d at 1541(internal quotation omitted)."

Tal v. Hogan, 453 F.3d 1244 at 1270 (10th Cir., 2006).

The trial court dismissed predicate RICO acts pled by Medical Supply, erroneously believing that all predicate acts must be pled to the pleading standard for fraud:

> "**But in this case plaintiff alleges predicate acts of extortion, not fraud, and therefore no such heightened pleading standard applies**. See *Robbins*

v. Wilkie, 300 F.3d 1208, 1211 (10th Cir. 2002) (clarifying that *Farlow* and *Cayman Exploration Corp*. only require that RICO predicate acts of fraud be pleaded with particularity)" [emphasis added]

Ferluga v. Eickhoff, 408 F.Supp.2d 1153 at 1159 (D. Kan., 2006).

The defendant Shughart, Thomson & Kilroy is properly a RICO defendant: "The requirements the court finds necessary are met by the Law Firm here. Bryan Reynolds's RICO claim cannot be dismissed for failure to plead a proper RICO enterprise." *Reynolds v. Condon*, 908 F.Supp. 1494 at 1510 (N.D. Iowa, 1995).

The Appellant Brief statement of facts at pgs. 25-30 *supra* describes the places in Medical Supply's complaint that aver the defendants committed the elements of RICO as an "association in fact" consisting of a "union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This type of enterprise "can be formal or informal, [but] some type of organizational structure is required." *Stachon v. United Consumers Club, Inc*., 229 F.3d 673, 675 (7th Cir.2000). *Black Radio Network, Inc. v. NYNEX Corp*., 44 F.Supp.2d 565, 580 (S.D.N.Y. 1999); with *Feinberg v. Katz*, NO. 99 Civ. 45(CSH), 2002 WL 1751135, at *12 (S.D.N.Y. July 26, 2002) (finding enterprise allegation sufficient where the complaint alleges a group without centralized hierarchy formed for the sole purpose of carrying out a pattern of racketeering acts (citing an unpublished Second Circuit opinion, *Pavlov v. Bank of New York Co., Inc*., 25 Fed. Appx. 70 (2d Cir.2002))). In perhaps its least developed form, an enterprise may be found where there is simply a "discrete economic association

existing separately from the racketeering activity." *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir.1980); see *United States v. Turkette*, 452 U.S. 576, 585, 101 S.Ct. 2524 L.Ed.2d 246 (1981).

Allegations of the existence of a RICO enterprise must meet only the "notice pleading" requirements of Fed.R.Civ. Pro. 8. *Trustees of Plumbers and Pipefitters* 886 F.Supp. 1134, 1144-45 (S.D.N.Y.1995)' *Nat'l Pension Fund v. Transworld Mech., Inc*., 886 F.Supp. 1134, 1144-45 (S.D.N.Y.1995); *Azurite Corp. v. Amster & Co*., 730 F.Supp. 571 (S.D.N.Y.1990).

Furthermore, Medical Supply pled a RICO enterprise that is "'an organization separate from the predicate acts [of racketeering] themselves,' and must be `organized in a manner amenable to hierarchial or consensual decision making.'" *Stachon v. United Consumers Club, Inc*., 229 F.3d 673, 675 *Id*.

Medical Supply's complaint meets the operation and management test of *Reves* 507 U.S. at 179, 113 S.Ct. 1163.Simply put, "one is liable under RICO only if he `participated in the operation or management of the enterprise itself.'" *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 521 (2d Cir.1994).

> "*Lockheed Martin Corp. v. Boeing Co*., 357 F.Supp.2d 1350 (M.D.Fla.2005), in which the district court ruled that by creating its bid estimates based on Lockheed Martin's confidential information, which was stolen from an ex-Lockheed employee, Boeing had "controlled" the government's bid process within the meaning of the civil RICO statute.
>
> The Lockheed Martin court relied in part on *United States v. Castro*, 89 F.3d 1443 (11th Cir.1996). In Castro, a group of lawyers paid a judge to assign them contract public defender cases. The Eleventh Circuit ruled that although the lawyers had no actual control over who received the public defender appointments, their kickbacks to the judge gave them sufficient

"control" over the court that they could be held liable for RICO violations. The Lockheed Martin court analogized Boeing's scheme to Castro, stating:

> [I]n this case, the Boeing defendants were not primarily responsible for determining which companies received . . . contracts. Yet, like the defendants in Castro, they are alleged to have engaged in illegal activity which substantially impacted the decisions of those who did have principal decision-making authority. The only difference in this case is that the decision-makers were neither aware of, nor complicit in, the alleged scheme. This is a distinction, however, that is irrelevant to the question of whether the Boeing Defendants controlled the alleged legitimate enterprise through their illegal conduct.
>
> *Lockheed Martin*, 357 F.Supp.2d at 1359-60."

James Cape & Sons Co. v. PCC Const. Co., 453 F.3d 396 at 401-402 (7th Cir., 2006).

When a RICO enterprise is described as an association in fact, "lower-rung" members of the enterprise can be deemed liable if they "knowingly implemented" decisions of upper management, thereby "enabling the enterprise to achieve its goals." *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc*., 62 F.3d 967, 979 (7th Cir.1995). The association if fact alleged by Medical Supply describes defendants "knowing participation" associates and associate companies at the direction of defendant co-conspirators:

> "A closer look at the *MCM Partners* case proves helpful in this regard. *MCM Partners* involved an alleged association-in-fact RICO enterprise consisting of various defendants who had as their purpose to make one of the defendants "`the exclusive provider of forklift and material handling and personnel moving equipment for all exhibition contractors at McCormick Place [in Chicago, Illinois].' "*Id*. at 977-78. After first noting the key differences between association-in-fact enterprises and traditional RICO enterprises, the court relied on *several* factors to conclude that certain "lower-rung" defendants knowingly implemented the decisions of the enterprise's upper management. *Id*. at 979. The court stressed that the lower-rung participants were alleged to have committed predicate acts of racketeering" `at the direction' of the enterprise's managers," and further that

> they "were vital to the achievement of the enterprise's primary goal." *Id*. (internal citation omitted). That being the case, the court concluded that the plaintiff had sufficiently stated a claim under § 1962(c)'s conduct requirement with respect to certain members of the alleged association-in-fact enterprise."

Decatur Ventures, LLC v. Stapleton Ventures, Inc., 373 F.Supp.2d 829 (S.D. Ind., 2005).

The Tenth Circuit described the pleading requirement for Section 1962(d) in *Tal v. Hogan*, 453 F.3d 1244 at 1270 (10th Cir., 2006). The above Appellant Brief statement of facts at pgs. 25-30 *supra* shows that Medical Supply sufficiently pled the elements of independent 18 U.S.C. § 1962(c) claim violations and the statement of facts also show that the complaint described more than two legally separate defendants participating in a conspiracy that included the objection to commit several substantive 18 U.S.C. § 1962 predicate acts to accomplish their over arching conspiracy to overcharge government health insurance programs. *Id*.

> "A [RICO] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor ... One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a [RICO] conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, and so punishable in itself."

Salinas, 118 S.Ct. at 476-77. *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469 at 476-77, 139 L.Ed.2d 352 (1997). "Once a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming."

United States v. Diaz, 176 F.3d 52, 97 (2d Cir.1999) (quoting *United States v. Amato*, 15 F.3d 230, 235 (2d Cir.1994)). Medical Supply § 1962(d) allegations suffice to satisfy *Salinas*.

As shown by the statement of facts, Medical Supply meets the fraud based predicate act pleading standard:"…complaints alleging fraud must comply with both Fed. R.Civ.P. 8(a) *and* 9(b). See *Figueroa Ruiz,* 896 F.2d at 648 n. 3; *Old Time Enterps.,* 862 F.2d at 1217. That is, not only must the statement of the claim "show[] that the pleader is entitled to relief," Fed.R.Civ.P. 8(a)(2), but "the circumstances constituting fraud ... [must] be stated with particularity." Fed R. Civ. P. 9(b)."

IV: Whether The Trial Court Erred In Finding Medical Supply And Lipari Failed To State Claims Under The USA PATRIOT Act, Specifically 31 U.S.C. § 5318(g)(3) And 18 U.S.C. § 1030

Standard of Review: Because the district court dismissed the Plaintiffs' USA PATRIOT At claim for want of subject matter jurisdiction, this court reviews the district court's grant of the motions to dismiss de novo. *Georgacarakos v. United States*, 420 F.3d 1185, 1186 (10th Cir.2005); *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1294 (10th Cir.2003) (grant of motion to dismiss under either Fed.R.Civ.P. 12(b)(1) or 12(b)(6) is reviewed de novo). The court assumes the truth of all facts Plaintiffs allege. *Georgacarakos*, 420 F.3d at 1186.

This court has recognized express grants of private rights of action by Congress: "The law [1872 Mining Law] expressly creates a right of action for adverse claimants. 30 U.S.C. § 30." *High Country Citizens Alliance v. Clarke*, 454

F.3d 1177 at 1183 (10th Cir., 2006). Determining the existence of a private right of action is a two step process: “The proper inquiry is two-fold: did Congress intend to create a private right of action and, if so, what were the intended limits on this private right of action.” *Guardians Ass'n of New York City Police Dept., Inc. v. Civil Service Com'n of City of New York*, 633 F.2d 232 at 255 (C.A.2 (N.Y.), 1980).

As the Supreme Court has emphasized, "absent a clearly expressed legislative intention to the contrary," the plain language of a statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc*., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

The Congress expressly created and expanded private rights of action with the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (The USA PATRIOT Act) Pub. L. No. 107-56 (2001), 115 Stat. 272. The USA PATRIOT Act created a private right of action for Medical Supply to address the conduct of the Defendants in gaining access to the FINCEN network for the purpose of filing a suspicious activity report to prevent Medical Supply from providing hospital supplies and reducing healthcare costs.

As Judge Mansfield’s dissent opposing inferred private rights of action in *Leist v. Simplot*, 638 F.2d 283:

> "If, as the majority states was the case with the 1974 amendments to the Commodity Exchange Act, Congress makes a "complete overhaul " of a statute, expressly creating other remedies, it is reasonable to expect that it will indicate any intent to **create such an important right as that to bring a private suit by an express grant, which would take but one sentence**,…" [emphasis added]

Leist v. Simplot, 638 F.2d 283 Dissent of Judge Mansfield at 327-328 (C.A.2 (N.Y.), 1981).

Through the USA PATRIOT Act, Congress amended 18 U.S.C.§1030 to include a cause of action for impairment, or potential impairment of medical diagnosis, treatment or care, physical injury, a threat to public health or safety. That one sentence referred to by Judge Mansfield is 18 U.S.C.§1030 (g): "Any person who suffers damage or loss by reason of a violation of this section **may maintain a civil action against the violator to obtain *compensatory damages*** and injunctive relief or other equitable relief."[emphasis added]

None of the many motions to dismiss or the orders of the court raised issues over whether Medical Supply sufficiently pled the requirements for a 18 U.S.C.§1030 (g) claim. *Medical Supply I* which addressed the threat of a Suspicious Activity Report used as an instrument by the defendants to enforce monopolization of the hospital supply market does not preclude an action against the defendants once a violation of the USA PATRIOT Act has been committed and Medical Supply Chain is injured:

> "In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they

were inflicted. Cf. *Schenley Industries v. N.J. Wine & Spirit Wholesalers Assn*., 272 F.Supp. 872, 887—888 (NJ 1967)" [emphases added]

Zenith Radio Corp v. Hazeltine Research, Inc, 401 U.S. 321 at 340, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

V: Whether The Trial Court Erred In Providing Medical Supply And Lipari A Chance To Amend The Petition For Relief

Standard of Review: We review the district court's decision to deny leave to amend for an abuse of discretion. *Gohier v. Enright*, 186 F.3d 1216, 1218 (10th Cir.1999). Where the decision was based on futility of amendment, however, we review de novo whether the complaint, as amended, would withstand a jurisdictional challenge. See *id*. (reviewing de novo whether complaint, as amended, would state claim). *Merida Delgado v. Gonzales*, 428 F.3d 916 at 921 (Fed. 10th Cir., 2005).

The trial court denied Medical Supply leave to amend its complaint on the very unusual grounds that Medical Supply had notice of the defects in the complaint from the defendants' motions for sanctions, the court did not supplement or comment on the defendants judgment that Medical Supply's complaint was defective. This order on its face deprives the parties of the services an independent tribunal in the sense of *Bright v. Westmoreland County*. The trial court gave no indication of independent judicial review:

"Judicial opinions are the core workproduct of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own

reason and logic."

Bright v. Westmoreland County, No. 03-4320 at pg.4 (Fed. 3rd Cir. 8/24/2004) (Fed. 3rd Cir., 2004).

The problem for the assertion that Medical Supply had notice from the defendants' motions for sanctions is that on their face the defendants' motions were the grossest misstatements of law, clearly contradicting the controlling US Supreme Court precedents on point *Lawlor v. Nat'l Screen Services*, 349 U.S. 322 (1955) and *Zenith Radio Corp v. Hazeltine Research, Inc*, 401 U.S. 321 at 340, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), the controlling precedents of the Western District of Missouri including *Wilford Banks v. International Union Electronic, Electrical*, No. 03-3982 at pg. 5- 6 and fn 2 (Fed. 8th Cir. 12/3/2004) (Fed. 8th Cir., 2004)(distinguished from *Lawlo*r on other grounds) and *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 at pg. 36 (C.A.8 (Mo.), 1964) where this action was filed. The defendants' motions to dismiss and motions for sanctions also clearly were in error over the current standard for claim preclusion in both the Eight and Tenth Circuits, incorrectly using the earlier same evidence test instead of the transactional analysis approach, despite Medical Supply's repeated memorandums of law stating the inapplicability of Claim Preclusion under transactional analysis and citation to current controlling precedent. Suggestion In Opposition To Us Bancorp NA's Motion For Sanctions pg. 348.

The defendants' motions for sanctions also clearly contradicted the express language of the USA PATRIOT Act granting the private right of action stated in

Medical Supply's complaint and stated no legal authority or published precedent for doing so.

Consequently, the trial court abused its discretion on adopting the clearly erroneous and frivolous arguments of the defendants supporting sanctions and these arguments cannot be a basis for denying amendment to correct deficiencies in Medical Supply's pleading if any exist.

> "[L]eave [to amend] shall be freely given when justice so requires," see Fed. R. Civ. P. 15(a), and we see absolutely no unfair prejudice the City, or any other reason not to allow Mr. Bolden to amend his complaint."

*Bolden v. City of Topek*a, Case No. 04-3306 at pg. 16- 17 (10th Cir. 2006.).

VI. Whether The Award Of Sanctions For Bringing The New Action Violated Rule 11 When The Plaintiff Had A Clearly Established Right To Bring A Separate Proceeding To Scrutinize The Conduct Of The Parties In *Medical Supply I*

Standard of Review. Review of the District Court's grant of sanctions is under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp., --- U.S. ----,* 110 S.Ct. 2447, 2460-61, 110 L.Ed.2d 359 (1990) (across the board abuse of discretion standard in Rule 11 cases). "A court abuses its discretion when its decision is based on an error of law." *United States v. Howell*, 285 F.3d 1263, 1267 (10th Cir. 2002).

The defendants' own motions seeking sanctions against the plaintiff violated Rule 11 and Title 28 U.S.C. § 1927. Medical Supply has the clearly established right to bring new claims based on the conduct in the litigation of *Medical Supply I*: "[A]n adverse party may, by bringing a new proceeding, invoke the power of the

courts to scrutinize the conduct of the parties in the previous action. *Marshall v. Holmes*, 141 U.S. at 599, 12 S.Ct. at 65, quoting *Johnson v. Waters*, 111 U.S. 640, 667, 4 S.Ct. 619, 633, 28 L.Ed. 547 (1884)" [emphasis added] *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895 at 901 (C.A.2 (N.Y.), 1985).

In ruling for the defendants and sanctioning the plaintiff, the District Judge abused his discretion and ruled contrary to controlling law and in the face of prima facie evidence that the complaint could not be frivolous for being supported in the above mentioned cases, an argument made by the plaintiff in his suggestion opposing sanctions. Aplt. apdx. At pgs. 349-355.

Medical Supply's current case alleges Shughart Thomson & Kilroy, P.C. on behalf of the other defendants and acting through Andrew M. DeMarea controlled racketeering conduct directed at Medical Supply's counsel for the purpose of depriving Medical Supply of legal representation. While Shughart Thomson & Kilroy, P.C. as counsel for US Bancorp, NA, US Bank, Piper Jaffray and their officers was in the only privity relationship recognizable in the earlier action, this conduct was alleged to take place after the filing of Medical Supply's Amended complaint in *Medical Supply Chain, Inc. v. US Bancorp et al*., Case No. 02-2539-CM and largely after that action was dismissed on June 16, 2003. In fact, the RICO pattern was not even discovered until 2005. See *Medical Supply v. Novation et al* complaint. Pg. 142, ¶ 573.

The Tenth Circuit has examined immunity for conduct during a civil lawsuit and found it only exists where a party is seeking redress from government.

Medical Supply has a clearly recognized right to pursue damages against the defendants for misconduct during *Medical Supply Chain I* ("purely private threats of litigation are not protected because there is no petition addressed to the government." *Cardtoons v. Major League Baseball Ass'n,* (en banc) 208 F.3d 885 at 893 (10th Cir., 2000).

The conduct Medical Supply has complained of took place after filing and amending *Medical Supply Chain I.* As such the court was clearly in error for sanctioning the plaintiff for failing to research the applicable law: *Mitchell v. City of Moore*, 218 F.3d 1190, 1202 (10th Cir. 2000) (stating in dicta "we agree with those courts holding the doctrine of claim preclusion does not necessarily bar plaintiffs from litigating claims based on conduct that occurred after the initial complaint was filed" in the previous suit.). See *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 750 F.2d 731, 739 (9th Cir.1984) (internal quotation marks omitted) (emphasis added), cert. denied, 474 U.S. 919, 106 S.Ct. 247, 88 L.Ed.2d 256 (1985); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir.1992) (decision whether or not to attempt to assert claims that arose subsequent to the filing of the action "is optional for the plaintiff; the existence of the doctrine of res judicata does not make the filing of supplements mandatory"). See *S.E.C. v. First Jersey Securities, Inc*., 101 F.3d 1450 at 1464 (C.A.2 (N.Y.), 1996).

VII: Whether The Trial Court Erred In Denying Samuel Lipari The Right To Represent His Interests Pro Se As Assignee Of The Dissolved Missouri Corporation Medical Supply Chain, Inc. By

Granting The Defendants' Motion To Strike Lipari's Timely Motion For Reconsideration.

Standard of Review: A district court's ruling on an issue of law is subject to de novo review. *Moncrief v. Williston Basin Interstate Pipeline Co*., 174 F.3d 1150, 1163-64 (10th Cir. 1999).

As a party summoned into court by the memorandum and Order's award of sanctions, Lipari had the right to appear and represent his interests: "A nonnamed party may also have standing to appeal if the district court has otherwise "summoned" him into court." *Shults v. Champion Intern*. Corp., 35 F.3d 1056 at 1061 (C.A.6 (Tenn.), 1994) and became an interested party and had the right to appeal: "[t]he right of a nonparty to appeal an adjudication of contempt cannot be questioned," *United States Catholic Conference v. Abortion Rights Mobilization, Inc*., 487 U.S. 72, 76 (1988), given the binding nature of that adjudication upon the interested nonparty."

The Tenth Circuit has even established that standing as a party is not required for the court to entertain a reconsideration ("…or by a pleading which has no standing in the case as a matter of law") *Director of Revenue, State of Colorado v. United States*, 392 F.2d 307 at 308-309 (10th Cir., 1968) and ("cases where a nonparty may be allowed to appeal") *Dietrich Corp. v. King Resources Co*., 596 F.2d 422 (C.A.10 (Colo.), 1979).

The trial court and defendants' assertions that Samuel Lipari had no standing for failing to file a formal entry of appearance or for submitting an

improper appearance cannot be valid under *Suggs v. Mutual Ben. Health & Accident Ass'n*, 10 Cir., 115 F.2d 80 as quoted by *Director of Revenue, State of Colorado v. United States*, 392 F.2d 307 at 308-309 (10th Cir., 1968) *Supra.* These also fail because a party need not file a formal appearance in federal court, and the dissolution of a firm need not abate suits by or against it, *Canadian Ace Brewing Co. v. Joseph Schlitz Brewing Co*., 629 F.2d 1183, 1185-86 (7th Cir. 1980), since "the dissolved corporation might have a successor that could be substituted for it and the suit continue." *BondPro Corp. v. Siemens Power Generation, Inc*., 463 F.3d 702, 705 (7th Cir. 2006).

In *Levy v. Liebling*, 238 F.2d 505 (7th Cir. 1956), cert. denied, 353 U.S. 936, 77 S.Ct. 812, 1 L.Ed.2d 759 (1957) the question was raised as to the ability of former shareholders to bring an action on a judgment, after the corporation was dissolved. The decision allowed the shareholders to maintain a cause of action on the judgment, recognized the rights of former shareholders to succeed, in their individual capacities, to rights owned by their corporation prior to its dissolution. The prevailing rule is the general principle that property of a dissolved corporation passes to its stockholders, who can then maintain an action on the property. (Fletcher, supra, § 8224, 19 Am.Jur.2d Corporations § 1659).

Samuel Lipari is the assignee of all rights and interests of the dissolved Missouri corporation Medical Supply Chain, Inc. See pgs. 1724-1726 Missouri Secretary of State Dissolution exhibit showing assignment. 28 U.S.C. § 1654 ensures that individuals may appear pro se. Section 1654 states: "In all courts of

the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." F. R.Civ P. Rule 17 relies on the corporation law of Missouri to determine the capacity of a party after dissolution. Rule 17(b) provides that issues of capacity are determined by the law of the individual's domicile. *Esposito v. United States*, No. 03-3183 at pg.1 (Fed. 10th Cir. 5/26/2004) (Fed. 10th Cir., 2004). Missouri court has determined this issue:

> "Section 351.525 mandated every statutory trustee to be named in a suit after dissolution of a corporation. However, § 351.525 was repealed on May 29, 1991. Because of this statute's repeal, with no provision under current Missouri law replacing it, we find that Deer Wood's assignment of its rights, title and interest under the contract is valid."

Smith v. Taylor-Morley, Inc., 929 S.W.2d 918 (Mo. App. E.D., 1996)

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 773, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), the Supreme Court stated in no uncertain terms that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor."

The trial court was collaterally estopped from its judgment that Samuel Lipari could not represent himself pro se. In *Samuel K. Lipari v. General Electric Company, et al*. 16th Cir. Missouri State Case. No. 0616-CV-07421, the issue of whether Samuel Lipari as an assignee of interest from the dissolved Missouri corporation Medical Supply Chain, Inc. had standing to represent himself pro se was raised by John K. Power, the counsel for Neoforma and Novation in this action who also represented the General Electric defendants. The doctrine of

collateral estoppel or issue preclusion precludes a court from reconsidering an issue previously decided in a prior action. *Estate of True v. C.I.R.*, 390 F.3d 1210, 1232 (10th Cir.2004). Missouri state law finds preclusive effect in identical circumstances and applies it preclusion to jurisdictional issues. See *Woods v. Mehlville Chrysler-Plymouth*, 198 S.W.3d 165 at 168 (Mo. App., 2006).

The court was required to look to Missouri state law to determine the preclusive effect of the proceedings in *Lipari v. General Electric et al* No. 0616-CV-07421 on the federal district court action. See *McFarland v. Childers*, 212 F.3d 1178, 1185 (10th Cir.2000) also *Pittsburg County Rural Water Dist. v. McAlester*, 358 F.3d 694 at 708 (10th Cir., 2004).

The US District Court of the Western District of Missouri and the Eighth Circuit Court of Appeals in *Samuel Lipari* v. *General Electric Company, et al.* W.D. MO. Case no. 06-0573-CV-W-FJG and *In Re Samuel K. Lipari*, (Petition for Writ of Mandamus), (8th Cir. 2006) necessarily determined standing of Samuel Lipari to represent the assigned interests of his dissolved corporation pro se in now final judgments that did not expressly litigate the issue but are never the less issue preclusive on standing. See *Gospel Missions of America v. City of Los Angeles,* 2002 C09 585 at ¶33 (USCA9, 2002).

VIII: Whether The Notice Of Appeal From The Trial Court's Order Granting The Defendants' Motion To Strike Samuel Lipari's Motion For Reconsideration Was Timely.

Standard of Review: A district court's ruling on an issue of law is subject to de novo review. *Moncrief v. Williston Basin Interstate Pipeline Co*., 174 F.3d 1150, 1163-64 (10th Cir. 1999).

The trial court's order striking reconsideration is not a decision on the merits of the reconsideration motion but on the face of its title and in the text of the order itself, the ruling is instead a sua sponte strike order that does not weigh the issues or arguments sought to be reconsidered. Furthermore it is an order on other motions that are outside of the exceptions to the 150 day rule for delaying the start of the thirty day limit when no separate judgment has been filed:

> "IT IS THEREFORE ORDERED that Ira Dennis Hawver's Motion to Withdraw (Doc. 81) is denied.
>
> IT IS FURTHER ORDERED that plaintiff's Motion for Reconsideration (Doc. 80); plaintiff's Motion Under Rule 15 for Leave to Rewrite and Amend Complaint to Cure Any Defects Requiring Dismissal Remaining After Outcome of Reconsideration Motion (Doc. 92); plaintiff's Motion to Strike Documents # 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93 (Doc. 95); and plaintiff's
>
> Motion to Rewind Action and Return Proceeding to the Western District of Missouri in the Interest of Justice Under 28 U.S.C. [§] 1631 (Doc. 102) are hereby stricken from the record.
>
> Dated this 7th day of August 2006, at Kansas City, Kansas."

Order striking Reconsideration. Aplt. apdx. at pg.1866. As such, the notice of appeal was timely, having not even exhausted the 150 day amendment to Rule 4(a)(7) and Rule 58.

In *Scola v. Boat Frances, R., Inc*., 618 F.2d 147 (C.A.1 (Mass.), 1980) the court examined the timeliness of an appeal from an order striking part of an earlier

judgment and found against the defendants' argument that the original order should have started the clock for appeal:

"The defect in defendant's argument is that the February 16, 1978, order is not one that commences the running of the aggrieved party's time to appeal. The final decision that is appealable under 28 U.S.C. § 1291 (1976), the appealable "judgment" defined in Rule 54(a) of the Federal Rules of Civil Procedure, must, under Rule 58, be set forth on a separate document distinct from the jury verdict or nonjury decision by the court."

Scola v. Boat Frances, R., Inc., 618 F.2d 147 at 151 (C.A.1 (Mass.), 1980)

The notice of appeal 31 days after the District Court's order on the Motion to reconsider was within the 180 time limit under Fed. R.App. P. 4(a)(7)(A)(ii) and Fed.R.Civ.P. 58(b)(1)-(2). See *Key v. Kaiser*, 2002 C10 1188 at ¶ 15 (USCA10, 2002).

PRAYER FOR RELIEF

The appellants respectfully requests that the court reinstate its prosecution of the defendants over the federal and state claims listed in the appellants' complaint.

Respectfully Submitted,

/s/ Dennis Hawver

_____

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CERTIFICATE OF COMPLIANCE

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced from the beginning of Brief of the Appellant on pg. 18 to the conclusion Prayer for Relief on pg. 71and contains 13,998 words.

Complete one of the following:

_X_ I relied on my word processor to obtain the count and it is :MS Office 2004 for Mac.

__ I counted five characters per word, counting all characters including citations and numerals.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Dennis Hawver

_____

Ira Dennis Hawver 8337

CERTIFICATION OF DIGITAL SUBMISSIONS

I hereby certify the following:

Compliance with emergency General Order of October 20, 2004 (e) that copies were provided on a compact disc supplied along with written materials and by electronic mail.

Compliance with emergency General Order of October 20, 2004 (f) that

(1) all required privacy redactions (below) have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk,

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program Kaspersky Anti-Virus 6.0

and, according to the program, are free of viruses.

/s/ Dennis Hawver

_____

Ira Dennis Hawver 8337

CERTIFICATE OF SERVICE

I certify that in addition to the service requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules, identical copies of The Appellant's Opening Brief was submitted to the Clerk in Digital Form and was provided to counsel for all other parties hereto by e-mail on February 20, 2007 along with an electronic link to the pdf version of the Appellants' Appendix which is too large to email: http://www.medicalsupplychain.com/pdf/Novation%20Appeal%20Appendix.pdf

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_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 05-2299-CM**
NEOFORMA, INC., et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

On March 9, 2005, plaintiff Medical Supply Chain, Inc. filed the above-captioned case in the United States District Court for the District of Western Missouri, case number 05-2010-CV-W-ODS. Plaintiff brought suit against Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association ("VHA"), Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp NA, U.S. Bank National Association, Jerry A. Grundhofer, Andrew Cesare,[1] Piper Jaffray Companies, Andrew S. Duff, Shughart Thomson & Kilroy, P.C.,[2] and Novation, LLC. Plaintiff's 115 page complaint alleges sixteen counts including claims for price restraint under the Sherman Act, restraint of trade and monopolization under both federal and Missouri law, conspiracy, tortious interference with contract or business expectancy, breach of contract, breach of fiduciary duty, fraud, prima facie tort, and claims under RICO and the USA PATRIOT Act.

[1] Throughout the docket sheet, this defendant's last name was spelled numerous different ways. The court will use "Cesare," the spelling most often used by plaintiff's counsel.

[2] Plaintiff's complaint names "Shughart Thomson & Kilroy Watkins Boulware, P.C." but the law firm's correct name is "Shughart Thomson & Kilroy, P.C.".

On June 15, 2005, Judge Ortrie D. Smith of the Western District of Missouri granted defendants' Motions to Transfer the case to the District of Kansas, citing this district court's experience with "the almost identical previous lawsuit" and the interests of justice. (Doc. 26, at 2).

Each group of defendants have filed a motion to dismiss, and two groups of defendants have filed renewed motions after the case was transferred, resulting in seven motions to dismiss. The motions to dismiss pending before the court are defendant Robert Zollars' Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 2); Defendant Neoforma, Inc.'s Motion to Dismiss, [sic] Complaint, or Alternatively to Require Amendment, Pursuant to F.R.C.P. Rules 8 and 9 (Doc. 4); Defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Motion to Transfer, Dismiss and/or Strike (Doc. 6); Defendants Curt Nonomaque and Robert Baker's Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim (Doc. 11); Defendant Shughart Thomson & Kilroy, P.C.'s Motion to Transfer, Dismiss and/or Strike (Doc. 13); Defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Renewed Motion to Dismiss and/or Strike (Doc. 32); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Renewed Motion to Dismiss Complaint for Failure to State a Claim (Doc. 34).

Additional motions before the court are defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Motion for Sanctions (Doc. 22); Defendants' Motion to Stay Rule 26(f) Conference and Discovery (Doc. 24); plaintiff's Motion for Reconsideration of Order Transferring Venue (Doc. 28); Novation, LLC, VHA, University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion for Sanctions (Doc. 36); plaintiff's

Motion to Strike Defendants' Renewed Motion to Dismiss and/or Strike (Doc. 38); plaintiff's Motion to Consolidate Under Rule 42 (Doc. 39); plaintiff's Motion to Require Consolidation Arguments to be in the Form of Pleadings on the Record and Notice of Threat of Unlawful Sanctions (Doc. 42); plaintiff's Motion to Strike Novation Defendants' Renewed Motion to Dismiss (Doc. 43); plaintiff's Motion for Clarification of Order in Case No. 03-2324 (Doc. 45); First Plaintiff's Motion for Partial Summary Judgment Under F. R. Civ. P. Local Rule 56.1 (Doc. 46); plaintiff's Motion for Leave to Join Additional Defendants Under Fed. R. Civ. P. 29(a) (Doc. 49); plaintiff's Motion to Substitute Plaintiff Under F.R.C.P. Rules [sic] 17(a), 15(a) and 25(a) (Doc. 56); plaintiff's Motion to Substitute Defendant Under F.R.C.P. Rules [sic] 17(a) (Doc. 57); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion to Set Oral Hearing on Motion to Dismiss (Doc. 76).

I. Background

A. Bret D. Landrith

Plaintiff's counsel for all of the pending motions before the court, Bret D. Landrith, withdrew as counsel for plaintiff on January 30, 2006 after being disbarred from the practice of law in the state of Kansas on December 9, 2005 for violating Kansas Rules of Professional Conduct relating to competence, meritorious claims, candor toward the tribunal, fairness to opposing parties and counsel, respect for rights of third persons, and misconduct. *See In re Landrith*, 124 P.3d 467, 485-86 (Kan. 2005). On February 7, 2006, Ira Dennis Hawver entered his appearance on behalf of Medical Supply Chain, Inc.

B. Prior Relevant Cases

Plaintiff has brought two other cases in this court that are relevant to the court's analysis. The first, captioned *Medical Supply Chain, Inc. v. US Bancorp, NA, et al*, case number 02-2539-CM ("Medical

Supply I"), was filed on October 22, 2002 against defendants US Bancorp, NA; US Bank Private Client Group, Corporate Trust, Institutional Trust and Custody, and Mutual Fund Services, LLC, a subsidiary of US Bancorp; Piper Jaffray; Andrew Cesare; Susan Paine; Lars Anderson; Brian Kabbes; and Unknown Healthcare Supplier. Plaintiff contended these defendants engaged in conduct violating (1) the Sherman Antitrust Act; (2) the Clayton Antitrust Act; and (3) the Hobbs Act. Plaintiff also alleged defendants (4) "fail[ed] to properly train [their] employees on the USA PATRIOT Act or to provide a compliance officer"; (5) misused "authority and excessive use of force as enforcement officers under the USA PATRIOT Act"; and (6) violated "criminal laws to influence policy under section 802 of the USA PATRIOT Act." The complaint further charged defendants with (7) misappropriation of trade secrets under state law; (8) tortious interference with prospective contracts; (9) tortious interference with contracts; (10) breach of contract; (11) promissory estoppel; (12) fraudulent misrepresentation; and (13) violation of the covenant of good faith and fair dealing. Plaintiff sought over $943 million in damages and declaratory relief.

On June 16, 2003, this court granted defendants' motions to dismiss for failure to state any claims upon which relief could be granted and dismissed the case. *Medical Supply I*, 2003 WL 21479192, at *9 (D. Kan. June 16, 2003). When discussing plaintiff's USA PATRIOT Act claims, the undersigned judge advised Mr. Landrith to "take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *Id.* at *6. Furthermore, with regard to the same claims, the undersigned judge noted that "the court finds plaintiff's allegation so completely divorced from rational thought that the court will refrain from further comment until such time as federal criminal proceedings are commenced, if indeed they ever are." *Id.* at *8. On November 8, 2004, the Tenth Circuit affirmed the district court's dismissal, and ordered plaintiff to show cause why he should not be sanctioned for filing a

frivolous appeal pursuant to Fed. R. App. P. 38. *Medical Supply I*, 112 Fed. Appx. 730, 731-32 (10th Cir. 2004). On December 30, 2004, the undersigned judge assessed attorney fees and double costs as a sanction against Mr. Landrith. Defendants were awarded $23,956 in attorney fees. *Medical Supply I*, 2005 WL 2122675, at *1 (D. Kan. May 13, 2005).

The second case brought by plaintiff in this court, captioned *Medical Supply Chain, Inc. v. General Electric Company, et al.*, case number 03-2324-CM ("Medical Supply II"), was filed on June 18, 2003. Defendants included General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC, and Jeffrey Immelt. Plaintiff's amended complaint alleged violations of the Sherman Act, the Robinson-Patman Act, and various state law claims. Specifically, plaintiff alleged that it

> suffered antitrust injury from the defendants' breach of a written contract to buy out the remainder of a lease and provide financing for Medical Supply's entry into the hospital supply market. This contract was a unique credit agreement and an essential facility required for entry into the e-commerce market for hospital supplies.

Plaintiff further alleged that "GE founded a cartel or trust with its horizontal and vertical competitors, centered around an electronic marketplace that now has over 80% of the hospital e-commerce market," and that "GE's refusal to deal and group boycott, preventing Medical Supply's entry into a market GE has monopoly power in[,] is a violation of the Sherman and Clayton Antitrust Acts."

On January 29, 2004, the undersigned judge granted defendants' motions to dismiss, but opted not to impose Rule 11 sanctions against plaintiff. *Medical Supply II*, 2004 WL 956100, at *5 (D. Kan. Jan. 29, 2004). In granting defendants' motions to dismiss, the court noted that "at the most fundamental level, plaintiff's antitrust claims fail." *Id.* at *3. On July 26, 2005, the Tenth Circuit affirmed the district court's

dismissal of plaintiff's complaint, but reversed and remanded on the issue of sanctions against plaintiff, finding that "at least [plaintiff's] claims against Jeffrey Immelt in his individual capacity were frivolous in that no allegation was made that Immelt had any personal connection with [plaintiff's] alleged injury or even that he knew [plaintiff] existed." *Medical Supply II*, 144 Fed. Appx. 708, 716 (10th Cir. 2005). The issue of sanctions remains pending.

C. Instant Allegations

Plaintiff asserts federal question subject matter jurisdiction based on several federal acts including the Clayton Act, the Sherman Act, the Declaratory Judgment Act,[3] the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the USA PATRIOT Act. Plaintiff also asserts diversity jurisdiction, despite acknowledging that both plaintiff and at least one defendant reside in Missouri. (Compl., at 4-6). Therefore, this court does not have diversity jurisdiction over plaintiff's case. 28 U.S.C. § 1332. Plaintiff alleges that this court has personal jurisdiction "over the parties who are in the territorial limits of the United States and who have sufficient contacts with the State of Missouri." (Compl., at 5).

In addition to the captioned defendants, plaintiff also lists eight "coconspirators not named as defendants in this action," several of which are relevant for purposes of this Order, including General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC, and Jeffrey R. Immelt.

[3] Plaintiff asserts subject matter jurisdiction under the Declaratory Judgment Act, but did not assert any claims against any defendants under that act.

The court is unclear on the bulk of plaintiff's allegations. On page 84 of its complaint, plaintiff lists its "summary of claims" as follows:[4]

> 423. Medical Supply Chain, Inc., in its antitrust litigation opposing trade restraint in the electronic market for hospital supplies. Medical Supply has experienced substantial antitrust injury from the actions of Novation, a joint venture created by UHC and VHA, Inc. in support of the electronic marketplace entity Neoforma, Inc. which is believed to be an instrumentality of UHC and VHA, Inc. which were both in an alliance to eliminate competition among member competitors in a scheme to inflate prices similar to the alliance of Shell and Texaco to create two joint ventures, Equilon Enterprises LLC and Motiva Enterprises condemned for per se Sherman I prohibited conduct in *Dagher v Saudi Refining Inc*, 369 F.3d 1108, 1114 (9th Cir. 2004).
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> 424. Medical Supply Chain, Inc. has been excluded from the hospital supply market with agreements between UHA and VHA's Novation in combination with their electronic marketplace Neoforma, Inc. US Bancorp NA, and The Piper Jaffray Companies exchanged directors with Novation and participated in exclusive agreements with Novation and Neoforma to keep hospitals using technology products from companies US Bancorp NA and Piper Jaffray had an interest in. The purpose of these agreements was to injure the hospital supply consumers with artificially inflated prices.
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> 425. Because of these illegal anticompetitive agreements with Novation and Neoforma, Inc., Piper Jaffray and then US Bancorp refused to deal with Medical Supply Chain, Inc. US Bancorp broke a contract with Medical Supply Chain, Inc. to provide escrow accounts needed to capitalize Medical Supply's entry into the hospital supply marketplace, using the pretext of the USA PATRIOT Act. US Bancorp and Piper Jaffray simultaneously stole Medical Supply's intellectual property, which has since been openly used by Novation and Neoforma. US Bancorp and Piper Jaffray have continued to extort property from Medical Supply Chain on behalf of the hospital supply cartel by obstructing entry to the market for hospital supplies through the threat of malicious USA PATRIOT Act reports.
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> 426. Medical Supply attempted to obtain preliminary injunctive relief against US Bancorp, The Piper Jaffray Companies and an Unknown Healthcare Supplier to

[4] For convenience and clarity, the court has copied plaintiff's summary of claims in its entirety, and did not designate any mistakes or typographical errors in the language.

prevent them from using the USA PATRIOT Act as a sham petition designed to prevent Medical Supply from entering the market and to stop the theft of its intellectual property. To date, Medical Supply has not been successful.

427. In June of 2004, Novation/ Neoforma, Inc. again stopped Medical Supply from entering the market for hospital supplies using exclusive dealing agreements with General Electric and GE's electronic marketplace cartel GHX, LLC. These agreements caused GE to break a written contract to purchase a commercial real estate lease from Medical Supply. The contract included Medical Supply's requirement to use the proceeds to capitalize Medical Supply's entry to market since it was under the extortion of US Bancorp threatened and malicious USA PATRIOT Act reporting. Medical Supply is currently attempting to resolve its contract with GE and obtain injunctive relief and treble damages under Sherman I and II.

428. On December 14, 2004 Medical Supply served notice on UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars that Medical Supply had not succeeded in obtaining prospective injunctive relief against the US Bancorp and Piper Jaffray defendants to prevent antitrust injuries from being obstructed from entering the market for hospital supplies or the theft of Medical Supply's intellectual property. The notice informed the UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars that if they did not provide a substantiated response denying their responsibility for the hospital supply cartel's actions against Medical Supply, they would be held jointly and severally liable:

> "If you dispute that any of these actions were taken against Medical Supply, or that your company is liable as an antitrust coconspirator, please promptly provide a substantiated basis for Medical Supply's reliance on the same to me at the address provided below. Since your company has not refuted the publicized events and relationships described herein, a constructive use of the time remaining between now and our anticipated filing of February 1, 2005 might be to reach an agreement on the platform and electronic format the millions of recorded transactions, hospital supply contracts, kickbacks and equity shares that will be exchanged through discovery as we collectively document the injuries to America's hospitals and our company from your concerted refusals to deal and group boycotts."

> 429. Only counsel for Neoforma responded and the purpose of the communication was to have Medical Supply await their answer till after the holidays, an answer that never came.
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> 430. The coconspirators UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars did however renew their conscious commitment to a common scheme designed to achieve an unlawful objective of keeping Medical Supply out of the market for hospital supplies by reviewing the case against US Bancorp and consulting with representatives for US Bancorp, US Bank, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff. The cartel decided to rely on the continuing efforts to illegally influence the Kansas District Court and Tenth Circuit Court of Appeals to uphold the trial court's erroneous ruling. The cartel also renewed their efforts to have Medical Supply's sole counsel disbarred, knowing that an extensive search for counsel by Medical Supply had resulted in 100% of the contacted firms being conflicted out of opposing US Bancorp and actually effected a frenzy of disbarment attempts against Medical Supply's counsel in the period from December 14, 2004 to February 3rd, 2005, all originating from the cartel's agents Shughart Thomson and Kilroy's past and current share holders.

(Compl., at 84-86).

Plaintiff seeks "approximately $1,500,000,000.00 for the conduct related to the refusal to provide trust accounts and . . . approximately $1,500,000,000.00 for the conduct related to preventing Medical Supply from selling the office building lease to General Electric Transportation Co." (Compl., at 114). Plaintiff also seeks $1 million for damages sustained as a "consequence of Defendants' tortuous [sic] interference with contract or business expectancy and/or in prima facie tort . . . together with punitive or exemplary damages for the same, in an amount in excess of $10,000," "approximately" $1.5 million in damages for defendants' violations of "civil racketeering laws," $500,000 for damages plaintiff sustained as a result of defendants' USA PATRIOT Act violations, and costs and reasonable attorney fees. (Compl., at 114-15).

II. Legal Standard for Motions to Dismiss

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

III. Analysis

A. Plaintiff's Motion for Reconsideration of Order Transferring Venue (Doc. 28)

Whether to grant or deny a motion for reconsideration is committed to the court's discretion. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1386 (10th Cir. 1998); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (10th Cir. 1988). In exercising that discretion, courts in general have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *See Marx v. Schnuck Mkts., Inc.*, 869 F. Supp. 895, 897 (D. Kan. 1994) (citations omitted); D. Kan. Rule 7.3 (listing three bases for reconsideration of order). "A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." *Sithon Maritime Co. v. Holiday Mansion*, 177 F.R.D. 504, 505 (D. Kan. 1998). Plaintiff's arguments in support of

reconsideration do not assert a change in controlling law or the availability of new evidence. Moreover, in arguing that the U.S. District Court for the Western District of Missouri committed clear error by transferring the instant case to this district, plaintiff did not raise any arguments that it could not have raised in its motions opposing transfer. Because plaintiff is not entitled to a second chance at presenting its strongest case, *Sithon Maritime Co.*, 177 F.R.D. at 505, plaintiff's motion for reconsideration is denied.

B. Plaintiff's Motions to Strike (Docs. 38 and 43)

Plaintiff requests that the court strike two renewed motions to dismiss. The bulk of plaintiff's arguments simply respond to defendants' motions to dismiss rather than argue in support of striking the motions. Plaintiff's on-point argument is that the renewed motions to dismiss include new arguments and authorities that were available when defendants filed their original motions to dismiss.

The court may "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The court finds that defendants' renewed motions do not fall within the purview of Rule 12(f). Rather, defendants renewed their motions only after the instant case was transferred from the U.S. District Court for the Western District of Missouri (in the 8th Circuit) to this court (in the 10th Circuit). Moreover, the court finds that striking the motions is inconsequential; even if the court struck the motions at issue, none of its instant rulings would change. Plaintiff's motions to strike are denied.

C. Motions to Dismiss

Pending before the court are five motions to dismiss and two renewed motions to dismiss. Defendants assert several different arguments in support of dismissal, including that this court does not have personal jurisdiction over certain defendants, plaintiff did not properly serve certain defendants, all of plaintiff's claims fail to state a claim for which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), several of plaintiff's claims are barred by claim and/or issue preclusion, and plaintiff's complaint violates Federal Rules of Civil Procedure 8 and 9. In addition, several defendants contend that some of plaintiff's allegations against specific defendants and third parties are so immaterial, impertinent and scandalous that they should be stricken by the court.

The court has reviewed the pending motions to dismiss and responses, along with the complaint and plaintiff's prior cases in this district. Even presuming all well-pleaded allegations as true, resolving doubts in favor of plaintiff, and viewing the pleadings in the light most favorable to plaintiff, the court finds that dismissal of plaintiff's complaint is warranted for several reasons.[5]

1. Rule 12(b)(6)

Plaintiff's complaint fails at the most basic level to allege sufficient facts to support cognizable legal claims. Federal Rule of Civil Procedure 12(b)(6) allows the court to dismiss a cause of action for "failure to state a claim upon which relief can be granted." The court recognizes that "[d]ismissal under Rule 12(b)(6) is a 'harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.'" *Morse v. Regents of Univ. of Colo.*, 154 F.3d 1124, 1127 (10th Cir. 1998) (quoting *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d

[5] Although the court limited its analysis to Rule 12(b)(6), claim preclusion and Rule 8, the court does not intend to imply that defendants' additional grounds for dismissal are without merit. Rather, three separate grounds for dismissal are sufficient, and the court declines to continue its analysis.

1357, 1359 (10th Cir. 1989)). However, even considering the harshness of this remedy, dismissal under 12(b)(6) is warranted in this case.

a. Sherman Act, § 1 (Counts I and II)

A plaintiff must plead three elements to state a claim under § 1 of the Sherman Act: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. 15 U.S.C. § 1; *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992); 1 Irving Scher, et al., *Antitrust Adviser* (4th ed. 2001) § 1.04. Accepting the allegations contained in the complaint as true, the court finds that plaintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors. Plaintiff's complaint alleges numerous conspiracies and agreements between various defendants. For example, plaintiff alleges that "Defendants entered into a combinations [sic] and or conspiracies in unreasonable restraint of trade or commerce . . . in the markets for hospital supplies, hospital supplies sold in e-commerce and the capitalization of healthcare technology and supply chain management companies." (Compl., at 87). Although plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations. *See TV Commc'ns Network, Inc.*, 964 F.2d at 1024 ("Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief.") (citing *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir. 1980)); *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1373 (10th Cir. 1979) (holding that to survive a motion to dismiss, a complaint stating violations of the Sherman Act "must allege facts sufficient, if they are proven, to allow the court to conclude that claimant has a legal right to relief") (citation omitted); *see also Medical Supply II*, 2004 WL 956100, at *3 (dismissing plaintiff's antitrust claims for, inter alia, failure

to allege that the named defendants were parties to an unlawful agreement"), *rev'd on other grounds*, 144 Fed. Appx. 708 (10th Cir. 2005)); *Medical Supply I*, 2003 WL 21479192, at *3 (D. Kan. June 16, 2003), *aff'd*, 112 Fed. Appx. 730 (10th Cir. 2004) ("Accepting the allegations contained in the complaint as true, the court finds plaintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1."). Counts I and II fail to state a claim upon which relief can be granted.

b. Sherman Act, § 2 (Counts III and IV)

Section 2 of the Sherman Act prohibits monopolies in interstate trade or commerce. 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."). Conduct violates this section when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389-90 (1956); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987). "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In the Tenth Circuit, "monopoly power is defined as the ability both to control prices and exclude competition." *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1567 (10th Cir. 1991). Further, "determination of the existence of monopoly power requires proof of relevant product and geographic markets." *Id.*

Plaintiff's relevant allegations regarding § 2 of the Sherman Act specifically consists of the following paragraph:

> Defendants collectively have at all times material to this complaint maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies in the several Stated [sic] of the United States; and have used, attempted to use, or combined and conspired to use, their monopoly power to affect competition in the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies sale [sic] of the same in the several States of the United States in violation of 15 U.S.C. § 2.

(Compl., at 96).

Thus, even accepting each of plaintiff's allegations as true, plaintiff has clearly failed to allege (1) defendants' possession of monopoly power, (2) a relevant product and geographic market, or (3) that defendants either controlled prices and excluded competition. *See Medical Supply II*, 144 Fed. Appx. at 713 (affirming the district court's holding on plaintiff's Sherman Act, § 2 claim, and stating that "we see no reason to disturb the district court's conclusion that [plaintiff] failed to state a claim that GE had illegally monopolized or attempted to monopolize the North American hospital supply e-commerce market"); *Medical Supply I*, 2003 WL 21479192, at *3 ("Here, plaintiff has failed to allege that defendants both controlled prices and excluded competition. Further, plaintiff has not pled the existence of a relevant product market or geographic market. Plaintiff has not stated that defendants' alleged market power stems from defendants' willful acquisition or maintenance of that power rather than from defendants' development "of a superior product, business acumen, or historic accident."). The court finds that Counts III and IV fail to state a claim of monopoly under § 2.

c. Clayton Act (Count V)

A provision of the Clayton Act, 15 U.S.C. § 19, prohibits persons from serving, at the same time, as a director or officer of any two corporations that are engaged in commerce and are competitors, "so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." 15 U.S.C. § 19(a)(1). Plaintiff's complaint, however, fails to allege who the alleged interlocking directors are, for which defendants' companies they serve, or that the corporations in question are actual competitors. For these reasons, plaintiff's Count V is dismissed for failure to state a claim.

d. RICO (Count XV)

To plead a viable civil RICO claim under 18 U.S.C. § 1962(c), plaintiff must allege that a defendant "'(1) participated in the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Abbott v. Chem. Trust*, 2001 WL 492388, at *15 (D. Kan. Apr. 26, 2001) (quoting *BancOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1100 (10th Cir. 1999)). Plaintiff also alleges that defendants conspired to violate 18 U.S.C. § 1962(c). *See* 18 U.S.C. § 1962(d). Under Rule 9(b), plaintiff must allege with particularity not only each element of a RICO violation, but also the predicate acts of racketeering. *Phillips USA, Inc. v. Allflex USA, Inc.*, 1993 WL 191615, at *2 (D. Kan. May 21, 1993) (quoting *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989 (10th Cir. 1992)). To properly allege the predicate acts, plaintiff must specify the "who, what, where, and when" of each purported act. *Id.* (citation omitted).

Here, plaintiff failed to sufficiently allege the "who, what, where, and when" its RICO claim. Plaintiff's specific RICO allegations consists of the following: "The Defendants engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity," as well as numerous assertions that defendant Shughart Thomson & Kilroy, a law firm based in Kansas City, Missouri, violated RICO by conspiring with other unspecified defendants to shut plaintiff out of the healthcare supply industry. Again, plaintiff offers no specific facts in support of its numerous allegations. Thus, plaintiff's RICO claim fails to state a claim for which relief may be granted.

Plaintiff also cites to 18 U.S.C. §§ 1503 and 1513 in its RICO discussion. Section 1503 prohibits influencing, intimidating, impeding or injuring a juror or officer of the court, 18 U.S.C. § 1503(a), while § 1513 prohibits retaliation against a witness for attending or testifying in an official proceeding, or for providing information relating to the commission of a federal offense to a law enforcement officer, 18 U.S.C. § 1513(a)(1). Plaintiff seems to argue that defendant Shughart Thomson & Kilroy violated these statutes when it lodged ethics complaints against Mr. Landrith. Plaintiff's allegations have nothing to do with unlawfully influencing a juror or officer of the court, or retaliating against a witness or informant. Therefore, these allegations fail to state a claim.

Also as part of its RICO claim, plaintiff alleges that defendants violated 17 U.S.C. § 506 when it "stole copyrighted works to keep Medical Supply from realizing its plan to enter the market for hospital suppliers . . . that included business plans, algorithms, confidential proprietary business models, customer and associate lists from Medical Supply Chain, Inc. in 2002 and from its predecessor company Medical Supply Management in 1995 and 1996." (Compl., at 110). This is the entirety of detail plaintiff gives regarding its criminal copyright claim. Thus, plaintiff does not allege exactly what material was stole by

whom, how the allegedly stolen material fits the definition of copyrighted material, or how the material was stolen.

Plaintiff also alleges that defendants violated 18 U.S.C. § 2319. However, because plaintiff makes absolutely no allegations regarding this statute other than to state that "Defendants [sic] violation falls under 18 USC § 2319," this claim fails to state a valid claim.

As part of its RICO claims, plaintiff also alleges that defendants violated the Hobbs Act "by preventing Medical Supply's entry into commerce under color of official right," citing to 18 U.S.C. § 1951. Section 1951 prohibits the obstruction, delay or affection of commerce by robbery or extortion. Significantly, extortion is defined as the "wrongful use of actual or threatened force, violence, or fear, under color of official right." 18 U.S.C. § 1951(b)(2). Here, there is no allegation that defendants, who are private parties, acted under color of official right, or acted with any force, violence or fear. Therefore, plaintiff's claim under the Hobbs Act fails to state a claim.

e. USA PATRIOT Act (Count XVI)

Plaintiff alleges that all defendants, through defendants US Bancorp NA and U.S. Bank National Association, violated two sections of the USA PATRIOT Act, 31 U.S.C. § 5318(g)(3) and 18 U.S.C. § 1030, by "maliciously" filing a suspicious activity report regarding plaintiff and its founder Samuel Lipari. No private cause of action exists to enforce the USA PATRIOT Act. *Medical Supply I*, 112 Fed. Appx. at 731. Therefore, plaintiff's USA PATRIOT Act claims are dismissed.

f. State Law Claims

Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal

claims, leaving only the supplemental state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (quotation marks, alterations, and citation omitted). Having dismissed each of plaintiff's federal claims, this court finds no compelling reason to retain jurisdiction over the state law claims and dismisses them without prejudice.

2. Issue/Claim Preclusion

Several defendants argue that issue and/or claim preclusion bar several of plaintiff's claims. Claim and issue preclusion are rules of "fundamental and substantial justice that enforce[] the public policy that there be an *end* to litigation." *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1009 (10th Cir. 1990) (internal citation and quotation omitted). Claim and issue preclusion serve to "avoid[] unnecessary expense and vexation for parties, conserve[] judicial resources, and encourage[] reliance on judicial action." *Id.*

Under the doctrine of issue preclusion, "'[w]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Botefuhr*, 309 F.3d at 1282 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)).

> Four elements must be demonstrated in order to trigger issue preclusion: "(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been fully adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."

Id. at 1282 (quotations omitted).

On the other hand, "claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005) (citations omitted). "If these requirements are met, [claim preclusion] is appropriate unless the party seeking to avoid preclusion did not have a 'full and fair opportunity' to litigate the claim in the prior suit. *Id.* (quoting *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 n.4 (10th Cir. 1999)).

Here, at least five of plaintiff's claims against three defendants are barred by claim preclusion. In *Medical Supply I*, plaintiff brought suit against three of the same defendants as the instant case: US Bancorp NA, Piper Jaffray, and Andrew Cesare. This court reached final judgment on the merits of each of plaintiff's claims in *US Bancorp* by dismissing each claim for failure to state a claim for which relief can be granted pursuant to Rule 12(b)(6). *See Medical Supply I*, 2003 WL 21479192. Moreover, the Tenth Circuit affirmed this court's dismissal. *See Medical Supply I*, 112 Fed. Appx. (10th Cir. 2004). The identical claims include Sherman Act § 1 claims, 15 U.S.C. § 1 (Counts I and II of the instant action), Sherman Act § 2 claims, 15 U.S.C. § 2 (Counts III and III), the Hobbs Act claims, 18 U.S.C. § 1951(b)(2) (Count XV), the USA PATRIOT Act claims, 31 U.S.C. § 5318 (Count XVI), as well as several state claims. Finding that each of these claims (1) ended in a judgment on the merits in a prior case, (2) involved the many of the same defendants and (3) involved the same causes of action, the court finds that claim preclusion bars plaintiff's claims as to the identical defendants.[6]

[6] The court is confident that several of plaintiff's instant claims, to the extend that the court understands them, are also precluded by issue preclusion. However, because the court has several other grounds on which to base dismissal of plaintiff's claims, the court opts to not wade through the details of plaintiff's claims looking for previously-litigated issues.

3. Rule 8

Plaintiff's complaint, as a whole, violates Federal Rules of Civil Procedure Rule 8(a) and 8(e)(1). Rule 8(a) states: "A pleading . . . shall contain . . a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(e)(1) elaborates on the short and plain requirement in requiring each averment to be "simple, concise, and direct." Plaintiff's 115 page, 613 paragraph complaint falls miles from Rule 8's boundaries. Pages seven through fifty of plaintiff's complaint are organized under the heading of "The Relative Markets" and consist of a multitude of unsupported, unauthenticated commentary about the healthcare industry in the United States. These "facts" include quotes from President George W. Bush, U.S. Senate Committee hearing testimony, quotations from newspaper articles and study findings. Also included is wholly irrelevant information such as paragraph eighty-eight, which seeks to educate the court about the number of deaths in 2003 resulting from the lack of affordable health insurance, as well as unsubstantiated and very weighty allegations, such as that "defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospitals to be overcharged $30,000,000,000.00 (thirty billion dollars) in 2002." (Compl., at 11). Pages fifty to eighty-four comprise a section entitled "Events," which includes some background of this case and others, allegations regarding defendants and other third persons, caselaw, newspaper article quotations, and discussion about disciplinary complaints lodged against Mr. Landrith, to name a few. The "Claims for Relief" section starts on page eighty-six, and continues in the same style. For instance, the discussion of plaintiff's first count spans eleven pages, excluding the fact that plaintiff begins each count by realleging all previous paragraphs. In sum, plaintiff's complaint is so exceptionally verbose and cryptic that dismissal is appropriate.

Although the short and plain requirement of Rule 8 is a low burden, several courts have dismissed complaints like plaintiff's. *See United States el rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378-79 (7th Cir. 2003) (affirming dismissal of plaintiff's 155 page, 400 paragraph complaint, holding that "[l]ength may make a complaint unintelligible, by scattering and concealing in a morass of irrelevancies the few allegations that matter") (citing *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 702-03 (3d Cir. 1996) (240 pages, 600 paragraphs); *Kuehl v. FDIC*, 8 F.3d 905, 908-09 (1st Cir. 1993) (43 pages, 358 paragraphs), *Michaelis v. Neb. State Bar Assoc.*, 717 F.2d 437, 439 (8th Cir. 1983) (98 pages, 144 paragraphs)).

The court is unwilling to allow plaintiff to amend its complaint for three reasons. First, for reasons explained more fully below, the court believes amendment would be futile. Second, before requesting sanctions against plaintiff, two groups of defendants gave plaintiff at least twenty-one days notice pursuant to Federal Rule of Civil Procedure 11(c)(1)(A). After receiving such notice, plaintiff chose not to withdraw or amend its complaint. Therefore, any additional opportunity is not necessary. Third, the author of the complaint is plaintiff's original counsel, Mr. Landrith. Mr. Hawver recently entered his appearance on behalf of plaintiff, but has chosen not to amend the complaint in this case. Thus, Mr. Hawver has chosen to step into the shoes of Mr. Landrith and adopt the complaint as his own.

D. Defendants' Requests for Sanctions (Docs. 22 and 36)

Two groups of defendants filed two separate motions for sanctions against plaintiff and plaintiff's counsel. Defendants argue that sanctions are warranted pursuant to Federal Civil Procedure Rule 11 and 28 U.S.C. § 1927 in light of plaintiff's decision to disregard previous admonitions from this court and the

Tenth Circuit. Defendants also contend that plaintiff and its counsel filed the instant lawsuit unnecessarily to harass and annoy defendants with frivolous and costly litigation.

Federal Rule of Civil Procedure 11(b) states that by filing a pleading, an attorney is certifying that the information contained in the motion,

> (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 and 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; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Violation of these requirements will result in sanctions imposed by the court. Fed. R. Civ. P. 11(c); *see Griffen v. City of Okla. City*, 3 F.3d 336, 342 (10th Cir. 1993) ("Rule 11 requires the district court to impose sanctions if a document is signed in violation of the Rule."). The standard for Rule 11 sanctions is an objective one. *See White v. Gen. 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."). Likewise, subjective bad faith is not required to trigger Rule 11 sanctions. *Burkhart ex rel. Meeks v. Kinsley Bank*, 804 F.2d 588, 589 (10th Cir. 1986).

Section 1927 provides that "[a]ny attorney . . . 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 attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Sanctions may be imposed under § 1927 "for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987). Like Rule 11, the court must apply an objective standard, and subjective bad faith is not a necessary showing for application of § 1927 sanctions. Because § 1927 is penal in nature, an award should only be made "'in instances evidencing a serious and standard disregard for the orderly process of justice'" and the court must be aware of the "need to ensure that the statute does not dampen attorneys' zealous representation of their clients' interests." *Ford Audio Video Sys., Inc. v. AMX Corp., Inc.*, 1998 WL 658386, at *3 (10th Cir. Sept. 15, 1998) (quoting *Dreiling v. Peugeot Motors of Am., Inc.*, 768 F.2d 1159, 1165 (10th Cir. 1985) (internal quotations omitted)).

The court notes that, pursuant to Rule 11(c)(1)(A), both groups of defendants requesting sanctions gave plaintiff at least twenty-one days notice before filing their motions for sanctions. "The basic requirements of due process with respect to the assessment of costs, expenses, or attorney's fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond." *Braley*, at 1514. Plaintiff responded to defendants' motions by arguing that claim and issue preclusion do not bar plaintiff's claims, and that defendants violated Rule 11 and § 1927 by requesting sanctions. Plaintiff chose not to withdraw or amend its complaint.

The court finds that sanctions against plaintiff in the form of attorney fees and costs are appropriate and necessary pursuant to both Rule 11 and § 1927 for four reasons. First, the mere fact that plaintiff filed a nearly unintelligible 115 page complaint, which the court already found violates Rule 8, suggests that plaintiff's complaint, and the instant suit as a whole, was brought for the purpose of harassing defendants or

the court, causing unnecessary delay and/or needlessly increasing the cost of litigation in violation of Rule 11(b)(1). Second, as discussed above, not one of plaintiff's federal claims supports a viable claim for which relief can be granted pursuant to Rule 12(b)(6). As such, plaintiff's complaint consists of frivolous claims in violation of Federal Rule of Civil Procedure 11(b)(2). Moreover, each of plaintiff's federal claims lack the evidentiary support needed to avoid violating Rule 11(b)(3). Third, plaintiff's insistence on re-litigating claims barred by claim preclusion "unreasonably and vexatiously" "multiplies the proceedings" in violation of § 1927.

Fourth, and most importantly, plaintiff failed to heed the court's previous admonitions and sanctions, choosing instead to proceed with the instant suit and attempt another bite at the proverbial apple. Plaintiff's previous two claims in this court were dismissed for failure to state a claim pursuant to Rule 12(b)(6). *Medical Supply I*, 2003 WL 21479192, at *9; *Medical Supply II*, 2004 WL 956100, at *5. In *Medical Supply I*, the undersigned judge advised plaintiff's counsel to "take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *Id.* at *6. In the same Order, the undersigned judged found plaintiff's allegations "completely divorced from rational thought." *Id.* at *8. In *Medical Supply II*, the undersigned judge noted that "at the most fundamental level, plaintiff's antitrust claims fail." 2004 WL 956100, at *3.

Both prior dismissals were affirmed by the Tenth Circuit. *Medical Supply I*, 112 Fed. Appx. at 731-32; *Medical Supply II*, 144 Fed. Appx. at 716. In *Medical Supply I*, the Tenth Circuit ordered plaintiff to show cause why sanctions should not be imposed. 112 Fed. Appx. at 731-32. The undersigned judge imposed attorney fees totaling $23,956 and double costs as a sanction against Mr. Landrith. *Medical*

Supply I, 2005 WL 2122675, at *1. In *Medical Supply II*, the Tenth Circuit reversed and remanded on the issue of sanctions against plaintiff, and the issue of sanctions remains pending. 144 Fed. Appx. at 716

Plaintiff and its counsel have had plenty of warning about filing frivolous claims from both this court and the Tenth Circuit. But plaintiff persisted, filing a third lawsuit against many of the same defendants and alleging many of the same claims. Enough is enough. *See Brooks v. Couchman*, 2006 WL 137415, at *1 (10th Cir. Jan. 19, 2006) (affirming the district court's dismissal of plaintiff's third attempt at the same argument, stating that "we have expended valuable court resources on at least two occasions dealing with [plaintiff] and his various meritless theories. We repeat our sentiment . . . : 'We will spend no more judicial time or resources addressing his frivolous claims.'" (internal citation omitted)); *Sweeney v. Resolution Trust Corp.*, 16 F3d 1, 6-7 (1st Cir. 1994) (finding that the district court did not abuse its discretion in imposing sanctions on plaintiffs for filing a third and "repetitive" motion to remand when the court had previously denied two "almost identical motions and made detailed findings of fact").

The court may impose sanctions against plaintiff, plaintiff's counsel, or against both with joint and several liability. *White*, 908 F.2d at 685-86. However, "the sanctioning of a party requires specific findings that the party was aware of the wrongdoing." *Id.* at 685 (citations omitted); *Barrett v. Tallon*, 30 F.3d 1296, 1303 (10th Cir. 1993) ("Thus, in the case of a frivolously pleaded RICO claim, it seems that the court should sanction the responsible attorneys rather than the plaintiffs, unless it finds that the plaintiffs insisted, against the advice of counsel, that the RICO claim be asserted, or that the plaintiffs had a sufficient understanding of the nature, elements, and limitations of the attempted RICO claim to independently evaluate its applicability to the alleged facts.").

Certainly plaintiff's former counsel, Bret D. Landrith, is culpable. Mr. Landrith was the attorney of record when each of the sanctionable motions were filed, and Mr. Landrith signed and authored the complaint and each of the motions before the court. Nonetheless, sanctions against plaintiff are also appropriate for two reasons. First, plaintiff's CEO and sole shareholder, Samuel Lipari, takes responsibility for the decisions to knowingly bring the instant lawsuit after the result of plaintiff's previous attempts at litigation. For instance, Mr. Lipari's affidavit, entitled "Affidavit of Sam Lipari on The Unsuitability of Transfer," states:

> I chose to bring this new action in Missouri District court because I have a responsibility to Medical Supply's stakeholders . . . to adjudicate these claims. I brought two earlier and related actions to Kansas District court based on the advice of my counsel. I have witnessed first hand that no decision or outcome in either case including from the Tenth Circuit Court of Appeals had any relationship to the pleadings of my company or applicable law. I make this determination based on my considerable personal experience as a clerk and researcher for a Missouri legal firm and upon discussion with what I believe are the foremost healthcare antitrust authorities in our nation.

(Doc. 30, exh. 1). Mr. Lipari's affidavit continues with a litany of conspiracy theories involving defendants, this court, and other government agencies and employees. Significantly, however, Mr. Lipari's affidavit also discusses numerous instances when he actively participated in prior and current litigation. Mr. Lipari's affidavit also discusses attending one of Mr. Landrith's disciplinary conferences. Thus, Mr. Lipari was well-aware of the legal arguments and allegations being brought by his attorney, as well as the disciplinary allegations against Mr. Landrith prior to his disbarment. Even so, plaintiff chose to continue vigorously litigating the instant case. Second, after Mr. Landrith was disbarred, plaintiff chose to retain new counsel and continue litigating this case. Therefore, sanctioning plaintiff as well as Mr. Landrith serves to deter both from future frivolous filings.

In sum, the court finds that defendants' reasonable attorney fees and costs against plaintiff and Mr. Landrith jointly and severally is the minimum amount of sanctions necessary to "adequately deter the undesirable behavior." *White v. Gen. Motors*, 977 F.2d 499, 502 (10th Cir. 1992) (internal quotations and citations omitted).

E. Plaintiff's Motion for Clarification of Order in Case No. 03-2324 (Doc. 45)

Plaintiff's motion for clarification seems to request this court to clarify its ruling in a separate case, case number 03-2324, which found that plaintiff's request to consolidate case number 03-2324 with the instant case is moot. Case number 03-2324 was closed as of February 13, 2004, with attorney fees the only remaining issue. The court need not address this motion for two reasons. First, plaintiff has previously requested the court to "clarify" its decision in case number 03-2324, and the court found plaintiff's request moot in light of the posture of the case. Second, plaintiff's instant case will soon be closed, as the instant Memorandum and Order's holdings dismiss plaintiff's entire complaint. Therefore, the issue of whether to consolidate two closed cases is a moot one.

IT IS THEREFORE ORDERED that defendant Robert Zollars' Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 2); Defendant Neoforma, Inc.'s Motion to Dismiss, [sic] Complaint, or Alternatively to Require Amendment, Pursuant to F.R.C.P. Rules 8 and 9 (Doc. 4); Defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Motion to Transfer, Dismiss and/or Strike (Doc. 6); Defendants Curt Nonomaque and Robert Baker's Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim (Doc. 11); Defendant Shughart Thomson & Kilroy, P.C.'s Motion to Transfer, Dismiss and/or Strike (Doc. 13); Defendants US Bancorp, U.S. Bank National Association, Piper Jaffray

Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Renewed Motion to Dismiss and/or Strike (Doc. 32); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Renewed Motion to Dismiss Complaint for Failure to State a Claim (Doc. 34) are granted. Plaintiff's case is hereby dismissed.

IT IS FURTHER ORDERED that defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Motion for Sanctions (Doc. 22), and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion for Sanctions (Doc. 36) are granted. Plaintiff and Mr. Bret D. Landrith are hereby jointly and severally sanctioned in the amount of defendants' reasonable attorney fees and costs. **Defendants shall submit an accounting of their attorney fees and costs within twenty (20) days of this Memorandum and Order.**

IT IS FURTHER ORDERED that plaintiff's Motion for Reconsideration of Order Transferring Venue (Doc. 28); plaintiff's Motion to Strike Defendants' Renewed Motion to Dismiss and/or Strike (Doc. 38); plaintiff's Motion to Strike Novation Defendants' Renewed Motion to Dismiss (Doc. 43); and plaintiff's Motion for Clarification of Order in Case No. 03-2324 (Doc. 45) are denied.

IT IS FURTHER ORDERED that Defendants' Motion to Stay Rule 26(f) Conference and Discovery (Doc. 24); plaintiff's Motion to Consolidate Under Rule 42 (Doc. 39); plaintiff's Motion to Require Consolidation Arguments to be in the Form of Pleadings on the Record and Notice of Threat of Unlawful Sanctions (Doc. 42); First Plaintiff's Motion for Partial Summary Judgment Under F. R. Civ. P. Local Rule 56.1 (Doc. 46); plaintiff's Motion for Leave to Join Additional Defendants Under Fed. R. Civ. P. 29(a) (Doc. 49); plaintiff's Motion to Substitute Plaintiff Under F.R.C.P. Rules [sic] 17(a), 15(a) and

25(a) (Doc. 56); plaintiff's Motion to Substitute Defendant Under F.R.C.P. Rules [sic] 17(a) (Doc. 57); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion to Set Oral Hearing on Motion to Dismiss (Doc. 76) are denied as moot.

SO ORDERED.

Dated this 7th day of March 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 05-2299-CM**
NEOFORMA, INC., et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Pending before the court are plaintiff's Motion for Reconsideration (Doc. 80); plaintiff's counsel Ira Dennis Hawver's Motion to Withdraw (Doc. 81); plaintiff's Motion Under Rule 15 for Leave to Rewrite and Amend Complaint to Cure Any Defects Requiring Dismissal Remaining After Outcome of Reconsideration Motion (Doc. 92); plaintiff's Motion to Strike Documents # 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93 (Doc. 95); and plaintiff's Motion to Rewind Action and Return Proceeding to the Western District of Missouri in the Interest of Justice Under 28 U.S.C. [§] 1631 (Doc. 102).

I. Background

On March 9, 2005, plaintiff Medical Supply Chain, Inc. ("Medical Supply") filed the above-captioned case in the United States District Court for the Western of District Missouri, case number 05-2010-CV-W-ODS. Plaintiff brought suit against Neoforma, Inc.; Robert J. Zollars; Volunteer Hospital Association ("VHA"); Curt Nonomaque; University Healthsystem Consortium; Robert J. Baker; US Bancorp NA; U.S. Bank National Association; Jerry A. Grundhofer, Andrew Cesare;[1]

[1] Throughout the docket sheet, this defendant's last name was spelled numerous different ways. The court will use "Cesare," the spelling most often used by defendants' counsel.

Piper Jaffray Companies; Andrew S. Duff; Shughart Thomson & Kilroy, P.C.;[2] and Novation, LLC. Plaintiff's 115 page complaint alleges sixteen counts including claims for price restraint under the Sherman Act, restraint of trade and monopolization under both federal and Missouri law, conspiracy, tortious interference with contract or business expectancy, breach of contract, breach of fiduciary duty, fraud, prima facie tort, and claims under RICO and the USA PATRIOT Act.

The Western District of Missouri court transferred the case to this court on July 14, 2005. On March 7, 2006, this court dismissed plaintiff's case after finding that each of plaintiff's federal claims failed to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and declining to retain supplemental jurisdiction over plaintiff's state law claims. The court also found that claim preclusion barred several of plaintiff's claims. Furthermore, the court held that plaintiff's 115 page complaint violates Federal Rules of Civil Procedure 8(a) and 8(e)(1), and granted sanctions to defendants pursuant to Federal Rule of Civil Procedure 11(b) and 28 U.S.C. § 1927.

II. Analysis

A. Motion to Withdraw

On January 30, 2006, Bret D. Landrith withdrew as counsel for plaintiff after being disbarred from the practice of law in the State of Kansas on December 9, 2005 for violating Kansas Rules of Professional Conduct relating to competence, meritorious claims, candor toward the tribunal, fairness to opposing parties and counsel, respect for rights of third persons, and misconduct. On February 2, 2006, the court denied plaintiff's request to substitute Samuel K. Lipari, CEO of Medical Supply, as plaintiff for Medical Supply because although Medical Supply's corporate status was dissolved on

[2] Plaintiff's complaint names "Shughart Thomson & Kilroy Watkins Boulware, P.C." but the law firm's correct name is "Shughart Thomson & Kilroy, P.C.."

January 27, 2006, dissolution had not occurred at the time Mr. Lipari filed his motion to substitute. The court ordered Medical Supply to retain counsel because Mr. Lipari could not proceed *pro se* on behalf of a corporation. On February 7, 2006, Ira Dennis Hawver entered his appearance on behalf of Medical Supply.

Mr. Hawver requests that the court allow him to withdraw because Mr. Lipari no longer requires his representation. Attached to his motion to withdraw is Mr. Lipari's Entry of Appearance (Doc. 79), suggesting that Mr. Lipari intends to replace Mr. Hawver. But Mr. Lipari is not an attorney, and Mr. Hawver did not offer substitute counsel. The court finds that Mr. Hawver's motion does not comport with D. Kan. Rule 83.5.5, which requires withdrawing counsel without substitute counsel to "provide evidence of notice to the attorney's client containing (1) the admonition that the client is personally responsible for complying with all orders of the court and time limitations established by the rules of procedure or by court order and (2) the dates of any pending trial, hearing or conference." Mr. Hawver did not provide such notice to the court. As such, the court denies Mr. Hawver's motion to withdraw.

B. Mr. Lipari's Motions (Docs. 80, 92, 95 and 102)

On March 14, 2006, one week after this court dismissed plaintiff's case, Mr. Lipari filed an Entry of Appearance (Doc. 79). Since that time, Mr. Lipari has filed four motions currently pending before the court. The question before the court is whether Mr. Lipari may represent Medical Supply or substitute himself for Medical Supply.

Because Medical Supply was incorporated under the laws of Missouri, the effect of corporate dissolution on pending litigation is governed by Missouri law. Pursuant to Mo. Ann. Stat. § 351.476.2(6), "[d]issolution of a corporation does not: . . . (6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution." *See also Reben v. Wilson*, 861

S.W.2d 171, 176 (Mo. App. E.D. 1993). Therefore, even though Medical Supply was dissolved, its corporate existence continues for purposes of proceeding with this litigation. Medical Supply remains the sole plaintiff in this case.

Moreover, Mr. Lipari cannot proceed *pro se* on behalf of Medical Supply because a *pro se* individual may not represent a corporation. *See Nato Indian Nation v. State of Utah*, 76 Fed. Appx. 854, 856 (10th Cir. 2003) ("Individuals may appear in court pro se, but a corporation, other business entity, or non-profit organization may only appear through a licensed attorney.") (citations omitted).

The court also finds that Mr. Lipari may not substitute himself for Medical Supply. Federal Rule of Civil Procedure 25(c), which governs the procedural substitution of a party after a transfer of interest, states: "In case of any transfer of interest, the action *may* be continued by or against the original party, *unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action*." Fed. R. Civ. P. 25(c) (emphasis added). As evidenced by the plain language of Rule 25(c), the court has discretion to allow Mr. Lipari to substitute. *Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1324 (10th Cir. 1978). The court declines to exercise its discretion, however, because this case has been dismissed, and substitution will not change that outcome.

Mr. Lipari also argues that because the court sanctioned him personally, the court should allow him to represent himself *pro se*. Mr. Lipari is mistaken. The court sanctioned Medical Supply, not Mr. Lipari. Although the court discussed Mr. Lipari's personal involvement in the litigation in its ruling opposing sanctions against plaintiff and plaintiff's counsel, it did so for the purpose of demonstrating plaintiff's culpability. It is irrelevant that Mr. Lipari, as Medical Supply's sole shareholder, is ultimately liable for plaintiff's sanctions.

For the above-mentioned reasons, the court strikes each of Mr. Lipari's pending motions, including Documents 80, 92, 95 and 102. Consistent with this ruling, the court cautions Mr. Lipari

against filling additional motions. Of course, plaintiff may allow Mr. Hawver or other counsel to represent it. But the court reiterates that it dismissed plaintiff's case with prejudice and sanctioned plaintiff for violations of Federal Rule of Civil Procedure 11(b) and 28 U.S.C. § 1927. Plaintiff has a history of filing frivolous lawsuits and motions, for which the court has sanctioned plaintiff on several occasions. Future attempts to resurrect this case could result in the court imposing additional sanctions.

IT IS THEREFORE ORDERED that Ira Dennis Hawver's Motion to Withdraw (Doc. 81) is denied.

IT IS FURTHER ORDERED that plaintiff's Motion for Reconsideration (Doc. 80); plaintiff's Motion Under Rule 15 for Leave to Rewrite and Amend Complaint to Cure Any Defects Requiring Dismissal Remaining After Outcome of Reconsideration Motion (Doc. 92); plaintiff's Motion to Strike Documents # 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93 (Doc. 95); and plaintiff's Motion to Rewind Action and Return Proceeding to the Western District of Missouri in the Interest of Justice Under 28 U.S.C. [§] 1631 (Doc. 102) are hereby stricken from the record.

Dated this 7th day of August 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-2299
NOVATION, LLC	)
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

NOTICE OF APPEAL

Comes now, the plaintiff Medical Supply Chain and Samuel K. Lipari through their counsel, Dennis Hawver, Esq. and enters the present notice of appeal. Plaintiff respectfully appeals for the following reasons:

1. The trial court's order granting dismissal overrules the US Supreme Court decision regarding claim preclusion in *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955), a holding repeatedly followed by the Tenth Circuit.

2. The plaintiff has adequately pled Sherman Antitrust Act based claims that the defendants made specific agreements to restrain trade in the two relevant markets identified (hospital supplies and hospital supplies through an electronic marketplace), that the defendants have monopoly power in the

identified markets and the plaintiff has adequately alleged facts supporting the existence of a defendant antitrust conspiracy in an organized complaint where the required averments and claim elements are easily located by aid of a table of contents. Under the law, a conspiracy may consist of any mutual agreement or arrangement, knowingly made, between two or more competitors. *Law v. Nat'l Collegiate Athletic Ass'n* 185 F.R.D. 324, 336, n.19 (D. Kan. 1999).

3. The plaintiff has adequately pled RICO, RICO Enterprise and RICO Conspiracy claims that included misconduct before the trial court warranting appeal.

4. The trial court has again overruled the US Congress, invalidating two portions of the USA PATRIOT Act Public Law 107–56 ‘‘Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001’’ specifically § 814 of the USA PATRIOT Act entitled DETERRENCE AND PREVENTION OF CYBERTERRORISM (18 U.S.C.§1030 (e)) which creates a private right of action for Medical Supply to address the conduct of the Defendants in gaining access to the FINCEN network for the purpose of filing a suspicious activity report to prevent Medical Supply from providing hospital supplies and reducing healthcare costs and § 351 (31 U.S.C. § 5318 (g)(3)) making the defendants liable for filing a malicious Suspicious Activity Report against the plaintiff.

5. The court has disregarded the principals of *res judicata* and the Rooker-Feldman Doctrine in ignoring the final ruling of a Missouri state court in *Samuel K Lipari V General Electric Company, et al* Jackson County District

Court Case No. 0616-CV07421. Samuel Lipari was determined to be privileged to act *pro se* in vindicating his personal property interest that include the assigned claims of the dissolved Missouri corporation Medical Supply Chain, Inc. under the corporation laws of the State of Missouri, the source for determining Lipari's rights under Federal Rule of Civil Procedure Rule 17. Fed.R.Civ.P. 17(b) requires that "(t)he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." The defense counsel John K. Power's dismissal motion on behalf of alleged coconspirators in privity with the defendants in this matter was overruled by the Missouri state judge resolving the issue of whether Samuel Lipari acting *pro se* is the proper party under Missouri Statutes to represent the dissolved corporation's claims. See Exb 1. at pg. 2 (Order overruling GE defendants' dismissal and ordering mediation).

5. Finally, the trial court awarded attorneys fees to the defendants when Medical Supply was the prevailing party as an acting private attorney general under the catalyst test described in *Ellis v. University of Kansas Medical Center* 10th Cir. Case No. 96-3343a 12/21/1998. The defendants settled antitrust claims in the identified relevant market and would have continued their monopoly control of the hospital supply of retractable needles but for the plaintiff's present lawsuit. See Exb 2. and 3.

6. The plaintiff requires the opening brief to be increased from 30 to 80 pages.

Respectfully submitted,

/s/ Dennis Hawver

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Certificate of Service

I certify that on September 8th, 2006 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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/s/ Dennis Hawver

_____

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Text:		Document ID - 06-SMCC-2239; Served To - GE TRANSPORTATION SYSTEMS GLOBAL
	16th Judicial Circuit (Jackson County)	
0616-CV07421 - SAMUEL K LIPARI V GENERAL ELECTRIC COMPANY ET AL		
03/22/2006	Docket Entry:	Filing:
Text:		CIVIL FILING INFORMANTION SHEET
Filing Party:		LIPARI, SAMUEL K
	Docket Entry:	Pet Filed in Circuit Ct
03/23/2006	Docket Entry:	Case Mgmt Conf Scheduled
Associated Events:		07/05/2006 , 09:00:00 - Case Management Conference
	Docket Entry:	Notice
Text:		OF CASE MANAGEMENT CONFERENCE FOR CIVIL CASE AND ENTRY OF PRETRIAL ORDER ON JULY 05, 2006 IN DIV 5 AT 9:00 AM
03/28/2006	Docket Entry:	Summons Issued-Circuit
Text:		Document ID: 06-SMCC-2237, for GENERAL ELECTRIC COMPANY; Document ID: 06-SMCC-2238, for GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORPORATION; Document ID: 06-SMCC-2239, for GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING LLC; Document ID: 06-SMCC-2240, for CARPETS N MORE; Document ID: 06-SMCC-2241, for HEARTLAND FINANCIAL;
04/10/2006	Docket Entry:	Corporation Served
Text:		Document ID - 06-SMCC-2237; Served To - GENERAL ELECTRIC COMPANY; Server - ; Served Date - 04-APR-06; Served Time - 00:00:00; Service Type - Sheriff Department; Reason Description - Served; Service Text - E King
04/10/2006	Docket Entry:	Corporation Served
Text:		Document ID - 06-SMCC-2238; Served To - GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORPORATION; Server - ; Served Date - 04-APR-06; Served Time - 00:00:00; Service Type - Sheriff Department; Reason Description - Served; Service Text - E King
	Docket Entry:	Corporation Served
Text:		Document ID - 06-SMCC-2241; Served To - HEARTLAND FINANCIAL; Server - DAVID A. NICKERSON; Served Date - 04-APR-06; Served Time - 11:03:00; Service Type - Civil Process Server; Reason Description - Defendant Served; Service Text - JAMA BURKE/MGR-IN CHARGE
04/11/2006	Docket Entry:	Corporation Served

Text:		Document ID - 06-SMCC-2239; Served To - GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING LLC; Server - ; Served Date - 05-APR-06; Served Time - 00:00:00; Service Type - Sheriff Department; Reason Description - Served; Service Text - E King
05/02/2006	Docket Entry:	Summons Returned Non-Est
Text:		Document ID - 06-SMCC-2240; Served To - CARPETS N MORE; Server - RONALD L. HOLLADAY; Served Date - 27-APR-06; Served Time - 23:59:00; Service Type - Civil Process Server; Reason Description - No Answer
05/04/2006	Docket Entry:	Motion to Dismiss
Text:		Gen Electric Capital Business Asset Funding Corp and GE Transp Systems Global signaling LLC.
Filing Party:		GENERAL ELECTRIC COMPANY,
Associated Docket Entries:		05/31/2006 - Motion Denied
		ORDER DENYING DEFENDANTS GE'S MOTION TO DISMISS UPON FULL CONSIDERATION, the Court, having reviewed General Electric Company, General Electric Capital Business Asset Funding Corporation and GE Transportation System's Global Signaling, LLC's Motion to Dismiss filed on May 4, 2006 by Defendants and being fully advised in the premises, hereby DENIES the motion. WHEREFORE, IT IS ORDERED, General Electric Company, General Electric Capital Business Asset Funding Corporation and GE Transportation System's Global Signaling, LLC's Motion to Dismiss is DENIED. Dated: MAY 25, 2006 _____ W STEPHEN NIXON, Judge
	Docket Entry:	Suggestions in Support
Text:		of their Motion to dismiss.
Filing Party:		HEARTLAND FINANCIAL,
05/04/2006	Docket Entry:	Motion to Dismiss
Filing Party:		HEARTLAND FINANCIAL,
Associated Docket Entries:		05/31/2006 - Motion Granted/Sustained
		ORDER GRANTING HEARTLAND FINANCIAL'S MOTION TO DISMISS UPON FULL CONSIDERATION, the Court, having reviewed Heartland Financial's Motion to Dismiss filed on May 4, 2006 by Defendant and being fully advised in the premises, hereby GRANTS the motion. WHEREFORE, IT IS ORDERED, Heartland Financial's Motion to Dismiss is GRANTED for Plaintiff's failure to state a claim upon which relief can be granted. Dated: MAY 25, 2006 _____ W STEPHEN NIXON, Judge
	Docket Entry:	Suggestions in Support
Text:		of their motion to dismiss.
Filing Party:		GENERAL ELECTRIC COMPANY,

05/17/2006	Docket Entry:	Notice
Text:	LP NOTICE OF MISNOMER REGARDING PLT	
Filing Party:	LIPARI, SAMUEL K	
05/30/2006	Docket Entry:	Suggestions in Opposition
Text:	l/p to plts notice of misnomer.	
05/31/2006	Docket Entry:	Motion Denied
Text:	ORDER DENYING DEFENDANTS GE'S MOTION TO DISMISS UPON FULL CONSIDERATION, the Court, having reviewed General Electric Company, General Electric Capital Business Asset Funding Corporation and GE Transportation System's Global Signaling, LLC's Motion to Dismiss filed on May 4, 2006 by Defendants and being fully advised in the premises, hereby DENIES the motion. WHEREFORE, IT IS ORDERED, General Electric Company, General Electric Capital Business Asset Funding Corporation and GE Transportation System's Global Signaling, LLC's Motion to Dismiss is DENIED. Dated: MAY 25, 2006 _____ W STEPHEN NIXON, Judge	
Associated Docket Entries:	05/04/2006 - Motion to Dismiss	
	Gen Electric Capital Business Asset Funding Corp and GE Transp Systems Global signaling LLC.	
	Docket Entry:	Motion Granted/Sustained
Text:	ORDER GRANTING HEARTLAND FINANCIAL'S MOTION TO DISMISS UPON FULL CONSIDERATION, the Court, having reviewed Heartland Financial's Motion to Dismiss filed on May 4, 2006 by Defendant and being fully advised in the premises, hereby GRANTS the motion. WHEREFORE, IT IS ORDERED, Heartland Financial's Motion to Dismiss is GRANTED for Plaintiff's failure to state a claim upon which relief can be granted. Dated: MAY 25, 2006 _____ W STEPHEN NIXON, Judge	
Associated Docket Entries:	05/04/2006 - Motion to Dismiss	
06/01/2006	Docket Entry:	Suggestions in Opposition
Text:	L/P - TO THE GENERAL ELECTRIC DEFT'S MOTION FOR DISMISSAL	
Filing Party:	LIPARI, SAMUEL K	
06/15/2006	Docket Entry:	Suggestions in Support
Text:	OF MOT TO DISMISS GENERAL ELECTRIC DFTS AFFIRMATIVE DEFENSES	
Filing Party:	LIPARI, SAMUEL K	
	Docket Entry:	Motion to Dismiss
Text:	GE DFTS AFFIRMATIVE DEFENSES	
Filing Party:	LIPARI, SAMUEL K	

	Docket Entry:	Motion Filed
Text:	TO REQUIRE GE DFTS TO ANSWER PETITION	
Filing Party:	LIPARI, SAMUEL K	
07/05/2006	Docket Entry:	Jury Trial Scheduled
Text:	CIVIL CASE MANAGEMENT SCHEDULING ORDER Now on JULY 5, 2006 this matter coming on for scheduling conference and pursuant to Local Rule 35.1, the Court hereby enters the following Scheduling Order: Plaintiff appears by counsel, SAMUEL K LIPARI. Defendant fails to appear by counsel. 1. This case is set for trial on March 5, 2007 at 9:30 A.M. 2. The parties are ordered to participate in mediation pursuant to Rule 17. Mediation shall be completed by September 1, 2006. Each party shall personally appear at the mediation and participate in the process. In the event a party does not have the authority to enter into a settlement, then a representative of the entity that does have actual authority to enter into a settlement on behalf of that party shall also personally attend the mediation with the party. 3. Lee Wells is appointed to be the mediator in this case. 4. Each party shall pay their respective pro-rata cost of the mediation directly to the mediator. 5. Parties shall file any designated portion of depositions to be read or shown or played to the jury by videotape ten (10) days before trial. 6. Five (5) days before trial, the parties shall file a list of exhibits to be offered or referred to in the evidence. 7. Five (5) days before trial, the parties shall file a list of witnesses to be called to testify at trial. 8. Five (5) days before trial, the parties shall file any motions in limine, proposed jury instructions, counter designations and objections to proposed deposition excerpts to be read or played to the jury by videotape, and any trial briefs with the Court and the opposite party. 9. Dates in this pretrial order shall be changed only by leave of Court. Dated: JULY 5, 2006 W STEPHEN NIXON Judge	
Associated Events:	03/05/2007 , 09:30:00 - Jury Trial	
	Docket Entry:	Filing:
Text:	LP DISCLOSURE OF RELEVANT WITNESSES AND DOCUMENTS.	
Filing Party:	LIPARI, SAMUEL K	
07/17/2006	Docket Entry:	Answer Filed
Text:	LP	
Filing Party:	GENERAL ELECTRIC COMPANY,	
	Docket Entry:	Notice
Text:	L/P OF FILING OF REMOVAL	
Filing Party:	GENERAL ELECTRIC COMPANY,	
07/19/2006	Docket Entry:	Notice
Text:	L/P OF FILING PROPOSED ORDER	
Filing Party:	LIPARI, SAMUEL K	

Feature: *Wednesday, November 23, 2005*

Hijacking at the Hospital

Purchasing groups created to hold down health costs seem to be holding up patients instead.

By PABLO LASTRA

A Texas engineer designed a syringe with a needle that automatically retracts after one use, a design that could save so many lives among healthcare workers that a medical workers' union was screaming for it. But the sales teams trying to sell the improved syringes to hospitals were routinely shown the door without even getting to make their pitch.

Shaw: 'If you pay anybody a fee ... to try to influence a purchase, that would put you in prison in any other industry.'

The sales crew for a California inventor got the same treatment. He'd developed a far more accurate version of the device that measures the levels of blood oxygen — an advance with the potential to save many newborns every year. But despite the support of doctors' groups, hospitals across the United States were denied the chance to buy his revolutionary product.

By comparison, new software to help hospitals keep up with medical supply needs doesn't sound so dramatic. Nonetheless, its developer says the software could save healthcare consumers in this country up to $80 billion a year. But when the software company went looking for funding to launch a business based on the new system, the bank turned it down for what seemed like bizarre reasons. Perhaps a more plausible explanation: The bank had a business relationship with an investment firm closely tied to a giant hospital supply entity, one that controls close to a third of all the hospital supply business in the United States — and that stood to lose hugely by the introduction of such software.

Novation claims it saves member hospitals $1 billion a year.

The common link in all these cases is Novation, a North Texas company that, while little known to the average person, has become the largest broker of hospital and medical supplies in the country, wielding

enormous influence over the lives of patients, the safety of hospital workers, and the zooming costs of healthcare in this country. But it's also a giant in trouble. Several small medical supply manufacturers that say they have been squeezed out of the market by Novation are lining up to sue, and the company has already paid out millions of dollars in settlements. Congress is in its third year of investigating Novation's activities. At least one state attorney general is investigating the company. And now the company is a target of a Dallas-based investigation by the U.S. Attorney's office into massive allegations of Medicare fraud — a probe that has been hampered by the deaths, within the last 18 months, of two of the prosecutors involved in it.

U.S. Sen. Herb Kohl of Wisconsin co-authored legislation that would have strictly regulated GPOs like Novation.

Lipari: 'They're keeping us out of the market. There's a vast number of companies ... that Novation's monopoly is doing this to.'

The irony is that Novation and other entities like it — called group purchasing organizations — were invented to help hospitals save money. But instead of saving patients money, many people charge, Novation, in effect, is working on behalf of manufacturers and suppliers, helping them — and Novation itself — to make as much money as possible, to the detriment of taxpayers and the healthcare-buying public. Moreover, a recent deal involving a publicly traded partner of Novation has raised more concerns about its position in the healthcare industry, which verges ever closer to a monopoly. All while prices for medical supplies — paid for by insurers, patients, and taxpayers — continue to escalate at a rate far outpacing inflation.

"It's a bad deal for consumers," said Bud Weinstein, a University of North Texas professor of economics who has studied the GPOs on behalf of smaller manufacturers. "They claim that they save consumers money, but healthcare costs are rising at twice the rate of inflation."

Novation and other GPOs were given the right by Congress to accept payments that would be illegal kickbacks in any other industry. The end result is that groups that are supposed to be working for hospitals and patients to lower costs actually get their money from manufacturers whose natural tendency is to raise, not lower, prices and who can use their influence with the GPOs to corner the market for their products through long-term contracts worth billions of dollars. Critics compare this system to a car salesman who tells buyers that he's working to get them a lower price, when it's clearly against his interest to reduce his percentage-based commission. Small manufacturers claim that the GPOs, which control access to almost all hospitals, freeze them out of the market through backroom deals with medical supply giants like Tyco and Becton Dickinson.

Some Novation board members purchased stock in the companies they were supposed to be negotiating lower prices from — a clear conflict of interest. When Congress threatened to tighten up

conflict-of-interest rules, they simply quit the board rather than give up the valuable stock.

How many patient-generated, taxpayer-provided, congressionally allowed dollars are ending up in Novation directors' personal pockets? That may be the biggest kick in the pants of all: Novation won't show the government or anyone else in the public their books — except as required by the subpoenas that arrive with increasing frequency at the company offices.

The first group purchasing organization for medical supplies in the United States was created by New York hospitals that teamed up almost a century ago. But GPOs really took off in the 1980s as healthcare costs soared due to quickly evolving technology. Many of the small GPOs consolidated to form larger buying pools that could negotiate better prices with manufacturers through combined purchasing power and economies of scale.

Today there are some 600 GPOs, wielding control over $66 billion in healthcare supplies every year. Only about 30 have the size to negotiate significant volumes of sales, and the largest of them all is Irving-based Novation, a for-profit cooperative that claims to broker $24 billion in sales annually. Novation and Premier, the second-place company, together control about 54 percent of all hospital purchases in the country.

In 1986, Congress passed legislation regulating GPOs, including the so-called "safe harbor" agreement that exempts GPOs from federal laws against kickbacks. The rationale was that allowing GPOs to be financed by "administrative fees" paid by suppliers would allow hospitals to spend their money on patient care. Hospitals that belong to GPOs are obligated to buy supplies from them.

Novation came into existence in 1998, when two hospital networks — VHA of Irving and the University HealthSystem Consortium based in Illinois — set it up as a joint venture. VHA is a network of around 2,200 nonprofit hospitals and care organizations, including large hospitals like Baylor and Yale-New Haven. UHC has only about 200 members, but they include prestigious teaching and research hospitals like Parkland in Dallas.

GPOs like Novation say that, if not for them, healthcare would be even more expensive. However, the Government Accountability Office reported to Congress that in many cases, hospitals that used GPO contracts paid more for supplies than they would if they negotiated with the vendors directly.

Fort Worth Weekly contacted Baylor, Parkland, Children's Medical Center in Dallas, and Tarrant County's John Peter Smith hospital system to ask about their experiences with the GPOs. Baylor officials said they didn't have time for interviews. Children's Medical Center officials didn't return a reporter's phone calls. JPS officials called back but didn't reach a reporter by deadline.

Anthony Hinds, Parkland's vice president for strategic sourcing, said his hospital is "very satisfied" with Novation."Novation's position is unique — if we had to actually do the contracting for every item, we'd have to increase our staff fivefold," Hinds said. "But Novation does that for us. As long as we can validate that we're getting the best values, it saves us a lot of effort and money. From my standpoint, Novation really helps us not have to hike up our costs."

Hinds said he could not say how much money Parkland saves through its Novation contracts, but that considering other services Novation provides its members besides buying, such as evaluating products, hospitals get a good deal.

Money's not the only consideration, however. Some people believe that GPOs are costing lives as well

as millions of dollars.

As many as 60,000 healthcare workers contracted serious infectious diseases from accidental needle sticks in the last decade, including an average of one a week infected with the HIV virus. When Tom Shaw of Little Elm, west of Frisco in Denton County, heard the statistics in the late '80s, he started thinking about how a syringe might work that would eliminate such risk. Shaw, an engineer by training, eventually came up with a brilliantly simple solution: a syringe in which a spring mechanism retracts the needle into the barrel once the plunger is depressed, making reuse — and accidental pokes — impossible. He started Retractable Technologies to market the invention.

At the time there were other safety syringes in the market, but the mechanisms were more complicated, weren't completely foolproof, and could be modified for repeated use. However, when Shaw began trying to market his line of safety syringes in 1997, he found he couldn't even get in the door to show the products to hospitals, despite some clear advantages over competing products and the preference expressed by healthcare workers who had tried them. The reason, it turned out, was that the hospitals he tried to sell to were on GPO contracts — and were required to purchase from the large manufacturers that sold through the GPO, like $5 billion-a-year syringe giant Becton Dickinson, which controls 90 percent of the syringe market in this country. Shaw criticized the system in the press and to legislators while at the same trying to get on board with the GPOs by submitting bids. But the methods of doing business that the GPOs demanded seemed like bribery to him.

"If you pay anybody any fee, administrative or otherwise, to try to influence a purchase, that would put you in prison in any other industry," he said. "With the safe harbor [provision], the major manufacturers can pay GPOs to keep [other companies] out of the hospitals, and the GPOs make a lot of money."

When Novation finally looked at another of Retractable's products — a safer device for taking blood samples — the GPO suggested to Shaw that it could carry his company's product under its private label, Novaplus. Novation officials told him that by labeling the product as Novaplus, they could raise the price per unit to $1 from the 27-cent bid that Retractable had submitted, and the two companies would share the profits from the huge markup. According to the lawsuit Retractable eventually filed, a similar offer came from Premier, the second-largest GPO, which invited Retractable to attend a conference for suppliers, where $25,000 would buy Shaw not only advertising but also a "private dinner" with Premier executives and a small-group meeting with hospitals. Shaw rejected both deals and continued to rail against GPOs, eventually getting the attention of Congress.

Nick Rudikoff is a field researcher with the Service Employees International Union, which represents many nurses and other medical care workers and also runs a web site called Novation Watch. He said the union will oppose GPOs, especially Novation, as long as they continue to fail to deliver on their promise of lower prices and safer products.

"We believe that Novation's ... business practices exclude some of the most innovative medical devices like safer needles, while the costs [of resulting injuries and claims by workers] are passed on to healthcare purchasers," he said. "The infuriating part is our members don't mind putting their lives on the line, but hospitals aren't doing all they can to protect our workers. It's completely unacceptable that the hospitals can't buy these technologies because they are locked in a contract."

Shaw agreed. He said that even though his syringes cost a few pennies more than competitors', the cost is minimal compared to the risk of exposing healthcare workers to deadly disease. Retractable now has a contract with Novation, but Becton Dickinson still sells far more needles thanks to its lower

price and volume agreements with hospitals, even though clinical tests show Becton Dickinson's model resulted in more needle sticks. Shaw said Novation pushes Becton Dickinson's syringes because they make more money off them.

"They're killing nurses," he said. "Novation doesn't tell them they're not getting a safe needle. But they're moving a lot of them, and they're collecting a lot of fees. Nurses don't complain because they care for other people, not themselves."

When asked about Retractable's charges, Lynn Gentry, director of public relations for VHA, a Novation co-owner, said that small manufacturers like Retractable have gotten the attention of the media, but that for all its complaints, Retractable is now under contract with Novation and hospitals are free to buy its syringes.

Shaw and others said that his company's experience makes it clear that the basic problem with GPOs won't be fixed until the organizations are forced to stop taking fees from manufacturers.

"You work for the man who pays you," Shaw said. GPOs aren't really group purchasing organizations, working to help the buyer, he said — "They're group sales organizations. They're moving sales for major manufacturers, who pay bribes they call 'administrative fees.' Becton Dickinson pays to keep us out of hospitals — and that would put them in prison if they didn't have a safe harbor provision."

Ironically, Retractable, which is struggling to compete in the American market, is succeeding in China, which is licensing its safety syringe design with the intention of manufacturing 400 million syringes a year. Retractable also scored a major contract with the U.S. government to provide seven African countries with safe needles to help prevent transmission of AIDS.

"We can sell in communist countries because it's very dangerous" for bigger companies "to try to pay bribes over there," he said. "I don't know if there's a safe harbor in China to pay bribes to put products in the market that aren't safe. Americans fund the development of this technology, but they don't get to use it because of all the illegal activities going on here.

"The system is crooked — even Japan and Germany can't get into the American medical supply market," he said, because "the market here is already owned and paid for by the American companies."

And hospitals are part of the problem, not innocent victims of the scheme, Shaw said. Since GPOs are set as up as cooperatives, their revenue from administrative fees is shared with member hospitals.

Several sources told the Weekly that most hospitals bill insurance companies and Medicare or Medicaid for the full price of supplies bought through GPOs. When the hospitals later receive the fee income that provides a substantial discount on those prices, the resulting cost reductions are not passed through to those who were charged full price. Some question whether that practice constitutes insurance and Medicare and Medicaid fraud.

"What they [hospitals] want is two sets of invoices, one that says that they paid a [higher] price, that they turn over to the insurer or the government," Shaw said. "Which is not what they really pay once they take into account the reimbursements and rebates and benefits they get from GPOs."

Joe Kiani couldn't get his product into American hospitals even though doctors were asking for it and babies' lives were at stake.

An Iranian immigrant, Kiani took out a second mortgage on his California home in 1989 to start a company called Masimo. His mission was developing a better pulse oximeter, the device that measures oxygen in the blood and is critical to monitoring newborns. Independent testing showed that Kiani's version of the device virtually eliminated a problem plaguing earlier oximeters — false readings of blood oxygen levels that occur as a result of patient movement. A false alarm could result in a nurse administering too much oxygen to a baby, resulting in eye damage. On the other hand, if a nurse, after getting false readings, then disregarded a true reading, the result could be lack of oxygen to the brain, followed by brain damage. According to articles in The New York Times, doctors who tried Kiani's product found it far superior to the most popular oximeter, manufactured by Nellcor, a unit of Tyco International, a $40 billion-a-year scandal-plagued conglomerate.

Like Shaw, Kiani found that hospitals would not buy his product because Masimo did not have a contract with a GPO. According to court filings, when Masimo approached Premier, the GPO's own product-review process concluded that the new oximeter was superior to Nellcor's. Nonetheless, Premier's contract for pulse oximetry went to Nellcor — which, along with its parent company, was paying millions of dollars in fees to Premier and even investing in Premier's "Innovation Institute." Nellcor also got a multi-year contract with Novation.

Masimo and Retractable both took on the system through the courts.

Retractable filed a federal lawsuit against Novation, Premier, Becton Dickinson, and Tyco in Texarkana federal district court in January 2001, alleging that "the defendants combined or conspired to eliminate or lessen competition and to acquire and maintain monopoly power among hospitals and healthcare technology providers." The antitrust complaint stated that Novation and Premier's true purpose in the marketplace as GPOs is "to deliver substantial market share to monopolistic medical device manufacturers, such as Becton Dickinson and Tyco, in exchange for substantial 'administrative fees' and other forms of remuneration." Further, the complaint stated, GPOs require member hospitals to purchase as much as 90 percent of their supplies from their contracted vendors, with incentives for even higher levels of compliance, thereby blocking out small manufacturers.

The defendants denied any wrong-doing, but Novation, Premier, and Tyco all settled with Retractable in April 2003 for an undisclosed amount plus promises to allow Retractable access to hospitals. Shaw said that Becton Dickinson, the lone remaining defendant, settled in July 2004 for $100 million.

When asked for comment, Gentry, the Novation spokesman, requested that the Weekly submit written questions via e-mail. Most of the questions posed to Novation went unanswered, however. The spokesman did say that news coverage of the company has been "rife with errors" and that Novation has had to spend a lot of time "educating the media" and trying to repair "the damage caused by accusations from certain manufacturers" like Retractable.

As for Masimo, the company sued Tyco in 2002 but not the GPOs, although they were cited in the complaint as sharing an interest with Tyco in keeping Masimo out of hospitals through "anti-competitive agreements." Masimo also alleged that Novation's contract with Tyco gave larger discounts to hospitals that purchased at least 95 percent of their oximeters from Tyco. "The most favorable price discounts," the complaint stated, "are not linked to sales volume, but ... to the exclusion of competition." The complaint also alleged that Novation offered additional incentives to hospitals that purchased bundles of products from Tyco, leaving Masimo, which sold only oximeters, in an uncompetitive position while giving Tyco larger sales for many different supplies. A hospital that bought 95 percent of its supplies from a list of 12 Tyco product categories could receive a rebate

for as much as 7 percent of its purchase.

Eventually pressure from doctors and nurses who clamored for Masimo's oximeter led Premier to grant Masimo a contract shortly after the lawsuit was filed. Novation did the same a year later, only days before its CEO was scheduled to testify before Congress. Masimo's revenues have taken off since it gained that access to hospitals, and the company now has revenues in excess of $100 million a year. In March of this year, a jury concluded that Tyco owed Masimo $140 million in damages. Tyco has appealed this verdict.

Other small manufacturers have followed in the footsteps of Masimo and Retractable Technologies, suing the GPOs to gain access to hospitals. Nick Patton, a lawyer in Texarkana, is representing Genico, a manufacturer of laparoscopic surgical equipment, and Rochester Medical, which makes catheters, in federal antitrust lawsuits against Novation, Premier, and Tyco.

"These companies' products are competitive and represent a significant advance," he said. "The bottom-line effect of GPOs' practices is to cut out competition. It seems near impossible for a new company with a great product and good pricing to get in the marketplace."

The floodgates may have been opened for small companies who want a piece of the GPOs. Patton said that he's talked to two or three other companies about possible litigation against Novation.

With 2,400 hospitals as members, Novation controls access to close to a third of hospitals nationwide and claims to have saved its members $1 billion in 2003. But the company does not release information on its revenue. In fact, Novation's reputation is one of extreme secrecy.

"I've talked to member hospitals who say it's like getting info out of the CIA," said Rudikoff, of the medical workers union. "They're not open at all with them. As far as outside community scrutiny, they don't disclose anything to the public. They're resistant to any kind of oversight. Novation is a private entity owned by hospitals, which are a public trust, but they act as though everything is their own private business, which just happens to be 60 percent sponsored by taxpayers."

Many in the industry suspect Novation's earnings go far beyond the 3 percent of sales that Congress envisioned. Novation itself admitted that 30 percent of its contracts exceeded that, although following congressional hearings, the company said it voluntarily capped its fees at 3 percent, and Gentry, the Novation spokesperson, told the Weekly that the average fee is now 2.1 percent. Fees in excess of 3 percent of sales are supposed to be scrutinized for possible abuse by the Centers for Medicare and Medicaid Services.

After Senate subcommittee hearings last year on GPOs' influence on the healthcare market, legislation was proposed by U. S. Sens. Herb Kohl of Wisconsin and Mike DeWine of Ohio that would have more strictly regulated the purchasing groups, but the bill never made it out of committee. More hearings are scheduled for next year — and a Senate Judiciary Committee source said the GPOs' self-imposed code of conduct as well as the "safe harbor" provision will be under scrutiny. "There's also a valid concern that the GPOs are getting bigger and bigger," the source said. The high rate of consolidation in the industry, he said, "makes this an antitrust issue."

At the end of each year, Novation's earnings beyond operating expenses technically are supposed to go back to their member hospitals — but that doesn't always happen. GPOs can use administrative fees to finance other ventures. In Novation's case, it invested heavily in a struggling company in a deal that left industry experts scratching their heads.

Neoforma was one of the darlings of the dot-com bubble. Started in 1996 to enable hospitals to order supplies through the internet, Neoforma was embraced by Wall Street, and its stock reached a price of $735 shortly after it went public in 2000. After that, it was all downhill for the company. As investors realized that the company's earnings prospects were miserable, the stock price plummeted, reaching $5.66 at one point after a stock split. But where market watchers saw little hope, Novation saw an opportunity. In 2000, Novation invested its member hospitals' money in a deal that made Neoforma into Novation's e-commerce partner for 10 years. UHC and VHA, the two hospital consortia that formed Novation, came to own 50 percent of a company that has bled more than $700 million in red ink since it came into existence.

Neoforma's main source of revenue came from that business relationship it formed with Novation. Neoforma had $74.4 million in revenue in 2004 — mostly from suppliers that were forced by their agreements with Novation to also sign up for Neoforma's e-commerce service. But Neoforma also reported losses of $61 million. Some member hospitals, according to The New York Times, complained about Novation's investment in a hopeless company.

Some Novation executives also owned shares of Neoforma — which hospital officials pointed to as a conflict of interest. Curt Nonomaque, chief executive officer of VHA and a board member of Novation, had personally invested $150,000 in Neoforma, although he sold that stock in 2001. When congressional pressures for reform caused GPOs to institute an informal code of conduct, GPO board members had to declare conflicts of interest, including investments in companies that did business with the GPOs. This resulted in several board members at Novation leaving the company rather than selling their stock.

And Neoforma didn't just hemorrhage money — it infuriated suppliers who alleged that forcing them to pay for Neoforma's service was a double-dip by Novation.

"Neoforma has generated so many losses it's just been a huge albatross around Novation's neck," said a medical supply chain expert who did not want to be named because, he said, GPOs have "destroyed his life" for comments he made in the past. "Novation was Neoforma's largest consumer — that's the revenue that's been keeping Neoforma afloat. If they lost that, they would disappear. People at VHA and UHC didn't look real smart taking their members' money and investing into Neoforma."

Mark Lahey, executive director of the Medical Device Manufacturers Association, a group that represents small manufacturers like Retractable and Masimo, said Neoforma's business model made little sense for Novation to invest in.

Lahey said that Novation insists its vendors sign up for Marketplace@Neoforma, which "charg[es] six figures for companies to list their products with Neoforma. And Novation pimps them endlessly, even though they're losing money." Unfortunately, he added, "Hospitals aren't looking as closely as they should" into what Novation does with their money.

The latest developments regarding Neoforma have been even stranger. Last month, Neoforma announced a merger with Global Healthcare Exchange, its only remaining competitor in healthcare e-commerce. The action came after Neoforma's gloomy prospects forced it to consider a merger "to achieve maximum shareholder value" — and, reportedly, to stave off bankruptcy. In the pending merger, individual Neoforma stockholders would receive $10 a share — while VHA and UHC would end up with major ownership positions in the new company.

GHX is a privately owned enterprise belonging to Premier and 80 of the largest medical supply

manufacturers, including Becton Dickinson and Tyco. The merger means Novation has jumped in bed with its largest rival.

"This is just another opportunity for Novation and Premier to get together along with all the large manufacturers and have meetings behind closed doors," said the supply chain expert. "By having GHX come and buy Neoforma, Novation executives look like geniuses to their member hospitals, although they're really creating a monopoly. The GPOs are supposed to be fighting the manufacturers, but instead they're openly getting in business with them."

The deal may or may not make Novation execs look good in the long run. Neoforma is facing a class-action lawsuit in Delaware filed by shareholders who allege that the deal is unfair to them. Lawyers for the shareholders declined to comment on the case.

If people like Shaw, Patton, and Lahey sound paranoid about a conspiracy involving hospitals, big manufacturers, and GPOs combining to rip off American healthcare consumers, they're not alone. Medical Supply Chain, a Missouri company that develops software that enables hospitals to order supplies directly from manufacturers, alleges that Novation and Neoforma, in conspiracy with manufacturers, distributors, and suppliers, have charged $100 billion in excess costs to hospitals since 2002. The anti-trust lawsuit seeks $1.5 billion in damages from Novation, Neoforma, and their executives, as well as US Bank and investment firm Piper Jaffray.

Samuel Lipari, CEO of the Missouri firm, said that his company's troubles began in 2002. Lipari sought funding from US Bank to start MSC. The loan, which seemed like a sure thing, was denied. US Bank cited a money laundering provision of the USA PATRIOT Act as the reason, telling Lipari that his company "could not really give all the correct answers on the source and flow of money" for Medical Supply Chain. Lipari and his attorney, Bret Landrith, argued that the PATRIOT Act seemed irrelevant to a company in good standing with the state of Missouri and clearly traceable funds from U.S. citizens seeking a bank loan.

"We knew Medical Supply Chain could save hospitals 40 percent over the prices they pay," said Landrith. "Web-based exchanges like ours can make hospitals more efficient than Wal-Mart." But as they looked into the problem, Landrith and Lipari said they noticed that US Bank had a business relationship with Piper Jaffray, which in turn had a relationship with Novation and Neoforma. The only explanation for denying funding to MSC, which claims that it could save hospitals $80 billion, was that Piper Jaffray, US Bank, and Novation conspired to keep MSC out of the marketplace.

"They're keeping us out of the market," said Lipari. "There's a vast number of other companies with technology to improve healthcare that Novation's monopoly is doing this to. Our litigation is identical to Retractable's, and the evidence is parallel to their case."

An independent study by Harvard Law School Prof. Einer Elhauge brought together all the arguments against GPOs. He said that contracts requiring hospitals to purchase 90 percent or more of their supplies from large vendors exclude rivals and harm consumers and hospitals to the tune of $6 billion a year. The loyalty rebates, he said, act as penalties for hospitals that stray from the GPO. Beyond that, Elhauge concluded, the GPO process also stifles the development of even more innovative products.

The Justice Department is taking Novation's role in the market seriously. In August of last year, shortly before the Senate subcommittee held hearings on tighter regulation for GPOs, federal prosecutors in Dallas opened a criminal investigation into the medical supply industry, with Novation at the center of it.

Federal officials declined to comment on the investigation, which came to light when Becton Dickinson revealed in its financial statements that Justice had issued subpoenas regarding its transactions with Novation. Officials at Novation also confirmed receiving federal subpoenas demanding documents, but pointed out that investigations could be launched without evidence of misconduct.

Based on the subpoenas, the investigation appears to be seeking evidence of Medicare fraud and conspiracy to defraud the United States.

"Hospitals get a big fat check once or twice a year from the GPOs," explained one expert who is close to the investigation. "No other deal gives free money to a hospital. And they can report checks not as a reduction in cost, but as miscellaneous income. This allows them to be reimbursed ... for the original price before they account for the money they get from GPOs and manufacturers. That's what the investigation is about."

The huge volume of documents that investigators are having to sort through has dragged the process out for more than a year, another source said, and pointed out that hospitals and manufacturers have received subpoenas as well as GPOs.

The investigation wasn't helped when two federal prosecutors involved in the case died weeks apart from each other. Thelma Colbert, who headed a civil litigation unit of the Fort Worth DOJ office that prosecuted companies involved in defrauding government-funded programs, drowned in her swimming pool in July 2004. The Tarrant County medical examiner's office determined the death was accidental. Then, on Sept. 13, 2004, Shannon Ross, the criminal chief for the U.S. Attorney's office in Dallas, who reportedly had signed the GPO subpoenas, was found dead in her Rowlett home. In that case, the Dallas County medical examiner ruled the death to have been from natural causes.

About the same time federal prosecutors were launching their investigation of Novation, the company also came under scrutiny from Connecticut Attorney General Richard Blumenthal, whose office, he said, was "very interested in potential undue influence exerted by vendors and manufacturers on individuals in positions to make healthcare purchasing decisions." No indictments have been returned in either the state or federal investigation, but Blumenthal's office is continuing to serve subpoenas.

Gentry, the Novation spokesman to whom the Weekly delivered its written questions, was also asked to arrange interviews with company officials regarding the investigations. The spokesman said executives did not respond when he mentioned the Weekly's requests. He also said no company executives were under government investigation.

Meanwhile, Mark McKenna, CEO of Novation, announced his intent to step down in spring of 2006, after his successor has been appointed. The press release announcing this did not give a reason for McKenna's decision, but the spokesperson said McKenna, who is 56, "wants to enjoy life."

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Novation Awards Multiple Contracts for Safety Needles and Syringes

IRVING, TX; December 5, 2005 — Novation, the supply company of VHA Inc. and the University HealthSystem Consortium, has signed agreements with four suppliers for safety needles and syringes. The agreements will take effect on Jan. 1, 2006 and run through Dec. 31, 2008. The agreements were signed based on Novation's public competitive bid process and input from the member surveys and member councils.

“Novation recognizes the critical importance of protecting patients, health care workers and the environment,” said Cathy Denning, senior director, contract and program services at Novation. “This is why we actively pursue the inclusion of safety-related products in our contract portfolio. These agreements exemplify Novation's commitment to safety and providing members with a broad choice of supplier options.”

The agreements are with the following companies:

Company	Products
Becton Dickinson (Franklin Lakes, N.J)	Safety-Lok™, SafetyGlide™, Eclipse™, Integra™
Retractable Technologies Inc. (Little Elm, Texas)	Vanishpoint® Syringes, Vanishpoint® Insulin, Vanishpoint® TB, Vanishpoint® Allergy Tray
Smiths Medical (Keene, N.H.)	Needle-Pro® Safety Needles, Needle-Pro® Safety Combos, Insulin & TB Needles, Edge® Safety Needles
Tyco Healthcare (Mansfield, Mass.)	Magellan™ Safety Needles, Monoject® Safety Needles/Syringes Combo, Monoject® Safety Needles

The increase costs of raw materials such as resin and petroleum necessitated a minimal price increase for Becton Dickinson and Tyco Healthcare products. However, Novation obtained – lower pricing on Retractable Technologies Inc. products and Smiths Medical agreed to maintain previous contract pricing on its products.

Many variables influence the supply of raw materials and ultimately the cost of various medical and surgical supplies. Novation monitors the market to ensure that as the availability and pricing of raw materials improves, the original contract pricing is either restored or prices are cut.

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About Novation
Based in Irving, Texas, Novation is the leading health care contracting services company, delivering unmatched savings and value to nearly 2,500 members of VHA Inc. and the University HealthSystem Consortium (UHC), two national health care alliances. Through its public competitive bid process, Novation develops and manages contracts with more than 700 suppliers, both large and small. By combining scale and agility with clinical knowledge and product expertise, Novation offers the most extensive range of innovative contracting services, including: contract development, contract and supplier management, custom contracting, enhanced savings programs, online contract management and analytical tools, order management and online supplier connectivity. VHA and UHC members used Novation's contracts to purchase more than $25 billion in supplies in 2005.

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