UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY, KANSAS

Medical Supply CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-
NOVATION, LLC	) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	) Attorney Lien
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.	)

ANSWER MEMORANDUM IN SUPPORT OF RECONSIDERATION OF TRANSFER

Comes now the plaintiff Medical Supply Chain, Inc. and makes an answer to defendants' suggestion opposing reconsideration of the court's order transferring this action to Kansas. Because the papers of this case have been transferred to Kansas District court even while the transfer is to be reconsidered, the plaintiff is required under *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509 (10th Cir.1991) to file its answer memorandum in the transferee court. In *Chrysler Credit*, the Tenth Circuit held that "[o]nce the files in a case are transferred physically to the court in the transferee district, the transferor court loses all jurisdiction over the case, including the power to review the transfer." *Id.* at 1516-17 (footnote omitted).

The Plaintiff is entitled to Choice of Forum

Medical Supply brought this action in the Western District of Missouri. "In general, federal courts give considerable deference to a plaintiff's choice of forum and thus the party seeking a transfer under section 1404(a) typically bears the burden of proving that a transfer is warranted. See *Jumara*, 55 F.3d at 879; *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir.1992)." *Terra Intern., Inc. v. Mississippi Chemical Corp.*, 119 F.3d 688 at 695 (C.A.8 (Iowa), 1997). Deference to the plaintiff's choice of forum is particularly strong where the plaintiff has chosen his home forum. See *Nichols v. United States Bureau of Prisons*, 895

F.Supp. 6, 8 (D.D.C.), pet. for writ of mandamus den., 1995 WL 551095 (D.C.Cir.1995).

Plaintiff and The State of Missouri Have Substantial Interests in This Action

Both the forum state of Missouri and the plaintiff Medical Supply have substantial interests in the litigation proceeding in the Western District of Missouri because the claims are based conduct committed against the plaintiff in Missouri and in violation of Missouri's state antitrust and contract laws. This state interest is immense. While this reconsideration of transfer motion is being argued, the first 65,000 Missouri residents were cut off of Medicaid benefits on July 1, 2005. A July 2nd , 2005 Los Angeles Times article stated 1/3 of the Missourians losing insurance coverage are children: "An estimated 24,000 children are expected to lose their benefits, dental coverage is being cut for adults, and disabled people are losing coverage for crutches and other aids." See Missouri's Sharp Cuts to Medicaid Called Severe-*More than 68,000, a third of them children, may lose benefits in the move to avoid tax hikes*. LA Times, July 1, 2005.

On June 29, 2005, David Moskowitz MD, was invited to testify before the Missouri Medicaid Reform Commission and in his released pretestimony stated for the 65,000 patients losing coverage; "Since oxygen tanks are among the items no longer covered**, many patients will soon die**"[emphasis added]. Of course patients are the consumers in the market for hspital supplies that is the primary relevant market of Medical Supply's antitrust claims. Doctor Moskowitz also stated; "The Missouri Legislature is wrestling with the most critical domestic issue of our time. It is literally a life and death issue for tens of millions of Americans. It seems to me profoundly un-American, on the eve of our nation's birthday, to have people die simply because Medicaid is still paying retail for drugs."

The plaintiff's complaint alleges that the costs of hospital supplies including equipment like oxygen tanks and consumables like prescription drugs are artificially inflated from the defendants' market manipulations in violation of the State of Missouri's antitrust laws and the Sherman Antitrust Act as part of the defendants' common enterprise to overcharge Medicaid and Medicare. This court is required to make its initial determinations on the merits of the plaintiff's complaint for both jurisdiction and sufficiency of the claims based on the averments in the plaintiff's complaint and to take them as true.

Medical Supply and the State of Missouri's Interests Can Only Be Served By Civil Enforcement

On July 11th, 2005, Jeffrey Hill, a correspondent for The Hill, The Newspaper For and About Congress, reported that with the support of Kansas Senator Sam Brownback, the hospital supply industry

will not be regulated for the abuses of the defendants in their Group Purchasing Organization practices and that instead a voluntary disclosure scheme to counter act the serious conflicts of interest recognized in the industry:

> "After a series of behind-the-scenes talks with key senators, companies that supply medical devices, drugs and other products appear to have dodged an onerous regulatory bullet.
>
> The suppliers, known as hospital group-purchasing organizations (GPOs), received a boost when three senators and the hospital industry backed new voluntary ethical guidelines for the industry.
>
> The Judiciary Committee has scrutinized the potentially anti-competitive practices of these GPOs. But today Sens. Jon Kyl (R-Ariz), Sam Brownback (R-Kan.) and Charles Schumer (D-N.Y.), all members of the judiciary panel, plan to offer their support of the GPOs' guidelines.
>
> In a statement to be released today, Schumer praises the "strong" code of conduct issued by the Healthcare Group Purchasing Industry Initiative. "I am hopeful that, with the steps the industry has taken, the Senate will not have to intervene," Schumer said.
>
> The Senate Judiciary Committee's Antitrust Subcommittee has held a series of hearings in the past few years, and the panel's chairman, Mike DeWine (R-Ohio), and ranking Democrat, Herb Kohl (Wis.), have pressured the industry to provide safeguards to ensure that GPOs are engaging in fair business practices and providing their clients with lower prices.
>
> Though unknown to most outside of the healthcare sector, GPOs act as middlemen, making large-volume buys from healthcare-products manufacturers for hospitals and other healthcare providers. The industry estimates it moves about $80 million worth of supplies each year.
>
> Kohl and DeWine co-wrote the Medical Device Competition Act in the 108th Congress that would have directed the Department of Health and Human Services to design ethics standards for the industry. The measure has not been introduced in the 109th Congress.
>
> Demands from Kohl, DeWine and other senators resulted in ever-stricter guidelines' being considered by the GPOs over the past several years. "As this initiative has developed, the degree of disclosure [required for GPOs] we committed to has been ratcheted up many times," said Richard Norling, CEO of Premier Inc., a GPO and hospital chain.
>
> The policies represent "a gold standard for public disclosure and best practices," Norling said in a written statement.
>
> The hospital industry praised the guidelines.
> "The initiative offers stakeholders greater insight into GPO business practices and decisionmaking," six hospital organizations said in a joint statement. "It also ensures that GPOs who are part of the initiative operate ethically and are held accountable."
>
> The organizations include the American Hospital Association and the Federation of American Hospitals. The National Rural Health Association is slated to release a supportive statement of its own today.
>
> The hospital industry's endorsement of the GPO guidelines suggests confidence that they will result in fair competition and deeper discounts. Supply costs are topped only by labor among hospitals' expenses.
> Issued in April, the ethics standards rely heavily on the GPOs' willingness to report accurately company policies designed to prevent conflicts of interest involving GPO board members and officers with the GPOs' business partners. Questionnaires measuring GPOs' adherence to the standards must be answered each year; the results are made available to policymakers, competitors and the public.
>
> The initiative says that 80 percent of GPOs are endorsing the guidelines."

Jeffrey Hill "Healthcare Providers Look To Dodge New Mandates",The Hill, July 11th, 2005.

On July 12th, 2005, the defendants UHC, VHA and Novation strongly endorsed this substitute for regulation in a press release by their lobbying organization Healthcare Group Purchasing Industry Initiative entitled "Key Senators And Largest Hospital Groups Express Support For New Initiative Promoting

Greater GPO Transparency-*Initiative is Most Extensive, Voluntary Disclosure of Ethical and Business Practices Undertaken by Any U.S. Industry, Experts Say*."

Of course, for Medical Supply and its counsel Bret Landrith to have suggested in a Kansas District Court in October of 2002 that conflicts of interest between US Bank, US Bancorp NA (USB), Piper Jaffray Companies (PJC) arising from their exclusive heathcare technology company capitalization agreements with the GPO Novation LLC and their investment relationships and coverage with Neoforma, Inc. were harming hospitals and patient consumers in the nationwide market for hospital supplies invited the Kansas District judge who had heard no evidence to admonish Medical Supply's counsel to check his facts. When Medical Supply brought the clear errors of law on appeal, the Tenth Circuit demonstrating no independent consideration dismissed the appeal with a show cause order and sanctioned Medical Supply's counsel with its harshest sanctions for a "frivolous" appeal. The defendants continue to this day quoting these biased and ill informed decisions and failing to provide legal support for motions in opposition to the plaintiff's claims.

On July 13th, 2005, The Kansas State Disciplinary Administrator, Stanton Hazlett served notice he would formally prosecute Medical Supply's counsel for making an appeal in the earlier Kansas District court case. This is despite his admission in the previous prosecution that he omitted exculpatory evidence from the two *ex parte* probable cause hearings before commencing the earlier prosecution. Medical Supply's counsel lost his family, his house and income as result of the earlier two year prosecution in furtherance of the defendants' obstruction of justice.

The earlier prosecution which is still ongoing has materially harmed Medical Supply's representation, being temporally coordinated to disrupt Medical Supply's counsel in the trial court jury trial and appeal of *Bolden v. City of Topeka*, the case that was pretextually used by the defendants.

Kansas utterly flunks as a forum where litigation on these issues can be pursued in the interest of justice. State of Kansas Judicial Branch officials including Stanton Hazlett certainly have no governmental interest in preventing competition in the hospital supply market or in punishing claims or appeals for being in the form of proper complaints under the federal antitrust statutes and the USA PATRIOT Act. The State of Kansas also suffers from Medicaid overcharging that has led to budget shortfalls and a finding by Governor Sebelius's administration that the state's minorities continue to suffer from lack of access to healthcare. See the Kansas Health Institute Report entitled Racial and Ethnic Minority Health Disparities in Kansas:A Data and Chartbook, State of Kansas Judicial Branch officials certainly could have no legitimate interest in retaliating against victims or their counsel who are seeking redress in federal court. Similarly, State of Kansas Judicial Branch officials and their agents shouldn't interfere in representation agreements of private litigants on behalf of the defendants or offer $300,000.00 bribes in an attempt to fix this case while it was in the Missouri Western District Court. See attached affidavit of Sam Lipari, exb. 1.

In contrast with Stanton Hazlett's felonious criminal use of his Kansas Judicial Branch Office to punish each and every ethical act of Medical Supply's counsel, the Texas solution described in the plaintiff's complaint of merely terminating attorneys capable of enforcing the federal antitrust laws against the defendants now seems commendably humane.

The Kansas District Court And The Tenth Circuit Do Not Honor Federal Antitrust Statutes In the Hospital Supply Market

The Kansas District court abused its discretion in dismissing an injunction to prevent the defendants from keeping Medical Supply out of the market for hospital supplies and even admonished the plaintiff's counsel in the mistaken belief that artificially created shortages of hospital supplies from contract price manipulation could not cause patient deaths. These are determinations that could only be made by the court after evidence had been presented. The Tenth Circuit panel never the less sanctioned the plaintiff's counsel for even appealing the trial court's clear mistake and error regarding the USA PATRIOT Act used by the defendants to keep Medical Supply out of the market for hospital supplies and in contradiction to established Tenth Circuit precedent on identified but uncharged antitrust coconspirators and discoverable unknown defendants.

Kansas Has No Developed State Antitrust Law

There is no body of state antitrust law in Kansas that has been developed like that of the State of Missouri's and under which the plaintiff has brought its claims. The Kansas Supreme Court described the Kansas antitrust statutes in 1999:

> "That the statutes are broad may not be denied. That there has been no meaningful interpretation of these statutes in Kansas is also true. For a comprehensive discussion of the state of antitrust law under the Kansas statutes at the time Noah filed the underlying antitrust action, see Kenton C. Granger, A Glimpse at a Plaintiff's Remedies Under Kansas' Antitrust Laws, 8 Washburn L.J. 1 (1968). The statutes relied upon by Noah were enacted 1889, 1897 (a year before Congress passed the Sherman Act), and 1899. **The statutes have been virtually ignored by the bar, with only a few cases coming to this court since their enactment**." [emphasis added]

Bergstrom v. Noah, 974 P.2d 520 at 530, 266 Kan. 829 (Kan., 1999).

The Kansas District court which was unable to rule consistently with federal antitrust acts and Tenth Circuit established precedent will now be called upon to interpret Missouri's antitrust laws while Missouri's own residents are being subjected to the hell the plaintiff sought to prevent and to which Kansas officials have no interest in stopping (The affidavit of Samuel Lipari even reveals State of Kansas officials including Stanton Hazlett are actively trying to obstruct justice and prevent these claims from being

litigated by depriving Medical Supply of counsel).

The Interests of Justice Favor The Western District of Missouri

The Interests of Justice Favor The Western District of Missouri, the plaintiff's chief executive has been witness to the injustice, intimidation and harassment that has been meted out in Kansas against the plaintiff, the plaintiff's representation and witnesses in federal actions in Kansas as a direct result of the defendants' conduct averred in the complaint.

> "Section 1404(a) governs the ability of a federal district court to transfer a case to another district. This provision reads: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1994). The statutory language reveals three general categories of factors that courts must consider when deciding a motion to transfer: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice. *Id.*"

Terra Intern., Inc. v. Mississippi Chemical Corp., 119 F.3d 688 at 691 (C.A.8 (Iowa), 1997). The plaintiff's suggestion opposing transfer of this action to the District of Kansas concentrated on the third element, the interests of justice that would be disserved by a transfer to Kansas District Court. The plaintiff explained how many of the issues raised by the defendants in their response to the complaint would be resolved in the favor of the plaintiff under Kansas District court precedent and when applying the law of the transferee forum state. The defendants unanimously answered, acknowledging the plaintiff's arguments regarding the change of venue's modification of the parties' substantive rights without controverting the plaintiff's arguments.

The Interests of Justice Are Defeated By The Choice of Law Rule

Of particular note is the defendants' lack of informing argument and acceptance of the plaintiff's assertion on which venue's law will apply. Normally, the rule is contrary to the plaintiff's assertion:

> "The rule is settled that when a district court grants a venue change pursuant to 28 U.S.C. § 1404, the transferee court is obligated to apply the law of the state in which the transferor court sits." *Benne v. International Business Machines Corp.*, 87 F.3d 419, 423 (10th Cir.1996) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805, 820, 11 L.Ed.2d 945 (1964) (rule applies whether defendant or plaintiff initiates change of venue))."

Yoder v. Honeywell Inc., 104 F.3d 1215 at 1219 (C.A.10 (Colo.), 1997). However, the defendants asserted in their initial response to the complaint that personal jurisdiction over some of the defendants was lacking. "When the transferor court lacks personal jurisdiction, however, the choice of law rules of the transferee court apply. "*Doering v. Copper Mountain Inc.,* 259 F.3d 1202 at 1209 (10th Cir., 2001). The Tenth Circuit has ruled that when jurisdiction is corrected by the transfer, 28 U.S.C. § 1631 is properly

used, mandating the law of the transferee forum:

> "In such cases, the transferee jurisdiction's substantive and choice of law rules apply so long as the transfer did in fact cure a jurisdictional defect, as we note below. *Trierweiler,* 90 F.3d at 1532. We note below that the proper course of action since the enactment of 28 U.S.C. § 1631 is to transfer pursuant to that statute, which requires that the transferee court apply that jurisdiction's law. *Ross v. Colorado Outward Bound School, Inc*., 822 F.2d 1524, 1526-27 (10th Cir.1987)."

Viernow v. Euripides Development Corp., 157 F.3d 785 at 793 (C.A.10 (Utah), 1998).

The transfer of this action to the Kansas District court is a situation in which the transferee court should consider the transfer "clearly erroneous," and therefore seeks to transfer the case back to the transferor court, the doctrine of the law of the case provides that such retransfers "should necessarily be exceptional," and "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." *Christianson v. Colt Industries Operating Corp*., 486 U.S. 800, 819, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988).

The Court Is In Error Because of The Affidavit of Intimidation and Harassment Outweighs Any Experience Or Efficiency In A Kansas District Court or Tenth Circuit Court of Appeals That In Its Prejudice And Bias Refused To Read The Plaintiff's Pleadings or Briefs

No evidence was heard in two emergency preliminary injunction hearings and no findings of fact or law were made in the Tenth Circuit interlocutory appeal of denial of preliminary injunctive relief which was later dismissed as moot. The defendants' reply tries to argue that the Tenth Circuit appellate panel's handling of the Medical Supply vs. US Bancorp appeal lends efficiency in the conservation of judicial resources since the circuit has become familiar with the parties and the facts of the case. The show cause order and the judgment of the same panel belies this contention. Medical Supply sought *en banc* reconsideration precisely because the panel had demonstrated no familiarity with any of Medical Supply's filings. See

The Western District of Missouri transferor court has ruled interpreting the interest of justice factor similar to the court in *Reiffin v. Microsoft Corp*., 104 F.Supp.2d 48 (D.C., 2000) responded to many of the same issues regarding venue as raised in this action. However, as will be explained *infra*, important differences exist between Medical Supply and Reiffin that cause a similar outcome to be an abuse of discretion. The *Reiffin* court examined transfer where facts and claims are identical or closely related to an earlier action in transferee forum and the transferee forum had extensive familiarity with parties, facts and legal issues. The *Reiffin* court observed:

> "[t]he interest-of-justice factor encompasses the desire to avoid multiple litigation from a single transaction [and] to try related litigation together ...." See *Vencor Nursing Centers, L.P. v. Shalala*, 63 F.Supp.2d 1, 6 (D.D.C.1999) (emphasis added); *Hawksbill Sea Turtle v. FEMA*, 939 F.Supp. 1, 3 (D.D.C.1996). A court considering transfer of venue "may consider the interest of conserving judicial resources and practical considerations which will facilitate a final resolution of the litigation in an expeditious and inexpensive manner." *Harris v. Republic Airlines*, 699 F.Supp. 961, 962 (D.D.C.1988).

Reiffin v. Microsoft Corp., 104 F.Supp.2d 48 at 55 (D.C., 2000). Medical Supply's claims are not based on the same transactions as the earlier litigation as clearly stated in *Lawlor v. Nat'l Screen Services*, 349 U.S. 322 (1955) and *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).

The *Reiffin* court noted the steps the plaintiff could have taken instead of re-filing his complaint in another district court:

> "[T]he plaintiff has a strong belief, forcefully expressed, that Microsoft acted dishonestly and in bad faith in the related California proceeding, and that that conduct led the Northern District Judge to issue an erroneous ruling. This court expresses no opinion on the merits of those beliefs. However, there were several potential avenues for the plaintiff to raise these concerns, and none of them involve filing a largely duplicative action in this district. Specifically, the plaintiff might have filed a motion for reconsideration, with the Northern District Judge, pursuant to Federal Rule of Civil Procedure 59(e). Alternately, if he believes that Microsoft's alleged dishonesty led the Northern District Judge to issue an erroneous ruling, he could file a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). Lastly, the plaintiff can ask that court to impose sanctions on Microsoft or its counsel."

Reiffin v. Microsoft Corp., 104 F.Supp.2d 48 at 55 (D.C., 2000). In the earlier action in Kansas District court, Medical Supply sought a reconsideration under Rule 59(e). The trial court did not acknowledge the clear error in failing to recognize coconspirators when identified in the complaint and the express language in the USA PATRIOT Act granting private rights of action, supplemented by quotes from a legal article on anti money laundering suspicious activity reporting liability after implementation of the USA PATRIOT Act.

When Medical Supply made an appeal, seeking the only remedy for errors of law and the only remedy for the court's misconduct, a Tenth Circuit panel made no independent findings of fact or law and issued a show cause order against the plaintiff and its counsel. Medical Supply answered that show cause order, citing several private rights of action in the text of the USA PATRIOT Act contradicting the Tenth Circuit panel's formal memorandum and order.

In its findings on the show cause response, the Tenth Circuit panel acknowledged that Medical

Supply's issue on appeal was indeed wrongly decided when it admitted that there are private rights of action under the USA PATRIOT Act. The same panel went on to rule contradicting the circuit's controlling opinions on unnamed but identified antitrust coconspirators and on dismissals related to discoverable unknown civil defendants and sanctioned Medical Supply's counsel over $23,000.00.

The Tenth Circuit's Overt Retaliatory Hostility To Medical Supply And To Federal Law Being Applied In The Market For Hospital Supplies Transcends Concerns Over Forum Shopping

While the above may be seen as mere bad out comes a forum shopper may seek to avoid, the plaintiff disagrees. The plaintiff exercised its freedom to bring a new claim in a different venue, including one like Missouri District court that honors United States law. The advantages to the plaintiff and defendants are many and include the Missouri court's opinion which so closely tracks with *Reiffin v. Microsoft Corp*. another federal court in another circuit as to permit a scholarly resolution of the transfer issue to the satisfaction of all parties regardless of their location or circuit jurisdiction precisely because the Missouri district follows US law. The Kansas decisions and those of the Tenth Circuit over the earlier Medical Supply action have no such utility.

Counsel for the many defendants in this action are united in seeking the transfer of this action to Kansas District court, it does not appear consideration has been given to the fact that some of the defendants are publicly held and have already lost over several hundred million dollars of assets as a result of the non US law based outcomes of Kansas District court in the prior litigation (See plaintiff's complaint ¶¶ 330-336 US Bancorp NA (USB) $750 million dollar loss of Piper Jaffray , ¶¶ 370, 371 Piper Jaffray Companies $225,000,000.00 loss (PJC), ¶¶ 375,376,377 describing Neoforma's (NEOF) likely loss of $61 million dollars per year in VHA and UHC fees.

Clearly, if Kansas District court followed federal statutes and controlling case law, Medical Supply would have obtained preliminary injunctive relief under the Sherman Antitrust Act and with US Bank escrow accounts could have entered the market for hospital supplies in December of 2002, preventing the above described losses to the publicly traded defendant companies US Bancorp NA, The Piper Jaffray Companies and Neoforma. The defendants would also not now be liable for their contemplated damages (now trebled) inflicted upon Medical Supply when they took Sherman Act antitrust law prohibited actions against the plaintiff.

At the time counsel for the Kansas action defendants and charged conspirators US Bancorp NA

and Piper Jaffray also sought the court outcomes that injured their clients. No doubt because even these staggering losses are far less than the illegitimate monopoly profit from the conspiracy's artificial inflation of hospital supplies. Currently, the defendants' counsel seeks to transfer this new action back to the Kansas District court where that court and the Tenth Circuit have demonstrated a hostile unwillingness to follow US Supreme Court decisions regarding sufficiency of pleadings in hospital supply market antitrust cases as if the jurisdiction has seceded from the Union.

The danger to the interests of justice if this transfer is made is the potential for further injury to the share holders of US Bancorp NA (USB), The Piper Jaffray Companies (PJC) and Neoforma (NEOF) who do not enjoy distributions of the illegitimate hospital supply monopoly profit received by the principals of VHA, UHC and Novation. It is unlikely that their interests as shareholders will be protected when the Tenth Circuit would not even accept the concept of capital markets when Medical Supply described the defendants' actions to monopolize the upstream market for hospital supplies, the capitalization of healthcare technology companies through the sale of shares of stock.

The plaintiff's complaint and the uncontroverted affidavit of its chief officer state that the plaintiff and its counsel were intimidated and harassed outside of the Kansas legal action by the defendants and a Kansas District Court official who was not assigned to the case. The affidavit describes how witnesses are intimidated, threatened and harassed to prevent or retaliate against their testimony in Kansas District court. The affidavit and complaint also describe the retaliatory actions taken against the plaintiff's counsel because of Medical Supply's claims, even after the earlier Kansas action was dismissed and continuing to this day. See attached affidavit of Sam Lipari Exb. 1.

Part of the foreseeable results of the defendants' direct conduct against the plaintiff's counsel and the defendants conduct against the plaintiffs' counsel through agents and employees of Shughart, Thomson and Kilroy includes depriving Medical Supply of representation in a US Supreme Court appeal of the Tenth Circuit decision. Transferring this action to the Kansas District court cannot be in the furtherance of the interests of justice.

Medical Supply seeks to invoke the power of the Missouri district court to scrutinize the conduct of the parties in the previous Kansas action. See *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 addition to the witness and victim intimidation and harassment documented in Kansas district court, the affidavit of Sam Lipari also provided the court with the information that the Kansas District court judges had recused themselves from a related action brought by Medical Supply's counsel to enjoin a state ethics prosecution against plaintiff's counsel involving the same Kansas magistrate and conduct described in the current Medical Supply complaint. While that would seem to dispatch the idea that the interests of justice favor transfer to Kansas District court, further needs to be said. The Tenth Circuit provided the Chief Judge of the District of Utah who made no independent findings of law or fact, adopting by reference contradicting defense counsel arguments in non-specified pleadings. These adopted findings of law [Medical Supply's counsel's witness affidavits were uncontroverted] included that the Disciplinary Administrator whose prosecution was to be enjoined was immune because he is a judge [he is not a judge] and equally erroneously that 42 U.S.C. §1981 no longer provided rights protecting African Americans enforceable under 42 U.S.C. §1983.

CONCLUSION

Whereas the transferor court abused its discretion ignoring the obstruction of justice experienced by the plaintiff in Kansas and the certain irreparable harm that will result from the transfer, the plaintiff Medical Supply respectfully requests that this action be returned.

"

Respectfully Submitted

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Certificate of Service

I certify that on July 20th, 2005 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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