UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
KANSAS CITY, KANSAS DIVISION

MEDICAL SUPPLY CHAIN, INC. Plaintiff, vs. GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORPORATION, AND GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING, L.L.C. Defendants.	Civil Action No. 03-2324-CM **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Dated August 21, 2003

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INTRODUCTION

Plaintiff Medical Supply Chain ("MSC") filed this action only two days after this Court dismissed MSC's similar claims against US Bancorp. *Medical Supply Chain, Inc. v. US Bancorp, NA*, No. 02-2539-CM, 2003 WL 21479192 (D. Kan. June 16, 2003) (the "US Bancorp Action'). Unable as a matter of law to blame US Bancorp for its purported travails, MSC now alleges that General Electric, GE Capital, GE Transportation Systems, and GE CEO Jeffrey Immelt have violated the antitrust laws and Missouri common law by refusing to sublease a building or provide financing to MSC. But MSC's claims against the Defendants in this action fare no better than its claims against US Bancorp. Even if MSC's outlandish factual allegations are accepted as true, it is clear from the face of the Amended Complaint that MSC has not stated a claim for antitrust violations or for breach of contract, fraud, breach of the duty of fair dealing, or bad faith under Missouri state law.

MSC's claims are based on GE Capital's denial of MSC's application for financing that MSC itself claims would have been "unusual." MSC's Amended Complaint must be dismissed because MSC does not and cannot honestly plead the required elements of the various alleged antitrust violations. Indeed, MSC does not even allege that it competes with the Defendants.

On an even more fundamental level, moreover, MSC's Amended Complaint fails to state a claim because MSC's own allegations establish that MSC cannot show injury cognizable under the antitrust laws. MSC admits that Defendants' conduct was not the but-for cause of its injury, and MSC certainly was not injured in a way that affected its ability to compete – the requisite injury to support an antitrust claim.

It is similarly plain from the face of the Amended Complaint that MSC's state law claims must also be dismissed. MSC again fails to allege the most fundamental elements of its claims.

It does not, nor can it, demonstrate the performance of conditions precedent and, therefore, it cannot properly allege a breach of contract or breach of a duty of fair dealing. MSC does not even attempt to allege any of the elements necessary for a fraud claim. And MSC's "bad faith" cause of action in tort has never been accepted in Missouri and was rejected in California, where the precedent upon which MSC relies has been overruled.

In its dismissal of the US Bancorp Action, this Court reminded Bret Landrith, MSC's counsel in both that action and this case, of the requirements of Fed. R. Civ. P. 11(b)(2). The Court specifically admonished MSC'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." 2003 WL 21479192, at *6. MSC's Amended Complaint in this case shows that its counsel has thumbed its nose at both this Court's warning and warnings from Counsel for the Defendants that MSC's claims were not well grounded in law.[1] Indeed, MSC's claims against Defendants must be dismissed on many of the very same grounds upon which the US Bancorp Action was dismissed. Although MSC has also asserted several new claims not raised in the US Bancorp Action, those too suffer fatal defects. MSC's legal theories are at war with clearly established precedent, and not a single count of MSC's 14-count Amended Complaint states a claim for which relief may be granted. MSC's Amended Complaint should be dismissed.

[1] When MSC's counsel initially threated litigation against Defendants, Defendants' counsel warned that it would seek sanctions if MSC pursued the claims it has now asserted in this case. Defendants are preparing a motion under Rule 11 and will file the motion after serving it on MSC and waiting the twenty-one days required by Fed. R. Civ. P. 11(c)(1)(A).

LEGAL STANDARD FOR A MOTION TO DISMISS

The court will dismiss a cause of action for failure to state a claim 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, 1305 (10th Cir. 1998), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court must accept as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1305, 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).

Courts may, however, take judicial notice of matters outside the complaint without converting a motion to dismiss into a motion for summary judgment. *City of Philadelphia v. Fleming Companies, Inc.*, 264 F.3d 1245, 1251 n.4 (10th Cir. 2001); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Of particular relevance here, a court may take judicial notice of "its own records and files, and facts which are part of its public records," and such notice "is particularly applicable to the court's own records of prior litigation closely related to the case before it." *St. Louis Baptist Temple, Inc. v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979). *See also City of Philadelphia*, 264 F.3d at 1251 n.4 (10th Cir. 2001) (taking judicial notice of filings in state court litigation); *Abdelsamed v. United States*, Civ. A. 01-N-1774 (CBS), 2002 W.L. 31409521, at *17-18 (D. Colo. Sept. 17, 2002) (taking judicial notice of complaint filed by plaintiff in another action).

In an antitrust case, "[a] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983). As the Seventh Circuit has stated:

> When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing case load of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.

Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984). Simply put, antitrust litigation is "'too expensive a process to waste time on fanciful claims.'" *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 971 F. Supp. 1419, 1424 (M.D. Fla. 1997) (quoting *Commonwealth of Pennsylvania v. PepsiCo*, 836 F.2d 173, 182 (3d Cir. 1988)), *aff'd*, 145 F.3d 1258 (11th Cir. 1998) (affirming Rule 12(b)(6) dismissal). Thus, "a plaintiff must do more than cite relevant antitrust language to state a claim for relief." Rather, it "must allege sufficient facts to support a cause of action under the antitrust laws." *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992).

FACTUAL BACKGROUND

This factual background is based on the allegations of the Amended Complaint, which Defendants accept as true for purposes of this motion only, and upon facts alleged by MSC in the US Bancorp Action, of which Defendants respectfully request the Court take judicial notice.[2]

[2] MSC's Amended Complaint includes three exhibits – an unsigned, unsworn "affidavit" from Lynn James Everhard attaching his resume, various press clippings, and a "brief" he submitted to various government agencies; an MSC business plan; and an unexecuted form contract utilized by Novation and Neoforma (neither of which is a party to this action). These exhibits are improper. *See, e.g.*, *Chiaramonte v. Fashion Bed Group, Inc.,* 129 F.3d 391, 400 (7th Cir. 1997) (unsigned and unsworn affidavit is "not part of the record"); *Schmitz v. Mars, Inc.*, 261 F.Supp.2d 1226, 1229 (D. Or. 2003) (striking exhibits to complaint as improper and refusing to consider them in deciding motion to dismiss). Nevertheless, to avoid burdening this Court with additional paper, Defendants are not moving to strike these exhibits at this time because nothing in these exhibits saves MSC's Amended Complaint from dismissal under Rule 12(b)(6).

The Parties. Plaintiff MSC is a Missouri Corporation. MSC spent ten years developing technology and has spent the last three years completing the research and development for commercialization of an Internet-based service to "manage strategic data and provide direct support to buyers and sellers that make up the healthcare supply chain." Am. Compl. ¶ 3. This service is designed to permit MSC to compete to provide "hospital supplies through e-commerce." Am. Compl. ¶ 33. Plaintiff has not yet begun providing this service and admittedly has no revenue. Am. Compl. ¶¶ 4, 35.

Defendant General Electric Company ("GE"), in addition to other lines of business, manufactures medical equipment and parts. Am. Compl. ¶ 15. GE is not alleged to provide any service (Internet-based or otherwise) relating to the healthcare supply chain or to compete in the business of selling "hospital supplies through e-commerce." But GE is a shareholder of Global Healthcare Exchange ("GHX"), an "electronic marketplace promising online distribution at lower prices to hospitals" that competes in the "hospital supplies through e-commerce" business. Am. Compl. ¶ 15. GE's share of the ownership of GHX is not alleged.

Defendant Jeffrey R. Immelt is currently the Chief Executive Officer of GE. Am. Compl. ¶ 10. Previously, as President of GE Medical Systems, Mr. Immelt oversaw GE's capitalization of GHX in 2000. Am. Compl. ¶ 7. Mr. Immelt is not alleged to have any knowledge of, let alone any personal role in, Defendants' refusal to sublease an office building or provide a mortgage to MSC.

Defendant GE Capital Business Asset Funding Corporation ("GE Capital") is a GE subsidiary "performing GE's commercial lending operations." Am. Compl. ¶ 17. GE Capital is not alleged to provide hospital supply chain services or compete in "hospital supplies through e-commerce."

Defendant GE Transportation Systems Global Business Signaling ("GETS"), a GE subsidiary, is a global supplier of ground transportation products. Am. Compl. ¶ 18. GETS assumed a lease on a building at 1600 N.E. Coronado Drive, Blue Springs, Missouri (the "Blue Springs Building") when it bought Harmon Industries, Inc., a railroad signal company. Am. Compl. ¶ 18. Like GE and GE Capital, GETS is not alleged to provide hospital supply chain services or compete in "hospital supplies through e-commerce."

MSC's Dispute with US Bancorp. In March of 2002, MSC sought to establish a banking relationship with US Bancorp, but US Bancorp, citing "know your customer" requirements of the USA Patriot Act, refused to establish the escrow accounts requested by MSC. Pl.'s Am. Compl. ¶ 53, *Medical Supply Chain, Inc. v. US Bancorp NA*, No. 02-2539-CM (D. Kan. filed Nov. 12, 2002) (hereinafter "US Bancorp Am. Compl.") (Attached as Ex. 1). MSC claimed in that litigation that US Bancorp's conduct "prevented [MSC] from entering the healthcare supplier/distribution market by refusing to act as a supplier of financial services and facilities in the form of escrow accounts . . . ." US Bancorp Am. Compl. ¶ 103. In an affidavit attached to its complaint in the US Bancorp Action, MSC's chairman, Samuel Lipari, stated that US Bancorp's conduct had been "devastating to [MSC's] ability to enter the market." MSC similarly alleges in its Amended Complaint in this case that US Bancorp's conduct "prevented it from beginning its operations." Am. Compl. ¶ 4.

On December 18, 2002 this Court denied MSC's request to enjoin US Bancorp's conduct and on June 16, 2003 this Court dismissed MSC's Complaint, characterizing some of MSC's allegations as "completely divorced from rational thought." 2003 WL 21479192, at *8. MSC nowhere alleges that it has been able to recover from the harm allegedly inflicted by US Bancorp

or that it would be able to enter the market given this Court's refusal to enjoin US Bancorp's conduct.

MSC's Dispute with the Defendants. MSC's interaction with the Defendants began with MSC looking to sublease a portion of the Blue Springs Building. Am. Compl. ¶ 19. GETS leased the entire building as a result of its acquisition of Harmon Industries, but had vacated the building. Am. Compl. ¶ 20. When GE's leasing agent for the building was unwilling to sub-lease only a part of the building, MSC obtained from the owner of the building a letter of intent to sell the entire building to MSC for $5.4 million. Am. Compl. ¶ 21. In the case of such a sale, GE would remain as a lessee of the Blue Springs Building.

As a result of US Bancorp's conduct, MSC was unable to obtain financing to purchase the building from a national bank. Am. Compl. ¶ 23. On or about May 15, 2003, Bret Landrith, MSC's counsel, wrote to George Fricke, a property manager at GE, offering to release GE from its remaining lease obligations on the building. Am. Compl. ¶ 25. The offer contained a number of express conditions, however. Specifically, the offer was "contingent on . . . the City of Blue Springs' approval of Medical Supply Chain's purchase and occupation of the building," and "contingent upon GE Capital securing a twenty year mortgage on the property with a first year moratorium." Am. Compl. ¶ 25. In closing the letter, MSC sought the name of a contact person at GE Capital. Am. Compl. ¶ 25.

On May 15th, Mr. Fricke left a voice mail message stating that "we will accept that transaction," and on the same day he followed up with an e-mail stating that "GE will accept your proposal to terminate the existing lease." Am. Compl. ¶¶ 26-27. MSC does not allege that Mr. Fricke purported to accept MSC's mortgage proposal on behalf of GE Capital or that Mr. Fricke was even authorized to act on behalf of GE Capital. Nor does MSC allege that anyone

from GE Capital accepted MSC's mortgage proposal orally or in writing either before or after GE Capital's review of MSC's loan application.

After reviewing MSC's financial information, GE Capital did not finance MSC's purchase of the building on the "unusual" terms MSC required. Am. Compl. ¶ 30. As a consequence, Medical Supply Chain filed this suit for damages under the Federal antitrust laws and state common law. On August 15, before Defendants answered or otherwise moved in response to the Complaint, MSC filed an Amended Complaint.

ARGUMENT

I. MSC HAS NOT ALLEGED INJURY COGNIZABLE UNDER THE ANTITRUST LAWS.

It is basic that in order to sustain a claim under the antitrust laws, a plaintiff must show both but-for causation and "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). MSC does not and cannot allege either type of injury here.

A. MSC Has Not Alleged That Defendants Are The But-For Cause Of Its Alleged Injury.

In order to sustain an antitrust claim, a plaintiff must show "there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage . . . ." *Sharp v. United Airlines, Inc.*, 967 F.2d 404, 407 (10th Cir. 1992) (quoting *Reibert v. Atl. Richfield Co.*, 471 F.2d 727, 731 (10th Cir. 1973)). Therefore, the first question that must be asked in any antitrust case is whether "'but for' the violation, the injury would not have occurred." *Greater Rockford Energy & Tech. Corp. v. Shell Oil*, 998 F.2d 391, 395 (7th Cir. 1993). As the Court of Appeals for the Second Circuit has held, "lack of

causation in fact is fatal to the merits of any antitrust claim. Consequently, an essential element in plaintiffs' claim is that the injuries alleged would not have occurred but for [the defendant's] antitrust violation." *Argus, Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 41 (2d Cir. 1986) (internal citation omitted). MSC's Amended Complaint must be dismissed because it failed to allege that GE or its subsidiaries are the cause in fact of MSC's inability to compete. Indeed, according to MSC's own allegations, Defendants' decisions not to extend financing or lease a building to MSC is not the but-for cause of MSC's injury.

In its Amended Complaint filed against US Bancorp, Plaintiff claimed US Bancorp had "prevented [MSC] from entering the healthcare supplier/distribution market by refusing to act as a supplier of financial services and facilities in the form of escrow accounts . . . ." US Bancorp Am. Compl. ¶ 103. In addition, MSC claimed it has been "severely injured and is in danger of further injury resulting from [US Bancorp's] actions in restraint of trade through their combining or conspiring with any other persons, to monopolize or attempt to monopolize any part of the trade or commerce." US Bancorp Am. Comp. ¶ 99. Furthermore, in its Amended Complaint against GE, Plaintiff notes that US Bancorp had threatened MSC "with a malicious USA PATRIOT Act report to keep Medical Supply from entering the hospital supply market." Am. Compl. ¶ 23. Plaintiff has repeatedly asserted that the actions of US Bancorp were the cause of Plaintiff's inability to compete. MSC nowhere alleges that – notwithstanding US Bancorp's conduct – it would have been able to compete in the relevant market but-for Defendants' conduct. This break in the chain of causation is fatal to US Bancorp's claims because courts do not permit antitrust claims where plaintiff's injuries do not flow "from that which makes defendants' acts unlawful." *Greater Rockford Energy and Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 401 (7th Cir. 1993) (quoting *Brunswick*, 429 U.S. at 489); *see Federal Prescription Serv.,*

Inc. v. Am. Pharmaceutical Ass'n, 663 F.2d 253, 268-72 (D.C. Cir. 1981) (holding that mail-order prescription service would have incurred the same costs regardless of defendant's alleged anticompetitive conduct); *Hodges v. WSM, Inc.*, 26 F.3d 36, 39 (6th Cir. 1994) (finding no antitrust injury where plaintiff suffered due to defendant's rightful exercise of property rights, not defendant's alleged anticompetitive behavior).

B. MSC'S Inability To Obtain Financing Is Not Antitrust Injury Absent An Allegation That Consumers Were Harmed By Defendants' Conduct.

At the time of its initial contact with the Defendants, MSC was seeking only to sublease a part of a building. Am. Compl. ¶¶ 19-21. Plaintiff nowhere alleges that it was even looking for financing (from GE Capital or anyone else) before it hatched its plan to turn a property lease into a financing vehicle. MSC does not and cannot allege that its inability to lease a particular office building in Missouri has harmed its ability to compete or – more importantly – that it harmed consumers. MSC's Amended Complaint does not say what MSC would have done with the financing, or explain how MSC's inability to secure financing from GE Capital impaired its ability to compete. Plaintiff similarly fails to allege that consumers have been harmed by GE Capital's decision to reject MSC's financing application.

These failures doom MSC's Complaint, because an antitrust complaint must be dismissed "absent allegations that [the defendant's] conduct hampered [the plaintiff's] ability to compete." *Classic Communications, Inc. v. Rural Tel. Serv. Co., Inc.*, 995 F. Supp. 1185, 1187 (D. Kan. 1998). MSC might have liked to have financing from GE Capital, but unless GE Capital's failure to provide financing impaired MSC's ability to compete in the relevant market, Defendants cannot have violated the antitrust laws. *See, e.g., GAF Corp. v. Circle Floor Co.*,

463 F.2d 752, 759 (2d Cir. 1972) (affirming dismissal of complaint where "the anticompetitive acts alleged in the complaint have not lessened [the plaintiff's] ability to compete.").

II. MSC FAILS TO STATE A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT.

Counts 1-4 of MSC's Amended Complaint are based on Section 1 of the Sherman Act, 15 U.S.C. § 1. In addition to the fatal defects described above relevant to all of MSC's antitrust claims, these claims fail because MSC has not alleged an actionable conspiracy and because even if it had, MSC has not alleged the existence of an agreement that unreasonably restrains trade.

A. Plaintiff's "Bare Bones" Allegations of Concerted Action Do Not Meet The Pleading Requirements Under Section 1.

A plaintiff must allege an agreement between two separate entities in order to withstand a motion to dismiss a Section 1 claim. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984). MSC's barebones allegation that Defendants violated Section 1 by "refusing to deal or boycotting Medical Supply pursuant to their involvement in a cartel with other suppliers and electronic marketplaces in contract and conspiracy," Am. Compl. ¶ 36, is legally insufficient to survive a motion to dismiss.

1. Counts 1 and 4 fail to state a claim because MSC does not identify the parties to the alleged conspiracy.

In Counts 1 and 4, Plaintiff alludes to an agreement between Defendants and "other healthcare suppliers" and agreements with "other suppliers and electronic marketplaces." Am. Compl. ¶¶ 33, 36. These cursory statements do not sufficiently notify the Defendants of the nature of the agreements alleged and therefore fail to state a claim. *See Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387-88 (10th Cir. 1980). In *Mountain View*

Pharmacy, the Plaintiff alleged twenty-eight defendants had engaged in tying arrangements and price fixing in violation of Section 1 of the Sherman Act, but did not specify which defendants were the conspiring parties. Despite the fact that the conspiracy allegation was limited to the named parties in the suit, the court affirmed dismissal, holding that '[a] blanket statement that twenty-eight defendants have conspired to fix prices . . . to thirteen plaintiffs does not provide adequate notice for responsive pleading." *Id*. at 1388. Indeed, in this case, unlike *Mountain View Pharmacy*, the plaintiff has not even identified the universe of alleged co-conspirators by naming them as defendants in the Amended Complaint.

In addition to identifying the alleged conspirators, *Mountain View Pharmacy, supra*, the complaint must "provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place." *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994). MSC's Amended Complaint fails this test. MSC does not – and cannot consistent with Fed. R. Civ. P. 11 – allege that the Defendants agreed with any third party to deny MSC financing or the sublease of an office building.

MSC's Amended Complaint never elaborates on the alleged conspiracy other than to simply assert that such an agreement exists. *See* Am. Compl. ¶¶ 33-36. Because of Medical Supply Chain's failure to allege any of the required particulars, "[d]ismissal of [this] 'bare bones' allegation of antitrust conspiracy without any supporting facts is appropriate." *Estate Constr. Co.*, 14 F.3d at 221; *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992) ("Conclusory allegations that the defendant violated [the antitrust] laws are insufficient."). Because MSC has failed to plead the particulars of the alleged conspiracy, Counts 1 and 4 must be dismissed.

2. Counts 2 and 3 fail to state a claim because the Defendants are legally incapable of conspiring with each other.

Counts 2 and 3 of the Amended Complaint identify only the Defendants as members of the alleged conspiracy. *See* Am. Compl. ¶ 34 ("The Defendants have through their repudiation of their agreement to buy out their lease and provide financing, furthered their monopoly . . . ."); Am. Compl. ¶ 35 ("The defendants' repudiation of the financing cut off access to a facility necessary to enable Medical Supply to capitalize its entry into the North American hospital supply e-commerce market . . . ."). As Plaintiff acknowledges in the first sentence of the Amended Complaint, GE Capital and GE Transportation Systems are subsidiaries of General Electric Corporation. Furthermore, Plaintiff notes that Mr. Immelt is an officer of GE. Am. Compl. ¶ 10. Under *Copperweld Corp. v. Independence Tube Corp.*, a parent corporation, its subsidiaries, officers, directors and employees are incapable as a matter of law of conspiring with each other. 467 U.S. at 771 ("[T]he coordinated activity of a parent and its wholly-owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act."); *id.* at 769 ("The officers of a single firm are not separate economic actors . . . ."); *Medical Supply Chain, Inc. v. US Bancorp,* 2003 WL 21479192, at *3; *see also In re Ind. Serv. Orgs. Antitrust Litig.*, 85 F. Supp. 2d 1130, 1149 (D. Kan. 2000). Therefore, in accordance with the Supreme Court's holding in *Copperweld*, Counts 2 and 3 must be dismissed for failing to state a claim for which relief may be granted.

B. MSC Lacks Standing To Challenge The Cartel Alleged In Count 4.

Count 4 fails, as described above, because MSC has not sufficiently alleged a conspiracy. (It also fails, as described in Part I of this brief, because MSC cannot show injury.) To the extent that Count 4 alleges that Defendants have formed a cartel and agreed to "maintain their inflated price structure" resulting in overcharges to hospitals, Am. Compl. ¶ 36, that Count also fails

because MSC lacks standing. MSC does not allege that it is a hospital, so it is not directly injured by the alleged conspiracy to charge high prices. Indeed, as a competitor of the alleged cartel, MSC would benefit by any agreement to charge high prices, because MSC could either undercut the price to win business or profit from the cartel's pricing "umbrella." The case law is thus unequivocal that MSC lacks standing to complain of the Defendants' conduct. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990) (holding that a firm has not suffered antitrust injury where competitors have agreed to fix prices); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (same); *Anesthesia Advantage, Inc. v. Metz Group*, 759 F. Supp. 638, 645-46 (D. Colo. 1991) (holding that plaintiffs had "no standing to assert [against its competitors] the price fixing claim independently or as a larger conspiracy, even assuming that the defendants were price fixing.").

C. Even If The Amended Complaint Adequately Alleged A Conspiracy Between the Defendants and GHX, The Facts Do Not Allege An Agreement That Would Be Unlawful.

Although the Amended Complaint never explicitly alleges that any Defendant agreed with GHX to deny MSC access to financing or the sublease of an office building, even if such an agreement *were* adequately alleged, it would not violate the antitrust laws.

1. Any agreement between Defendants and Global Healthcare Exchange would be a vertical agreement to be analyzed under the antitrust "rule of reason."

MSC claims that the Defendants' refusal to deal is per se unlawful restraint of trade under Section 1 of the Sherman Act. Am. Compl. ¶ 34. But there is no allegation that any Defendant agreed with any firm that competes with that Defendant to disadvantage MSC. Specifically, there is – and could be – no allegation that GE or GETS agreed with any competing supplier of office space to deny office space to MSC or that GE Capital agreed with any competing supplier

of financing to deny financing to MSC. There is no allegation that Mr. Immelt had any involvement whatsoever in the deciding whether MSC would get a mortgage or office space, let alone that he agreed with any competitor of any GE business. Even if the Amended Complaint adequately alleged an agreement between a Defendant and GHX, it would be a vertical agreement because no Defendant is alleged to compete with GHX. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.").

Vertical agreements (except for vertical price fixing, which is not alleged here) are analyzed under the antitrust "rule of reason." *Bus. Elecs.*, 485 U.S. at 730-31.

2. An exclusive dealing arrangement between Defendants and GHX would be lawful under the rule of reason.

A vertical agreement in which firms agree that they will deal only with each other (or not deal with each others' competitors) is an "exclusive dealing arrangement." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 473 n.2 (3d Cir. 1992). Exclusive dealing arrangements, like other non-price vertical restraints, are analyzed under the rule of reason. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 44-45 (1984) (O'Connor, J., concurring); *Bus. Elecs., supra*.

Application of the rule of reason means that the exclusive dealing arrangement is unlawful only if the Defendants have market power, which is defined as "the power to control prices or the power to exclude competition." *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 n.3 (10th Cir. 1986). *See SCFC ILC, Inc. v. VISA U.S.A., Inc.*, 36 F.3d 958, 965

(10th Cir. 1994) (proof of market power "is a critical first step, or 'screen,' or 'filter,' which is often dispositive of the case").

MSC does not allege that GE or GETS has market power in the market for commercial real estate leasing or that GE Capital has market power in the financing market. Mr. Immelt plainly does not have market power in any antitrust market. This dooms MSC's exclusive dealing claims, for an exclusive dealing arrangement is unlawful "only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." *Jefferson Parish*, 466 U.S. at 45 (O'Connor, J., concurring). In *Jefferson Parish* an exclusive dealing arrangement that foreclosed competitors from 30% of the available market was found lawful, *id*., and other cases refused to find liability where as much as 40% of the available market was foreclosed to competitors.[3] There are many other suppliers of office space leases and financing (even if banks are excluded), and neither GETS nor GE Capital could have a 40% share in any plausible market. Because MSC does not and cannot allege that Defendants have market power, any agreement with GHX not to deal with MSC – if it existed – would be lawful. There is no conceivable set of facts that MSC could allege that would support an exclusive dealing claim, and MSC's Section 1 claims should be dismissed with prejudice.

III. MSC FAILS TO STATE A CLAIM UNDER SECTION 2 OF THE SHERMAN ACT.

Counts 5 through 9 allege violations of Section 2 of the Sherman Act, 15 U.S.C. § 2. In addition to the fatal defects described in Part I relevant to all of MSC's antitrust claims, these

[3] *See Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162-65 (9th Cir. 1997) (granting summary judgment notwithstanding foreclosure levels of 38%); *Sewell Plastics, Inc. v. Coca-Cola*, 720 F. Supp. 1196, 1212-14 (W.D.N.C. 1989) (34-40% insufficient to sustain exclusive dealing claim), *aff'd mem.*, 912 F.2d 463 (4th Cir. 1990); *Kuck v. Benson*, 647 F. Supp. 743, 746 (D. Me. 1986) (37% insufficient).

counts fail because MSC has failed to allege a proper relevant market, failed to allege that the Defendants have monopoly power or a dangerous probability of obtaining such power, and failed to allege actionable anticompetitive conduct.

A. MSC's Section 2 Claims Must Be Dismissed Because MSC Has Failed To Define A Proper Relevant Market.

A plaintiff is required to establish a relevant market to prevail on a monopolization or attempted monopolization claim under Section 2 of the Sherman Act. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir. 2002). *See generally Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) ("Without a definition of that market there is no way to measure [a defendant's] ability to lessen or destroy competition."). A proper relevant market consists of all products or services that are reasonably interchangeable. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). In this case, MSC alleges that the relevant market is "hospital supplies delivered through e-commerce in North America." Am. Compl. ¶ 37. This market definition fails as a matter of law, mandating the dismissal of counts 5, 6, 7, 8 and 9.

A market definition must be plausible to survive a motion to dismiss. *See TV Communications Network*, 964 F.2d at 1028 (affirming dismissal because the plaintiff "did not allege a relevant product market which [the defendant] was capable of monopolizing, attempting to, or conspiring to monopolize in violation of section 2 of the Sherman Act."); *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (to survive a motion to dismiss, the plaintiff "must allege a relevant market that includes all [products or services] that are reasonably interchangeable"). In *Adidas America*, Judge Van Bebber dismissed a complaint alleging monopolization of a market for "NCAA promotional rights" where the plaintiff "failed to explain

or even address why other similar forms of advertising . . . are not reasonably interchangeable." 64 F. Supp. 2d at 1102. MSC's Amended Complaint suffers from the same defect – it fails to explain why "hospital supplies through e-commerce" is a proper market.

The market cannot be limited to "hospital supplies through e-commerce" simply because that is the only way that MSC plans to sell hospital supplies. "[A]n antitrust plaintiff may not define a market so as to cover only the practice complained of, this would be circular or at least result-oriented reasoning." *Adidas Am.*, 64 F. Supp. 2d at 1102. Rather, the market alleged in a complaint must be justified through application of the relevant legal principles for market definition. As Judge Van Bebber noted:

> 'Where [an antitrust] plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.'

Adidas Am., 64 F. Supp. 2d at 1102 (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997) and collecting cases).

MSC's relevant market fails as a matter of law because it is both too broad and too narrow. MSC's "hospital supplies through e-commerce" market is too broad because MSC fails to address how the market could be broad enough to include all hospital supplies, from bandages to CT scanners. A bandage is obviously not "reasonably interchangeable" with a CT scanner. MSC's market is too narrow because the Amended Complaint fails to explain why the market may be limited to "hospital supplies through e-commerce." Just as the complaint in *Adidas America* was dismissed because the plaintiff failed to explain why other forms of advertising were not substitutes, MSC's Amended Complaint must be dismissed because it fails to explain

why other ways of selling hospital supplies (such as selling through telemarketing, catalogs or a direct sales force) are not reasonable substitutes. Indeed, MSC's Amended Complaint recognizes that "hospital supplies through e-commerce" competes with traditional ways of buying supplies. *See, e.g.*, Am. Compl. ¶ 3 (describing how the use of e-commerce can replace the tradition hospital supply chain).

B. Even If "Hospital Supplies Through E-Commerce" Were A Market, Defendants Cannot Monopolize Or Attempt To Monopolize A Market In Which They Do Not Compete.

Even if "hospital supplies through e-commerce" were a proper market, MSC's Amended Complaint is fundamentally flawed because none of the Defendants are alleged to compete in the "hospital supplies through e-commerce market." A plaintiff claiming monopolization must allege that the defendant possesses "monopoly power in the relevant market," and a plaintiff claiming attempted monopolization must allege that the defendant has a "dangerous probability of success in monopolizing the relevant market." *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999). The defendant's market share is a key factor in determining whether it has either monopoly power or a dangerous probability of obtaining such power. *Id*. Monopolization generally requires a share of 70% or more, *Colorado Interstate Gas v. Natural Gas Pipeline*, 885 F.2d 683, 694 n.18 (10th Cir. 1989), while establishing an attempt to monopolize generally requires a share of at least 30%, and shares less than 50% rarely support a claim for attempted monopolization. *See, e.g., Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) ("a market share of 30 percent is presumptively insufficient to establish the power to control price"); *US Anchor Mfg. Co. v. Rule Indus.*, 7 F.3d 986, 1001 (11th Cir. 1993) ("[B]ecause [defendant] possessed less than 50% of the market at the time the alleged predation

began and throughout the time when it was alleged to have continued, there was no dangerous probability of success as a matter of law.").

Because none of the Defendants are alleged to compete in the purported "hospital supplies through e-commerce market," their market share is *zero*. It is plain that a defendant cannot be guilty of monopolizing or attempting to monopolize a market in which it does not compete. *See, e.g., Aquatherm v. Florida Power & Light*, 145 F.3d 1258, 1261 (11th Cir. 1998) (affirming district court's dismissal of a Section 2 claim because electric power company did not compete in the relevant market); *Pastore v. Bell Tel. Co.*, 24 F.3d 508, 513 (3d Cir. 1994) ("Without any share in the relevant market as described by plaintiffs, there can be no inference that defendants hold sufficient economic power in that market to create a dangerous probability of monopoly.").

MSC does allege that GHX (in which GE is an investor) and Neoforma, another "hospital supplies through e-commerce" competitor, have a combined share of 80%. But this does not save MSC's Amended Complaint. First, the combined share of GHX and Neoforma is irrelevant to any Section 2 analysis. "[I]n order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a particular defendant." *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (rejecting attempt to show dangerous probability of success by aggregating shares of two defendants). More fundamentally, however, the shares of GHX and Neoforma are irrelevant to this action; only the shares of the individual Defendants can be used to establish a violation of Section 2. The share of GHX and Neoforma can no more be attributed to the Defendants than can they be attributed to each other.

The fact that GE owns an interest in GHX does not make GE (let alone the other defendants) a competitor in the market in which GHX allegedly competes. For example, in *Spanish Broadcast System, Inc. v. Clear Channel Communications, Inc.*, 242 F. Supp. 2d 1350 (S.D. Fla. 2003), the defendant did not compete in the alleged relevant market, but did own 26% of a firm that did compete. The court dismissed the plaintiff's Section 2 claims, holding that this ownership interest did not convert the defendant into a competitor in the relevant market. *Id*. at 1363. *Accord Invamed, Inc. v. Barr Labs., Inc.*, 22 F. Supp. 2d 210, 219 (S.D.N.Y. 1998) ("that the [Defendants] possess market power through their alleged ownership interests in [a market participant], standing alone, does not satisfy the pleading requirements of a monopolization or attempted monopolization claim.").

In an attempt to mend this fatal deficiency, Plaintiff appears to argue in Count 7 that the Supreme Court's holding in *Copperweld Corp. v. Independence Tube Corp.* imputes the market in which Global Healthcare Exchange competes to GE and its subsidiaries. Am. Compl. ¶ 39. In *Copperweld* the Supreme Court held that a corporation and its wholly owned subsidiaries are incapable of conspiring to restrain trade under Section 1 of the Sherman Act. 467 U.S. 752, 771 (1984). *Copperweld* does not mean that the Defendants compete in every market in which their affiliates compete. *Invamed*, 22 F. Supp. 2d at 219 & n.2 (characterizing invocation of *Copperweld* as "curious[]" and noting that "the Court did not hold that members of a corporate group thus should be treated as a single enterprise under section 2.").

C. MSC Does Not Allege Actionable Anticompetitive Conduct.

Even if MSC alleged a relevant market and properly alleged that the Defendants had monopoly power or a dangerous probability of obtaining such power, MSC's claims would still fail because it has not alleged that Defendants have acted anticompetitively to obtain or maintain

such power. Section 2 is violated only "when monopoly power is gained or held by conduct constituting an abnormal response to market opportunities." *Instructional Sys. Dev. Corp. v. Aetna Cas. and Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987). GE Capital's refusal to extend credit on terms that MSC itself alleges to be "unusual" is not an "abnormal response to market opportunities." And though MSC trots out antitrust jargon like "essential facilities" and "change of pattern," it fails to allege facts necessary to prevail under those theories. "The use of antitrust 'buzz words' does not supply the factual circumstances necessary to support [a plaintiff's] conclusory allegations." *TV Communications*, 964 F.2d at 1026.

1. MSC does not allege an unlawful refusal to deal or denial of an essential facility.

Count 7 and Count 9 allege that Defendants violated Section 2 through a "unilateral refusal to deal" or "denial of an essential facility."[4] Because an essential facilities claim is merely a subspecies of a refusal to deal claim, these two counts are indistinguishable. Both fail for the same reason – it is not unlawful for a firm without monopoly power to refuse to deal.

MSC alleges two refusals to deal: GE and GETS refused to sublease a building, and GE Capital refused to provide financing. (Mr. Immelt is not alleged to have refused to deal at all.) These claims fail because neither GE, GETS, nor GE Capital is alleged to have a dangerous probability of obtaining monopoly power (let alone monopoly power itself). As discussed above, no Defendant has a dangerous probability of obtaining monopoly power in the alleged "hospital supplies through e-commerce" market because none even competes in that market. GE and GETS are nowhere alleged to have a dangerous probability of obtaining market power in any

[4] These counts allege only unilateral conduct. MSC's allegations of a conspiracy to refuse to deal are found in Counts 1 and 3 and addressed in Part II, *supra*.

real estate market and GE Capital is not alleged to have a dangerous probability of obtaining market power in any market for financing. The refusals to deal of GE, GETS and GE Capital are therefore necessarily lawful, for as the Supreme Court has recognized, "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Characterizing the refusal to deal as denial of an "essential facility" does not save MSC's claims. In order to establish liability under the essential facility doctrine, MSC must allege: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983). MSC fails to state an essential facilities claim because neither GE, GETS, nor GE Capital is alleged to be a monopolist and because none is alleged to compete with MSC. *See MCI*, 708 F.2d at 1132 (monopolist must control facility); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987) (rejecting essential facilities claim because "it is difficult to see how denying a facility to one who, like [the plaintiff], is not an actual or potential competitor could enhance or reinforce the monopolist's market power.").

2. Count 8's "change of pattern" claim does not state an antitrust violation.

In Count 8 (Am. Compl. ¶ 40), MSC alleges that GE "interrupted [its] pattern of distribution of property by denying the validity of an electronic contract . . ." and that this

somehow violated the antitrust laws, citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Liability was imposed in that case where "the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Id.* at 603. Because neither GETS nor GE Capital is alleged to be a monopolist in any relevant market, MSC's Amended Complaint does not state a claim under *Aspen Skiing*.

IV. MSC FAILS TO STATE A CLAIM UNDER SECTION 2(e) OF THE ROBINSON-PATMAN ACT.

In Count 10 of the Amended Complaint, Plaintiff alleges that Defendants have violated Section 2(e) of the Robinson-Patman Act. Am. Compl. ¶ 42. Section 2(e) makes it unlawful for a seller to:

> Discriminate in favor of one purchaser against another purchaser or purchasers of a *commodity bought for resale* . . . by . . . furnishing . . . any services or facilities connected with the processing, handling, sale, or offering for sale of such *commodity* so purchased upon terms not accorded to all purchasers on proportionally equal terms.

15 U.S.C. § 13(e) (emphasis added).

As a threshold matter, the Robinson-Patman Act only bars price discrimination in the sale of commodities. *See, e.g.*, *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 355-57 (1968). MSC complains that Defendants have discriminated in the supply of a real estate lease or financing, Am. Compl. ¶ 40, but neither is a "commodity" within the ambit of Section 2(e). *See Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1328 (6th Cir. 1983) ("[D]iscriminatory practices in the extension of credit . . . are beyond the scope of either § 2(d) or § 2(e)) (citing *Murphy Oil Corp.*, 674 F.2d at 1119 & n.7; *Skinner v. United States Steel Corp.*, 233 F.2d 762, 765 (5th Cir. 1956)); *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970) (lease is

not a commodity); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 652 (C.D. Cal. 1978) ("It suffices to say that real estate and intangibles are not commodities within the meaning of the Act.").

More fundamentally, MSC has not alleged a violation of the Robinson-Patman Act because it has not actually alleged "discrimination," namely "two sales made by the same seller to at least two different purchasers at two different prices." *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1202 (11th Cir. 1993). MSC's claims fail because MSC does not – and cannot – identify any firm that obtained a lease or financing from a Defendant on more favorable terms.

V. MSC'S STATE LAW CLAIMS FAIL AS A MATTER OF LAW.

In addition to the Sherman and Clayton Act claims, Medical Supply has also brought four state law claims against the Defendants: (1) breach of contract; (2) fraudulent misrepresentation; (3) breach of duty of care and fair dealing; and (4) bad faith. The Court has jurisdiction over these claims pursuant to 28 U.S.C. § 1367(a).[5] If the Court dismisses the federal claims, the most logical response with regard to the state law claims would be to dismiss those claims as well. *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002).

Notwithstanding the jurisdictional issue pertaining to Medical Supply's state law claims, the claims must be dismissed because Medical Supply has not properly pled cognizable causes of action under Missouri law, which applies to this case because Missouri has the most significant relationship to the cause of action and the parties. Plaintiff is a Missouri corporation,

[5] MSC appears to assert that there is diversity of citizenship, Am. Compl. ¶ 2, but fails to allege the state of incorporation or principal place of business of any of the Defendants.

Defendants' alleged misconduct took place in Missouri, and the allegations in the Amended Complaint concern real property in Missouri. *Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1358 (8th Cir. 1994) (citing Restatement (Second) Conflict of Laws § 145). *See also Commercial Union Assurance Co. v. Hartford Ins. Co.*, 86 F. Supp. 2d 921, 923-24 (E.D. Mo. 2000) (citing Restatement (Second) Conflicts of Laws § 188).[6]

A. All State Law Claims Against Mr. Immelt Should Be Dismissed.

MSC's state law claims are asserted against all Defendants, apparently including Mr. Immelt, GE's CEO. As described in detail below, all of the state law claims suffer from fatal defects with regard to the corporate defendants. Those same failings are equally applicable to the claims against Mr. Immelt. At an even more basic level, however, Mr. Immelt is not alleged to have had any personal involvement in any of the conduct that forms the basis of MSC's state law claims. He certainly is not alleged to personally be a party to any contract with MSC, to have made fraudulent misrepresentations to MSC, to have owed or breached a duty of good faith to MSC, or to have acted in bad faith.

B. Count 11 (Breach of Contract) Should Be Dismissed Because MSC Does Not Allege Satisfaction Of Two Conditions Precedent.

1. Contract claim against GE.

The basis for MSC's breach of contract claim is that the May 15, 2003 letter from its corporate counsel, Bret Landrith, to GE Commercial Properties (George Fricke) and Fricke's voice mail and e-mail of the same day responding to Landrith's proposal constitute a written agreement. Am. Compl. ¶¶ 26, 27, 43. However, pursuant to Landrith's proposal, the "offer is

[6] MSC appears to agree that Missouri law applies to its claims. *See, e.g.*, Am. Compl. ¶ 48 (citing "Missouri case law").

contingent on . . . the City of Blue Springs' approval of Medical Supply Chain's purchase and occupation of the building and is contingent upon GE Capital securing a twenty year mortgage on the building and the property with a first year moratorium." Am. Compl. ¶ 25. Thus, under the terms of MSC's offer, there were at least two express conditions precedent to the formation of any contract: (1) the approval of the City of Blue Springs; and (2) the agreement by GE Capital to provide a twenty year mortgage on the terms stated.

The satisfaction of a condition precedent must either be alleged in the complaint or MSC must state a reason for its non-performance. *Lowery v. Air Support Int'l., Inc.*, 982 S.W.2d 326, 330 (Mo. App. 1998) (citing *Globe Am. Corp. v. Miller Hatcheries, Inc.*, 110 S.W.2d 393, 396 (Mo. App. 1937)). MSC's breach of contract claim must be dismissed because it does not and cannot allege satisfaction of either condition.

At most, MSC alleges that it introduced itself to the City of Blue Springs Economic Development Committee. Am. Compl. ¶ 44. MSC is conspicuously silent, however, regarding whether the City of Blue Springs approved Medical Supply's purchase and occupation of the building at 1600 N.E. Coronado Drive, and it is silent as to any reason or excuse as to why the City did not provide the necessary approval. MSC's silence regarding this condition precedent is fatal and its breach of contract claim against GE must fail. *Lowery*, 982 S.W.2d at 330.

The Amended Complaint also fails to allege satisfaction of the other condition precedent, acceptance by GE Capital of a mortgage on the terms required by MSC. To the extent the Amended Complaint suggests that this condition precedent was satisfied by Fricke's acceptance of Landrith's contingent offer, the facts alleged in the Amended Complaint make clear that Fricke – who is alleged to work for GE and not for GE Capital or GETS (Am. Compl. ¶ 43) – was speaking on behalf of GE and no other GE entity (and certainly not on behalf of Mr.

Immelt). Even if Fricke accepted the contract on behalf of GE, GE's acceptance of the contingent contract for the buyout of a lease would not bind GE Capital to extend a mortgage to MSC. In a breach of contract action, "two separate corporations are to be regarded as distinct legal entities, even if the stock of one is owned partly or wholly by the other." *Mid-Missouri Tel. Co. v. Alma Tel. Co.*, 18 S.W.3d 578, 582 (Mo. App. 2000) (finding no breach of contract signed by an affiliate).

The Amended Complaint alleges only that George Fricke told MSC that he "was the authority for the building at 1600 NE Coronado Dr." Am. Compl. ¶ 43. The Amended Complaint does *not* allege that GE Capital told MSC that Fricke could accept a contract on its behalf or even that Fricke suggested he had such authority. *Cf. Essco Geometric v. Harvard Indus.*, 46 F.3d 718, 726 (8th Cir. 1995) ("Under Missouri law, apparent authority is created by the conduct of the principal which causes a third person reasonably to believe that the purported agent has the authority to act for the principal, and to reasonably and in good faith rely on the authority held out by the principal.").

Indeed, MSC plainly understood that Fricke was not acting for GE Capital because in its May 15 proposal to GE Commercial Properties, MSC requested that Fricke provide it with "a contact person for GE Capital or its mortgage agent." Am. Compl. ¶ 25. MSC's conduct is consistent with its recognition that Fricke had not accepted MSC's mortgage terms in his May 15 voice mail or e-mail, because on May 22 MSC provided GE Capital with a "loan package that included its financials." Am. Compl. ¶ 29. One does not make a loan application after the loan has been approved.

Because Fricke had neither actual nor apparent authority to act for GE Capital, GE Capital never accepted MSC's offer of a mortgage, meaning that the second condition precedent

was not satisfied. As neither of the two conditions precedent to the existence of a binding contract was satisfied, there was no contract between GE and MSC and could thus be no breach. MSC's breach of contract claim against GE must therefore be dismissed.

2. Contract claims against GE Capital, GETS, and Mr. Immelt.

Although it is unclear from MSC's Amended Complaint, it appears that MSC has also asserted breach of contract claims against GE Capital, GETS, and Mr. Immelt. Any contract between MSC and GE Capital, GETS, or Mr. Immelt would have to be "in writing and signed by the party to be charged therewith" to be enforceable under Missouri's Statute of Frauds, Mo. Rev. Stat. § 432.010, given that MSC offer was for a contract that was not capable of performance within a year. MSC's allegations as to GE Capital, GETS, and Mr. Immelt must fail because there is no allegation of *any* agreement between MSC and these three Defendants, let alone a written contract signed by any of these Defendants as required under the Statute of Frauds.

As discussed above, George Fricke did not and could not accept an offer on behalf of GE Capital, GETS, or Mr. Immelt. *See Mid-Missouri Tel. Co.*, 18 S.W.3d at 582. Because GE Capital, GETS, and Mr. Immelt were not parties to the purported contract, they cannot be bound by the terms and obligations of the contract. *Cont'l Cas. Co. v. Campbell Design Group, Inc.*, 914 S.W.2d 43, 44 (Mo. App. 1996) (A "basic legal premise [is] that a contract generally binds no one but the parties thereto, and it cannot impose any contractual obligations or liability on one not a party to it."). Accordingly, MSC has no claim for breach of contract against GE Capital, GETS, or Mr. Immelt.

C. Count 12 (Fraudulent Misrepresentation) Should Be Dismissed.

Count 12 of MSC's Amended Complaint alleges that "Defendants" have

> gained the opportunity to destroy Medical Supply and prevent it from entering the hospital supply market by communicating by telephone and in written signed communication that they have accepted the Plaintiff's offer and in overt actions demonstrating that they are in a binding agreement, including partial performance, when in fact they had no intention of being bound by the agreement once they discovered Medical Supply as an electronic marketplace would compete with GHX, LLC and go against their agreement with Neoforma to exclude competitors.

Am. Compl. ¶ 48. MSC's claim is entirely deficient under Missouri law.

1. Fraud claim Against GE.

Under Missouri law, there are nine elements of a fraudulent misrepresentation claim.

MSC must show:

1. representation;
2. its falsity;
3. its materiality;
4. Defendant's knowledge of its falsity or ignorance of its truth;
5. Defendant's intent that the representation should be acted upon by Plaintiff in the manner reasonably contemplated;
6. Plaintiff's ignorance of falsity of representation;
7. Plaintiff's reliance on representation being true;
8. Plaintiff's right to rely thereon; and
9. Plaintiff's consequent and proximate injury.

Joel Bianco Kawasaki Plus v. Merrimac Valley Bank, 81 S.W.3d 528, 536 (Mo. 2002).

Furthermore, MSC's claim for fraud must be plead with particularity. Fed. R. Civ. P. Rule 9(b). *See also City of Wellston v. Jackson*, 965 S.W.2d 867, 870 (Mo. App. 1998) ("Every essential element of fraud must be plead, and failure to plead any element renders claim defective and subject to dismissal."). Here, MSC fails to allege all nine elements of a fraud claim. MSC makes no allegation regarding materiality, its own ignorance, reliance, right to reliance or damages. MSC's failure to plead these essential elements renders its claim defective.

Moreover, the allegations MSC does set forth demonstrate there was no fraud. In order for MSC to successfully plead a fraud claim, it must allege that GE knew that its statement that it would perform the proposed transaction with MSC was false at the time it agreed to enter into the transaction or that GE was ignorant as to the truth of whether it could perform the agreement with MSC. *See City of Warrensburg v. RCI Corp.*, 571 F. Supp. 743, 754 (W.D.Mo. 1983) ("The action for misrepresentation of an intention to perform an agreement is a recognized exception to the general rule under Missouri law that '[T]he giving of . . . a promise, even though breached the next day, is not such a fraudulent misstatement of fact as will support an action for tortious fraud. The misrepresentation must be of existing fact.'" (citations omitted)). *See also Restatement (Second) of Torts*, § 530.

MSC's fraud claim fails because the Amended Complaint fails to assert that the Defendants had no intention of performing their alleged agreements at the time that they allegedly accepted MSC's offer. In fact, MSC's Amended Complaint alleges exactly the opposite. In Paragraph 48, MSC alleges that Defendants had "no intention of being bound by the agreement *once they discovered* Medical Supply's electronic marketplace would compete with GHX, LLC . . . ." (emphasis added). Thus, according to MSC's own allegations, Defendants' decision to not be bound by the agreement occurred *after* they allegedly entered into the

agreement. MSC therefore cannot allege the fourth element of a fraudulent misrepresentation claim because MSC cannot show a misrepresentation of an existing fact. As such, MSC does not, and cannot, state a claim of action for fraudulent misrepresentation. *See City of Warrensburg*, 571 F.2d at 754.

2. Fraud claims against GE Capital, GETS, and Mr. Immelt.

MSC does not allege that GE Capital, GETS, or Mr. Immelt made any representations to Medical Supply, let alone that such representations were false or material or that the speaker had knowledge of the falsity or was ignorant of the truth of the statement at the time the statement was made. In short, MSC does not allege any of the nine elements necessary against GE Capital, GETS, or Mr. Immelt. As such, MSC's claim for fraudulent misrepresentation as to these three Defendants must fail.

Even if MSC's Amended Complaint was construed so as to include a claim of fraudulent misrepresentation against GE Capital, GETS, or Mr. Immelt, the claim should fail for the same reason that the MSC's claim of fraudulent misrepresentation should fail against GE. MSC has not alleged that GE Capital, GETS, and Mr. Immelt had the intent of not complying with the agreement at the time the agreement was entered into. Because of this failure, MSC's fraudulent misrepresentation claims against GE Capital, GETS, and Mr. Immelt must be dismissed.

D. Count 13 (Breach Of Duty Of Care And Fair Dealing) Should Be Dismissed.

In Count 13, MSC asserts a breach of good faith and fair dealing claim based on Defendants' failure to perform the alleged contract and subsequent statements. Under Missouri law, a breach of good faith and fair dealing is a breach of contract theory. *See Magruder Quarry & Co. v. Briscoe*, 83 S.W.3d 647, 651 (Mo. App. 2002). In order for MSC to successfully state the cause of action for breach of duty of good faith and fair dealing, it must first state a claim for

breach of contract. As set forth above, MSC's allegations of a contract are insufficient to state a claim and, as such, its breach of good faith and fair dealing claim also fails.

E. Count 14 (Bad Faith) Should Be Dismissed.

Count 14 of MSC's Amended Complaint alleges that the Defendants have acted in bad faith. Missouri law does not recognize an independent cause of action for bad faith outside the unique context of disputes between insurance companies and their insureds regarding the settlement of claims. *See generally Quick v. Nat'l Auto Credit*, 65 F.3d 741, 745 (8th Cir. 1995) (discussing basis of doctrine). MSC cites *Commercial Cotton Co. v. United Cal. Bank*, 163 Cal. App. 3d 511, 516 (1985), for the existence of such a duty in the lending context, but *Commercial Cotton* has been overruled. *See Copesky v. Superior Court*, 229 Cal. App. 3d 678 (1991). Thus, even the California courts "have unanimously refused to sanction tort remedies outside the context of an insurance policy." *Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407, 418 n.9 (Cal. 1999). Accordingly, Count 14 should be dismissed.

CONCLUSION

Not a single count in MSC's 14-count Amended Complaint states a claim for which relief can be granted. Accordingly, Defendants respectfully request that the Amended Complaint be dismissed per Fed. R. Civ. P. 12(b)(6).

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served by overnight delivery this 21st day of August, 2003 on

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