United States Court of Appeals

For the Tenth Circuit

Docket No. 03-3342 (10th Cir.)

Case No.: 02-2539-CM (Kans. Dist. Ct.)

Medical Supply Chain, Inc.

v.

US Bancorp, NA;US Bank; Private Client Group, Corporate Trust, Institutional Trust And Custody, And Mutual Fund Services, LLC.; US Bancorp Piper Jaffray; Jerry A. Grundhofer; Andrew Cesere; Susan Paine; Lars Anderson; Brian Kabbes; and Unknown Healthcare Supplier

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Appeal from the United States District Court
for the District of Kansas
Hon. Judge Carlos Murguia

MOTION FOR EN BANC REHEARING OF PANEL SUA SPONTE SANCTIONS*

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* Jurisdictional authority for en banc review of hearing panel's sanctions on pg.s 1-2.

Attachments

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MOTION FOR EN BANC REHEARING OF SANCTION ORDER

The appellant makes this request for en banc rehearing of the appellate panel's *sua sponte* order of double attorney's fees (**Pg. 17**) against appellant's counsel for abuse of discretion. The appellate panel's sanction order "relying on a materially incorrect view of the relevant law" is contrary to the standard in *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384 at 402, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) and therefore an abuse of discretion.

The hearing panel made material errors in relevant antitrust law and conceded that it erroneously upheld the trial court's ruling that there is no private right of action under USA PATRIOT Act Pub. L. No. 107-56, 115 Stat. 272 (2001). The decision also contradicts controlling case law of this circuit regarding the prohibition of dismissal when there is a discoverable unknown defendant (*Krueger v. Doe*, 162 F.3d 1173 (C.A.10 (Okla.), 1993) and plurality of actors through expressly identified but unnamed coconspirators (*Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983) as described *infra*. The en banc "appellate court would be justified in concluding that, in making such errors, the district court [here, the hearing panel] abused its discretion." *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384 at 402. "If the appeal is not frivolous under this standard, Rule 38 does not require the appellee to pay the appellant's attorney's fees." *I.d* at 407.

The Tenth Circuit's local rules do not exclude the award of sanctions from en banc rehearing under Rule 35.7. The appellant unfortunately is prohibited from

seeking a denial of an earlier en banc petition (**Pg. 26**) for being late (even though it was filed within 14 days of receiving the panel judgment) under local rule 35.1 (C). However the panel's order of sanctions impacts the appellant counsel's liberty interests in representing clients and in protected speech on the violation of antitrust statutes and on his client's right to redress and therefore necessitates review. As a *sua sponte* order by an appellate hearing panel, the only opportunity for the appellant to appeal the basis for the sanction determination is through an en banc rehearing. The US Supreme Court in Rule 10 states certiorari will rarely be given for "…the misapplication of a properly stated rule of law." Conversely, the trial court charged with determining the considerable amount of attorney's fees to be levied against Medical Supply's counsel would not have the authority to reverse the superior appellate panel. Medical Supply's appeal was neither destined for an obvious result in law nor wholly without merit. "An appeal is frivolous when the result is obvious, or the appellant's arguments of error are wholly without merit.' *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987)." The en banc panel is the reviewing court necessitated by *Braley*: "Following *Braley* to impose sanctions, a court must make specific findings sufficient to…(3) **identify for the *reviewing court*** the reason for the sanction." *Sally Beauty Company, Inc. v. Beautyco, Inc.*, No. 03-6055 (Fed. 10th Cir. 6/21/2004) (Fed. 10th Cir., 2004). [emphasis added]

Medical Supply's counsel is being harshly sanctioned for appealing denial of relief based on a complaint for an urgent Temporary Restraining Order filed

10/22/02 and amended 11/02/02 because the defendants were repudiating a contract (misusing the USA PATRIOT Act shown to be a false pretext) on 10/15/02 to provide escrow accounts required for the deposit of $350,000.00 raised from manufacturer rep candidates by Medical Supply. The denial of the TRO caused all funds to be lost on 12/1/02, including the company's last resources used to recruit the candidates and all funds invested in preparation of training. No funds have ever been available for legal representation.

Medical Supply's cause is controversial because it's an action is to seek an injunction against breaking a contract to provide escrow accounts in furtherance of a boycott of US Bancorp and Piper Jaffray's coconspirator identified in the complaint as Novation, a healthcare Group Purchasing Organization ("GPO") competitor of Medical Supply's in the hospital supply market identified in the complaint with its captive e-commerce marketplace Neoforma, Inc. competing with Medical Supply on the web. **Pg.s 44-56** The Clerk of the Court, Patrick Fisher shared with counsel this court's nonpleading based misinformation and resulting prejudice against Medical Supply's cause in a July 1, 2004 conversation. **Pg. 56**

The appellant panel is unaware that these defendants can be found to monopolize a market they do not directly compete in and therefore conclusorily rejected the appellant's Sherman 1 and 2 claims in ¶¶6,7,8 of the sanction order in clear error (**Pg. 23**), despite this well established point of antitrust law:

> "However, in *Aquatherm* the plaintiffs did not name (or even identify) the alleged co-conspirators who participated in the relevant market. In this case, SBS alleges a conspiracy between HBC, a clear market participant, and CC. **Nothing in our case law suggests that a conspiracy must be limited solely to market participants so long as the conspiracy also involves a market participant and the non-participant has an incentive to join the conspiracy**. Cf. *Spectators' Communication Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 222 (5th Cir. 2001) ("**[W]e conclude that there can be sufficient evidence of a combination or conspiracy when one conspirator lacks a direct interest in precluding competition, but is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive**."). In its brief, CC correctly points out that Spectators involved a group boycott with multiple conspirators, thereby giving the non-participant defendant the power to injure the plaintiff." [emphasis added]

Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc., No. 03-14588 (Fed. 11th Cir. 6/30/2004) (Fed. 11th Cir., 2004) . The amended complaint (**Pg. 47**) at ¶82 averred the US Bancorp Piper Jaffray defendants' control over the day to day operations of companies in Medical Supply's market, even to the point of placing corporate officers on the GPO board of directors.

The hospital supply market is recognized to be anticompetitive See The Exclusion of Competition For Hospital Sales Through Group Purchasing Organizations June 25, 2002 by Harvard Law Professor Einer Elhauge and The US General Accounting Office report Pilot Study Suggests Large Buying Groups Do Not Always Offer Hospitals Lower Prices April 30, 2002 cited in the Amended Complaint.

On 4/30/02 Elizabeth A. Weatherman, Managing Director Warburg Pincus, LLC and Vice Chair of the Medical Group of the National Venture Capital

Association testified before the Senate that "…**companies subject to, or potentially subject to, anti-competitive practices by GPOs will not be funded by venture capital**. As a result, many of these companies and their innovations will die, even if they offer a dramatic improvement over an existing solution." [emphasis added] She was called back on 7/17/03 because of the Judiciary's Antitrust Subcommittee concerns that GPO monopoly power and unethical conduct is still starving their healthcare technology competitors of capitalization.

The complaint pleads the fact that US Bancorp Piper Jaffray was fined for acts of extortion against a healthcare technology company attempting to capitalize itself with another investment bank (¶80, Amd. Cmplt. pg. 34 (**Pg. 47**)) in the upstream relevant market of healthcare capitalization The article cited why the National Association of Securities Dealers fined Piper Jaffray but the conduct is also a Sherman 2 monopolization violation:

> "The NASD investigation found a Piper managing director, Scott Beardsley, threatened to discontinue coverage of Antigenics Inc., a biotech firm, if it did not select Piper as a lead underwriter for a planned secondary stock offering.As part of a settlement with the NASD, Piper was censured and fined $250,000 and Beardsley was censured and fined $50,000."

Both Medical Supply appeals were described to the third Senate Judiciary hearing on the GPO problem because of the important public policy being defeated by antitrust violations against e-commerce suppliers:

> "[A] bank tied to an investment house that has seventy percent of its holdings in health care suppliers refused to provide the company with simple escrow services through a blatant misapplication of the USA Patriot Act. Most recently an international conglomerate that is a founder of GHX

was willing to take a $15 million dollar loss on a real estate deal just to keep this company out of the market."

Testimony of Lynn James Everard, Hospital Group Purchasing: Has the Market Become More Open to Competition?, United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition and Business and Consumer Rights July 16, 2003. The committee's counsel made the recommendation that Medical Supply seek the en banc rehearing denied by the panel.

On 7/15/02 The NY Times reported the investigation of antitrust conduct of US Bancorp and Piper Jaffray's coconspirator Novation:

> "Premier and Novation are also being investigated by the Federal Trade Commission and the General Accounting Office, the investigative arm of Congress. The F.T.C. wants to know if the groups, which last year negotiated contracts worth more than $30 billion, are wielding too much control in the market for hospital supplies.The G.A.O. has already issued a preliminary report that questions whether the groups actually save hospitals money."

By 8/21/04 The NY Times reported that the Justice Department had opened a broad criminal investigation of the medical-supply industry revealing that Novation is being subjected to a criminal inquiry:

> "Novation's primary business is to pool the purchasing volume of about 2,200 hospitals, as well as thousands of nursing homes, clinics and physicians' practices, and to use their collective power to negotiate contracts with suppliers at a discount. In many cases, the contracts offer special rebates to hospitals that meet certain purchasing targets. Although Novation is not well known outside the industry, **it wields formidable power because it can open, or impede, access to a vast institutional market for health products**." [emphasis added]

The Counsel for Medical Supply responded to the panel's show cause order for sanctions with an answer incorporating by reference the case record and stating a complete defense: that the Sherman 1 and 2 claims along with the assertion a private right of action exists under the USA PATRIOT Act were erroneously rejected by the trial court and the appellate panel. The panel's memorandum and order exhibited unfamiliarity with the appellant's brief and the record on appeal, (Medical Supply's brief and pleadings were there to inform the court, see **Pg.s 59, 64-70** explaining Sherman 2 aspect of USA PATIOT Act and contradicting the trial court's admonishment). Medical Supply's counsel formulated a response to the panel that would decisively show Medical Supply had correctly stated a Sherman 1 claim, answering the single element Judge Murgia had faulted. The answer showed how the breach of a contract to provide escrow accounts as a result of an anticompetitive agreement with a market competitor stated on its own a Sherman 1 and 2 claim and finally listing two of the many, many express private rights of action in the USA PATRIOT Act. All in a deliberative attempt to adapt to the limited attention span a busy hearing panel could devote to a cause it had dismissed as entirely frivolous. The appeal brief gave these same arguments in great depth.

The panel is mistaken at ¶3 of its order (**Pg. 2**) about Judge Murgia's memorandum dismissing Medical Supply's Sherman 1 claims. Of the three elements, the trial court found only the absence of plurality of actors or agreement, the first element: "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 in the same paragraph quotes the amended complaint in one passage that surprisingly stands alone as a complete Sherman1 Group Boycott synonymous with Concerted Refusal to Deal claim sufficiently pled under FRCP 8(a):

> "…that ***defendants*** **[the named defendants]** use "***anticompetitive sole source contracts*** **[the agreements to restrain trade]** between their client health care suppliers and health care GPOs [sic] **[the independent co-conspirators identified in other paragraphs as Neoforma and Novation and the group purchasing organizations Premier and Novation]** the defendants have developed" in order to inflate the value of equity shares **[to raise prices of capitalization instruments]** that defendants market; that defendants "operate a conspiracy among their subsidiaries and parent companies" for the purpose of restraining commerce; that defendants rejected plaintiff's application for escrow accounts in order to prevent plaintiff's entry into the market; and that defendants have acted in furtherance of the conspiracy through a refusal to deal, denial of services, and boycotting or withholding of critical facilities in order to exclude plaintiff from the market." [emphasis added]

Trial court memorandum and order (**Pg.s 74-5**). This same quote states Sherman 2 claims for Monopoly, Concerted Refusal to Deal, Single Firm Refusal to Deal and even the heightened standard for Sherman 2 Attempted Monopolization less the two relevant markets pled in the amended complaint at and the geographic nature of the market ¶36 (nationwide market), ¶ 43 "This plan ***would put representatives in the field nationwide*** …[to] assist in the adoption of MSCI's supply chain empowerment program."[emphasis added]. Medical Supply's Amended Complaint pled agreements to raise prices in the relevant market of healthcare capitalization. See Amd. Cmplt. ¶81, Amd. Cmplt. pg. 34-5,

(**Exb. 3**)Amd. Cmplt. pg. 10-12, However, Judge Murgia stated "plaintiff has not pled the existence of *a pricing agreement, or agreement of any kind, among the defendants* in restraint of trade." [emphasis added]

Both courts ignored the GPO's including Premier and Novation both of which are distributors of hospital supplies and competitors of Medical Supply, described as coconspirators in the combine (Amd Cmplt pg. 26,28,29,33) and **Pg.s 44-56** . Also ignored are the direct competitors of Medical Supply as a hospital supply electronic market place Commerce One and Medibuy averred to be in agreement to increase healthcare capitalization prices (shares) with the named defendants and exclusive dealing agreements with the GPOs. *Id*. The panel is in error sanctioning Medical Supply's counsel because these coconspirators are not named as defendants yet, before any discovery that would identify which is the unknown healthcare provider:

> **The fact that Beacon pursues only one of the contracting parties does not limit its ability to obtain relief**. Accordingly, I conclude that claims 1-4, 7, 8-11, and 14 should not be dismissed for failure to allege a conspiracy to restrain trade or commerce between two or more actors." [emphasis added]

Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F.Supp. 1350 at 1363 (Colo., 1996). The trial court and the hearing panel are mistaken about a lack of reasonableness in counsel's brief argument that US Bancorp NA can be liable under Sherman 1 and 2 for a conspiracy including its subsidiaries and an independent defendant or unnamed but identified coconspirators:

> "…**[P]arent *corporations can be held directly liable for independently participating* in the antitrust violations of their subsidiaries**. *Reading Int'l, Inc. v. Oaktree Capital Mgmt., LLC*, 2003 WL 22928728 (S.D.N.Y. Dec. 10, 2003) (slip copy); *Carl Hizel & Sons, Inc. v. Browning-Ferris Indus., Inc.,* 590 F.Supp. 1201, 1202 (D.Colo.1984)." [emphasis added]

Nobody in Part. Presents v. Clear Channel Communs., 311 F.Supp.2d 1048 at 1069-70 (D. Colo., 2004). See also *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc*., No. 02-9222 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004) upholding "there was no "unity of purpose or a common design" between ACIC/Brantford and Barr. *Copperweld*, 467 U.S. at 771, 104 S.Ct. 2731" *Geneva Pharmaceuticals Tech. v. Barr Laboratories*, 201 F.Supp.2d 236 at 275 (S.D.N.Y., 2002) and the Second Circuit reinstated the Sherman 1 and 2 claims.

The trial court and the hearing panel are mistaken about the significance of US Bancorp and Piper Jaffray in concert with a hospital supplier collaboratively refusing to deal or in other words conducting a group boycott against Medical Supply's use of escrow accounts to accept capitalization from its representative candidates.

> "To establish that a group boycott is per se illegal in this Circuit, "there must be an agreement among conspirators whose market positions are horizontal to each other." *Westman Com'n Co. v. Hobart Intern., Inc*., 796 F.2d 1216, 1224 n. 1 (10th Cir.1986). "**While the competitors need not be at the same market level as the plaintiff, there must be concerted activity between two or more competitors at same market level**." *Key Financial*, 828 F.2d at 641." [emphasis added]

Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F.Supp. 1350 at 1363 (Colo., 1996). The amended complaint pleads concerted refusal to deal or group

boycott between actors horizontal to each other in both relevant markets, healthcare company capitalization and hospital supplies.

The panel abuses its discretion in attacking Medical Supply's counsel with the most severe sanctions for reasoning that Judge Murgia has employed a heightened standard of pleading in dismissing Sherman Act claims. Judge Murgia did not grant any reasonable inference or view the amended complaint's factual allegations "in the light most favorable to the nonmoving party." *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). Medical Supply's brief reflected a very reasonable interpretation that the trial judge believed these simply stated elements were insufficient. In fact, Judge Murgia stated that Medical Supply's Sherman 2 claims needed to be dismissed because *particular words* were not used:

> "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."

Trial order at **Pg.s 78-9**, indicating a mistaken belief that formalistic pleading still applied to antitrust. It is beyond refute that the trial court denied preliminary injunctive relief twice and based its dismissal in part upon this court's denial of pre hearing relief in #02-3443 all on an incorrect heightened pleading standard for a violation of statute, mistakenly requiring a showing of irreparable harm to obtain the statute's expressly provided injunctive relief. A decision the plaintiff's memorandums of 6/26/03 and 7/10/03 showed contradicted controlling

authority. Subsequent Tenth Circuit decisions adopted the rule observed by Medical Supply that a showing irreparable harm is not required for a statute violation. See *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft* (10th Cir., 2003) and en banc rehearing.

Leatherman v. Tarrant County, 507 U.S. 163 (1993), bars the district court from applying a heightened pleading standard in antitrust cases. *MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 976 (7th Cir. 1995) see also *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 2002 C05 351 (USCA5, 2002): "judicial attempts to apply a heightened pleading standard in antitrust cases had been "scotched" by the Supreme Court's decision…[in *Leatherman*]…and that after *Leatherman*, an antitrust plaintiff need not include "the particulars of his claim" to survive a motion to dismiss. 33 F.3d at 782."

The hearing panel committed plain error in determining the plaintiff should be sanctioned for asserting an unknown healthcare supplier defendant was one way the complaint established a plurality of co-conspirators. Plain error is "obvious" or "clear under current law." *United States v. Olano*, 507 U.S. 725, 734 (1993). The Tenth Circuit recognizes complaints against unknown defendants, i.e. *Gaylor v. Does*, 105 F.3d 572 (C.A.10 (Colo.), 1997). "Dismissal against unknown defendants is proper "only when it appears that the true identity of the defendant cannot be learned through discovery or the court's intervention." *Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir.1985)." *Krueger v. Doe*, 162 F.3d 1173 (C.A.10 (Okla.), 1993).

In *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, per se Sherman 1 liability was held for concerted refusal to deal or group boycott charges against Progressive and unnamed defendants, just as Medical Supply claimed against the US Bancorp defendants, Unknown Healthcare Supplier and other companies identified but not named as defendants:

> "A further complaint on behalf of Olsen was that Progressive conspired **with certain unnamed co-conspirators, for example, George Best, CBS Musical Instruments (CBS) and Bobbie Herger (owner and operator of Herger's Music Store in Provo, Utah), in violation of Section 1 of the Act.** Olsen asserts that Progressive conspired with Best to cause Olsen to lose franchises, to destroy his credit and business reputation, to take over his business location and terminate his corporate charter, to fix prices, and to cause manufacturers to boycott his business."

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983).

The U.S. Bancorp defendants were in contract with Medical Supply to provide escrow accounts for a $6000.00 fee. U.S. Bank broke the contract, Medical Supply Chain, Inc.'s complaint (written shortly after to obtain emergency injunctive relief and avoid the resulting irreparable harm) alleged the breaking of the contract was a result of exclusive dealing agreements between the defendants which included Unknown Healthcare Supplier and the unnamed but identified coconspirators. See Amd. Cmplt ¶¶81,82,86.(**Pg. s 46-50**) "[T]he exclusive dealing arrangement itself satisfies the § 1 requirement of coordinated action." *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, No. 02-9222 at pg. 45 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004).

In *Covad Communications*, the breaking of the agreement between the plaintiff and the monopolist alone become adequate to state a claim.**"[A]llegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws**." [emphasis added] *Covad Communications Co. v. Bellsouth Corp.*, at ¶63 2002 C11 260 (USCA11, 2002), reversed on other grounds. The US Supreme Court recently stated this point of law, which the panel's decision now surprisingly conflicts with:

> "The leading case imposing § 2 liability for refusal to deal with competitors is *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U. S. 585, in which the Court concluded that ***the defendant's termination of a voluntary agreement with the plaintiff*** suggested a willingness to forsake short-term profits to achieve an anticompetitive end." [emphasis added]

Verizon Communications Inc. v. Law Offices of Trinko, 540 U.S. ___ (U.S. 1/13/2004) (2004).

Now that Medical Supply has experienced all the injury it sought to avoid, it is required to bring its claims for monetary damages to a federal district court, likely the Western District of Missouri, a notice pleading district: "...if future damages are unascertainable, a cause of action for such damages does not accrue until they occur. *Zenith*, 401 U.S. at 339, 91 S.Ct. at 806." *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc.*, 872 F.2d 931 at FN4 (C.A.10 (Kan.), 1989). See also *Barnosky Oils Inc., v. Union Oil Co.,* 665 F.2d 74, 82 (6th Cir. 1981). US Bank was still attempting to perform the financing part of the contract after Medical Supply filed for its injunctive relief. If "the initial refusal is not final, each time the victim

seeks to deal with the violator and is rejected, a new cause of action accrues. See *Pace Indus*., 813 F.2d at 237-39; *Midwestern Waffles, Inc. v. Waffle House, Inc*., 734 F.2d 705, 714-15 (11th Cir.1984)." *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc*., 872 F.2d 931 at 933-4 (C.A.10 (Kan.), 1989).

Medical Supply also now has evidence the malicious suspicious activity report as a sham petition was filed to further the agreement to suppress competition. See, e.g., *Al George, Inc. v. Envirotech Corp*., 939 F.2d 1271, 1274-75 (5th Cir. 1991); *Korody-Colyer Corp. v. General Motors Corp*; *In re Relafen Antitrust Litigation* at pg. 6 (Mass., 2003). The amended pleading for now ripe monetary damages in Kansas District Court or a new filed action in some other federal district court would suffer no issue preclusion on Sherman 1 or 2 claims. *Oltremari v. Kansas Social & Rehabilitative Service*, 871 F.Supp. 1331 (Kan., 1994). The failure of either the trial court or the appellate panel to address the meritorious appeal that the defendant's use of the USA PATRIOT Act was a sham petition is a Sherman 2 (**Pg.s 59, 64-70** (Amd Cmplt. ¶¶ 115-118 on **Pg.s 89-90**). A violation not excepted by *Eastern RR v. Noerr*., 365 U.S. 127, 141, 81 S.Ct. 523, 531, 5 L.Ed.2d 464 or maliciously under the USA PATRIOT Act private right of action (Amd Cmplt. ¶¶ 115-118 on **Pg.s 89-90**) completes the lack of preclusive effect of this panel decision. If left standing, the panel's order sanctioning Medical Supply's counsel would be impaired with no means to repay the sanctioned funds or prosecute the action. Neither Medical Supply's counsel, president or any stakeholder have received any income since losing the TRO and their $350,000.00 on 12/01/ 2002.

I certify the above motion is 15 pages of double spaced 13 point type.

Respectfully submitted,

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Certificate of Service

I certify I have served two copies of this pleading upon opposing counsel listed below via U.S. Mail on January 10th, 2005.

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