

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SAMUEL K. LIPARI,

Plaintiff,

v.

US BANCORP, et al.

Defendants.

Case No.: 07-2146-CM-DJW

REPORT OF PARTIES' PLANNING CONFERENCE

1. **Rule 26(f) Conference.** Pursuant to Fed. R. Civ. P. 26(f), a discovery and case management conference was held by counsel via email and telephone. The conference participants were plaintiff, Samuel Lipari appearing *pro se* and Mark Olthoff and Jay Heidrick for defendants.

2. **Preliminary Matters.**

a. The following persons appeared at the scheduling conference:

Samuel K. Lipari, *pro se*: 816-365-1306
Mark Olthoff- Counsel for defendants: 816-395-0620
Jay Heidrick- Counsel for defendants: 816-691-3743

b. The parties provide the following information regarding themselves and their counsel:

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- c. The parties submit the following summary of the case:

Plaintiff:

Plaintiff as the assignee of claims from his dissolved Missouri corporation, Medical Supply Chain, Inc. alleges the defendants U.S. Bank and US Bancorp created contracts and agreements with the plaintiff to provide escrow accounts for the plaintiff to capitalize his entry into the nationwide hospital supply market. The complaint alleges that when the defendants discovered the plaintiff would be competing with US Bancorp Piper Jaffray's healthcare companies, the defendants caused the contracts and agreements to be breached with knowledge of the future profits the plaintiff would obtain from the contract and that the plaintiff would immediately lose \$350,000.00 he had raised. The complaint alleges the defendants used the USA PATRIOT Act as a fraudulent excuse and committed other frauds. The complaint also alleges that the defendants caused the plaintiff's trade secrets and business plan to be delivered to his competitors.

Parties believe subject matter jurisdiction is conferred upon this court through diversity jurisdiction under 28 U.S.C. § 1332.

Medical Supply claims that it was injured because, in the absence of the escrow accounts and financing, it could not launch its business and enter into the

market for hospital supplies to compete against Novation LLC. Based on these basic facts, plaintiff's Complaint asserts claims for breach of contract, misappropriation of trade secrets, fraudulent misrepresentation, breach of fiduciary duty and *prima facie* tort.

Defendant:

Plaintiff claims he is the sole assignee of this cause of action from his former corporation, Medical Supply Chain, Inc. Plaintiff alleges that he requested defendant U.S. Bank to open one or more escrow accounts to be used by Medical Supply and its potential students/customers, but the Bank declined to do so; that Medical Supply sought a loan from U.S. Bank and gave the Bank a copy of its business plan; and that the Bank declined the loan and misappropriated trade secrets from its business plan before returning it to Medical Supply.

Medical Supply claims that it was injured because, in the absence of the escrow accounts and financing, it could not launch its business and enter into the market for educating students in medical supply services in the health care industry. Based on these basic facts, plaintiff's Complaint asserts claims for breach of contract, misappropriation of trade secrets, fraudulent misrepresentation, breach of fiduciary duty and *prima facie* tort.

Defendants assert numerous defenses as set forth in their Answer, including the following: Plaintiff's pleading fails to state claims against defendants upon which relief can be granted, for the reasons more fully set forth in motion to dismiss which is pending; there were valid business reasons justifying defendants' decisions to decline to enter into escrow accounts with plaintiff and to decline plaintiff's request for financing, and defendants' decisions in that regard were reasonable and appropriate under the circumstances; there was no contract between plaintiff and defendants and, if there were, there was no breach of any such contract; plaintiff did not furnish to defendants any confidential or trade secret information, nor did defendants wrongfully use or disclose any information provided by plaintiff to defendants; none of the defendants breached any duty owed to plaintiff; plaintiff did not suffer any damages as a result of any wrongful conduct by any of the defendants; plaintiff lacks standing to assert its claims; plaintiff's claims are barred in whole or in part by *res judicata*. Defendants' affirmative defenses are more specifically identified in their Answer.

The Court maintains subject matter jurisdiction pursuant to the diversity jurisdiction provisions of 28 U.S.C. § 1332, *et seq.*

3. Plan for ADR

- a. The parties' position on ADR.

Plaintiff shall submit to defendant a written, good faith settlement proposal by February 4, 2008. By February 18, 2008, defendant shall make a

written, good faith response to such proposal, either accepting it or submitting a good faith counterproposal to settle the case. By March 3, 2008, the parties shall send confidential reports to the magistrate judge, stating the efforts to settle the case, current evaluations of the case, views concerning future settlement negotiations, prospects for settlement, a specific recommendation regarding mediation and/or any other ADR method, and an indication (preferably jointly) concerning who has been selected by the parties to serve as a mediator or other neutral in an ADR process.

- b. To date, the parties have engaged in the following good faith efforts to resolve this matter:

Plaintiff:

Around November 8, 2002, Plaintiff offered to settle for provision of the first ten escrow accounts in time to prevent the loss of \$350,000.00 and to pay the defendants \$6000.00 for fees. Defendants rejected the offer through their attorney Patrick J. McLaughlin a partner and co-chair in the corporate trust services of Dorsey & Whitney LLP and Mark A. Olthoff, KS lic. #70339 of Shughart Thompson & Kilroy. The defendants' problem with the plaintiff proposed settlement was that even though no damages would have to be paid and the plaintiff would be paying US Bank the lucrative fees for the first ten accounts, the plaintiff would have entered the market violating the agreement between US Bancorp Piper Jaffray and Novation LLC's Neoforma, Inc. to exclude competitors in the supplier markets that weren't approved by Novation LLC, VHA and UHC.

In a 2003 Tenth Circuit Mediation conference during *Medical Supply Chain, Inc. v. US Bancorp, NA, et al* 112 Fed. Appx. 730 (10th Cir. 2004) where US Bank and US Bancorp through their attorneys Mark A. Olthoff, KS lic. #70339 and Andrew M. DeMarea KS lic. #16141 of Shughart Thompson & Kilroy offered merely to not seek attorney's fees from the plaintiff if plaintiff dismissed his claims.

Defendants:

The parties have previously exchanged settlement positions in prior litigation and defendants feel that, at this time, settlement appears virtually impossible.

- c. The parties have not agreed on an alternative dispute resolution procedure.

Plaintiff:

Plaintiff is opposed to the introduction of an arbitrator and against trying the matter before anyone other than a US District Court Judge and jury. The

reason for the plaintiff's opposition to ADR is the consistent nature of rulings of the trial court in preceding Medical Supply Chain litigation. Plaintiff believes the defense counsel repeatedly misstated the law in the face of controlling precedent and US Supreme Court decisions which resulted in clearly erroneous rulings. Plaintiff believes that the reversal decision *In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders* (U.S. Jud. Conf. 2007) stemming from the US Senate Judiciary Committee's concern over the experiences of the plaintiff in this court now provides meaningful review of failure to prosecute a complaint of judicial misconduct upon dismissal of the complaint by the chief judge under 28 U.S.C. § 352(b), or upon the denial of a petition for review of the complaint by the circuit judicial council under 28 U.S.C. § 352(c).

Plaintiff believes there would be no such protection in ADR from the mediator adopting legal authorities misrepresented by the defense counsel while ignoring the plaintiff's recitation to controlling case law.

Defendants:

The parties have not yet agreed on a method of alternative dispute resolution and, at this time, defendants do not view any real likelihood of settlement based on the extreme differences in their evaluations of the plaintiff's case.

4. **Plan for Pre-Discovery Disclosures.** The parties have exchanged the disclosures required by Fed. R. Civ. P. 26(a)(1).

Plaintiff:

Information required by Fed. R. Civ. P. 26(a)(1) due by March 1, 2008.

Defendants:

Plaintiff previously served its Rule 26 disclosures in April 2007, defendants in May, 2007. Defendants will produce any documents in their possession on or before January 15, 2008. Plaintiff has produced disclosures which are impossibly overbroad and non-compliant with Rule 26(a)(1). Plaintiff has identified seventy (70) witnesses including Judges Waxse and O'Hara as well as Patrick Fisher. Plaintiff has produced electronic copies of over 11,000 pages of documents which appear to relate primarily to other litigation. Plaintiff's damages statement does not reference the current defendants but rather states that: "The total damages sought from the GE Defendants is Four Hundred and Fifty Million Dollars \$450,000,000." Defendants have made two good faith attempts to resolve this issue.

5. **Plan for Discovery.** The parties propose to the court the following discovery plan:

- a. All discovery shall be commenced or served in time to be completed by:

Plaintiff: December 1st, 2009. Reasons for this date include:

- litigation in multiple courts for 6 years
- conduct by defendants during that period to evade contract is discoverable
- some conduct committed by attorneys and privilege arguments are expected to take a long time to resolve
- plaintiff's experience with co-conspirator GE described in this complaint required two Mandamus actions, the litigation with US Bank has already required one interlocutory appeal and two other appeals
- continuing conduct of US Bank defendants will likely result in an interim injunction being sought by the plaintiff will based upon experience be denied and result in an interlocutory appeal if merited
- this court is likely to continue the case during the interim appeal even though the Tenth Circuit has stated Hon. Carlos Murguia loses jurisdiction during plaintiff's previous interlocutory appeal
- the defendants have a fundamental and unshakable belief that discovery rules and precedent are inapplicable to them and the plaintiff believe the outcomes and dismissals to date reflect this court's understanding the defendants are not subject to discovery and much further litigation is required before the plaintiff has exhausted his right to redress in the court.

Defendants: June 13, 2008. Defendants believe this date is *only* possible if limitations are established. *See* 5.c below and 4 above.

- b. The parties intend to serve disclosures and discovery electronically, as permitted by this court's General Order No. 03-1, Exhibit 1, Rules 5.4.2 & 26.3.

Plaintiff asserts his right to receive all discoverable records originally created electronically or stored electronically by the defendants and their agents or employees in their original electronic format with accompanying metadata *Williams, et al v. Sprint*, Case No. 03-2200-JWL-DJW , 230 F.R.D. 640; 2005 U.S. Dist. LEXIS 21966; 62 Fed. R. Serv. 3d (Callaghan)1052; 96 Fair Empl. Prac. Cas. (BNA) 1775 (KS Dist. 2005).

- c. One or more of the parties anticipate the following problem(s) in discovery, which should be discussed with the court and, if possible, resolved at the scheduling conference:

Plaintiff:

The defendant objects to the subjects the plaintiff seeks discovery on, making a generalized objection that the motive behind the breach, the fraud and misconduct of the defendants to deprive the plaintiff of his property rights in the contract are outside of the pleadings. The plaintiff believes that this conduct is within the express averments of the complaint. The plaintiff also believes the defendants are in error over the legal standard for disallowing discovery and have made no showing in support of the lack of relevance as required in the District of Kansas:

“The "Notes of Advisory Committee Rules" concerning the 1946 Amendment to 26(b) state:

The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at trial but also inquiry into matters themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978), the Supreme Court stated:

The key phrase in this definition — "relevant to the subject matter involved in the pending action" — has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. See *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388, 91 L.Ed. 451 (1947). **Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.** *Id.*, at 500-501, 67 S.Ct. [at] 388-389, 91 L.Ed. 451. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits. (footnote omitted).

Id. at 351, 98 S.Ct. at 2389.

The Tenth Circuit has held that "the trial court [has] broad discretion as to the control of discovery, ... and rulings will not set aside short of an abuse of discretion." *Marsee v. U.S. Tobacco Co.*, 866 F.2d 319, 326 (10th Cir.1989) (quoting *Shaklee Corp. v. Gunnell*, 748 F.2d 548, 550 (10th Cir.1984) (citations omitted)). "In particular, rulings on relevancy of material sought for discovery are within the trial court's discretion." *Marsee*, 866 F.2d at 326.

The party opposing the discovery has the burden of proving its lack of relevance. *Koch v. Koch Industries, Inc.*, No. 85-1636-C, 1992 WL 223816, 1992 U.S.Dist. LEXIS 14094 (D.Kan. Aug. 24, 1992) (citing *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978))." [Emphasis added]

Aramburu v. Boeing Co., 885 F.Supp. 1434 at 1437 (D. Kan., 1995)
The intent or motive of US Bank in breaching the contract as averred in the complaint at the direction US Bancorp is a necessary element under Missouri law and necessitates discovery:

"[I]n resolving the tensions between the opposed needs of disclosure of confidentiality we are reminded that the discovery rules are to be accorded broad

and liberal treatment, particularly where proof of intent is required." *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 640 (S.D.N.Y.1987) (quoting *Gray v. Board of Higher Educ., City of New York*, 692 F.2d 901, 904 (2d Cir.1982) (citing *Herbert v. Lando*, 441 U.S. 153, 170-175, 99 S.Ct. 1635, 1645-48, 60 L.Ed.2d 115 (1979))."

Aramburu v. Boeing Co., 885 F.Supp. 1434 at 1438 (D. Kan., 1995)

The Kansas District court is stringent in requiring the showing in opposition to discovery relevance to be specific, not conclusory:

"More than a conclusory statement that the discovery is irrelevant must be offered, the opposing party must show specifically how the request is not reasonably calculated to lead to the discovery of admissible evidence. *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3rd Cir.1982). Courts should lean towards resolving doubt over relevance in favor of discovery. *Corrigan v. Methodist Hosp.*, 158 F.R.D. 54, 57 (E.D.Pa.1994)."

Teichgraeber v. Memorial Union Corp., 932 F.Supp. 1263 at 1266 (D. Kan., 1996).

The Magistrate has consistently enforced the requirement that opposition to discovery be specific when undue burden is asserted:

"As the party resisting the discovery, Defendants have the burden to show facts justifying their objections. See *Snowden v. Connaught Lab., Inc.*, 137 F.R.D. 325, 332 (D.Kan. 1991). Those resisting discovery must demonstrate that the time or expense involved in responding to requested discovery is unduly burdensome. Moreover, the party resisting discovery has the obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure which would be required to produce the requested documents. This information is necessary to enable the Court to determine the burden imposed by the discovery.

Defendants have submitted no explanation, let alone an affidavit or other proof, demonstrating that responding to Request 35 would impose an undue burden. The Court will not speculate that the requested discovery causes undue burden; therefore, Defendants' objection with regard to undue burden will be overruled."

Doebeler v. Sprint Corp., No. 00-2053-KHV (D. Kan. 6/5/2001) (D. Kan., 2001). Undue burden is a far more common basis used by courts to limit discovery than relevancy used by the defendants. Relevancy arguments are usually resolved in favor of the plaintiff requesting the information:

“United States v. American Telephone & Telegraph, 461 F.Supp. 1314, 1341 n. 81 (D.D.C.1978) ("The clear policy of the rules is toward full disclosure ... [I]t is rare that a particular item of requested information is not `relevant' under the broad definition given that word in Rule 26.") (quoting Judge Kaufman, Judicial Control Over Discovery, 28 F.R.D. 111, 119 (1961)); 8 Wright & Miller, Civil §§ 2008, 2009.”

Avianca, Inc. v. Corriea, 705 F.Supp. 666 at 676 (D.D.C., 1989)

Discovery under Rule 26 is broad:

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978) (Rule 26(b)(1) "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."); *United States v. American Telephone & Telegraph*, 461 F.Supp. 1314, 1341 n. 81 (D.D.C.1978) ("The clear policy of the rules is toward full disclosure ... [I]t is rare that a particular item of requested information is not `relevant' under the broad definition given that word in Rule 26.") (quoting Judge Kaufman, Judicial Control Over Discovery, 28 F.R.D. 111, 119 (1961)); 8 Wright & Miller, Civil §§ 2008, 2009. The facts of this case as they have become apparent since the magistrate's order, including the joinder of Andres Cornelissen as a party defendant, and the evidence of conflicts of interest involving Corriea and his corporate affiliations, clearly demonstrate the relevancy of all of the documents sought.

“Seaboard objects to KPL's request for "all Seaboard's bond forms for construction performance bonds in use for the years 1983 through the present." Seaboard contends the forms are not relevant. KPL contends that since Seaboard raises the defense of lack of proper notice, an issue of contract interpretation is involved and thus the forms are relevant. Given the broad nature of relevancy for discovery purposes, the court finds that these forms are relevant for discovery. Thus, the court denies Seaboard's request for an order limiting discovery on this matter.”

Green Const. Co. v. Kansas Power and Light Co., 732 F.Supp. 1550 at 1554 (D. Kan., 1990)

Under Missouri law that governs the plaintiff's state law based claims, discovery of the relationship between the parties outside of the contract is relevant and required for the contract related tort claims:

“Under Missouri law, the trend appears to favor the theory that a tort action arising from a breach of contract may be brought only if the duty owed is superimposed by operation of law as an incident of the relationship between the parties rather than the contract. See, *Fingers v. Mount Tabor United Church of Christ*, 439 S.W.2d 241 (Mo.App. 1969); *State ex rel. Cummins Missouri Diesel*

Sales Corporation v. Eversole, 332 S.W.2d 53, 57-58 (Mo.App.1960). However, Missouri appears willing to allow a litigant to maintain an action for fraud and recover punitive as well as actual damages where the duty breached is exclusively incidental to the contract. See, *Throckmorton v. M.F.A. Central Cooperative*, 462 S.W.2d 138 (Mo.App.1970); *Byers Bros. Real Estate & Ins. Agency, Inc. v. Campbell*, 353 S.W.2d 102 (Mo. App.1961). There are other situations which may be compared with this position. Cf., *Stambaugh v. Wedlan*, 371 S. W.2d 361, 363 (Mo.App.1963); *Harzfeld's Inc. v. Otis Elevator Co.*, 114 F. Supp. 480 (W.D.Mo.1953).”

General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d at 1216 (C.A.8 (Mo.), 1973)

Communications of defendant corporation’s control group and its agents to commit the alleged fraud or breach are not privileged:

“Communications made before the fact of or during the commission of a crime, fraud, or tort between an attorney and persons within the control group of the corporate client are not protected by the attorney-client privilege. To allow the attorney-client privilege to attach for such communications would permit an attorney to be a principal or an accessory to a crime, fraud, or tort without fear of discovery and would permit clients to commit crimes, frauds, and torts with the aid of legal advice beforehand. Consultation to carry out the wrongful conduct is a conspiracy. The attorney-client privilege was not meant to protect such communications intended to foster criminal, fraudulent, or tortious conduct. *Union Camp Corp. v. Lewis*, 385 F.2d 143 (4th Cir. 1967); *United States v. Bob*, 106 F.2d 37 (2d Cir. 1939), cert. denied, 308 U.S. 589, 60 S.Ct. 115, 84 L.Ed. 493; Annot., 2 A.L. R.3d 861 (1965).

Although there are no crimes charged in this case, frauds on the Patent Office and business torts in the form of antitrust violations are alleged. In order for the attorney-client privilege not to apply to communications made before or during the commission of a crime, fraud, or tort, there must be only a prima facie showing that the lawyer's advice was designed to serve his client in the furtherance of its wrongful conduct. *Union Camp Corp.*, *supra*, at 144; *United States v. Bob*, *supra*, 106 F.2d at 40; *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 77 L.Ed. 993 (1933) (dictum).”

Duplan Corporation v. Deering Milliken, Inc., 397 F.Supp. at 1171 (D.S.C., 1974).

Missouri punitive damages law requires discovery on the defendants’ motives in breaching the contract and subsequent conduct to deprive the plaintiff of enforcing his property rights under the contract. Also Missouri law requires discovery on the defendants motive in preventing the plaintiff from recovering for General Electric’s breach of the following funding agreement the plaintiff obtained to cover for the breach of the defendants US Bank and US Bancorp:

“The behavior by DuPont is comparable to that found in other cases in which courts have held that the plaintiff made a submissible case for punitive damages. These cases involve evidence in which the defendant committed repeated bad acts from which the jury could find willful or outrageous conduct by the defendant. For instance, in *DeLong v. Hilltop Lincoln-Mercury, Inc.*, the court found no error in submitting the issue of punitive damages where evidence demonstrated a "culpable mental state or reckless disregard for an act's consequences." 812 S.W.2d 834, 841 (Mo. App. 1991). The defendant in *DeLong* repeatedly made false representations to customers concerning previous ownership of automobiles, refused to provide information despite the ease of doing so, and refused to repurchase the automobiles upon plaintiff's discovery of true prior ownership. *Id.* Similarly, in *Northland Ins. Co. v. Chet's Tow Service, Inc.*, evidence was introduced that the defendant lied about its charges, changed the amount due, refused payment and attempted to double bill. 804 S.W.2d 54, 57 (Mo. App. 1991). The court found this evidence sufficient to demonstrate an evil motive and that the trial court had not made an error in submitting the issue of punitive damages to the jury. *Id.* In this case, there is sufficient evidence demonstrating that DuPont committed several different acts from which the jury could reasonably infer an evil motive. After Colt had notified Fabricor it would no longer supply Fabricor, DuPont attempted to convince BMS, Fabricor's other major supplier, not to supply Corian to Fabricor by making misrepresentations to BMS regarding the consequences BMS faced if it continued to supply Fabricor. Additionally, DuPont made it known that it did not want anyone to do business with Fabricor, made false representations on several different occasions over a period of several months concerning Fabricor's financial ability to perform for Marriott, and sought a way to prevent Fabricor from obtaining a supply of Corian from any distributor in the nation. This is sufficient evidence to submit the issue of punitive damages to the jury. DuPont's third point on appeal is denied.”

Fabricor, Inc. v. E.I. Dupont Denemours & Co., 24 S.W.3d 82 (Mo. App.W.D., 2000).

The plaintiff requires discovery of communications used to Under Missouri law this purpose for interference with a contract or business expectancy is a necessary element:

"False statements tending to prejudice or injure a person in the person's business, by suggesting the person is unreliable, insolvent, or the like, are independently actionable and constitute an improper means." *Kerr Const. Paving Co., Inc. v. Khazin*, 961 S.W.2d 75, 80-81 (Mo. App. 1997). Regardless of DuPont's reason for interfering with Fabricor's business relationship with Marriott, when DuPont made false statements with regard to Fabricor's financial ability to perform, it employed improper means in interfering in the relationship. Therefore, it is irrelevant whether DuPont was acting to protect its own legitimate economic interest, because under the law of tortious interference, one is never

justified in using improper means to interfere with another's business relations. *Id.* at 80.

In light of this evidence, this court finds that Fabricor presented substantial evidence on the elements of causation and lack of justification to make a submissible case on its claim of tortious interference. The evidence was sufficient for the jury to find that DuPont caused the breach of the relationship between Fabricor and Marriott. The evidence was also sufficient for the jury to find that DuPont tortiously interfered with Fabricor's business relationship with Marriott by improper means when DuPont made false representations to Marriott. Therefore, DuPont's first and second points are denied."

Fabricor, Inc. v. E.I. Dupont Denemours & Co., 24 S.W.3d 82 (Mo. App.W.D., 2000).

The plaintiff's complaint also alleges that defendants breached the contract for the purposes of restraining trade in the hospital supply market where the defendants through their US Bancorp Piper Jaffray business units had relationships and investments with Neoforma, Inc. and Novation LLC and were part of an agreement to restrain trade in the United States market for hospital supplies. Restraint of trade is a recognized element meeting the motive requirement for interference with a contract or business expectancy:

"DuPont next argues that it was justified in interfering with Fabricor's relationship with Marriott because DuPont was attempting to protect its business relationship with Marriott. DuPont is correct that if a defendant has a legitimate interest, economic or otherwise, in a contract or expectancy sought to be protected, then to demonstrate an absence of justification, the plaintiff must show that the defendant employed improper means in seeking to further only its own interests. *Community Title*, 796 S.W.2d at 372; *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 408 (Mo. App. 1996). For purposes of tortious interference with a business expectancy, "improper means are those that are independently wrongful such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade or any other wrongful act recognized by statute or the common law." *Id.* at 81."

Fabricor, Inc. v. E.I. Dupont Denemours & Co., 24 S.W.3d 82 (Mo. App.W.D., 2000).

If the plaintiff is denied the full and fair opportunity to litigate his claims, he will have to bring additional actions in Missouri state court against the defendants and their agents which are citizens of Missouri. This needlessly consumes the resources of Missouri State court and by the controlling law of this jurisdiction, the outcome obtained in this matter would be set aside:

“Thus the basic issue on appeal is whether the denial of discovery to the defendants was prejudicial and did not enable them to have a fair trial. It is the difference between the relevancy determinations made by the trial court for a limitation of discovery and that applied during the course of trial. Matters or subjects at the time of discovery were ruled not to be then relevant but became relevant at trial and were included in plaintiff's case in chief. This may have been inevitable considering the nature of the several causes of action.

There was an erroneous denial of discovery as the matter ultimately developed. Such a denial is ordinarily prejudicial. *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir.). It is not possible to determine here whether the outcome would have been different had discovery been permitted. There were many statements on diverse subjects testified to at trial as described above which were excluded by the narrow scope of the order limiting discovery. These were significant subjects and concerned many statements attributed to defendants. The diversity and scope of the trial testimony as compared to the subjects as to which discovery was permitted makes it impossible to determine whether the result would have been different had discovery been permitted. We are not faced with but a limited variation or with but one or two subjects but instead a large part of the proof.

It is apparent that the trial court had broad discretion as to the control of discovery, *Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir.), *Voegeli v. Lewis*, 568 F.2d 89 (8th Cir.), and rulings will not be set aside short of an abuse of discretion. *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir.). **We must hold that there was a denial of discovery sought by the defendants that precluded a fair trial and the judgment must be set aside.** [Emphasis added]

Shaklee Corp. v. Gunnell, 748 F.2d 548 (C.A.10 (Utah), 1984).

The plaintiff is at a loss why the defendants are objecting to the extensive witnesses and documents the plaintiff will use to show it could have earned its reasonable damages expectations if the defendants had not prevented the plaintiff from entering the market for hospital supplies. It is clearly required to be turned over to the defendants and it will be used at trial.

Similarly the defendants are arguing the plaintiff cannot include disclosures related to General Electric's breach of the contract the plaintiff sought to cover for US Bank's breach with. Especially since the complaint alleges US bank and US Bancorp participated in obstructing the plaintiff from obtaining redress for his claims against GE. It is clearly required to be turned over to the defendants because it will be used at trial as proof of the defendants' motive.

Defendants:

If plaintiff's Rule 26(a)(1) "disclosure" is a reflection of its discovery intentions, then defendants foresee substantial discovery problems with regard to

both oral and documentary discovery, including the scope of discovery, compliance with the limitations provided under the Federal Rules of Civil Procedure. Unless there is a rational basis and relevancy established, plaintiff's discovery will be overly burdensome and a protective order required.

- d. Disclosure of discovery of electronically stored information (ESI) should be handled as follows:

Plaintiff:

Plaintiff prefers email or a link to an FTP client for transfer of larger files.

Plaintiff observes the defense counsel has not communicated to its defendants who during "September - early October 2002" were in possession of plaintiffs' bank accounts, email communications with US Bancorp Piper Jaffray and their advisory reports on electronic market places in hospital supplies being able to save 20% of hospital supplies nationwide. All of which were created and stored electronically and over which the Hon. Magistrate Waxse heard a telephone conference regarding a previous parties' planning committee teleconference and had previously received the plaintiff's notification of the need for these electronic documents.

Also defense counsel has omitted the US Bancorp intranet and web pages announcing US Bancorp Piper Jaffray's involvement in healthcare start up venture capital funds. Foot note 10 of the plaintiff's amended complaint in the original action gave defense counsel notice of additional ESI documents: US BANCORP NA web site homepage news article regarding falling values of venture funds including those of US BANCORP NA, dated Oct. 15, 2002.

ESI also exists for the following:

The case resulting in a \$250,000.00 fine by the National Association of Securities Dealers for threatening to deny Antigenetics, Inc. a critical service of analyst coverage if it did not select US BANCORP PIPER JAFFRAY as a lead underwriter for a second issuing of Stock.

February 2000, US BANCORP PIPER JAFFRAY Senior Analyst Daren Marhula's study estimating \$83 billion dollars spent annually could be eliminated if supplies were purchased through the internet and that \$23 billion of the total spent on medical supplies is pure process and procurement costs, and about half of this cost could be eliminated by ordering supplies over the Internet.

Furthermore the time period proposed by the defendant is not the full period of defendant conduct addressed by the complaint October 2002 till being filed in 2007. The plaintiff's counsel Dennis Hawver was served paper versions of the defendants' agents billing statements that were created electronically and are

presently stored electronically, even by the defense counsel who made the representation that there is no ESI.

Defendant:

Defendant is unaware of any ESI in its possession, custody or control that in any way relates to the matters alleged in the Complaint, which specifically relates to the time frame of late September - early October 2002.

- e. The parties have not agreed at this time to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows:

Plaintiff:

Plaintiff proposes that privilege documents be handled as specified in the following Kansas court cases (Missouri adopted the Kansas State court case *Cypress Media*'s standard:

"The party asserting a privilege or the work-product doctrine as a bar to discovery has a two-fold burden. First, the party must present the privilege objection "in a timely and proper manner." Id. Second, the party must show the privilege is applicable. *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 656 (10th Cir.1984). In short, "[t]he applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document." *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir.1984), cert. dismissed, 469 U.S. 1199, 105 S.Ct. 983, 83 L.Ed.2d 984 (1985).

The Federal Rules of Civil Procedure spell out the requirements for a timely and proper privilege objection. Rule 34(b) requires the producing party on a request for production of documents to serve a written response within 30 days after service of the request or within a longer or shorter period set by the court or agreed to by the parties. In its response, the producing party must state whether it assents or objects to the request and the reasons for any stated objection. As amended in 1993, Rule 26(b)(5) specifies what a producing party must provide when the objection is based on privilege or the workproduct doctrine:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Rule 26(b)(5) plainly contemplates that the required notice and information is due upon a party withholding the claimed privileged material. Consequently,

reading Rules 26(b)(5) and 34(b) together, the producing party must provide the Rule 26(b)(5) notice and information at the time it was otherwise required to produce the documents under Rule 34.

When a producing party fails to make a timely and proper objection, a court may find that the party has waived any objections to a document request under Rule 34. Marx, 929 F.2d at 12; *Scaturro v. Warren and Sweat Mfg. Co., Inc.*, 160 F.R.D. 44, 46 (M.D.Pa.1995); *McEwen v. Digitran Systems, Inc.*, 155 F.R.D. 678, 681 n. 2 (D.Utah 1994); 4A James W. Moore et al., *Moore's Federal Practice* ¶ 34.05[2] (1995). Even when the untimely objection is based on privilege, the court likewise may find a waiver. See *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir.1981); *United States v. 58.16 Acres of Land, Clinton County, Ill.*, 66 F.R.D. 570, 572 (E.D.Ill.1975); see 8 Charles A. Wright, et al., *Federal Practice and Procedure* § 2016.1 at 230-31 (1994) ("Some courts state that such a log must be delivered within the time limits for filing a discovery response and that failure to list a document works a waiver." (footnote omitted)). The Advisory Committee Notes to the 1993 Amendments

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of Rule 26 reveal that waiver was a contemplated remedy for non-compliance with Rule 26(b)(5):

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection."

First Sav. Bank, F.S.B. v. First Bank System, Inc., 902 F.Supp. 1356 (D. Kan., 1995).

The plaintiff suggests that information sought to be withheld be treated as in *Cypress Media v. City of Overland Park*, 997 P.2d 681 (Kan., 2000) with a privilege log showing a line by line assertion and justification of privilege and the opportunity to challenge through *in camera* hearings.

Defendants:

Defendants propose the use of a "claw back" agreement.

- f. Discovery is needed on the following specific subjects:

Plaintiff: Plaintiff believes discovery is required on the following specific subjects:

1. Communications Related To The Transactions Between The Defendants and Plaintiff

All email, letters, affidavits, memorandums, reports, inquiries sent to the plaintiff by the defendants, their agents and representatives to the plaintiff, his former company, former counsel or witnesses.

All email, letters, affidavits, memorandums, reports, inquiries, account statements, loan documents web site inquiries created or circulated by the defendants, their employees and agents including those of US Bancorp Piper Jaffray related to the plaintiff, his former company or former counsel or witnesses and the names and addresses of the persons creating or receiving the above described documents.

All manuals, policy materials, operating procedures related to escrow account services and business loans.

2. Communications To Conceal Defendants' Liability to Plaintiff

All communications by Andrew Cecere, US Bancorp Chief Financial Officer, Richard K. Davis US Bancorp CEO, Jerry A. Grundhofer former CEO of U.S. Bancorp, Andrew S. Duff, formerly a vice chairman of U.S. Bancorp and formerly president and chief executive officer of the U.S. Bancorp Piper Jaffray unit, and Mark Reed General Counsel with external entities or their principals and agents including Edward D. Jones & Co., Royal Bank of Canada, Berkshire Hathaway Inc., Novation LLC, Bob Zollars, Neoforma, Inc., Volunteer Hospital Association, University Healthcare Consortium, and St. Luke Health System, related to Medical Supply Chain, Inc., the plaintiff, his witnesses, former counsel, or claims.

All communications between US Bancorp. Inc. and its securities public accounting and audit firms including Ernst & Young LLP regarding liability from litigation during the period from June 2002 to March 2008 and related to US Bancorp's compliance under Sarbanes-Oxley Act, Section 404 in the effectiveness of controls in place to report liability from litigation.

Disclosures made to federal and state investigators regarding US Bancorp and its Piper Jaffray subsidiary's roles in manipulating the capitalization of technology start up companies in *Securities and Exchange Commission v. U.S. Bancorp Piper Jaffray Inc.*, 03 CV 2942 (WHP) (S.D.N.Y.)

Records contained on the Corporate Analysis and Planning ("CAP") drive of the U.S. Bank document management system or in any other database related to Chris Walden, Becky Hainje, Becky Hainje of US Bank in Independence, Missouri, Susan Paine, Lars Anderson, Brian Kabbes.

The case resulting in a \$250,000.00 fine by the National Association of Securities Dealers for threatening to deny Antigenetics, Inc. a critical service of analyst coverage if it did not select US BANCORP PIPER JAFFRAY as a lead underwriter for a second issuing of Stock.

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Communications to the Johnson County District Attorney and the Kansas Attorney General concerning the plaintiff and his company, his claims, counsel and witnesses.

3. Communications To Deprive Plaintiff of Recovery For Breach of Contract

All communications to FINCEN, the Securities and Exchange Commission and the Office of the Comptroller of the Currency concerning the plaintiff, his claims, his company, witnesses or former counsel (Discoverability of Suspicious Activity Report not yet determined in this jurisdiction but was disclosed and used in the District of Kansas in *USA v. Wittig et al*, 03-cr-40142-JAR);

All phone calls, voice messages, logs, emails, and letters of ex parte communications by the defendants and their agents to employees of the Kansas State Judicial branch and to employees of the U.S. District Court for the Western District of Missouri, U.S. Court of Appeals for the Eight Circuit, the Kansas District Court and the Tenth Circuit Court of appeals and the contents of any communication oral or otherwise to any of the above by attorneys on behalf of the defendants concerning the plaintiff, his dissolved company, witnesses or former counsel, including communications by

- a. Susan C. Hascall, formerly of Shughart Thompson and Kilroy, P.C. with law clerks and other employees of the U.S. Court of Appeals for the Tenth Circuit from 12/02/2003 to 10/13/2005;
- b. Steven D. Ruse, KS lic. #11461, of Shughart Thomson & Kilroy, P.C. to Hon. Judge Carlos Murguia from October to December of 2002;
- c. Andrew M. DeMarea, KS lic. #16141 of Shughart Thompson & Kilroy to Hon. Magistrate James P. O'Hara from November 2004 to January 2005; to John J. Ambrosio, KS. Lic #07489 of Ambrosio & Ambrosio, Chtd.;
- d. Mark A. Olthoff, KS lic. #70339 to US District Court Magistrate James P. O'Hara from October 2004 to March, 2005; employees and agents of the Kansas Disciplinary Administrator's office and the Johnson County Kansas Discipline Committee including Rex A. Sharp KBA#12350 of Gunderson, Sharp & Walke, L.L.P in October, November and December 2007.

4. Communications To Deprive Plaintiff of the Ability To Cover For The Breach

Actions taken by US Bancorp, US Bank employees and their agents to defeat the plaintiff's ability to cover for the breached contracts with the defendants. Plaintiff asserts that the defendants and their agents work to defeat contracts between the plaintiff and third parties like General Electric out of a motive to restrain trade as alleged in the complaint is relevant and discoverable under *Fabricor, Inc. v. E.I. DuPont Denemours & Co.*, 24 S.W.3d 82 (Mo. App.W.D., 2000).

Documents related to the defendants' representation by and communication with the law firms Dorsey & Whitney LLP, Husch & Eppenger, LLC and Blackwell Sanders LLP, Arnold & Porter, Seyfarth Shaw LLP and Lathrop & Gage LC including correspondence, attachments, agreements, emails and phone communications and logs for all minutes of meetings with officers, employees, representatives, and agents for and any related entities, representatives or agents concerning Medical Supply Chain, Inc., Samuel Lipari, Bret Landrith, Dennis Hawver or any witness identified in the complaint.

5. Defendants' Insurance, Indemnity, Surety, and Subrogation Agreements

The guarantees made to US Bancorp and US Bank NA in February 2003 by The Piper Jaffray Company to compensate the defendants for liability from the plaintiff and from US Bancorp Piper Jaffray's conduct in the capitalization of healthcare technology companies and any modification made after February 2003.

All insurance claims, errors and omissions set offs, write downs or transfers of stock applied for or received from underwriting sureties or investment banking houses over the 2003 forced divestiture of US Bancorp Piper Jaffray from US Bancorp due to the breach of agreements between US Bank and the plaintiff.

All guarantees and notes of indebtedness created by US Bancorp Piper Jaffray/The Piper Jaffray Company or its principals to compensate US Bancorp for the misconduct against the plaintiff that caused the breach of agreements between US Bank and the plaintiff, including the subordinated debt interest in the new Piper Jaffray Company of \$215 million.

The guarantees of Shughart Thompson & Kilroy and or US Bancorp made to or received from Bruce Blefeld and Kathleen Bone Spangler to insure Novation LLC or US Bancorp against liability from the misconduct against the plaintiff that caused the breach of agreements between US Bank and the plaintiff to provide escrow accounts capitalizing Medical Supply Chain, Inc.'s entry into the hospital supply market controlled by Novation LLC.

The negligence insurance policies of Shughart Thompson & Kilroy, P.C. that would reimburse US Bancorp, Inc. and Jerry A. Grundhofer for any judgments

obtained by the plaintiff or by US Bancorp over negligence over the management of attorneys in defending against the plaintiff's claims.

Defendants:

Defendants dispute the relevance or necessity of the plaintiff's proposed discovery topics. The scope of the discovery sought is overly broad and well outside the allegations of his Complaint. For their part, defendants anticipate the subjects of discovery will be all of plaintiff's allegations, damages, experts, defendants' affirmative defenses, and any necessary third-party discovery.

- g. Plaintiff seeks a maximum of 100 interrogatories and defendants seek a maximum of 25 interrogatories, including all discrete subparts, by each party to another party.
- h. Plaintiff seeks a maximum of 20 depositions by each party and defendants seek a maximum of 10 depositions by each party.
- i. Length of depositions:

Plaintiff: 10 hours each, max 5 hours per day unless mutual consent to exceed 5 hours in one day.

Defendants: No more than seven (7) hours of actual transcribed time unless otherwise mutually agreed.

- j. Disclosures required by Fed. R. Civ. P. 26(c)(2):

Plaintiff:

Disclosures required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, shall be served by plaintiff by September 1, 2009, and by defendants by March 1, 2010. Disclosures and reports by any rebuttal experts shall be served by April 20, 2010.

Defendants:

Disclosures required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, shall be served by plaintiff by March 1, 2008, and by defendants by April 15, 2008. Disclosures and reports by any rebuttal experts shall be served by May 1, 2008.

- k. The parties agree that physical or mental examinations pursuant Fed. R. Civ. P. 35 are not appropriate in this case.

- l. Supplementations of disclosures under Fed. R. Civ. P. 26(e) shall be served at such times and under such circumstances as required by that rule. In addition, such supplemental disclosures shall be served 40 days before the deadline for completion of all discovery.
- m. Preliminary witness and exhibit disclosures pursuant to Fed. R. Civ. P. 26(a)(3)(A) and (C):

Plaintiff:

Plaintiff shall provide its lists on or before _____. Defendants shall provide their lists on or before _____.

Defendants:

The parties shall provide their Preliminary Witness and Exhibit lists on or before May 5, 2008.

- n. The parties agree that there is a need for discovery in this case to be governed by a protective order. The parties shall submit a jointly proposed protective order by February 15, 2008. Such jointly proposed protective orders must include, in the first paragraph, a concise but sufficiently specific recitation of the particular facts in this case that would provide the court with an adequate basis upon which to make the required finding of good cause pursuant to Fed. R. Civ. P. 26(c). If the parties disagree concerning the need for, and/or the scope or form of a protective order, the party or parties seeking such an order shall file an appropriate motion and supporting memorandum by a date to be determined at the future scheduling conference (if needed).

6. Deadlines for Amendments and Potentially Dispositive Motions.

Plaintiff:

- a. Plaintiff believes the joinder of additional parties and the amendment of his complaint is likely but requires information normally produced in Rule 26 initial disclosures but understands US Bank and US Bancorp have already objected to the scope of normal Rule 26 discovery. Plaintiff proposes the date be four weeks after documents are received from the defense counsel after resolution of discovery disputes.

Punitive damages amendment is determined at a later date, defendants have provided no material discovery to date, additional parties and conduct revealed in discovery would not be res judicata because plaintiff was denied full opportunity to litigate, plaintiff would be forced to see an injunction, if injunction was denied plaintiff would pursue an interlocutory appeal which under the Tenth Circuit's last interlocutory order between the parties would have the effect of depriving this

court of jurisdiction and ending the relevance of the current case management calendar.

Defendants:

- a. Any motion for leave to join additional parties or to otherwise amend the pleadings shall be filed by February 1, 2008.
- b. Provided that such defenses have been timely preserved, any motions to dismiss for lack of personal jurisdiction, venue, propriety of the parties, or failure to state a claim upon which relief may be granted shall be filed by February 11, 2008.
- c. All other potentially dispositive motions shall be filed by:

Plaintiff: March 1, 2010.

Defendants: July 28, 2008

- d. All motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kuhns Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar law, shall be filed no later than:

Plaintiff: January 20, 2010

Defendants: July 28, 2008

7. Other Items.

- a. Any party asserting comparative fault shall identify all persons or entities whose fault is to be compared by:

Plaintiff:

Plaintiff will permit defendants to add defendants' co-conspirators who can be enjoined to shoulder a portion of the defendants' liability by March 1, 2010.

Defendants: Defendants do not believe the principles of comparative fault will apply to this action.

- b. The defendants do not request a status conference prior to the final pretrial conference. The plaintiff does request a status conference in 2010, prior to the final pretrial conference.
- c. The parties request that the court hold the final pretrial conference at an available date convenient to the Court.
- d. Defendants believe the case should be ready for trial by February, 2009 and believe trial will last approximately one week. Plaintiff believes the case should

be ready for trial after March, 2010 and believes the trial should last approximately four weeks. At the present time, defendants believe trial should last one week.

- e. The parties are not prepared to consent to trial by a magistrate judge at this time.

Plaintiff:

Plaintiff does not consent for the reasons detailed in 3(c) above regarding ADR and because on May 7th, 2007, Mark A. Olthoff KS lic. #70339, Andrew M. DeMarea KS lic. #16141 and Jay E. Heidrick KS lic #20770 falsely misrepresented the law to Magistrate David J. Waxse that the plaintiff's complaint was barred by *res judicata* despite the express dismissal without prejudice identified in the complaint ¶ 32 , that Magistrate Waxse had jurisdiction to stay discovery despite the exclusive federal jurisdiction of the Tenth Circuit identified in ¶ 34 of the complaint and that the plaintiff lacked standing as an assignee to the rights of the dissolved corporation. Mark A. Olthoff KS lic. #70339 and Andrew M. DeMarea KS lic. #16141 had been previously served the clear controlling authority contradicting their misleading assertions in the Western District of Missouri, yet made the misrepresentations again in this court after the case was transferred as part of an intentional scheme to interfere with the machinery of justice. Magistrate David J. Waxse was deceived by the misrepresentation and in an order dated May 24th, 2007 suspended Discovery as an appropriate measure for a case likely to be dismissed.

The plaintiff was injured by Mark A. Olthoff KS lic. #70339, Andrew M. DeMarea KS lic. #16141 and Jay E. Heidrick KS lic #20770 misrepresentations in having his redress continually postponed and thereby being prevented from entering the hospital supply market. This was fraud on the court. *Weese v. Schukman*, 98 F.3d at 553 (C.A.10 (Kan.), 1996). The plaintiff believes the presiding US District Judge is subject to a challenge to the outcome upon review and where in the Tenth Circuit, appeals from clear error in hospital supply cases are themselves sanctioned, the US Judicial Conference has now provided an additional safeguard in favor of justice.

(Plaintiff did not authorise defendants' deletion of the above. This conduct is relevant to both the plaintiff's contract claims and later determination of the need to seek punitive damages. It is also why discovery is broader than defendants acknowledge.)

- f. Other matters: none.

Date: January 7, 2008

s/ Samuel Lipari

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s/ Jay E. Heidrick

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ATTORNEYS FOR DEFENDANTS

**IN THE UNITED STATES COURT
DISTRICT OF KANSAS**

Case No. 2:07-cv-02146-CM-DJW

SAMUEL K. LIPARI,
(Assignee of Dissolved Medical Supply Chain, Inc.)

Plaintiff,

v.

U.S. BANCORP and
U.S. BANK NATIONAL ASSOCIATION,

Defendants.

**RESPONSE TO DEFENDANTS' SECOND
MOTION TO DISMISS**

Prepared by

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Pro se

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<i>Tip-Top Plumbing Co. v. Ordemann</i> , 946 S.W.2d 786 (Mo. App. 1997)	9
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PLAINTIFF'S REPLY TO DEFENDANTS' MOTION TO DISMISS

Comes now the plaintiff Samuel K. Lipari appearing pro se and makes the following response to the defendants' second motion to dismiss the plaintiff's initial and un-amended complaint.

The plaintiff renews his objection to a second motion to dismiss where the Federal Rules of Civil Procedure permit only one. The defendants' current dismissal is a prohibited second Rule 12 motion to dismiss. Palermo, Federal Pretrial Practice: Basic Procedure & Strategy 2001 states at page 21; "Rules 12(g) and 12(h), read together, provide in general, there shall not be more than one Rule 12 motion to dismiss....All defenses and grounds "then available" shall be asserted in the one motion; certain defenses shall be asserted in the Rule 12 motion, or in the initial responsive pleading (or amendment thereof) under threat of waiver."

The plaintiff is also aware of this court's disposition toward him and his claims embodied by the court's January 24th, 2008 decision to over rule the Magistrate Judge's case management schedule and require this answer by February 2, 2008.

An impartial observer could find that the issuance of a minute order changing the schedule without accompanying documentation could prejudice a pro se defendant excluded from the electronic case management system.

The plaintiff has no doubt as to what would have been in store for his claims or his future ability to enter the hospital supply market and compete against US Bancorp's co-conspirator Novation LLC had he not made the deadline.

I. Plaintiff's Complaint states colorable claims and demonstrates a plausible entitlement to relief:

The defendants through their agents the law firm of Shughart Thomson & Kilroy, PC and the firm's State of Missouri licensed attorneys Mark A. Olthoff KS # 70339, Andrew M. Demarea KS #16141, and Jay E. Heidrick KS #20770 have misrepresented to the court the content and words clearly on the face of the plaintiff's complaint and have falsely stated the complaint does not state elements that it clearly does.¹

¹ The court would have been reversed on the most recent appeal for adopting Mark A. Olthoff KS # 70339, and Andrew M. Demarea KS #16141 repeated misrepresentations that the elements of the plaintiff's antitrust and racketeering claims were not pled when in fact they were and appeared where the table of contents stated they were. The defense counsel were unable to support this court's rulings in total. See Applt Br at pages 19-31: <http://www.medicalsupplychain.com/pdf/Novation%20Appeal%20Brief.pdf>
Applee Br at <http://www.medicalsupplychain.com/pdf/Novation%20&%20US%20Bank%20Reply%20Brief.pdf>

The defendants through Mark A. Olthoff KS # 70339, Andrew M. Demarea KS #16141, and Jay E. Heidrick KS #20770 have misrepresented clear and long established Missouri law establishing the form of the writing or memorandum that meets the statute of frauds in Shughart Thomson & Kilroy's own state of Missouri. The defendants through Mark A. Olthoff KS # 70339, Andrew M. Demarea KS #16141, and Jay E. Heidrick KS #20770 have not replied to the Missouri authority of the Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri in *Intern. Casings Group v. Premium Standard Farms*, 358 F.Supp.2d 863 (W.D. Mo., 2005). resolving forming a valid written contract through separate email messages, establishing whether a signature was affixed to the writing under Missouri law and whether the email meets the Missouri statute of frauds.

The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri's ruling on evidence presented in a preliminary injunction hearing and verifies the plausibility of the plaintiff's escrow trust contract claims (and therefore fiduciary relationship claims) and had Shughart Thomson & Kilroy done their required research Mark A. Olthoff KS # 70339, Andrew M. Demarea KS #16141, and Jay E. Heidrick KS #20770 would know these issues have been resolved in the plaintiff's favor under a now controlling case. The August 8, 2006 Missouri State Court of Appeals opinion of Hon. Robert G. Ulrich, Hon. Joseph M. Ellis, and Hon. Ronald R. Holliger in *Crestwood Shops, L.L.C. v. Hilkene*, No. WD 65694 (Mo. App. 8/8/2006) has confirmed the US District court's resolution in *Intern. Casings Group* of the Missouri Statute of Fraud's application to contracts formed or modified through email.

In addition to attempting to deceive the court into overruling 15 USC §7001, the federal Electronic Signatures in Global and National Commerce Act, widely known as "E-SIGN"² an important efficiency creating accomplishment of US Bancorp's own lobbyists with no reference to case law after E-Sign's June 30, 2000 enactment; the defendants misrepresent the clear and long established oral contract exceptions to the Missouri Statute of frauds based on performance and value obtained by the defendants which the

² Section 101(a) of E-SIGN states that "(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

plaintiff consistently pled in factual averments since the original 2002 complaint in case the analysis from the November 28, 2000 writings of Patrick A. Randolph, Jr., Professor of Law, UMKC School of Law in his postings to the LISTSERVE for the Real Estate Brokers Discussion Group on the effect of E-Sign were erroneous. Fortunately for the court and parties, Professor Randolph was right and the email did create an enforceable contract under the Missouri Statute of Frauds enabling this action to be resolved by summary judgment after the completion of the full discovery described in the case management report of parties.

The plaintiff's averments describe independent torts including the interference with the plaintiff's contract to sell a lease to General Electric to mitigate or replace the \$350,000.00 taken from the plaintiff by US Bank. This conduct is as the defendants suggest actionable under the contract claim as a violation of the inherent good faith and fair dealing and the averments support contrary to their denials, claims for breach of fiduciary duty and Prima Facie tort. The plaintiff will discuss these claims and their sufficiency under Missouri law *infra*. The Uniform Commercial Code as adopted by Missouri applies to the plaintiff's contract related claims:

“Legal issues arising under the contract between Medcon and Engel are governed by Missouri law because Missouri was the place the contract was made and the place where it was to be performed. See *Nepera Chemical, Inc. v. Sea-Land Service Inc.*, 794 F.2d 688, 695 (D.C.Cir. 1986). The Uniform Commercial Code is in force in Missouri and controls this case. Under UCC section 2-610, Medcon's letter to Engel of August 8, 1990 constituted an anticipatory breach. See Mo.Rev.Stat. § 400.2-610.”

Engel Industries v. First American Bank, 798 F.Supp. 9 at 12 (D.C., 1992).

This court is not able to grant the defendants' dismissal. The plaintiff brought his claims under state law in a Missouri court. It is clear that "[i]n the absence of a state supreme court ruling, a federal court must follow an intermediate state court decision unless other authority convinces the federal court that the state supreme court would decide otherwise." *Delano v. Kitch*, 663 F.2d 990, 996 (10th Cir.1981) (citing *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940)), cert. denied, 456 U.S. 946, 102 S.Ct. 2012, 72 L.Ed.2d 468 (1982); *Hicks ex rel. Feiock v. Feiock*, --- U.S. ----, 108 S.Ct. 1423, 1428 & n. 3, 99 L.Ed.2d 721 (1988).

This court cannot change Missouri state controlling authority: “As a federal court sitting in diversity, we do not have the power to alter Missouri law.” *Vess Beverages, Inc. v. Paddington Corp.*, 941 F.2d 651 at 655 (C.A.8 (Mo.), 1991).

a. Damages for Breach of Contract

As the defendants Memorandum for Dismissal clearly states at pgs. 3-4 , the plaintiff averred a written contract existed. The defendants excerpt ¶ 201 of the plaintiff's complaint quoting the plaintiff describing the written contract memorandum.

At page 4 of the Memorandum for Dismissal, the defendants quote a phone conversation taking place before the breach occurred from a transcript referenced by the complaint where the plaintiff's former attorney describes an oral agreement and the enforceability of oral contracts. The defendants state the telephone transcript is an "eight-page quote of a *supposed* telephone conversation between himself, then MSCI attorney Bret Landrith, and defendants' employees Lars Anderson, Brian Kabbes and Susan Anderson" (emphasis added). The defendants try to say Landrith's informal discussion of oral contract liability before the breach somehow changes the complaint which describes and avers breaches of both oral and written contracts. To relieve the doubt raised by the defendants pleading in the press but not to resolve a pleading sufficiency issue, the plaintiff has posted the recorded conversation online:

<http://www.medicalsupplychain.com/pdf/USB%20Lars%20Anderson%20Bryan%20Kabbes%20Conversion.wav>

The patently false misrepresentation of the plaintiff's complaint by the defendants through their agents the law firm of Shughart Thomson & Kilroy, PC and the firm's State of Missouri licensed attorneys Mark A. Olthoff KS # 70339, Andrew M. Demarea KS #16141, and Jay E. Heidrick KS #20770 that there is no averment of a contract writing is at the second to the last paragraph on page 4 of trial doc. 44 filed by Shughart Thomson & Kilroy on 12/19/2007 where Olthoff, Demarea, and Heidrick state:

"Taking these allegations as true, Lipari admits there was no executed written contract between the parties. Therefore, plaintiff's factual allegations do not show a plausible chance of recovery for breach of a written contract."

As will be shown below, the defendants have misrepresented fact and law. The complaint repeatedly describes several writings and the signing by US Bank. The plaintiff has researched the applicable law while the defendants have avoided it or deliberately misrepresented the law despite their duty to the forum and to the plaintiff in a fiduciary escrow trust relationship. The recent Missouri case law on the creation of an email contract proves the plaintiff's claims are plausible.

1. Defendants Have Misrepresented the Applicable Contract Pleading Standard

The plaintiff brings attention to the court that the correct pleading standard for a federal court sitting in diversity was served upon the court and the defense counsel in the plaintiff's 09/11/2007 answer (Doc. 37) to the defendants' earlier motion to dismiss (Doc.# 22).

"Under standard Erie doctrine, state pleading requirements, so far as they are concerned with the degree of detail to be alleged, are irrelevant in federal court even as to claims arising under state law." *Andresen v. Diorio*, 349 F.3d 8, 17 (1st Cir.2003); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (rule 8's simplified pleading standard applies to all civil actions)." [Emphasis added]

The Bradbury Co., Inc. v. Teissier-Ducros, 387 F.Supp.2d 1167 at 1172-73 (D. Kan., 2005). See also *Litton v. Maverick Paper Co.*, 354 F.Supp.2d 1209 at 1217 (D. Kan., 2005) (Rule 8(a), Fed.R.Civ.P. statement sufficient to give notice of claim.)

"The elements for a breach of contract claim are: (1) the existence of a contract between the parties; (2) consideration; (3) the plaintiffs performance or willingness to perform in compliance with the contract; (4) defendant's breach of the contract; and (5) that plaintiff was damaged by the breach." [Emphasis added]

Britvic Soft Drinks, Ltd. v. ACSIS Techs., Inc., 265 F.Supp.2d 1179, 1187 (D.Kan.2003). See also *Ice Corp. v. Hamilton Sundstrand Inc.*, 444 F.Supp.2d 1165 (D. Kan., 2006)." [Emphasis added]

Neither the court in its order nor the defendants gave notice that the standard Hon. Judge Carlos Murguia stated for pleading breach of contract in *Muller v. American Management Ass'n Intern.*, 315 F.Supp.2d 1136 at 1140 (D. Kan., 2003), or Hon. Judge Wesley E. Brown adopted in *The Bradbury Co., Inc. v. Teissier-Ducros*, 387 F.Supp.2d 1167 at 1171 (D. Kan., 2005); or Hon. Judge Julie Robinson adopted in *Ice Corp. v. Hamilton Sundstrand Inc.*, 444 F.Supp.2d 1165 (D. Kan., 2006) had changed or been overruled.

The defendants have not provided any argument or basis for deviating from the Tenth Circuit Law of the Case Rule where the previous dismissal where the sufficiency of the complaint under Rule 12(b)(6) was decided with plaintiff's citation to *Britvic Soft Drinks*:

"The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir.1991) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983))."

The Bradbury Co., 387 F.Supp.2d 1167 at 1170.

As stated in the rule of *The Bradbury Co.* 387 F.Supp.2d 1172-73 *supra*, under the *Erie* doctrine, the Missouri state law pleading requirement advocated by the defendants in *Scher v. Sindel*, 837 S.W.2d

350, 354 (Mo. App. E.D. 1992) and *E.A.U., Inc. v. R. Webbe Corp.*, 794 S.W.2d 679, 685 (Mo. App. E.D. 1990) is irrelevant. As are the added elements from *Yoeast v. Farm Credit Bank of St. Louis*, 832 S.W.2d 325 (Mo. App. W.D. 1992) recited by the defendants at page 6 of their motion for dismissal. (The plaintiff's complaint repeatedly describes exchanges of promises and performances giving value meeting the consideration element defendants cite from *Allison v. Agribank*, FCB, 949 S.W.2d 182, 188 (Mo. App. S.D. 1997) that is shared by *Britvic Soft Drinks*.

The defendants cite to *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (applying "plausibility" standard to claims in tort and violation of civil rights). Current US Circuit Courts of Appeals weighing the impact on contract pleading requirements after *Twombly* 127 S.Ct. 1555, 167 L.Ed.2d 929 have found that Rule 8 standards in regard to pleading breach of contract have not changed. See *Lindsay v. Yates*, 498 F.3d 434 (6th Cir., 2007), *Airborne Beepers v. At & T Mobility LLC*, 499 F.3d 663 at 667 (7th Cir., 2007). The Tenth Circuit case *Ton Services, Inc. v. Qwest Corp.*, 493 F.3d 1225 (10th Cir., 2007) *infra* also states there is no difference under the new plausibility rule and *Conley v. Gibson* 355 U.S. 41 (1957) in the way one business' claims against another were evaluated at the pleading stage in a non antitrust conspiracy case. The Tenth Circuit has not overruled Hon. Judge Carlos Murguia's breach of contract pleading standard in *Muller*.

2. Britvic Soft Drinks Elements In The Plaintiff's Complaint

"Defendants' Offer of US BANCORP Escrow Services" on page 19 followed by ¶¶ 83,84,85, 86, 87, 88 describing who what where and when the US Bank officials made the offer.

"Meeting of the Minds With US BANCORP" on page 20 followed by ¶¶ 89,90, 91 describing MSCi's acceptance of the offer, concurrence on material terms, the mutual exchange of beneficial promises and reaching an agreement for US Bank Trust department to provide escrow accounts and the attendant escrow agent services. ***Britvic (1) the existence of a contract between the parties.***

"Performance of Escrow Contract" on page 21 followed by ¶¶ 92, 93 and 94 describing performance by the plaintiff as the parties agreed in altering the escrow agreement (a written memorandum) to conform to the preferences of US Bank as expressed by the Vice President of the St. Louis Trust Department, Brian Kabbes. ***Britvic (2) consideration***

“**Oral Confirmation of Escrow Contract**” on page 21 followed by ¶95 describing Becky Hainje a US Bank witness to Brian Kabbes’ mind on whether an agreement was reached to provide escrow accounts and ¶ 96 the creation of another written contract connected with the escrow agreement, a line of credit. ***Britvic (1) the existence of a contract between the parties***

“**Defendants’ Receipt of Value for Escrow Contract**” on page 21 followed by ¶¶ 97, 98 describes performance by the plaintiff at the request of Brian Kabbes to give US Bank the benefit of ordering the funds to be deposited in a third party treasury fund owned by US Bank. This is both a performance and receipt of value by the defendants, two different independent grounds that the defendants’ agent Shughart Thomson & Kilroy, PC and the firm’s State of Missouri licensed attorneys Mark A. Olthoff KS # 70339, Andrew M. Demarea KS #16141, and Jay E. Heidrick KS #20770 know takes the agreement out of the Missouri Statute of Frauds. ***Britvic (2) consideration, (3) the plaintiffs performance or willingness to perform in compliance with the contract***

“**Written Memorialization of Escrow Service Agreement**” on page 21 followed by ¶¶ 99, 100, 101 and 102 describing the completion of a written memorandum as contemplated by both parties and acknowledged by parties. ***Britvic (1) the existence of a contract between the parties, (3) the plaintiffs performance or willingness to perform in compliance with the contract.***

“**Defendants’ Breach Injures Medical Supply**” on page 21 followed by ¶¶ 199 and 200 describes the good financial condition MSCI was in before the breach, ¶¶ 201-207 describes the extraordinary lengths the plaintiff went through to prevent and to mitigate the future injury of breach, ¶¶ 208-219 describe the plaintiff’s third attempt to cover for the breach and mitigate the damages owed by US Bank. ¶¶ describes US Bank acting to defeat the plaintiff’s mitigation through tortious interference and where US Bank had no interest in the contract between the plaintiff and General Electric. (¶206 describes an earlier attempt to mitigate by seeking another escrow agent which US Bank also prevented both by using the threat of a USA PATRIOT Act and not allowing the accounts of another agent to be hosted by US Bank). ***Britvic (4) defendant's breach of the contract, Britvic (5) that plaintiff was damaged by the breach.***

“**Count I Cause Of Action For Breach Of Contract**” ¶ 196 states the published US Bank Five Star Guarantee warranty of US Bank’s trust account product and full banking services had not been

modified by any other parole writing, ¶197 states formally the warranty on escrow account products being sued over is written: “This contract was executed in writing by the Defendants and MSCI when their respective agents opened the Medical Supply Chain Corporate checking account. The allegation that the escrow account agreement itself is a written memorandum of the contract to provide escrow accounts is stated at ¶201:

“201. The Defendant’s Vice President Brian Kabbes and Samuel Lipari came into formation of a written contract for escrow account services when both had agreed upon some or all of the terms in exchanges of email including: the composition of the escrow form, the language limiting the liability of US BANK and the escrow agent, the language designating US BANK’s compensation for its duties in any legal disputes arising between the parties, the directions for US BANK’s investment of long term held funds, the directions for US BANK’s investment of short term held funds, the selection of investment vehicles for both funds respectively, the name and address of BRIAN KABBES as escrow agent on the escrow form, the name and address of US BANK as escrow depository on the escrow form, the price term US BANK is charging for the agreed upon escrow service and the price term and payment schedule for maintaining the account.”

Plaintiff’s complaint at ¶201. ***Britvic (1) the existence of a contract between the parties. Britvic (4) defendant's breach of the contract.***

In Missouri, it is a fundamental precept of contract law that "nominal damages are available where a contract and its breach are established." *Dierkes v. Blue Cross and Blue Shield*, 991 S.W.2d 662, 669 (Mo.banc 1999). Stated otherwise, proof of the existence of a contract and its breach make a submissible case on damages, no matter whether actual damages have been proven. *Wasson v. Schubert*, 964 S.W.2d 520, 526 (Mo.App. 1998); *Kozeny-Wagner, Inc. v. Shark*, 709 S.W.2d 149, 152[4] (Mo.App. 1986). This satisfies ***Britvic (5) that plaintiff was damaged by the breach.***

‘When a plaintiff sues for damages arising directly out of a breach of contract, he or she need not prove past profits or expenses. *Id.* Thus, "where the breach alleged consists of prevention of performance, the party not in default may generally recover the profits which would have resulted to him from performance." *Id.* at 819. Moreover, where "loss is ascertainable with reasonable certainty from the breach and the profits claimed are not speculative or conjectural and were within the contemplation of the parties when the contract was made" any plaintiff — even a new business — may seek lost profits arising from a breach of contract. *Id.* (internal citations omitted).’ [Emphasis added]

Bmk Corp. v. Clayton Corp., 226 S.W.3d 179 at pg. 195 (Mo. App., 2007)

3. The Defendants Misrepresentation of Missouri Statute of Frauds Oral Exceptions

Even if the court like in the previous litigation between the parties adopts the defendants’ falsehood about something missing from the complaint, like that the complaint does not allege a written

contract when it alleges several signed writings that meet the writing requirement under Missouri law, the plaintiff still prevails against dismissal.

The defendants have frivolously or without diligent research raised the Statute of Frauds as a defense. However the complaint alleges and no one has disputed that the plaintiff performed under the contract as required until US Bancorp's repudiation. This averment put the defense counsel on notice that the contract was out of the Statute of Frauds:

"It is axiomatic that a party may become bound through its performance to a contract that it has not signed ... It is a fundamental contract law that the parties may become bound by the terms of a contract even though they did not sign the contract, where they have otherwise indicated their acceptance of the contract, or led the other party to so believe that they have accepted the contract.... It is established that a signature is not always necessary to create a binding agreement.... It is likewise established that the purpose of a signature is to demonstrate 'mutuality of assent' which could as well be shown through the conduct of the parties.... That [a party] failed to sign the agreement is immaterial for any written contract though signed only by one of the parties binds the other if he accepts it and both act in reliance on it as a valid contract If a person has accepted a written agreement and has acted upon it he is bound by it, although he may not have set his hand to the document.

Commercial Union Assocs. v. Clayton, 863 P.2d 29, 34 (Utah Ct.App.1993) (quoting various sources) (internal citations and quotations omitted); *Estate Landscape and Snow Removal Specialists, Inc., v. Mountain States Tel. and Tel. Co.*, 844 P.2d 322, 330 (Utah 1992) ("[A] party's conduct may be conclusive proof of acceptance ...")."

Becker v. Hsa/Wexford Bancgroup, L.L.C., 157 F.Supp.2d 1243 at 1248-1249 (D. Utah, 2001).

As Missouri attorneys the defense counsel is responsible for knowing that their motion to dismiss misrepresents established state case law. It is sufficient to plead full performance of an oral contract to avoid a motion to dismiss under the Missouri Statute of Frauds. *Irwin v. Berrelsmeyer*, 730 S.W.2d 302 (Mo.App. E.D.).

The defendants' Missouri attorneys are well aware the Statute of Frauds fails for other clearly established reasons. Namely the complaint states in detail how the defendants sought and obtained a change in the terms of the contract to utilize a treasury fund the defendants owned but concealed without disclosing the ownership as required to trust customers, creating a self-interest that voided the Statute of Frauds. However, as will be shown *infra*, the defendants formed written contracts with the plaintiff that are part of the escrow agreement and also under clearly established Missouri law meet the Statute of Frauds requirements.

The requirement of utilizing US Bancorp's captive US treasury fund imposed by US Bancorp as described in the complaint takes the contract out of the statute of frauds. Where the leading and main object

of defendant's promise to plaintiffs that he would see that they were paid was in his own interest, the promise was not within the statute of frauds. *Carvitto v. Ryle* (A.), 495 S.W.2d 109. See also *Tip-Top Plumbing Co. v. Ordemann*, 946 S.W.2d 786 (Mo. App. 1997), and *Owens v. Goldammer*, 2002 MO 629 at ¶37 (MOCA, 2002).

Part performance and the obtaining of benefits by the party seeking to raise the statute of frauds are also both clearly established in the Tenth Circuit as removing an issue from the statute of frauds:

“However, we find and we hold that there was sufficient part performance to take the oral agreement out of the statute and we find and we hold that defendants are estopped from setting up the statute as a bar. 49 Am.Jur. Statute of Frauds, § 581, p. 888; *Holton v. Reed* (1952) 10 Cir., 193 F.2d 390; *Pasotex Petroleum Co. v. Cameron* (1960) 10 Cir., 283 F.2d 63 and *Oxley v. Ralston Purina Company* (1965) 6 Cir., 349 F.2d 328. Moreover, defendants permitted plaintiff to put up the operating capital [albeit it was ultimately paid back with interest] and the management knowhow which put United Packers on its feet, and this management knowhow was part of the sale to Hughes. That being true, as was said in *Pasotex*, supra, in discussing the applicability of a statute of frauds, "The retention and enjoyment of the benefits of the bargain validated the alleged unauthorized part of the transaction."

Ellis Canning Company v. Bernstein, 348 F.Supp. 1212 at 1229 (D. Colo., 1972).

4. Evidence of Contract

The plaintiff has copies of the email, memorandums, loan application, letter of credit agreement, bank receipts, Five Star Guarantee, Non Disclosure notice, tape recordings as described by the complaint.

The plaintiff served notice on May 6, 2003 during *Medical Supply Chain v. US Bancorp N A, et al* 02-cv-02539-CM of his expectations that recent federal decisions on electronic discovery be observed and that the defendants maintain all electronically stored data relative to the plaintiffs contract, tortious interference, fiduciary duty and antitrust related claims and submitted a proposed electronic discovery plan. See Exb. 1

The plaintiff through his counsel Bret D. Landrith in a F.R. Civ. P. Rule 16 case management conference the week of May 2, 2003 with Steven D. Ruse, KS lic. #11461 and Mark A. Olthoff, KS lic. #70339 of Shughart Thomson & Kilroy, PC and reminded them again of the plaintiff's proposed electronic discovery plan. A tape of that conference was made by the plaintiff and can be heard online at [http://www.medicalsupplychain.com/pdf/Suggart%20Thompson%20Kilroy%20Steven%20Ruse%20Mark%20Olthoff%20Conversion .wav](http://www.medicalsupplychain.com/pdf/Suggart%20Thompson%20Kilroy%20Steven%20Ruse%20Mark%20Olthoff%20Conversion.wav)

The escrow services contract was formed between the parties with the following email which has Brian J. Kabbes a Vice President of US Bank's Trust Department in St. Louis Missouri accepting the

escrow agreement or memorandum after the inclusion of a term requiring the funds to be invested in a treasury fund owned by US Bank and causing his name “Brian J. Kabbes” to be affixed to the memorandum as required under 2 E. Farnsworth, Farnsworth on Contracts § 6.8, at 144 (1990); Restatement (Second) of Contracts § 134 (1981); *Dinuba Farmers' Union Packing Co. v. J.M. Anderson Grocer Co.*, 193 Mo.App. 236, 182 S.W. 1036 (1916); *Kamada v. RX Group Ltd.*, 639 S.W.2d 146, 148 (Mo.App.1982); *Vess Beverages, Inc. v. Paddington Corp.*, 941 F.2d 651 at 654 (C.A.8 (Mo.), 1991) *Venable v. Hickerson, Phelps, Kirtley & Associates, Inc.*, 903 S.W.2d 659 at 662 (Mo. App.W.D., 1995); *Intern. Casings Group v. Premium Standard Farms*, 358 F.Supp.2d 863 (W.D. Mo., 2005) discussed *infra*:

5. Effect of Anticipatory Breach

The defendants repudiated the contract with the plaintiff. The complaint describes Brian Kabbes, a US Bank Vice President stating that the escrow contracts would not be performed after they were sent to the key candidates selected by the plaintiff. “An anticipatory repudiation can be made orally. See *Upland Ind. Corp. v. Pacific Gamble Robinson Co.*, 684 P.2d 638, 643 (Utah 1984) (anticipatory breach “is the outcome of words or acts evincing an intention to refuse performance in the future”); accord RESTATEMENT § 250 (indicating that anticipatory repudiation is typically made by way of a “statement”).” *Becker v. Hsa/Wexford Bancgroup, L.L.C.*, 157 F.Supp.2d 1243 at 1252-1253 (D. Utah, 2001).

The defendants argue that the complaint should be dismissed because the claims are not to be treated as true under the defendants’ flawed or mistaken understanding of plausibility. See the New Plausibility rule *infra*. As demonstration of the plaintiff’s untruthfulness the defendants’ agents Mark A. Olthoff KS # 70339, Andrew M. Demarea KS #16141, and Jay E. Heidrick KS #20770 dishonestly state on page 5-6 of trial doc. 44 filed by Shughart Thomson & Kilroy on 12/19/2007::

“Had there been a meeting of the minds between the parties, a written contract memorializing all of these terms would exist. Although plaintiff alleges that he proposed to Mr. Kabbes a written escrow contract (Complaint, ¶ 87), nowhere does he allege that defendants signed this—or any other—agreement. Nor is a signed written agreement attached to the Complaint. Lipari even admits there is no written agreement between the parties. *Supra*, p. 4.”

Defendants’ memorandum at page 5-6. As shown *supra* the plaintiff’s complaint alleges at ¶¶ 99, 100, 101 and 102 describing the completion of a written memorandum as contemplated by both parties and acknowledged by parties and is stated again formally in ¶201 of the plaintiff charge of breach of contract.

The defendants' deception upon the court includes the aspersion for not attaching evidence to the complaint. The plaintiff's matter was originally filed in Kansas District Court in 2002. KS. District Local Rule 5.1 prevents evidentiary exhibits from being filed with a petition. This petition was transferred to this court over the plaintiff's objection from being filed in Missouri State Court. There, evidentiary exhibits are not part of the petition for dismissal purposes and therefore not included:

"Whatever may be the doctrine elsewhere, in this state a demurrer strikes squarely at the face of the petition, and nowhere else. Mere exhibits, under our practice, constitute no part of the petition for the purposes of a demurrer. This has been held early and late. 6 Ency. of Pl. & Pr. pp. 298, 299; *Hadwin v. Home Mut. Ins. Co.*, 13 Mo. 473; *Curry v. Lackey*, 35 Mo. 389; *Hoyt v. Oliver*, 59 Mo. 188; *Hickory County v. Fugate*, 143 Mo. 71, 44 S. W. 789; *State ex rel. v. Crumb*, 157 Mo., loc. cit. 561, 57 S. W. 1030; *Pomeroy v. Fullerton*, 113 Mo., loc. cit. 453, 21 S. W. 19."

Hubbard v. Slavens, 218 Mo. 598, 117 S.W. 1104 (Mo., 1909). The plaintiff cautions the court and the defendants that electronic documents are not the paper print out or representation, discovery and production of the actual electronic record in its original format is required to make a meaningful evaluation (Plaintiff entitled to document's original electronic format with accompanying metadata) *Williams, et al v. Sprint*, Case No. 03-2200-JWL-DJW , 230 F.R.D. 640; 2005 U.S. Dist. LEXIS 21966; 62 Fed. R. Serv. 3d (Callaghan)1052; 96 *Fair Empl. Prac. Cas.* (BNA) 1775 (KS Dist. 2005). As the defense counsel's repeated misrepresentations to the tribunal clearly demonstrate, the plaintiff was better served by saving the electronic documents for formal discovery where depositions and affidavits of records custodians can assemble a detailed record for review.

The defendants use a quote from the tape recorded transcript (again before the breach occurred) of the plaintiff stating ""OK, well then let me ask you this Brian, why won't you just set the escrow up?" (emphasis added))." See defendants' memorandum at pg. 6 as proof the complaint fails under the plausibility factor. When in contract law as Mark A. Olthoff KS # 70339, Andrew M. Demarea KS #16141, and Jay E. Heidrick KS #20770 surely know willingness to perform by the party suing for breach is an element required to be pled and determines the claim is plausible. ***Britvic (3) the plaintiff's performance or willingness to perform in compliance with the contract.***

6. The New Plausibility Factor

The Plausibility factor as stated in *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) is : "We look for plausibility in th[e] complaint." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1970, 167 L.Ed.2d 929 (2007).2"

At footnote 2 the Tenth Circuit panel stated:

“Although the Supreme Court was not clear on the articulation of the proper standard for a Rule 12(b)(6) dismissal, its opinion in *Bell Atlantic* and its subsequent opinion *Erickson v. Pardus*, ___ U.S. ___, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007), suggest that courts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief. See *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir.2007) (considering *Bell Atlantic* and *Erickson* and concluding that a “plausibility” standard was what the Supreme Court intended).

Although we now restate our Rule 12(b)(6) standard in order to bring it into compliance with *Bell Atlantic*, we emphasize that in this case our decision would be the same regardless of whether we used the old “no set of facts” standard, see, e.g., *David*, 101 F.3d at 1352, or adopt either a plausibility standard or a requirement that the complaint include factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atlantic Corp.*, 127 S.Ct. at 1965.”

Alvarado v. Kob-Tv, L.L.C., 493 F.3d 1210 at fn 2 (10th Cir., 2007). The careful consideration of

Plausibility is described in *Iqbal v. Hasty*, 490 F.3d 143 at pg. 157-158 (2d Cir.2007) where the court states:

“Court’s opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible “plausibility standard,” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.”

Id.

In *Netquote, Inc. v. Byrd*, 504 F.Supp.2d 1126 (D. Colo., 2007) it appears one of the plaintiff’s claims was implausible because the tort of unfair competition in Colorado has not been expanded to provide a cause of action for any alleged improper conduct by a competitor that deceives a plaintiff or its clients. Instead, it reaches only conduct that involves either using or copying a plaintiff’s products or services and deceiving or confusing the public as to the source of the business in question.” *Id* at 1133.

The August 28 *Anderson v. Suiters*, 499 F.3d 1228 case fleshes out the standard a little more:

“We may uphold the grant of a motion to dismiss if, viewing the well-pleaded factual allegations in the complaint as true and in the light most favorable to the non-moving party, the complaint does not contain enough facts to state a claim to relief that is plausible on its face.” *Macarthur v. San Juan County*, 497 F.3d 1057, 2007 WL 2045456, at *5m 2007 U.S.App. LEXIS 17008, at *16 (10th Cir.2007) (quoting *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1968-69, 167 L.Ed.2d 929 (2007)). As we have explained this new standard for reviewing a motion to dismiss, “the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.” *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir.2007).”

Anderson v. Suiters, 499 F.3d 1228 (10th Cir., 2007).

Ton Services, Inc. v. Qwest Corp., 493 F.3d 1225 (10th Cir., 2007) states the new plausibility rule and also states “Under either standard, all well-pleaded factual allegations are accepted as true and

construed in the light most favorable to the plaintiff. *Alvarado*, 2007 WL 2019752 at *3.” The Ton services court reversed the trial court’s dismissal because the claim stated enough facts to show a cause of action existed:

“In this case, TON alleges and provides a factual basis for its allegations that (1) Qwest failed to timely file tariffs and supporting cost data with state regulators, (2) such failures precluded regulators from determining Qwest's NST compliance, and (3) under the Waiver/Refund Order, TON was entitled to refunds once NST-compliant rates were filed. Because “[c]arriers must comply with the comprehensive scheme provided by the statute and regulations promulgated under it[,]” the failure to comply “may justify departure from the filed rate.” *ICC v. Transcon Lines*, 513 U.S. 138, 147, 115 S.Ct. 689, 130 L.Ed.2d 562 (1995). At this stage of the litigation, where the procedural posture of the case requires all allegations in the complaint to be construed in TON's favor and this court's reading of TON's complaint demonstrates that TON's central challenge involves Qwest's procedural compliance with FCC orders and regulations rather than a challenge to the reasonableness of Qwest's rates, the filed rate doctrine cannot categorically preclude TON's claims. Accord *Davel Commc'ns*, 460 F.3d at 1085. The district court's conclusion to the contrary, and its reliance on *AT & T v. Central Office Telephone*, an inapposite case involving state law contract and tort claims, was erroneous.

Moreover, TON's complaint alleges the Waiver/Refund Order put Qwest on notice that it might owe PSPs a refund on its previously filed rates and asserts that Qwest was part of the coalition which initially proposed the refund.¹⁶ See Waiver/Refund Order, 12 F.C.C.R. at 21375-76 ¶¶ 13-14 (discussing April 10 RBOC Coalition letter to the FCC requesting a waiver); *id.* at 21379-80 ¶¶ 19-20 (specifying that an LECs' reliance on the waiver required it to provide refunds for the difference between its NST-compliant rates and its prior rates).”

Ton Services, Inc. v. Qwest Corp., 493 F.3d 1225 at (10th Cir., 2007) but the plaintiff still had far more to establish:

“Until it is determined (1) whether Qwest's procedural noncompliance with the NST gives rise to a violation of 47 U.S.C. §§ 201(b), 276(a), or 416(c), and (2) whether Qwest's tariffed rates complied substantively with the NST, it is impossible to determine whether the filed rate doctrine bars TON's claims. Only if both of these issues are resolved against TON would the filed rate doctrine likely preclude TON's ability to proceed in federal court.”

Id. At fn. 15

The fatal flaw of the defendants’ attempts to use the new plausibility standard is that they have misunderstood the meaning. The plaintiff’s email formation of a written contract has been born out in evidentiary and summary judgment level proceedings on the same material facts as will be shown *infra*. The defendants do not analyze or refer to these cases which treat the plaintiff’s fact pattern seriously and resolve the issues against the defendants. Instead the defendants repeatedly assert the untruthfulness of the plaintiff as the basis the court should dismiss the complaint (surprisingly while they themselves misrepresent the complaint on its facial content).

The other Tenth circuit decision actually referencing plausibility and applying the new standard cautions trial courts not to use plausibility in the dismissal or even summary judgment to evaluate truthfulness credibility of witnesses or the plaintiff:

“Second, the court's assessment of the sincerity of Kay's beliefs was premature at this stage of the claim. "The inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment, . . . and therefore the issue of sincerity can rarely be determined on summary judgment," let alone a motion to dismiss. *Snyder*, 124 F.3d at 1352-53 (internal quotation omitted).

Reviewing his complaint, and taking the factual allegations as true, enough factual support exists to rationally and plausibly conclude that Kay is a sincere devotee of the Wiccan faith. Kay persistently asked prison administrators for permission to possess tarot cards in order to practice his religion. On two occasions, he surreptitiously brought tarot cards into the BCCF and was disciplined for it. Kay Compl., R., Doc. 3, at 7. If any thing, these facts evince some conviction on Kay's part to practice his faith with the use of tarot cards.”

Kay v. Bemis, 500 F.3d 1214 at 1219-1220 (10th Cir., 2007). The court in *Kay* is consistent with the basis for the US Supreme Court's ruling reemphasizing the viability of Rule 8 and the need to accept as truthful the plaintiff's complaint at this stage in the litigation:

“Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U. S. ___, ___ (2007) (slip op., at 7-8) (quoting *Conley v. Gibson*, 355 U. S. 41, 47 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, supra, at ___ (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002); *Neitzke v. Williams*, 490 U. S. 319, 327 (1989); *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974)).

Erickson v. Pardus, No. 06-7317 (U.S. 6/4/2007) (2007).

7. E-Mail Contracts Under Missouri Statute of Frauds

The plaintiff asserted the legal basis under the E-Sign electronic signatures act as it applies to contracts formed via email or subject to the Missouri Statute of Frauds for seeking a preliminary injunction in 2002 against the defendants and a declaratory judgment in advance of the breach and injury based on the November 28, 2000 writings of Patrick A. Randolph, Jr., Professor of Law, UMKC School of Law in his postings to the LISTSERVE for the Real Estate Brokers Discussion Group and cited in 2002 and 2003 by the plaintiff.

The plaintiff believes the issues of whether a Missouri contract was formed via email and whether it meets the requirements of Missouri's Statute of Frauds has been dispositively resolved by The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri in *Intern. Casings*

Group v. Premium Standard Farms, 358 F.Supp.2d 863 (W.D. Mo., 2005). To aid the parties in settling this matter and since the Hon. Carlos Murguia produced no written memorandum or findings of fact in either of the plaintiff's 2002 hearings seeking preliminary injunction:

"11/18/2002 4 MINUTE SHEET of motion for TRO hearing before Judge Carlos Murguia denying plaintiff's motion for preliminary injunctive relief. [2-1] Court Reporter: Nancy Wiss(MG) (Entered: 11/19/2002)

12/12/2002 11 MINUTE SHEET of hearing before Judge Carlos Murguia: Prel inj hearing held; the court denies motion for urgent preliminary injunctive relief from USA Patriot Act by plaintiff [6-1]; denying motion for urgent preliminary injunctive relief from trade secret misappropriation by plaintiff [7-1] and the court denies motion to strike Motion for Urgent Preliminary Injunctive Relief from Trade Secret Misappropriation and Motion for Urgent Preliminary Injunctive Relief Against USA Patriot Act Reporting [8-1]. (CK) (Entered: 12/18/2002)"

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The plaintiff is incorporating the relevant analysis from Hon. Nanette Laughrey's opinion at length on Statute of Frauds, the existence of a written contract, and signature as it applies to email under Missouri law in identical material facts *Intern. Casings Group v. Premium Standard Farms*, 358 F.Supp.2d 863 at 871-875 (W.D. Mo., 2005). See **Exb 2**

The August 8, 2006 Missouri State Court of Appeals opinion of Hon. Robert G. Ulrich, Hon. Joseph M. Ellis, and Hon. Ronald R. Holliger in *Crestwood Shops, L.L.C. v. Hilken*, No. WD 65694 (Mo. App. 8/8/2006) has confirmed the US District court's resolution in *Intern. Casings Group* of Missouri Statute of Fraud's application to contracts formed or modified through email. The plaintiff also incorporates relevant analysis at length for the benefit of the parties. See **Exb 3**

b. Plaintiff's description and averment of a signed written escrow account contract meets the Missouri Standard of Frauds which also never applied to deposit accounts and his averments of an alternative pleading of an oral agreement where value was received by the defendants and the plaintiff performed meet the exception to the Missouri Statute of Frauds.

Defendants' argument that the Missouri Statute of Frauds prevents the enforcement of the contract for escrow accounts between the parties is demonstrated to be clear error where the contract for escrow accounts is memorialized in writing and the signature of the US Bank Trust officer Brian Kabbes is affixed in accordance with Missouri controlling case law requirements. The defendants also misrepresent the applicability of the statute of frauds for a credit agreement. The complaint describes two different written

contracts. One for the US Bank Trust department's escrow accounts product and attendant escrow agent services and a separate line of credit also in writing.

The plaintiff takes exception with the argument escrow accounts are credit agreements. That contradicts the law of Kansas which developed or addressed contract requirements for valid accounts of deposit at about the same time as Missouri. Missouri itself contrary to the defendants' characterization, will look to oral parole evidence of an escrow account if the writings are incomplete. See *Jake C. Byers, Inc. v. J.B.C. Investments*, 834 S.W.2d 806 at 810-812 (Mo. App. E.D., 1992).

While the plaintiff denies escrow accounts are agreements to lend money and has averred in his complaint that the separate agreement for US Bank to provide a line of credit is in writing, the plaintiff points out two decisions from Missouri contradicting the defendants:

"The bank argues, without being precise, that the "alleged contracts" should have been in writing. Although an extended discussion of the point is unnecessary, we have the tentative opinion that a valid cause of action for breach of an oral contract to lend money is recognized at law. See, e.g., *Wait v. First Midwest Bank/Danville*, 142 Ill.App.3d 703, 96 Ill.Dec. 516, 521, 491 N.E.2d 795, 800 (1986)."

Dennis Chapman Toyota, Inc. v. Belle State Bank, 759 S.W.2d 330 (Mo. App. S.D., 1988). Under the creditor debtor statute of frauds for Missouri, courts recognize a writing has to contain the requisite language to protect the creditor from assertions of oral contract. The defendants have not at this stage produced the writing or even alleged it had the requisite notice wording to raise the statute of frauds against oral assertions:

"Under § 435.045.3, the prohibition against a debtor maintaining an action or defense except on a written agreement does not apply unless the written credit agreement contains the following language in ten-point boldface type:

Oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrowers(s)) and us (creditor) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it.

R.S.Mo. § 435.045.3(1)."

Horseshoe Entertainment v. General Elec., 990 F.Supp. 737 at 740 (E.D. Mo., 1997).

1. The Loan Contract Was in Writing And Breached

The plaintiff's complaint describes the complete set of express agreements between the parties and how they were breached. The defendants do not discuss the loan contract which was in writing and was breached, the plaintiff never received a rejection of the credit agreement or any funds:

“In this case, appellee's employee made an offer to process a loan for appellant which Frey accepted by submitting an application in September 1995. The bank's employee had told appellant that it would take five days to process the loan.

In our view, when appellee received the last requested documentation in October, it had a duty to complete the process within or close to the five day time frame. Since appellee took more than one and a half months to issue a commitment letter, this establishes on its face that a breach of the initial loan processing agreement occurred in early November 1995.

In addition, the commitment letter constituted a second offer by the bank which was also accepted by appellant, establishing another contract.”

Toledo O.J., Inc. v. Fifth Third Bank, 2001 OH 4008 at ¶¶ 28,29, 30 (OHCA, 2001).

c. Count II: Damages for Fraud and Deceit

The plaintiff disagrees with the defendants over independent tortuous conduct alleged in the complaint. The factual averments support the separate non contract claim of tortuous interference in the business expectancy from the sale of a lease to General Electric. The defendants and counsel for General Electric have already turned into the US District Court for the District of Kansas their billing records under seal that describe the times dates and meetings of US Bancorp counsel to aid and direct General Electric's efforts to escape liability on the purchase of a real estate lease from the plaintiff. The plaintiff was never served these records and is entitled to them from discovery.

The Falsehood of the Reason Given For Not Performing

The complaint details the misrepresentation of the defendants that the USA PATRIOT Act prevented from performing the contract and required their breach. The tape recording of US Bank officials reveals the USA PATRIOT Act was the reason given (later recorded and written communications demonstrate the defendants sought to deny they had used the USA PATRIOT Act as a pretext for not performing).

This is the lie described in the complaint. US Bank Trust Department used as a pretext a deliberately false misrepresentation of the USA PATRIOT Act law and then committed the fraud of claiming they did not use the USA PATRIOT Act and instead some other criteria selected after the breach was claimed to be the valid justification. The tapes prove fraud deceit and pretext not legal misrepresentation.

The pretext is independently demonstrable for each of the following reasons; 1) the “know your customer” reporting requirements contemplated under the act were not a barrier but a mere reporting mechanism; 2) the applicability of any reporting requirements to a domestic trust or escrow account was

speculative at the time the reason was given; and 3) the US Treasury Department which is responsible for regulating banks had published it was delaying implementation of the USA PATRIOT Act to banks.

1. New Frauds Under F.R. Civ. P. Rule 15 b.

Despite their duty of good faith and fair dealing under contract and fiduciary duty to the plaintiff along with their duty of honesty to the tribunal, the defendants through their agent Shughart Thomson & Kilroy, PC continually commit frauds that are actionable by the plaintiff.

“Amendments to conform the pleadings with the issues actually tried are procedurally divided by Rule 15(b). The first part provides that if issues are tried with either express or implied consent, they are treated as if raised in the pleadings. The test of consent should be whether the defendant would be prejudiced by the implied amendment, i. e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory. *United States v. 47 Bottles, More or Less, Etc.*, 320 F.2d 564, 573 (3d Cir. 1963).”

Monod v. Futura, Inc., 415 F.2d 1170 at 1174 (10th Cir., 1969). See also *Horton v. Smith Intern., Inc.*, 944 F.2d 911 (C.A.10 (Utah), 1993).

The recent report of parties planning conference contained the following recounting of events which was included by the plaintiff over the objection of the defendants. However it was tried with implied consent and this court effectively over ruled the Magistrate’s ordered stay of discovery. The other factor from *Parreco v. Rental Housing Com’n*, 885 A.2d 327 at 334 (DC, 2005) that the opposing party directly articulate a defense is also met:

“On May 7th, 2007, Mark A. Olthoff KS lic. #70339, Andrew M. DeMarea KS lic. #16141 and Jay E. Heidrick KS lic #20770 falsely misrepresented the law to Magistrate David J. Waxse that the plaintiff’s complaint was barred by *res judicata* despite the express dismissal without prejudice identified in the complaint ¶ 32 , that Magistrate Waxse had jurisdiction to stay discovery despite the exclusive federal jurisdiction of the Tenth Circuit identified in ¶ 34 of the complaint and that the plaintiff lacked standing as an assignee to the rights of the dissolved corporation. Mark A. Olthoff KS lic. #70339 and Andrew M. DeMarea KS lic. #16141 had been previously served the clear controlling authority contradicting their misleading assertions in the Western District of Missouri, yet made the misrepresentations again in this court after the case was transferred as part of an intentional scheme to interfere with the machinery of justice. Magistrate David J. Waxse was deceived by the misrepresentation and in an order dated May 24th, 2007 suspended Discovery as an appropriate measure for a case likely to be dismissed. The plaintiff was injured by Mark A. Olthoff KS lic. #70339, Andrew M. DeMarea KS lic. #16141 and Jay E. Heidrick KS lic #20770 misrepresentations in having his redress continually postponed and thereby being prevented from entering the hospital supply market. This was fraud on the court. *Weese v. Schukman*, 98 F.3d at 553 (C.A.10 (Kan.), 1996).”

The above describes the defendants’ extrinsic fraud that has so plagued the litigation between the parties. The violation of candor to the court is worse by an attorney misrepresenting the law than by misrepresenting fact. Only the former is actionable as fraud on the court.

The defendants' present motion to dismiss contains much of the intrinsic fraud of misrepresenting facts to prevent the plaintiff from recovering that the defendants memorandum of law asserts would be recognized as actionable fraud in the State of Missouri.

Should the defendants succeed in deceiving this court to obtain a dismissal through the factual misrepresentation of what is facially written in the plaintiff's claim, the remedy is governed by *Chewning v. Ford Motor Company* and would result in an action for fraud against the perpetrators believed to be a resident corporation of Missouri and individual residents of Missouri in the Independence, Missouri's 16th Circuit court where this current petition was filed:

"[51] The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney - an officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court. These actions by an attorney constitute extrinsic fraud.

[52] Moreover, we note that, while their analysis does not turn on the categorization of fraud as intrinsic or extrinsic, numerous jurisdictions hold an attorney's subornation of perjury and/or the intentional concealment of documents constitute fraud upon the court. *Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072 (2d Cir. 1972) (institution of action by attorney who knew that there was complete defense to action might be fraud upon the court); *Great Coastal Express, Inc., v. Int'l Brotherhood of Teamsters*, 675 F.2d 1349, 1357 (4th Cir. 1982) ("[I]nvolvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court."); *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 986 (4th Cir. 1987) ("A verdict may be set aside for fraud on the court if an attorney and a witness have conspired to present perjured testimony."); *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978) (fabrication of evidence where attorney is implicated is fraud upon the court); *H.K. Porter Co. v. Goodyear Tire & Rubber*, 536 F.2d 1115, 1119 (6th Cir. 1976) ("Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court."); *Dixon v. Comm'n of Internal Revenue*, 2003 WL 1216290 (9th Cir. 2003) (fraud on the court occurred where attorneys entered into secret settlement agreements with taxpayers in exchange for false testimony); *Synanon Found., Inc., v. Bernstein*, 503 A.2d 1254 (D.C. 1986) (attorney subornation of perjury and false statements to trial court constitute fraud upon the court); *Porcelli v. Joseph Schlitz Brewing Co.*, 78 F.R.D. 499 (E.D. Wis. 1978) (noting distinction between perjury involving officers of the court and witness or party); see 12 James Wm. Moore et al., *Moore's Federal Practice* ¶ 60-21[53][b] (3d ed. 2002).

[54] Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs."

Chewning v. Ford Motor Company, 2003 SC 109 at ¶¶ 51-54 (SC, 2003)

d. Misappropriation of trade secrets

The defendants' counsel and Shughart Thomson & Kilroy, PC must be utterly unfamiliar with business capitalization for the defendants' agents Mark A. Olthoff KS # 70339, Andrew M. Demarea KS #16141, and Jay E. Heidrick KS #20770 and failure to perform the required Rule 11 diligence for their

dismissal pleading to make the misrepresentation that the thirty three page business plan currently in possession of US Bancorp and in control of US Bank Senior Counsel Sarah B. Stroebel (314122) the defendants' records custodian is the same as the three page executive summary described in the complaint at ¶ 56:

"56. SAMUEL LIPARI was instructed to send an executive summary of his business plan via email. (Exb 1.)"

Plaintiff's petition at page 14. The rest of the professions at least have a clue:

"An executive summary is a report, proposal, or portfolio, etc in miniature (usually one page or shorter). That is, the executive summary contains enough information for the readers to become acquainted with the full document without reading it. Usually, it contains a statement of the problem, some background information, a description of any alternatives, and the major conclusions. Someone reading an executive summary should get a good idea of main points of the document without becoming bogged down with details."

http://oregonstate.edu/dept/eli/buswrite/Executive_Summary.html See *Technical Writing: A Reader-Centered Approach*, 2nd ed. By Paul V. Anderson, Harcourt, Brace, Jovanovich Publishers, 1991.

The plaintiff withstood dismissal on the previous challenge to the plaintiff's misappropriation of trade secrets claim on the basis the plaintiff's 09/11/2007 answer (Doc. 37) to the defendants' earlier motion to dismiss (Doc.# 22) citing to the near identical fact set Missouri case *Lyn-Flex West Inc. v. Dieckhause et al.*, 24 S.W.3d 693 (Mo. App. E.D., 1999).

e. Breach of Fiduciary Duty- Count IV- Plaintiff has alleged facts showing a fiduciary duty

The plaintiff has alleged facts showing the existence of a confidential relationship and contrary to the defendant's analysis, a cause of action in tort separate from the escrow agreement exists against the defendants who held the plaintiff's property, business account funds and candidate contracts while the defendants committed other wrongs, misrepresentations and deprived documents as recently as last week and all of which were contrary to their duty as a fiduciary:

"Defendants argue that plaintiff has failed to plead anything more than breach of contract. Generally, punitive damages are not recoverable for breach of contract. An exception to this rule exists, however, where the breach amounts to an independent, willful tort. *Smith v. Amer. Bank & Trust Co.*, 639 S.W.2d 169, 176 (Mo.App.1982). We find that plaintiff has alleged an independent tort of breach of fiduciary duty in order to seek punitive damages.

An escrow agent owes a fiduciary duty to those parties for whom he holds property. *Progressive Iron Works Realty Corp. v. Eastern Milling Co.*, 155 Me. 16, 150 A.2d 760, 762 (1959). Thus, the duty imposed upon Dingman is by virtue of a fiduciary relationship created by the escrow agreement. The breach of such duty constitutes a tort. *Otto v. Imperial Casualty & Indemnity Co.*, 277 F.2d 889, 893-94 (8th Cir.1960), quoting *Kohnle v. Paxton*, 268 Mo. 463, 188 S.W. 155, 159 (1916) ("a tort is a wrong to another in his rights created by law or existing in consequence of a relation established by contract ..."). An escrow agent's failure to strictly follow the terms of the

escrow agreement is a breach of his fiduciary duty. *Tucson Title Ins. Co. v. D'Ascoli*, 94 Ariz. 230, 383 P.2d 119, 121 (1963). Further, a fiduciary must act scrupulously and honestly in carrying out his duties. *Id.* 383 P.2d at 121-122.”

Eastern Atlantic Transp. and Mechanical Engineering, Inc. v. Dingman, 727 S.W.2d 418 at 422-423 (Mo. App.W.D., 1987).

The defendants through the current misrepresentations in this dismissal motion and in refusing to turn over the written escrow agreement, the email where Brian Kabbes affixes his names and address for a signature, the loan application and line of credit agreement, and other documents possessed by the plaintiff but sought through discovery to eliminate authentication issues and conserve the court and parties’ resources are still committing fraud and violating the escrow fiduciary duty. Brian Kabbes has also not come forward to disclose the frauds:

An escrow relationship gives rise to two distinct fiduciary duties: the escrow agent must act in strict accordance with the terms of the escrow agreement and must disclose to the escrow parties a known fraud. *Berry v. McLeod*, 124 Ariz. 346, 351-52, 604 P.2d 610, 615-16 (1979).

“As an escrow, the Bank was an agent who owed a fiduciary duty to both Kitchen Krafters and Schell in all matters affecting the escrow relationship. *First Fidelity Bank v. Matthews* (1984), 214 Mont. 323, 692 P.2d 1255. Furthermore in its capacity as an agent, the Bank had a duty to make full disclosure to its principals of all material facts relevant to the agency. 3 Am.Jur.2d Agency § 211. The evidence submitted supports the contention that this duty was breached.”

Kitchen Krafters, Inc. v. Eastside Bank of Montana, 242 Mont. 155, 789 P.2d 567 at 573(Mont., 1990).

1. Bad Faith of Defendants

Bad faith, is an improper means to support a claim for intentional interference with the General Electric contract to buy a lease from the plaintiff, and has been recognized in cases involving a fiduciary or agency relationship. See, e.g., *Macke Laundry Service Limited Partnership v. Jetz Service Company, Inc.*, 931 S.W.2d 166 (Mo. App. W.D. 1996), *Eib v. Federal Reserve Bank of Kansas City*, 633 S.W.2d 432 (Mo. App. W.D. 1982).

“Improper means, for purposes of intentional interference with contractual relations, are those means which are independently wrongful, notwithstanding injury caused by the interference. *Thomas Phelps*, 977 S.W.2d at 38, *Community Title*, 796 S.W.2d at 373. Improper means include misrepresentation of fact, threats, violence, defamation, trespass, restraint of trade, or any other wrongful act recognized by statute or the common law. *Thomas Phelps*, 977 S.W.2d at 38, *Community Title*, 796 S.W.2d at 373, *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 317 (Mo.banc 1993).”

Kruse Concepts v. Shelter Mutual Insurance, 16 S.W.3d 734 (Mo. App. E.D., 2000).

"A party . . . demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." *Byrne v. Nezhat*, 261 F.3d 1075, 1121 (11th Cir. 2001) quoting *Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998).

As a rule, whether bad faith is established is a question of fact." *Havemeyer Place Co., LLC v. Gordon*, 93 Conn.App. 140, 156-57 (2006). "Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Citation omitted; internal quotation marks omitted.) *Habetz v. Condon*, 224 Conn. 231, 237 (1992).

e. Prima Facie Tort- Count V- Plaintiff has alleged intentional wrongful acts

U.S. Magistrate Judge James P. O'Hara, the former managing partner of Shughart Thomson & Kilroy PC abused the plaintiff's then counsel Bret D. Landrith in an unrelated case (US District Court audio at <http://www.medicalsupplychain.com/to/pdf/Bolden%20Hearing.wav>) on the pretext that he had failed to serve City of Topeka officials on a complaint alleging their misconduct while acting solely in their individual capacity. The audio reveals Magistrate O'Hara was concerned about the "stealth lawsuit" a reference to Shughart Thomson & Kilroy PC's utter liability to US Bancorp for advising the bank not to accept \$6000.00 from the plaintiff as a fee for the first ten accounts while the plaintiff found a replacement escrow provider. In acting out on Landrith over this liability of Shughart Thomson & Kilroy PC, U.S. Magistrate Judge James P. O'Hara repeatedly suggested that James Bolden should sue his representative Bret D. Landrith.

U.S. Magistrate Judge James P. O'Hara also communicated Shughart Thomson & Kilroy PC's false defense that Landrith was incompetent and the damages he sought are prohibited as speculative to James Bolden's District judge. The first status hearing attended by James Bolden with his Kansas District judge was on the record and the transcript contains the District judge stating the erroneous "too speculative" defense Shughart Thomson & Kilroy PC was lobbying the US District Court of Kansas with through ex parte communications to defeat the plaintiff's valid claims through extrinsic fraud and denial of Due Process. The injury to James Bolden's case was a collateral result willingly accepted by Shughart

Thomson & Kilroy PC despite the brutal deprivations of Liberty the City of Topeka was inflicting on Bolden to prevent him from presenting his case in federal court.

The plaintiff lost his counsel when Landrith was ultimately disbarred over the magistrate's report. The plaintiff witnessed the Magistrate under oath misrepresent that he had not denied discovery in other cases though he had denied it in the plaintiff's related action against US Bancorp's coconspirator General Electric. The plaintiff witnessed U.S. Magistrate Judge James P. O'Hara remain after he testified and talked ex parte to the State of Kansas Attorney Discipline panel members Randall D. Grisell, Sally Harris and Michael Schmitt.

Later in their report recommending disbarment to the Kansas Supreme Court, Randall D. Grisell, Sally Harris and Michael Schmitt fraudulently asserted that the respondent Bret D. Landrith failed to adequately cite to the record in an appeal brief. Landrith's opening brief that Randall D. Grisell, Sally Harris and Michael Schmitt cited made sixty seven citations to the record to support his client David Martin Price a witness of James Bolden's in contentions which coincidentally also were the same assertions that the tribunal charged the respondent Landrith for untruthfulness in failing to support with a basis in fact.

The panel's report materially misrepresented facially and fraudulently the official Kansas State court records and found with O'Hara a conclusion of law against Landrith on the decision not to serve the City of Topeka officials in the Kansas District Court case that is exactly contradictory to the state of the law then and the pretext or falsehood of Magistrate Judge James P. O'Hara's report is now a matter of law in this district *Bell v. City of Topeka, Kansas*, 496 F.Supp.2d 1182 (D. Kan., 2007):

"1. The City of Topeka is the only remaining defendant in this action. On February 27, 2007, this Court dismissed defendants, former Mayor Butch Felker, former Mayor James A. McClinton, and Chief of the City of Topeka Police Department Ed E. Klumpp, who had been sued only in their official capacities, because **claims against these defendants in their official capacities are redundant when the City of Topeka has been named as defendant as well** (Doc. 82). Plaintiff has also named "Four Unknown Narcotics Agents of the City of Topeka Police Department" as defendants." [Emphasis added]

Bell v. City of Topeka, 496 F.Supp.2d 1182 at fn 1

The Kansas District Court, receiving the harsh dismissal and sanction order against both the plaintiff and his disbarred counsel *Medical Supply Chain, Inc. v. Novation LLC et al* KS Dist. Court Case No.: 05-2299 where this court ruled contradicting *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) on identical operative facts also refused to extend their

decision on reciprocal disbarment until the Tenth Circuit had ruled on James Bolden's appeal where the federal issues ruled erroneously on by the Kansas Supreme Court were being heard. The Tenth Circuit, a month after Landrith was disbarred, overturned Kansas District Court Judge Kathryn H. Vratil in *Bolden v. City of Topeka*, 441 F.3d 1129. (10th Cir. 2006) which has now been favorably cited by the Sixth Circuit in *Coles v. Granville* Case No. 05-3342 (6th Cir. May 22, 2006).

The plaintiff's claims for prima facie tort against the defendants is sufficiently pled since it has become an indisputable matter of record the second Shughart Thomson & Kilroy PC actor, Andrew M. Demarea KS #16141 made another ethics complaint against the plaintiff's then counsel Bret D. Landrith for appealing this court's clear error on the existence of a private right of action under the USA PATRIOT Act (The statute expressly states several private rights of action. All case law on the subject up hold's Congress' express grants of private rights of action) and for appealing this court's dismissal of the plaintiff's claims against the defendants where the complaint clearly met even the current standard under *Bell Atlantic Corp. v. Twombly* for antitrust conspiracy with Neoforma, Inc. and Novation LLC, the plaintiff having identified the coconspirators and the public record of US Bancorp Piper Jaffray underwriting Neoforma, Inc. and US Bancorp being fined for extorting other healthcare technology companies similar to Medical Supply Chain, Inc. over entering the Novation LLC hospital supply market.

The complaint by Andrew M. Demarea KS #16141 was never prosecuted, it was just used along with U.S. Magistrate Judge James P. O'Hara's conduct by Shughart Thomson & Kilroy PC to poison the tribunal. The plaintiff's counsel was reciprocally disbarred before Bolden's appeal was ruled on because of this court, the Hon. Judge Carlos Murguia's vehement dismissal and condemnation of the plaintiff for the preceding antitrust litigation against US Bancorp and Novation LLC where Shughart Thomson & Kilroy PC misrepresented to the court that elements located in the table of contents were not in the pleading and misrepresented controlling law causing the appeal briefs to reveal the Hon. Carlos Murguia was wrong on every issue appealed on from his dismissal ruling. See footnote 1 on page 1 of this memorandum.

On November 18, 2007, the New York Times ran a feature article on a witness to all the extortion and monopolization conduct of the Novation LLC conspirators the plaintiff had described in his antitrust complaint <http://www.nytimes.com/2007/11/18/business/18whistle.html> and which the defense knew at the time the attorneys were representing to Hon. Carlos Murguia that the plaintiff's claims were frivolous.

f. The Civic value of the plaintiff's complaint

The defendants raise again their arguments in support of the motion to strike that this court has already ruled on. The recent decision of Missouri Governor Matt Blunt not to seek reelection along with the State of Kansas revisiting the University of Kansas's agreement with the Novation LLC hospital St. Luke's Healthcare System and protect KU's academic credentials from being exploited by Novation LLC to obtain Cancer research funds are more likely than not due to the civic perseverance of the plaintiff in trying to enter a hospital supply market that US Bancorp's continuing fraud through the agency of Shughart Thomson & Kilroy PC is blackballing him from.

Novation LLC hospital St. Luke's at 4401 Wornall in Kansas City, Missouri would have started receiving hundreds of millions of dollars in a cancer research program headed currently by Thomas Jeffery Wieman, M.D. that would have exploited the legitimate credentials of the University of Kansas Medical School which the Novation LLC hospital St. Luke's needed to give the appearance it could qualify as a major research center.

Without the advocacy of the plaintiff against the hospital supply cartel participants including US Bancorp the hospital supply cartel spokes of the conspiracy would have benefited from Elias A. Zerhouni, M.D, director of The National Institutes of Health (NIH), a part of the U.S. Department of Health and Human Services causing John E. Niederhuber, M.D., the Director of the National Cancer Institute (NCI) to compromise its cancer research center standards and make the combination of the Novation LLC hospital St. Luke's and the University of Kansas Medical School a National Cancer Institute (NCI)-designated Comprehensive Cancer Center when the new institution still does not have the research faculty, protocols or instructional curriculum to qualify and that the newly created institution would reasonably take as long as a decade to legitimately qualify.

CONCLUSION

Whereas for the above stated reasons the plaintiff respectfully requests the court deny the defendants' second motion to dismiss.

Respectfully Submitted,

S/ Samuel K. Lipari

Samuel K. Lipari
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Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

CERTIFICATE OF SERVICE

I certify I have sent a copy to the undersigned opposing counsel via email on 1/31/08.

Mark A. Olthoff, Esq.,
Jay E. Heidrick, Esq.
Shughart Thomson & Kilroy, P.C.
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S/ Samuel K. Lipari

Samuel K. Lipari

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

CASE NO.: 02-2539-CM

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff,

vs.

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

UNKNOWN HEALTHCARE SUPPLIER

Defendants.

REPORT OF PARTIES' PLANNING MEETING

April 21, 2003

Exb 1

REPORT OF PARTIES' PLANNING MEETING

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 - a. Appearances
 - b. Contact information
 - c. Parties' summary of the case
 - (1) The asserted basis for the court's subject matter jurisdiction
 - (2) The facts, claims, and theories of recovery by plaintiff
 - (3) The facts, claims, and theories of defense
 - (4) The statutes, if any, upon which the claims and defenses are based
 - (5) Under controlling jury instructions or precedents, the essential elements of each claim or affirmative defense in the view of the party asserting such claim or defense
 - (6) The most important or key factual issues and legal issues that are believed to be involved in the case in light of the above-referenced essential elements
 - (7) A breakdown of damages sought
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Map Out

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Appendix

- I. Proposed Order for Protection Against Inadvertent Waiver**
- II. Plaintiff Proposed Spoliation Prevention Stipulation**
- III. Proposed Expert Discovery Stipulation**
- IV. Disclosure of preliminary designated experts**

REPORT OF PARTIES' PLANNING MEETING

1. Rule 26(f) Meeting.

Pursuant to Fed. R. Civ. P. 26(f), a discovery and case management meeting was held on April 21, 2003, and was attended by:

Counsel for Medical Supply Chain, Inc.: Bret D. Landrith
Counsel for the Defendants:

2. Preliminary Matters

d. Appearances

Counsel for Medical Supply Chain, Inc.:

Bret D. Landrith, Esq.
Telephone: 620-231-7636

Counsel for defendant:

e. Contact information

Counsel for plaintiff:

Bret Landrith
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Name and residence addresses of plaintiff:

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1300 NW Jefferson Court
Blue Springs, MO 64015
816-220-4128
Fax 816-220-4199

Counsel for defendants:

Name and residence addresses of defendants;

f. Parties' summary of the case

(1) The asserted basis for the court's subject matter jurisdiction

This court has jurisdiction of this action pursuant to 28 U.S.C. 1343 and 1331 and over pendant state law based claims.

These proceedings are instituted under the provisions of the Sherman Act and the Clayton Act.

This Court has jurisdiction over complaints based on Hobbs Act, The USA PATRIOT Act.

Jurisdiction for Medical Supply Chain, Inc. to commence this action for injunctive relief is conferred by the Clayton Act, 15 U.S.C. §§ 4, 13 and 26 and K.S.A. 60-3321.

Misappropriation of trade secret; injunctive or other protective relief

Kansas substantive law permits an injured party to have civil remedies for criminal acts
Smith v. Welch 265 Kan. 868.

Acts of private individuals may support an action for liability under 42 U.S.C. § 1983 if the individuals are "willing participant[s] in a joint action with the state or its agents." *Brinkman*, 793 F. 2d at 112; *Dennis v. Sparks*, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).

(2) The facts, claims, and theories of recovery by plaintiff

STATEMENT OF THE FACTS

Medical Supply Chain, Inc. is a Missouri corporation in good standing with the Secretary of State. Medical Supply was formed in October of 2000, by Sam Lipari to commercialize over three years of research and development spent creating an information technology infrastructure standard that allowed hospitals to manage their own procurement including bidding, logistics, and purchasing documentation. A Dun & Bradstreet report dated October 31st stated the company had a clear credit history and a strong financial condition. Mr. Lipari's innovation is an electronic marketplace that

generates profound savings over existing industry offerings. This service innovation works via the Internet so every hospital and supplier can utilize an open market. These automated services increase competitiveness by managing hundreds of thousands of products and thousands of suppliers, allowing hospital-purchasing officers to easily exploit the competitive effect on prices. Medical Supply has shown that this innovation guarantees 20% savings in cost to hospitals, which equals at least a 5% increase in each hospital's bottom line.

Sam Lipari put great effort into selecting an appropriate national bank with a full range of services, including nation wide checking, escrow services, short and long term credit facilities, receivables financing and international clearing of transactions between thousands of hospitals and their suppliers world wide. Several national banks were evaluated and on April 15, 2002 US BANCORP NA subsidiary, US BANK was selected because it also had an investment arm called US BANCORP PIPER JAFFRAY that targeted healthcare and participated as underwriter and funds manager for pre public offering healthcare manufacturers and service providers in addition to acting as underwriter for corporate bonds of healthcare companies. Mr. Lipari also established a personal checking account with US BANK following an investigation by Chex Systems, Inc.

On June 5th, 2002 Sam Lipari contacted US BANCORP PIPER JAFFRAY'S to speak with Heath Lukatch, managing director of the US BANCORP PIPER JAFFRAY healthcare venture fund about Medical Supply being considered for venture capital and other financial services. Medical Supply was instructed to send an executive summary of its business plan via email. Sam Lipari sent the summary and financial projections for Medical Supply with a restriction on disclosure notice. US BANCORP PIPER JAFFRAY made no response to the receipt of the executive summary and financial projections from Medical Supply. Again, Sam Lipari contacted US BANCORP PIPER JAFFRAY and his calls were not taken and not returned. Sam Lipari also attempted to speak to a US BANCORP PIPER JAFFRAY venture fund manger at their San Francisco office but again, his calls were not taken or returned.

Leading healthcare strategists advised Sam Lipari on the need to quickly enter the market and take advantage of the opportunity created by the healthcare industry's sudden willingness to reject the existing supply distribution channels, which are primarily maintained by Group Purchasing Organizations. The New York Times began uncovering corruption performed by Group Purchasing Organization including price rigging and the elimination of access to innovative medical devices and supplies. The New York Times articles showed the lack of a competitive market imperiled the lives of patients. During these advisory meetings the first news of WorldCom's debacle was breaking. Medical Supply's management felt that with the exception of US BANCORP PIPER JAFFRAY, which concentrated its investments in healthcare; much of the assets venture funds reported were in fact overvalued equities in telecom technology companies further depressing the venture capital markets.

Medical Supply resolved to develop a way to internally capitalize a roll out of its supply chain empowerment program and management technology. Instead of seeking venture capital funds from US BANCORP PIPER JAFFRAY Medical Supply created its own capitalization plan that would utilize the intellectual assets of its healthcare supply chain property by offering a comprehensive 12 month education and healthcare supply chain certification program.

Medical Supply's plan put representatives in the field nationwide that possessed the knowledge and skills to communicate with all levels of hospital management and assist in the adoption of Medical Supply's health system empowerment program. The representatives would pay for their certification and be responsible for their marketing and sales operations, consistent with organizations that rely on independent manufacturer's representatives. Since Medical Supply's services were new to the market, Sam Lipari and his advisors decided that it would be critical for the certification fee to be held in escrow until the candidates had a chance to meet Medical Supply's certification team and evaluate their abilities in mastering healthcare supply chain empowerment knowledge. After a weeklong orientation, the candidates would decide whether or not to commit to the certification program and Medical Supply reserved the opportunity to reject any candidates it felt would not succeed in the program.

Medical Supply developed a curriculum and contracted with the industry's foremost logistics and supply chain experts to provide instruction during the weeklong orientation and advise candidates throughout the certification process that included the 12-month practicum. Medical Supply made arrangements to include information and presenters from companies with expertise in healthcare supply chain fundamentals and financial analysis of healthcare purchasing in addition to human resource evaluations. Medical Supply representatives would then be able to assist with products, services, and technologies outside of those offered through Medical Supply's capabilities that would complement Medical Supply's supply chain empowerment program in allowing a health system/hospital to break free of its Group Purchasing Organization supplier.

Beginning August 1st, 2002, Medical Supply advertised nationwide to recruit experienced account executives and sales professionals. Medical Supply processed hundreds of applicants with details of resumes, job history, and financial disclosure. For the first of what were to be quarterly classes, Medical Supply selected 15 candidates that had the potential to succeed as independent representatives for its services. After numerous telephone interviews ten applicants had committed to becoming certification candidates and attend the certification classes beginning the first week of December 2002. During this same time, Medical Supply was preparing the escrow account system that the candidates would utilize when making payment.

The US BANK representative Becky Hainje offered to provide escrow account services and on October 3, 2002 put Sam Lipari in contact with, PRIVATE CLIENT GROUP in St. Louis, Missouri. Sam Lipari described Medical Supply's need for escrow accounts to vice president BRIAN KABBES, and emailed him an escrow contract that Medical Supply counsel had prepared for its candidates. BRIAN KABBES asked questions about

the candidates, the certification program and how many candidates had been selected so far. Sam Lipari negotiated with BRIAN KABBES to reduce the escrow fee per account since all escrow accounts would be identical, and US BANK had refused to have the funds in a single account. BRIAN KABBES agreed to lower the fee for US BANKS escrow agent services from the normal of \$1,500 to \$600 per account.

After reviewing the escrow contract, on October 5th, BRIAN KABBES communicated to Sam Lipari that the language of paragraph 10 “Security Interests” should be changed so that a security interest for US BANK could be created in the \$5,000 portion of the escrow that became Medical Supply’s property the moment a candidate submitted their certification funds into escrow. Medical Supply altered its escrow contract to conform to BRIAN KABBES’ suggestion and on or about October 7th emailed the changes to BRIAN KABBES. BRIAN KABBES and US Bank were identified as the escrow agent in the escrow agreement and BRIAN KABBES’ address was included in the body of the agreement.

On October 8th, US BANK’s Kansas City manager told Sam Lipari that there would be no problems with the escrow accounts and that BRIAN KABBES had told her that they were a “slam dunk.” They arranged for Sam Lipari to meet with Doug Lewis, the commercial loan officer for a line of credit based on the portion of the escrow accounts Medical Supply was guaranteed.

On October 9th, BRIAN KABBES called to request an additional change in the escrow contract. He supplied a specified US Treasury fund investment language for the funds while the funds were in the custody of US BANK TRUST DEPARTMENT. Medical Supply agreed to the additional change and modified the investment instructions exactly as BRIAN KABBES instructed. Medical Supply was told there were no more changes to be included so the certification and escrow agreements were sent out so candidates would have a chance to review the material before their November 1st deadline, which required their funds to be in the US BANK escrow accounts.

On October 10th, Sam Lipari delivered the Medical Supply business plan and associate program with all contracts and supporting documents to Douglas Lewis, at the US BANK, Independence, Missouri to make application for a line of credit utilizing escrow accounts as collateral. The business plan and associate program booklets each had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained in them. A letter of introduction also stated the contents were protected with restricted disclosure and possession of the materials.

On October 15th, BRIAN KABBES called Sam Lipari and informed him that they had turned down the escrow accounts because of the USA Patriot Act. When asked to clarify, he said the know your customer requirements had changed and US Bank could not set up the escrow accounts for MEDICAL SUPPLY Sam Lipari was shocked and stunned and handed away the phone, where BRIAN KABBES repeated again The Patriot Act as the reason the accounts were denied. Medical Supply researched the act and discovered it did

not apply to Medical Supply, already an established customer of US Bancorp for personal and corporate banking services; or the independent representatives, for each of whom Medical Supply has a fourteen-page background and financial history. Medical Supply contacted all levels of US Bancorp management explaining the reliance Medical Supply had on US Bancorp fulfilling its agreement to provide escrow accounts, the inability to replace these services on such a short notice and the staggering damages Medical Supply would suffer. US Bancorp's highest corporate officers still maintained the refusal to provide the escrow accounts based on the USA PATRIOT Act. Each of these conversations was recorded and excerpts from the transcripts appear in Medical Supply's pleadings. US Bank's Kansas City manager was told by BRIAN KABBES that;" no more time would be spent," by US Bancorp on Medical Supply's escrow accounts, the bank would not change its decision. She relayed this conversation on a taped answering machine, which was also transcribed for the pleadings.

Sam Lipari had asked US Bancorp officers after the refusal if a conflict of interest with US Bancorp's affiliated healthcare technology and supplier companies had caused the interruption in the pattern and activity of providing the escrow accounts. He explained the negotiations, the alterations and final approval process they had gone through with BRIAN KABBES. Sam Lipari also explained that much of US Bancorp's investments were in Medical Supply's relevant market and the interruption in US Bancorp's performance did not happen until US Bank's Independence office had obtained Medical Supply's business plan, revealing Medical Supply's potential to provide efficiency and reduce healthcare supply prices. US Bancorp's PRIVATE CLIENT trust officers denied a conflict of interest by strangely stating they had not given out Medical Supply's business plan, a question that had not been asked. It was especially alarming since the St. Louis PRIVATE CLIENT GROUP had not been given the plan and could not have obtained it from US BANK in Independence under the nondisclosure instructions he had given Doug Lewis and which were stated on the documents. This caused Sam Lipari to fear his trade secret information might become compromised. In 1995, two small Group Purchasing Organizations exploited a confidential relationship with Sam Lipari to misappropriate an innovative services pricing business model utilizing trade secret information. Mr. Lipari was unable to protect his trade secrets or obtain compensation. As Group Purchasing Organizations merged; Mr. Lipari's innovation became the model used by most of the 1.3 trillion dollar healthcare industry.

On November 6th, Sam Lipari obtained the documents he had entrusted with Doug Lewis at US BANK in Independence. Upon returning to Medical Supply's office Sam Lipari inspected the documents and found that the binders had been separated and copies or faxes had been made of the associate program and the business plan documents. There are tractor marks from a copy or fax machine on the back of all the pages. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied. There were no marks on the back of these documents. The documents that were copied or faxed contain all confidential details to the business, business model, management team, investors, industry experts, advisors, business practices, market strategies, revenue model, service structure, formula, algorithms, and financials including 5 year details, 5 year condensed, and break even analysis. Sam Lipari

is fearful this information will fall into the wrong hands further blocking or eliminating entry to market.

Medical Supply approached the law firm Shook, Hardy, & Bacon to provide escrow agency services at US BANK to try to mitigate the injury caused by US Bancorp's interruption and refusal to deal. The firm declined because of concerns over the USA PATRIOT Act issue raised by US Bancorp. Medical Supply approached other candidates to provide escrow agency services but they also declined. Medical Supply found one other national bank in its region with the capability of providing the unique financing instrument it had created with US Bancorp but not in time for the November 1st funds Medical Supply depended on. Medical Supply also investigated US Bancorp's conduct in trying to control the capitalization of healthcare technology firms and suppliers and realized there were strong reasons to fear US Bancorp would continue to misuse the USA PATRIOT Act and make a "Suspicious Activity Report" against Medical Supply that would destroy the company's chances of ever obtaining the high level banking services it would need to provide the nation's hospitals with lower prices and competitive markets for medical devices and supplies.

US BANCORP NA, in combination with its wholly owned subsidiaries US BANCORP PIPER JAFFRAY, PRIVATE CLIENT GROUP and US BANK, along with their affiliate UNKNOWN HEALTHCARE SUPPLIER (herein, collectively; "US Bancorp") is the dominant venture fund and investment banking underwriter for capitalizing healthcare technology and healthcare supplier firms through seed capital, venture capital, bonds, initial public offerings of healthcare technology and healthcare supplier firms' securities and the marketing of healthcare technology and healthcare supplier firms' stock issues. US Bancorp devotes 70% of its venture funds to healthcare technology and supplier companies. US Bancorp is the largest venture fund investor of pre public offering healthcare technology and supplier companies.

US Bancorp on its healthcare venture fund web site states that it closely supervises the management of the healthcare companies it invests in. The healthcare venture fund also states it places US Bancorp officers on the boards of these healthcare technology and supplier companies when US Bancorp decides it is needed. US Bancorp leverages its monopoly power in the capitalization of healthcare technology and supplier companies through the acquisition and exercise of monopoly power in investment analysis for stimulating market interest and demand (increasing prices) for healthcare technology and healthcare supplier firms' securities including private placements, bonds, and stocks. US Bancorp uses this monopoly power to increase demand and price for equities including venture funds and securities in healthcare technology and healthcare supplier firms it controls or has ownership interest in.

US Bancorp determined that twenty three billion dollars could be saved in the cost of healthcare supplies with the development of electronic marketplaces to efficiently handle the eighty three billion dollar hospital supply procurement market. US Bancorp used this information to acquire interests in fledgling healthcare electronic marketplaces. In

partnership with other underwriters, US Bancorp aggressively promoted these companies and profited from the increase in securities prices obtained.

At the same time, US Bancorp developed strong affiliations with the dominant healthcare supply distribution channels called Group Purchasing Organizations or “GPO’s.” The GPO’s are the beneficiaries of the distribution system’s inefficiencies. US Bancorp convinced the two dominant GPO’s; the publicly traded company Novation and the privately held company Premier that together control over one half of the national healthcare supply market, to acquire the fledgling electronic market places to prevent eliminating the inefficiency that was the source of the GPO’s profit. The electronic marketplace technology that had the potential to remove inefficiencies from healthcare supply procurement was diverted to create mere web page store fronts for supplies sold through the same old inefficient but profitable GPO distribution channel.

US Bancorp assisted in underwriting their securities and debt to accomplish the mergers, acquiring ownership interests in the new conglomerates and exchanging directors. US Bancorp then used its influence over the dominant GPO’s including the director it placed on the board of Premier to negotiate anticompetitive sole source contracts with healthcare technology and supplier firms US Bancorp provided venture funding and public underwriting for. US Bancorp then used its monopoly power in healthcare technology stock analysis to provide coverage in the media, advertising the marketplace advantages of the companies that had secured these exclusive and anticompetitive contracts. US Bancorp then profited from manipulating the publicly traded prices of the securities because it retained significant equity in the healthcare technology companies it provided venture funding and underwriting for. These anticompetitive contracts and the kickbacks of equity and revenue to Premier, Novation, and their corporate officers along with the high healthcare supply prices they caused became the subject of a New York Times investigative series and United States Senate, Federal Trade Commission and General Accounting Office investigations in 2002.

Plaintiff’s Claims

(3) The facts, claims, and theories of defense

(4) The statutes, if any, upon which the claims and defenses are based

15 U.S.C. § 1

15 U.S.C. § 2

15 U.S.C. § 4

15 U.S.C. § 13 (b) and (e)

15 U.S.C. § 15

15 U.S.C. § 26

USA Patriot Act

The Kansas Trade Secret Misappropriation Act K.S.A. 60-3321

(5) under controlling jury instructions or precedents, the essential elements of each claim or affirmative defense in the view of the party asserting such claim or defense

Essential elements of Plaintiff's Claims: Per Se Sherman 1 Violations, Generally

Are an exception to the Rule of Reason analysis where the act complained of is a naked restraint. No justifications are permitted. Anticompetitive effects do not have to be shown by the plaintiff. There are no defenses to a per se naked restraint of trade.

Sherman 1 Conspiracy

As the Supreme Court has stated "agreements whose nature and necessary effect are so plainly anticompetitive . . . no elaborate study of the industry is needed to establish their illegality-they are 'illegal per se.'" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978).

To establish a civil cause of action under Section 1 [of the Sherman Anti-Trust Act], a plaintiff must prove four elements: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 572 (3d Cir. 1986) (citations omitted).

Sherman 1 Boycott (Concerted Refusal to Deal) Horizontal Restraint antitrust claim

A refusal to deal is a *per se* restraint of trade in violation of the Sherman Act when done in concert with others as part of a conspiracy (as in *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959)) or the unwillingness to deal was in furtherance of a monopoly. See e.g., *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375, 47 S.Ct. 400, 71 L.Ed. 684 (1927). MSCI's pleadings accuse the defendants of refusal to deal in concert with Unknown Healthcare Suppliers in furtherance of a monopoly and as attempted monopolization.

In Sherman Act Section 1 cases where the Court has applied the per se approach to invalidity to concerted refusals to deal, "the boycott often cut off access to a supply, facility or market necessary to enable the boycotted firm to compete, . . . and frequently the boycotting firms possessed a dominant position in the relevant market." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, ante, at 294.

Sherman 1 "Sham Petition" Horizontal Restraint antitrust claim. A "sham petition" to cause government action or to use an official act falsely to provide a barrier to competition is itself actionable "monopolization" behavior. Elements of Sham/Harassment 1) Purposeful interference not protected when a gov't process (rather than the outcome of the process) is used as a competitive weapon 2) That is a) Objectively baseless and b) Improperly Motivated. Sham/Harassment is an exception to Noerr-Pennington immunity. Here the defendants 1) knew the USA Patriot Act did not

apply to MSCI 2) had no reasonable belief that MSCI would be found to be in violation of the act 3) acted with the improper motive of using the gov't process as a pretext for breaching their contract to provide escrow account and thereby prevent competition in hospital supply market. *Eastern R.R. Pres. Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961) and *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508,512(1972)

Sherman 1 Refusal To Deal/Denial of Unique Financial Instrument *Per Se* Naked restraint against MSCI's entry into US Bancorp's affiliate healthcare technology company markets/ no pro competitive justification. *Elements* 1) denial of escrow accounts, provided to other businesses, required as partial security for line of credit-unique, novel or custom financial instrument 2) could not be replicated in the market in the time between repudiation and market entry date 3) by US Bancorp NA, a dominant healthcare industry financier and its affiliate healthcare suppliers *United States Steel Corporation v. Fortner Enterprises, Inc.*, 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977).

Sherman 2 Monopoly

There are two basic elements of a §2 Sherman Act violation. The first is the "possession of monopoly power in the relevant market" and the second is the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966).

To state a monopolization claim under Sherman Act § 2, Medical Supply plead: (1) US Bancorp posses monopoly power in the relevant markets of healthcare technology and supplier capitalization, healthcare technology stock analysis and hospital supplies, where US Bancorp is able to set prices and keep out competitors; and (2) US Bancorp's willful acquisition and maintenance of that power is distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident, but instead US Bancorp acquires and maintains that power through fraud, manipulation, leverage of monopoly power in one relevant market to obtain power in another relevant market, through the "sham" use of official government duties and theft of customer information. See *TV Communications*, 964 F.2d at 1025 (quotations and citations omitted).

To demonstrate market power by circumstantial evidence, a plaintiff must: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil Co., Inc. v. Atlantic Richfield, Co.* at 1434 (citations omitted).

Sherman 2 Attempted Monopolization

To state a claim for attempted monopolization under Sherman Act § 2, Medical Supply plead: (1) US Bancorp attempted to monopolize the relevant market nationwide for capitalizing healthcare technology and supplier companies;(2) US Bancorp has a dangerous probability of success in monopolizing the healthcare technology and supplier

capitalization where it was already the largest venture fund investor and is concentrating 70% of its venture fund investments in this relevant market, where US Bancorp is able to set prices and keep out competitors; (3) US Bancorp has a specific intent to monopolize healthcare technology and supplier capitalization and had been fined this year for attempting to coerce another healthcare technology company into using US Bancorp's services through extortion; and (4) that US Bancorp interrupted the provision of escrow account services to Medical Supply once it realized Medical Supply had obtained capitalization from a competing source in furtherance of US Bancorp's attempt to monopolize healthcare technology and supplier capitalization. See *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d at 1025.

Sherman 2 Refusal to Deal

A lawful monopolist could properly be held liable under Section 2 for a refusal to deal only if it had monopoly power and if its refusal to deal sacrificed profit available from exercising that monopoly power in order to exclude competition and thereby to create additional market power-only if, in other words, it sought to enlarge its monopoly by "attempting to exclude rivals on some basis other than efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (internal quotation marks omitted).

Sherman 2 Refusal to Deal "change of pattern" Horizontal Restraint antitrust claim

Defendant-monopolist's election "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, 105 S.Ct. at 2858. The elements are 1) escrow accounts are furnished to US Bank corporate customers on their secretary of state good standing and the conformity of the escrow contract, a pattern of US Bank business for many years, 2) US Bank interrupts this practice for Medical Supply Chain, Inc., 3) Interruption must be shown not to be for a valid business reason 4) Valid reason must be valid in pro-competitive efficiency terms. Distinguish "between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other." "does not violate Section 2 if valid business reasons exist for that refusal." *Id.* at 605, 105 S.Ct. at 2858.

A seller's right not to deal with a particular buyer has been limited; for if the seller, in order to secure adherence to policies of price maintenance, tying arrangements, or similar suppressions of competition, uses means that go beyond a simple announcement of policy and declination to sell, his conduct falls under the proscriptions of the antitrust laws. *Osborn v. Sinclair Refining Company* 324 F.2d 566 (1963)

Sherman 2 Denial of Essential Facility

In *Alaska Airlines*, the court defined the essential facilities doctrine, generally, as: imposing "liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain to compete with the first." 948 F.2d at 542. A facility is "essential" if it is otherwise unavailable and cannot be "reasonably or practically duplicated." *Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1380 (9th Cir.1992). Section 2 of the Sherman Act

prohibits a monopolist's unilateral action, like Kodak's refusal to deal, if that conduct harms the competitive process in the absence of a legitimate business justification. See *Kodak*, 504 U.S. at 483 n. 32, 112 S.Ct. at 2090 n. 32 (citing *Aspen Skiing*, 472 U.S. at 602, 105 S.Ct. at 2857). Unilateral refusals to deal often concern an "essential" facility. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

Clayton Act Refusal To Deal

Clayton §3 requires either market power in the relevant market, or a significant amount of commerce in the relevant market.[*Times-Picayune*]

Clayton Act discrimination in services or facilities 15 U.S.C. § 13 (e) per se violation where 1) competition exists, 2) competitors are treated with disparity by 3) dominant service or facility provider. *FTC v. Simplicity* is the first time in the Supreme Court, issues relating to the availability of certain defenses to a prima facie violation of § 2(e), (15 U.S.C. § 13) of the Clayton Act were examined. The Court held that neither 'cost-justification' nor an absence of competitive injury may constitute 'justification' of a prima facie § 2(e) violation. *FTC v. Simplicity Pattern Co., Inc.* 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959)

Clayton Act Interlocking Directorates

Prima Facie § 8 Case. There are four basic elements to a § 8 violation, as set forth in subsection (a)(1):

1. The same person must serve as either a director or officer of two corporations (other than in certain regulated industries, which, as discussed below, are covered by other statutes) at the same time. Under § 8(a)(4), the only "officers" covered are those elected by the board of directors.
2. Both corporations must be engaged, in whole or in part, in interstate commerce.
3. The two corporations must be competitors by virtue of the nature of their business and the location of their operations.
4. Each of the corporations concerned must have net worth aggregating more than \$13,813,000.⁶ In calculating the aggregate net worth, only the corporate entities themselves are considered; the net worth of parents, subsidiaries, and other affiliates is not included.

Hobbs Act Racketeering and Extortion (Proposed amendment to RICO)

MSCI has standing to pursue claims asserted under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 to § 1968. RICO takes aim at "racketeering activity," which includes acts chargeable under state criminal laws and punishable by imprisonment for more than one year, such as murder, kidnapping, robbery, bribery, extortion, or dealing in narcotics. See 19 U.S.C. § 1961(1)(A) (West 1984 and Supp. 2000). RICO makes it unlawful for "any person" to: (1) use money derived from a pattern of racketeering activity to acquire or maintain control of an enterprise, (2) acquire or maintain control of an enterprise through a pattern of racketeering activity, (3) conduct an enterprise through a pattern of racketeering activity, or (4) conspire to do so. See *id.* § 1962(a)-(d).

In addition to imposing criminal penalties, RICO authorizes a private suit by "any person injured in his business or property by reason of a violation of § 1962." *Id.* § 1964(c). Thus, if a defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure a plaintiff in his business or property, the plaintiff has a claim under § 1964(c). See *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985).

MSCI relies on § 1962(b), § 1962(c), and § 1962(d). A violation of § 1962(b) requires: (1) acquisition or maintenance of (2) an interest in or control of (3) any enterprise (3) through a pattern (4) of racketeering activity. See *Medallion TV Enters., Inc. v. SelecTV of Cal., Inc.*, 627 F. Supp. 1290, 1292 (C.D. Cal. 1986). A violation of § 1962(c) requires: (1) participation (2) in the affairs of an enterprise (3) through a pattern (4) of racketeering activity. See *id.* A violation of § 1962(d) requires either: (1) an agreement, the objective of which is a substantive violation of RICO, and (2) awareness of the essential nature and scope of the enterprise and intent to participate in it. See *Howard v. America Online, Inc.*, 208 F.3d 741, 751 (9th Cir. 2000).

MSCI has standing to recover to the extent that, having been injured in business or property by the conduct constituting the violation. See *Sedima*, 473 U.S. at 496. The RICO statute requires no more than this. See *id.* at 497.

Excessive Use of Force, Failure to Train under USA PATRIOT Act (Proposed Amendment to include 42 USC §§1983, 1985)

USA PATRIOT ACT amends the Federal Deposit Insurance Act (12 U.S.C. 1828). This amendment contains the limitation that *an institution and its agents may be civilly liable for any disclosure that is "made with malicious intent."*

Each account refused was a predicate racketeering offense along with Piper Jaffray's extortion of Antigenics, Inc., a business associate of Medical Supply's. Each act of racketeering and terrorism under Count VI; Violation Of Criminal Laws To Influence Public Policy Under Section 802 Of The USA Patriot Act described by Medical Supply are predicate offenses" set out in 18 U.S.C. § 1962, for which there are civil remedies under 18 U.S.C. § 1964 (1982)

The plaintiff's "failure to train and supervise" and "excessive use of force" claims are actionable under 42 § USC 1983 and allowance should be made for the pleading to be amended so it conforms to the defendant's requirements. The plaintiff has shown that the defendants enforced the USA Patriot Act against Medical Supply, that that enforcement was as an agent for the Department of the Treasury and its FINCEN crimes unit. Failure to train and supervise is a settled cause of action under 42 § USC 1983 for improper use of force committed by unprepared employees of the enforcement agency. Acts of private individuals may support an action for liability under 42 U.S.C. § 1983 if the individuals are "willing participant[s] in a joint action with the state or its agents." *Brinkman*, 793 F. 2d at 112; *Dennis v. Sparks*, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).

"The elements of a civil conspiracy are 1) an actual violation of a right protected under §1983 and 2) actions taken in concert by the defendants with specific intent to violate the aforementioned right." *Kerr v. Lyford*, 171 F. 3d 330, 339 (5th Cir. 1999).

The Defendants misappropriated MSCI's Trade Secrets in violation of MSCI's intellectual property rights (Conversion) and K.S.A. 60-3321

1. In an action to enjoin unfair competition arising by reason of the unauthorized use of a trade secret, the plaintiff must establish (1) the existence of a trade secret used by plaintiff in its business or trade, (2) a confidential relationship between the parties, (3) disclosures made in confidence by plaintiff to defendant concerning the trade secret, and (4) an unauthorized use of those disclosures by the defendant.

2. An exact definition of a trade secret may not be possible, but factors to be considered in recognizing a trade secret are: (1) the extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, i. e., by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

3. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

KOCH ENGINEERING COMPANY, INC. v. Wayne C. FAULCONER and Faulcon Engineering 610 P.2d 1094, 227 Kan. 813.

Breach of confidentiality.

Many cases have held that a bank may have a duty to disclose information in its possession to a customer, perhaps even information about another customer. *Barnett Bank v. Hooper*, 498 So. 2d 923, 925-26 (Fla. 1986).

Courts have struggled with the question of whether a bank owes a duty to its customer not to disclose to third parties information learned in the course of banking dealings. For example, the court in *Djowharzadeh v. City Nat'l Bank and Trust Co.*, 646 P.2d 616, 619-20 (Okla. Ct. App. 1982) imposed tort liability on a bank for breaching a duty of confidentiality owed an applicant denied a condominium loan when the wives of the bank's senior executives purchased the bargain-priced condominium five days after the bank denied the regular customer's application to finance the purchase. See also *Jordan v. Shattuck Nat'l Bank*, 868 F.2d 383, 387 (10th Cir. 1989) [under state law, bank had duty to keep information derived from loan application confidential, therefore questions of wrongful disclosure and intentional interference with contractual relationships were jury issues]; *Rubenstein v. South Denver Nat'l Bank*, 762 P.2d 755, 756 (Colo. Ct. App. 1988) [in a case in which defendants told plaintiffs' customer that plaintiffs were having financial difficulty, the court summarized the general agreement of reported decisions,

and stated "a bank has an obligation to its customers not to disclose unnecessarily, promiscuously, or maliciously their financial condition"]; *Steevest, Inc. v. Scansteel Serv., Inc.*, 807 S.W.2d 476, 484 (Ky. 1991) [bank loaning money to shareholder may be liable if it uses shareholder's confidential financial information in financing a competitor].

Breach of Contract Claims

Breach of Written Contract to provide Small Business Banking Services

A written agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

Breach of Oral Contract to provide Escrow Accounts

An oral agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

Oral agreements are enforceable, even if some terms were somewhat indefinite, including the exact amount of the loan, the date of the loan, the rate of interest, or the terms of repayment. *National Farmers Org., Inc. v. Kingsley Bank*, 731 F.2d 1464, 1469-70 (10th Cir. 1984); *Landes Constr. Co., Inc. v. Royal Bank*, 833 F.2d 1365, 1368, 1375 (9th Cir. 1987)

Breach of Written Contract to provide Escrow Accounts

A written agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

Escrow Accounts Outside Of K.S.A. 33-106 Statutes of Frauds

The Kansas Supreme Court has found oral agreements between a customer and a bank relating to escrow accounts do not come under the statute of frauds: "For its sixth issue the Bank argues the agreement (if any) [an oral agreement by bank to credit the proceeds of the future sale of the home (funds in an ESCROW ACCOUNT against the Becker loan) between Becker and the Bank was unenforceable as violative of the Statute of Frauds....The Bank argues the agreement was one 'to answer for the debt ... of another.' Clearly, that was not the agreement." [emphasis added] *BECKER v. BUMAN and ALLEN COUNTY BANK & TRUST*, 721 P.2d 246 at Page 252, 239 Kan. 342 (1986)

Escrow Accounts Outside Of K.S.A. 16-118(a) Statute of Frauds

"Furthermore, there is evidence in the legislative record that the 1989 amendment was intended to make clear that lenders would not be required to sign documents, such as promissory notes, which traditionally only required the signature of the debtor to make such agreements enforceable." *Bittel v. Farm Credit Services Of Central Kansas, P.C.A.* 962 P.2d 491, at 498, 265 Kan. 651, (1998)

Expectation damages including lost profits

A party who seeks to recover his expectation interest in the contract is asking to be given the benefit of his bargain by being put in as good a position as he would have been in had

the contract been performed. Restatement (Second) of Contracts § 344(a) (1981); *Vanderpool v. Higgs*, 10 Kan.App.2d 1, 3, 690 P.2d 391 (1984). Expectation damages usually consist of lost profits plus any incidental or consequential losses caused by the breach. 22 Am.Jur.2d, Damages § 45, p. 69.

In Kansas, "loss of profits resulting from a breach of contract may be recovered as damages when such profits are proved with reasonable certainty, and when they may reasonably be considered to have been within the contemplation of the parties." *Vickers v. Wichita State University*, 213 Kan. 614, 618, 518 P.2d 512 (1974); *Levi Strauss & Co. v. Sheaffer*, 8 Kan.App.2d 117, 127, 650 P.2d 738 (1982).

... a defendant whose wrongful conduct has rendered difficult the ascertainment of precise damages suffered by the plaintiff is not entitled to complain that they cannot be measured with the same exactness and preciseness as would otherwise be possible. *Eastman v. Southern Photo*, 273 US 359 at 378/79, (1926) ... rarely is it possible to demonstrate to any absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass - *Jeanes v. Milner*, 428 F.2d 598 at 605, (8th Cir 1970) cites *Hicks v. US*, 368 F.2d 626 at 632, (4th Cir 1966)

Breach of Contract Warranty

US BANCORP NA has made an express warranty "Five Star Service Guaranty" publishing that it will compensate any customer for the amount of money it takes to reimburse them for their loss. 1) Express warranties are created by the seller when s/he makes promises a/b, describes, or provides models or samples of the goods & the bargain is based in part on those representations. [UCC 2-313] 2) Implied warranties arise from a common factual situation or set of conditions and exist unless explicitly negated [UCC 2-313 comment 1]. Implied warranty of merchantability [UCC 2-314] means goods are fit for their usual purposes, saleable, and conform to representations on the pkg (if any). 3) Implied warranty of fitness for a particular use comes up when buyer depends on seller's expertise that goods will suit buyer's needs. [UCC 2-315] 4) Third parties may be beneficiaries of express or implied warranties – see UCC 2-318.

Promissory Estoppel

Decatur Cooperative Association v. Urban, 219 Kan. 171, Syl. pp 5, 6, 7, 547 P.2d 323 (1976), states:

"The doctrine of promissory estoppel may render enforceable any promise upon which the promisor intended, or should have known, that the promisee would act to his detriment, and which is indeed acted upon in such a manner by the promisee, where application of the statute of frauds to that promise would thus work a fraud or gross injustice upon the promisee."

"Before the doctrine of promissory estoppel can be invoked in a case involving the statute of frauds the promisee must first show by competent evidence that a valid and otherwise enforceable contract was entered into by the parties." *Id.*

"In order for the doctrine of promissory estoppel to be invoked the evidence must show that the promise was made under circumstances where the promisor intended and reasonably expected that the promise would be relied upon by the promisee and further that the promisee acted reasonably in relying upon the promise. Furthermore promissory estoppel should be applied only if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice." *Id.*

"A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show that it rightly relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts. *Iola State Bank v. Biggs*, 233 Kan. 450, Syl. p 4, 662 P.2d 563 (1983). [265 Kan. 663] In order to recover on a theory of promissory estoppel, the Bittels must establish that they entered into an otherwise valid and enforceable contract with P.C.A. in June 1993 to renew their financing. They also must prove that P.C.A. should have known that the Bittels would rely upon this agreement and that the Bittels did reasonably rely upon P.C.A.'s promise. *Bittel v. Farm Credit Services Of Central Kansas, P.C.A.* 962 P.2d 491, at 498, 265 Kan. 651, (1998).

Partial Performance

"Before partial performance can be invoked to escape the operation of the statute of frauds, the contract must be fully made in every respect, except for an actual writing. *Owasso Dev. Co. v. Associated Wholesale Grocers, Inc.*, 19 Kan.App.2d 549, 873 P.2d 212, rev. denied, 255 Kan. 1003 (1994).

Negligent Misrepresentation

Kansas first adopted the tort of negligent misrepresentation as defined in Restatement (Second) of Torts § 552 (1976) *Mahler v. Keenan Real Estate, Inc.*, 255 Kan. 593, 605, 876 P.2d 609 (1994). *Gerhardt v. Harris*, 261 Kan. 1007, 1018, 934 P.2d 976 (1997), stating: "The comments to § 552 show that negligent misrepresentation applies to suppliers of commercial information in favor of users of such information in their commercial transactions." The court later added: "Generally, § 552 includes negligent supply of commercial information to others for guidance in their business transactions." 261 Kan. at 1019, 934 P.2d 976. To permit a claim for negligent misrepresentation, 1) such a misrepresentation must be an affirmative statement of fact 2) upon which MSCI had a right to rely. *Bittel V. Farm Credit Services Of Central Kansas, P.C.A.* 962 P.2d 491 at pg. 501, 265 Kan. 651, (1998)

Fraudulent Misrepresentation

In *Gerhardt*, the court quoted from *City of Warrensburg, Mo. v. RCA Corp.*, 571 F.Supp. 743 (W.D.Mo.1983), which distinguished negligent misrepresentation from a misrepresentation to perform an agreement. The RCA court set forth the comment to § 530, which said in part: "If the agreement is not enforceable as a contract, as when it is without consideration, the recipient still has, as his only remedy, the action in deceit under the rule stated in § 525 [Liability for Fraudulent Misrepresentation]." 571 F.Supp. at 753. The RCA court went on to state: "Unlike § 530, § 552 does not, by its terms,

apply to misrepresentation of intention to perform an agreement. Nor do the illustrations to § 552 apply to other than typical cases of misrepresentation of factual, commercial information. The Comments to § 530 specifically state that where there is no viable action on the [265 Kan. 665] contract, the exclusive remedy for misrepresentation of intention to perform an agreement lies in the action for deceit...". 571 F.Supp. at 753. . *Bittel V. Farm Credit Services Of Central Kansas, P.C.A.* 962 P.2d 491 at pg. 501, 265 Kan. 651, (1998)

The elements of fraudulent misrepresentation are as follows:

1. a false representation is made;
2. which is material to the transaction;
3. which is made with knowledge of its falsity or reckless disregard as to whether it was true or false;
4. with the intention by the person making the representation that the recipient will be induced to act or refrain from acting;
5. which representation is justifiably relied upon by the recipient; and
6. which reliance proximately causes the recipient to suffer damages.

First, in order to be actionable, the representation need not be in the form of a positive assertion. It can consist of anything calculated to deceive, whether by single act or combination, whether by suppression of truth or a suggestion of what is false, and it includes direct falsehoods, innuendos, silence, gestures, etc.

Secondly, an *innocent* representation is actionable where the party making the representation is under some duty to ascertain the truth or falsity of the statement before making the "representation."

Lastly, a representation may be actionable by some third party if that third party's reliance was foreseeable. *Bortz v. Noon*, 698 A.2d 1311 (Pa. Super. 1997)

Fiduciary Duty Jury Instruction

Statement of a Trust Officer's fiduciary duty, if found.

A typical fiduciary duty jury charge might be:

A fiduciary relationship exists whenever under the circumstances trust and confidence reasonably may be and is reposed by one person in the integrity and fidelity of another. A fiduciary is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. A transaction by which the fiduciary obtains an advantage from the beneficiary is presumed to be a violation of the fiduciary's duties.

Trust Officer has the burden of proving by a preponderance of the evidence all of the facts necessary to establish that Trust Officer did not violate its fiduciary duties to

Breach Of Duty Of Good Faith And Fair Dealing.

Kansas courts imply a duty of good faith and fair dealing in every contract. Parties shall not "intentionally and purposely do anything to prevent the other party from carrying out his part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Bonanza, Inc. v. McLean*, 242 Kan. 209, 222, 747 P.2d 792 (1987). In dealing with good faith arguments against lenders by borrowers, we have stated the test of good faith is subjective and requires only honesty in fact. *Karner v. Willis*, 238 Kan. 246, 249, 710 P.2d 21 (1985). The traditional rule is that the lender-borrower relationship creates no special duty. *Denison State Bank v. Madeira*, 230 Kan. at 695, 640 P.2d 1235. We have followed this rule, imposing liability on financial institutions only in those instances involving fraud and conflicts of interest. See Rossi, Lender Liability in Kansas: A Paradigm of Competing Tort and Contract Theories, 29 Washburn L.J. 495, 503-05 (1990) (comprehensive review of Kansas lender liability cases). *Paul v. Smith*, 191 Kan. 163, 170, 380 P.2d 421 (1963) ("agreements establishing fiduciary relationships, if not in writing, must be clear and convincing").

Bad Faith

Litigating Defenses To Enforcement That Are Without Merit

Commercial Cotton Co. v. United Cal. Bank, 163 Cal. App. 3d 511, 516, 209 Cal. Rptr. 551 (1985) [bank liable for "stonewalling" assertion of an invalid defense to customer's lawsuit]

Tortious Interference With A Contract

Under common law, intentional interference with contractual relations gives rise to a tort action if it is malicious or without justification. See *Stratmore v Goodbody*, 866 F2d 189, (6th Cir KY 1989) denied 490 US 1066 Proof of motive for wrongful conduct is not essential to recovery for tort. See *L&N RR v Thomas*, 183 SW2d 19, (KY 1944)

... malice is imputed where wrongful act evidenced entire want of care or great indifference to consequences and rights of others *RB Tyler v Kinser*, 346 SW2d 306, (KY 1961)

... Justice Holmes described this form of malice as follows: "if the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally. . . . "Holmes, Privilege, Malice, and Intent, 8 Harv L Rev. 1, at 1 (1894) as quoted in 49 U CHI LR 61 at p. 94 . . . Malice required for intentional interference with prospective contractual relations may be inferred by proof of lack of justification.= *NCAA v Hornung*, 754 SW2d 855, (KY 1988)

We conclude that tort liability exists in Kentucky for the malicious interference with known contractual rights of another when special damage results therefrom, at least when accomplished by some unlawful means such as fraud, deceit or coercion. [citation

omitted] We would place the breach of a fiduciary or confidential relationship on a par with fraud and deceit. The pleadings sufficiently charge the tort of malicious interference with known contractual rights of another through the use of unlawful means. *Henkin v Berea Bank & Trust Co.*, 566 SW2d 420, (Ky App. 1978), *NCAA v. Hornung*, 754 SW2d 855 at 858 (KY 1988).

(6) The most important or key factual issues and legal issues that are believed to be involved in the case in light of the above-referenced essential elements

The Plaintiff's Key Factual and Legal Issues:

The plaintiff believes there are no open factual or legal issues in this matter. The facts required for defendants' liability on the above stated claims are already in the record as evidence at this date. The defense has not denied any fact required to find for the plaintiff on any of the currently stated claims. The sole defense to any of the above claims is legitimate "business justification" that promotes competition in the relevant market place and overpowers the fiduciary duty owed by the defendants to the plaintiff.

The defendants have not provided any evidence that contradicts evidence proffered by the plaintiff that the "business justification" was 1) pre-textual and 2) a deliberate misrepresentation of "know your customer" costs that did not in fact exist under the USA PATRIOT Act (the reason repeatedly stated and clarified in recorded conversations) and finally, the defense never asserted a pro-competitive justification as required.

After numerous motions, pleadings, briefs and affidavits by the plaintiff stating the absence of a pro-competitive justification and the consequent failure of any legal defense to the plaintiff's antitrust claims, which were responded to by the defendants as a group in motions, hearings, appellate motion defenses, an appellee brief and three motions to dismiss the court cannot now entertain a raising of a pro-competitive justification by a current defendant party.

The plaintiff anticipates that there will be new factual and legal issues as other defendants are added. Furthermore, the current defendants as well as future defendants have the opportunity to challenge factual and legal assertions related to the damages.

The Defendants' Key Factual and Legal Issues:

(7) A breakdown of damages sought

The anti-trust actions taken by US Bancorp and its affiliates have resulted in devastating losses to healthcare. MSCI is suffering short and long-term losses, through injury to the corporation, its stakeholders, associates, suppliers and more than 2000 hospitals. In addition the public has suffered injury and loss of life which are not recoverable. MSCI's loss in reasonable and foreseeable expectation injuries through delay and denial of

services exceed the financial resources of the majority of the defendants and defendant entities.

In addition to revenue losses, MSCI is suffering from injury to its collateral commitments and obligations, which it is unable to meet as a result of anti-trust actions taken by US Bancorp and its affiliates. According to MSCI's misappropriated forward financials dated November 2002, which were in the possession of US Bancorp and its affiliates at the time of the breach and anti-trust actions; the lost profits directly resulting are \$250 Million. Due to MSCI commitments and obligations to its stakeholders, an additional \$250 Million in asset appreciation and expected return on their investment.

As a direct result of the injury to MSCI, its associate/representatives also are damaged due to the anti-trust actions of US Bancorp and its affiliates. According to MSCI's misappropriated forward financials dated November 2002, the associate/representatives losses equal \$48 million dollars.

As a direct result of the actions taken against MSCI by US Bancorp and its affiliates, MSCI's business consultant and supplier associates have been injured in MSCI's inability to fulfill success agreements and service contracts. MSCI business consultants and suppliers have performed several hundred hours in services and created value added intellectual property of value only to MSCI for performance in the denied relevant market, all in reliance on MSCI's expectations contained in the November 2002 business plan and its corporate and personal commitments. These obligations are contractually due and MSCI is unable to meet its obligations as a result of the antitrust injury. These monetary losses are \$6.5 Million.

MSCI has been injured in the loss of reputation through the inability to meet the expectations of hospitals that were dependent on the web based electronic market model and in the antitrust/RICO concept that an injury to a business associate is an injury to the plaintiff. The direct result of MSCI losses and inability to perform its services to customer hospitals are the savings and additional revenue MSCI generates for its customers through its services. Losses to the MSCI identified class of customers described in its November 2002 business plan are directly due to the anti-trust actions of US Bancorp and its affiliates and are 20% of the total spend these health systems suffer annually. The misappropriated forward financials that were in the possession of the defendants show this amount to be \$1.7 Billion.

Total Actual Damages As of April 21, 2003

The above claims reflect the losses suffered by MSCI, its business associate stakeholders, associate/representatives, suppliers and customers. To date, damages are \$1.7 Billion dollars.

Punitive Damages

The plaintiff plans to file a motion for leave to amend the complaint to include punitive damages once the initial phase of discovery is sufficiently progressed to have obtained the evidentiary attachments.

Antitrust Treble Damages

MSCI is seeking damages under claims for antitrust injury, as such the above actual damages, and final fees and costs will be trebled.

Attorney's Fees As of April 21, 2003

The plaintiff's current trial court level fees are \$113,750

The plaintiff's current appellate level fees are \$163,800

Authorities for Damages

Bank Malfeasance

How reasonably foreseeable consequences to bank malfeasance are treated when the bank had knowledge or should have known of the implications of its harmful act is indicated in *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910 (Mo App 1994).

New Business Profits

Medical Supply Chain, Inc. had a high level of national market viability. MSCI can prove its lost profits and value with reasonable certainty. See generally Roger I. Abrams, Donald Welsch, & Bruce Jones, Stillborn Enterprises: Calculating Expectation Damages Using Forensic Economics, 57 Ohio St. L.J. 809 (1996) (criticizing the "new business rule" and indicating the proofs that are needed to support this kind of claim). As those authors concluded, "The key judicial finding [is] the market viability of the stillborn enterprise." *Id.* at 834. See also Bollas, The New Business Rule and the Denial of Lost Profits, 48 Ohio St.L.J. 855 (1987). Instead of a strict bar on such claims, many courts now hold that, regardless of whether a business is new or is established, lost profits can be recovered if it is possible to show by competent evidence and with reasonable certainty that profits would have been made and the amount of those profits. 22 Am.Jur.2d Damages § 627.

Westric Battery Co. v. Standard Elec. Co., 482 F.2d 1307 (10th Cir. 1973), "[i]t is conceivable that there could be capital loss shown in addition to out-of-pocket expenses and loss of profits." *Id.* at 1317

Lost future profits may be used as a method of calculating damage where no other reliable method of valuing the business is available, see *Albrecht v. The Herald Co.*, 452 F.2d 124 at 129 (8th Cir. 1971) cited for this purpose by 10th Cir.

Antitrust Lost Profits

US Bancorp Piper Jaffray is the unusual monopolist who made and published an exhaustive expert study concluding Medical Supply Chain's form of web based hospital supply Electronic marketplace would have an \$83 Billion dollar market and that it would eliminate \$23 Billion dollars in price inefficiency. Medical Supply Chain's forward financials were authoritative and understated. The evidence indicates that US Bancorp and its affiliates were convinced of MSCI's viability and took steps to kill it.

Antitrust/RICO Customer, Business Associate Injury as Plaintiff Damage

RICO civil standing is not limited to only the immediate victim of a defendant's RICO violation. *Zervas v. Faulkner*, 861 F.2d 823, 823, 833 (5th Cir.1988) ("A requirement that the nexus between the injury and a predicate act be 'direct' may ... be overly restrictive.")

Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc., 18 F.3d 260, 263 (4th Cir.1994) (rejecting adoption of a rule that only injuries suffered by the immediate victim of a predicate act satisfy the "by reason of" requirement of § 1964(c)). In *Mid Atlantic*, a plaintiff telephone company accused one of its competitors of violating RICO by defrauding its customers with fictitious charges, enabling it to charge lower rates to entice new subscribers. The plaintiff company alleged that it lost revenues from subscribers who were defrauded into accepting the fraudulent lower rates of the defendant company. The Fourth Circuit **rejected the argument that the plaintiff company lacked standing because the customers were the directly injured parties and only they were proximately injured by its alleged misconduct.**

"...loss of other employment opportunities was foreseeable by the defendants and could certainly be anticipated as a natural consequence of their alleged misrepresentations, Khurana has sufficiently pleaded that the alleged substantive violations of § 1962(b) and § 1962(c) proximately caused his business opportunity loss." *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 at 153(C.A.5 (La.), 1997)

3. Plan for Pre-Discovery Disclosures

Plaintiff Designation Of Date Defendants Had Reasonable Notice That Litigation Is Imminent For Document Preservation Requirements

Defendants knew or had reasonable notice litigation regarding the escrow accounts was imminent: OCTOBER 15th, 2002.

If a defendant is reasonably on notice that litigation has begun or is imminent, it would be a profound tactical mistake to destroy documents. If a company knows or should know that certain records may eventually become relevant in litigation, it must preserve them. When litigation is pending or imminent, usual procedures for electronic data destruction or recycling may have to be suspended. *In re Prudential Sales Practices Litigation*, 169 F.R.D. 598 (D.N.J. 1997).

Plaintiff Pre-Discovery Disclosures

Plaintiff Experts

In the appendix, the Plaintiff identifies and provides resumes of its preliminary designation of experts.

Plaintiff identifies Cheryl Woodall as the enterprise software forensic expert for purposes of the electronic discovery plan.

Plaintiff requested pre-discovery disclosures

Plaintiff requires all insurance policies, limits and payment status relevant to the defendants actions including errors and omissions of the trust officers and legal malpractice for the trust department counsel, Kristin Strong.

Plaintiff requires all insurance policies, limits and payment status relevant to the defendants' legal counsel including the firms Dorsey Whitney and Shughart, Thomson, and Kilroy for malpractice. (Plaintiff has reason to believe these policies are being used as a partial surety by the defendants and may have a direct claim related to the assertions and conduct of the defense.)

Plaintiff requires a list of the customer entities and corporate officers for accounts and services provided medical suppliers and distributors listed in the appendix from each defendant.

4. Plan for ADR

- a. The parties agree that ADR would not serve a useful purpose in this case.
- b. To date, the parties have engaged in the following good faith efforts to resolve this matter:
 - 1. The plaintiff attempted to explain the inapplicability and suspension of the USA Patriot Act given as a reason for breaking the escrow account by the defendants.
 - 2. The plaintiff sought to compromise and have the contract for 10 escrow accounts honored instead of litigating before filing its complaint.
 - 3. The plaintiff attempted to have a voluntary agreement to a court order barring USA Patriot Act reporting but the defendants prior to the hearing for preliminary injunctive relief rejected it.
 - 4. The plaintiff offered to make available experts for mutual discovery over the academic holiday weekend. Offer refused by defense.
 - 5. The plaintiff contacted The Royal Bank of Canada and offered to flexibly resolve its claims against Piper Jaffray. RBC decided not to purchase Piper Jaffray.
 - 6. The plaintiff contacted A.G. Edwards and offered to flexibly resolve its claims against Piper Jaffray. A.G. Edwards decided not to purchase Piper Jaffray.
 - 7. The plaintiff attempted to settle Piper Jaffray's portion of the damages but received no response.
- c. The parties have agreed on the following alternative dispute resolution procedure: None*

* Plaintiff now on information and belief understands the monopoly profit depended upon by the defendants was at all times far in excess of the risk of a judgment posed by this action. As a consequence, plaintiff will make no further settlement attempts.

5. Plan for Discovery

THE ELECTRONIC DATA DISCOVERY PLAN

This action concerns several antitrust and racketeering claims involving many separate defendants and third party corporations in addition to contract and fiduciary duty clauses of action. The industries of the defendants and the specific relevant and related markets of the antitrust claims rely almost exclusively on electronic documentation and their regulatory and business practices environments require that the electronic documentation is fully archived. The defendant and third party corporate institutions and their officers have left data trails behind them that are infinitely detailed and far more accessible than they would have been as little as five years ago. These circumstances enable the claims to be decisively proved or disproved after a careful weighing of abundant evidence. To minimize the expense and time required by the parties and the court in this process, the following electronic data discovery plan is proposed.

The first step of the electronic data discovery plan is to **Map Out** the locations where information relevant to the claims is to be found. Following the mapping of locations data universe which is expected to be the equivalent of between 10 and 30 million documents distributed among the defendants, plaintiff and third party customers, vendors or suppliers; this plan implements a proposed DATA PRESERVATION ORDER. Under the terms of the proposed order, proactive monitoring of preservation tasks and the status of data repositories is reported periodically at regular **Rule 16 Conferences**.

Once the relevant data has been identified, located and preserved, the next step is for the parties to conduct **Discovery Requests And Review**. A critical part of minimizing the time and costs to the parties is for all documents and data to be delivered to the opposing parties in electronic form if the data was originated in an electronic medium and if it was at any time converted into electronic form. To safeguard against unintentional forfeiture of privilege while keeping the exchange of data as fast as possible, this plan includes a proposed INADVERTENT WAIVER PROTECTION ORDER. Finally, the last step involves preparing evidence for hearing and concerns **Trial Issues** of authentication. This plan requires counsel for both parties to archive the original version or authentic copy of data delivered in discovery so that authentication controls will be in place at trial.

MAP OUT

Rule 26(a)(1) provides a party must, without awaiting a discovery request, provide to other parties: "A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the party will use to support its claims and defenses, unless solely for impeachment, identifying the subjects of the information;.." This requirement means that a company must search available electronic systems for relevant information even prior to a discovery request. *McPeck v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C. 2001)

These disclosures must be made at or within 14 days after the Rule 26(f) conference, at which the parties meet to discuss settlement and a discovery plan. Although this time restriction can be amended by stipulation or court order, Rule 26(a)(1) is clearly designed to encourage early disclosure of important information supporting a party's claims or defenses. Accordingly, parties must have efficient procedures in place to preserve and retrieve relevant documents and data at the outset of litigation.

This plan utilizes the parties' existing RRP's or Retention Requirements Plan as a guide to find the locations of relevant data and implement preservation measures required in the DATA PRESERVATION ORDER. The corporation entities have had the responsibility of implementing a corporate records management program. In addition, the corporation working with outside counsel may have already developed a discovery response program that includes specific procedures for handling electronic discovery requests. The RRP's will be used to identify caches of relevant electronic data, described below, and how to extract information from them.

The corporation entities existing RRP's:

- Set the term for retaining documents, which should reflect applicable statutory and administrative limitation retention periods, or other applicable laws.
- Establish uniform indexing procedures to enable rapid recovery of relevant information from the archives.

The Map Out phase requires disclosure of persons who are familiar with their corporation entity's Information Technology department and external contractors who maintain the entity's data, including equity ownership registries for stock ownership. Once identified, the parties can pursue 30(b)(6) discovery of the corporate officers knowledgeable about electronic document storage and document retention policies at this early phase of litigation. These depositions will be used to provide substantive information about systems and document management protocols, shaping further discovery. *See, e.g., Carbon Dioxide Industry Antitrust Litigation*, 155 F.R.D. 209, 214 (M.D. Fla. 1993) (depositions to acquire information about defendants' computers were necessary to proceed with substantive discovery); *Alexander v. FBI*, 188 F.R.D. 111 (D.D.C. 1998)(deposition about e-mail systems facilitated substantive discovery).

The RRP's are the preliminary guide to this plan's Map Out process. The depositions and/or internal investigations by defense counsel will be used to determine the chasm between corporate entities' document retention policies and manuals and how executives and key witnesses understand and apply those policies.

Compliance with the DATA PRESERVATION ORDER will require each defendant corporate entity to identify, list and maintain the electronic information that resides at various places within the defendant organization and its business affiliates, customers, vendors, and suppliers. The corporate entities are required to have familiarity with these locations, described below, and how to extract information from them.

Electronic Data discovery requests will seek relevant data from and about the following:

- **System users and administrators.** The system administrators and relevant system users will be asked how, when and where information is stored, and why it is stored in that manner -- for example, how files are named, password-protected and encrypted.
- **Personal computer and server hard drives.** Information will be extracted from PCs and servers. For PCs, the preferred extraction method is to create a bit-by-bit image of their hard drives. Failure to follow this procedure, such as by employing a simple unerase or disk-copying utility, may lead to destruction of data, claims of spoliation and sanctions.
- **Telephone And Cell Phone Records** You have cell phones and their call logs and Palm Pilots. You have browser-based applications. Do you have to get cookie files and personal history files? In certain parts of the world, you may outsource communications.
- **Network backup tapes.** Backup tapes of server data are regularly archived in case of a server or system failure. The system administrator typically follows a backup-tape recycling rotation schedule in which tapes are overwritten after a certain period, typically two to four weeks. As discussed above, the rotation schedule should stop once litigation is commenced to preserve possibly relevant information.
- **Internet server data and Internet visit data, such as cookies.** These data can help administrators trace someone's Internet usage trail. The trail may be reconstructed from server logs and other trace evidence, such as cookies. You have browser-based applications. Do you have to get cookie files and personal history files?
- **Embedded chips and PDA devices.** Relevant data can often be found in voicemail systems, dictaphone systems, EZ Pass, and Palm Pilots and other personal digital assistants.
- **Databases -- spreadsheets, e-mail and other dynamic systems.** Database printouts frequently do not accurately represent the system data available to and/or used by the user. Computer code under each field or cell may affect the presentation of data to the viewer and what is actually printed. This may be important if the database's operations -- how it functioned and processed information -- is relevant to the proceeding. If that is the case, examination of the code under each field or cell will be necessary.
- **Meta data.** Meta data is embedded data. For example, many word processors store information about a document that is not readily apparent from the face of the document, such as the author or the time it was last accessed or modified. Likewise, the specification (international standard) for e-mail enables e-mail to be exchanged between different systems. The specification identifies about 30 fields, but the sender and recipients typically see only a few fields -- to, from, subject, date and headline. The sending e-mail system may contain more information such as time sent or blank copies -- "bccs." This information, particularly bccs, could be critical in this litigation.

- **System logs.** Many computers and servers have their own "audit trail" software that traces user action and inaction on the system. Some track user identities, passwords and access times.

- **File slack -- deleted and encrypted files.** Files are stored in "allocated" space. Deleted files typically reside in unallocated or "slack" space. Computer forensics can recover deleted files even if they have been overwritten many times. Comparison of deleted files with the printed or current electronic versions of the file may reveal evidence of tampering or alteration. Encrypted files require a deciphering key to access the data.

Authentic Copies Of Electronic Information

Data that is not captured properly may not be admissible in evidence. What constitutes an authentic copy of electronic data? Most courts allow duplicates, subject to a proper foundation, which is premised on the data's being authentic. Federal Rule of Evidence 1001(3) defines "original" computer data as "any printout or other output readable by sight, shown to reflect the data accurately. ..." Rule 1001(4) further defines "duplicate" as "a counterpart produced by the same impression as the original, or from the same matrix ... or by mechanical or electronic re-recording ... or by other equivalent techniques which accurately reproduces the original."

The copying process must be exact and complete; the data must be capable of independent verification as a duplicate of the original (accomplished through algorithmic electronic file comparison, which creates an identifying number that will match the original with the copy); and the data must be tamper-proof so as to protect against alteration of the data between copying and presentation in court (the IT specialist should write-protect the data, run virus checks and document the secure transport and storage of the data).

RULE 16 CONFERENCES

One of the most useful management tools for electronic discovery is the Rule 16 pretrial conference. Topics for discussion at the conference may include: preservation of evidence (including whether backup, archival and "deleted" files will be exchanged), preliminary disclosures as to the parties' computer systems (including numbers, types, and locations of computers, operating systems in use and backup schedules), document processing and production formats, testifying experts and anticipated evidentiary disputes.

As with the Rule 26(f) meeting, counsel must be armed with all of the salient facts regarding all electronic evidence that is relevant to the case. Being fully prepared at a Rule 16 conference may help limit the scope of discovery of the client's data while maximizing the disclosures from opposing parties. The court may be educated by expert testimony as to the nature, location and volume of electronic data, as well as the time and cost involved in producing it.

DISCOVERY REQUESTS AND REVIEW

Parties will incrementally approach electronic discovery by fashioning their request as narrowly and reasonably as possible. Electronic discovery takes place like a ladder. The first rung or two are narrow requests that will not give rise to defenses about the expense and burden.

After the Rule 26 disclosures, attorneys may acquire more in-depth information or additional electronic data through a combination of interrogatories, requests for documents, and depositions. Requests should be carefully crafted to seek the data relevant to the claims and defenses in the matter. A request for "all electronic data" will likely result in an objection based on burden or expense, and courts often will not allow a "fishing expedition." Therefore, discovery requests must be specific and exhibit an understanding of how electronic data are created, stored and destroyed.

The same criteria used in disclosing client data under the Rule 26 initial disclosure provision can be used to formulate effective interrogatories. The response to those interrogatories should provide a road map for a follow-up request for documents or subpoena duces tecum. If the response does not provide a road map, there are plenty of cases to support a motion to compel.

Understanding all the advantages and potential pitfalls of electronic evidence is very important. Though electronic searches may be easier and faster than reviewing hard copies, the sheer volume of electronic documents can lead to mistakes. In a few million electronic pages of data, for example, it is relatively easy to miss an e-mail between you and your own client, inadvertently waiving the attorney-client privilege.

FRCP 34 authorizes requests for production of documents, including "electronic data compilations." FRCP 34(a). It is now black letter law that computerized data is discoverable if relevant. *Anti Monopoly, Inc. v. Hasbro, Inc.*, 1996 U.S. Dist. LEXIS 16355, 1996 WL 22976 (S.D.N.Y.). Computer records, including those that have been "deleted," are discoverable documents under Rule 34. *Simon Property Group v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000).

Courts routinely grant requests for electronic production, even when the same information has been produced in hard copy. *Anti-Monopoly, supra*. Courts recognize the necessity and efficiency of production in electronic form, and have applied the federal rules' mandate of just, efficient and inexpensive resolution of disputes to require electronic production.

If a requesting party will otherwise incur unnecessary expense, paper will not substitute for computer-readable discovery. *Storch v. IPCO Safety Products Co.*, 1997 U.S. Dist. LEXIS 10118, 1997 WL 401589 (E.D. Pa. 1997) (defendant required to produce electronically rather than impose upon plaintiff the cost of re-inputting data to allow computer analysis); *In re Air Crash Disaster at Detroit Metropolitan Airport*, 130 F.R.D. 634 (E.D. Mich. 1989) (party compelled to re-create computer-readable tape though it had already produced printouts).

TRIAL ISSUES

To be admissible, e-mail and other electronic evidence must be authenticated, and the evidence must clear any hearsay hurdles. Computer records may be admitted under the business records exception to the hearsay rule. However, the Federal Rules of Evidence require the party offering a computerized record to prove it was created "at or near the time" of the transaction, act, or event recorded in order to qualify as a business record exception to hearsay.

THE DEPOSITION PLAN

Plaintiff suggests all non-named party depositions take place through video conferencing with audio and video recording.

THE THIRD PARTY PRACTICE PLAN

Plaintiff will notify defense of all third parties sought to be subpoenaed for business records. Plaintiff will notify defense at the point when evidence indicates a third party might properly be a defendant.

Plaintiff will not permit assertion of representation of third parties unless prior relationships are disclosed and documented. Plaintiff will seek to suspend this action and initiate an action against any law firm for the purpose of obstructing discovery and delaying justice.

THE PLAN FOR PRIVILEGE DETERMINATIONS AND REDACTIONS

Trial Preparation Materials

Medical Supply Chain, Inc. is a party under a substantial hardship and cannot obtain the substantial equivalent of the following relevant information in which it is in substantial need of. Medical Supply Chain, Inc. is an antitrust plaintiff and as such avails itself of the statutory policy requiring the defendants to produce the relevant evidence.

All things prepared by defendants and defendant's representatives in preparation for or anticipation of the:

1. Current action against Medical Supply Chain, Inc., Sam Lipari, Ed Engel or Bret D. Landrith
2. Current or recent actions, demands, negotiations against US Bancorp Piper Jaffray for "laddering" schemes manipulating the price of post IPO stock issues of technology companies, in collusion with US Bancorp customers and fund managers.
3. Recent actions against defendants for failure to supervise or train as components to regulatory agency, criminal or private party civil complaints. *

***On November 6, 2002, U.S. Bancorp Piper Jaffray was fined \$100,000 for failing to properly supervise a securities employee or to have adequate systems in place to detect or prevent fraud schemes like the one that was the subject of the fine that**

lasted from 1998 to 2001, noting that the brokerage had one supervisor responsible for more than 70 branch managers.

4. US Bank banking privacy act violations and proposed class action settlement
5. US Bancorp Piper Jaffray NASD securities violation enforcement proceeding for extortion of Antigenetics, Inc.
6. US Bancorp Piper Jaffray's Chief Executive Officer's NASD securities violation enforcement proceeding for extortion of Antigenetics, Inc.
7. US Bancorp Piper Jaffray's civil action by Antigenetics, Inc.
8. US Bancorp Piper Jaffray state attorney general securities violation enforcement proceedings or letters of inquiry
9. US Bancorp Piper Jaffray NASD securities violation enforcement proceeding for destroying email and other records*

***On December 3, 2002 Securities regulators found U.S. Bancorp Piper Jaffray guilty of violating SEC Rule 17a-4 by failing "to preserve for three years, and/or to preserve in an accessible place for two years" such office memoranda as e-mails related to their exchange, brokerage or dealer businesses. U.S. Bancorp Piper Jaffray agreed to pay \$1.65 million in fines. The Plaintiff planned to use this evidence to prove its antitrust claims.**

10. US Bancorp, US Bancorp Piper Jaffray SEC, NASD, Spitzer NY AG securities conflict of interest violation enforcement proceeding proposed settlement
11. US Bancorp, US Bancorp Piper Jaffray agreements or settlements with Premier, Inc, and its corporate officers
12. US Bancorp, US Bancorp Piper Jaffray agreements with Novation, Inc., and its corporate officers
13. US Bancorp, US Bancorp Piper Jaffray agreements with Neoforma, Inc., and its corporate officers

Identities and role of all persons acting for the defendants or their representatives, witnesses, experts, and persons acting for opponent parties in the above matters.

Rule 26(b)(5) Asserted Privilege claims

Asserting parties description of nature of documents, communications, or things in a manner that, without revealing information itself privileged or protected, will enable the other parties to access the applicability of the privilege or protection due 00/00/00

Parties objecting to discovery on the basis of the attorney-client privilege bear the burden of establishing that the privilege applies. To carry the burden, they must describe the documents or information to be protected, state precise reasons for the objection to discovery, and provide sufficient information to enable the court to determine whether each element of the asserted privilege is satisfied. A blanket claim as to the applicability of a privilege does not satisfy the burden of proof.

Under the facts of this case, where a public agency claimed various exemptions under the Kansas Open Records Act on the basis of attorney-client and other privileges, it was not erroneous or an abuse of discretion for the trial court to require the preparation of a

privilege log like that permitted under Federal Rule of Civil Procedure 26(b)(5) as part of the burden of proving the claims of privilege and exemption.

Under the facts of this case, after finding the City of Overland Park's privilege log was clearly insufficient, the trial court did not abuse its discretion in ordering the City to produce unredacted copies of all of its 1996 attorney fee billing statements of outside legal counsel. See *Cypress Media v. City of Overland Park*, 997 P.2d 681 (Kan., 2000)

In Camera proceedings to redact per Cypress Media due 00/00/00

6. Deadlines for Amendments and Potentially Dispositive Motions

June Suspension For US Senate Hearings

Sam Lipari and his counsel, along with some designated experts will be testifying in Washington D.C. concerning the investment banking circumvention of the healthcare supply safe harbor by US Bancorp NA and its effect on the industry and America's healthcare infrastructure. MSCI will be unable to comply with most discovery during this period.

Amendment to Include Additional Parties (No Deadline)

While federal courts normally allow for liberal amendment of pleadings during the course of discovery, the antitrust nature of this case increases the court's impetus to allow amendment of pleadings to include additional parties as required by Title 15, Chapter 1, Sec. 5 stating:

"Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof"

Amendment to Include Restatement of Causes of Action prior to Discovery Commencement (May 6th, 2003)

Plaintiff shall amend stated causes of action to the identified new claims. No additional copy of Amended pleading will be turned into the court and the new pleading will retain voided body text with a single line strike. To avoid confusion, the old paragraph numbering will not be retained.

Amendment to Include New Causes of Action and or Parties (As warranted)

Defendants' Motions to Dismiss (Filed March 27th)

Plaintiff's Motion to Dismiss Defenses (at pre discovery closing of pleadings)

Amendment to include Punitive Damages (motion for leave to amend to filed 120 days into discovery)

7. Follow on Preliminary Injunctive Relief and Debtor Injunctive Relief requests

Appeal Remand Evidentiary Hearing (If required)

Plaintiff's witnesses: Jerry A. Grundhofer, Andrew Cesere, Susan Paine, Lars Anderson, Brian Kabbes, Nancy Hainje, Doug Lewis, Piper Jaffray Chief Counsel and affiant, US Bancorp NA's CFO, Sam Lipari

Plaintiff requests jury as hearing fact finder*

Preliminary Judgment Debt Injunction

Plaintiff requires Preliminary Injunction Hearing on orders to prevent defendants from escaping judgment. US Bancorp has demonstrated financial desperation 1) it is unable to secure junk bonds this fiscal year to underwrite the acquisition of additional bank chains (a modus operandi that has enabled it to escape a consistent basis determining its ROI) 2) it was unable to sell Piper Jaffray at a 150 million dollar loss to escape the growing litigation liability and regulatory fines, and now is attempting to jettison it through a stock spin off in the face of a very weak IPO market and now having to certify the offering under Sarbaines-Oxley 3) it was forced to sell \$500 million dollars of notes in the first quarter of 2003 on private markets because of its excessive bad loan risk exposure 4) US Bancorp has consistently overstated its employee pension investment expectations to a degree that violates fiduciary responsibility and conceals the bank holding company's financial ill health.

Evidentiary Hearing (If required)

Plaintiff's witnesses: Jerry A. Grundhofer, Andrew Cesere, Susan Paine, Lars Anderson, Brian Kabbes, Nancy Hainje, Doug Lewis, Piper Jaffray Chief Counsel and affiant, US Bancorp NA's CFO, Sam Lipari

Plaintiff requests jury as hearing fact finder*

Preliminary Injunction Against Spin-Off of Piper Jaffray

Plaintiff requires Preliminary Injunction Hearing on orders to prevent defendants from spinning off Piper Jaffray to avoid a large percentage of the liability for the claims of this action. Defendants have announced detailed plans and have started to affect the initial public offering of securities for Piper Jaffray. The plan involves stripping Piper Jaffray of its sole viable asset, its large sales force and leaving it with the only productive asset being its discredited stock research and analysis division.

The core value of Piper Jaffray when it was an independent second tier investment-banking house was its research and analysis division and its unique industry reputation for sound, objective analysis. After US Bancorp NA acquired Piper Jaffray, it engaged in fraudulent misrepresentation of its research to cheat its investment customers, it has attempted to plea bargain and settle with regulatory agencies for this misconduct and spoliation of incriminating evidence, however this asset no longer has any value in selling trustworthy advice to assist customers in choosing investments.**

US Bancorp NA has stated plans and is acting with the intent to burden the spin off with tremendous debt for capital already consumed by US Bancorp. This debt places US

Bancorp NA as senior obligee. The plaintiff believes there is no reasonable expectation that this spun off Piper Jaffray will be a viable entity capable of paying its individual share of a judgment to MSCI that will likely be in excess of \$1 Billion dollars. The plaintiff believes the defendant's intent is to "tube out" Piper Jaffray to avoid a large part of the impending judgment.

Evidentiary Hearing (If required)

Plaintiff's witnesses: Jerry A. Grundhofer, Andrew Cesere, Susan Paine, Lars Anderson, Brian Kabbes, Nancy Hainje, Doug Lewis, Piper Jaffray Chief Counsel and affiant, US Bancorp NA's CFO, Piper Jaffray IPO Lead Underwriter CEO, Piper Jaffray IPO auditor CEO, lead counsel for Piper Jaffray IPO legal consulting firm and Sam Lipari
Plaintiff requests jury as hearing fact finder*

* The Seventh Amendment (right to jury trial) does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law. When Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, as in the enforcement of antitrust laws through statutory specified injunctive relief, and where there is obviously no functional justification for denying the jury trial right, a jury trial must be made available if the action involves rights and remedies of the sort typically enforced in an action at law. *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), at 194-195, 94 S.Ct. at 1008.

**Prudential Securities was able to continue to exist after a similar breach of customer confidence. However, it did so with extreme expenditures in restorative public relations that exceeded Piper Jaffray's total historic cumulative advertising spending. Prudential Securities also maintained its sales force and enjoyed having the vast majority of its business and clients driven to it by Prudential Insurance's very large insurance agent sales force.

8. Pre-Trial scheduling and Trial

Appendix

I. PROPOSED ORDER FOR PROTECTION AGAINST INADVERTENT WAIVER

Inadvertent waiver protection order

The parties agree large document productions raise the potential for inadvertent production of privileged information.

The parties agree to institute controls, using technology, bookmarking privileged documents, running searches for key terms frequently appearing in privileged documents and instituting internal layers of review to minimize the risk of inadvertent disclosure. However, in recognition that such disclosures may occur despite a party's best efforts, counsel agrees to institute the present confidentiality agreement in which each side agrees to return privileged documents inadvertently produced.

Signature Plaintiff
Signature Defendants

- whether the privilege issue requires the redaction of the electronic discovery

II. PLAINTIFF PROPOSED SPOILIATION PREVENTION STIPULATION

Data Preservation Order

One of the most important issues in this action's electronic discovery is data preservation.

E-mail and electronic files are abundant, much of the data resides on backup tapes, which are frequently recycled, or on individual hard drives, on which data are altered and overwritten with each use. Now that litigation has initiated, the parties agree to protect against a potential spoliation accusation.

The parties agree to immediately halt all electronic document-handling policies that result in the recycling of tapes or other e-data destruction that may destroy potentially relevant files. Data destruction must cease at all locations of all parties.

Attorneys agree that the data on the hard drives of named individual defendants and key people be preserved through the use of mirror-imaging technology, which freezes the data in snapshot fashion. In addition, the attorneys agree preservation letters will be sent to all parties and nonparties in possession of potentially relevant data. The attorneys will prepare a preservation order draft by May 16th, 2003. As the case moves forward, the parties agree to monitor compliance and report current status and list of hard drives under effect each 60 days.

Plaintiff agrees not to pursue spoliation sanctions for US Bancorp Piper Jaffray's destruction of e-mail relevant to this case identified in the plea bargain to the SEC and NASD providing 1)all documentation related to the settlement and fine is delivered to the plaintiff , 2)the defense ceases to use the absence of e-mail records for the defined period subject to settlement to refute MSCI's claims as it did in it 10th circuit motion reply, 3) US Bancorp Piper Jaffray stipulates to this proposed order and participates fully in the monitoring requirement.

The parties further agree that further spoliation will result in sanctions at the discretion of the court including adverse inferences or presumptions (at either the case level or the issue level), preclusion of evidence, monetary sanctions, and dismissal or default.

The parties recognize that due to the nature of the complained of acts, spoliation may give rise to a separate cause of action in tort and that spoliation related to Sherman 1 and RICO allegations may result in criminal penalties for obstruction of justice through destruction of evidence.

Signature Plaintiff
Signature Defendants

* *In re Prudential Sales Practices Litigation*, 169 F.R.D. 598 (D.N.J. 1997). A plan for halting destruction of electronic records -- for example, disabling e-mail auto-delete features and suspending backup tape recycling -- is essential. Even with a plan in place, effective and continuous communication to all employees is critical. In *Prudential*, for example, the court found no willful misconduct, but determined the company's efforts to notify employees of the duty to preserve electronic information were "uncoordinated and haphazard." Finding that senior management should have implemented a comprehensive electronic document preservation plan, the court levied a \$1 million sanction

As *Prudential* illustrates, a court need not conclude that intentional data destruction occurred to impose a penalty. A finding of intent, however, can increase the severity of spoliation sanctions from monetary fines to an adverse jury instruction or even a default judgment. See *Linnen, supra* (defendant's continuing customary recycling of backup tapes during litigation was "inexcusable conduct"); *Lewy, supra* (defendant's inability to produce customer complaints supported negative inference instruction); *Carlucci, supra* (default judgment entered for defendant's intentional destruction of records pursuant to improper document retention policy).

III. PROPOSED EXPERT DISCOVERY STIPULATION

Expert Discovery Stipulation

In order to avoid consuming the parties' and the Court's time and resources on potential discovery issues relating to experts, the parties have agreed to certain limitations on the scope of expert-related discovery and testimony in this matter. Neither the terms of the stipulation nor the parties' agreement to them implies that any of the information restricted from discovery in this stipulation would otherwise be discoverable.

The parties will make all disclosures required by Rule 26(a)(2)(B), as modified or limited by this Stipulation, at the times provided by this Court for the service of written expert reports.

The parties will supplement such disclosures at least three (3) business days before an expert's deposition. To the extent that the disclosures include exhibits, information or data processed or modeled by computer at the direction of a disclosed expert in the course of forming the expert's opinions, machine readable copies of the data along with the appropriate computer programs and instructions shall be produced, provided that no party need produce computer programs that are commercially available and provided further that databases and computer programs that (i) are used in the ordinary course of a party's business and (ii) are not practicable to copy need not be produced so long as reasonable access is timely offered for purposes of replication and analysis of disclosed results.

The following categories of data, information, or documents need not be disclosed by

any party, and are outside the scope of permissible discovery (including deposition questions):

- (a) any notes or other writings taken or prepared by or for an expert witness in connection with this matter, including correspondence or memos to or from, and notes of conversations with, the expert's assistants and/or clerical or support staff, one or more other expert witnesses or non-testifying expert consultants, or one or more attorneys for the party offering the testimony of such expert witness, unless the expert witness is relying upon those notes or other writings in connection with the expert witness' opinions in this matter;
- (b) draft reports, draft studies, or draft work papers; preliminary or intermediate calculations, computations, or data runs; or other preliminary, intermediate or draft materials prepared by, for or at the direction of an expert witness;
- (c) any oral or written communication between an expert witness and the expert's assistants and/or clerical or support staff, one or more other expert witnesses or non-testifying expert consultants, or one or more attorneys for the party offering the testimony of such expert witness, unless the expert witness is relying upon the communication in connection with the expert witness' opinions in this matter.

The parties further state that, to the extent that the specific stipulations agreed to herein waive disclosure requirements under Fed. R. Civ. P. 26(a)(2)(B) or (C), the parties agree to such waiver.

Signature Plaintiff
Signature Defendants

IV. DISCLOSED EXPERT RESUMES

Industry Market Viability Expert

Lynn James Everard, C.P.M.

6123 NW 45th Avenue Coconut Creek, FL 33073

Education

1977 State University of New York at Buffalo
Bachelor of Arts in Anthropology

Professional Appointments

2002 - Present	Vice President, Supply Chain Education and Strategy HealthCare Logistics Services, Inc. Coconut Creek, FL
2001 - 2002	Independent Consultant

2001 - 2001	Senior Manager, Healthcare Consulting Practice PricewaterhouseCoopers, New York, NY
2000 - 2001	Independent Consultant
1999 - 2000	Vice President and Principal The Weeks Group, Inc.. Coconut Creek, FL
1994 - 1999	President Everard Consulting Services, Inc., Coconut Creek, FL
1993 - 1994	Materials Manager HealthInfusion, Miami, FL
1991 - 1993	Regional Director of Materials Management Critical Care America, Ft. Lauderdale, FL
1989 - 1991	National Materials Manager CarePlus, Ft. Lauderdale, FL
1987 - 1989	Purchasing Manager National Health Care Affiliates, Buffalo, NY
1985 - 1987	Pharmacy Buyer Buffalo General Hospital, Buffalo, NY
1984 - 1985	Specialty Buyer HyGrade Distributors, Tonawanda, NY
1981 - 1984	Purchasing-Operations Manager Jeffrey-Fell Company, Buffalo, NY

Professional Affiliations

Past:	National Association of Purchasing Management, Buffalo, NY: Chairman, Professional Development Committee
Present:	Association for Healthcare Resource and Materials Management Institute for Supply Management, Florida Gold Coast

Awards and Honors

Certified Purchasing Manager (C.P.M.) by the Institute for Supply Management

Appointed to Editorial Review Board of *FirstMoves* magazine

Professional Presentations

2002	“What Every CEO Needs to Know About Supply Chain Management”, AmeriNet CEO Forum
	“Cost Savings Opportunities in the Internal Supply Chain”, MedAssets HSCA Annual Meeting

- 2001 “Blueprint for an Efficient Health Care Supply Chain” presented at the following”
 -HEDIC (HCEC) Annual Conference
 -Christus Health Materials Management Meeting
 -Society for Professional Group Purchasing
- 2000 “Value Proposition Modeling: Creating Value Based Relationships”, presented in conjunction with RSNA sponsored by Berlex Laboratories
- 1998 “Inventory Management Strategies That Work!”, sponsored by *Home Health Care Dealer/Supplier*, Medtrade 1998.
- “Using Materials Management to Improve the Bottom Line of a Retail Pharmacy”, sponsored by AmeriSource, Starship '98 Annual Conference.
- “One Step Ahead: Activity Based Costing and Cost Reduction”, sponsored by NAMES, providing training on Activity Based Costing and Activity Based Management for home medical equipment companies.
- “ Activity Based Costing and Activity Based Management: Preparing for Profitability in Managed Care Contracts”, sponsored by Florida Association of Homes for the Aging, providing training in Activity Based Costing for long term care facility administrators.
- 1997 “Analyzing Your Cost of Service”, NHIA Annual Meeting, providing home infusion companies with an introduction to Activity Based Costing and Activity Based Management.
- “Materials Management in Home Care”, The MED Group Purchasing Rally, addressing opportunities to use Materials Management techniques to reduce operating costs.
- “ABC/ABM....What’s With All The Letters?”, The MED Group, providing home medical equipment companies with an introduction to Activity Based Costing and Activity Based Management.
- “Using Inventory Management to Improve Cash Flow”, Medtrade 1997, addressing how home care companies can improve their cash flow by using inventory management principles.
- 1996 “Issues in the Management of Revenue Producing Assets”, Medtrade 1996, discussing methods for home care companies to improve their management of rental equipment.
- 1995 “Measuring Contract Profitability”, Medtrade 1995, addressing the need f or home care companies to measure profitability on a payor specific basis.

“Operational Considerations in the Implementation of New Computer systems”, Medtrade 1995, discussing the need for company introspection prior to buying software.

Publications

- 2002 “Ah, for the Good Ol’ Days of Adversarial Relationships!”, *Repertoire*, January, 2002
- “What’s the Best Way to Manage Floor Stock”, *FirstMoves*, May/June, 2002
- “The Push and Pull of Reforming the Supply Chain”, *FirstMoves*, May/June, 2002
- “Internet Based E-Commerce: How Far Have We Come Really?”, *FirstMoves*, July/August, 2002
- 2001 “Blueprint for an Efficient Health Care Supply Chain”, published by MDSI, January, 2001
- “Putting “Value” In Value Added”, *Repertoire*, January, 2001
- “Transactional Analysis and You”, *Repertoire*, March, 2001
- “Creating an Appetite for Value”, *The Health Strategist*, March, 2001
- “e-Commerce: Worth Waiting For”, *Repertoire*, April, 2001
- “The Supply Chain’s Dirty Secret”, *Repertoire*, May, 2001
- “Value Proposition Modeling”, *Advance for Administrators in Radiology and Radiation Oncology*, June 2001
- “Look Upstream”, *Repertoire*, June, 2001
- “So, You’re Selling an Outsourcing Program”, *Repertoire*, July, 2001
- “E-Commerce: Where’s the Beef?”, *Repertoire*, August, 2001
- “Hospital and Distributor Dilemma: Allow Bid Process to Break Up Productive Relationships?”, *Repertoire*, September, 2001

“Six Easy Steps to Change Your Focus From Tactics to Strategies”,
FirstMoves, September, 2001

“The Post-EHCR Supply Chain”, *Repertoire*, October, 2001

2000 “The Dot-Coms: Missing Link or Missed Opportunity”, *Repertoire*,
January, 2000

“Think You’re in the Products Business? Think Again”, *Repertoire*, April
2000

“The Customer’s Point of View”, *Repertoire*, June, 2000

“E-Commerce: Progress Update, June 2000”, *Repertoire*, June, 2000

“VPM: Making the Transition from Products to Services”,
FirstMoves.com, June, 2000

“The E-Commerce Imperative”, White Paper, written for Medibuy, July,
2000

Publications (Continued)

“Eight Things Sellers Need to Know About Buyers”, *Repertoire*, July,
2000

“Dot-Coms Settle In For The Long Haul”, *Repertoire*, July, 2000

“The Distrust Epidemic”, *Repertoire*, August, 2000

“The Case For Distributor Disintermediation”, *Repertoire*, August, 2000

“VPM: Developing the Model”, *FirstMoves.com*, August, 2000

“The Promises You Keep”, *Repertoire*, September, 2000

“Dot-Com Trial and Error”, *Repertoire*, October, 2000

“What is the future of E-Commerce in the health care supply chain?”,
Global Med News, October, 2000

“Rebates R.I.P.”, *Repertoire*, October, 2000

“VPM: Applications, Considerations, and Customer Selection”,
FirstMoves.com, October, 2000

“The HIPAA Challenge”, *Repertoire*, November, 2000

“Promedix First To Market With a Value Proposition Model for E-Commerce, *FirstMoves.com*, December, 2000

“GPOs: More Than Just Low Prices”, *Repertoire*, December, 2000

1999

“Pricing Out Profitability”, *Infusion*, January, 1999

“Are You Selling Programs or Products”, *Medical Product Sales*, April, 1999

“Lessons from Polk County”, *HME News*, April, 1999

“Controlling Inventory”, *Advance for Post Acute Care*, July/August, 1999

“Enhancing Profitability in the Health Care Supply Chain, Part 1”, *FirstMoves.com*, September, 1999

“Enhancing Profitability in the Health Care Supply Chain, Part 2”, *FirstMoves.com*, October, 1999

“Enhancing Profitability in the Health Care Supply Chain, Part 3”, *FirstMoves.com*, November, 1999

“Enhancing Profitability in the Health Care Supply Chain, Part 3”, *FirstMoves.com*, December, 1999

Publications (Continued)

1998

“Better Business: Outsourcing”, *Home Health Care Dealer/Supplier*, March/April, 1998

“Distributing for Profit”, *Home Health Care Dealer/Supplier*, March/April, 1998

“The HCFA Competitive Bidding Demonstration Project: Causes, Effects, and Strategies”, written for The MED Group, July, 2000

“A Program for Profitability”, *Contemporary Long Term Care*, August, 1998

“Define Yourself”, *Home Health Care Dealer/Supplier*, September/October, 1998

“Building Support Systems”, *Home Health Care Dealer/Supplier*,
November/December, 1998

- 1997 “The NHIA Industry Research Project: Food For Thought”, *Infusion*,
January, 1997
- “1997: Is This The Year The Paradigm Will Finally Shift?”, *Infusion*,
February, 1997
- “Purchasing: Dealing Effectively With Sales Reps”, *Infusion*, March, 1997
- “Outsourcing the Distribution of Supplies”, *Infusion*, April, 1997
- “Negotiations: Trading Value For Value”, *Infusion*, May, 1997
- “The Cost of Outcomes”, *Infusion*, July, 1997
- 1996 “Inventory Turns”, *Infusion*, January, 1996
- “You Bought Your System: Now What?”, *Infusion*, February, 1996
- “Infusion Devices: Buy, Rent, Or Lease?”, *Infusion*, March, 1996
- 1996 “Group Purchasing Organizations in Infusion Therapy”, *Infusion*, April,
- “Taking Care of Your Infusion Devices”, *Infusion*, May, 1996
- “Outsourcing: A Closer Look”, *Infusion*, June, 1996
- “Achieving Your Goals With Outside Consultants”, *Infusion*, July, 1996
- “Cutting Costs Through Process Improvement”, *Infusion*, August, 1996
- “Contract Management: Getting What You Bargained For”, *Infusion*,
September, 1996
- “Is Materials Management Part of Your Strategic Plan”, *Infusion*, October
1996
- “Supply Chain Management: An Added Defense”, *Infusion*, November,
1996

Publications (Continued)

“Providers and GPOs: Forging a True Win-Win Relationship”, *Infusion*, December, 1996

1995 “Pricing Scrutiny Persists”, *Homecare Magazine*, January 1995

“Investigating Infusion Costs”, *Homecare Magazine*, May, 1995

“Working the System”, *Homecare Magazine*, September, 1995

“Beefing Up Materials Management”, *Infusion*, December 1995

Mr. Everard has over twenty years experience in the healthcare supply chain management in diverse single and multiple site organizations including product distribution, acute care, long-term care and home care. Mr. Everard is a consultant, author, speaker, and strategist. His expertise includes procurement, inventory and asset management and logistics and distribution, E-Commerce, Activity Based Costing, internal supply chain efficiency, relationship management, outsourcing analysis, and cost optimization strategies uniquely qualify him to address some of the most pressing challenges in today’s health care environment. Mr. Everard’s expertise and experience are complemented by his ability to analyze complex situations and develop innovative and cost effective solutions that pay both short and long-term dividends for his clients. Everard holds the Certified Purchasing Manager (C.P.M.) designation conferred by the Institute for Supply Management. He has demonstrated clarity of thinking in regard to the future of the healthcare supply chain. He is the author of three white papers including his most recent paper entitled “Blueprint for an Efficient Health Care Supply Chain”. He was named Contributing Editor for two of the industry’s most forward thinking publications, Repertoire magazine and FirstMoves.com. He previously wrote a monthly column for Repertoire Magazine and currently does a column for FirstMoves magazine. He was recently appointed to serve on the Editorial Board of FirstMoves magazine.

Industry Business Model Efficiency Expert

Lawton R. Burns

James Joo-Jin Kim Professor; Professor of Health Care Systems and Management
Director, Wharton Center for Health Management and Economics
PhD, University of Chicago, 1981; MBA, University of Chicago, 1984; MA, University of Chicago, 1976; BA, Haverford College, 1973

Academic Positions Held

Wharton: 1994-present (named James Joo-Jin Kim Professor, 1999; Director, Wharton Center for Health Management and Economics, 1999-present). *Previous appointments*: University of Arizona; University of Chicago. *Visiting appointment*: University of Wisconsin

Career and Recent Professional Awards; Teaching Awards

2001: Arthur Anderson Distinguished Visitor, University of Cambridge (UK); Teacher of the Year, Administrative Medicine Program, School of Medicine, University of Wisconsin, 1999; Edwin Crosby Memorial Fellowship, Hospital Research and Educational Trust, 1992-93; Udall Fellowship, Udall Center for Public Policy, 1990-91; Invited Lecture Series, Catholic University of Rome, Luiss, and National Agency for Health Care Services (Rome), 1997.

Professional Leadership 1999-2003

Associate Editor, *Health Care Management Review*, 1992-present; Editorial Board, *Health Services Research*, 1994-present; Editorial Board, *AUPHA/Health Administration Press*

Consulting

Development of integrated delivery systems, Illinois Hospital Association, 1994-97; Medical staff-hospital integration, Tucson Medical Center, 1992-93; Integrated Community Nursing Service, Carondelet Health System, 1992-93; Patient care restructuring, University Medical Center, 1992

Research Areas

Integrated health care; supply chain management; health care management; formal organizations; physician networks; physician practice management firms

Current Projects

Health care supply chain. Structure, process, and outcomes of integrated delivery systems in health care. Hospital ownership conversions.

Representative Publications

(with S.M. Shortell and R.M. Anderson)

"Does Familiarity Breed Contentment? Impact of Integration on Physician Attitudes and Behaviors." *Research in the Sociology of Health Care* (1998).

(with R. DeGraaff and H. Singh)

"Determinants of For-Profit Acquisition of Physician Group Practices." *Quarterly Review of Economics and Finance* (1999).

(with J. Cacciamani, J.R. Clement, W. Aquino)

"The Fall of the House of AHERF: The Allegheny Bankruptcy." *Health Affairs* (2000).

Hospital Supply Market Monopolization Expert

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Professor of Law

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Education

* Harvard College A.B. 1982

* Harvard Law School J.D. 1986

Appointments

* Visiting Professor of Law, 1994

* Professor of Law, 1995

Biographical Information

Einer Elhauge is Professor of Law at Harvard Law School, where he teaches a gamut of courses ranging from Antitrust, Contracts, Corporations, Health Care Law, and Public Choice Theory. Before coming to Harvard, he was a Professor of Law at the University of California at Berkeley, and clerked for Judge Norris on the 9th Circuit and Justice Brennan on the Supreme Court. He received both his A.B. and his J.D. from Harvard, graduating first in his law school class.

He is an author of numerous pieces on range of topics even broader than he teaches, including legislative term limits, the implications of interest group theory for judicial review, antitrust petitioning and state action immunity, corporate sale of control doctrine, antitrust tying and predatory pricing doctrine, whether lawyers improve the legal system, how to devise a morally just and cost effective medical system, the 2000 Presidential election, and statutory interpretation. He represented the State of California in successfully defending their term limits law from constitutional challenge, and represented the Florida House of Representatives on legal issues concerning the Bush v. Gore Presidential election litigation in Florida in 2000.

Recent and Working Papers

The Exclusion of Competition for Hospital Sales Through Group Purchasing Organizations

(report to U.S. Senate)

Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory - And the Implications for Defining Costs and Market Power

(Yale Law Journal, Volume 112, No. 4, January 2003, pages 681-827)

Preference-Estimating Statutory Default Rules

(Columbia Law Review, Volume 102, No. 8, December 2002, pages 2027-2161)

Preference-Eliciting Statutory Default Rules

(Columbia Law Review, Volume 102, No. 8, December 2002, pages 2162-2290)

The Lessons of Florida 2000

(110 Policy Review 15-36, Dec 2001-Jan 2002)

Soft on Microsoft - the Potemkin Antitrust Settlement

(The Weekly Standard, pp. 17-18, March 25, 2002)

Tunney Act Comments of Professor Einer Elhauge on the Proposed Settlement between the United States and Microsoft

What Term Limits Do that Ordinary Voting Cannot

(Cato Policy Analysis, No. 328, Dec. 16, 1998)

The Court Failed My Test

(The Washington Times, Op-Ed, July 10, 1998)

The Limited Regulatory Potential of Medical Technology

(82 Virginia Law Review 1525-1617, 1996)

Allocating Health Care Morally

(82 California Law Review 1449, December 1994)

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WORK EXPERIENCE:

Sprint PCS/Inteliant, Project Manager & eBusiness Data Mart Architect 10/00 – Present
Designed and directed implementation of data warehouse structures and processes for ebusiness reporting including online store, wireless web transactions, online account management, web server log file analysis, and several other web-based applications. Gathered and documented requirements. Developed logical and physical data models for the eBusiness data mart using PowerDesigner. Analyzed and documented impact for Local Number Portability, a federally mandated requirement.

VIRGINIA COMMONWEALTH UNIVERSITY, Adjunct Professor (part-time)
Fall 1999 – Spring 2000

Taught INFO 464 - Database Systems, including database concepts, logical and physical database design, object-oriented methodologies with Oracle 8i, data warehousing star schemas and Developer 6.

PHILIP MORRIS USA

Database Administrator/Team Lead, Information Services Procedures, Projects & Assets
8/98 – 9/00

- Installed and configured Oracle 7 and 8 databases on Windows NT and HP Unix
- Performed data migration from mainframe to Oracle on AIX using SQL*Loader
- Reorganized Oracle 7 and 8 tablespaces and set up many development and testing environments
- Performed backup and recovery on Oracle 7 and 8 and set up automated backup processes
- Maintained Oracle databases for Year 2000, workstation management and manufacturing data collection using ERWIN, including logical and physical modeling and data architecture.
- Wrote PL/SQL triggers and custom database replication programs to establish a data repository for manufacturing data. Also used the Oracle replication manager to set up replication. Used dimensional modeling techniques to plan for reporting.
- Provided Oracle database administration, performance tuning, security and user support on 20 databases
- Upgraded Oracle database software and installed patches
- Coordinated technical review of leases and maintenance for hardware and software, and managed projects in the data center. Managed the transition of assets to a new corporate consolidated data center.

Lead Systems/Technical Analyst, Information Services 8/96 – 8/98

Planned a comprehensive infrastructure management system for the enterprise. Developed a prioritization methodology for information technology projects across the enterprise and implemented on a Lotus Notes database. The project included all phases of the development life cycle using the company-standard structured methodology, and including requirements gathering and analysis, data architecture, programming, testing, installing and supporting users. Aligned IT projects with IT and business area strategy. Developed measurements, benchmarking criteria and a pictorial user interface for infrastructure capacity planning.

Senior Industrial Engineer 8/91 - 6/96

Developed and implemented a model for equipment forecasting based on production allocation, equipment utilization by module, product specifications and other constraints. Developed and implemented a system for use by industrial engineers for statistical analysis of machine efficiency data. For these two systems, directed the software development lifecycle including requirements gathering and analysis, conceptual and physical modeling, data normalization, programming, training users and documentation. Assisted the Marlboro Adventure team promotion with fulfillment logistics for delivering approximately 15 million items to customers in about four months. Coordinated labor analysis of raw materials distribution methods and recommended best alternative. Evaluated material handling products on the market and recommended equipment. Simulated finished goods flow from manufacturing to offsite warehouses and made recommendations on material handling equipment, shipping docks and trucks.

HEALTH CARE MICROSYSTEMS, Senior Consultant 8/89 - 6/91

Evaluated organizations, systems and operations of several hospital materials management departments. Made recommendations to reduce costs and increase productivity for clients. Wrote specifications for the purchase of new materials management systems and evaluated existing systems. Designed, developed and implemented a supply distribution program for issuing and charging supplies. Directed the entire software development lifecycle including requirements analysis, database logical and physical design using data flow diagrams and data normalization, data architecture, installation of systems, documentation, training of users and ongoing support.

EMULEX CORPORATION, Master Scheduler 8/88 - 8/89

Designed, developed and implemented programs for Work-in-Process projection and tracking, revenue projection and production planning, including all phases of the software development life cycle – requirements analysis, logical and physical database modeling, data architecture, documentation, training and support.

INTERLAKE, INC., Project Manager 8/85 - 4/87

Coordinated the building of automated warehouses with AS/RS including engineering and manufacturing of components, shipment of materials to job sites, construction of building, installation of equipment and software development. Software development work included gathering and analyzing requirements, overseeing the development by an outside contractor and implementation of systems.

LITTON AUTOMATED SYSTEMS, Systems Engineer, Sales Engineer 1/81 – 8/85

Designed automated material handling systems including computer simulations, gathered customer business and technical requirements, wrote material handling system proposals, presented proposals to customers.

EDUCATION:

M.B.A. in General Management, U.C.L.A., 1988

Certificate in Computer Science, Virginia Commonwealth University, 1996
Bachelor of Industrial Engineering, Georgia Tech, 1980

CERTIFICATIONS:

Brainbench Master Data Warehousing Specialist, August 2000
Oracle Database Administration, 1998
Novell CNE (Certified Novell Engineer), 1996
APICS CPIM (Certified in Production and Inventory Management), 1989

Date: April 21, 2003

Report of the Parties' Planning Meeting:

Counsel for Medical Supply Chain, Inc.:

S/Bret D. Landrith

Bret Landrith
605 W. Kansas
Pittsburg, KS 66672
Kansas Supreme Court Number: 20380

Report of the Parties' Planning Meeting:

Counsel for the Defendants:

358 F.Supp.2d 863
INTERNATIONAL CASINGS GROUP, INC., Plaintiff,
v.
PREMIUM STANDARD FARMS, INC., Defendant.
No. 04-1081-CV-W-NKL.

United States District Court, W.D. Missouri, Western Division.
February 9, 2005.
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Andrew J. Enschede, Howard K. Jeruchimowitz, Paul Del Aguila, Paul T. Fox, Greenberg, Traurig, LLP, Chicago, IL, Michael P. Joyce, Van Osdol, Magruder, Erickson & Redmond, Kansas City, MO, for Plaintiff.

Kevin D. Mason, Todd W. Ruskamp, Shook Hardy & Bacon LLP, Kansas City, MO, for Defendant.

ORDER

LAUGHREY, District Judge.

Pending before the Court is Plaintiff International Casing Group's ("ICG") Motion for Preliminary Injunction [Doc. # 8]. For the reasons set forth below, the Court grants ICG's Motion.

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I. Background

Defendant Premium Standard Farms ("PSF") is a pork producer that has sold its hog casings to ICG for over six years. The two PSF facilities that supply their hog casings to ICG are located in Milan, Missouri ("Milan facility"), and Clinton, North Carolina ("Clinton facility"). ICG has its own equipment and employees on site at the Clinton and Milan facilities to harvest and process the casings.

Prior to May 2002, PSF and ICG had long term output contracts for both facilities. In May 2002, PSF and ICG terminated these contracts. However, the parties continued performing under the terms of their contracts, and in June 2002, they resumed negotiations regarding new terms for both facilities. The parties negotiated a

myriad of issues, including, but not limited to, an electrical room that needed re-wiring at the Clinton facility, pricing adjustments related to quality control issues (frequently referred to as the bloody guts issue) and a blower pipe at the Clinton facility. Many of these negotiations occurred via e-mail between the parties and both entities consistently relayed negotiation terms and positions to one another via electronic correspondence. The negotiations were protracted.

In early 2004, Kent Pummill ("Pummill") represented PSF in its negotiations with ICG and Tom Sanecki ("Sanecki") represented ICG. In a series of e-mails from March and April 2004, Pummill and Sanecki discussed several open issues. Because of the importance of these e-mails, the Court includes them verbatim. All of the following e-mails were sent in 2004. The Court did not include the discussions about mucosa and these redactions are noted. Additionally, the Court did not include a series of three e-mails from May 19-21, 2004, regarding an unpaid invoice by ICG. See Pl.Ex. 32-33.

Date	Sender	Recipient	Text

02/19	Kent Pummill	Tom	Here is where we are at. We agree that there is

Sanecki some blood in the casings as with all CO2 systems.

cleaned up.

We don't agree it is an 8 cent discount. We would

Thanks, Kent

like to offer the following:
2 cent discount on the

Clinton contract; we [PSF] will pay 100% of the

02/26 Tom Sanecki Kent I am in LA this week, I will call you next week to

electrical that was completed last year; you pay for

Pummill discuss, or would you prefer Eric and I come to KC

putting in the stainless steel pipe going to your

for a quick meeting next week. We would be available

building; Heparin — to make sure your doing your

Tuesday-Thursday.

best in your building on mucosa. When we average

more than 41,000 units of heparin in a month, we will

02/26 Kent Pummill Tom Bo is traveling. Shoot me your counter offer next

give you 30% of that dollar amount, for anything

Sanecki week, and lets get this moving.

over and above 41,000 units. Where are your sticking

points, so we can get both plants under contract

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and behind us?

03/18 Tom Sanecki Kent I will be out of the office thru 03/29/04.

Thanks, Kent

Pummill

I have the following questions and I think we should

02/26 Kent Pummill Tom Did you get my e-mail. What is your counter-offer?

schedule a meeting in KC to get this resolved.

Sanecki I agree, we have gone too long. Lets get this

[Deleted discussion regarding mucosa]

Electrical room and blow
pipe — not to beat a dead

horse but, I think getting
the guts, undamaged, to

the casing department
should be PSF's responsibility.

ICG paid for the blow
system and it has worked

for years. It has only been
since it has been

disassembled by your
maintenance department for

cleaning that we have
been having problems with

damaged guts.

The quote we have is for
\$25,000, I expect this to go

up due to the increases in
the cost of steel, my guess

is an additional \$8,000-
\$10,000. We also need to

make sure that the finish
is not going to cause

damage. My suggestion is
that ICG will pay for the

pipe and turn the blower
system over to PSF, if PSF

will extend both contracts
an additional two years.

The remaining issue is the
compensation for the

bloody guts. \$0.02 is not
enough to compensate for

the additional processing
required. I suggest that

we schedule a meeting for
either 04/06/04 or 04/07/04

in KC. Please let me
know your thoughts.

03/23 Kent Pummill Tom We might as
well schedule a meeting then, because

Sanecki if you want more than
2 cents, then our plan is to

put it back out to bid.

[Deleted discussion
regarding mucosa]

We have paid for the
electrical room. You pay for

the pipe. Sounds like it
just comes down to the

discount # . We will do a
2 cent discount at Clinton

and will go 5 years on a
new contract for both plants.

Your choice, this or us
putting both plants back out

to bid. Let me know, we
would be glad to meet.

Thanks, Kent

04/19 Tom Sanecki Kent I am not happy about the \$0.02. The mucosa is fine,

Pummill it would be helpful if yield numbers we provided to

us so we can continue to work on optimizing the

collection and the feedback is very important.

The pipe vs. the electrical room is ok, and the sooner

we get this contract signed the better, we need to

get this pipe replaced. It is effecting our yields. Do

we agree that when ICG pays for the pipe replacement

and we have the 5 year contract that PSF will

take responsibility and ownership of the pipe?

Can we do something about the costs we have

incurred with the bloody guts we have already processed?

This started in January 15, 2003, so for

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fastcase

16+ months. Can we get an additional \$0.02 for the

next 16 months or an additional \$0.005 off for the 5

year contract?

Please call me when you get a chance [phone

number deleted].

04/20 Kent Pummill Tom Send the new contracts with a decrease of \$0.025 for

Sanecki the next 5 years at Clinton. We will take ownership

of the new pipe installed by ICG after it is installed.

Thanks, Kent

04/27 Tom Sanecki Kent I have sent you 4 copies of each contract. I have

Pummill initialed and signed each. Please have Bo sign and

initial and return 2 copies to ICG.

I put the effective date of the \$0.025 reduction at

Clinton for 05/03/2004.
ICG will get the blow pipe

replaced ASAP after
receiving the signed contracts.

PSF will maintain the
blow system and at the end of

the new contract it will
become PSF's property.

PSF will pay for the
electrical room upgrades at

Clinton. Thanks for your
help.

04/27 Kent Pummill Tom Will do.
Thank you.

Sanecki

Kent

05/10 Tom Sanecki Kent How are the
contracts going????

Pummill

05/10 Kent Pummill Tom Legal has
them. I will double check this morning.

Sanecki

06/07 Kent Pummill Tom Finally got
them back from Legal and Bo Manly.

Sanecki Everything looks fine
except on 2G. Jerry wants to

have 2G end with "ADA"
and mark through the

following: "and will
defend and indemnify ICG

against any claims by
Premium employees unless

due to gross negligence
by ICG employees or their

agents." He says this is
covered in 10.

Bo is adamant about not
going 5 years. He turned

180 degrees on me. He
wants just 3. If you can

agree with me on 3 years,
then I will mark through

and initial the "2G"
section and change and initial

the term to 3 years, and
get Bo to sign and send

them on their way.

I thought we were home
free; we are real close.

Will this work for you? I
will take another penny

off the price for Clinton to
get this signed and off my

desk. I think you and I are
both tired and want this

off our desks. Let me know.

Kent

06/21 Tom Sanecki Kent OK, but as you can imagine I am surprised by this

Pummill change. Do you want to mark-up your contract and

mark the price schedule, then sign and send to me.

We will get the blow pipe done ASAP. Thanks.

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06/21 Kent Pummill Tom We will mark up the contract and send it to you.

Sanecki Thanks, Kent.

Send me a new pricing schedule, and I will attach

the new one to Clinton's contracts.

06/21 Tom Sanecki Kent Shall we make these prices effective 06/28/2004?

Pummill

06/21 Kent Pummill Tom That is fine.

Sanecki

The "contracts"¹ referred to in Sanecki's April 27, 2004, e-mail outlined the payment mechanism for the casings and provided that the price of the casings would be based on a price benchmark contained in the Pratt Report, which is a trade publication used by the casings industry. The pricing schedule was attached to each "contract," incorporated by reference, signed by Sanecki and sent to PSF. The pricing schedule reflected that ICG was paying less for the casings from the Clinton facility than those from the Milan facility.² These "contracts" were for five years.

In his June 7 e-mail to Sanecki, Pummill agrees to take off another penny for the Clinton casings in exchange for a three instead of a five year contract. After receiving Sanecki's agreement to the three year duration, Pummill marked up the contracts and gave them to Robert W. (Bo) Manly ("Manly") for Manly's signature. Manly is the president of PSF. While awaiting Manly's signature on the contracts, ICG and PSF implemented the new pricing schedules as of June 28, 2004. In July 2004, Sanecki inquired a few times about obtaining the written contracts and Pummill responded that Manly still had them.

On August 2, 2004, Pummill e-mailed Sanecki to tell him that Calvin Held ("Held") was now supervising both the Milan and Clinton facilities and that Manly wanted Held to "approve" the contracts for the two facilities. Pummill also indicated that Held was inquiring about why ICG was paying less money for the casings from the Clinton facility than the casings from the Milan facility. In September 2004, Sanecki met with Held to discuss the price disparity between the two facilities. It appears that Held did not notify Sanecki at that meeting

that PSF would not honor the pricing arrangement. The new prices continued to be paid even after the meeting.

On November 17, 2004, PSF sent ICG written notice of its intent to terminate the parties' business relationship. PSF's termination letter anticipated that the Milan facility relationship would terminate on January 3, 2005, and the Clinton facility relationship would terminate on January 10, 2005. Prior to this notice, PSF had already started negotiating with a third party³ to purchase the casings from the Milan and Clinton facilities. As of the date of the preliminary injunction hearing, PSF had contracted with Standard Casings

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Company ("Standard") to sell its Milan and Clinton casings to Standard.

On January 7, 2005, the Court held an evidentiary hearing regarding ICG's Motion for Preliminary Injunction. Pending resolution of that Motion, the parties are performing under the terms reached as of June 21, 2004. After the preliminary injunction hearing, the Court was notified that Standard has moved its equipment to Missouri and North Carolina and is ready to begin harvesting the casings at PSF's facilities.

II. Discussion

In determining whether to grant a preliminary injunction, courts weigh four factors: (1) the probability that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between the harm to the movant and any harm that granting the injunction will cause to other parties to the litigation; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir.1981).

A. Success on the Merits⁴

1. Meeting of the Minds

To be successful, ICG must establish that it has a contract with PSF. The parties agree that

this transaction is controlled by the UCC which provides:

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

....

(3) Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Mo.Rev.Stat. § 400.2-204. PSF contends that it has no agreement with ICG because there was never a "meeting of the minds," particularly, with reference to price.

PSF is correct that ICG must establish that there was a "meeting of the minds" between ICG and PSF. *Dierker Associates D.C., P.C. v. Gillis*, 859 S.W.2d 737, 743 (Mo.Ct.App.1993); *Paul's Rod & Bearing, Ltd. v. Kelly*, 847 S.W.2d 68, 72 (Mo.Ct.App.1991).⁵ Whether a meeting of the minds exists, however, "is determined objectively by looking at the intent of the parties as expressed by their actual words or acts." *Paul's Rod & Bearing, Ltd.*, 847 S.W.2d at 72. See *Computer Network, Ltd. v. Purcell Tire & Rubber Co.*, 747 S.W.2d 669, 675 (Mo.Ct.App.1988). A meeting of the minds cannot be "determined on the undisclosed assumption or secret surmise of either party." *Computer Network, Ltd.*, 747 S.W.2d at 675 (quoting *Shofler v. Jordan*, 284 S.W.2d 612, 615 (Mo.Ct.App.1955)). This is because Missouri follows the objective theory of contracts. *Computer Network, Ltd.*, 747 S.W.2d at 675. "The objective theory lays stress on the outward manifestation of assent made to the other party in contrast to the older idea that a contract was a true 'meeting of the minds.'" *Id.* (quoting *J. Calamari & J. Perillo, CONTRACTS* § 2-13, at 23 (2d ed.1977)).

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There is substantial evidence to show that PSF and ICG did reach a meeting of the minds on June 21, 2004 for a new three year, hog casing, output contract for the Milan and Clinton facilities. The parties had been negotiating since 2002 and had resolved most of the issues in dispute by April of 2004. Price, the bloody guts issue and the defective pipe at the Clinton facility were still being discussed. On March 23, Kent Pummill, who had authority to negotiate on behalf of PSF, said:

We have paid for the electrical room. You pay for the [Clinton] pipe. Sounds like it just comes down to the discount # . We will do a 2 cent discount at Clinton and will go 5 years on a new contract for both plants. Your choice, this or us putting both plants back out to bid. Let me now, we would be glad to meet.

Tom Sanecki, who had authority to negotiate for ICG, responded by accepting some of Pummill's proposal and raising additional issues. The following day, Pummill instructs Sanecki to send the new contracts with a decrease of \$.025. Mr. Sanecki does so and there is no response from PSF until June 7, 2004 when Mr. Pummill writes:

Finally got them [contracts] back from legal and Bo Manly. Everything looks fine except on 2G. Jerry [PSF general counsel] wants to have 2 G end with "ADA" and mark through the following: [language unrelated to this dispute]. Bo is adamant about not going 5 years. He turned 180 degrees on me. He wants just 3. If you can agree with me on 3 years, then I will mark through and initial the "2G" section and change and initial the term to 3 years, and get Bo to sign and send them on their way. I thought we were home free; we are real close. Will this work for you? I will take another penny off the price for Clinton to get this signed and off my desk.

Mr. Sanecki responds OK. At that point, both parties had agreed on all the essential terms of the contract. While PSF now contends that the price issue was unresolved, that argument is inconsistent with its agreement to implement the

new prices effective June 28, 2004 pursuant to an e-mail exchange between Sanecki and Pummill on June 21, 2004. That agreement occurred on the same day that both sides had resolved all outstanding issues under discussion and Pummill had offered a lower price for the Clinton facility⁶ and Sanecki had accepted it.

PSF also argues that there were oral communications with ICG, in addition to the e-mails, that demonstrate that the price issue was never resolved. However, the Court does not find support in the preliminary injunction hearing record for that position. There were conversations about price before the June 21 e-mail but those disputes were resolved in the June 21 e-mail and the parties implemented the new, agreed upon pricing system. That is the best objective evidence that the issue of price was resolved on June 21. There were also discussions about price after the June 21 e-mail, but the best explanation for those discussions was the change in management at PSF and not the absence of a meeting of the minds on June 21.

Sometime after June 21, 2004, and before August 2, 2004, PSF placed Calvin Held over both the Clinton and Milan facilities. August 2 is the first time that PSF notifies ICG that Held is "approving both contracts." An inquiry is made by PSF on that date as to why there is a difference

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between the price at Milan and the price at Clinton. A meeting is arranged with Held and at that meeting he is told by Sanecki the reason for the price differential. It does not appear that PSF told ICG at that meeting that the price being paid pursuant to the June 21 agreement was unacceptable or notified ICG that it would no longer pay that price. In fact, the price was paid by PSF through 2004. Indeed, the new prices remained in effect even after PSF notified ICG that it must vacate the Milan and Clinton facilities. While it is possible that a jury may conclude differently, it is more likely that a jury will believe that Held, the new PSF manager,

didn't like the deal that had been struck for his facilities and PSF was back tracking on an agreement that had already been made.

Finally, PSF contends that there was no meeting of the minds on June 21, 2004, because the agreement was never reduced to writing and signed by both parties. However, merely because parties intend a written memorialization of the agreed upon terms does not demonstrate that they intend the writing to be a condition precedent to the formation of a contract. "Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof..." 1 Restatement of the Law of Contracts, Ch. 3, § 26. The real question is whether the parties intended a written document to be a condition precedent to the formation of a binding contract. *Sanders v. DeWitt*, 579 S.W.2d 707, 711 (Mo.Ct.App.1979); *Priest v. Oehler*, 328 Mo. 590, 41 S.W.2d 783, 787 (1931); *Shapleigh Inv. Co. v. Miller*, 193 S.W.2d 931, 937 (Mo.Ct.App.1946); 17 AM. JUR.2D Contracts § 28, pp. 363-66. It is also stated that where there is an intent by the parties not to be bound by the oral contract but only by a later prepared and signed written contract, such an intention must be specifically understood in the original agreement. *Hunt v. Dallmeyer*, 517 S.W.2d 720, 724 (Mo.Ct.App.1974).

Considering the evidence presented at the preliminary injunction hearing, the Court concludes that a jury is likely to find that the parties intended that their agreement be reduced to writing as a memorialization. They did not intend the writing to be a condition precedent to the formation of the contract. Pummill's e-mail on June 7, 2004, said that everything looked fine except two things. Sanecki then agreed to PSF's proposal concerning those two things. The parties then implemented the new pricing structure which was the major stumbling block to the formation of the contract. In his June 21 e-mail, Pummill says that "we" will mark up the contracts to conform to the agreement and PSF was then to send them to ICG. At no time does

Pummill say "I" will mark them up and then give them to Manley for his approval, and if Manly approves them, we will send them to you. There is nothing in the communications or the actions of the parties that suggest that no contract was formed until the paper documents were formally signed by both Sanecki and Manly. See *Hunt v. Dallmeyer*, 517 S.W.2d 720, 724 (Mo.Ct.App.1974) (where there is an intent by the parties not to be bound by the oral contract but only by a later prepared and signed written contract, such an intention must be specifically understood in the original agreement).

Nor is there objective evidence to indicate that Pummill did not have the authority to enter into the agreement on behalf of PSF. The evidence strongly suggests that he had authority to bind PSF. While there is evidence that suggests that Sanecki did not want to make repairs required by the terms of the agreement until there was a writing, this does not mean that the parties

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intended the written documents be a condition precedent to the formation of a contract. Sanecki was obviously concerned about making the repairs on the defendant's property in the event that PSF attempted to backtrack on its agreement. It was also a minor issue in comparison to the implementation of the new pricing structure which was done as of June 28, 2004. It is probable that a jury will find that a written document with a formal signature was not a condition precedent to the formation of the contract.

2. Statute of Frauds

Because this dispute involves a contract for the sale of goods in excess of five hundred dollars, it must satisfy the Statute of Frauds or one of the exceptions to it. Mo.Rev.Stat. § 400.2-201 (applying the Statute of Frauds to contracts exceeding five hundred dollars).⁷ PSF contends that the Statute of Frauds has not been satisfied because the agreement was not in writing and was not signed. ICG contends that

the April 27, 2004, documents and the e-mails between Pummill and Sanecki satisfy the writing and signature requirements of the Statute of Frauds.

The Statute of Frauds has two requirements relevant to this dispute. See Mo.Rev.Stat. § 400.2-201.8 The writing must evidence a contract for the sale of goods and "it must be 'signed,' a word which includes any authentication which identifies the party to be charged...." Howard Construction Co. v. Jeff-Cole Quarries, 669 S.W.2d 221, 226 (Mo.Ct.App.1983); also see Sedmak v. Charlie's Chevrolet, Inc., 622 S.W.2d 694, 699 (Mo.Ct.App.1981); Vess Beverages, Inc. v. Paddington Corp., 886 F.2d 208, 213 (8th Cir.1989).

a. Written Contract for the Sale of Goods

As previously indicated, the Court has concluded that it is probable that the e-mail exchange between Sanecki and Pummill and the written contracts sent by Sanecki on April 27, 2004, established a contract which contained all the essential terms of the parties' output agreement for the Milan and Clinton facilities.

The fact that the terms of the agreement are contained in separate documents does not prevent compliance with the Statute of Frauds. To satisfy the Statute of Frauds, the writing "may comprise several writings that, in combination, supply the essential terms." Vess Beverages, Inc. v. Paddington Corp., 941 F.2d 651, 654 (8th Cir.1991) (applying Missouri law).⁹ The content of the e-mails establishes that the document sent by Sanecki on April 27, 2004, were part of the negotiated terms, as were the terms specifically resolved by the e-mails. Therefore, it is probable that ICG will convince the jury that the documents sent by Sanecki on April 27, 2004 and the parties' subsequent e-mail communications establish a binding written contract for the sale of goods that contain all the essential terms.

b. The Signature

The more difficult question is whether the writings which evidenced the sale of goods were signed. The answer depends on the definition of "signature" in the context of the UCC.

The UCC's definition of "signed" includes "any symbol executed or adopted by a party with present intention to authenticate

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a writing." Mo.Rev.Stat. 400.1-201(39). The Comment to the UCC's definition states:

The inclusion of authentication in the definition of 'signed' is to make clear that as the term is used in this Act a complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete and the court may use common sense and commercial experience in passing upon these matters.

Id. at Cmt. ¶ 39.

Missouri has also adopted the Uniform Electronic Transactions Act ("UETA"). See Mo.Rev.Stat. §§ 432.200-432.295.10 The UETA applies to Missouri's UCC provisions that govern the Statute of Frauds and the UETA defines an electronic signature as, "An electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." Mo.Rev.Stat. § 432.205(8).11 Moreover, the UETA states, "If a law requires a signature, an electronic signature satisfies the law." Mo.Rev.Stat. § 432.230(4).12 Hence, although Pummill's and Sanecki's signatures were electronic, they satisfy the signature requirement of the UCC's Statute of Frauds, so long as each had the present intention to authenticate the document.

There is overwhelming evidence that Sanecki's and Pummill's e-mails are authentic and that the information contained in them was intended by each to accurately reflect their

communications with the other. Although they do not all contain a typed name at the bottom of the e-mails, each e-mail contains a header with the name of the sender. Given the testimony at the preliminary hearing, it is clear that Sanecki and Pummill, by hitting the send button, intended to presently authenticate and adopt the content of the e-mails as their own writing. This is enough to satisfy the UCC given the breadth of its definition of signature, as well as the UETA which specifically refers to a "process attached to or logically associated with a record."¹³

Furthermore, the purpose of the UCC is to prevent fraud. See 73 AM. JUR. 2D Statute of Frauds § 425. In this case, there is no dispute about the content or authenticity of the parties' communications. Therefore, neither fraud nor perjury is a concern. Indeed, it would be contrary to the purpose of the UCC to permit a party to negotiate all the terms of an agreement, do so in a way which accurately records their negotiations and agreement, but then permit the party to escape responsibility for its promises because a piece of paper with a handwritten signature has not been produced. See 73 AM. JUR. 2D Statute of Frauds § 468 ("The courts do not tolerate the use of the statute

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of frauds to enable one to take advantage of a person's own wrong and it ought not to be used as a means to allow persons who have made a promise to circumvent their obligations.").

The Court's finding that an electronic signature in an e-mail satisfies the Statute of Frauds is supported by the developing case law. See *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289 (7th Cir.2002); *Roger Edwards, LLC v. Fiddes & Son, Ltd.*, 245 F.Supp.2d 251 (D.Me.2003); *Central Illinois Light Co. v. Consolidation Coal Co.*, 235 F.Supp.2d 916, 919 (C.D.Ill.2002); *Commonwealth Aluminum Corp. v. Stanley Metal Association*, 186 F.Supp.2d 770, 774 (W.D.Ky.2001); *Rosenfeld v. Zerneck*, 4 Misc.3d 193, 776 N.Y.S.2d 458 (N.Y.Sup.2004); *Shattuck v. Klotzbach*, 2001

WL 1839720, No. 011109A (Mass.Super. Dec. 11, 2001); *Amedisys, Inc. v. JP Morgan Chase Manhattan Bank (In re National Century Financial Enterprises, Inc.)*, 310 B.R. 580, 595 (Bankr.S.D.Ohio 2004).

Commentators have also suggested that an e-mail "signature" is sufficient to satisfy the Statute of Frauds provision in the UCC. 12 ANDERSON ON THE COMMERCIAL CODE § 106:6ES (explaining that a valid signature includes "a name as part of an e-mail ... if the requisite intention is present."); Richard Allan Horning, *Has Hal Signed A Contract: The Statute of Frauds in Cyberspace*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 253 (August 1996); Jean Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online*, 2001 WIS. L. REV. 527 (2001); Steven Domanowski, *E-Sign: Paperless Transactions in the New Millennium*, 51 DEPAUL L. REV. 619 (Winter 2001).

PSF has cited *Toghiyany v. AmeriGas Propane, Inc.*, 309 F.3d 1088, 1090-91 (8th Cir.2002), for the proposition that an e-mail cannot satisfy the signature requirement of the Statute of Frauds. In *Toghiyany*, the Eighth Circuit held that a contract was not enforceable because it lacked a durational term. The court also said the following:

Furthermore, the documents constituting the contract must be signed, or, in the alternative, one document must be signed, so long as the others are significantly related to it. *Vess Beverages*, 941 F.2d at 654. An enforceable contract cannot be inferred from the writings supplied by the parties in this case because the writings — various e-mails and draft agreements — neither contain the essential durational element nor are signed. *Id.*; see also *Kansas City Power & Light Co.* at 1003.

Id. The cases cited by the Eighth Circuit in *Toghiyany*, *Vess Beverages, Inc. v. Paddington Corp.*, 941 F.2d 651 (8th Cir.1991), and *Kansas City Power & Light Co. v. Burlington N. R.R. Co.*, 707 F.2d 1002 (8th Cir.1983), do not deal

with the electronic signature issue nor does the court explain why it concludes that the e-mails are not signed. So while Toghiyany "tugs the other way," Cloud, 314 F.3d at 296, the Court does not believe it precludes the decision reached today in this case. Significantly, the UCC's definition of "signature" did not apply in Toghiyany because the sale was not governed by the UCC. Second, Toghiyany was decided before the enactment of the Missouri UETA which was passed in 2003 — one year after the Eighth Circuit issued its opinion in Toghiyany. The UETA, therefore, best reflects Missouri's law at the time these e-mails were exchanged. Third, in *General Trading Int'l, Inc. v. Wal-Mart Stores, Inc.*, 320 F.3d 831 (8th Cir.2003), another panel of the Eighth Circuit suggests but does not explicitly state that an e-mail can satisfy the Statute of Frauds' signature requirement. See Cohen, Henning & Rusch, *The Frontiers of Article 2: Software Contracts, Rolling Contracts, and Electronic*

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Commerce in Goods, SK038 ALI-ABA 1, 10 (December 9-11, 2004). Like Toghiyany, *General Trading* was decided on other grounds so the current status of the UCC and electronic signatures is unclear in the Eighth Circuit.

PSF also argues that the Missouri and North Carolina UETA do not apply to Pummill's e-mails because the Acts require that the transactions are between "parties each of which has agreed to conduct transactions by electronic means." Mo.Rev.Stat. 432.220(2).¹⁴ In determining whether the parties have agreed, the Court may look to "context and surrounding circumstances, including the parties' conduct." *Id.* The Court has done so and concluded that a fact finder will probably infer from the objective evidence that the parties agreed to negotiate and eventually reach the terms of an agreement via electronic mail based on their ongoing e-mail negotiations during all of 2003 and the beginning of 2004. Moreover, the parties' continued performance after the new pricing structure took effect on June 28, 2004,

demonstrates they intended to reach an agreement via the June 2004 e-mails.

Furthermore, in determining whether PSF agreed to "conduct transactions by electronic means," the Court looks to whether Pummill intended to authenticate the writing — not whether he subjectively intended to enter into a contract. In *Vess Beverages*, the court rejected the argument that an individual authenticated his meeting notes when he created an attendance list for the meeting and included his own initials among the initials of the other attendees. 941 F.2d at 655. The court stated, "the signature need not be legally effective assent to the contract, but the signer must sign with the intent to indicate that the document is his." *Id.* The court further stated, "Lest there be any confusion, we emphasize that the standard is whether the party to be charged signed the writing with intention to authenticate the writing. Although one who signs a writing with intent to assent to its terms or to authenticate that an agreement exists fulfills the signature requirement in so doing, neither of these latter two types of intent is necessary to satisfy the Statute of Frauds." *Id.* at n. 5. Thus, in determining whether Pummill had the "present intention to authenticate" his June 2004 e-mails, the Court has considered whether Pummill intended to verify that the e-mails were his communications — not whether Pummill's e-mails manifested a subjective intent to formalize in writing a binding contract. To find otherwise would undermine the objective theory of contracts which Missouri follows.

Accordingly, the Court finds that it is probable that ICG will prevail on the merits regarding the formation of a binding contract which satisfies the Statute of Frauds.

B. Irreparable Harm

ICG claims that it will suffer irreparable harm if the Court denies its pending Motion and allows PSF to withdraw its supply of hog casings to ICG.¹⁵

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Under the UCC, a court may order specific performance of a contract for the sale of goods where "the goods are unique or in other proper circumstances." Mo.Rev.Stat. § 400.2-716.16 UCC § 2-716(1). According to the Comment, goods are unique where a "particular or peculiarly available source or market" exists or where there is an inability to obtain cover goods. *Id.* at Comm. 1. In determining whether a party has alternative remedies available that would warrant the denial of injunctive relief, courts have stated that the alternative remedy "must be as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance." *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 40 (8th Cir.1975). Thus, the test is whether PSF is a "particular or peculiarly available source" for hog casings and whether ICG has an alternative remedy available to it.

Processing companies purchase hog casings from one of two sources in the industry: (1) long-term supply contracts with a slaughterhouse like those at issue in this dispute, or (2) the spot market where buyers may purchase casings that are not subject to long-term contracts. PSF asserts that ICG can obtain adequate cover goods from the spot market to supplement its supply. The parties do not generally dispute that ICG can obtain additional hog casings from the spot market; however, the parties vigorously dispute whether those casings are satisfactory for ICG's particular purposes.

Under its contracts with PSF, ICG controls the initial processing and cleaning mechanisms that it uses to prepare the casings. These methods are proprietary and specific to ICG and the casings that it sells to its customers. If ICG is forced to seek casings from suppliers on the spot market, then it will not have control over the processing and cleaning of the casings and it will not be able to implement its proprietary methods. Moreover, to produce the casings that it sells to its customers, ICG needs casings from its suppliers that have certain characteristics including, but not limited to, consistent color and slip and certain length percentages. All of these characteristics that ICG needs bear on the quality of the casings and the credible evidence

does not suggest that the spot market can produce casings of the same quality as PSF.

At the hearing on ICG's pending Motion, PSF demonstrated that ICG can obtain other hog casings from the American spot market and from foreign casings markets. However, PSF did not demonstrate that these replacement casings are of the same quality and specification as ICG obtains from PSF. ICG has demonstrated that the casings produced by PSF are not fungible and not readily available on the spot market; thus, the Court concludes on the current record that ICG cannot find cover goods to replace PSF's casings.

In addition to being unable to find comparable cover casings, ICG also established that it will suffer harm to its good will and reputation in the casings industry if an injunction is not issued. Without PSF's casings, ICG will be unable to satisfy its obligations to its customers, thereby causing those customers to look to other suppliers. The loss of customers is further exacerbated by the limited pool of potential new customers. Thus, ICG provided credible evidence that its current relationships will be adversely affected by PSF's repudiation, that ICG will be unable to ameliorate these relationships in the near future, and that PSF's repudiation will affect ICG's long-term ability to attract new customers. This loss of good will can be a basis for irreparable harm and the Court finds that ICG will suffer

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irreparable harm unless it grants ICG's pending Motion. See *Medicine Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir.2003) (loss of good will can constitute irreparable harm) (citation omitted).

C. Balance of the Harms

ICG has established that if the Court does not grant its Motion, then it will immediately lose 50% of its supply of casings and be unable to fulfill its orders to its customers. Moreover, ICG has established that its class of potential customers is limited to a narrow group of

companies and that its failure to fulfill its orders will have detrimental long-term consequences on its ability to obtain new sources of revenue or renew its contacts with customers that it loses. Thus, if the Court denies ICG's Motion, then it will suffer an immediate loss, both in terms of revenue and customer loyalty, but it will also suffer a prospective loss in the form of damage to its relationships with its customers.

PSF, on the other hand, will also suffer harm if the Court grants ICG's Motion. Prior to terminating its relationship with ICG, PSF negotiated and procured an agreement with another casings processor that agreed to purchase its casings output. PSF argues that if the Court grants ICG's Motion, then it will have to renege on its contract with the new buyer and potentially face litigation for that breach.

Weighing the potential harms to the parties, the Court finds the equities weigh in favor of ICG. ICG's potential loss is great and will continue into the future; for these reasons, it is not capable of quantification. To the extent that PSF suffers harm, that harm will be in the form of performing a contract that the parties negotiated and bargained for, and the Court cannot refuse ICG an appropriate remedy because PSF undertook to enter into negotiations with a third party after having second thoughts about its June 2004 agreement. Thus, the Court finds that the balance of the harms favors ICG.

D. The Public Interest

Similarly, the Court finds that the public interest also favors enforcing the contracts in favor of ICG. As outlined above, the parties negotiated a binding agreement for both facilities and the general public has an interest in courts enforcing binding contracts. Thus, the public interest weighs in favor of ICG.

E. Summary

Because the parties' writings in April and June 2004 manifest a meeting of the minds regarding their intentions to enter into an agreement and because those writings are authenticated in a way that satisfies the Statute

of Frauds, the Court finds that ICG is more likely to succeed on the merits of its claim. Although ICG's success is not guaranteed because some of the issues are factual in nature and reserved for juries, the Court finds that it is more likely than not based on the evidence before the Court at this juncture. Additionally, the Court finds that ICG cannot obtain cover goods that are of the same quality and degree as those produced by PSF and that ICG will suffer the greater harm if the Court does not grant ICG's pending Motion. Finally, the Court finds that the public interest weighs in favor of enforcing the parties' agreement. Therefore, the four factors outlined in *Dataphase*, 640 F.2d at 114, weigh in favor of granting ICG's Motion for Injunction.

III. Conclusion

Accordingly, it is hereby

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ORDERED that International Casing Group, Inc.'s Motion for Preliminary Injunction [Doc. # 8] is GRANTED.

Notes:

1. Sanecki referred to these documents as contracts. The Court does not believe a contract was reached as of April 27, 2004; hence, the use of quotation marks.
2. According to ICG, the differential was in part because of the quality control issues at the Clinton facility.
3. The third party is Standard Casings Company, owned by Roger Theise. Roger Theise previously worked for ICG.
4. For purposes of this subsection of the Court's Order, North Carolina's UCC provisions are identical to Missouri's. Thus, the Court will evaluate the parties' claims under Missouri law, but the analysis will be equally applicable to the Clinton facility contract that is governed by

North Carolina law. The Court will provide parallel citations to North Carolina authorities where appropriate.

5. North Carolina contract law also requires a meeting of the minds. See *The Currituck Associates v. Hollowell*, 601 S.E.2d 256, 263 (N.C.Ct.App.2004); *Fulk v. Piedmont Music Center*, 531 S.E.2d 476, 480 (N.C.App.2000).

6. By this point, only the Clinton price was in dispute. The Milan price had been agreed to earlier.

7. See N.C. Gen.Stat. § 25-2-201.

8. See also N.C. Gen.Stat. § 25-2-201 at cmt. 1.

9. See also *Schafer v. Barrier Island Station, Inc.*, 946 F.2d 1075, 1078 (4th Cir.1991) ("the statute of frauds may be satisfied by several writings which relate to each other") (applying North Carolina law).

10. See generally N.C. Gen.Stat. §§ 66-311 to 66-326 (N.C.UETA).

11. See also N.C. Gen.Stat. § 66-312(9) (definition of "electronic signature").

12. See also N.C. Gen.Stat. § 66-317(d).

13. The Court is aware that an e-mail can be fraudulently sent, indicating it is from one person when it is in fact from someone else. However, a contract written on paper can be forged. With e-mail, it can readily be determined whether the e-mail came from the computer of the reported sender or not, just as there are ways to determine whether a signature is forged. Therefore, the fact that the e-mail header with the name of the sender can be electronically "forged," should not render it an insufficient signature as a matter of law. Of course, this issue is irrelevant here because Pummill has acknowledged under oath that he sent the e-mails.

14. See also N.C. Gen.Stat. § 66-315.

15. PSF argues that ICG limited its potential remedies by virtue of the April 2004 agreements, which contain a paragraph that stated, "In the event of a default by either of the parties hereto, the other (i.e., the non-defaulting) party shall be entitled to (1) terminate the Agreement and (2) recover from the defaulting party whatever damages it shall rightfully be entitled to under applicable provisions of governing law." However, this clause cannot be construed to limit ICG's right to seek injunctive relief because a paragraph that purports to set forth the sole remedy must clearly express that it is the sole remedy. Mo.Rev.Stat. § 400.2-719(1)(b); N.C. Gen.Stat. § 25-2-719(1)(b). The Court finds no such language in the foregoing paragraph and, accordingly, the Court rejects PSF's argument regarding ICG's alleged sole remedy.

16. See also N.C. Gen.Stat. § 25-2-716.

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CRESTWOOD SHOPS, L.L.C., Respondent,
v.
SALLY HILKENE AND CHURCHILL IN CRESTWOOD, L.L.C., Appellants.
No. WD 65694
Court of Appeals of Missouri, Western District.
August 8, 2006

Appeal from the Circuit Court of Jackson County, Missouri Honorable Sandra Carol Midkiff, Judge.

Before: Joseph M. Ellis, P.J., Robert G. Ulrich, and Ronald R. Holliger, JJ.

ROBERT G. ULRICH, Judge.

Sally Hilken and Churchill in Crestwood, L.L.C. (Churchill), owned by Ms. Hilken, appeal the "Partial Judgment for Declaratory Judgment and Injunction" entered by the Jackson County Circuit Court in favor of Crestwood Shops, L.L.C. (Crestwood). The judgment found that a lease between Churchill and Ms. Hilken, lessees, and Crestwood, lessor, was validly terminated and no longer legally in effect. Five points are presented on appeal. First, Ms. Hilken argues that Crestwood did not accept her offer to rescind a lease because the acceptance was not a mirror image of the offer.¹ Second, she argues that Crestwood could not rescind the lease because it was in breach of the lease. Third, she argues that the offer to rescind the lease did not comply with the Statute of Frauds. Fourth, she argues that an offer to rescind the lease had not been made. Finally, she argues that Crestwood could not have accepted the offer to rescind the lease because the offer was made subject to a condition precedent, which the trial court failed to find had occurred prior to the purported acceptance. The judgment is affirmed.

Facts

Ms. Hilken is the owner of Churchill, a store selling accessories, jewelry, handbags, fashion clothing, interior design items, and home gifts. Churchill has operated a retail store since December 2003, in a shopping center owned by

Crestwood. The shopping center is located in Kansas City, Missouri.

Churchill has been a successful business, and, as a result, outgrew its space and requested that Crestwood lease it any additional retail space when space became available. In December 2004, Crestwood offered to lease Churchill adjacent space in the same shopping center. The space was then occupied by a bookstore. Ms. Hilken, as sole owner and officer of Churchill, executed a lease (Lease) with Crestwood for this additional space (Leased Space) on December 15, 2004, retained by Crestwood, unsigned by it.

Subsequently, the bookstore entered into a lease termination agreement with Crestwood. Pursuant to this agreement, the bookstore agreed to terminate its lease with Crestwood and surrender the space by February 28, 2005. Crestwood signed the Lease with Churchill on January 28, 2005. Churchill's Lease was to commence March 1, 2005.

Over a period of a couple months, the relationship between Ms. Hilken and Crestwood deteriorated because of three primary sources of contention. Ms. Hilken asserted to Crestwood that the condition of the newly leased premises was unsatisfactory because of the presence of mold, a faulty foundation due to leaking water, and a defective HVAC system. Prior to taking possession of the Leased Space, Ms. Hilken discovered damage to the foundation in the basement because of a prior leak and the presence of mold in the basement. She also became aware that the HVAC system needed to be replaced. Ms. Hilken had other complaints about the Leased Space, including, among other things, that the bookstore had

permitted an adjacent tenant to partition off and use portions of the Leased Space, that the Leased Space did not have a restroom or fire escape, and that the awnings were removed from the exterior of the Leased Space. The primary issues, however, were the mold, foundation, and HVAC system. Ms. Hilken informed Scott Padon, Crestwood's property manager, of these problems. When Ms. Hilken took possession of the Lease Space on March 1, 2005, the problems had not yet been cured.

A series of conversations, emails, and letters between Ms. Hilken, Mr. Padon, and other agents of Crestwood regarding the problems and their resolution commenced shortly after Ms. Hilken discovered them. Ms. Hilken desired to have the problems resolved quickly because she had a contractor waiting to renovate the interior of the Leased Space so that the second store location could open for business. Crestwood had a policy of requiring three bids if work would cost more than \$2,500 and began the process of securing bids for the mold abatement. Crestwood also commenced steps to remedy the foundation damage and faulty HVAC system. In addition, Ms. Hilken was required to submit to Crestwood her plans for renovating the Leased Space so that Crestwood could approve them. She failed to submit her plans to the satisfaction of Crestwood.

As the interaction between Ms. Hilken and Crestwood became more contentious, both parties manifested a desire to communicate with the other party only in writing. In a certified letter addressed to Ms. Hilken and dated March 15, 2005, Mr. Scott Padon, acting for Crestwood, addressed several issues, including Ms. Hilken's planned improvements to the Leased Space, installation of a fire exit door, demising walls, and various outdoor design details. The letter did not address the mold, foundation, or HVAC system.

Ms. Hilken received the certified letter from Mr. Padon on March 17, 2005. She became frustrated from the delay that resulted from sending the letter certified and from the letter's

failure to address the mold, foundation, or HVAC system. Ms. Hilken conveyed her frustration by making numerous handwritten notes on the letter and faxing the letter, with the notes, to Mr. Padon. One of the handwritten notes was the following:

IF THERE ARE CONTINUED DELAYS
& IGNORING IMP. FACTS IN THESE
LETTERS I CAN RELEASE MYSELF FROM
THIS LEASE AS OF 3-22-05.

Also on March 17, 2005, Ms. Hilken exchanged a series of email with Todd Miller, a friend and Churchill employee. Mr. Miller is also the son of Kaye Miller, one of the owners of Crestwood. The first email, at 12:45 p.m., reported that Churchill was closed because of her brother's death.² Mr. Miller responded at 12:56 p.m. and inquired if he could be of assistance. Ms. Hilken responded at 3:24 p.m. as follows:

You can help me by killing scott padon and the landlords.

I want out of that f...g lease.

I received a certified letter that was so unprofessional and missing important issues that should have been in the letter. Just wasting time. The owners are idiots because they will lose the best builder in town to improve their space. They've dicked us around for almost a month. He can't do the job if he can't start on Monday. So I will get out of the lease if he's not doing it. Hell, the things they let shawver3 get away with, like selling erotica in th [sic] basement!

I feel they are harassing me over petty stuff. They know what Churchill is. The new space will be a better one, but I don't want to be there anymore. It's petty and unprofessional they way the have treated me and Andy.⁴

Luckily, I have enough legal ways to leave.

Let them find someone else who will put the money into crestwood like I have. Good luck finding someone that stupid.

At 3:50 p.m. on March 17, 2005, Ms. Hilken sent the following email to Mr. Padon:

Dear Scott,

I have faxed to you at 3:14 p.m. Today [sic] a response to your certified letter. We have wasted 2 days due to your sending a certified letter. And the letter did not address the most pertinent points, mold, water, and hvac. How could I sign such an incomplete letter? Please rewrite the letter, being thorough and specific (what is the design of the door? Is it per the one george instructed andy to draw and I included with my plans? Will it accommodate large furniture?) How will mold and water be addressed and eradicated? Are they doing what you said they would do on the hvac? While they are resolving these issues, they should excuse me of all rent expenses.

I wish to release myself from the lease by March 24th, if the owners can't resolve the issues which cause concern for myself, andy fritel, and my workers. More specifically the stachybotris⁵ present in the space. Also, Andy's schedule will not permit him to do the space after April 1. I would not have leased the space without his involvement.

Also, my exterior signage will be like Bloomsday.⁶ Where he had his logo, I will have mine. I can get you a drawing next week, but this is petty to hold up the construction inside. Also, an awning to match aixois⁷ with "churchill" on it. Please include in the letter that any improvements, approved by owners, but paid for by me will be my property to take upon leaving.

The exterior lanterns are a safety hazard for people walking to aixois. I liked Jim's idea to have a hanging lantern, similar to george's bracket, that would be high enough to not hurt anyone.

The door stain that is existing is what I thought the space would have. New door would match it.

This entire process should have been reviewed with me prior to March 1. This has been an ordeal for both myself and andy fritel. It is unfortunate that the owners and leasing agents couldn't have been more professional in these specifics prior to the commencement of this lease.

I will be on email only. I will be at the store briefly on Friday, but have family commitments through the weekend and monday.

If you send another certified letter, please copy on email so more time is not wasted,

Sally

(emphasis added).

Ms. Hilken emailed Mr. Padon again on March 18, 2005. In this email, she inquired whether he received her fax and advised him that he could contact her through email if he had questions. That same day, Crestwood, through its attorneys, wrote the following letter to Ms. Hilken:

Dear Sally:

Crestwood Shops, LLC is in receipt of your email correspondence to Scott Padon, Senior Property Manager and Agent for Crestwood Shops, LLC, dated March 17, 2005 (sent at 3:50 p.m.) wherein you indicate your request to be released from the lease of the space located at 301 East 55th Street by March 24, 2005.

Crestwood Shops, LLC hereby honors and accepts your request and both parties shall be released from any and all obligations to the other as of March 24, 2005. The existing lease between the parties for the space located at 309 East 55th Street shall remain unaffected hereby.

Further correspondence was exchanged between the parties wherein it was clear that Crestwood considered the Lease to be terminated while Ms. Hilken considered the Lease to still be effective.

Churchill filed a declaratory judgment action on April 7, 2005, seeking a declaration that the Lease had not been terminated. Crestwood filed its petition on April 8, 2005, seeking a declaration that the Lease had been terminated. The petitions were consolidated, and trial was had on May 11, 2005. The court's "Partial Judgment for Declaratory Judgment and Injunction" was entered on June 1, 2005. The trial court explicitly found a portion of Ms. Hilken's testimony regarding whether she read the Lease not credible. It made the following relevant findings of fact:

In February and early March 2005, Ms. Hilken raised a number of complaints to Crestwood regarding the foundation, mold remediation, and HVAC system.

There was no evidence Ms. Hilken obtained inspections of the foundation or mold by a "qualified inspector," as required by the Lease.

No party ever proposed an abatement plan regarding the mold.

Ms. Hilken created a barrage of email demands and inquiries, directed at Mr. Padon.

Mr. Padon knew of Ms. Hilken's complaints and was required to obtain three bids for the mold abatement work.

By March 14, 2005, Mr. Padon still did not have a mold abatement plan in place and was unable to provide a timetable to Ms. Hilken.

The mold was remediated by April 6, 2005.

There was no credible evidence that the foundation problems interfered with Ms. Hilken's use or improvement of the Leased Space.

There was credible evidence that Crestwood was in the process of contracting for work to the foundation.

The last water damage occurred in August 2004, and there was no credible evidence that

there was a water or foundation problem that, in March 2005, caused any threat of immediate damage or impairment of Ms. Hilken's use of the Leased Space.

There was no credible evidence that the remediation of the mold problem interfered with Ms. Hilken's ability to continue with her improvements, construction, or modification of the Leased Space.

There was no credible evidence that the presence of mold in the basement caused any delay in Ms. Hilken's construction plans for the Leased Space.

Crestwood's failure to obtain full mold remediation on or before March 17, 2005, did not amount to a material or substantial breach of the Lease.

On March 17, 2005, Ms. Hilken sent an email to Mr. Padon containing the following offer:

I wish to release myself from the lease by March 24th, if the owners can't resolve the issues which cause concern for myself, andy fritz, and my workers. More specifically the stachybotris present in the space. Also, Andy's schedule will not permit him to do the space after April 1. I would not have leased the space without his involvement.

Ms. Hilken complained that Mr. Padon had sent a certified letter, thus wasting time, and stated that she preferred to have all communication made in writing. She established a clear pattern and preference for communicating with Mr. Padon by email.

Both parties agreed to conduct transactions by electronic means. Based on the context and surrounding circumstances, the parties were in full agreement on their intention to conduct transactions by email.

Ms. Hilken's clear intention on March 17, 2005, was to get out of her lease obligations for the Leased Space. This intention is evidenced by her email to Mr. Padon in which she made the

offer, by her email to Mr. Miller, and by her handwritten comments on Mr. Padon's March 15, 2005, letter.

Ms. Hilken's testimony that she did not intend her email of March 17, 2005, to Mr. Padon, to be an offer to terminate the lease is found to lack credibility. There is credible evidence that she did intend to void the lease, and that it was her clear intention to do so on March 17, 2005, when she sent her email to Mr. Padon.

Crestwood accepted Ms. Hilken's offer and returned her deposit and first month's rent.

The judgment made the following relevant conclusions of law:

Crestwood could reasonably believe that Ms. Hilken's email of March 17, 2005, constituted an offer to terminate the Lease if Crestwood could not fulfill her demands by March 24, 2005. They made a timely and valid acceptance of Ms. Hilken's offer. The acceptance of Ms. Hilken's offer to terminate the lease effective March 24, 2005, constitutes a mirror image of her offer. This completed a valid contract.

Even if Crestwood was in breach of the Lease, this would not impede Ms. Hilken's ability to make a valid offer to terminate the Lease. She had the legal capacity to make such an offer on behalf of Churchill and she did so.

The offer conveyed by email, and the acceptance conveyed by certified mail, constituted a valid contract to terminate the lease. The two documents satisfy the requirements of the Statute of Frauds.

The March 17, 2005, email from Ms. Hilken to Mr. Padon satisfied the requirements of the Uniform Electronic Transactions Act. Ms. Hilken's email was a valid written offer.

The judgment decreed that the Lease was no longer legally in effect, and it was validly terminated.

Thereafter, Churchill, Ms. Hilken, and Crestwood jointly dismissed all remaining claims, making the judgment final. Churchill and Ms. Hilken's timely notice of appeal followed.

Standard of Review

In a court-tried case, the judgment of the trial court will be affirmed unless no substantial evidence supports it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Martin v. Reed*, 147 S.W.3d 860, 861 (Mo. App. S.D. 2004)(citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). The trial court's judgment will be set aside only with a firm belief that the judgment is wrong. *McRentals, Inc. v. Barber*, 62 S.W.3d 684, 696 (Mo. App. W.D. 2001). All evidence and inferences favorable to the judgment are accepted as true, while all contrary evidence and inferences are disregarded. *Martin*, 147 S.W.3d at 861. Deference is given to the trial court's findings regarding witness credibility and the trial court is free to believe or disbelieve all or part of the witnesses' testimony. *Id.*; *McRentals, Inc.*, 62 S.W.3d at 696. Deference is also given to a trial court's findings of fact. *In re Estate of Moore*, 136 S.W.3d 163, 164 (Mo. App. S.D. 2004). Interpretation of a contract is a question of law and is subject to de novo review. *Local 781 Int'l. Ass'n of Firefighters v. City of Independence*, 996 S.W.2d 112, 115 (Mo. App. W.D. 1999). When interpreting a contract, the overriding concern of the appellate court is to give effect to the intentions of the parties. *Id.*

Point I

In the first point relied on, Churchill and Ms. Hilken argue that the trial court erred in concluding that the March 18, 2005, letter from Crestwood constituted an acceptance of an offer to rescind the Lease. They assert that the trial court erroneously applied the law because the purported acceptance did not mirror the terms of the alleged offer.

The existence of a contract requires both an offer and acceptance. *Walker v. Rogers*, 182 S.W.3d 761, 768 (Mo. App. W.D. 2006).

Acceptance must be unequivocal and a "mirror-image" of the offer. *Id.* An acceptance that includes new or variant terms from the offer presented is a rejection of the original offer and a counter-offer. *Pride v. Lewis*, 179 S.W.3d 375, 379 (Mo. App. W.D. 2005). A determination of whether an offer has been accepted depends upon what is actually said and done; it does not depend on the understanding or supposition of one of the parties. *Walker*, 182 S.W.3d at 768.

In her March 17, 2005, email, Ms. Hilken stated: "I wish to release myself from the lease by March 24th, if the owners can't resolve the issues which cause concern for myself, andy fritel, and my workers." The trial court found that this language was Ms. Hilken's offer to terminate the Lease. In response to this email, Crestwood sent Ms. Hilken a certified letter on March 18, 2005; the letter stated:8 "Crestwood Shops, LLC hereby honors and accepts your request and both parties shall be released from any and all obligations to the other as of March 24, 2005." Ms. Hilken contends that the acceptance is not a mirror image of the offer and, thus, that it is really a counteroffer, and there was no agreement to rescind the Lease.

She asserts that her March 17, 2005, email only offered to release herself and Churchill from the Lease. It did not, she claims, offer to terminate the Lease or mutually release all of the parties from their responsibilities under the Lease. She asserts that the offer was to release herself from the Lease, not to rescind, void, or mutually release all parties from the Lease.

In *Woods ex rel. Woods v. Cory*, 192 S.W.3d 450, 459-60, (Mo. App. S.D. 2006), the defendant claimed that the language of acceptance introduced new or variant terms from the language of the offer and was, thus, a rejection and counter-offer. The language of the offer was to pay "\$35,000.00 to settle all cases and claims." *Id.* at 460. The language of the acceptance was to "settle all matters connected with these cases for \$17,5000.00 to each case." *Id.* The appellate court found that defendant's claim was without merit. *Id.* It stated that it "is undisputed that Defendant offered to pay

\$35,000.00 to settle the two claims and Plaintiffs accepted \$ 35,000.00 to settle both claims." *Id.* Thus, *Woods* teaches that the language used to extend and accept an offer does not have to be identical in order for a valid contract to result. Instead, the acceptance must not change the terms of the offer.

Ms. Hilken argues that Crestwood's acceptance was more than merely using different words to accept the offer. Instead, she asserts it changed the terms of the offer. She relies primarily upon *Pride v. Lewis*, 179 S.W.3d 375 (Mo. App. W.D. 2005). In *Pride*, a potential homebuyer made an offer to purchase a home, with closing to take place on a certain date. *Id.* at 377. The sellers accepted the offer, but changed the closing date in the contract. *Id.* The sellers admitted that changing the closing date converted the acceptance into a counter-offer because the terms of the offer, namely the closing date, had been changed. *Id.* at 379. This court found that the buyer never accepted the counter-offer, and a valid contract did not result. *Id.* at 381.

Ms. Hilken uses a definition, first asserted by Crestwood, that the term "release" indicates a desire to "terminate all of his/her rights and obligations under the agreement." She states that this definition does not encompass terminating the other party's obligations under the agreement. Ms. Hilken's argument is logically flawed. The Lease was between Churchill and Ms. Hilken as lessors and Crestwood as lessees. According to Ms. Hilken's argument, her email was an offer to release both herself and Churchill, of which she is the sole shareholder and officer, from the Lease. She was offering, per her endorsement of Crestwood's definition of release, to terminate all of her rights and obligations under the Lease. Thus, she and Churchill would no longer be a party to the Lease, as they would have neither rights nor obligations under the Lease. Applying Ms. Hilken's analysis, this would leave Crestwood as the sole party to the Lease. Crestwood would be a lessor without a lessee. It would have rights, but no party against whom to enforce them. It would have obligations, but no party to whom

they were owed. If Ms. Hilken's offer was to terminate all of her and Churchill's rights and obligations under the Lease, it was also an offer to terminate Crestwood's rights and obligations under the Lease as Crestwood could not remain the sole party to the Lease. The effect was to terminate the Lease entirely. When Crestwood accepted Ms. Hilken's offer, it merely stated this fact. It did not change or add terms to the offer; it re-stated the offer and clarified the effect of releasing Ms. Hilken and Churchill from the Lease. Crestwood's acceptance was a valid acceptance; it was not a counter-offer.

Point denied.

Point II

In the second point relied on, Churchill and Ms. Hilken argue that the trial court erred in concluding that Crestwood could rescind the Lease. They assert that the trial court erroneously declared and applied the law because Crestwood had already breached the Lease. They rely upon the rule that a party who has committed a contractual breach cannot later rescind the contract. *Meyer Mill. Co. v. Baker*, 43 S.W.2d 794, 796-97 (Mo. 1931); *Landau v. St. Louis Pub. Serv. Co.*, 273 S.W.2d 255, 257-58 (Mo. 1954).

The trial court made the following relevant finding:

Even if Crestwood was in breach of the Lease, this would not impede Ms. Hilken's ability to make a valid offer to terminate the Lease. She had the legal capacity to make such an offer on behalf of Churchill and she did so.

In essence, Ms. Hilken argues that this finding is incorrect. She relies on *Meyer Milling Co. v. Baker*, 43 S.W.2d 794, 796-97 (Mo. 1931), and *Landau v. St. Louis Public Service Co.*, 273 S.W.2d 255, 257-58 (Mo. 1954), for support of her claim. These two cases involved a defendant that breached a contract and then attempted to unilaterally terminate the contract. The cases are distinguishable from the case sub judice. A mutual agreement to terminate the contracts did not exist in either of the two cases

as the trial court found occurred in this case. Ms. Hilken cites the following language from *Landau* in support of her assertion:

However, even if defendant's action in mailing out this form of release could be construed as the manifestation of an intention to repudiate or breach the contract, the trouble with plaintiff's position is that she had first breached it. "[A] party who has himself been guilty of the first substantial breach of contract cannot rescind the contract because of subsequent refusal or failure to perform by the other party."

273 S.W.2d at 258 (citation omitted). This language illustrates that a party who has breached a contract may not unilaterally choose to rescind the contract. In this case, Crestwood did not unilaterally rescind the Lease. Ms. Hilken made an offer, and Crestwood accepted the offer. Thus, even if Crestwood were in breach of the Lease, which is not decided, it was not prevented from accepting Ms. Hilken's offer to terminate the Lease. The trial court's finding was correct.

Point denied.

Point III

In the third point relied on, Churchill and Ms. Hilken argue that the trial court erred in concluding that Ms. Hilken's March 17, 2005, email satisfied the Statute of Frauds as a signed writing. They assert that the trial court erroneously applied the law because the parties had not agreed to conduct Lease transactions by electronic means.

None of the parties dispute that because the Lease was for a term of five years, it was within the purview of the Statute of Frauds. §§ 432.010, 432.060.9 Thus, like the Lease itself, the termination of the Lease must also be in writing to comport with the Statute of Frauds. *Id.* This is also not disputed by the parties. The trial court relied upon the Uniform Electronic Transactions Act (UETA), section 432.200 et seq.,¹⁰ to conclude that Ms. Hilken's March 17, 2005, email to Crestwood was a signed writing comporting with the Statute of Frauds. The

UETA gives legal effect to contracts formed by electronic record, but its application is limited to transactions where all the parties to the agreement have agreed to conduct transactions by electronic means. § 432.220.2. Section 432.220.2 states:

Sections 432.200 to 432.295 apply only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

Ms. Hilken argues in this third point that her March 17, 2005, email does not qualify as a signed document under the Statute of Frauds because the parties did not agree to conduct transactions by electronic means. She relies on the following Lease provisions:

Landlord hereby leases to Tenant and Tenant hereby leases from Landlord the Premises for a term ... commencing on the Commencement Date and ending on the Expiration Date set forth in Article 1, unless sooner terminated as provided herein ...¹¹

... Except as otherwise expressly provided herein, no subsequent alteration, amendment, change or addition to this Lease, nor any surrender of the Premises, shall be binding upon Landlord or Tenant unless reduced to writing and signed by them.¹²

This Lease comprises the entire agreement and understanding of the parties; and all prior negotiations, correspondences, proposals, verbal understandings and other prior documents are hereby merged into this Lease, which shall not be amended or modified except by a formal written instrument executed by both parties.¹³

Ms. Hilken also states that the Lease and an amendment to the Lease were executed by her on behalf of Churchill. She observes that the emails between her and Crestwood or its agents were signed by her, but not explicitly on behalf of Churchill. All of this, she asserts, is evidence

that the parties did not agree to conduct transactions via email.¹⁴

The trial court made the following relevant findings of fact:

Ms. Hilken created a barrage of email demands and inquiries, directed at Mr. Padon.

Ms. Hilken complained that Mr. Padon had sent a certified letter, thus wasting time, and stated that she preferred to have all communication made in writing. She established a clear pattern and preference for communicating with Mr. Padon by email.

Both parties agreed to conduct transactions by electronic means. Based on the context and surrounding circumstances, the parties were in full agreement on their intention to conduct transactions by email.

The trial court also made the following relevant conclusions of law:

The offer conveyed by email, and the acceptance conveyed by certified mail, constituted a valid contract to terminate the lease. The two documents satisfy the requirements of the Statute of Frauds.

The March 17, 2005, email from Ms. Hilken to Mr. Padon satisfied the requirements of the Uniform Electronic Transactions Act. Ms. Hilken's email was a valid written offer.

Several pieces of evidence admitted at trial support the trial court's findings and conclusions. In an email Mr. Padon sent to Ms. Hilken on March 1, 2005, he stated: "Because of the accusations voiced during our meeting last Friday, I would prefer to have my correspondence with you in writing, which unintentionally delayed my response to you because I need to be in my office to email." Ms. Hilken responded with an email stating: "I prefer not to call you, and have been advised to have all communications with you in writing."

Ms. Hilken acknowledges this evidence, but claims it only evidences an agreement to

communicate or correspond via email. It does not, she asserts, manifest an agreement to conduct transactions via email. In her March 17, 2005 email, sent at 3:50 p.m., Ms. Hilkene stated: "I will be on email only." This is the email in which Ms. Hilkene made the offer to terminate the Lease, which Crestwood subsequently accepted. In this email, Ms. Hilkene makes her offer and states that she is available only through email. By accepting the offer, Crestwood agrees that such an offer, a transaction, may be done through email. This is substantial evidence that the parties agreed to transact business via email.

Section 432.220.2 requires the trial court to examine the "context and surrounding circumstances, including the parties' conduct" in determining whether the parties agreed to conduct transactions by electronic means. As noted above, the parties communicated primarily through email. They explicitly agreed to communicate only in writing. Further, Ms. Hilkene complained when Crestwood communicated with her via a certified letter because the letter took two days to reach her. She demonstrated a preference for email because of its speed. Moreover, she conveyed her offer to terminate the contract via email and stated that she could only be reached through the use of email. The trial court found that this evidence was the manifestation of an intent to conduct business through email. Deference is given to a trial court's findings of fact. Moore, 136 S.W.3d at 164. The trial court's findings and conclusions are not error.

Point denied.

Point IV

In the fourth point relied on, Churchill and Ms. Hilkene argue that the trial court erred in concluding that the March 17, 2005, email constituted an offer to rescind the Lease between Churchill and Crestwood. They assert that the trial court erroneously applied the law to the facts because the trial court failed to consider whether the surrounding circumstances, the method of communications, and the language

used supported its finding. Instead of an offer, they claim that the March 17, 2005, email was an attempt to continue negotiations under the terms of the Lease as illustrated by the surrounding circumstances, the method of communications, and the language used.

Ms. Hilkene argues that the language of the March 17, 2005, email belies its characterization as an offer to terminate the Lease. This is because she stated, "I wish to release myself from the lease" and did not explicitly state an offer to terminate, rescind, or cancel the Lease. She claims that the email indicates her intent to exercise her option not to pay rent or otherwise perform her obligations under the Lease. She also reiterates her argument from Point I, that the email does not state an offer to release Crestwood from the Lease; it only mentions herself. In addition, she notes that the remainder of the March 17, 2005, email discusses fixture placement and signage, thus evincing her intent to occupy the Leased Space.

Further, Ms. Hilkene reiterates her argument from Point III that she expressed no intention to terminate the Lease because, under the terms of the Lease, a termination is required to be a formal writing executed by both parties. She notes that Crestwood required a formal written amendment when it previously amended the Lease and that it executed a formal written termination agreement when the prior tenant, a bookstore, terminated its lease.

Moreover, Ms. Hilkene states that she previously indicated a desire to be released from the Lease if her concerns were not addressed in the comments she wrote on the March 15, 2005, certified letter sent to her by Mr. Padon and then faxed by her to Mr. Padon. Despite asserting this intention, she continued to negotiate with Crestwood regarding her concerns. This, she claims, indicates that her use of the word "release" was not an offer to terminate the contract and that she intended to continue negotiating, as she had the previous time she used the word "release."

Finally, she argues that, because of her frustration regarding the various problems with the leased Space and because of the mental distress she experienced that resulted from her brother's death, she was not in a good mental state when she wrote the March 17, 2005, email. She argues that the trial court failed to consider these circumstances and her emotional distress.

All of the above, she argues, is evidence that the March 17, 2005, email was not an offer to terminate the Lease. She claims that the trial court failed to consider this evidence and arguments when it found that the email was an offer. The trial court made the following relevant findings of fact:

On March 14, 2005, in an email to Mr. Padon, Ms. Hilken made a written request that her rent should not start until "you finish the work that should have been completed before March 1. There were months before where you could have acquired all your bids and done the work...."

Crestwood and Mr. Padon had not responded to Ms. Hilken's request to abate her rent obligation, when on March 17, 2005, Ms. Hilken sent another email to Mr. Padon, containing the following offer:

I wish to release myself from the lease by March 24th, if the owners can't resolve the issues which cause concern for myself, andy fritel, and my workers. More specifically the stachybotris present in the space. Also, Andy's schedule will not permit him to do the space after April 1. I would not have leased the space without his involvement.

On March 17, 2005, at 3:24 p.m., within the same hour that she emailed to Mr. Padon her desire to be released from the Lease, Ms. Hilken sent an email to the son of another Crestwood tenant and LLC member, indicating her desire and intention to be released from the Lease. She wrote, in part, "I want out of that f....g lease...Luckily, I have enough legal ways to leave. Let them find someone else who will put money into Crestwood like I have...." The manner in which this email was delivered was

further evidence of her desire and intent that the message be communicated to the shop owner LLC member. Also in her handwritten response to Mr. Padon's letter of March 15, 2005, Ms. Hilken wrote: "If there are continued delays ignoring imp. Facts in these letters I can release myself from this lease as of 3-22-05." Ms. Hilken's clear intention on March 17, was to get out of her Lease obligation for the 301 premises.

Ms. Hilken's testimony that she did not intend her email of March 17, 2005, to Mr. Padon, to be an offer to terminate the lease is found to lack credibility. There is credible evidence that she did intend to void the lease, and that it was her clear intention to do so on March 17, 2005, when she sent her email to Mr. Padon.

It also made the following relevant conclusions of law:

Crestwood could reasonably believe that Ms. Hilken's email of March 17, 2005, constituted an offer to terminate the Lease if Crestwood could not fulfill her demands by March 24, 2005. They made a timely and valid acceptance of Ms. Hilken's offer. The acceptance of Ms. Hilken's offer to terminate the lease effective March 24, 2005, constitutes a mirror image of her offer. This completed a valid contract.

The offer conveyed by email, and the acceptance conveyed by certified mail, constituted a valid contract to terminate the lease. The two documents satisfy the requirements of the Statute of Frauds.

These findings of fact reflect that the trial court considered all of the evidence, including that Ms. Hilken had previously used the word "release" and that she was seeking a rent abatement, found that she lacked credibility, and determined that it was her intent to offer to terminate the Lease in her March 17, 2005, email.¹⁵ Generally, intent is a question of fact. *Goff v. Case*, 17 S.W.3d 574, 578 (Mo. App. W.D. 2000). Deference is given to the trial court's findings regarding witness credibility and

the trial court may believe or disbelieve all or part of the witnesses' testimony. *Martin*, 147 S.W.3d at 861; *McRentals, Inc.*, 62 S.W.3d at 696. Deference is also given to a trial court's findings of fact. *Moore*, 136 S.W.3d at 164. The trial court simply did not believe Ms. Hilken's testimony or evidence that she did not intend to offer to terminate the Lease. This was not error. See, e.g., *Luebbert v. Simmons*, 98 S.W.3d 72, 78-79 (Mo. App. W.D. 2003)(In response to woman's argument that she lacked the necessary intent to be bound when signing a promissory note because she was drunk and joking, the appellate court stated that "[t]his was a credibility call" and that the trial court was free to disbelieve the woman's account of the events.).

Point denied.

Point V

In the fifth point relied on, Churchill and Ms. Hilken argue that the trial court erred in concluding that Crestwood accepted the alleged offer to rescind the Lease. They assert that the trial court erroneously applied the law to the facts because the alleged offer was subject to a condition precedent, which the trial court failed to find had occurred prior to Crestwood's purported acceptance.

"Under certain circumstances ... a condition precedent can qualify the very existence of a contract, such as when the terms of the offer or a statute impose a condition precedent upon the validity of a contract." *Meco Sys., Inc. v. Dancing Bear Entm't, Inc.*, 42 S.W.3d 794, 803 (Mo. App. S.D. 2001). Ms. Hilken's offer was made with the following language:

I wish to release myself from the lease by March 24th, if the owners can't resolve the issues which cause concern for myself, andy fritel, and my workers. More specifically the stachybotris16 present in the space. Also, Andy's schedule will not permit him to do the space after April 1. I would not have leased the space without his involvement.

The offer was made on March 17, 2005, and Crestwood accepted it on March 18, 2005. Ms. Hilken now argues that Crestwood could not have accepted the offer until March 24, 2005, and only then if the issues of concern had not been resolved. She asserts that the arrival of March 24, 2005, without resolution of the problems, was a condition precedent to the formation of an agreement to terminate the Lease. Ms. Hilken argues that no evidence was presented that Crestwood could not resolve the mold issue by March 24, 2005. She also claims that the trial court did not make a finding that the condition precedent occurred.¹⁷

At trial, Mr. Padon testified that the mold was remediated by April 6, 2005. Kaye Miller, one of the three managing partners of Crestwood, testified that when they received Ms. Hilken's March 17, 2005, offer via email, they discussed it. She stated that "it was absolutely impossible" to complete the mold work by March 24, 2005, and, because of this, Crestwood accepted Ms. Hilken's offer. She also testified that Crestwood could not meet Ms. Hilken's conditions because the mold remediation would take ten days to two weeks to complete once a company was hired and that, as of March 17, 2005, Crestwood had not even received all the bids. The trial court made the following relevant findings of fact:

By March 14, 2005, Mr. Padon still did not have a mold abatement plan in place and was unable to provide a timetable to Ms. Hilken.

The mold was remediated by April 6, 2005.

The trial court made the following relevant conclusions of law:

Crestwood could reasonably believe that Ms. Hilken's email of March 17, 2005, constituted an offer to terminate the Lease if Crestwood could not fulfill her demands by March 24, 2005. They made a timely and valid acceptance of Ms. Hilken's offer. The acceptance of Ms. Hilken's offer to terminate the lease effective March 24, 2005, constitutes a mirror image of her offer. This completed a valid contract.

The judgment also contained the following:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Commercial Lease between Crestwood Shops, L.L.C. and Sally S. Hilkene and Churchill's in Crestwood was validly terminated, effective March 24, 2005.

The evidence was that Crestwood was unable to remediate the mold by March 24, 2005. The mold was not actually remediated until April 6, 2005. Because of the inability of Crestwood to remediate the mold by March 24, 2005, Crestwood accepted the offer. The trial court recognized the existence of the condition precedent and decreed that the Lease was terminated effective March 24, 2005, the date set by Ms. Hilkene. Implicit in the judgment, the trial court found that the condition precedent did not occur. If it had, there would not have been an agreement to terminate the Lease.

Ms. Hilkene further argues that her offer did not require that the mold be abated by March 24, 2005. Instead, it required that the mold be "resolved" by that date, meaning that a plan of action be in place by that date. Interpretation of a contract is a question of law and is subject to de novo review. Local 781 Int'l. Ass'n of Firefighters, 996 S.W.2d at 115. Ms. Hilkene and Mr. Padon exchanged several emails. In these, Ms. Padon informed Ms. Hilkene that he was in the process of obtaining bids and could not develop a timetable until all bids were received. In a March 14, 2005, email to Mr. Padon, Ms. Hilkene made a written request that her rent should not start until "you finish the work that should have been completed before March 1. There were months before where you could have acquired all your bids and done the work...." In this email, she was requesting the work to be completed, not that a plan of action be initiated. Also in these emails, Ms. Hilkene informed Ms. Padon that her contractor could not do the remodeling work after April 1 and that she would not have leased the additional space if she knew she would have to use another contractor. Given this, a reasonable interpretation of the word "resolve" is that Ms.

Hilkene wanted to terminate the Lease if the mold was not abated by March 24, 2005, so that she could begin remodeling on that date. The trial court interpreted the word this way, evidenced by its judgment, and so does this court. Further, even if the word resolve were ambiguous, it would be construed against Ms. Hilkene, the drafter. *Byrd v. Frank B. Wilson Trust*, 182 S.W.3d 701, 706 (Mo. App. W.D. 2006).

Point denied

Conclusion

All of Ms. Hilkene and Churchill's points are denied, and the judgment is affirmed.

All concur.

Notes:

1. Ms. Hilkene was sole owner and officer of Churchill in Crestwood, L.L.C., and during all relevant events acted for and on behalf of the corporation and herself.
2. Ms. Hilkene's brother died on approximately March 15, 2005.
3. Shawver refers to the proprietor of the bookstore, the former tenant.
4. Andy Fritzel is the contractor Ms. Hilkene hired to renovate the Leased Space.
5. This is the variety of mold found in the basement of the Leased Space.
6. Bloomsday is the former tenant, the bookstore.
7. Aixois is a neighboring business.
8. Ms. Hilkene states that Crestwood stated: "Crestwood has accepted your offer of March 17th and considers both parties to be released from the lease for the Premises, effective March 24, 2005." She does not indicate where this is

located in the record. The judgment found that Crestwood accepted the offer with the language used in the opinion. This language is from the certified letter sent to Ms. Hilken by Crestwood on March 18, 2005.

9. All statutory references are to RSMo 2000 unless otherwise stated.

10. All references to the Uniform Electronic Transactions Act are to RSMo Cum. Supp. 2003 unless otherwise stated.

11. This provision is located in Article 3 of the Lease.

12. This provision is located in Article 38.8 of the Lease.

13. This provision is located in Article 38.10 of the Lease.

14. Ms. Hilken may be implying that her March 17, 2005, email was not an offer to terminate the contract because such an offer violated the cited provisions of the Lease or because the offer was not signed explicitly by her on behalf of Churchill. The only argument raised in the point relied on is that the parties did not agree to conduct transactions by electronic means. "Issues not encompassed by the point relied on and raised only in the argument portion of the brief are not preserved for review." *Pearson v. Pearson*, 22 S.W.3d 734, 739 n.4 (Mo. App. W.D. 2000) (internal quotation marks and citation omitted). Thus, any argument outside of whether evidence was presented that the parties agreed to conduct transactions through email is not considered.

15. In the reply brief, Ms. Hilken argues that the trial court failed to state what "credible evidence" existed in the record to conclude that the March 17, 2005, email was an offer from Churchill to rescind the Lease. Ms. Hilken does not cite authority for the proposition that the trial court was required to make such a finding. Further, the trial court's findings cite the correspondence between Ms. Hilken and Mr. Padon and Mr. Miller as evidence of her intent

to make such an offer and that such an offer was made.

16. This is the variety of mold found in the basement of the Leased Space.

17. Ms. Hilken argues that a finding was required in the judgment that the mold issue could not be resolved before March 24, 2005. She cites no authority requiring such a finding, however.

**IN THE UNITED STATES COURT
DISTRICT OF KANSAS**

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:07-cv-02146-CM
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

**AFFIDAVIT OF PLAINTIFF SAMUEL K. LIPARI
IN SUPPORT OF PLAINTIFF'S ANSWER TO SHOW CAUSE**

I Samuel K. Lipari, residing at 297 NE Bayview, in the City of Lee's Summit and in the County of Jackson of the State of Missouri was the chief executive officer of the now dissolved Missouri corporation Medical Supply Chain, Inc. I assigned all interests and rights of Medical Supply Chain, Inc. to myself on the day I dissolved the corporation with the Missouri Secretary of State. I hereby testify to the following regarding my disclosures of discovery in response to the defendants' motions for production of documents and answers to interrogatories. I also hereby testify to how I responded to the defendants fraudulent motions to compel and fraudulently procured orders to show cause, which I believe to have been made in the absence of jurisdiction by the court over this Missouri State case and in the absence of jurisdiction while the same matter or controversy is in the 10th Circuit Court of Appeals. I Samuel K. Lipari testify to the following:

I. Plaintiff Rule 26 Compliance

1. On June 7, 2005 I, Samuel K. Lipari served the defendants with an initial disclosure index of exhibits, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", an index of documents with Bates stamp and a list of witnesses served by personal service to 120 W. 12th Street Kansas City, MO in case # 05-0210-CV-W- ODS, the defendants had previously received the plaintiff's witnesses and all known addresses in 2003 as part of the plaintiff's proposed joint case management order sent to the defendants and Magistrate Waxse in 2003.

2. On April 20, 2007 I, Samuel K. Lipari again served the defendants with an updated index of exhibits and witness list. The document index, *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", refers to a Bates stamp number and dates that corresponds with the four volumes of evidentiary exhibits including a witness list that is categorized by reference participation and relevance. Volume I - *See Exhibit 22* pg. 1-

3972 April 20, 2007 “Lipari Trial Exhibits Volume I”, which are evidentiary document that support plaintiffs complaint and pleadings, Volume II - *See Exhibit 23* pg. 1-2848 April 20, 2007 “Lipari Trial Exhibits Volume II”, which are evidentiary documents that support plaintiff’s attempt to overcome US Banks contract breach through efforts to cover or mitigate the damages with General Electric and Michael W. Lynch, Volume III - *See Exhibit 24* pg. 1-4009 April 20, 2007 “Lipari Supplemental Trial Exhibits Volume I”, which are additional evidentiary document that support plaintiffs attempt to overcome US Banks contract breach and Volume IV - *See Exhibit 25* pg. 1-167 April 20, 2007 “Lipari Supplemental Trial Exhibits Volume II”, which are evidentiary document that further support plaintiff’s attempts to overcome US Bank and US Bancorp’s contract breach through covering or mitigating the losses with General Electric and Michael Lynch; all combined on indexed digital disk (DC) as a complete Rule 26(a)(1) disclosure record.

3. On May 3, 2007 I, Samuel K. Lipari served the defendants again with an updated index (supplemental) of exhibits and witness list. The document index, *See Exhibit 26* pg. 1-42 May 3, 2007 “Disclosure”, the index refers to a Bates stamp number and dates that corresponds with the four volumes of evidentiary exhibits including a witness list that are categorized by reference participation and relevance. Volume I - *See Exhibit 22* pg. 1-3972 April 20, 2007 “Lipari Trial Exhibits Volume I”, which are evidentiary document that support plaintiffs complaint and pleadings, Volume II - *See Exhibit 23* pg. 1-2848 April 20, 2007 “Lipari Trial Exhibits Volume II”, which are evidentiary document that support plaintiffs attempt to overcome US Banks contract breach through cover and mitigation, Volume III - *See Exhibit 24* pg. 1-4009 April 20, 2007 “Lipari Supplemental Trial Exhibits Volume I”, which are additional evidentiary document that support plaintiffs attempt to overcome US Banks contract breach through cover and mitigation and Volume IV - *See Exhibit 25* pg. 1-167 April 20, 2007 “Lipari Supplemental Trial Exhibits Volume II”, which are evidentiary document that further support plaintiffs attempts to overcome US Banks contract breach through cover and mitigation; all combined on indexed digital disk (DC) as a complete Rule 26(a)(1) disclosure record.

4. On February 9, 2008 I, Samuel K. Lipari served the defendants and the Hon. Magistrate David J. Judge Waxse, *See Exhibit 27* pg. 1-5 February 9, 2008 “Settlement Brief Notice” with a settlement brief and three volumes of evidentiary exhibits indexed by volume, exhibit number and the description of the document. Settlement Brief - *See Exhibit 28* pg. 1-107 February 9, 2008 “Lipari v US Bank Settlement Brief”, Volume I - *See Exhibit 29* pg. 1-118 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. I”,

Volume II - *See Exhibit 30* pg. 1-385 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. II”, and
Volume III - *See Exhibit 31* pg. 1-27 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. III”.

5. On March 10, 2008 the defendants through Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 emailed an objection to the plaintiff’s disclosures, *See Exhibit 32* pg. 1 March 10, 2008 “Jay Discovery Objection”. That same day on March 10, 2008 I, Samuel K. Lipari responded with a reply letter, *See Exhibit 33* pg. 1 March 10, 2008 “Reply to Defendant Discovery Objection”. In that letter I, Samuel K. Lipari agreed to resolve any issues defendant might have with regard to plaintiffs Rule 26(a)(1) disclosures.

6. On March 26, 2008 I, Samuel K. Lipari served by email the plaintiff’s answers to the defendants’ first set of interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 “Answer to First Set of Interrogatories”.

A. Defendants’ First Material Misrepresentations to the Court by an officer of the court over the Plaintiff’s Discovery Compliance

7. On April 22, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 filed the Motion to Compel, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” Rule 26(a)(1).

8. On April 23, 2008 the day after filing their Motion to Compel, the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 served the plaintiff with a Golden Rule Letter, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari” outlining deficiencies in plaintiff’s Rule 26(a)(1) first set of interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 “Answer to First Set of Interrogatories”. Defendants filed their Motion to Compel, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” Rule 26(a)(1) one day in advance of providing plaintiff with a Golden Rule Letter notice, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari” the plaintiff had no opportunity to correct any deficiencies, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” Rule 26(a)(1). Now compare the date of, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” with the date of, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari”.

9. On April 30, 2008 I, Samuel K. Lipari filed a response to defendants Motion to Compel, *See Exhibit 37* pg. 1-8 April 30, 2008 “Plaintiff Response to April 22 68 Motion to Compel”

10. On May 6, 2008 I, Samuel K. Lipari served its response to defendants Golden Rule Letter dated

April 23, 2008, *See Exhibit 38* pg. 1-45 May 6, 2008 “Response to Golden Rule Letter Dated April 23”, plaintiff’s second set of interrogatories in response to defendants Golden Rule Letter, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari”, but the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Att’y. Lic. #20770 fraudulently omitted notice to the Honorable Magistrate Judge David J. Waxse that the plaintiff did in fact respond with a second set of interrogatory answers, *See Exhibit 38* pg. 1-45 May 6, 2008 “Response to Golden Rule Letter Dated April 23”.

11. On May 7, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a communication by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Att’y. Lic. #20770 emailed the plaintiff requesting disclosure clarification, *See Exhibit 39* pg. 1-2 May 7, 2008 “Clarification of CD Rule 26 Disclosures” and suggested that the plaintiff somehow manipulated the disk format of exhibits. Later that same day I, Samuel K. Lipari responded to defendants’ request and explained that there may be a conflict between operating system programs. The defendants made no additional requests.

12. On May 17, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a communication by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Att’y. Lic. #20770 served the plaintiff with US Bank’s Preliminary List of Witnesses & Exhibits, *See Exhibit 40* pg. 1-3 May 17, 2008 “US Bank Preliminary List of Witnesses & Exhibits” with six witnesses and five exhibits and no explanation of witness relevance or addresses. The five exhibits are documents I, Samuel K. Lipari had provided to the defendants as part of my Rule 26 disclosures. The witnesses also appear to be only those from the plaintiff’s list of witnesses and the text of the complaint provided the defendants by the plaintiff.

13. On May 22, 2008 defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Att’y. Lic. #20770 filed another Motion to Compel, *See Exhibit 41* pg. 1-3 May 22, 2008 “Motion to Compel”.

14. On June 5, 2008 I, Samuel K. Lipari emailed my second Rule 26 supplemental disclosures, *See Exhibit 42* pg. 1-3 June 5, 2008 “Second Rule 26 Supplemental Disclosures” to cure witness address deficiencies requested by the defendants that were not available to the plaintiff when the plaintiff served his Response to Golden Rule Letter Dated April 23, 2008, *See Exhibit 38* pg. 1-45 May 6, 2008 “Response to

Golden Rule Letter Dated April 23”. The defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. made no additional request for clarification or notice of any deficiencies.

II. Completion of the First Fraud on the Court Over Plaintiff’s Discovery Compliance

15. On July 8, 2008 The Honorable Magistrate Judge David J. Waxse filed a Memorandum and Order based on the fraudulent misrepresentations by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. and the order gives the appearance Magistrate Judge David J. Waxse was deceived by the defendants’ fraud on the court, *See Exhibit 43* pg. 1-5 July 8, 2008 “Memorandum and Order”.

16. On July 15, 2008 I, Samuel K. Lipari notified defendant, *See Exhibit 44* pg. 1 July 15, 2008 “Email to Jay Requesting Clarification” as to what additional Rule 26(a)(1) disclosures are needed that plaintiff has not already provided. The defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. made no additional request.

III. Completion of the Second Fraud on the Court Over Plaintiff’s Discovery Compliance

17. On July 22, 2008 The Honorable Magistrate Judge Waxse filed a Memorandum and Order, *See Exhibit 45* pg. 1-12 July 22, 2008 “Memorandum and Order” in reply to defendants Motion to Compel *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel”.

A. Defendants’ Subsequent Misrepresentations through an officer of the court

18. On August 18, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 filed a response to show cause that furthered the defendants repeated pattern of fraud, *See Exhibit 46* pg.1-2 August 18, 2008 “Defendants Response to Show Cause”.

IV. Completion of the Third Fraud on the Court Over Plaintiff’s Discovery Compliance

19. On August 18, 2008 The Honorable Magistrate Judge Waxse filed a Notice and Order to Show Cause, *See Exhibit 47* pg. 1-2 August 18, 2008 “Notice and Order to Show Cause” in response to defendants response to show cause order *See Exhibit 46* pg.1-2 August 18, 2008 “Defendants Response to Show Cause”.

A. Defendants' Subsequent Misrepresentations through an officer of the court

20. On August 20, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 filed a Motion for Order to Show cause that attempted to complete the fraudulent scheme of repeated frauds on the court for the purpose of procuring a dismissal through fraud, *See Exhibit 48* pg. 1-3 August 20, 2008 "Defendants Motion to Show Cause".

V. Completion of the Fourth Fraud on the Court Over Plaintiff's Discovery Compliance

21. On August 25, 2008 The Honorable Magistrate Judge Waxse filed the Second Notice and Order to Show Cause *See Exhibit 49* pg. 1-6 August 25, 2008 "Second Notice and Order to Show Cause".

A. PLAINTIFF HAS PRODUCED SEVEN SETS OF OVER 10,000 INDEXED EVIDENTIARY EXHIBITS WITH A SHORT ABBREVIATION AND BATES STAMP NUMBERS IN ADDITION TO SEVENTY CATEGORIZED WITNESSES ASSOCIATED BY RELEVANCE

22. As of September 1, 2008 I, Samuel K. Lipari have produced seven set of exhibits to defendants, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure" *See Exhibit 28* pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief", *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I", *See Exhibit 30* pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II", *See Exhibit 31* pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III" combining over 10,000 documents indexed by volume, exhibit number, description of the document, Bates stamp in addition to 70 categorized witnesses associated by relevance all of which contradict every fraudulent motion filed by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. used as the basis of the order from the Honorable Magistrate Judge David J. Waxse regarding the plaintiffs Rule 26(a)(1) disclosures compliance.

23. The defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. have disclosed only five whitens and five exhibits, *See Exhibit 40* pg. 1-3 May 17, 2008 "US Bank Preliminary List of Witnesses & Exhibits".

24. I, Samuel K. Lipari last submitted an index of exhibits May 3, 2007, *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure" The Disclosure identifies a corresponding Bates stamp located in the upper right hand side of plaintiffs disclosure documents which references each specific evidentiary document, *See Exhibits 22, 23* "Lipari Trial Volume I, II", and *See Exhibits 24, 25* "Lipari Supplement Trial Exhibits Volume I, II." In addition, on February 9, 2008 I, Samuel K. Lipari served defendants and The Honorable

Magistrate Judge David J. Waxse with plaintiff's settlement brief and three volumes of evidentiary exhibits, *See Exhibit 27* pg. 1-5 February 9, 2008 "Settlement Brief Notice", and *See Exhibits 29, 30, 31* "February 9, 2008 Settlement Brief Evidence Exhibits Vol. I, II, III", indexed by volume, exhibit number, description of the document and totaling 530 pages. The settlement brief explained and referenced each evidentiary document's relevance to the plaintiff's complaint and its role in supporting the elements of the plaintiff's claims, answering every interrogatory question posed by the defendants even exceeding the scope the defendants were entitled to through discovery by identifying the legal theory of the plaintiff relevant to each document and element.

25. Going back to the beginning of this matter or controversy on June 7, 2005 I, Samuel K. Lipari served an initial index of exhibits with referenced Bates stamped and a list of witnesses associated by relevance, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure". As this matter or controversy developed over time I, Samuel K. Lipari submitted subsequent disclosures indexed with Bates stamp and added additional witnesses, *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure" and again on May 3, 2007, *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure". Plaintiff **Exhibits 21, 26** were provided to defendant on an indexed digital disk (CD) as required by electronic discovery Rules.

26. In addition to my submitting production of discovery request three times with two electronic copies prior to defendants April 22, 2008 Motion to Compel Rule 26(a)(1), I, Samuel K. Lipari also submitted to the defendants for the purpose of additional disclosures and served notice to The Honorable Magistrate Judge David J. Waxse, plaintiff's Settlement Brief Notice with three volumes of additional evidence, *See Exhibit 27* pg. 1-5 February 9, 2008 "Settlement Brief Notice", *See Exhibit 28* pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief" with three volumes of evidentiary documents, Vol. I, II, III, *See Exhibits 29, 30, 31* February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I, II, III" indexed paragraph-by-paragraph totaling 530 pages of additional evidence all of which contradict every fraudulent motion filed by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. and the order from The Honorable Magistrate Judge David J. Waxse regarding the plaintiffs Rule 26(a)(1) disclosures compliance.

VI. Defendant's Rule 26(a)(1) Compliance

27. To date (September 1, 2008) I, Samuel K. Lipari have received no electronic discovery from defendants and the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. continue to misrepresent to the court that they have produced discovery

relevant to their defense, *See Exhibit 40* pg. 1-3 May 17, 2008 “US Bank Preliminary List of Witnesses & Exhibits” where the documents are merely copies of the plaintiff’s production, not the emails and original electronic files of US Bank and US Bancorp that the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. were under notice to preserve and instead appear to have destroyed with the intent to obstruct justice.

**A. DEFENDANTS HAVE ONLY PRODUCED 41 PAGES OF DOCUMENTS
ALL ON PAPER COPIED FROM PLAINTIFF’S OWN DISCLOSURES AND
116 PAGES OF BANK STATEMENTS DESPITE REQUEST FOR ONLY ELECTRONIC FILES**

28. To date (September 1, 2008) I Samuel K. Lipari have received no electronic discovery from the defendants and the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. continue to misrepresent to The Honorable Magistrate Judge Waxse that 116 pages of plaintiffs bank statements showing that the plaintiff was in fact a valued customer of US Bank and 41 pages of documents copied from plaintiff previously submitted disclosures is compliance to the Honorable Magistrate Judge David J. Waxse for defendants’ Rule 26(a)(1) discovery obligation to the plaintiff.

29. The Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge David J. Waxse continue to illustrate bias and prejudice against the plaintiff or in the alternative have made discovery rulings procured through the defendants’ fraud on the court as I, Samuel K. Lipari believe the evidentiary record contained herein plainly shows and that I, Samuel K. Lipari have and did comply with Rule 26(a)(1) in advance of defendants’ first, second and third Motions to Compel or Show Cause, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” and again May 22, 2008, *See Exhibit 41* pg. 1-3 May 22, 2008 “85 Motion to Compel”, and again *See Exhibit 48* pg. 1-3 August 20, 2008 “Defendants Motion to Show Cause”.

30. In addition, the Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge David J. Waxse through adoption of the defendants’ filings through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. have accepted fraudulent assertions by the defendants in pleadings by Shughart Thomson & Kilroy, P.C. associate Jay E. Heidrick, KS Att’y. Lic. #20770 that the plaintiff has not complied with his discovery obligations, in order for the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. to obtain sanctions and ultimately the dismissal of the plaintiff’s claims; which is also threatened in defendants’ last filing, a pleading by Shughart Thomson & Kilroy, P.C. associate Jay E. Heidrick, KS Att’y.

Lic. #20770, *See Exhibit 48* pg. 1-3 August 20, 2008 “Defendants Motion to Show Cause” and the Honorable Magistrate Judge Waxse’s last order *See Exhibit 49* pg. 1-6 August 25, 2008 “Second Notice and Order to Show Cause”.

31. The Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge David J. Waxse appear to I, Samuel K. Lipari as having ignored the evidentiary record provided to them by the plaintiff and have instead relied on the fraudulent and misleading assertions of the defendant through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. to participate in the defendants’ fraudulent scheme to procure through fraud a dismissal of my claims through the court’s bias and prejudiced orders against me.

32. I, Samuel K. Lipari believe the defendants’ assertions to the court are nothing more than a perversion of the law, the facts and the record contained herein at the expense of lives, taxpayers and judicial resources.

33. The defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. continue to make materially false misrepresentations to the court which grants those motions over my objections to this court’s subject matter jurisdiction and memorandums of law and fact contradicting those misrepresentations and their legal effect, which are known to the defendants, the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. and Hon. Magistrate Judge David J. Waxse to be false from the evidence, the record and the plaintiffs pleadings which were served on the Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge David J. Waxse. In addition the Honorable Magistrate Judge David J. Waxse and later the Honorable District Court Judge Carlos Murguia received the settlement evidence on July 10, 2008 as an exhibit to Lipari Objection to Order of Magistrate Judge Order to Compel (doc. 97) which refers in the second paragraph to the settlement brief and supporting volumes of evidentiary documents as exhibits which were submitted to Hon. Magistrate Judge David J. Waxse and the defendants back on February 9, 2008, *See Exhibit 30* pg. 1-5 February 9, 2008 “Settlement Brief Notice”, *Exhibit 29* pg. 1-118 February 9, 2008 ‘Settlement Brief Evidence Exhibits Vol. I’, *Exhibit 30* pg. 1-385 February 9, 2008 ‘Settlement Brief Evidence Exhibits Vol. II’, *Exhibit 31* pg. 1-27 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. III”.

34. The plaintiff believes the defendant’s arguments in pleadings by Shughart Thomson & Kilroy, P.C. associate Jay E. Heidrick, KS Atty. Lic. #20770 about the quality and structure of plaintiff’s

evidentiary disclosures are fraudulent and frivolous as plainly visible from the document indexes and formatting of the evidence provided digitally and partially in paper to the defendants, and that this fraud is identical in motivation and effect to the false assertions in pleadings including Motions to dismiss and motions for sanctions over the last six years by the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. through Shughart Thomson & Kilroy, P.C. shareholder Steven D. Ruse KS lic. #11461; Shughart Thomson & Kilroy, P.C. shareholder Mark A. Olthoff, KS Atty. Lic. # 70339; shareholder Andrew M. DeMarea, KS #16141; former associate Jonathan H. Gregor, KS Atty. Lic. # #50443; former associate Logan W. Overman, KS Atty. Lic. # #55002; and associate Jay E. Heidrick, KS Atty. Lic. #20770 about the contents of the plaintiff's complaints that are demonstrably false on the face of Shughart Thomson & Kilroy, P.C.'s pleadings and misrepresent controlling legal authority and even the language of the U.S. Congress in public laws creating statutes granting private rights of action including those private rights of action expressly created by the USA PATRIOT Act (Public Law Pub.L. 107-56) and the clearly established controlling authorities of the US Supreme Court including *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) providing for the plaintiff's right to not sue all antitrust co-conspirators in a single action for which this court erroneously sanctioned the plaintiff; that a prior judgment could bar subsequent claims contrary to *Lawlor*, 349 U.S. at 329, 75 S.Ct. 865 for which this court also erroneously sanctioned the plaintiff; and that under *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) providing for the plaintiff's right to bring antitrust and RICO claims (Bankers Trust, 859 F.2d at 1096) each time a plaintiff suffers an injury caused by an illegal act of the defendants because a cause of action accrues to recover damages based on that injury for which this court erroneously sanctioned the plaintiff. All of which the Hon. District Court Judge Carlos Murguia adopted even over the plaintiff's timely notices of the clear errors in motions to reconsider, Rule 60 Motions and answers to show cause.

VII. Plaintiff's Compliance with defendants' discovery production requests and interrogatories

35. To date (September 1, 2008) I, Samuel K. Lipari have complied with each request for production of documents and each set of interrogatories propounded by the defendants.

36. I, Samuel K. Lipari had already complied with defendants' fraudulently procured Order to Compel before it or the Motion to Compel was served on the plaintiff, *See Exhibits 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.*

"April 22, 2008 Doc. 68 Motion to Compel Order: Order filed July 22, 2008

07/22/2008 103 MEMORANDUM AND ORDER granting in part and denying in part 68 Motion to Compel. On or before 7/30/2008, Plaintiff shall serve an amended Rule 26(a)(1)(A)(i) witness disclosure statement in compliance with this Memorandum and Order. On or before 7/30/2008, Plaintiff shall serve a supplemental Rule 26(a)(1)(A)(ii) document disclosure statement or serve amended Rule 26(a)(1)(A)(ii) document disclosures in compliance with this Memorandum and Order. On or before 8/13/2008, Plaintiff shall show cause why he should not be required to pay a portion of the reasonable fees and expenses that Defendants incurred in making their Motion to Compel. Signed by Magistrate Judge David J. Waxse on 7/22/2008. (bh) (Entered: 07/22/2008)

37. The plaintiff had already complied with defendants' First Motion to Compel before it was served on the plaintiff, *See Exhibits 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.*

A. The Material Fraudulent Misrepresentations to The Court in the First Motion to Compel

"MOTION TO COMPEL COMPLIANCE WITH RULE 26(a)(1)

The defendants, by and through their attorneys of record Shughart Thomson & Kilroy, P.C., file this Motion to Compel Plaintiff's Compliance with Rule 26(a)(1). In support of this Motion, defendants state as follows:

1. On April 20, 2007, plaintiff served his initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1). *See, Doc. No. 26.*"

Exhibit 35 pg. 1-3 April 22, 2008 "68 Motion to Compel"

38. On April 20, 2008 the plaintiff did not file or serve anything to defendants. On March 26, 2008 thirty days earlier than represented to the court, I, Samuel K. Lipari served my answers to the defendants' first set of interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 "Answer to First Set of Interrogatories".

"2. The disclosures are essentially duplicates of his disclosures made in a corresponding lawsuit Jackson County, Missouri captioned *Lipari, et al. v. General Electric, et al.* Circuit Court of Jackson County, Missouri, Case No. 0616-CV07421. Neither defendant is a party to that action, and plaintiff's disclosures are therefore irrelevant to this suit."

Exhibit 35 pg. 1-3 April 22, 2008 "68 Motion to Compel"

39. If the court and defendants had reviewed the record they will find that Missouri, Case No. 0616-CV07421 are the contract state claims dismissed without prejudice stemming from similar conduct participated in by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. for the purpose of committing extrinsic fraud by preventing the plaintiff from covering or mitigating his damages from US Bank and US Bancorp's breach through the third parties General Electric and Michael W. Lynch. This conduct is tortious interference with a business expectancy under Missouri law and the damages are equal to what the plaintiff would have obtained in his transaction with General Electric and what he would have obtained through capitalizing his corporation's entry into the market for hospital supplies with Michael w. Lynch's assistance. The Hon. Carlos Murguia was served evidence of this tortious interference in the plaintiff's business expectancies with General Electric in the

absence of a property interest by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in the form of sealed affidavits for attorneys' fees listing conferences with General Electric's counsel Husch, Blackwell & Sanders LLP then called Husch Eppenberger. LLC.

"3. Additionally, plaintiff's disclosures fail to comply with the intent and letter of Rule 26(a)(1). His disclosures list over 70 witnesses but do not list contact information or subjects of knowledge. Thirty-nine pages of his disclosures contain broad and generic descriptions of documents— none of which appear relevant to this suit. Finally, plaintiff provides a compact disc which contains over 11,000 pages of documents that again lack relevance to this suit."

Exhibit 35 pg. 1-3 April 22, 2008 "68 Motion to Compel"

40. As of September 1, 2008 I, Samuel K. Lipari have produced seven set of exhibits to defendants, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure" *See Exhibit 28* pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief", *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I", *See Exhibit 30* pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II", *See Exhibit 31* pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III" combining over 10,000 documents indexed by volume, exhibit number, description of the document, Bates stamp in addition to 70 categorized witnesses associated by relevance all of which contradict every fraudulent motion filed by the defendants and order from The Honorable Magistrate Judge David J. Waxse regarding the plaintiffs Rule 26(a)(1) disclosures compliance..

41. On April 20, 2007 and May 3, 2007 I, Samuel K. Lipari served the defendants with an updated index of exhibits and witness list. The document index, *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure", refers to a Bates stamp number and dates that corresponds with the four volumes of evidentiary exhibits including a witness list that are categorized by reference to witness participation and relevance. Volume I - *See Exhibit 22* pg. 1-3972 May 3, 2007 "Lipari Trial Exhibits Volume I", which are evidentiary document that support plaintiffs complaint and pleadings, Volume II - *See Exhibit 23* pg. 1-2848 May 3, 2007 "Lipari Trial Exhibits Volume II", which are evidentiary documents that support plaintiff's attempt to overcome US Banks contract breach, Volume III - *See Exhibit 24* pg. 1-4009 May 3, 2007 "Lipari Supplemental Trial Exhibits Volume I", which are additional evidentiary document that support plaintiffs attempt to overcome US Banks contract breach and Volume IV - *See Exhibit 25* pg. 1-167 May 3, 2007 "Lipari Supplemental Trial Exhibits Volume II", which are evidentiary documents that further support plaintiff's attempts to overcome US Bank's contract breach all combined on indexed digital disks (DC) as a

complete Rule 26(a)(1) disclosure record.

“4. Defendants have made repeated good faith efforts to resolve this dispute with the plaintiff. See, Correspondence attached as Exhibit 1; Response to Motion for Extension to Supplement, Doc. No. 56. Plaintiff indicated to defendants and the Court that he would supplement his disclosures by April 15, 2008. See, Doc. No. 55. But he has failed to do so. “

Exhibit 35 pg. 1-3 April 22, 2008 “68 Motion to Compel”

42. Defendants’ false statement contradicts the record. On March 26, 2008 I, Samuel K. Lipari served by email the answers to the defendants’ first set of interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 “Answer to First Set of Interrogatories” and on April 23, 2008 defendants served the plaintiff with a Golden Rule Letter, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari” outlining deficiencies in plaintiff’s Rule 26(a)(1) first set of answers to defendants’ interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 “Answer to First Set of Interrogatories”. The defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. filed their Motion to Compel, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” Rule 26(a)(1) one day in advance of providing the plaintiff with a Golden Rule Letter notice, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari.” The plaintiff had no opportunity to correct any deficiencies before defendants filed their April 22, 2008 Motion to Compel, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” Rule 26(a)(1). I, Samuel K. Lipari have compared the date of the motion, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” with the date of, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari”. The defendants through the false conduct and misrepresentation of their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. created and mailed the required Golden Rule letter after they had already filed their motion to compel.

“5. Defendants are filing a supporting legal memorandum herewith and incorporate by reference all arguments made therein.”

Exhibit 35 pg. 1-3 April 22, 2008 “68 Motion to Compel”

43. I, Samuel K. Lipari had already complied with the defendants’ fraudulently procured Order to Compel dated July 8, 2008 before the order was entered by the Hon. Magistrate Judge David J. Waxse:

“May 22, 2008 Doc. 85 Motion to Compel Order: Order filed July 8, 2008

07/08/2008 96 MEMORANDUM AND ORDER granting 85 Motion to Compel. Plaintiff shall, within fourteen days of the date of this Order, produce all documents responsive to Defendants' First Set of Requests for Production and serve supplemental responses to Defendants' First Interrogatories No. 1, 3, 5-14, 16-17, and 21. Plaintiff shall, within twenty-one (21) days of the date of this Order, show cause in a pleading filed with the Court, why he should not be required to pay the reasonable fees and expenses that Defendants have incurred in making their Motion to Compel. Signed by Magistrate Judge David J. Waxse on 7/8/2008. (bh) (Entered: 07/08/2008)”

44. The plaintiff had already complied with defendants' fraudulently procured Order to Compel before it or the Motion to Compel was served on the plaintiff, *See Exhibits 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.*

B. The Material Fraudulent Misrepresentations to The Court in the Second Motion to Compel

"DEFENDANTS' MOTION TO COMPEL DISCOVERY RESPONSES

Defendants, U.S. Bancorp and U.S. Bank National Association, by and through their attorneys Shughart, Thomson & Kilroy, file this Motion to Compel Discovery Responses. In support of this Motion, defendants state as follows:

"1. On March 6, 2008, defendants served their First Set of Interrogatories and First Set of Requests for Production on plaintiff."

Exhibit 41 pg. 1-3 May 22, 2008 "85 Motion to Compel"

45. To date, I Samuel K. Lipari have only received from the defendants a response with only five witnesses and five exhibits on May 17, 2008 not as defendants again misrepresented to the court March 6, 2008, *See Exhibit 40* pg. 1-3 May 17, 2008 "US Bank Preliminary List of Witnesses & Exhibits" and May 17, 2008 is 30 days after defendants filed their Motion to Compel Rule 26(a)(1) against plaintiff, *See Exhibit 35* pg. 1-3 April 22, 2008 "68 Motion to Compel", five days before defendants filed their second Motion to Compel, *See Exhibit 41* pg. 1-3 May 22, 2008 "85 Motion to Compel".

46. The defendants filed their first Motion to Compel against the plaintiff, *See Exhibit 35* pg. 1-3 April 22, 2008 "68 Motion to Compel" 30 days before the plaintiff had received any Rule 26(a)(1) disclosures from the defendants, *See Exhibit 40* pg. 1-3 May 17, 2008 "US Bank Preliminary List of Witnesses & Exhibits" and 3 years after plaintiff served his first Rule 26(a)(1) initial disclosures, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure". I Samuel K. Lipari have received no electronic discovery from the defendants and the defendants continue to make fraudulent misrepresentations to the court. Somehow The Honorable Magistrate Judge David J. Waxse has accepted the defendants' 5 witnesses and 5 exhibits as defendants Rule 26(a)(1) obligation to plaintiff.

"2. On April 22, 2008, plaintiff served his responses to defendant's Interrogatories, but did not serve any responses or otherwise provide documents in response to defendant's request for Production."

Exhibit 35 pg. 1-3 May 22, 2008 "68 Motion to Compel"

47. Statement of facts paragraph two is a continuation of the fraud on the court by the defendants and was accepted by the Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge Waxse who appear to have been deceived and ordered a Motion to Compel procured from the defendants' fraud. On April 22, 2008 I, Samuel K. Lipari did not file or serve anything to defendants. On

March 26, 2008 thirty days earlier than represented to the court, I, Samuel K. Lipari served the first answers to defendants' first set of interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 "Answer to First Set of Interrogatories".

48. As of September 1, 2008 I, Samuel K. Lipari have produced seven set of exhibits to defendants, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure" *See Exhibit 28* pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief", *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I", *See Exhibit 30* pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II", *See Exhibit 31* pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III" combining over 10,000 documents indexed by volume, exhibit number, description of the document, Bates stamp in addition to 70 categorized witnesses associated by relevance all of which contradict every fraudulent motion filed by the defendants and order from the Honorable Magistrate Judge David J. Waxse regarding the plaintiffs Rule 26(a)(1) disclosure compliance.

"3. Plaintiff's responses to Interrogatory Nos. 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17 and 21 are insufficient in that they fail to provide the information requested by each Interrogatory."

Exhibit 35 pg. 1-3 May 22, 2008 "68 Motion to Compel"

49. On March 10, 2008 I, Samuel K. Lipari received an email subject: "Lipari v. US Bank-Plaintiff's First Requests for Production...", *See Exhibit 32* pg. 1 March 10, 2008 "Jay Discovery Objection". After receiving defendants email March 10, 2008 I, Samuel K. Lipari sent a letter to the defendants, *See Exhibit 33* pg. 1 March 10, 2008 "Reply to Defendant Discovery Objection" expressing interest to comply with defendants request. On March 26, 2008 I, Samuel K. Lipari complied with defendants request, *See Exhibit 34* pg. 1-17 March 26, 2008 "Answer to First Set of Interrogatories" on April 22, 2008 one day prior to receiving defendants golden rule letter concerning deficiencies in plaintiffs First Set of Interrogatories, *See Exhibit 36* pg. 1-5 April 23, 2008 "Golden Rule Letter to Lipari" defendants filed a Motion to Compel Rule 26(a)(1), *See Exhibit 35* pg. 1-3 April 22, 2008 "68 Motion to Compel". The defendants did not give plaintiff an opportunity to cure any deficiencies before filling a Motion to Compel; in fact defendants filled its Motion to Compel in advance of providing plaintiff notice or an opportunity to cure any deficiencies. This evidences the defendants' continuation of fraud on the court and the Honorable Magistrate Judge David J. Waxse was deceived ignoring the plaintiff's objections by ordering a Motion to Show Cause.

"4. Plaintiff should be ordered to provide full responses and documents in response to defendants'

Requests for Production. Likewise, because he did not offer any objections, plaintiff should be ordered to provide full and complete responses to Interrogatory Nos. 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17 and 21.”

Exhibit 35 pg. 1-3 May 22, 2008 “68 Motion to Compel”

50. Statement of facts paragraph four is a continuation of the fraud on the court by the defendants and was accepted by the Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge Waxse who were deceived by this paragraph into finding that the plaintiff had not answered some of the defendants’ interrogatories fully or produced all the requested documents when in fact the plaintiff had supplemented both the disclosures of documents and the answers to interrogatories which the defendants’ omitted from disclosing to the court. As of September 1, 2008 I, Samuel K. Lipari have produced seven set of exhibits to defendants, *See Exhibit 20* pg. 1-7 June 7, 2005 “Initial Disclosure”, *See Exhibit 21* pg. 1-40 April 20, 2007 “Disclosure”, *See Exhibit 26* pg. 1-42 May 3, 2007 “Disclosure” *See Exhibit 28* pg. 1-107 February 9, 2008 “Lipari v US Bank Settlement Brief”, *See Exhibit 29* pg. 1-118 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. I”, *See Exhibit 30* pg. 1-385 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. II”, *See Exhibit 31* pg. 1-27 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. III” combining over 10,000 documents indexed by volume, exhibit number, description of the document, Bates stamp in addition to 70 categorized witnesses associated by relevance all of which contradict every fraudulent motion filed by the defendants and the order from the Honorable Magistrate Judge Waxse regarding the plaintiffs Rule 26(a)(1) disclosure compliance.

51. When I, Samuel K. Lipari learned by the defendant’s letter (See **Exhibit 36** pg. 1-5 April 23, 2008 “Golden Rule Letter”) of deficiencies, I complied with the defendants request and submitted a supplemental disclosure addressing deficiencies brought to plaintiff’s attention then on May 6, 2008 I, Samuel K. Lipari responded with an additional 28 pages of interrogatories *See Exhibit 38* pg. 1-45 May 6, 2008 “Response to Golden Rule Letter Dated April 23”. On May 7, 2008 I, Samuel K. Lipari received an email subject: “Documents on CD for Rule 26 disclosures...”

“Sam-

In your response to our Motion to Compel, you indicated that the CD of documents you provided were searchable. That is not the case. The files are password protected that prevent any type of OCR, re-printing as a .pdf and searching. Please provide the password that will allow us to change the security setting for these files and make them searchable. Or please provide us with a new CD that allows OCR and searchable functions. Thanks.

Jay”

Exhibit 39 pg. 1-2 May 7, 2008 “Clarification of CD Rule 26 Disclosures”

52. On that same day I, Samuel K. Lipari responded with an explanation to defendant *See Exhibit*

39 pg. 1-2 May 7, 2008 “Clarification of CD Rule 26 Disclosures”.

“Jay,

Sorry for the misunderstanding. I have not password protected any of the files. I think we are using two different meanings of searchable, the table of contents leads you to documents by keywords. Some are scanned images where keyword searching, cutting and pasting is not possible. Some were made into pdfs with the software I could afford, not Adobe and you have to go into the properties section to alter or save. You are no doubt inconvenienced but that is the software I have and the form I have created and store the pdfs in the normal course of business. You on the other hand give me only the paper versions of MS Word documents for the few docs you have produced in discovery even though I have requested only electronic documents. I hope this helps. Best regards, S~”

Exhibit 39 pg. 1-2 May 7, 2008 “Clarification of CD Rule 26 Disclosures”

C. The Material Fraudulent Misrepresentations to The Court in the Third Motion to Compel

53. On May 22, 2008 the defendants filed another Motion to Compel, *See Exhibit 41* pg. 1-3 May 22, 2008 “85 Motion to Compel”.

54. On June 5, 2008 I, Samuel K. Lipari responded with additional witness addresses, *See Exhibit 42* pg. 1-3 June 5, 2008 “Second Rule 26 Supplemental Disclosures”.

55. On July 15, 2008 I, Samuel K. Lipari emailed defendant and ask what additional information is need to comply with the courts order, *See Exhibit 44* pg. 1 July 15, 2008 “Email to Jay Requesting Clarification”

“5. Defendants certify that they have made a good faith attempt to resolve this discovery dispute. On April 23, 2008, defendants sent a letter to plaintiff outlining the deficiencies in his discovery responses. Plaintiff contacted defendants’ attorney on May 6, 2008, indicating that he was attempting to comply with the Golden Rule letter. Defendants’ attorney responded that same day and requested plaintiff’s supplemental responses by May 12, 2008. But plaintiff has failed to serve any supplemental responses to defendants’ interrogatories and has not served any responses to defendants’ Requests for Production. On May 20, 2008, defendants’ counsel attempted to contact plaintiff via telephone, but could not reach him.”

Exhibit 35 pg. 1-3 May 22, 2008 “68 Motion to Compel”

56. Despite the best efforts of the plaintiff to cooperate and meet the defendants discovery demands, having already repeatedly produced every document in an organized indexed fashion and repeatedly answering every interrogatory even disclosing requested legal theories and other information beyond the scope of discovery demands, the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. filed a Motion to Compel, *See Exhibit 35* April 22, 2008 “68 Motion to Compel” Rule 26(a)(1) the day before giving notice to plaintiff *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari” about any deficiencies and the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. have asserted their conduct is in good faith.

57. I, Samuel K. Lipari didn't contact defendant on May 6, 2008, plaintiff served defendants with twenty seven additional pages of interrogatories, *See Exhibit 38* pg. 1-45 May 6, 2008 "Response to Golden Rule Letter Dated April 23".

58. I, Samuel K. Lipari served my supplemental response May 6, 2008, *See Exhibit 38* pg. 1-45 May 6, 2008 "Response to Golden Rule Letter Dated April 23" six days before defendant made its request deadline of May 12, 2008. Plaintiff's first response to defendants request was made March 26, 2008, *See Exhibit 34* pg. 1-17 March 26, 2008 "Answer to First Set of Interrogatories".

59. As of September 1, 2008 I, Samuel K. Lipari have produced seven sets of exhibits to defendants, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure" *See Exhibit 28* pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief", *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I", *See Exhibit 30* pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II", *See Exhibit 31* pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III" combining over 10,000 documents indexed by volume, exhibit number, description of the document, Bates stamp in addition to 70 categorized witnesses associated by relevance all of which contradict every fraudulent motion filed by the defendants and order from The Honorable Magistrate Judge Waxse regarding the plaintiffs Rule 26(a)(1) disclosure compliance. The plaintiff has complied with defendants' fraudulently procured Order to Compel before it or the Motion to Compel was served on the plaintiff, *See Exhibits 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31*.

60. I, Samuel K. Lipari never received any calls from defendant. Plaintiff's phone is on his person 24 hours a day 7 days a week and has a voice mail feature for leaving messages. No call was made and I, Samuel K. Lipari never received a message.

61. On August 25, 2008 the court filed the following order (doc 120)

"120 SECOND NOTICE AND ORDER TO SHOW CAUSE". Defendants' Motion for Order to Show Cause 118 is granted. Plaintiff Samuel K. Lipari is required to show cause to United States District Judge Carlos Murguia, in a pleading filed by 9/8/08, why this case should not be dismissed with prejudice, or other sanctions imposed, pursuant to Federal Rule of Civil Procedure 37(b)(2)(A) for failure to comply with the Courts 7/8/08 Order (doc. 96), and/or pursuant to Federal Rules of Civil Procedure 16(f) and 37(b)(2)(A) for failure to participate in the preparation of a joint proposed pretrial order. Signed by Magistrate Judge David J. Waxse on 8/25/08. (mh) (Entered: 08/25/2008)"

Exhibit 49 pg. 1-6 August 25, 2008 "Second Notice and Order to Show Cause"

62. The above order is in error because of the fraudulent misrepresentations described in the preceding paragraphs and because I, Samuel K. Lipari sent the defendants and Magistrate Judge David J.

Waxse a joint pretrial order, See **Exhibit 51** August 21, 2008 “Plaintiff’s Pretrial Order” (email cover letter to Magistrate Waxse)) evidencing cooperation with the defendants as ordered by the court (see also **Exhibit 9** of the Answer to Show cause Order Plaintiff’s Combined Pretrial Order) at 1:54pm on the same day the defendants had sent to Magistrate Judge David J. Waxse a pretrial order at 12:31pm with only the defendants’ portions included. See **Exhibit 50** August 21, 2008 Defendants’s Pretrial Order (email cover letter to Magistrate Waxse). See also **Exhibit 8** of the Answer to Show cause Order.

63. On August 20, 2008 the defendants filed the following Motion for Order to Show Cause with a repetition of the above described materially false misrepresentations about the plaintiff’s compliance with discovery except the defendants are no longer making the false assertion that that the plaintiff has not produced or needs to produce documents requested by the defendants and the defendants revealed their fraudulent scheme had the goal of procuring the dismissal of the plaintiff’s claims:

“118 MOTION FOR ORDER TO SHOW CAUSE

Defendants, by and through counsel Shughart Thomson & Kilroy, P.C., move this Court for an Order requiring the plaintiff to show cause why this action should not be dismissed (or other sanctions levied) under Rule 37(b)(2)(A) for his failure to comply with the Court’s July 8, 2008 discovery Order. In support of this Motion, defendants state as follows:

1. On July 8, 2008, the Court ordered plaintiff, within 14 days of the Order, to serve supplemental responses to defendants’ First Interrogatories Nos. 1, 3, 5-14, 16, 17 and 21; and to produce all documents responsive to defendants’ First Request for Production. The Court also ordered the plaintiff, within 21 days of the Order, to show cause why he should not be required to pay the reasonable fees and expenses the defendants incurred for their Motion to Compel. *See*, Memorandum and Order, Doc. # 96.”

Exhibit 48 pg. 1-3 August 20, 2008 “Defendants Motion to Show Cause”

64. As I, Samuel K. Lipari have shown from the above sworn information and documentary exhibits, I had answered the defendants’ First Interrogatories Nos. 1, 3, 5-14, 16, 17 and 21 and I had produced all documents responsive to defendants’ First Request for Production before that these requests were made and several times in response to the defendants’ requests.

“2. On July 10, 2008, plaintiff filed an Objection to Magistrate’s Order, asking for District Court review of the July 8, 2008 Order. *See*, Doc. # 97. But the plaintiff did not seek to stay the Order under D. Kan. Rule 72.1.4(d).”

Exhibit 48 pg. 1-3 at ¶ 2 August 20, 2008 “Defendants Motion to Show Cause”

65. I, Samuel K. Lipari having as shown in the above sworn information and documentary exhibits, answered the defendants’ First Interrogatories Nos. 1, 3, 5-14, 16, 17 and 21 and I had produced all documents responsive to defendants’ First Request for Production before that these requests were made and several times in response to the defendants’ requests; therefore I, Samuel K. Lipari believe I did not need to file a motion seek to stay the Order under D. Kan. Rule 72.1.4(d) and if any non frivolous dispute still

exists with the defendants my conduct cannot be sanctioned because "substantially justified." See *Fitz, Inc. v. Ralph Wilson Plastics Co.*, 174 F.R.D. 587, 591 (D.N.J.1997) (noting that, in the context of Rule 37 sanctions, "substantial justification" occurs when there is a "genuine dispute concerning compliance") (citing *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)).

"3. Simply filing an Objection to Magistrate's Order does not relieve a party's obligation to comply with the order, absent an Order to Stay under D. Kan. Rule 72. See, *Kelly v. Market USA*, 2003 WL 21089075, *2 (D. Kan. 2003) (holding that *pro se* plaintiff's refusal to comply with the magistrate's order to produce discovery was unexcused even though the plaintiff had filed an objection to the order). A copy of the *Kelly* decision is attached as Exhibit A."

Exhibit 48 pg. 1-3 at ¶ 3 August 20, 2008 "Defendants Motion to Show Cause"

66. I, Samuel K. Lipari hereby reassert the response in the above paragraph regarding my actual compliance and substantial justification making a motion for stay under D. Kan. Rule 72.1.4(d) unnecessary.

"4. The plaintiff has not produced any documents or supplemental responses in accordance with the Court's Order, and has also failed to respond to the Court's Show Cause Order."

Exhibit 48 pg. 1-3 at ¶ 4 August 20, 2008 "Defendants Motion to Show Cause"

67. I, Samuel K. Lipari having as shown in the above sworn information and documentary exhibits, answered the defendants' First Interrogatories Nos. 1, 3, 5-14, 16, 17 and 21 and I had produced all documents responsive to defendants' First Request for Production before these requests were made and several times in response to the defendants' requests; therefore I, Samuel K. Lipari believe the above statement is an intentional fraud on the court by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. perpetuating a pattern of material misrepresentations by the defendants to have my claims dismissed through a sanction procured through this and similar frauds described above.

"5. Rule 37(b)(2)(A) states that if a party fails to comply with a court's discovery order, the court may levy sanctions on the party, including dismissal of the action. Because the plaintiff has failed to comply with the July 8, 2008 Order, the defendants request the Court order the plaintiff to show cause why this matter should not be dismissed or other sanctions issued pursuant to Rule 37(b)(2)(A)."

Exhibit 48 pg. 1-3 at ¶ 5 August 20, 2008 "Defendants Motion to Show Cause"

68. I, Samuel K. Lipari believe that paragraph 5 exposes and documents the fraudulent scheme of the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. to procure the dismissal of my claims through fraud that had earlier been concealed in the defendant response to the show cause order at 6:30 am on August 18, 2008 and upon which my affidavit of prejudice against this court, also dated August 18, 2008 was made.

VIII. Plaintiff's Rule 56(a) Summary Judgment disclosures

69. The plaintiff's initial and subsequent disclosures, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure", *See Exhibit 22* pg. 1-3972 April 20, 2007 "Lipari Trial Exhibits Volume I", *See Exhibit 23* pg. 1-2848 April 20, 2007 "Lipari Trial Exhibits Volume II", *See Exhibit 24* pg. 1-4009 April 20, 2007 "Lipari Supplemental Trial Exhibits Volume I", *See Exhibit 25* pg. 1-167 April 20, 2007 "Lipari Supplemental Trial Exhibits Volume II", *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I", *See Exhibit 30* pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II", *See Exhibit 31* pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III", documented the plaintiff's complaint, despite the plaintiff's repeated objections the defendants have obtained closure of discovery preventing any additional evidence except the documents provided by the plaintiff and the witnesses identifies in the plaintiff's complaint and witness disclosures for utilization by either party for a dispositive motion under Rule 59.

70. I, Samuel K. Lipari have provided emails, *See Exhibit 54* pg. 1 October 7, 2002 "Lipari email Notice of Changes to Escrow Agreement" (the "escrow agreement"), and *See Exhibit 55* pg. 1 October 8, 2002 "Kabbes email Signature of Accepted Changes", between the plaintiff's former corporation Medical Supply Chain, Inc. and US Bank forming a written contract to provide escrow agency and escrow accounts (the "contract to provide escrow accounts"). Three days later on October 11, 2002 plaintiff requested escrow release information from Mr. Kabbes, *See Exhibit 56* pg. 1 October 11, 2002 "Lipari Request for Escrow Release Language", so that escrow funds would be available for plaintiff to service the loan with Doug Lewis at US Bank Noland Rd., Independence Mo. branch. The escrow agreement prior to Mr. Kabbes change request, *See Exhibit 52* pg. 1-6 October 6, 2002 "Escrow Agreement Before Kabbes Changes", sent to Mr Kabbes on October 6 and the escrow agreement after plaintiff made the requested changes, *See Exhibit 53* pg. 1-6 October 7, 2002 "Escrow Agreement After Kabbes Changes. **Exhibit 54** and **Exhibit 55** were disclosed to defendants on February 9, 2008 *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I" Table of Contents pg. 2, **Exhibits 7** Lipari email to Kabbes 10-7-02, **Exhibit 8** Escrow Agreement with changes for Brian Kabbes' approval, **Exhibit 9** Escrow Agreement with Brian Kabbes' signature block affixed, **Exhibit 10** Lipari email to Brian Kabbes with

proposed release 10-11-02, and **Exhibit 11** Lipari email to Brian Kabbes 10-14-02 and thoroughly briefed on the evidence, *See Exhibit 28* pg. 1-107 February 9, 2008 “Lipari v US Bank Settlement Brief”.

71. I, Samuel K. Lipari have provided documentation with the emails forming a contract to provide escrow agency and accounts (the “contract to provide escrow accounts”) and an escrow deposit contract (the “escrow agreement”) , *See Exhibit 53* pg. 1-6 October 7, 2002 “Escrow Agreement After Kabbes Changes” authorized by Brian Kabbes, *See Exhibit 55* pg. 1 October 8, 2002 “Kabbes email Signature of Accepted Changes” US Bank’s Corporate Trust Department Vice President that I had to give a benefit and US Bank received a benefit when the escrow deposit document (the “escrow agreement”) was changed to designate a treasury fund owned by US Bancorp *See Exhibit 53* pg. 1-6 October 7, 2002 “Escrow Agreement After Kabbes Changes” pg. 2 Section 4 Investments.

72. I, Samuel K. Lipari have provided documentation that I have been injured ¶¶ 1-77 of this document by the defendants fighting the existence of a contract between the plaintiff and US Bank to provide escrow agency and escrow accounts despite their prohibition against denying the existence, *See Exhibit 55* pg. 1 October 8, 2002 “Kabbes email Signature of Accepted Changes”, benefits or effect of the contract *See Exhibit 53* pg. 1-6 October 7, 2002 “Escrow Agreement After Kabbes Changes” pg. 2 Section 4 Investments after receiving a benefit under Missouri law including the procurement of the present show cause order *See Exhibit 47* pg. 1-2 August 18, 2008 “Notice and Order to Show Cause” and again *See Exhibit 49* pg. 1-6 August 25, 2008 “Second Notice and Order to Show Cause”, which has greatly taxed me and interfered in my launching of a new business outside of the institutional hospital supply market monopolized by the defendants with their co-conspirators Neoforma, Inc now GHX LLC; Novation LLC and the General Electric Company.

73. I, Samuel K. Lipari in having provided the evidence supporting ¶ 72 above have provided the defendants with evidence that US Bank NA with the aid of US Bancorp Inc., its parent company have breached their contract with my former corporation Medical Supply Chain, Inc. by breaching the contract to provide escrow accounts’ inherent duty of good faith and fair dealing.

74. I, Samuel K. Lipari in having provided the evidence supporting ¶¶ 70 thru 73 above have provided the defendants with evidence that US Bank NA with the aid of US Bancorp Inc. have breached a fiduciary duty to me existing at Missouri law recognizing agreements to provide escrow agency and to act as an escrow account facility including the contract to provide escrow accounts between my former

corporation Medical Supply Chain, Inc. and US Bank are fiduciary obligations creating duties breached by the defendants in denying the existence, benefits or effect of the contract to provide escrow accounts.

75. I, Samuel K. Lipari in having provided the evidence supporting ¶¶ 70 thru 73 above have provided the defendants with evidence that US Bank NA with the aid of US Bancorp Inc. have deprived me of counsel, injured persons assisting me, tortuously interfered with my efforts to cover or mitigate the damages from US Bank's breach by interfering with my litigation against General Electric where US Bank and US Bancorp had no legal interest.

76. I, Samuel K. Lipari have been injured by US Bank and US Bancorp tortuously interfering with my business expectancies for legal representation by Hawver Law Office and Steven Siegel Hanson, LLP.

I hereby swear certifying that the above stated facts and attachments are true to the best of my knowledge and recollection.

Signature _____ Date _____

Notary

Subscribed and sworn before me on _____ Date _____

Index of Affidavit Exhibits

Exhibit 20 pg. 1-7 June 7, 2005 "Initial Disclosure"

Exhibit 21 pg. 1-40 April 20, 2007 "Disclosure"

Exhibit 22 pg. 1-3972 April 20, 2007 "Lipari Trial Exhibits Volume I"

Exhibit 23 pg. 1-2848 April 20, 2007 "Lipari Trial Exhibits Volume II"

Exhibit 24 pg. 1-4009 April 20, 2007 "Lipari Supplemental Trial Exhibits Volume I"

Exhibit 25 pg. 1-167 April 20, 2007 "Lipari Supplemental Trial Exhibits Volume II"

Exhibit 26 pg. 1-42 May 3, 2007 "Disclosure"

Exhibit 27 pg. 1-5 February 9, 2008 "Settlement Brief Notice"

Exhibit 28 pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief"

Exhibit 29 pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I"

Exhibit 30 pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II"

Exhibit 31 pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III"

Exhibit 32 pg. 1 March 10, 2008 "Jay Discovery Objection"

Exhibit 33 pg. 1 March 10, 2008 “Reply to Defendant Discovery Objection”

Exhibit 34 pg. 1-17 March 26, 2008 “Answer to First Set of Interrogatories”

Exhibit 35 pg. 1-3 April 22, 2008 “68 Motion to Compel”

Exhibit 36 pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari”

Exhibit 37 pg. 1-8 April 30, 2008 “Plaintiff Response to April 22 68 Motion to Compel”

Exhibit 38 pg. 1-45 May 6, 2008 “Response to Golden Rule Letter Dated April 23”

Exhibit 39 pg. 1-2 May 7, 2008 “Clarification of CD Rule 26 Disclosures”

Exhibit 40 pg. 1-3 May 17, 2008 “US Bank Preliminary List of Witnesses & Exhibits”

Exhibit 41 pg. 1-3 May 22, 2008 “85 Motion to Compel”

Exhibit 42 pg. 1-3 June 5, 2008 “Second Rule 26 Supplemental Disclosures”

Exhibit 43pg. 1-5 July 8, 2008 “Memorandum and Order”

Exhibit 44 pg. 1 July 15, 2008 “Email to Jay Requesting Clarification”

Exhibit 45 pg. 1-12 July 22, 2008 “Memorandum and Order”

Exhibit 46 pg. 1-2 August 18, 2008 “Defendants Response to Show Cause”

Exhibit 47 pg. 1-2 August 18, 2008 “Notice and Order to Show Cause”

Exhibit 48 pg. 1-3 August 20, 2008 “Defendants Motion to Show Cause”

Exhibit 49 pg. 1-6 August 25, 2008 “Second Notice and Order to Show Cause”

Exhibit 50 pg. 1 August 21, 2008 “Defendants Pretrial Order (email cover letter to Magistrate Waxse)”

Exhibit 51 pg. 1 August 21, 2008 “Plaintiff’s Pretrial Order (email cover letter to Magistrate Waxse)”

Exhibit 52 pg. 1-6 October 6, 2002 “Escrow Agreement Before Kabbes Changes”

Exhibit 53 pg. 1-6 October 7, 2002 “Escrow Agreement After Kabbes Changes”

Exhibit 54 pg. 1 October 7, 2002 “Lipari email Notice of Changes to Escrow Agreement”

Exhibit 55 pg. 1 October 8, 2002 “Kabbes email Signature of Accepted Changes”

Exhibit 56 pg. 1 October 11, 2002 “Lipari Request for Escrow Release Language”

Exhibit 57 pg. 1-6 February 13, 2008 “Plaintiff Production Request”

Exhibit 58 pg. 1-2 February 8, 2008 “Appendix II Settlement Brief Vol. I”

Exhibit 59 pg. 1-2 August 21, 2008 Notice Lipari Pretrial Order

Exhibit 60 pg. 1-2 August 21, 2008 Notice US Bank Pretrial Order

CERTIFICATE OF SERVICE

I certify I have sent a copy to the undersigned opposing counsel via electronic filing on 9/2/08.

Mark A. Olthoff, Esq.,
Jay E. Heidrick, Esq.
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S/ Samuel K. Lipari

Samuel K. Lipari

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS**

SAMUEL K. LIPARI,	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 07-CV-02146-CM-DJW
	)	
U.S. BANCORP, and	)	
	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

**DEFENDANTS' COMBINED RESPONSE TO
PLAINTIFF'S OBJECTIONS TO MAGISTRATE'S ORDERS**

Defendants, by and through counsel, Shughart Thomson & Kilroy, P.C., file this Combined Response to Plaintiff's Objections to Magistrate's Orders (Doc. Nos. 122 and 123). The Magistrate's Orders should be upheld in their entirety because they are not clearly erroneous, are supported by law, and the Court possesses jurisdiction to issue discovery orders.

I. Procedural Background

The procedural history surrounding the plaintiff's Objections to Magistrate's Orders is summarized below:

On July 22, 2008, the Court granted, in part, the defendants' Motion to Compel Compliance with Rule 26(a)(1) (Doc. No. 68). In its Order, the Court ordered the plaintiff to supplement his Rule 26 disclosures and to show cause on or before August 13, 2008 why he should not be required to pay a portion of the defendants' attorneys' fees associated with bringing the motion. *See*, Doc. No. 103.

On August 18, 2008, the defendants filed a Response to the Court's July 22, 2008 Order informing the Court that the plaintiff had not supplemented his Rule 26 disclosures and had not filed any response to the Court's Show Cause Order. *See*, Doc. No. 111.

On August 18, 2008, this Court issued a Notice and Order to Show Cause related to the plaintiff's non-compliance with its July 22, 2008 discovery order. The Court ordered the plaintiff to show cause to District Judge Carlos Murguia in a pleading filed by August 27, 2008, why this case should not be dismissed pursuant to Fed. R. Civ. P. 37(b)(2)(A). *See*, Doc. No. 114.

On August 18, 2008, this Court issued a separate Order requiring the plaintiff to pay a portion of the defendants' attorney fees and expenses associated with filing their Motion to Compel Plaintiff's Compliance with Rule 26(a)(1)(A). The Court ordered the defendants to submit an affidavit of fees no later than August 27, 2008 to aid the Court in determining the amount of fees to award. *See*, Doc. No. 115.

On August 18, 2008, plaintiff filed a document entitled "Response to defendants' assertion re: 111 Response to Order." In this document, the plaintiff attempted to respond to Defendants' Response the Court's July 22, 2008 Show Cause Order (Doc. No. 111). *See*, Doc. No. 113.

On August 20, 2008, the Court issued a docket entry Order concerning its August 18 Order to Show Cause (Doc. No. 114). The Court indicated that it had reviewed plaintiff's "Response to Defendants' Asserted Non-Compliance with the July 22, 2008 Order" (Doc. No. 113) and informed the plaintiff that the response contained in Doc. No. 113 did not alleviate the plaintiff's requirement to respond to the August 18 Show Cause Order. *See*, Doc. No. 117.

On August 22, 2008, the plaintiff filed an "Objection to Magistrate's Orders of 8/18/08" (Doc. No. 122). This "Objection" concerns the Magistrate Orders found in Doc. Nos. 114 and 115.

On August 22, 2008, the plaintiff also filed an "Objection to Magistrate's Order of 8/20/08" (Doc. No. 123). This "Objection" concerns the Magistrate Order found in Doc. No. 117.

Because the plaintiff's objections to the August 18 and August 20 Orders are based on the same facts, argument and legal theories, the defendants offer this combined response.

The Court should uphold the Magistrate's Orders of August 18, 2008 (Doc. Nos. 114 & 115) and August 20, 2008 (Doc. No. 117) because none of the Orders are clearly erroneous, each is supported by law, and the Court has jurisdiction to make and enforce discovery orders in this matter.

II. ARGUMENT

1. The Magistrate's Orders were not clearly erroneous.

Rule 72(a) of the Federal Rules of Civil Procedure provides that a party may serve an objection to a magistrate's order on a non-dispositive issue to the district judge within ten (10) days after being served a copy of the magistrate's order. The Rule provides that the district judge must modify or set aside any part of the Order that "is clearly erroneous or is contrary to law."

In applying the clearly erroneous standard, the district court must affirm the magistrate's decision unless the court "is left with the definite and firm conviction that a mistake has been committed." *See, Ocelot Oil Corp. v. Sparrow Industries*, 847 F.2d 1458, 1464 (10th Cir. 1988). None of Magistrate's Waxse's Orders are erroneous, much less *clearly* erroneous as required by Rule 72(a) and each of the Orders are supported by law.

The Order in Doc. No. 114 required the plaintiff to show cause as to why his case should not be dismissed for failure to comply with the Court's July 22, 2008 discovery Order. When a party fails to comply with a court order, dismissal and an order to show cause are allowable sanctions under Fed. R. Civ. P. 37(b). Therefore, the Court's Order found in Doc. No. 114 is not clearly erroneous and is supported by law.

Likewise, the Order found in Doc. No. 115 required the plaintiff to pay a portion of the reasonable attorney fees associated with defendants' Motion to Compel. The Court has wide discretion in determining whether to award fees associated with a Motion to Compel. *See, e.g.* Fed. R. Civ. P. 37(a)(5)(A). The Court gave the plaintiff an opportunity to be heard in its July 22, 2008 Show Cause Order (Doc. No. 103). But the plaintiff ignored the Court's show cause order and he cannot now assert the Court's order to pay fees is erroneous.

Finally, the Court's August 20, 2008 Order (Doc. No. 117) required the plaintiff to file a separate response to the Show Cause Order of August 18, 2008. A trial court has great deference to administer its docket how it sees fit. *In re Calder*, 973 F.2d 862, 868 (10th Cir. 1992) ("The court has the inherent power 'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'") Therefore, the Court's Order that the plaintiff file a separate response to its August 18, 2008 Show Cause Order is not clearly erroneous and is supported by law.¹

¹ It should be noted that the plaintiff failed to offer any response to the August 18, 2008 Show Cause Order relating to dismissal of his suit (Doc. No. 114).

For these reasons, the Magistrate's Orders of August 18 and 20 (Doc. Nos. 114, 115 and 117) are not clearly erroneous, are supported by law and should be upheld in their entirety.

2. This Court has jurisdiction and may issue orders as it deems fit.

The bulk of plaintiff's argument centers around the Court's authority to issue orders in light of his putative 28 U.S.C. § 144 "Affidavit of Prejudice" (Doc. No. 116). Plaintiff alleges that because he filed an "Affidavit of Prejudice", the Court may not issue further orders until ruling upon the "Affidavit of Prejudice". Plaintiff's interpretation of the law is incorrect.

An affidavit under § 144 only requires a judge to cease proceedings if the affidavit is specific and sets forth sufficient facts demonstrating a personal bias against the party. *See, e.g., U.S. v. Bennet*, 539 F.2d 45, 51 (10th Cir. 1976). If an affidavit is insufficient or simply alleges mere conclusions or unsupported statements, the court may proceed forward. *See, id.*

The plaintiff's affidavit is woefully insufficient. It contains nothing but conclusory and unsupported allegations concerning decisions rendered by this Court and the plaintiff's complaint that the Court has yet to rule on certain motions for protective order. But mere adverse decisions against a party are not sufficient to show bias or prejudice. *See, Winslow v. Lehr*, 641 F. Supp. 1237, 1241 (D. Colo., 1986). The affidavit must show a personal bias against the party, rather than a judicial bias. *See id.* (emphasis added).

The "Affidavit of Prejudice" fails to set forth any specific factual basis as to why either Judge Murguia or Magistrate Waxse would have any personal bias against the plaintiff and, in fact, fails to even allege that either Magistrate Waxse or Judge Murguia do have a personal bias against the plaintiff. Therefore, the "Affidavit of Prejudice" is wholly insufficient and the Court may proceed with this matter.

Plaintiff also alleges that this Court lacks subject matter jurisdiction due to the pending appeal of *Medical Supply II* (after the Court struck his improvidently filed "pleadings"). This

argument again demonstrates plaintiff's ignorance of procedure and substantive law. *Medical Supply II* was a separate action, involving a separate plaintiff, several different defendants, was dismissed by the Court and plaintiff's untimely appeal was dismissed by the Tenth Circuit. On the other hand, this suit involves state law claims that were dismissed from *Medical Supply II* without prejudice. While the plaintiff has unsuccessfully attempted to resurrect that earlier suit, this Court has denied his requests, stricken his "pleadings" and sanctioned Mr. Lipari with filing restrictions in that case. The "appeal" relates to these decisions – not the underlying case that has long since been dismissed with prejudice. *Medical Supply II* remains closed and further discussion on this frivolous argument is not necessary.

WHEREFORE, for the above stated reasons, the defendants request the District Court uphold in their entirety Magistrate Orders of August 18, 2008 and August 20, 2008 (Doc. Nos. 114, 115 and 117) and grant defendants all other relief to which they are justly entitled.

Respectfully submitted,

/s/ Jay E. Heidrick

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ATTORNEYS FOR DEFENDANTS
U.S. BANCORP and
U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 3rd day of September, 2008, to:

Mr. Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ Jay E. Heidrick

Attorney for Defendants

SAMUEL K. LIPARI,)
)
 Plaintiff,)
)
 v.) Case No. 2:07-cv-02146-CM
)
 U.S. BANCORP and)
 U.S. BANK NATIONAL ASSOCIATION,)
)
 Defendants.)

I Samuel K. Lipari, residing at 297 NE Bayview, in the City of Lee's Summit and in the County of Jackson of the State of Missouri was the chief executive officer of the now dissolved Missouri corporation Medical Supply Chain, Inc. I assigned all interests and rights of Medical Supply Chain, Inc. to myself on the day I dissolved the corporation with the Missouri Secretary of State. I hereby testify to the following regarding my disclosures of discovery in response to the defendants' motions for production of documents and answers to interrogatories. I also hereby testify to how I responded to the defendants fraudulent motions to compel and fraudulently procured orders to show cause, which I believe to have been made in the absence of jurisdiction by the court over this Missouri State case and in the absence of jurisdiction while the same matter or controversy is in the 10th Circuit Court of Appeals. I Samuel K. Lipari testify to the following:

1. On June 7, 2005 I, Samuel K. Lipari served the defendants with an initial disclosure index of exhibits, *See* **Exhibit 20** pg. 1-7 June 7, 2005 “Initial Disclosure”, an index of documents with Bates stamp and a list of witnesses served by personal service to 120 W. 12th Street Kansas City, MO in case # 05-0210-CV-W- ODS, the defendants had previously received the plaintiff’s witnesses and all known addresses in 2003 as part of the plaintiff’s proposed joint case management order sent to the defendants and Magistrate Waxse in 2003.

2. On April 20, 2007 I, Samuel K. Lipari again served the defendants with an updated index of exhibits and witness list. The document index, *See Exhibit 21* pg. 1-40 April 20, 2007 “Disclosure”, refers to a Bates stamp number and dates that corresponds with the four volumes of evidentiary exhibits including a witness list that is categorized by reference participation and relevance. Volume I - *See Exhibit 22* pg. 1-

3972 April 20, 2007 “Lipari Trial Exhibits Volume I”, which are evidentiary document that support plaintiffs complaint and pleadings, Volume II - *See Exhibit 23* pg. 1-2848 April 20, 2007 “Lipari Trial Exhibits Volume II”, which are evidentiary documents that support plaintiff’s attempt to overcome US Banks contract breach through efforts to cover or mitigate the damages with General Electric and Michael W. Lynch, Volume III - *See Exhibit 24* pg. 1-4009 April 20, 2007 “Lipari Supplemental Trial Exhibits Volume I”, which are additional evidentiary document that support plaintiffs attempt to overcome US Banks contract breach and Volume IV - *See Exhibit 25* pg. 1-167 April 20, 2007 “Lipari Supplemental Trial Exhibits Volume II”, which are evidentiary document that further support plaintiff’s attempts to overcome US Bank and US Bancorp’s contract breach through covering or mitigating the losses with General Electric and Michael Lynch; all combined on indexed digital disk (DC) as a complete Rule 26(a)(1) disclosure record.

3. On May 3, 2007 I, Samuel K. Lipari served the defendants again with an updated index (supplemental) of exhibits and witness list. The document index, *See Exhibit 26* pg. 1-42 May 3, 2007 “Disclosure”, the index refers to a Bates stamp number and dates that corresponds with the four volumes of evidentiary exhibits including a witness list that are categorized by reference participation and relevance. Volume I - *See Exhibit 22* pg. 1-3972 April 20, 2007 “Lipari Trial Exhibits Volume I”, which are evidentiary document that support plaintiffs complaint and pleadings, Volume II - *See Exhibit 23* pg. 1-2848 April 20, 2007 “Lipari Trial Exhibits Volume II”, which are evidentiary document that support plaintiffs attempt to overcome US Banks contract breach through cover and mitigation, Volume III - *See Exhibit 24* pg. 1-4009 April 20, 2007 “Lipari Supplemental Trial Exhibits Volume I”, which are additional evidentiary document that support plaintiffs attempt to overcome US Banks contract breach through cover and mitigation and Volume IV - *See Exhibit 25* pg. 1-167 April 20, 2007 “Lipari Supplemental Trial Exhibits Volume II”, which are evidentiary document that further support plaintiffs attempts to overcome US Banks contract breach through cover and mitigation; all combined on indexed digital disk (DC) as a complete Rule 26(a)(1) disclosure record.

4. On February 9, 2008 I, Samuel K. Lipari served the defendants and the Hon. Magistrate David J. Judge Waxse, *See Exhibit 27* pg. 1-5 February 9, 2008 “Settlement Brief Notice” with a settlement brief and three volumes of evidentiary exhibits indexed by volume, exhibit number and the description of the document. Settlement Brief - *See Exhibit 28* pg. 1-107 February 9, 2008 “Lipari v US Bank Settlement Brief”, Volume I - *See Exhibit 29* pg. 1-118 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. I”,

Volume II - *See Exhibit 30* pg. 1-385 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. II”, and
Volume III - *See Exhibit 31* pg. 1-27 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. III”.

5. On March 10, 2008 the defendants through Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 emailed an objection to the plaintiff’s disclosures, *See Exhibit 32* pg. 1 March 10, 2008 “Jay Discovery Objection”. That same day on March 10, 2008 I, Samuel K. Lipari responded with a reply letter, *See Exhibit 33* pg. 1 March 10, 2008 “Reply to Defendant Discovery Objection”. In that letter I, Samuel K. Lipari agreed to resolve any issues defendant might have with regard to plaintiffs Rule 26(a)(1) disclosures.

6. On March 26, 2008 I, Samuel K. Lipari served by email the plaintiff’s answers to the defendants’ first set of interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 “Answer to First Set of Interrogatories”.

A. Defendants’ First Material Misrepresentations to the Court by an officer of the court over the Plaintiff’s Discovery Compliance

7. On April 22, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 filed the Motion to Compel, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” Rule 26(a)(1).

8. On April 23, 2008 the day after filing their Motion to Compel, the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 served the plaintiff with a Golden Rule Letter, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari” outlining deficiencies in plaintiff’s Rule 26(a)(1) first set of interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 “Answer to First Set of Interrogatories”. Defendants filed their Motion to Compel, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” Rule 26(a)(1) one day in advance of providing plaintiff with a Golden Rule Letter notice, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari” the plaintiff had no opportunity to correct any deficiencies, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” Rule 26(a)(1). Now compare the date of, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” with the date of, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari”.

9. On April 30, 2008 I, Samuel K. Lipari filed a response to defendants Motion to Compel, *See Exhibit 37* pg. 1-8 April 30, 2008 “Plaintiff Response to April 22 68 Motion to Compel”

10. On May 6, 2008 I, Samuel K. Lipari served its response to defendants Golden Rule Letter dated

April 23, 2008, *See Exhibit 38* pg. 1-45 May 6, 2008 “Response to Golden Rule Letter Dated April 23”, plaintiff’s second set of interrogatories in response to defendants Golden Rule Letter, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari”, but the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 fraudulently omitted notice to the Honorable Magistrate Judge David J. Waxse that the plaintiff did in fact respond with a second set of interrogatory answers, *See Exhibit 38* pg. 1-45 May 6, 2008 “Response to Golden Rule Letter Dated April 23”.

11. On May 7, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a communication by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 emailed the plaintiff requesting disclosure clarification, *See Exhibit 39* pg. 1-2 May 7, 2008 “Clarification of CD Rule 26 Disclosures” and suggested that the plaintiff somehow manipulated the disk format of exhibits. Later that same day I, Samuel K. Lipari responded to defendants’ request and explained that there may be a conflict between operating system programs. The defendants made no additional requests.

12. On May 17, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a communication by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 served the plaintiff with US Bank’s Preliminary List of Witnesses & Exhibits, *See Exhibit 40* pg. 1-3 May 17, 2008 “US Bank Preliminary List of Witnesses & Exhibits” with six witnesses and five exhibits and no explanation of witness relevance or addresses. The five exhibits are documents I, Samuel K. Lipari had provided to the defendants as part of my Rule 26 disclosures. The witnesses also appear to be only those from the plaintiff’s list of witnesses and the text of the complaint provided the defendants by the plaintiff.

13. On May 22, 2008 defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 filed another Motion to Compel, *See Exhibit 41* pg. 1-3 May 22, 2008 “Motion to Compel”.

14. On June 5, 2008 I, Samuel K. Lipari emailed my second Rule 26 supplemental disclosures, *See Exhibit 42* pg. 1-3 June 5, 2008 “Second Rule 26 Supplemental Disclosures” to cure witness address deficiencies requested by the defendants that were not available to the plaintiff when the plaintiff served his Response to Golden Rule Letter Dated April 23, 2008, *See Exhibit 38* pg. 1-45 May 6, 2008 “Response to

Golden Rule Letter Dated April 23”. The defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. made no additional request for clarification or notice of any deficiencies.

II. Completion of the First Fraud on the Court Over Plaintiff’s Discovery Compliance

15. On July 8, 2008 The Honorable Magistrate Judge David J. Waxse filed a Memorandum and Order based on the fraudulent misrepresentations by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. and the order gives the appearance Magistrate Judge David J. Waxse was deceived by the defendants’ fraud on the court, *See Exhibit 43* pg. 1-5 July 8, 2008 “Memorandum and Order”.

16. On July 15, 2008 I, Samuel K. Lipari notified defendant, *See Exhibit 44* pg. 1 July 15, 2008 “Email to Jay Requesting Clarification” as to what additional Rule 26(a)(1) disclosures are needed that plaintiff has not already provided. The defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. made no additional request.

III. Completion of the Second Fraud on the Court Over Plaintiff’s Discovery Compliance

17. On July 22, 2008 The Honorable Magistrate Judge Waxse filed a Memorandum and Order, *See Exhibit 45* pg. 1-12 July 22, 2008 “Memorandum and Order” in reply to defendants Motion to Compel *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel”.

A. Defendants’ Subsequent Misrepresentations through an officer of the court

18. On August 18, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 filed a response to show cause that furthered the defendants repeated pattern of fraud, *See Exhibit 46* pg. 1-2 August 18, 2008 “Defendants Response to Show Cause”.

IV. Completion of the Third Fraud on the Court Over Plaintiff’s Discovery Compliance

19. On August 18, 2008 The Honorable Magistrate Judge Waxse filed a Notice and Order to Show Cause, *See Exhibit 47* pg. 1-2 August 18, 2008 “Notice and Order to Show Cause” in response to defendants response to show cause order *See Exhibit 46* pg. 1-2 August 18, 2008 “Defendants Response to Show Cause”.

A. Defendants' Subsequent Misrepresentations through an officer of the court

20. On August 20, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 filed a Motion for Order to Show cause that attempted to complete the fraudulent scheme of repeated frauds on the court for the purpose of procuring a dismissal through fraud, *See Exhibit 48* pg. 1-3 August 20, 2008 "Defendants Motion to Show Cause".

V. Completion of the Fourth Fraud on the Court Over Plaintiff's Discovery Compliance

21. On August 25, 2008 The Honorable Magistrate Judge Waxse filed the Second Notice and Order to Show Cause *See Exhibit 49* pg. 1-6 August 25, 2008 "Second Notice and Order to Show Cause".

A. PLAINTIFF HAS PRODUCED SEVEN SETS OF OVER 10,000 INDEXED EVIDENTIARY EXHIBITS WITH A SHORT ABBREVIATION AND BATES STAMP NUMBERS IN ADDITION TO SEVENTY CATEGORIZED WITNESSES ASSOCIATED BY RELEVANCE

22. As of September 1, 2008 I, Samuel K. Lipari have produced seven set of exhibits to defendants, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure" *See Exhibit 28* pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief", *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I", *See Exhibit 30* pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II", *See Exhibit 31* pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III" combining over 10,000 documents indexed by volume, exhibit number, description of the document, Bates stamp in addition to 70 categorized witnesses associated by relevance all of which contradict every fraudulent motion filed by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. used as the basis of the order from the Honorable Magistrate Judge David J. Waxse regarding the plaintiffs Rule 26(a)(1) disclosures compliance.

23. The defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. have disclosed only five whiteness and five exhibits, *See Exhibit 40* pg. 1-3 May 17, 2008 "US Bank Preliminary List of Witnesses & Exhibits".

24. I, Samuel K. Lipari last submitted an index of exhibits May 3, 2007, *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure" The Disclosure identifies a corresponding Bates stamp located in the upper right hand side of plaintiffs disclosure documents which references each specific evidentiary document, *See Exhibits 22, 23* "Lipari Trial Volume I, II", and *See Exhibits 24, 25* "Lipari Supplement Trial Exhibits Volume I, II." In addition, on February 9, 2008 I, Samuel K. Lipari served defendants and The Honorable

Magistrate Judge David J. Waxse with plaintiff's settlement brief and three volumes of evidentiary exhibits, *See Exhibit 27* pg. 1-5 February 9, 2008 "Settlement Brief Notice", and *See Exhibits 29, 30, 31* "February 9, 2008 Settlement Brief Evidence Exhibits Vol. I, II, III", indexed by volume, exhibit number, description of the document and totaling 530 pages. The settlement brief explained and referenced each evidentiary document's relevance to the plaintiff's complaint and its role in supporting the elements of the plaintiff's claims, answering every interrogatory question posed by the defendants even exceeding the scope the defendants were entitled to through discovery by identifying the legal theory of the plaintiff relevant to each document and element.

25. Going back to the beginning of this matter or controversy on June 7, 2005 I, Samuel K. Lipari served an initial index of exhibits with referenced Bates stamped and a list of witnesses associated by relevance, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure". As this matter or controversy developed over time I, Samuel K. Lipari submitted subsequent disclosures indexed with Bates stamp and added additional witnesses, *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure" and again on May 3, 2007, *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure". Plaintiff **Exhibits 21, 26** were provided to defendant on an indexed digital disk (CD) as required by electronic discovery Rules.

26. In addition to my submitting production of discovery request three times with two electronic copies prior to defendants April 22, 2008 Motion to Compel Rule 26(a)(1), I, Samuel K. Lipari also submitted to the defendants for the purpose of additional disclosures and served notice to The Honorable Magistrate Judge David J. Waxse, plaintiff's Settlement Brief Notice with three volumes of additional evidence, *See Exhibit 27* pg. 1-5 February 9, 2008 "Settlement Brief Notice", *See Exhibit 28* pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief" with three volumes of evidentiary documents, Vol. I, II, III, *See Exhibits 29, 30, 31* February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I, II, III" indexed paragraph-by-paragraph totaling 530 pages of additional evidence all of which contradict every fraudulent motion filed by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. and the order from The Honorable Magistrate Judge David J. Waxse regarding the plaintiffs Rule 26(a)(1) disclosures compliance.

VI. Defendant's Rule 26(a)(1) Compliance

27. To date (September 1, 2008) I, Samuel K. Lipari have received no electronic discovery from defendants and the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. continue to misrepresent to the court that they have produced discovery

relevant to their defense, *See Exhibit 40* pg. 1-3 May 17, 2008 “US Bank Preliminary List of Witnesses & Exhibits” where the documents are merely copies of the plaintiff’s production, not the emails and original electronic files of US Bank and US Bancorp that the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. were under notice to preserve and instead appear to have destroyed with the intent to obstruct justice.

**A. DEFENDANTS HAVE ONLY PRODUCED 41 PAGES OF DOCUMENTS
ALL ON PAPER COPIED FROM PLAINTIFF’S OWN DISCLOSURES AND
116 PAGES OF BANK STATEMENTS DESPITE REQUEST FOR ONLY ELECTRONIC FILES**

28. To date (September 1, 2008) I Samuel K. Lipari have received no electronic discovery from the defendants and the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. continue to misrepresent to The Honorable Magistrate Judge Waxse that 116 pages of plaintiffs bank statements showing that the plaintiff was in fact a valued customer of US Bank and 41 pages of documents copied from plaintiff previously submitted disclosures is compliance to the Honorable Magistrate Judge David J. Waxse for defendants’ Rule 26(a)(1) discovery obligation to the plaintiff.

29. The Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge David J. Waxse continue to illustrate bias and prejudice against the plaintiff or in the alternative have made discovery rulings procured through the defendants’ fraud on the court as I, Samuel K. Lipari believe the evidentiary record contained herein plainly shows and that I, Samuel K. Lipari have and did comply with Rule 26(a)(1) in advance of defendants’ first, second and third Motions to Compel or Show Cause, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” and again May 22, 2008, *See Exhibit 41* pg. 1-3 May 22, 2008 “85 Motion to Compel”, and again *See Exhibit 48* pg. 1-3 August 20, 2008 “Defendants Motion to Show Cause”.

30. In addition, the Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge David J. Waxse through adoption of the defendants’ filings through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. have accepted fraudulent assertions by the defendants in pleadings by Shughart Thomson & Kilroy, P.C. associate Jay E. Heidrick, KS Atty. Lic. #20770 that the plaintiff has not complied with his discovery obligations, in order for the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. to obtain sanctions and ultimately the dismissal of the plaintiff’s claims; which is also threatened in defendants’ last filing, a pleading by Shughart Thomson & Kilroy, P.C. associate Jay E. Heidrick, KS Atty.

Lic. #20770, *See Exhibit 48* pg. 1-3 August 20, 2008 “Defendants Motion to Show Cause” and the Honorable Magistrate Judge Waxse’s last order *See Exhibit 49* pg. 1-6 August 25, 2008 “Second Notice and Order to Show Cause”.

31. The Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge David J. Waxse appear to I, Samuel K. Lipari as having ignored the evidentiary record provided to them by the plaintiff and have instead relied on the fraudulent and misleading assertions of the defendant through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. to participate in the defendants’ fraudulent scheme to procure through fraud a dismissal of my claims through the court’s bias and prejudiced orders against me.

32. I, Samuel K. Lipari believe the defendants’ assertions to the court are nothing more than a perversion of the law, the facts and the record contained herein at the expense of lives, taxpayers and judicial resources.

33. The defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. continue to make materially false misrepresentations to the court which grants those motions over my objections to this court’s subject matter jurisdiction and memorandums of law and fact contradicting those misrepresentations and their legal effect, which are known to the defendants, the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. and Hon. Magistrate Judge David J. Waxse to be false from the evidence, the record and the plaintiffs pleadings which were served on the Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge David J. Waxse. In addition the Honorable Magistrate Judge David J. Waxse and later the Honorable District Court Judge Carlos Murguia received the settlement evidence on July 10, 2008 as an exhibit to Lipari Objection to Order of Magistrate Judge Order to Compel (doc. 97) which refers in the second paragraph to the settlement brief and supporting volumes of evidentiary documents as exhibits which were submitted to Hon. Magistrate Judge David J. Waxse and the defendants back on February 9, 2008, *See Exhibit 30* pg. 1-5 February 9, 2008 “Settlement Brief Notice”, *Exhibit 29* pg. 1-118 February 9, 2008 ‘Settlement Brief Evidence Exhibits Vol. I’, *Exhibit 30* pg. 1-385 February 9, 2008 ‘Settlement Brief Evidence Exhibits Vol. II’, *Exhibit 31* pg. 1-27 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. III”.

34. The plaintiff believes the defendant’s arguments in pleadings by Shughart Thomson & Kilroy, P.C. associate Jay E. Heidrick, KS Atty. Lic. #20770 about the quality and structure of plaintiff’s

evidentiary disclosures are fraudulent and frivolous as plainly visible from the document indexes and formatting of the evidence provided digitally and partially in paper to the defendants, and that this fraud is identical in motivation and effect to the false assertions in pleadings including Motions to dismiss and motions for sanctions over the last six years by the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. through Shughart Thomson & Kilroy, P.C. shareholder Steven D. Ruse KS lic. #11461; Shughart Thomson & Kilroy, P.C. shareholder Mark A. Olthoff, KS Att'y. Lic. # 70339; shareholder Andrew M. DeMarea, KS #16141; former associate Jonathan H. Gregor, KS Att'y. Lic. # #50443; former associate Logan W. Overman, KS Att'y. Lic. # #55002; and associate Jay E. Heidrick, KS Att'y. Lic. #20770 about the contents of the plaintiff's complaints that are demonstrably false on the face of Shughart Thomson & Kilroy, P.C.'s pleadings and misrepresent controlling legal authority and even the language of the U.S. Congress in public laws creating statutes granting private rights of action including those private rights of action expressly created by the USA PATRIOT Act (Public Law Pub.L. 107-56) and the clearly established controlling authorities of the US Supreme Court including *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) providing for the plaintiff's right to not sue all antitrust co-conspirators in a single action for which this court erroneously sanctioned the plaintiff; that a prior judgment could bar subsequent claims contrary to *Lawlor*, 349 U.S. at 329, 75 S.Ct. 865 for which this court also erroneously sanctioned the plaintiff; and that under *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) providing for the plaintiff's right to bring antitrust and RICO claims (Bankers Trust, 859 F.2d at 1096) each time a plaintiff suffers an injury caused by an illegal act of the defendants because a cause of action accrues to recover damages based on that injury for which this court erroneously sanctioned the plaintiff. All of which the Hon. District Court Judge Carlos Murguia adopted even over the plaintiff's timely notices of the clear errors in motions to reconsider, Rule 60 Motions and answers to show cause.

VII. Plaintiff's Compliance with defendants' discovery production requests and interrogatories

35. To date (September 1, 2008) I, Samuel K. Lipari have complied with each request for production of documents and each set of interrogatories propounded by the defendants.

36. I, Samuel K. Lipari had already complied with defendants' fraudulently procured Order to Compel before it or the Motion to Compel was served on the plaintiff, *See Exhibits 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.*

"April 22, 2008 Doc. 68 Motion to Compel Order: Order filed July 22, 2008

07/22/2008 103 MEMORANDUM AND ORDER granting in part and denying in part 68 Motion to Compel. On or before 7/30/2008, Plaintiff shall serve an amended Rule 26(a)(1)(A)(i) witness disclosure statement in compliance with this Memorandum and Order. On or before 7/30/2008, Plaintiff shall serve a supplemental Rule 26(a)(1)(A)(ii) document disclosure statement or serve amended Rule 26(a)(1)(A)(ii) document disclosures in compliance with this Memorandum and Order. On or before 8/13/2008, Plaintiff shall show cause why he should not be required to pay a portion of the reasonable fees and expenses that Defendants incurred in making their Motion to Compel. Signed by Magistrate Judge David J. Waxse on 7/22/2008. (bh) (Entered: 07/22/2008)

37. The plaintiff had already complied with defendants' First Motion to Compel before it was served on the plaintiff, *See Exhibits 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.*

A. The Material Fraudulent Misrepresentations to The Court in the First Motion to Compel

"MOTION TO COMPEL COMPLIANCE WITH RULE 26(a)(1)

The defendants, by and through their attorneys of record Shughart Thomson & Kilroy, P.C., file this Motion to Compel Plaintiff's Compliance with Rule 26(a)(1). In support of this Motion, defendants state as follows:

1. On April 20, 2007, plaintiff served his initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1). *See*, Doc. No. 26."

Exhibit 35 pg. 1-3 April 22, 2008 "68 Motion to Compel"

38. On April 20, 2008 the plaintiff did not file or serve anything to defendants. On March 26, 2008 thirty days earlier than represented to the court, I, Samuel K. Lipari served my answers to the defendants' first set of interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 "Answer to First Set of Interrogatories".

"2. The disclosures are essentially duplicates of his disclosures made in a corresponding lawsuit Jackson County, Missouri captioned *Lipari, et al. v. General Electric, et al.* Circuit Court of Jackson County, Missouri, Case No. 0616-CV07421. Neither defendant is a party to that action, and plaintiff's disclosures are therefore irrelevant to this suit."

Exhibit 35 pg. 1-3 April 22, 2008 "68 Motion to Compel"

39. If the court and defendants had reviewed the record they will find that Missouri, Case No. 0616-CV07421 are the contract state claims dismissed without prejudice stemming from similar conduct participated in by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. for the purpose of committing extrinsic fraud by preventing the plaintiff from covering or mitigating his damages from US Bank and US Bancorp's breach through the third parties General Electric and Michael W. Lynch. This conduct is tortuous interference with a business expectancy under Missouri law and the damages are equal to what the plaintiff would have obtained in his transaction with General Electric and what he would have obtained through capitalizing his corporation's entry into the market for hospital supplies with Michael w. Lynch's assistance. The Hon. Carlos Murguia was served evidence of this tortuous interference in the plaintiff's business expectancies with General Electric in the

absence of a property interest by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in the form of sealed affidavits for attorneys' fees listing conferences with General Electric's counsel Husch, Blackwell & Sanders LLP then called Husch Eppenberger. LLC.

"3. Additionally, plaintiff's disclosures fail to comply with the intent and letter of Rule 26(a)(1). His disclosures list over 70 witnesses but do not list contact information or subjects of knowledge. Thirty-nine pages of his disclosures contain broad and generic descriptions of documents— none of which appear relevant to this suit. Finally, plaintiff provides a compact disc which contains over 11,000 pages of documents that again lack relevance to this suit."

Exhibit 35 pg. 1-3 April 22, 2008 "68 Motion to Compel"

40. As of September 1, 2008 I, Samuel K. Lipari have produced seven set of exhibits to defendants, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure" *See Exhibit 28* pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief", *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I", *See Exhibit 30* pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II", *See Exhibit 31* pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III" combining over 10,000 documents indexed by volume, exhibit number, description of the document, Bates stamp in addition to 70 categorized witnesses associated by relevance all of which contradict every fraudulent motion filed by the defendants and order from The Honorable Magistrate Judge David J. Waxse regarding the plaintiffs Rule 26(a)(1) disclosures compliance..

41. On April 20, 2007 and May 3, 2007 I, Samuel K. Lipari served the defendants with an updated index of exhibits and witness list. The document index, *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure", refers to a Bates stamp number and dates that corresponds with the four volumes of evidentiary exhibits including a witness list that are categorized by reference to witness participation and relevance. Volume I - *See Exhibit 22* pg. 1-3972 May 3, 2007 "Lipari Trial Exhibits Volume I", which are evidentiary document that support plaintiffs complaint and pleadings, Volume II - *See Exhibit 23* pg. 1-2848 May 3, 2007 "Lipari Trial Exhibits Volume II", which are evidentiary documents that support plaintiff's attempt to overcome US Banks contract breach, Volume III - *See Exhibit 24* pg. 1-4009 May 3, 2007 "Lipari Supplemental Trial Exhibits Volume I", which are additional evidentiary document that support plaintiffs attempt to overcome US Banks contract breach and Volume IV - *See Exhibit 25* pg. 1-167 May 3, 2007 "Lipari Supplemental Trial Exhibits Volume II", which are evidentiary documents that further support plaintiff's attempts to overcome US Bank's contract breach all combined on indexed digital disks (DC) as a

complete Rule 26(a)(1) disclosure record.

“4. Defendants have made repeated good faith efforts to resolve this dispute with the plaintiff. See, Correspondence attached as Exhibit 1; Response to Motion for Extension to Supplement, Doc. No. 56. Plaintiff indicated to defendants and the Court that he would supplement his disclosures by April 15, 2008. See, Doc. No. 55. But he has failed to do so. “

Exhibit 35 pg. 1-3 April 22, 2008 “68 Motion to Compel”

42. Defendants’ false statement contradicts the record. On March 26, 2008 I, Samuel K. Lipari served by email the answers to the defendants’ first set of interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 “Answer to First Set of Interrogatories” and on April 23, 2008 defendants served the plaintiff with a Golden Rule Letter, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari” outlining deficiencies in plaintiff’s Rule 26(a)(1) first set of answers to defendants’ interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 “Answer to First Set of Interrogatories”. The defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. filed their Motion to Compel, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” Rule 26(a)(1) one day in advance of providing the plaintiff with a Golden Rule Letter notice, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari.” The plaintiff had no opportunity to correct any deficiencies before defendants filed their April 22, 2008 Motion to Compel, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” Rule 26(a)(1). I, Samuel K. Lipari have compared the date of the motion, *See Exhibit 35* pg. 1-3 April 22, 2008 “68 Motion to Compel” with the date of, *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari”. The defendants through the false conduct and misrepresentation of their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. created and mailed the required Golden Rule letter after they had already filed their motion to compel.

“5. Defendants are filing a supporting legal memorandum herewith and incorporate by reference all arguments made therein.”

Exhibit 35 pg. 1-3 April 22, 2008 “68 Motion to Compel”

43. I, Samuel K. Lipari had already complied with the defendants’ fraudulently procured Order to Compel dated July 8, 2008 before the order was entered by the Hon. Magistrate Judge David J. Waxse:

“May 22, 2008 Doc. 85 Motion to Compel Order: Order filed July 8, 2008

07/08/2008 96 MEMORANDUM AND ORDER granting 85 Motion to Compel. Plaintiff shall, within fourteen days of the date of this Order, produce all documents responsive to Defendants’ First Set of Requests for Production and serve supplemental responses to Defendants’ First Interrogatories No. 1, 3, 5-14, 16-17, and 21. Plaintiff shall, within twenty-one (21) days of the date of this Order, show cause in a pleading filed with the Court, why he should not be required to pay the reasonable fees and expenses that Defendants have incurred in making their Motion to Compel. Signed by Magistrate Judge David J. Waxse on 7/8/2008. (bh) (Entered: 07/08/2008)”

44. The plaintiff had already complied with defendants' fraudulently procured Order to Compel before it or the Motion to Compel was served on the plaintiff, *See Exhibits 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.*

B. The Material Fraudulent Misrepresentations to The Court in the Second Motion to Compel

"DEFENDANTS' MOTION TO COMPEL DISCOVERY RESPONSES

Defendants, U.S. Bancorp and U.S. Bank National Association, by and through their attorneys Shughart, Thomson & Kilroy, file this Motion to Compel Discovery Responses. In support of this Motion, defendants state as follows:

"1. On March 6, 2008, defendants served their First Set of Interrogatories and First Set of Requests for Production on plaintiff."

Exhibit 41 pg. 1-3 May 22, 2008 "85 Motion to Compel"

45. To date, I Samuel K. Lipari have only received from the defendants a response with only five witnesses and five exhibits on May 17, 2008 not as defendants again misrepresented to the court March 6, 2008, *See Exhibit 40* pg. 1-3 May 17, 2008 "US Bank Preliminary List of Witnesses & Exhibits" and May 17, 2008 is 30 days after defendants filed there Motion to Compel Rule 26(a)(1) against plaintiff, *See Exhibit 35* pg. 1-3 April 22, 2008 "68 Motion to Compel", five days before defendants filed their second Motion to Compel, *See Exhibit 41* pg. 1-3 May 22, 2008 "85 Motion to Compel".

46. The defendants filed their first Motion to Compel against the plaintiff, *See Exhibit 35* pg. 1-3 April 22, 2008 "68 Motion to Compel" 30 days before the plaintiff had received any Rule 26(a)(1) disclosures from the defendants, *See Exhibit 40* pg. 1-3 May 17, 2008 "US Bank Preliminary List of Witnesses & Exhibits" and 3 years after plaintiff served his first Rule 26(a)(1) initial disclosures, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure". I Samuel K. Lipari have received no electronic discovery from the defendants and the defendants continue to make fraudulent misrepresentations to the court. Somehow The Honorable Magistrate Judge David J. Waxse has accepted the defendants' 5 witnesses and 5 exhibits as defendants Rule 26(a)(1) obligation to plaintiff.

"2. On April 22, 2008, plaintiff served his responses to defendant's Interrogatories, but did not serve any responses or otherwise provide documents in response to defendant's request for Production."

Exhibit 35 pg. 1-3 May 22, 2008 "68 Motion to Compel"

47. Statement of facts paragraph two is a continuation of the fraud on the court by the defendants and was accepted by the Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge Waxse who appear to have been deceived and ordered a Motion to Compel procured from the defendants' fraud. On April 22, 2008 I, Samuel K. Lipari did not file or serve anything to defendants. On

March 26, 2008 thirty days earlier than represented to the court, I, Samuel K. Lipari served the first answers to defendants' first set of interrogatories, *See Exhibit 34* pg. 1-17 March 26, 2008 "Answer to First Set of Interrogatories".

48. As of September 1, 2008 I, Samuel K. Lipari have produced seven set of exhibits to defendants, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure" *See Exhibit 28* pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief", *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I", *See Exhibit 30* pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II", *See Exhibit 31* pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III" combining over 10,000 documents indexed by volume, exhibit number, description of the document, Bates stamp in addition to 70 categorized witnesses associated by relevance all of which contradict every fraudulent motion filed by the defendants and order from the Honorable Magistrate Judge David J. Waxse regarding the plaintiffs Rule 26(a)(1) disclosure compliance.

"3. Plaintiff's responses to Interrogatory Nos. 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17 and 21 are insufficient in that they fail to provide the information requested by each Interrogatory."

Exhibit 35 pg. 1-3 May 22, 2008 "68 Motion to Compel"

49. On March 10, 2008 I, Samuel K. Lipari received an email subject: "Lipari v. US Bank-Plaintiff's First Requests for Production...", *See Exhibit 32* pg. 1 March 10, 2008 "Jay Discovery Objection". After receiving defendants email March 10, 2008 I, Samuel K. Lipari sent a letter to the defendants, *See Exhibit 33* pg. 1 March 10, 2008 "Reply to Defendant Discovery Objection" expressing interest to comply with defendants request. On March 26, 2008 I, Samuel K. Lipari complied with defendants request, *See Exhibit 34* pg. 1-17 March 26, 2008 "Answer to First Set of Interrogatories" on April 22, 2008 one day prior to receiving defendants golden rule letter concerning deficiencies in plaintiffs First Set of Interrogatories, *See Exhibit 36* pg. 1-5 April 23, 2008 "Golden Rule Letter to Lipari" defendants filed a Motion to Compel Rule 26(a)(1), *See Exhibit 35* pg. 1-3 April 22, 2008 "68 Motion to Compel". The defendants did not give plaintiff an opportunity to cure any deficiencies before filling a Motion to Compel; in fact defendants filled its Motion to Compel in advance of providing plaintiff notice or an opportunity to cure any deficiencies. This evidences the defendants' continuation of fraud on the court and the Honorable Magistrate Judge David J. Waxse was deceived ignoring the plaintiff's objections by ordering a Motion to Show Cause.

"4. Plaintiff should be ordered to provide full responses and documents in response to defendants'

Requests for Production. Likewise, because he did not offer any objections, plaintiff should be ordered to provide full and complete responses to Interrogatory Nos. 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17 and 21.”

Exhibit 35 pg. 1-3 May 22, 2008 “68 Motion to Compel”

50. Statement of facts paragraph four is a continuation of the fraud on the court by the defendants and was accepted by the Honorable District Court Judge Carlos Murguia and the Honorable Magistrate Judge Waxse who were deceived by this paragraph into finding that the plaintiff had not answered some of the defendants’ interrogatories fully or produced all the requested documents when in fact the plaintiff had supplemented both the disclosures of documents and the answers to interrogatories which the defendants’ omitted from disclosing to the court. As of September 1, 2008 I, Samuel K. Lipari have produced seven set of exhibits to defendants, *See Exhibit 20* pg. 1-7 June 7, 2005 “Initial Disclosure”, *See Exhibit 21* pg. 1-40 April 20, 2007 “Disclosure”, *See Exhibit 26* pg. 1-42 May 3, 2007 “Disclosure” *See Exhibit 28* pg. 1-107 February 9, 2008 “Lipari v US Bank Settlement Brief”, *See Exhibit 29* pg. 1-118 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. I”, *See Exhibit 30* pg. 1-385 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. II”, *See Exhibit 31* pg. 1-27 February 9, 2008 “Settlement Brief Evidence Exhibits Vol. III” combining over 10,000 documents indexed by volume, exhibit number, description of the document, Bates stamp in addition to 70 categorized witnesses associated by relevance all of which contradict every fraudulent motion filed by the defendants and the order from the Honorable Magistrate Judge Waxse regarding the plaintiffs Rule 26(a)(1) disclosure compliance.

51. When I, Samuel K. Lipari learned by the defendant’s letter (See **Exhibit 36** pg. 1-5 April 23, 2008 “Golden Rule Letter”) of deficiencies, I complied with the defendants request and submitted a supplemental disclosure addressing deficiencies brought to plaintiff’s attention then on May 6, 2008 I, Samuel K. Lipari responded with an additional 28 pages of interrogatories *See Exhibit 38* pg. 1-45 May 6, 2008 “Response to Golden Rule Letter Dated April 23”. On May 7, 2008 I, Samuel K. Lipari received an email subject: “Documents on CD for Rule 26 disclosures...”

“Sam-

In your response to our Motion to Compel, you indicated that the CD of documents you provided were searchable. That is not the case. The files are password protected that prevent any type of OCR, re-printing as a .pdf and searching. Please provide the password that will allow us to change the security setting for these files and make them searchable. Or please provide us with a new CD that allows OCR and searchable functions. Thanks.

Jay”

Exhibit 39 pg. 1-2 May 7, 2008 “Clarification of CD Rule 26 Disclosures”

52. On that same day I, Samuel K. Lipari responded with an explanation to defendant *See Exhibit*

39 pg. 1-2 May 7, 2008 “Clarification of CD Rule 26 Disclosures”.

“Jay,

Sorry for the misunderstanding. I have not password protected any of the files. I think we are using two different meanings of searchable, the table of contents leads you to documents by keywords. Some are scanned images where keyword searching, cutting and pasting is not possible. Some were made into pdfs with the software I could afford, not Adobe and you have to go into the properties section to alter or save. You are no doubt inconvenienced but that is the software I have and the form I have created and store the pdfs in the normal course of business. You on the other hand give me only the paper versions of MS Word documents for the few docs you have produced in discovery even though I have requested only electronic documents. I hope this helps. Best regards, S~”

Exhibit 39 pg. 1-2 May 7, 2008 “Clarification of CD Rule 26 Disclosures”

C. The Material Fraudulent Misrepresentations to The Court in the Third Motion to Compel

53. On May 22, 2008 the defendants filed another Motion to Compel, *See Exhibit 41* pg. 1-3 May 22, 2008 “85 Motion to Compel”.

54. On June 5, 2008 I, Samuel K. Lipari responded with additional witness addresses, *See Exhibit 42* pg. 1-3 June 5, 2008 “Second Rule 26 Supplemental Disclosures”.

55. On July 15, 2008 I, Samuel K. Lipari emailed defendant and ask what additional information is need to comply with the courts order, *See Exhibit 44* pg. 1 July 15, 2008 “Email to Jay Requesting Clarification”

“5. Defendants certify that they have made a good faith attempt to resolve this discovery dispute. On April 23, 2008, defendants sent a letter to plaintiff outlining the deficiencies in his discovery responses. Plaintiff contacted defendants’ attorney on May 6, 2008, indicating that he was attempting to comply with the Golden Rule letter. Defendants’ attorney responded that same day and requested plaintiff’s supplemental responses by May 12, 2008. But plaintiff has failed to serve any supplemental responses to defendants’ interrogatories and has not served any responses to defendants’ Requests for Production. On May 20, 2008, defendants’ counsel attempted to contact plaintiff via telephone, but could not reach him.”

Exhibit 35 pg. 1-3 May 22, 2008 “68 Motion to Compel”

56. Despite the best efforts of the plaintiff to cooperate and meet the defendants discovery demands, having already repeatedly produced every document in an organized indexed fashion and repeatedly answering every interrogatory even disclosing requested legal theories and other information beyond the scope of discovery demands, the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. filed a Motion to Compel, *See Exhibit 35* April 22, 2008 “68 Motion to Compel” Rule 26(a)(1) the day before giving notice to plaintiff *See Exhibit 36* pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari” about any deficiencies and the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. have asserted their conduct is in good faith.

57. I, Samuel K. Lipari didn't contact defendant on May 6, 2008, plaintiff served defendants with twenty seven additional pages of interrogatories, *See Exhibit 38* pg. 1-45 May 6, 2008 "Response to Golden Rule Letter Dated April 23".

58. I, Samuel K. Lipari served my supplemental response May 6, 2008, *See Exhibit 38* pg. 1-45 May 6, 2008 "Response to Golden Rule Letter Dated April 23" six days before defendant made its request deadline of May 12, 2008. Plaintiff's first response to defendants request was made March 26, 2008, *See Exhibit 34* pg. 1-17 March 26, 2008 "Answer to First Set of Interrogatories".

59. As of September 1, 2008 I, Samuel K. Lipari have produced seven sets of exhibits to defendants, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure" *See Exhibit 28* pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief", *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I", *See Exhibit 30* pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II", *See Exhibit 31* pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III" combining over 10,000 documents indexed by volume, exhibit number, description of the document, Bates stamp in addition to 70 categorized witnesses associated by relevance all of which contradict every fraudulent motion filed by the defendants and order from The Honorable Magistrate Judge Waxse regarding the plaintiffs Rule 26(a)(1) disclosure compliance. The plaintiff has complied with defendants' fraudulently procured Order to Compel before it or the Motion to Compel was served on the plaintiff, *See Exhibits 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.*

60. I, Samuel K. Lipari never received any calls from defendant. Plaintiff's phone is on his person 24 hours a day 7 days a week and has a voice mail feature for leaving messages. No call was made and I, Samuel K. Lipari never received a message.

61. On August 25, 2008 the court filed the following order (doc 120)

"120 SECOND NOTICE AND ORDER TO SHOW CAUSE". Defendants' Motion for Order to Show Cause 118 is granted. Plaintiff Samuel K. Lipari is required to show cause to United States District Judge Carlos Murguia, in a pleading filed by 9/8/08, why this case should not be dismissed with prejudice, or other sanctions imposed, pursuant to Federal Rule of Civil Procedure 37(b)(2)(A) for failure to comply with the Courts 7/8/08 Order (doc. 96), and/or pursuant to Federal Rules of Civil Procedure 16(f) and 37(b)(2)(A) for failure to participate in the preparation of a joint proposed pretrial order. Signed by Magistrate Judge David J. Waxse on 8/25/08. (mh) (Entered: 08/25/2008)"

Exhibit 49 pg. 1-6 August 25, 2008 "Second Notice and Order to Show Cause"

62. The above order is in error because of the fraudulent misrepresentations described in the preceding paragraphs and because I, Samuel K. Lipari sent the defendants and Magistrate Judge David J.

Waxse a joint pretrial order, See **Exhibit 51** August 21, 2008 “Plaintiff’s Pretrial Order” (email cover letter to Magistrate Waxse)) evidencing cooperation with the defendants as ordered by the court (see also **Exhibit 9** of the Answer to Show cause Order Plaintiff’s Combined Pretrial Order) at 1:54pm on the same day the defendants had sent to Magistrate Judge David J. Waxse a pretrial order at 12:31pm with only the defendants’ portions included. See **Exhibit 50** August 21, 2008 Defendants’s Pretrial Order (email cover letter to Magistrate Waxse). See also **Exhibit 8** of the Answer to Show cause Order.

63. On August 20, 2008 the defendants filed the following Motion for Order to Show Cause with a repetition of the above described materially false misrepresentations about the plaintiff’s compliance with discovery except the defendants are no longer making the false assertion that that the plaintiff has not produced or needs to produce documents requested by the defendants and the defendants revealed their fraudulent scheme had the goal of procuring the dismissal of the plaintiff’s claims:

“118 MOTION FOR ORDER TO SHOW CAUSE

Defendants, by and through counsel Shughart Thomson & Kilroy, P.C., move this Court for an Order requiring the plaintiff to show cause why this action should not be dismissed (or other sanctions levied) under Rule 37(b)(2)(A) for his failure to comply with the Court’s July 8, 2008 discovery Order. In support of this Motion, defendants state as follows:

1. On July 8, 2008, the Court ordered plaintiff, within 14 days of the Order, to serve supplemental responses to defendants’ First Interrogatories Nos. 1, 3, 5-14, 16, 17 and 21; and to produce all documents responsive to defendants’ First Request for Production. The Court also ordered the plaintiff, within 21 days of the Order, to show cause why he should not be required to pay the reasonable fees and expenses the defendants incurred for their Motion to Compel. *See*, Memorandum and Order, Doc. # 96.”

Exhibit 48 pg. 1-3 August 20, 2008 “Defendants Motion to Show Cause”

64. As I, Samuel K. Lipari have shown from the above sworn information and documentary exhibits, I had answered the defendants’ First Interrogatories Nos. 1, 3, 5-14, 16, 17 and 21 and I had produced all documents responsive to defendants’ First Request for Production before that these requests were made and several times in response to the defendants’ requests.

“2. On July 10, 2008, plaintiff filed an Objection to Magistrate’s Order, asking for District Court review of the July 8, 2008 Order. *See*, Doc. # 97. But the plaintiff did not seek to stay the Order under D. Kan. Rule 72.1.4(d).”

Exhibit 48 pg. 1-3 at ¶ 2 August 20, 2008 “Defendants Motion to Show Cause”

65. I, Samuel K. Lipari having as shown in the above sworn information and documentary exhibits, answered the defendants’ First Interrogatories Nos. 1, 3, 5-14, 16, 17 and 21 and I had produced all documents responsive to defendants’ First Request for Production before that these requests were made and several times in response to the defendants’ requests; therefore I, Samuel K. Lipari believe I did not need to file a motion seek to stay the Order under D. Kan. Rule 72.1.4(d) and if any non frivolous dispute still

exists with the defendants my conduct cannot be sanctioned because "substantially justified." See *Fitz, Inc. v. Ralph Wilson Plastics Co.*, 174 F.R.D. 587, 591 (D.N.J.1997) (noting that, in the context of Rule 37 sanctions, "substantial justification" occurs when there is a "genuine dispute concerning compliance") (citing *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988).

"3. Simply filing an Objection to Magistrate's Order does not relieve a party's obligation to comply with the order, absent an Order to Stay under D. Kan. Rule 72. See, *Kelly v. Market USA*, 2003 WL 21089075, *2 (D. Kan. 2003) (holding that *pro se* plaintiff's refusal to comply with the magistrate's order to produce discovery was unexcused even though the plaintiff had filed an objection to the order). A copy of the *Kelly* decision is attached as Exhibit A."

Exhibit 48 pg. 1-3 at ¶ 3 August 20, 2008 "Defendants Motion to Show Cause"

66. I, Samuel K. Lipari hereby reassert the response in the above paragraph regarding my actual compliance and substantial justification making a motion for stay under D. Kan. Rule 72.1.4(d) unnecessary.

"4. The plaintiff has not produced any documents or supplemental responses in accordance with the Court's Order, and has also failed to respond to the Court's Show Cause Order."

Exhibit 48 pg. 1-3 at ¶ 4 August 20, 2008 "Defendants Motion to Show Cause"

67. I, Samuel K. Lipari having as shown in the above sworn information and documentary exhibits, answered the defendants' First Interrogatories Nos. 1, 3, 5-14, 16, 17 and 21 and I had produced all documents responsive to defendants' First Request for Production before these requests were made and several times in response to the defendants' requests; therefore I, Samuel K. Lipari believe the above statement is an intentional fraud on the court by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. perpetuating a pattern of material misrepresentations by the defendants to have my claims dismissed through a sanction procured through this and similar frauds described above.

"5. Rule 37(b)(2)(A) states that if a party fails to comply with a court's discovery order, the court may levy sanctions on the party, including dismissal of the action. Because the plaintiff has failed to comply with the July 8, 2008 Order, the defendants request the Court order the plaintiff to show cause why this matter should not be dismissed or other sanctions issued pursuant to Rule 37(b)(2)(A)."

Exhibit 48 pg. 1-3 at ¶ 5 August 20, 2008 "Defendants Motion to Show Cause"

68. I, Samuel K. Lipari believe that paragraph 5 exposes and documents the fraudulent scheme of the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. to procure the dismissal of my claims through fraud that had earlier been concealed in the defendant response to the show cause order at 6:30 am on August 18, 2008 and upon which my affidavit of prejudice against this court, also dated August 18, 2008 was made.

VIII. Plaintiff's Rule 56(a) Summary Judgment disclosures

69. The plaintiff's initial and subsequent disclosures, *See Exhibit 20* pg. 1-7 June 7, 2005 "Initial Disclosure", *See Exhibit 21* pg. 1-40 April 20, 2007 "Disclosure", *See Exhibit 26* pg. 1-42 May 3, 2007 "Disclosure", *See Exhibit 22* pg. 1-3972 April 20, 2007 "Lipari Trial Exhibits Volume I", *See Exhibit 23* pg. 1-2848 April 20, 2007 "Lipari Trial Exhibits Volume II", *See Exhibit 24* pg. 1-4009 April 20, 2007 "Lipari Supplemental Trial Exhibits Volume I", *See Exhibit 25* pg. 1-167 April 20, 2007 "Lipari Supplemental Trial Exhibits Volume II", *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I", *See Exhibit 30* pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II", *See Exhibit 31* pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III", documented the plaintiff's complaint, despite the plaintiff's repeated objections the defendants have obtained closure of discovery preventing any additional evidence except the documents provided by the plaintiff and the witnesses identifies in the plaintiff's complaint and witness disclosures for utilization by either party for a dispositive motion under Rule 59.

70. I, Samuel K. Lipari have provided emails, *See Exhibit 54* pg. 1 October 7, 2002 "Lipari email Notice of Changes to Escrow Agreement" (the "escrow agreement"), and *See Exhibit 55* pg. 1 October 8, 2002 "Kabbes email Signature of Accepted Changes", between the plaintiff's former corporation Medical Supply Chain, Inc. and US Bank forming a written contract to provide escrow agency and escrow accounts (the "contract to provide escrow accounts"). Three days later on October 11, 2002 plaintiff requested escrow release information from Mr. Kabbes, *See Exhibit 56* pg. 1 October 11, 2002 "Lipari Request for Escrow Release Language", so that escrow funds would be available for plaintiff to service the loan with Doug Lewis at US Bank Noland Rd., Independence Mo. branch. The escrow agreement prior to Mr. Kabbes change request, *See Exhibit 52* pg. 1-6 October 6, 2002 "Escrow Agreement Before Kabbes Changes", sent to Mr Kabbes on October 6 and the escrow agreement after plaintiff made the requested changes, *See Exhibit 53* pg. 1-6 October 7, 2002 "Escrow Agreement After Kabbes Changes. **Exhibit 54** and **Exhibit 55** were disclosed to defendants on February 9, 2008 *See Exhibit 29* pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I" Table of Contents pg. 2, **Exhibits 7** Lipari email to Kabbes 10-7-02, **Exhibit 8** Escrow Agreement with changes for Brian Kabbes' approval, **Exhibit 9** Escrow Agreement with Brian Kabbes' signature block affixed, **Exhibit 10** Lipari email to Brian Kabbes with

proposed release 10-11-02, and **Exhibit 11** Lipari email to Brian Kabbes 10-14-02 and thoroughly briefed on the evidence, *See Exhibit 28* pg. 1-107 February 9, 2008 “Lipari v US Bank Settlement Brief”.

71. I, Samuel K. Lipari have provided documentation with the emails forming a contract to provide escrow agency and accounts (the “contract to provide escrow accounts”) and an escrow deposit contract (the “escrow agreement”) , *See Exhibit 53* pg. 1-6 October 7, 2002 “Escrow Agreement After Kabbes Changes” authorized by Brian Kabbes, *See Exhibit 55* pg. 1 October 8, 2002 “Kabbes email Signature of Accepted Changes” US Bank’s Corporate Trust Department Vice President that I had to give a benefit and US Bank received a benefit when the escrow deposit document (the “escrow agreement”) was changed to designate a treasury fund owned by US Bancorp *See Exhibit 53* pg. 1-6 October 7, 2002 “Escrow Agreement After Kabbes Changes” pg. 2 Section 4 Investments.

72. I, Samuel K. Lipari have provided documentation that I have been injured ¶¶ 1-77 of this document by the defendants fighting the existence of a contract between the plaintiff and US Bank to provide escrow agency and escrow accounts despite their prohibition against denying the existence, *See Exhibit 55* pg. 1 October 8, 2002 “Kabbes email Signature of Accepted Changes”, benefits or effect of the contract *See Exhibit 53* pg. 1-6 October 7, 2002 “Escrow Agreement After Kabbes Changes” pg. 2 Section 4 Investments after receiving a benefit under Missouri law including the procurement of the present show cause order *See Exhibit 47* pg. 1-2 August 18, 2008 “Notice and Order to Show Cause” and again *See Exhibit 49* pg. 1-6 August 25, 2008 “Second Notice and Order to Show Cause”, which has greatly taxed me and interfered in my launching of a new business outside of the institutional hospital supply market monopolized by the defendants with their co-conspirators Neoforma, Inc now GHX LLC; Novation LLC and the General Electric Company.

73. I, Samuel K. Lipari in having provided the evidence supporting ¶ 72 above have provided the defendants with evidence that US Bank NA with the aid of US Bancorp Inc., its parent company have breached their contract with my former corporation Medical Supply Chain, Inc. by breaching the contract to provide escrow accounts’ inherent duty of good faith and fair dealing.

74. I, Samuel K. Lipari in having provided the evidence supporting ¶¶ 70 thru 73 above have provided the defendants with evidence that US Bank NA with the aid of US Bancorp Inc. have breached a fiduciary duty to me existing at Missouri law recognizing agreements to provide escrow agency and to act as an escrow account facility including the contract to provide escrow accounts between my former

corporation Medical Supply Chain, Inc. and US Bank are fiduciary obligations creating duties breached by the defendants in denying the existence, benefits or effect of the contract to provide escrow accounts.

75. I, Samuel K. Lipari in having provided the evidence supporting ¶¶ 70 thru 73 above have provided the defendants with evidence that US Bank NA with the aid of US Bancorp Inc. have deprived me of counsel, injured persons assisting me, tortuously interfered with my efforts to cover or mitigate the damages from US Bank's breach by interfering with my litigation against General Electric where US Bank and US Bancorp had no legal interest.

76. I, Samuel K. Lipari have been injured by US Bank and US Bancorp tortuously interfering with my business expectancies for legal representation by Hawver Law Office and Steven Siegel Hanson, LLP.

I hereby swear certifying that the above stated facts and attachments are true to the best of my knowledge and recollection.

Signature _____ Date _____

Notary

Subscribed and sworn before me on _____ Date _____

Index of Affidavit Exhibits

Exhibit 20 pg. 1-7 June 7, 2005 "Initial Disclosure"

Exhibit 21 pg. 1-40 April 20, 2007 "Disclosure"

Exhibit 22 pg. 1-3972 April 20, 2007 "Lipari Trial Exhibits Volume I"

Exhibit 23 pg. 1-2848 April 20, 2007 "Lipari Trial Exhibits Volume II"

Exhibit 24 pg. 1-4009 April 20, 2007 "Lipari Supplemental Trial Exhibits Volume I"

Exhibit 25 pg. 1-167 April 20, 2007 "Lipari Supplemental Trial Exhibits Volume II"

Exhibit 26 pg. 1-42 May 3, 2007 "Disclosure"

Exhibit 27 pg. 1-5 February 9, 2008 "Settlement Brief Notice"

Exhibit 28 pg. 1-107 February 9, 2008 "Lipari v US Bank Settlement Brief"

Exhibit 29 pg. 1-118 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. I"

Exhibit 30 pg. 1-385 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. II"

Exhibit 31 pg. 1-27 February 9, 2008 "Settlement Brief Evidence Exhibits Vol. III"

Exhibit 32 pg. 1 March 10, 2008 "Jay Discovery Objection"

Exhibit 33 pg. 1 March 10, 2008 “Reply to Defendant Discovery Objection”

Exhibit 34 pg. 1-17 March 26, 2008 “Answer to First Set of Interrogatories”

Exhibit 35 pg. 1-3 April 22, 2008 “68 Motion to Compel”

Exhibit 36 pg. 1-5 April 23, 2008 “Golden Rule Letter to Lipari”

Exhibit 37 pg. 1-8 April 30, 2008 “Plaintiff Response to April 22 68 Motion to Compel”

Exhibit 38 pg. 1-45 May 6, 2008 “Response to Golden Rule Letter Dated April 23”

Exhibit 39 pg. 1-2 May 7, 2008 “Clarification of CD Rule 26 Disclosures”

Exhibit 40 pg. 1-3 May 17, 2008 “US Bank Preliminary List of Witnesses & Exhibits”

Exhibit 41 pg. 1-3 May 22, 2008 “85 Motion to Compel”

Exhibit 42 pg. 1-3 June 5, 2008 “Second Rule 26 Supplemental Disclosures”

Exhibit 43pg. 1-5 July 8, 2008 “Memorandum and Order”

Exhibit 44 pg. 1 July 15, 2008 “Email to Jay Requesting Clarification”

Exhibit 45 pg. 1-12 July 22, 2008 “Memorandum and Order”

Exhibit 46 pg. 1-2 August 18, 2008 “Defendants Response to Show Cause”

Exhibit 47 pg. 1-2 August 18, 2008 “Notice and Order to Show Cause”

Exhibit 48 pg. 1-3 August 20, 2008 “Defendants Motion to Show Cause”

Exhibit 49 pg. 1-6 August 25, 2008 “Second Notice and Order to Show Cause”

Exhibit 50 pg. 1 August 21, 2008 “Defendants Pretrial Order (email cover letter to Magistrate Waxse)”

Exhibit 51 pg. 1 August 21, 2008 “Plaintiff’s Pretrial Order (email cover letter to Magistrate Waxse)”

Exhibit 52 pg. 1-6 October 6, 2002 “Escrow Agreement Before Kabbes Changes”

Exhibit 53 pg. 1-6 October 7, 2002 “Escrow Agreement After Kabbes Changes”

Exhibit 54 pg. 1 October 7, 2002 “Lipari email Notice of Changes to Escrow Agreement”

Exhibit 55 pg. 1 October 8, 2002 “Kabbes email Signature of Accepted Changes”

Exhibit 56 pg. 1 October 11, 2002 “Lipari Request for Escrow Release Language”

Exhibit 57 pg. 1-6 February 13, 2008 “Plaintiff Production Request”

Exhibit 58 pg. 1-2 February 8, 2008 “Appendix II Settlement Brief Vol. I”

CERTIFICATE OF SERVICE

I certify I have sent a copy to the undersigned opposing counsel via electronic filing on 9/2/08.

Mark A. Olthoff, Esq.,
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S/ Samuel K. Lipari

Samuel K. Lipari

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	No. 07-2146-CM
	)	
US BANCORP NA and	)	
US BANK NA,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Plaintiff Samuel K. Lipari filed the instant action in Jackson County Circuit Court on November 28, 2006 (Jackson County Case No. 0616-CV-32307) against defendants US Bancorp NA and US Bank NA. On December 13, 2006, defendants removed the action to the United States District Court for the Western District of Missouri, Western Division, on the basis of diversity. On April 10, 2007, the United States District Court for the Western District of Missouri transferred the case to this court pursuant to 28 U.S.C. § 1404(a). This matter is before the court on Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure (Doc. 43).

I. Background

As assignee of Medical Supply Chain, Inc. ("Medical Supply" or "MSCI"), plaintiff brings the following five state-law claims against defendants, each under Missouri law: (1) breach of contract; (2) fraud; (3) trade secret misappropriation; (4) breach of fiduciary duty; and (5) prima facie tort. Defendants originally moved to dismiss plaintiff's claims in April 2007, arguing plaintiff lacked standing and the claims were barred by res judicata. The court denied the dismissal of the

claims that had been brought in prior lawsuits because the prior lawsuits dismissed the state-law claims without prejudice, and thus, there had been no final judgment on the merits. At the time of the court's order, the record did not clearly delineate which of plaintiff's current claims had been raised in the previous lawsuits and dismissed without adjudication on the merits. Accordingly, the court denied defendants' motion to dismiss without prejudice and required the parties to set forth which claims had been raised in the prior lawsuits. In their supplemental briefing, the parties agreed that all of the current claims were brought in the prior lawsuits—in other words, the claims had not been adjudicated on the merits and were not barred by res judicata.

On December 19, 2007, defendants filed their second motion to dismiss. This motion was filed after defendants filed their answer, but while discovery was ongoing.

II. Timeliness of Motion

Plaintiff argues that defendants' second motion to dismiss is prohibited under Federal Rule of Civil Procedure 12(g). Under Rule 12(g), any defense that is available at the time of the original motion that is not included in the original motion may not be the basis of a second pre-answer motion. Rule 12(h)(2), however, specifically preserves a party's right to file a motion to dismiss for failure to state a claim and provides for a post-answer motion for failure to state a claim under Rule 12(c). Fed. R. Civ. P. 12(h)(2)(B). "The distinction between [a Rule 12(b)(6) motion and a Rule 12(c) motion] is purely formal, because the court must review a Rule 12(c) motion under the same standard that governs a Rule 12(b)(6) motion." *Res. Ctr. for Indep. Living, Inc. v. Ability Res., Inc.*, 534 F. Supp. 2d 1204, 1207 (D. Kan. 2008) (citing *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003)); *see also Fisher v. Lynch*, No. 07-2154-KHV, 2008 WL 2152053, at *1 (D. Kan. May 21, 2008) ("A motion for judgment on the pleadings under Rule 12(c) is governed by the same standards

as a motion to dismiss under Rule 12(b)(6).”). The court may treat a Rule 12(b)(6) motion as if it had been submitted under Rule 12(c). *Res. Ctr. for Indep. Living, Inc.*, 534 F. Supp. 2d at 1207 (treating the defendants’ post-answer motion to dismiss as if it had been styled a Rule 12(c) motion for judgment on the pleadings); *Faulk v. Tiffany*, No. 99-2354-GTV, 2000 WL 714336, at *1 (D. Kan. May 23, 2000) (citing *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990)); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980)). Because the same standard governs both motions, the court will consider defendants’ Rule 12(b)(6) motion to dismiss as if it had been styled a Rule 12(c) motion for judgment on the pleadings. *Res. Ctr. for Indep. Living, Inc.*, 534 F. Supp. 2d at 1207.

III. Legal Standards

This court will grant a Rule 12(b)(6) motion to dismiss only when the factual allegations fail to “state a claim to relief that is plausible on its face . . . or when an issue of law is dispositive.” *Meyer v. Christie*, No. 07-2230-JWL, 2007 WL 3120695, at *4 (D. Kan. Oct. 24, 2007) (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007); *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)). While the factual allegations need not be detailed, the claims must set forth entitlement to relief “through more than labels, conclusions, and a formulaic recitation of the elements of a cause of action.” *In re Motor Fuel Temperature Sales Practices Litig.*, 534 F. Supp. 2d 1214, 1216 (D. Kan. 2008). The allegations must contain facts sufficient to state a claim that is plausible, rather than merely conceivable. *Id.*

“All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true.” *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008). The court construes any reasonable inferences from these facts in favor of the plaintiff. *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006);

Dudnikov, 514 F.3d at 1070. The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Where, as here, a plaintiff is proceeding pro se,¹ “[d]ismissal . . . for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend.” *Jenkins v. Currier*, 514 F.3d 1030, 1032 (10th Cir. 2008) (quotation omitted). But plaintiff’s “pro se status does not relieve him from complying with the court’s procedural requirements.” *Barnes v. U.S.*, 173 F. App’x 695, 697 (10th Cir. 2006) (citations omitted); *see also Santistevan v. Colo. Sch. of Mines*, 150 F. App’x 927, 931 (10th Cir. 2005) (holding that a pro se litigant must follow the same rules of procedure as other litigants). He still “has the burden of alleging sufficient facts on which a recognizable legal claim could be based.” *Jenkins*, 514 F.3d at 1033 (internal quotations omitted).

IV. Analysis

A. Choice of Law

In a diversity matter, the court must apply the substantive law of the forum state, including its choice of law provisions. *Otis Elevator Co. v. Midland Red Oak Realty, Inc.*, 483 F.3d 1095, 1101 (10th Cir. 2007). Although this matter was transferred from the Western District of Missouri, “[t]he transfer of a case to another district does not alter the applicable law. The transferee court must apply the same law applicable in the transferor court.” *Hill’s Pet Prods., a Div. of Colgate-Palmolive Co. v. A.S.U., Inc.*, 808 F. Supp. 774, 776 n.3 (D. Kan. 1992); *see also Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1219 (10th Cir. 1997) (applying choice of law rules of state in which

¹ On January 2, 2008, plaintiff’s counsel withdrew at plaintiff’s request.

the transferor state sits). Thus, the court must apply Missouri's choice of law provisions.² When determining choice of law issues, Missouri applies the law of the state with the most significant relationship to the action. *Superior Equip. Co., v. Maryland Cas. Co.*, 986 S.W.2d 477, 480 (Mo. Ct. App. E.D. 1998) (discussing choice of law in contract actions); *Goede v. Aerojet Gen. Corp.*, 143 S.W.3d 14, 24–25 (Mo. Ct. App. E.D. 2004) (discussing choice of law in tort actions). This requires a balancing of several factors, including the following factors: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Superior Equip. Co., Inc.*, 986 S.W.2d at 480.

The complaint alleges the causes of action occurred in Jackson County, Missouri; the alleged contract was negotiated in Missouri; the alleged tortious conduct occurred in Missouri; plaintiff resides in Missouri; and the dissolved entity—Medical Supply—was incorporated and had its principal business location in Missouri. Based on the allegations in the complaint, the court finds that Missouri has the most significant relationship with this case, and thus, Missouri law applies to plaintiff's claims.

B. Breach of Contract

Defendants argue that plaintiff has failed to allege a cognizable breach of contract claim because he failed to allege an agreement and consideration. To state a cause of action for breach of contract under Missouri law, plaintiff must allege (1) an agreement between parties capable of contracting; (2) mutual obligations arising thereunder with respect to a definite subject matter; (3) a

² The result is the same under Kansas's choice of law provisions. Kansas law applies the law of the state where the contract was formed or the tortious conduct occurred. *Found. Prop. Invs., LLC v. CTP, LLC*, 159 P.3d 1042, 1046 (Kan. Ct. App. 2007); *Ling v. Jan's Liquors*, 703 P.2d 731, 735 (Kan. 1985).

valid consideration; (4) part performance by one party and prevention of further performance by the other; and (5) damages measured by the contract and resulting from its breach. *Scher v. Sindel*, 837 S.W.2d 350, 354 (Mo. Ct. App. E.D. 1992). To have an enforceable contract, there must be an agreement of the parties—or meeting of the minds—upon the terms of the contract. *Smith v. Hammons*, 63 S.W.3d 320, 325 (Mo. Ct. App. S.D. 2002). “The nature and extent of the contract’s essential terms must be certain or capable of being certain.” *Id.* The agreement is invalid when the parties have reserved the essential terms of the contract for future determination. *Id.* “Negotiations or preliminary steps towards a contract do not constitute a contract.” *Gateway Exteriors, Inc. v. Suntide Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. Ct. App. E.D. 1994) (citations omitted).

The basis for plaintiff’s breach of contract claim is that plaintiff and Brian Kabbes of defendant U.S. Bank exchanged email negotiations regarding escrow services for Medical Supply and had agreed upon some or all of the terms, including the following factors: the fees for the escrow agent services; defendant U.S. Bank’s compensation; the investment of long and short term held funds; the name of the escrow agent; and the payment schedule. (Complaint at ¶ 201.)³ Plaintiff further alleges that defendants performed diligence to determine whether to contract with Medical Supply (*id.* at ¶ 202); and that Mr. Kabbes also requested corporate good standing documentation from Medical Supply, which was provided (*id.* at ¶ 203).

Plaintiff’s allegations do not support a plausible “meeting of the minds.” By plaintiff’s own admission, the parties agreed to “some or all” of the terms. He alleges certain terms were supposedly agreed to, but fails to set forth the terms of the alleged contract or the substance of the email communications. Plaintiff has not pleaded a contract with any measure of definiteness and

³ Plaintiff misnumbered paragraphs in the complaint. After paragraph 225 on page 45, he begins numbering the paragraphs with number 194. He misnumbers the paragraphs through the complaint.

certainty. There is nothing in the pleading to show whether the alleged contract was oral or written,⁴ the terms of the contract, the amounts involved, the obligations of the respective parties, the measure of damages determined by the contract, or the time period of the terms. “In short, the pleading is so indefinite and uncertain that no cause of action for breach of contract is stated.” *Yoeast v. Farm Credit Bank of St. Louis*, 832 S.W.2d 325, 329 (Mo. Ct. App. W.D. 1992) (upholding dismissal of breach of contract claim for failure to state a claim because the plaintiffs did not plead a contract with any measure of definiteness and certainty).

Plaintiff’s allegations merely support a finding that Medical Supply and defendant U.S. Bank were negotiating or discussing the possibility of an escrow contract—which does not constitute a contract. *Gateway Exteriors, Inc.*, 882 S.W.2d 275, 279. The allegations do not support a breach of contract claim. It is, therefore, not necessary to address the applicability of the statute of frauds, Mo. Rev. Stat. § 432.045. For the above mentioned reasons, plaintiff’s breach of contract claim is dismissed.

C. Fraud⁵

In order to make a submissible case of fraudulent misrepresentation, plaintiff must allege the following: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) the speaker’s intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer’s ignorance of the falsity of the representation; (7) the hearer’s reliance on the representation being true; (8) the hearer’s right to rely

⁴ Under Count I, breach of contract, plaintiff alleges the contract was written, but he alleges it was oral in Count II, fraud.

⁵ Plaintiff improperly alleges new fraud claims in his response to defendants’ motion. The allegations relate to defendants’ and defendants’ counsel’s actions in this litigation. These claims are not properly before the court, and the court will not consider them.

thereon; and (9) the hearer's consequent and proximately-caused injury. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 765 (Mo. 2007). Allegations of fraud must be stated with particularity. Fed. R. Civ. P. 9(b); *Bohac v. Walsh*, 223 S.W.3d 858, 863 (Mo. Ct. App. E.D. 2007).

Defendants argue that plaintiff fails to state a claim for relief because (1) he failed to plead that defendants made a false representation; (2) he failed to plead justifiable reliance or causation; and (3) a party cannot maintain a cause of action in tort when the breach of duty is purely contractual. As alleged in the complaint, the false misrepresentation is that an agent of defendant US Bank "represented to MSCI that US BANK and the commercial trust department would not perform as escrow agent or host MSCI's escrow accounts because of the 'know your customer provisions' diligence requirements of the USA PATRIOT Act and made it impossible for the bank to perform this service for MSCI." (Complaint at ¶ 210.) Because it is dispositive of the issue, the court will first address plaintiff's alleged reliance.

Plaintiff alleges Medical Supply "justifiably relied upon this fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of US BANK's Commercial Trust department and instead contacted US BANCORP NA's Andrew Cesere, to try and resolve the problem." (Complaint at ¶ 216.) But the other allegations in his complaint indicate that he (1) was not ignorant of the falsity of the representation⁶ and (2) did not rely on the representation being true. After hearing the representation that the Patriot Act prevented defendants from setting up plaintiff's escrow, plaintiff and his attorney discussed the issue, at length, with defendant US Bancorp's employees—Brian Kabbes and Lares Anderson. (Complaint at ¶ 215.) The complaint also alleges that he discussed the issue with Ed Higgins, the head of personal trust in defendant US Bancorp's St.

⁶ The court is not opining on the truthfulness of the alleged misrepresentation, but assumes all facts in favor of plaintiff at this stage of the proceeding.

Louis office. (*Id.*) Based on the allegations in the complaint, it is clear that plaintiff did not believe the alleged misrepresentation to be true, and in fact disputed its truth with defendant US Bancorp. The court finds that plaintiff has not alleged reliance.

Because plaintiff has failed to plead all the elements of fraud, the court finds that he has not submitted a valid fraud claim and dismisses the claim. The court need not address defendants' other arguments regarding plaintiff's fraud claim.

D. Misappropriation of Trade Secrets

In the complaint, plaintiff alleges that Medical Supply gave its trade secrets to defendant US Bank to apply for a line of credit and that defendants have misappropriated Medical Supply's trade secrets under Mo. Rev. Stat. § 417.450 by copying and transmitting the trade secrets to (1) defendant US Bancorp; (2) three of defendant US Bancorp's officers; and (3) defendant US Bancorp's subsidiary, US Bancorp Piper Jaffray.

Misappropriation occurs in two ways (1) "when one acquires a trade secret through 'improper means,' that is, through such means as theft, bribery or inducing one to breach a duty of secrecy"; or (2) when one disclosing a trade secret without consent, inter alia, knew or had reason to know that the secret was '[a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.'" *H & R Block E. Tax Servs., Inc. v. Enchura*, 122 F. Supp. 2d 1067, 1074 (W.D. Mo. 2000) (citing and quoting Mo. Rev. Stat. § 417.453(2)(a) and (4)). Relying on Connecticut law, defendants argue that a corporation is not liable for disclosure of trade secrets when the alleged disclosure is to others within the corporation. But the complaint alleges that defendant US Bank exceeded its authorized use and disclosed the alleged trade secrets to other entities—defendant US Bancorp and its subsidiary US Bancorp Piper Jaffray. The complaint does not define the relationship between defendant US Bank, defendant US Bancorp, and US Bancorp Piper Jaffray.

Nor does it explain the terms of Medical Supply's disclosure to defendant US Bank. Defendants also contend that plaintiff has failed to state a claim for relief because Medical Supply had already provided the alleged trade secrets to US Bancorp Piper Jaffray. It is not clear from the complaint whether the information Medical Supply provided to US Bancorp Piper Jaffray is the same information as the alleged trade secrets. Based on the allegations in the complaint, the court finds that it is not "obvious that the plaintiff cannot prevail on the facts he has alleged." *Jenkins*, 514 F.3d at 1032. Defendants' motion regarding this claim is therefore denied.

E. Breach of Fiduciary Duty

"In order to adequately plead a claim for breach of fiduciary relationship, the plaintiff must plead (1) the existence of a fiduciary relationship between the parties, (2) a breach of that fiduciary duty, (3) causation and (4) harm." *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. Ct. App. W.D. 2000) (citing *Preferred Physicians Mut. Mgmt. Group v. Preferred Physicians Mut. Risk Retention*, 918 S.W.2d 805, 811 (Mo. Ct. App.1996)).

The complaint alleges that defendants owed plaintiff a fiduciary duty because (1) defendants were escrow service providers to Medical Supply and (2) defendants were the custodians of Medical Supply's confidential information. As the court explained above, the complaint does not allege a contract for escrow services, and thus, the only possible fiduciary relationship would arise from the parties' business dealings. "It has long been the rule in [Missouri] that the existence of a business relationship does not give rise to a fiduciary relationship, nor a presumption of such a relationship." *Chmielewski v. City Prods. Corp.*, 660 S.W.2d 275, 294 (Mo. Ct. App. W.D. 1983). And, ordinarily, there is no fiduciary relationship between a debtor and creditor. *Yoest*, 832 S.W.2d at 328.

Moreover, to allege a fiduciary relationship, plaintiff must alleged the elements of a fiduciary relationship, which including the following:

(1) one party must be subservient to the dominant mind and will of the other party as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value, which are the property of the subservient party, must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic and habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party.

Roth v. Equitable Life Assur. Soc. of U.S., 210 S.W.3d 253, 260 (Mo. Ct. App. E.D. 2006);

Chmielewski, 660 S.W.2d at 294–95 (“[A] confidential relationship is synonymous with a fiduciary relationship, and extends to instances in which a special confidence is reposed on one side and there is resulting *domination and influence* on the other.”). Plaintiff’s complaint does not allege a valid fiduciary relationship. Plaintiff does not allege he was subservient to defendants, surrendered his independence to defendants, or even placed trust and confidence in defendants. He was represented by counsel; he personally participated in the negotiations, negotiating lower fees and other terms; and he and his counsel disputed the denial of the escrow accounts—they contacted various individuals at the bank to fight the denial and threaten legal action.

In addition to failing to allege a fiduciary relationship, plaintiff’s claim that defendants breached a fiduciary duty because they disseminated Medical Supply’s alleged trade secrets is displaced by Mo. Rev. Stat. § 417.463.1. Section 417.463.1 provides that, with limited exceptions, “sections 417.450 to 417.467 displace conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret.” Mo. Rev. Stat. § 417.463.1. The limited exceptions are not applicable here. Mo. Rev. Stat. § 417.463.2. For these reasons, plaintiff has failed to state a cause of action for breach of fiduciary duty. Defendants’ motion regarding this claim is granted.

F. Prima Facie Tort

In order to plead a *prima facie* tort, the plaintiff must plead (1) an intentional lawful act by the defendant; (2) intent to cause injury to the plaintiff; (3) injury to the plaintiff; (4) an absence of any justification or an insufficient justification for the defendant's act. *Cridlebaugh v. Putnam County State Bank of Milan*, 192 S.W.3d 540 (Mo. Ct. App. W.D. 2006). "[T]he burden is on the plaintiff to affirmatively plead and prove an absence of justification on the part of the defendant." *Wilt v. Kansas City Area Transp. Auth.*, 629 S.W.2d 669, 673 (Mo. Ct. App. W.D. 1982). Missouri courts do not look upon *prima facie* tort claims with favor and have consistently limited their application. *Hertz Corp. v. Raks Hospitality, Inc.*, 196 S.W.3d 536, 549 (Mo. Ct. App. E.D. 2006). "The doctrine of *prima facie* tort is a tort of last resort, and it is difficult to find reported cases where a plaintiff actually has recovered on this theory." *Cridlebaugh*, 192 S.W.3d at 545.

Plaintiff alleges defendants are liable for the following intentional lawful acts: (1) refusing to provide escrow account services; (2) circulating derogatory financial information about Medical Supply; (3) placing warning notes against Medical Supply's officers on defendant US Bank's computer system; (4) disparaging Medical Supply's legal claims against defendants; (5) causing a disciplinary complaint to be filed against Medical Supply's counsel; and (6) preventing Medical Supply from obtaining a loan secured with escrow account funds as they were released to Medical Supply. (Complaint at ¶ 249.) Plaintiff has not properly alleged an "absence of any justification or an insufficient justification" for defendants' refusal to provide escrow account services. Plaintiff makes a conclusory allegation that "[t]here is an absence of justification and in the alternative insufficient justification for US BANK and US BANKCORP's acts," but the factual allegations in the complaint do not support this conclusion. As alleged in the complaint, the recorded phone message of US Bancorp's Becky Hainje explained that the escrow services were denied because (1) Medical Supply was an unknown start-up business; (2) the principals involved were unknown to the

bank; and (3) the “know your customer” provision of the Patriot Act. (Complaint at ¶ 214.)

Although the complaint may, if read liberally, allege that the latter reason was unjustified, it does not allege that the first two reasons were unjustified. The court finds that plaintiff has failed to state a claim regarding this allegation. Plaintiff’s remaining allegations regarding defendants’ lawful intentional acts are conclusory and fail to set forth factual allegations to support the conclusions. Thus, these allegations do not set forth claims for *prima facie* tort. *In re Motor Fuel Temperature Sales Practices Litig.*, 534 F. Supp. 2d at 1216 (holding claims must set forth entitlement to relief “through more than labels, conclusions, and a formulaic recitation of the elements of a cause of action.”). Based on the allegations in the complaint, the court finds that plaintiff has failed to state a claim for *prima facie* tort.

G. Rule 8

Defendants request the court dismiss plaintiff’s complaint because it violates Federal Rules of Civil Procedure 8. Rule 8(a) states: “A pleading . . . must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(d)(1) elaborates on the short and plain requirement in requiring each averment to be “simple, concise, and direct.” Plaintiff’s complaint is 71 pages and anything but “simple, concise, and direct.” But the court declines to dismiss on this ground. Plaintiff’s complaint asserts non-relevant information, but sets forth allegations for his claims. As discussed above, only one claim remains—misappropriation of Medical Supply’s alleged trade secrets. The court will consider the claim on its merits. The court also denies defendants’ request that it strike paragraphs 24–32 and 249(e) of the complaint.

IT IS THEREFORE ORDERED that Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure (Doc. 43) is granted in part and denied in part. All claims except plaintiff’s misappropriation of trade secrets claim pursuant to Mo. Rev.

Stat. § 417.450 are hereby dismissed.

Dated this 4th day of September 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

SAMUEL K. LIPARI,)
)
 Plaintiff,)
)
 v.) Case No. 2:07-cv-02146-CM
)
 U.S. BANCORP and)
 U.S. BANK NATIONAL ASSOCIATION,)
)
 Defendants.)

Comes now the plaintiff Samuel K. Lipari appearing pro se and objects to the court's partial dismissal of his complaint for the reasons stated below and preserves his rights to amend the complaint to cure any deficiencies should this court and its reviewing panel determine that the dismissal was proper.

1. The court does not have subject matter jurisdiction over this matter or controversy due to fraud on the Western District Clerk of the Court over the existence of diversity and the exclusive federal jurisdiction of the Tenth Circuit at the time of removal as explained fully in plaintiff's 9-2-08 answer to show cause at pg.2-13 ¶¶ 9-52.
2. The Hon. Judge Carlos Murguia has not yet ruled on the plaintiff's Affidavit of Prejudice as required to continue to make rulings in this action as explained fully in plaintiff's 9-2-08 answer to show cause at pg. 14-19 ¶¶ 53-77.
3. This matter or controversy is in appeal under the exclusive jurisdiction of the Tenth Circuit as explained fully in plaintiff's 9-2-08 answer to show cause at pg. 1-2 ¶¶ 3-8.
4. The plaintiff has attached the current state petition (**exb 1**) and the proposed amended petition. (**exb 2**).

5. The plaintiff reduced paragraphs of the complaint regarding his existing claims except the trade secret count. The plaintiff added the fraud on the court committed by the defendants in Kansas City, Kansas to the fraud section. The over all page count has been reduced to twenty pages.

6. The fraud additions are at ¶¶98-104 on page 15-16 and allege the misrepresentations by officers of the court deceived the court and injured the plaintiff by forcing the plaintiff to answer the show cause with

evidence to save his claims but the evidence created an irrefutable proof that the defendants' law firm had engaged in repeated frauds on the court and that the parties were in an enforceable contract with provable damages so the court had to dismiss the plaintiff's claims now shown to be valid in order to save the defendants' firm from liability.

7. The damages for contract have been now changed to \$950,000,000.00 to reflect being kept out of the market for hospital supplies monopolized by the defendants with Novation LLC for six years.

MEMORANDUM OF LAW

The plaintiff utilizes Rule 15 of the Federal Rules of Civil Procedure to amend his complaint. The litigation is still at an early stage making amendment practical. "As this case appears before us on appeal from a Rule 12(b)(6) dismissal, we assume it is still in a relatively early stage of litigation." *Moore, Jr. v. City of Harriman*, 272 F.3d 769 at fn 1 (6th Cir., 2000).

Alternatively the plaintiff seeks leave of the court to amend and has complied with D. Kan. R. 15.1. D. Kan. R. 15.1 requires that "a motion to amend . . . that may not be filed as a matter of right shall set forth a concise statement of the amendment or leave sought to be allowed with the proposed pleading attached." D. Kan. R. 15.1 (emphasis added).

The amendment is not delayed, having been made one day after the court's partial dismissal in good faith and is unlikely to cause prejudice to the other parties.

"The Federal Rules of Civil Procedure state that leave to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a) (2001). Thus, motions to amend are matters of discretion for the trial court. *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1462 (10th Cir.1991). Even though the decision is ultimately discretionary, the Tenth Circuit has offered guidance by listing factors for courts to consider. In *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir.1993), the Tenth Circuit suggested that a trial court's refusal to grant leave to amend should normally be justified on such factors as futility of the amendment, a showing of undue delay, undue prejudice to the non-moving party or bad faith of the moving party. *Phelps v. Hamilton*, 166 F.R.D. 489, 490 (D.Kan.1996)."

Zhu v. Countrywide Realty Co., Inc., 160 F.Supp.2d 1210 at 1223 (D. Kan., 2001).

Leave to amend is an appropriate remedy for a finding that the complaint violates Rule 8:

"Nonetheless, we would be concerned had the district court reacted to the amended complaint not only by dismissing the action, but by dismissing it with prejudice as the defendants requested. Such a dismissal would have constituted a harsh sanction, as it would have imposed the bar of res judicata against any future filing. See *Elmore v. Henderson*, 227 F.3d 1009, 1011 (7th Cir.2000) ("[A] suit that has been dismissed with prejudice cannot be refiled; the refiling is blocked by the doctrine of res judicata."). For that reason, "it will generally be an abuse of discretion to deny leave to amend when dismissing a nonfrivolous original complaint on the sole ground that it does not constitute the short and plain statement required by Rule 8." *Salahuddin*, 861 F.2d at 42; *Micklus v. Greer*, 705 F.2d 314, 317 n. 3 (8th Cir.1983) (noting that "usually when a plaintiff's complaint is dismissed for

failure to comply with Rule 8(a), that dismissal is to be with leave to amend," because when "Rule 8(a) dismissals are expressly with prejudice, they may have res judicata effect"); *Bertucelli v. Carreras*, 467 F.2d 214, 215 (9th Cir.1972) (noting that "ample opportunity for amendment should be provided in all except the most unusual cases").

It is not clear that such a harsh sanction would have been deserved in this case. After all, Rule 8 does not require a "short and plain complaint," but rather a "short and plain statement of the claim." FED. R.CIV.P. 8(a)(2) (emphasis added). Indeed, Rule 8(e)(2) provides that: "A party may set forth two or more statements of a claim or defense alternatively.... A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds." FED. R.CIV.P. 8(e)(2). Moreover, it is "each averment of a pleading" that Rule 8(e)(1) states "shall be simple, concise, and direct" — not each pleading itself."

Ciralsky v. C.I.A., 355 F.3d 661 at 669-670 (D.C. Cir., 2004).

The plaintiff's complaint was filed in Missouri State Court and was not inappropriate in length to meet the pleading requirements of state court where Rule 8 is inapplicable and a similar complaint on the related General Electric breach of contract was challenged by the defendants US Bank and US Bancorp hospital supply cartel and not dismissed or faulted. See **exb. 3**. Missouri GE state complaint.

The Tenth Circuit in *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129 (10th Cir., 2006) determined that prejudice to defendants from the amendment of a complaint is unlikely "we see absolutely no unfair prejudice to the City, or any other reason not to allow Mr. Bolden to amend his complaint."

Respectfully Submitted,

S/ Samuel K. Lipari

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via email, on this 5th day of September, 2008 to:

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ATTORNEYS FOR DEFENDANTS

S/ Samuel K. Lipari

Samuel K. Lipari

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT
INDEPENDENCE

SAMUEL K. LIPARI	)	
(Assignee of Dissolved	)	
Medical Supply Chain, Inc.)	)	
<i>Plaintiff</i>	)	Case No.
	)	
vs.	)	<u>Contract Breach</u>
	)	
US BANCORP, NA	)	<u>Jury Requested</u>
US BANK, NA	)	
<i>Defendants</i>	)	

Plaintiff SAMUEL K. LIPARI is the assignee of the dissolved Missouri Corporation Medical Supply Chain, Inc. SAMUEL K. LIPARI resides at 297 NE Bayview, Lee's Summit, MO 64064. His telephone is 816-365-1306 and email is saml@medicalsupplychain.com

Defendant US BANCORP, NA (US Bancorp) NYSE symbol USB is a bank holding corporation headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402.

Defendant US BANK, NA is a Delaware Corporation organized under the National Bank Act, 12 U.S.C. §§ 21-216d, headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402 and is a Missouri resident residing at 3640 S Noland Rd, Independence, 64055 Its telephone is (816) 521-3310

PETITION

Comes now the petitioner, SAMUEL K. LIPARI on his personal property interest as the sole assignee of rights for the dissolved Missouri Corporation Medical Supply Chain, Inc. where he was the founder and Chief Executive Officer and appears *pro se*.

This is a petition against the defendants for Breach Of Contract, Fraud, Trade Secret Misappropriation Under

R.S.Mo. § 417.450, Breach Of Fiduciary Duty, and Prima Facie Tort.

I. Jurisdiction

1. This court has jurisdiction over questions of Missouri common law in escrow contracts and Missouri statutory law on trade secrets raised in a timely manner by a plaintiff that has never slept on his rights.

2. The injury complained of occurred on December 1, 2002.

3. The defendants are moneyed corporations having banking powers and subject to the statute of limitations of six years in R.S.Mo. § 516.420.

4. The trade secret misappropriation complained of was discovered on November 6, 2002.

5. The defendants if not subject to the statute of limitations of six years in R.S.Mo. § 516.420 are subject to the five year statute of limitations in R.S.Mo. § 417.461.

II. Venue

6. The plaintiff makes a well pleaded complaint claiming state common law and state statutory causes of action over breach of contract to provide escrow services, fraud, trade secret misappropriation under R.S.Mo. § 417.450, breach of fiduciary duty, and prima facie tort taking place in Jackson County. The plaintiff's complaint is against

defendants that regularly do business in Jackson County, Missouri.

7. Venue is proper in this court.

III. Procedural History

8. Plaintiff, in the name of his Missouri corporation Medical Supply Chain, Inc. ("Medical Supply") brought an action to enjoin possible conduct by the defendants and to declare rights of parties under the subject contract of this claim in a federal action in the US District Court for Kansas in October 2002.

9. Medical Supply's first action for injunctive and declaratory relief in the U.S. District Court for the District of Kansas was captioned *Medical Supply Chain, Inc. v. US Bancorp, NA et al* KS. Dist. Case No.: 02-2539

10. Medical Supply sought 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 TRO was denied.

11. The defendants' later conduct breaking the contract 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.

12. Medical Supply's cause was controversial because it was an action to seek an injunction against breaking a contract to provide escrow accounts in furtherance of a boycott by 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.

13. Also identified in the complaint was Novation's captive e-commerce marketplace Neoforma, Inc. directly competing with Medical Supply on the Internet.

14. Medical Supply sought an interlocutory appeal on the denial of injunctive relief without a memorandum and order or findings of law and fact *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 02-3443.

15. Medical Supply also sought interim pre-hearing relief in the Tenth Circuit seeking to prevent the defendants from filing a malicious USA PATRIOT Act Suspicious Activity Report that would destroy the Medical Supply's ability to obtain escrow arrangements, higher level banking and international fund transfer services elsewhere to accomplish its capitalization and conduct hospital supply transactions. The pre-hearing relief opposed by the

defendants was denied and the interlocutory appeal was dismissed as moot.

16. Medical Supply appealed the dismissal of its injunctive and declaratory relief action *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 03-3342.

17. The Tenth Circuit upheld the trial court's dismissal without findings of law or fact and made a show cause order why Medical Supply and its counsel should not be sanctioned for a frivolous appeal.

18. Medical Supply answered the show cause order asserting the trial court had applied the incorrect legal standard and had misstated the USA PATRIOT Act.

19. The Tenth Circuit found that Medical Supply had pled a conspiracy that included a separate legal entity, contradicting the trial court's ruling and the Tenth Circuit panel found that Medical Supply was correct in the existence of private rights of action under the USA PATRIOT Act.

20. Instead of correcting its ruling and ordering that Medical Supply was entitled to injunctive and declaratory relief, the Tenth Circuit panel ordered that Medical Supply's counsel receive its most serious sanction for a frivolous appeal.

21. Medical Supply sought *en banc* rehearing of its appeal, giving notice that the panel's ruling had no preclusive effect for the parties regarding the future action for monetary damages in the Western District of Missouri. Neither the court nor opposing counsel contradicted Medical Supply's ripeness analysis.

22. The court declined to rehear the case *en banc*.

23. Medical Supply then brought its now ripe damages claims against US BANK and US BANCORP along with its existing pendant state law contract and trade secret misappropriation claims in the Western District of Missouri.

24. The case was transferred to the District of Kansas at Kansas City, Kansas to Kansas District Court Judge Kathryn H. Vratil who made no rulings delaying the opportunity to obtain discovery on the defendants' participation in the wrongful disbarment of Medical Supply's counsel for almost a year.

25. Kansas District Court Judge Kathryn H. Vratil then participated in an *ex parte* discussion on the day of the disbarment oral argument with personnel and justices of the Kansas Supreme Court, disparaging Medical Supply's counsel without his knowledge or opportunity to question Kansas District Court Judge Kathryn H. Vratil's testimony in

conduct designed to cause Medical Supply's counsel to be disbarred without due process.

26. Kansas District Court Judge Kathryn H. Vratil then removed herself from the case on October 20, 2005 minutes before the Kansas Supreme Court justices heard Medical Supply's counsel's oral argument. A transcript of the hearing which was resultantly delayed will give light to these unusual events.

27. The petitioner's case was then transferred to Kansas District Court Judge Carlos Murguia where he took no action for many months until immediately after Medical Supply's counsel was reciprocally disbarred by the Kansas District Court without disclosing to Medical Supply's counsel that Kansas District Court Judge Kathryn H. Vratil had participated in *ex parte* testimony over Medical Supply's counsel's "incompetence".

28. The Kansas District Court refused to postpone its decision on reciprocally disbarring Medical Supply's counsel until the Tenth Circuit ruled on the appeal of *Bolden v. City of Topeka* where Medical Supply's counsel representing James Bolden challenged Judge Kathryn H. Vratil's findings of law in that case and where Magistrate Judge James O'Hara, a managing partner in the defendants' law firm Shugart Thomson & Kilroy authored a case

management recommendation condemning Medical Supply's counsel for properly relying on controlling case law on alternative state law service of process.

29. The Kansas District court also interfered and obstructed providing records to the Tenth Circuit court for the appeal in *Bolden v. City of Topeka* during and after the state proceedings to disbar Medical Supply's attorney causing the Tenth Circuit to have to postpone the briefing schedule of James Bolden's appeal.

30. The Kansas District Court Judge Kathryn H. Vratil was ultimately overruled on two issues appealed by the petitioner and James Bolden's now disbarred counsel and the decision *Bolden v. City of Topeka*, 441 F.3d 1129.

(10thCir.2006) has been favorably cited by the Sixth Circuit.

31. No further court action occurred in the Medical Supply action until the petitioner's counsel had been disbarred, then Kansas District Court Judge Carlos Murguia began in earnest making rulings with the visible purpose of dismissing the action for the lack of counsel and completing the removal of representation participated in by the Kansas District court and to further its adversarial interest in the petitioner's proceeding.

32. The Kansas District Court Judge Carlos Murguia dismissed the federal claims in their entirety for failure to state a claim despite the fact that the complaint was identical in elements of pleading for its claims to the complaint filed in *Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al*, 8th Cir. 03-1441 and 03-1554 and Judge Murguia expressly declined to exert jurisdiction over the state law based claims.

33. The Kansas District court retained jurisdiction over the federal action to sanction Medical Supply's former counsel and SAMUEL K. LIPARI for among other reasons, witnessing his counsel's disbarment but then because of a timely motion for reconsideration ruled Medical Supply Chain, Inc. would be sanctioned.

34. Medical Supply Chain, Inc. and SAMUEL K. LIPARI as successor in interest gave notice of appeal of the federal court decision on September 8, 2006 and SAMUEL K. LIPARI's federal law based claims over the injuries to his former corporation are currently before the Tenth Circuit Court of Appeals in *Medical Supply Chain, Inc. v. Novation, et al*, (formerly W.D. MO case no. 05-0210, then KS Dist. Court case no.:05-2299, now 10th Cir. case no. 06- 3331.

IV. PARTIES

35. Mr. SAMUEL K. LIPARI was the Chief Executive Officer of the Missouri Corporation Medical Supply Chain, Inc.

36. Medical Supply Chain, Inc. was dissolved by Mr. LIPARI on January 27th, 2006.

37. Mr. LIPARI is the assignee of all interests and rights held previously by the Missouri Corporation Medical Supply Chain, Inc. under *Smith v. Taylor-Morley, Inc.*, 929 S.W.2d 918 (Mo. App. E.D., 1996).

38. Defendant US BANCORP, NA (US Bancorp) NYSE symbol USB is a bank holding corporation headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402.

39. Defendant US BANK, NA is a Delaware Corporation organized under the National Bank Act, 12 U.S.C. §§ 21-216d, headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402 and is a Missouri resident residing at 3640 S Noland Rd, Independence, 64055 Its telephone is (816) 521-3310

V. INTRODUCTION

40. The plaintiff brings the following state law claims against the defendants that arose in the course of the defendants' conduct in keeping Medical Supply Chain, Inc. ("MSCI") from competing in the national market for hospital supplies with a web based electronic marketplace capable of automating purchasing, logistics and fulfillment and

thereby reducing costs up to 40% in the 1.3 trillion dollar market.

41. The defendants had concentrated 70% of their venture capital in hospital suppliers through their subsidiary US BANCORP PIPER JAFFRAY.

42. The defendants through their subsidiary US BANCORP PIPER JAFFRAY formed exclusionary contracts to prevent competing hospital suppliers from having access to the market for hospital supplies.

43. The defendants through their subsidiary US BANCORP PIPER JAFFRAY controlled which companies would receive supplier contracts, access to Novation's member hospitals, venture and initial public offering capital.

44. When the defendants discovered the plaintiff would be able to enter the hospital supply market without US Bancorp Piper Jaffray getting a cut and that the plaintiff would be able to compete and undercut Novation's distribution system, the defendants breached their contract to withhold a critical input from the plaintiff and stole the plaintiff's intellectual property to help Novation protect against competition in the hospital supply market.

VI. STATEMENT OF FACTS

45. On or about 3/12/2002, following 3 years of R&D SAMUEL LIPARI, President and CEO of Medical Supply Chain, Inc.

(Medical Supply) began a process of selecting a corporate bank for the rollout of its healthcare supply chain empowerment program that produces significant benefits to healthcare and its patients.

46. SAMUEL LIPARI sought input from associates and advisors concerning selection of an appropriate national bank that would be capable of a full range of corporate banking services, including nation wide checking, escrow services, short and long term credit facilities, receivables financing and international clearing of transactions between thousands of health systems and their suppliers.

47. Several national banks were evaluated but US BANCORP NA was selected because it also had an investment banking relationship with Piper Jaffray.

48. Piper Jaffray had targeted healthcare customers and participated as underwriter and funds manager for pre IPO healthcare manufacturers and service providers and US BANCORP NA acted as underwriter for corporate bonds of healthcare companies.

49. On or about 4/15/02 SAMUEL LIPARI arranged for Medical Supply's corporate account to be opened at US BANK's SW Topeka branch.

50. The account was opened in the name of Medical Supply Chain, Inc., using Medical Supply's federal tax I.D. number with a cashier's check in the name of Medical Supply's agent and drawn on Miner's State Bank of Frontenac Kansas for \$7,500.00.

51. On or about 4/25/02 SAMUEL LIPARI opened a personal account in his name at US BANK's neighborhood branch at 3640 S. Noland Road, Independence, MO.

52. Before opening the checking account, the US Bank employee reviewed SAMUEL LIPARI's account application and submitted SAMUEL LIPARI's personal data to Chex Systems, Inc. for a background check, evaluation and verification of eight years of his previous banking history at other banking institutions.

53. SAMUEL LIPARI was approved for a personal checking account and an electronic debit card.

54. SAMUEL LIPARI initially used the personal account to pay expenses of Medical Supply with reimbursement from the corporation.

US BANK and US BANCORP's Knowledge of Medical Supply

55. On 6/5/02 SAMUEL LIPARI contacted Piper Jaffray's Minneapolis headquarters to speak to Heath Lukatch, managing director of the Piper Jaffray healthcare venture

fund about Medical Supply being considered as a venture capital candidate.

56. SAMUEL LIPARI was instructed to send an executive summary of his business plan via email. (Exb 1.)

57. SAMUEL LIPARI sent the summary and financial projections for Medical Supply with a restriction on disclosure notice.

58. Piper Jaffray made no response to the receipt of the executive summary and financial projections from Medical Supply's business plan.

59. SAMUEL LIPARI again telephoned the Minneapolis offices of the Piper Jaffray venture fund managers and his calls were not taken and not returned.

60. SAMUEL LIPARI also attempted to speak to a Piper Jaffray venture fund manger in their San Francisco office but again, his calls were not taken or returned.

61. On 7/9/02 SAMUEL LIPARI and Medical Supply were visited by a Merger and Acquisitions attorney for another San Francisco venture capital firm and after extensive discussions with her at Medical Supply's Blue Springs, MO headquarters on the need to quickly enter the healthcare supply chain market and take advantage of the opportunity created by the healthcare industry's sudden willingness to reject the existing Group Purchasing Organizations, and

after the New York Times had began uncovering corruption revelations in the market.

62. The discussions revealed the current condition of venture funding and IPO underwriting was very troubling.

63. At the time of these meetings the first news of WorldCom's debacle was breaking.

64. Medical Supply's management felt with the exception of Piper Jaffray, which concentrated its investments in healthcare, that much of the assets venture funds reported were in fact overvalued equities in telecom technology companies and that the collapse of WorldCom would further depress the venture capital markets.

65. The venture capital M&A attorney questioned SAMUEL LIPARI about the overtures of large companies seeking to acquire Medical Supply.

66. SAMUEL LIPARI recounted the contacts made with Supply Solution, a Michigan based company focused on expanding integration in the healthcare industry, GoCoop/Avendra a Florida based company providing e-procurement/group purchasing in the hospitality industry and also wanted to integrate in the healthcare industry, both of which were seeking go to market partners in healthcare, Owen Healthcare the pharmaceutical distribution subsidiary acting for Cardinal and Cerner, a Kansas City healthcare

company with enterprise resource planning software that is based on an older operating system, called EDI that is inferior to Medical Supply's web based services and poorly suited for electronic commerce.

67. Cerner had bought out Mitch Cooper & Associates, a healthcare supply chain consulting company and seemed to be trying to acquire the capability to create an electronic healthcare marketplace.

68. SAMUEL LIPARI told the VC attorney that Medical Supply would not compromise itself by being aligned with any existing healthcare supplier.

69. Medical Supply has the solution and SAMUEL LIPARI did not want to be tainted with companies that support the high cost healthcare problem.

70. SAMUEL LIPARI also recounted how start up healthcare electronic marketplace firms with technology similar to Medical Supply like Empacthealth and Medibuy had been bought up by GPOs for tens of millions of dollars, but that once they were no longer independent, their market potential was eliminated and the technology was used by GPO firms to deceive health systems into thinking their GPO partner was attempting to increase its economic efficiency when in fact they continued to restrict trade in support of monopolizing markets.

Medical Supply's Internal Capitalization Plan

71. Medical Supply resolved to develop a way to internally capitalize a roll out of its supply chain empowerment program and supply chain management technology.

72. Medical Supply settled on a plan that would utilize the value of its healthcare supply chain intellectual property and offer a comprehensive year long education and healthcare supply chain certification program to independent representatives.

73. This plan would put representatives in the field nationwide that possess the knowledge and skills to relate to all levels of management in healthcare systems and assist in the adoption of Medical Supply's supply chain empowerment program.

74. The independent representatives would pay for their certification and fund their own marketing and sales operations, consistent with distribution systems that rely on independent manufacturer's representatives.

75. Since Medical Supply's web services were new to the market, SAMUEL LIPARI decided that it would be critical for the certification fee to be held in escrow until the candidates had a chance to meet Medical Supply's certification team and have a chance to see if they would

succeed in mastering healthcare supply chain empowerment knowledge.

76. After a week long intensive seminar, the candidates would have the opportunity to decide whether or not to commit to the certification program and Medical Supply would have the opportunity to reject any candidates it felt would not succeed in the program.

77. Medical Supply developed a curriculum and contracted with the industry's foremost logistics and supply chain experts to provide instruction during the weeklong seminar and assist and advise candidates throughout the certification process.

78. Medical Supply made arrangements to include information and presenters from companies with expertise in financial analysis of healthcare purchasing, including strategic sourcing and human resource evaluations so that the representatives would be able to represent products and technology services outside of Medical Supply's capabilities that would complement Medical Supply's supply chain empowerment program in allowing a health system/hospital to break free of its GPO supplier.

79. Beginning 8/1/02 Medical Supply advertised nationwide to recruit experienced account executives and sales professionals and processed hundreds of applicants with

detailed evaluation of resumes, job history and financial disclosure applications.

80. For the first of what were to be quarterly classes, Medical Supply selected 15 candidates that had the potential to succeed as independent representatives for its services.

81. After numerous telephone interviews ten applicants had committed to becoming certification candidates and attend the certification class starting the first week of December/02.

82. During this same time, Medical Supply was preparing the escrow account system that the candidates would utilize.

Defendants' Offer of US BANCORP Escrow Services

83. On or about 10/1/02 Medical Supply contacted Chris Walden of the Noland Road, Independence MO branch of US BANK for direction on escrow accounts and commercial banking services.

84. Medical Supply was referred to Becky Hainje a US BANCORP "Private Banker" and on or about 10/3/02 Becky Hainje contacted SAMUEL LIPARI and told him she would arrange to put him in contact with the persons in different departments of US BANK that could provide Medical Supply the services Medical Supply requested and needed.

85. Becky Hainje connected Medical Supply with Brian Kabbes in St. Louis who was responsible for US BANK commercial trust accounts in Missouri and Kansas.

86. Becky Hainje also connected Medical Supply with Douglas Lewis, responsible for commercial loans in the Noland Road office.

87. SAMUEL LIPARI described Medical Supply's need for escrow accounts to Brian Kabbes and emailed him an escrow contract that Medical Supply counsel had prepared for its candidates.

88. Brian Kabbes asked questions about the candidates, the certification program and how many candidates had been selected so far.

Meeting of the Minds With US BANCORP

89. SAMUEL LIPARI negotiated with Brian Kabbes to reduce the escrow fee per account since all escrow accounts would be identical, and US BANK had refused to have the funds in a single account.

90. Brian Kabbes agreed to lower the fee for US Bank's escrow agent services from the normal of \$1,500 to \$600 per account and no hidden or additional transaction or disbursement fees.

91. After reviewing the escrow contract, on or about 10/5/02 Brian Kabbes communicated to SAMUEL LIPARI that the

language of paragraph 10 "Security Interests" should be changed so that a security interest for US BANK could be created in the \$5,000 portion of the escrow that became Medical Supply's property the moment a candidate submitted their certification funds into escrow.

Performance of Escrow Contract

92. Medical Supply altered its escrow contract to conform to Brian Kabbes' suggestion and on or about 10/7/02 emailed the changes to Brian Kabbes.

93. Brian Kabbes and US BANK were identified as the escrow agent in the escrow agreement and Brian Kabbes' address was included in the body of the agreement.

94. On or about 10/8/02 SAMUEL LIPARI spoke again to Becky Hainje about Medical Supply's need for a business line of credit based on the Medical Supply portion of the escrow assets.

Oral Confirmation of Escrow Contract

95. Becky Hainje said she had talked to Brian Kabbes and he had told her there would be no problems with the escrow accounts, that they were a "slam dunk."

96. Becky Hainje suggested SAMUEL LIPARI call Douglas Lewis and make an appointment to apply for the line of credit, which was based on the escrow account assets.

Defendants' Receipt of Value for Escrow Contract

97. On or about 10/9/02 Brian Kabbes called to request an additional change in the escrow contract.

98. Brian Kabbes supplied a specified US Treasury fund investment language for the funds while the funds were in the custody of US Bank Trust Department, without disclosing the treasury funds vehicle was also owned by US Bancorp which profited from steering US Bank's trust business into the treasury funds vehicle.

Written Memorialization of Escrow Service Agreement

99. Medical Supply agreed to the additional change and modified the investment instructions exactly as Brian Kabbes instructed.

100. Medical Supply also ask if there were any other changes needed before Medical Supply sent the contracts out to its certification candidates.

101. Brian Kabbes said there would be no other changes, thereby acknowledging the completion of the memorializing of the written agreement and asked why Medical Supply was sending the candidates the escrow contract.

102. Medical Supply explained that the contracts were going out with the certification program agreement so candidates would have a chance to review the information before their

November 1st deadline, which required their funds to be in the US Bank escrow accounts.

103. Brian Kabbes acknowledged the explanation and agreed to look over the release document Medical Supply developed that candidates would execute following the week long evaluation seminar to be held the first week of December.

104. During this conversation, Brian Kabbes also requested Medical Supply's current corporate good standing documentation from the Missouri Secretary of State's Office.

105. Medical Supply agreed to send him the reinstatement and tax clearance documents on Friday 10/11/02 and that Samuel Lipari was meeting with Douglas Lewis at the Noland Road Branch on the afternoon of Thursday 10/10/02 to set up the credit facility using the escrow accounts as security.

106. Samuel Lipari told Brian Kabbes he would have Douglas Lewis send the requested information to Brian Kabbes on 10/11/02.

107. Brian Kabbes made no statement that US Bank had yet to approve Medical Supply's escrow accounts and sought no additional information.

Defendants' Misappropriation Of Trade Secrets

108. On or about Thursday 10/10/02, Samuel Lipari delivered the Medical Supply business plan and associate program to

Douglas Lewis, at the US Bank, Noland road office to apply for the agreed upon commercial line of credit based on the portion of the escrow accounts Medical Supply would retain from its associate program.

109. The business plan and associate program booklets each had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained in them.

110. A letter of introduction also stated the contents were protected and restricted disclosure and possession of the materials.

111. Two more folders contained the good standing documentation Brian Kabbes requested and the associate program contracts that were sent to the candidates.

112. Douglas Lewis asked how many candidates Medical Supply had and SAMUEL LIPARI reached into his brief case and held up the ten folders of applicants who had committed to sending in their funds by November 1st and five others who were in the final stages.

113. SAMUEL LIPARI further explained that he planned to start a new certification group each quarter.

114. SAMUEL LIPARI was given a loan application and agreed to and did return the application the next day.

Repudiation of Agreement to Provide Escrows

115. On or about Tuesday 10/15/02 Brian Kabbes called SAMUEL LIPARI and informed him that US Bank had turned down the escrow accounts because of the USA PATRIOT Act.

116. When asked to clarify, he said the know your customer requirements had changed and US Bank could not set up the escrow accounts for Medical Supply.

117. SAMUEL LIPARI was shocked and stunned and handed away the phone, where Brian Kabbes repeated again The Patriot Act as the reason the accounts were denied.

118. Later that morning SAMUEL LIPARI called Becky Hainje and asked if she could see what happened.

119. SAMUEL LIPARI explained that Medical Supply was counting on the escrow accounts and that the line of credit depended on them too.

120. SAMUEL LIPARI said he could not believe the USA PATRIOT Act could be a reason that applied to Medical Supply.

121. Becky Hainje said she would call and see what happened.

122. Becky Hainje called back and left a taped recording on the Medical Supply answering system and listed the reasons Brian Kabbes told her.

123. Becky Hainje said the reasons were the lack of a "relationship with the Bank... that the principals involved with the business were people unknown to the bank, but the main reason is the know your customer provisions of the "Patriot Act" that was enacted after 9/11, and which we could not really give all the correct answers on the source and flow of money.

US BANCORP Participation in the Repudiation

124. On or about 10/15/02 Medical Supply found Andrew Cesere was the head of US Bancorp trust department on the US Bank web site and at 4 p.m. called his secretary Barb in Minneapolis.

125. Andrew Cesere was unavailable so Medical Supply asked Barb to leave instructions for him to call SAMUEL LIPARI about Medical Supply's corporate escrow account rejection at 9 a.m. the following morning.

126. Barb asked for more details concerning the problem.

127. Barb said Mr. Cesere had a morning meeting but she would get the message to him.

128. At 4:30 p.m. Barb called back and asked for additional information and the names of the people Medical Supply had dealt with so that Mr. Cesere could inquire about the problem.

129. At 9 a.m. the following morning on or about 10/16/02 Ed Higgins called, leaving a tape-recorded message on Medical Supply's answering system identifying him as the executive vice president of Midwest trusts for US BANK.

130. SAMUEL LIPARI, believing that the USA Patriot Act had probably been used to reject the escrow accounts because of his family sir name which is also the name of a small group of Islands in the Mediterranean Sea and which ends in "ari" like many Moslem sir names of people of Arabic descent, activated a tape recorder with a built in microphone and called Mr. Higgins back on the speaker phone.

131. Each subsequent call to US BANK in which Samuel Lipari participated was also recorded by him to document what he suspected was discrimination based on his national origin or ethnic descent. See Attachment 1 Transcript of Recordings.

132. Ed Higgins listened to SAMUEL LIPARI after stating he was an attorney and how long he had been working in trust banking, agreed with him that he saw no reason why the USA Patriot Act would apply to Medical Supply.

133. SAMUEL LIPARI explained that Medical Supply needed additional US Bank services including credit facilities, receivables financing and clearing and settlement services

for approximately \$90 million worth of transactions in the first year of operations.

134. Ed Higgins said he would check into the matter and call SAMUEL LIPARI back later that day.

135. Instead of Ed Higgins, Brian Kabbes called back with Lars Anderson who he identified as head of corporate trust new business development person and Susan Paine who he said he reported to, both on the line with him.

136. Medical Supply explained that at the time of his previous call, it was not realized that the escrow account contracts that US BANK had approved had already been sent out to the candidates in reliance on US BANK's agreement to host the escrow accounts.

137. Lars Anderson expressed some irritation that Medical Supply had contacted the head of the trust unit about the rejection of escrow accounts.

138. Lars Anderson said the bank had never been on board and it was not a done deal.

139. Brian Kabbes denied that there had been an agreement; he said he had twice told SAMUEL LIPARI.

140. Lars Anderson said that there had never been a signed off agreement to provide the service and that there had never been any bid for it.

Defendants' Knowledge of Breach

141. Medical Supply contradicted that and said the price for the service had been quoted by Brian Kabbes and after negotiating, a specific amount had been agreed upon.

142. SAMUEL LIPARI also told them Brian Kabbes provided and requested changes to the escrow and that Brian Kabbes had told Becky Hainje it was a "slam dunk."

Defendants' Knowledge of Irreparable Harm to Medical Supply

143. During the call Medical Supply attempted several times to work out any misunderstandings and set up at least the 10 accounts Medical Supply had relied on US Bank for and that US Bank had known about and that Medical Supply was now in danger of being irreparably harmed.

144. Medical Supply stated that the US Patriot Act did not apply and that Medical Supply was in actuality an established US BANK customer and that Medical Supply had been in a trust relationship with US BANK and the bank even had its business plan and information about its proprietary business model.

145. Brian Kabbes said that the trust department was a "stand-alone unit" and had its own criteria for accepting customers.

US BANK Refused to Reverse its Decision

146. Medical Supply pointed out that it had not received a true reason for denial of the accounts and that the reason given was a pretext at best.

147. Viewing US BANK's actions, Medical Supply stated they could only be explained by a conflict of interest due to US BANCORP's existing healthcare investments and involvement.

148. Medical Supply felt extremely disturbed by the apparent out come of this situation, there was not enough time to establish a new banking relationship with another nationally recognized Bank and Medical Supply would loose substantial momentum.

149. Medical Supply had spent several months building up to roll out it's supply chain empowerment program and felt to change a trust relationship in the middle will be devastating to it's entry to market.

150. Medical Supply researched over 300 resumes only to find 30 that appeared to be qualified.

Defendants' Fiduciary responsibility for trade secrets

151. On or about 10/17/02 SAMUEL LIPARI telephoned Douglas Lewis and told him what had happened.

152. Douglas said he had sent Brian Kabbes the good standing documentation but not the business plan and associate program.

153. SAMUEL LIPARI instructed him not to send the business plan and associate program materials to the corporate trust office of US Bank in St. Louis because of previous losses of intellectual property from unauthorized business plan dissemination.

154. SAMUEL LIPARI told Douglas Lewis that Medical Supply would be litigating over the escrow decision and planned to renew its application for a line of credit once it had the situation straightened out.

155. SAMUEL LIPARI suggested he might find another bank to provide the escrow accounts but Douglas Lewis said that would make the line of credit difficult. SAMUEL LIPARI further instructed Douglas Lewis to hold on to the materials and keep anyone else from having access to them.

156. Douglas Lewis agreed and stated he would keep the business plan materials safe.

157. On or about 10/18/02 Medical Supply drafted a letter and sent it to Jerry A. Grundhoffer, the President and Chief Executive Officer of US BANCORP NA with a copy being sent to Andrew Cesere, explaining the staggering damages US Bancorp would be liable for in imminent litigation due to the refusal to provide escrow accounts to Medical Supply.

158. Medical Supply suggested an alternative of fact finding depositions to take place in St. Louis, MO before

the end of the day Tuesday 10/22/02, believing US BANK to be misinformed about the USA Patriot Act and any reason for denying the escrow accounts.

159. US BANCORP Trust Department corporate counsel, Kristen Strong replied Friday 10/18/02 via fax and priority delivery with a letter denying US BANCORP NA was in contract with Medical Supply and that if any law suit is filed to address service for the trust department to her at her office.

160. Medical Supply called the trust department counsel Monday 10/21/02 to ask for service addresses of the other named entities and employees.

161. Kristen Strong said the same address would be good for all and then proceeded to ask what the causes of action were.

162. Medical Supply explained that it was chiefly an antitrust action based on the Sherman, Clayton and Hobbs Act and that causes of action under the USA Patriot Act were also a basis for the suit.

163. Kristen Strong was surprised Medical Supply was told the USA Patriot Act had been given as the reason for the denial of escrow account service but reiterated that there was no contract in her view and she saw no basis for the other causes of action.

164. Medical Supply stated that it would fax the complaint to her at the time the action was filed at the end of business Thursday 10/24/02, but they were still waiting for Mr. Jerry Grundhoffer to select the alternative of mutual fact finding to promote a resolution of the matter without litigation.

165. Kristen Strong stated that the depositions would not lead to any meaningful explanation, that Medical Supply had her letter explaining US BANK's reason for denying the escrow accounts and that the bank reserved the right to choose whom it served.

166. Medical Supply reminded her that US BANCORP had extensive investments in healthcare and that choosing not to provide a service to a competitor is actionable under antitrust law.

167. Kristen Strong warned Medical Supply not to contact anyone at US BANK and said If Medical Supply filed an action against US BANCORP NA, she would send a letter to the judge in advance of her answer to our complaint saying we had *ex parte* communications.

168. Medical Supply stated that it had not had any communications with US BANK employees since receiving her reply on Friday 10/18/02.

169. Medical Supply informed Strong it was an account holder at US BANK and would continue to have communications with US BANK regarding its other bank business.

170. Medical Supply contacted an attorney, familiar with the healthcare supply chain research and development done by SAMUEL LIPARI at the law firm of Shook, Hardy and Bacon and asked if his firm could act as escrow agent for accounts to be set up in US Bank.

171. The Shook, Hardy and Bacon attorney said the bank is better prepared to provide escrow services, fearing the liabilities and risks for an escrow agent where the USA PATRIOT Act had been invoked and declined to act as escrow agent.

172. On Thursday 10/24/02 Medical Supply filed for urgent injunctive relief against US BANCORP NA, its subsidiaries and named employees.

173. Medical Supply counsel contacted US BANK counsel Kristin Strong to clarify the clerk of the court's questioning of service and to attempt to schedule a hearing.

174. Ms. Strong said she would call the following morning Friday 10/25/02 to answer the question about service. She did not call and took the day off.

175. Medical Supply counsel called her on Monday morning 10/28/02 at which time she said the case had been transferred to outside counsel and gave the phone number to Medical Supply.

176. On or about 10/28/02 Medical Supply contacted US BANCORP's retained counsel and explained that there were questions about service and that Medical Supply was seeking to schedule a hearing that week for its requested relief to stop the harm it was suffering and to avoid a terminal outcome for the company.

177. US BANCORP's counsel said he had to travel and was unsure of his schedule but by the next day he might know of a time he could make a hearing.

178. Without hearing from the opposing counsel, Medical Supply became concerned and sent an email on or about 10/29/02 suggesting portions of the injunctive relief it seemed likely the two parties could agree on and explaining the harm it was suffering and what delaying the relief beyond critical dates would inflict on Medical Supply, its associates and customers.

The Defendants' Acceptance of Liability for Medical Supply's Business Plan Damages

179. The email explained the losses as follows: the damages of failing to receive the \$350,000 to \$450,000 it depended

on November 1st and the resulting effects of that delay on its projected financials including lost profit of \$51,795,005.00 lost increase in average valuation of \$155,385,015.00 Candidate lost revenue of \$15,499,788.00. 180. The email explained that these injuries would be far greater if a December 1st deadline is missed and if the company does not recover from US Bank's denial of the escrow accounts the total third year losses of the company would be as follows: lost profits \$51,795,005.00 loss of increased company avg. valuation of \$155,385,015.00 Candidate lost revenue of \$15,499,788.00 and Customer losses of \$697,486,200.00.

181. On or about Wednesday 10/30/02, US BANCORP's counsel sent a letter to the court dismissive of Medical Supply's complaint and stating that it would oppose all requested relief.

182. On or about Thursday 10/31/02, Medical Supply called US BANCORP's counsel explaining the necessity of the relief sought and specifically the relief requested under paragraph 66 of the first federal complaint seeking to stop US BANK from reporting negative information about Medical Supply under the USA PATRIOT Act.

183. US BANCORP's counsel reiterated his belief Medical Supply needed to find another bank and that no liability existed.

184. Medical Supply's counsel explained that SAMUEL LIPARI will not risk a hundred million dollar company that requires high level banking services to future damage from a secret USA PATRIOT Act report that has misinformation in it and would create a black mark preventing them from ever being able to do any business.

185. US BANCORP's counsel said it would not agree to even just the relief sought in paragraph 66 of the first federal complaint.

186. Medical Supply asked US BANCORP's counsel if his firm would act as an escrow agent for accounts to be deposited in US BANK, since Shook, Hardy and Bacon had declined to do so.

187. US BANCORP's counsel refused to do so stating that US Bank did not owe any duty to Medical Supply.

Defendants' Intellectual Property Misappropriation

188. Realizing there was no immediate solution to this matter, and the fact that a previous business model pricing system developed by SAMUEL LIPARI in 1993-1995 was appropriated by HSCA, Medecon and Cardinal Healthcare's subsidiary Owen Healthcare through exploitation of a

confidential business relationship and then taken later by many other GPOs.

189. On or about 11/6/02 SAMUEL LIPARI visited US BANK, Noland road branch to retrieve the documents left by him following the meeting with Douglas Lewis on 10/10/02.

190. Douglas Lewis gave the documents back to SAMUEL LIPARI.

191. SAMUEL LIPARI specifically ask if the documents were copied or faxed and Douglas Lewis said he put all of the information in his analysis and Samuel Lipari left the bank.

192. Upon returning to Medical Supply's office SAMUEL LIPARI inspected the documents and found that the binders had been separated and copies or faxes had been made of the associate program and the business plan documents.

193. There were also tractor marks from a copy or fax machine on the back of the entire associate program and the business plan pages.

194. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied.

195. There were no marks tractor marks on the back of these documents.

196. Medical Supply became fearful of where these documents were sent and who has reviewed them.

197. The documents that were copied or faxed contain all confidential details to the business, business model, management team, investors, industry experts, advisors, business practices, market strategies, revenue model, service structure, formula, algorithms and financials including 5 year details, 5 year condensed and break even analysis.

198. SAMUEL LIPARI became fearful this information would fall into the wrong hands further blocking or eliminating entry to market.

Defendants' Breach Injures Medical Supply

199. On or about 11/7/02 SAMUEL LIPARI received a complimentary D&B report dated 10/31/02 on Medical Supply.

200. The report indicated Medical Supply started in 2000 and has a clear credit history and a strong financial condition.

Medical Supply Seeks Federal Declaratory Relief

201. On November 18, 2002, Medical Supply obtained a TRO hearing on its request for preliminary injunctive relief. Medical Supply sought urgent preliminary injunctive relief from trade secret misappropriation and urgent preliminary injunctive relief from USA PATRIOT Act reporting.

202. Medical Supply had a second preliminary injunction hearing at 12:00 p.m. on December 12, 2002.

203. Medical Supply again sought urgent preliminary injunctive relief, opposed by the defendants from trade secret misappropriation and urgent preliminary injunctive relief from USA PATRIOT Act reporting, but was denied.

204. On December 17, 2002 Medical Supply filed a notice of interlocutory appeal to The Tenth Circuit Court of Appeals.

205. On June 16, 2003, the Kansas District Court dismissed Medical Supply's action for injunctive and declaratory relief.

206. After losing a motion for new trial, Medical Supply filed a timely notice for appeal on November 21, 2003.

207. On January 7th, 2004, the Tenth Circuit dismissed the interlocutory appeal as moot due to the superceding appeal of the action's dismissal.

The Third Attempt to Cover For Defendants' Breach

208. The defendants subjected MSCI to threatened and or actual USA PATRIOT Act Suspicious Activity Reporting (S.A.R.) with the knowledge that such reporting would harm or destroy MSCI's ability to capitalize its entry into the market for hospital supplies.

209. Never the less, on or about May 1st, 2003 Samuel Lipari again attempted to substitute or cover the

defendants breach, this time with a capitalization plan involving the purchase of an office building at 1600 N.E. Coronado Drive in Blue Springs.

210. On or about May 7th, 2003 MSCI's loan consultant Joan Mark explained if the General Electric Company provided a \$5.4 Million dollar mortgage on a \$10 Million dollar property and eliminated a \$5.4 Million dollar lease obligation that GE would directly benefit from a \$15 Million dollar swing to their balance sheet.

211. Samuel Lipari negotiated a contract to purchase 1600 N.E. Coronado Drive creating for MSCI \$350,000.00 in funds earned in the purchase bargain from selling the termination of the building's ten year \$5.4 million dollar lease with the building's tenant GE Transportation to its parent corporation, the General Electric Company (GE), which also agreed to provide MSCI a purchase mortgage as part of its contract with MSCI to release GE Transportation from the ten year lease.

212. When GE entered into the contract with MSCI, knowing of the S.A.R. threat by US BANK and US BANCORP related to GE by SAMUEL LIPARI.

213. GE on May 15th, 2003 agreed to buy the deeply discounted remainder of the lease and fund MSCI's mortgage to purchase the office building at 1600 N.E. Coronado Drive

after performing diligence over the executive summary of MSCI's business plan and affirming MSCI would be able to repay the mortgage based on MSCI's value proposition and the opportunity in the market for an independent hospital supply electronic marketplace on the internet.

214. Later, GE Medical and its former president Jeffrey R. Immelt, now CEO of GE learned that GE corporate had capitalized MSCI's entry into the hospital supply marketplace when GE's former CEO Jack Welch had specifically instructed Jeffrey R. Immelt to distribute GE Medical's equipment and supplies on the internet first in GE's electronic marketplace Global Exchange and then to form GHX, LLC as an electronic marketplace, both because Jack Welch feared an independent hospital supplier creating an electronic marketplace that would provide lower prices selling supplies from GE's competitors.

215. GHX, L.L.C. was capitalized by and remains under the control of GE and Jeffrey R. Immelt which retains a directorship on the board of the privately held company.

216. With GE and Jeffrey R. Immelt's approval GHX, L.L.C. had subsequently formed a joint venture with the remaining electronic marketplace for hospital supplies, Neoforma, Inc. part of a healthcare technology company capitalization syndicate with US BANCORP's Piper Jaffray and together in

an agreement, GHX, L.L.C. and Neoforma allocated market share of the nation's hospitals between each other.

217. GE repudiated its contract, sacrificing \$15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against GHX, L.L.C. and Neoforma in the market for hospital supplies.

218. MSCI sought to enforce its contract with GE and recover damages in federal court so tat MSCI would still be able to enter the market for hospital supplies and capitalizing its electronic marketplace.

219. SAMUEL LIPARI filed a *lis pendens* notice in the Jackson County Register of Deeds office based on his state law and antitrust claims in the US District Court.

US BANCORP and US BANK Work to Frustrate Recovery From GE

220. The defendants US BANCORP and US BANK along with Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff coordinated their defense of Medical Supply's action for injunctive and declaratory relief with the GE defendants Jeffrey R. Immelt, GE, GHX, GE Healthcare, GE Capital and GE Transportation who inconceivably attached the Medical Supply complaint and order to their 12(b)6 motion to dismiss in Medical Supply's separate action against Jeffrey R. Immelt, GE, GHX, GE Capital and GE Transportation.

221. On January 29, 2004, March 4, 2004, April 2, 2004 US Bancorp's counsel, Nicholas A.J. Vlietstra and Piper Jaffray's counsel Reed coordinated their appeal (10th C.C.A. 03-3342) with the GE defense. The GE defendants included the action against the US BANCORP defendants and Unknown Healthcare Provider as a related appellate case in (10th C.C.A. 04-3075) and used the US BANCORP order as a basis for a cross appeal (10th C.C.A. 04-3102) challenging the failure of the trial court to grant sanctions against Medical Supply."

222. A cartel of hospital suppliers organized in an anticompetitive agreement as members of GE's GHX, LLC and including the University Hospital Consortium (UHC), Robert J. Baker, the Volunteer Hospital Association (VHA, Inc.), Novation LLC, Neoforma, Inc. and Robert J. Zollars renewed their conscious commitment to a common scheme designed to achieve an unlawful objective of keeping Medical Supply out of the market for hospital supplies by reviewing the case against US BANCORP and consulting with representatives for the defendants US BANCORP and US BANK along with Jerry A. Grundhoffer, Andrew Cesere, the Piper Jaffray Companies and Andrew S. Duff.

223. The cartel decided to rely on the continuing efforts to illegally influence the Kansas District Court and Tenth

Circuit Court of Appeals to uphold the trial court's erroneous ruling.

224. The cartel also renewed their efforts to have Medical Supply's sole counsel disbarred, knowing that an extensive search for counsel by Medical Supply had resulted in 100% of the contacted firms being conflicted out of opposing US BANCORP and actually effected a frenzy of disbarment attempts against Medical Supply's counsel in the period from December 14, 2004 to February 3rd, 2005, originating from US BANCORP and US BANK's agent Shughart Thomson and Kilroy's past and current share holders."

225. The former eighteen year Shughart Thomson & Kilroy shareholder acting as magistrate on the GE case denied Medical Supply discovery and the court did not even permit discovery when the dismissal attachments necessitated conversion of the GE motion to one for summary judgment.

VII. CLAIMS

194. Plaintiff alleges the following claims against the defendants US BANK and US BANCORP upon information and belief that discovery will support findings against the defendants.

COUNT I

CAUSE OF ACTION FOR BREACH OF CONTRACT

195. Plaintiff hereby re alleges the preceding averments of facts and incorporates them herein.

196. The Defendants breached their contract with Medical Supply (MSCI) which interests are now assigned to SAMUEL LIPARI to provide MSCI with a full range of business banking services, including corporate trust services and escrow agency to be performed lawfully and professionally with a "five star guarantee" of quality of service.

197. This contract was executed in writing by the Defendants and MSCI when their respective agents opened the Medical Supply Chain Corporate checking account.

198. The Defendants breached their contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates.

199. This contract was made while the plaintiff was influenced by representations over the phone at a distance of 300 miles between the defendant US BANK's St. Louis office and the plaintiff as chief executive officer of MSCI a customer of US BANK's Noland Road Independence office in the regular course of business.

200. No writing or other memorialization of this contract to provide a full range of banking services with a "Five Star Guarantee" was referred to or contemplated at any time

during its negotiation and formation by either the Defendants or MSCI.

201. The Defendant's Vice President Brian Kabbes and Samuel Lipari came into formation of a written contract for escrow account services when both had agreed upon some or all of the terms in exchanges of email including: the composition of the escrow form, the language limiting the liability of US BANK and the escrow agent, the language designating US BANK's compensation for its duties in any legal disputes arising between the parties, the directions for US BANK's investment of long term held funds, the directions for US BANK's investment of short term held funds, the selection of investment vehicles for both funds respectively, the name and address of BRIAN KABBES as escrow agent on the escrow form, the name and address of US BANK as escrow depository on the escrow form, the price term US BANK is charging for the agreed upon escrow service and the price term and payment schedule for maintaining the account.

202. The Defendants performed diligence to determine whether to accept the contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates.

203. The Defendants required only one item to be rectified

for approval; a current good standing status from the Missouri Secretary of State, which MSCI provided, satisfying their sole open element.

204. The Defendants approved MSCI's escrow form for delivery along with MSCI's associate contract to MSCI's independent representative candidates for their examination and submission for review to their personal legal counsel. After entering into a contract with MSCI, the defendants breached the contract and did not provide the escrow accounts.

205. The Defendants breached the contract to provide escrow accounts to MSCI when the defendants discovered MSCI would reduce hospital supply prices nationwide with an internet based electronic marketplace.

206. MSCI attempted to cover or substitute as described in the statement of facts, seeking the services of Shook, Hardy & Bacon, then the defendants' own law firm to administer escrow accounts unsuccessfully.

207. MSCI then attempted to cover or substitute by obtaining the capitalization for entry to market through a real estate transaction with GE which breached its contract when it also discovered MSCI would reduce hospital supply prices nationwide with an internet based electronic marketplace.

COUNT II
CAUSE OF ACTION FOR FRAUD

208. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

209. The Defendant US BANCORP injured MSCI with a fraudulent misrepresentation material to their transaction of escrow agency and escrow account hosting through US BANK for MSCI and SAMUEL LIPARI.

210. Then Brian Kabbes speaking as a Vice President of US BANK falsely represented to MSCI that US BANK and the commercial trust department would not perform as escrow agent or host MSCI's escrow accounts because of the "know your customer provisions" diligence requirements of the USA PATRIOT Act had come into effect and made it impossible for the bank to perform this service for MSCI.

208. The defendants' officers Lars Anderson and Susan Paine made this fraudulent misrepresentation through the defendant Brian Kabbes by directing him to give this reason to MSCI's chief executive officer, SAMUEL LIPARI.

211. The defendant US BANCORP's officer Andrew Cesere directed the defendants' officers Lars Anderson, Susan Paine And Brian Kabbes not to retract this fraudulent misrepresentation when it had been questioned by MSCI and SAMUEL LIPARI and to maintain the misrepresentation in

their capacity as managing speaking officers for US BANCORP NA, US BANK.

212. The defendants' officers Andrew Cesere, Lars Anderson, Susan Paine and Brian Kabbes caused this fraudulent misrepresentation to be communicated to SAMUEL LIPARI with the intention to induce MSCI to refrain from enforcing US BANK's agreement to provide MSCI escrow agency services and escrow account hosting.

213. On 10-24-02 the defendants officer Brian Kabbes communicated to MSCI and SAMUEL LIPARI that US BANK's corporate trust division (US BANCORP) would not provide the escrow accounts because of the "know your customer" provision of the USA PATRIOT Act prevents them from providing the agreed upon escrow accounts.

214. Becky Hainje US Bancorp (Phone Message left on MSCI answering machine 10-24-02);

"Becky Hainje: Hi Sam this is Becky Hainje with US Bank I a... visited again with Brian Kabbes in the a... corporate trust area and a... ask him what would you need to provide in order to have the a... request for the escrow trust reviewed and he was very honest, he said a... really it does not look good, this is something that the bank would be willing to do and he doesn't want you to invest any more time in it with him, but he did give me a... the listing of the main reasons, the concerns that the bank had a... first of all was that of course this is an unknown start up business that a... did not have any prior existing relationship with the a... Bank a... that the principals involved with the business were people unknown to the bank as you mentioned they were National and he really had no idea, and but the

main reason is to know your customer "Patriot Act" that was enacted after 911, and which we really could not give all the correct answers a... on the course and the flow of money, so that's what the situation was a...I understand that your coming up with a unique way to finance and get a business off of the ground unfortunately this seems to be a day and an age where unique thinking outside of the box isn't a... is being, a...is very difficult to get anything going, and I apologize that I wasn't able to be of more service to you a...hopefully you will be able to get this going perhaps with Doug on financing, and I do wish you all the best, if you have any more concerns, please feel free to give me a call at 913-261-5725."

215. Brian Kabbes called back rather than Ed Higgins:

"Bret Landrith MSCI; "Yes Brian, this is Bret Landrith, returning your call.

Brian Kabbes US BANCORP; "Bret hey a...Lars Anderson wants to be on this call too, he is our new business development guy, do you mind if I get him on the line."

Bret Landrith MSCI; " No problem."

Lars Anderson US Bancorp; "Hey Bret, I got Lars Anderson, hey Bret."

Bret Landrith MSCI; "Nice to speak to you"

Lars Anderson US BANCORP; "Susan Pane is here also here in the office a..."

Brian Kabbes US BANCORP; "I report to Susan Pane and Lars is our new business development person, now you had called Andy Cesere yesterday."

Bret Landrith MSCI; "Yes I didn't realize when I last spoke to Brian that we had already sent out the escrow agreements that he approved, am of course."

Lars Anderson US Bancorp; "Who approved?"

Bret Landrith MSCI; "Brian Kabbes, he works there in your office, I think he is in front of you, a... of course it is sort of inherent in an escrow customer that somebody is seeking an escrow account because there is not a sufficient establishment of trust yet so between the parties and realizing that we are going to have to change the escrow account contracts with the, our ten best candidates that we've chosen who will produce the most revenue for our business in it's first year in market a... that became a substantial issue for us and I didn't realize that when I last spoke to Mr. Kabbes."

Lars Anderson US Bancorp; "Yeah, we were wondering how obviously calling Andy Cesere a..."

Bret Landrith MSCI; "well a..."

Lars Anderson US Bancorp; "as you were not happy with our decision not to move forward on the transaction to get a hold of management at the bank that runs our overall unit."

Bret Landrith MSCI; "a... Mr. Kabbes was very helpful, he suggested that we go to some local bank, you know some big bank hasn't bought up like you all and taken and run off the staff that knew anything, but a...he a... was also not clear on why we had sought a trust account at US Bank, because he didn't see why we didn't go to our own bank, of course you are our bank and have been since about April, the first corporate account we ever opened was with you all."

Lars Anderson US Bancorp; "Sure",

Brian Kabbes US BANCORP; "I said that when I said that I said your local bank, I didn't know it was with US Bank."

Bret Landrith MSCI; "Who has really accelerated there a level of customer service just recently in the former First Star Bank, you guys took over and occupied, and now they actually connect us with the people that can provide the services they say they have, and that is how come our local bank forwarded us to your Trust Department."

Lars Anderson US Bancorp; "Got yea...Well then no doubt nobody questions about whether you have an account or whether, you know we can't handle this type of transaction generally, the question centers around when did we commit to this transaction specifically and Brian and I have been talking and we don't know at any point where we specifically said we are on board a... we were trying to evaluate the transaction therefore looking at some of the specifics of the document and what our duties were."

Bret Landrith MSCI; "I don't think we need to go into minutia over that right now I think the chronology will come with the demand letter a...but we understood that you knew the purpose and why we kept contacting you in getting the second change approved, by the time you made the negative decision you also had our business plan and that's pretty serious."

Lars Anderson US Bancorp; "We have not divulged your Business Plan to any body, there is no confidentiality issue here."

Bret Landrith MSCI; "well a..."

Lars Anderson US Bancorp; "Where did we ever accept the transaction, we never provided you pricing, we never

provided you a bid and we certainly never signed off on the escrow agreement."

Bret Landrith MSCI; "we had pricing and its oral, and this is Missouri, and this is a business contract in your regular line of business and we relied and depended on your exception that it was ok and we sent it out to our best people."

Brian Kabbes US BANCORP; "I'll tell you what Bret, you can talk with Sam, you can get him on the phone if you want, because when I went over numbers with Sam, I said by no means is this a done deal, I need to run it past some people, I told him that twice, so I discussed numbers with him, but I said to him twice, I we came to what would work for you."

Bret Landrith MSCI; "Sam is in the room now."

Sam Lipari MSCI; "Hi Brian, well Brian, I also had conversations with Becky Hainje, and Becky had indicated as well that your conversation with her according to the recording that I have of the conversation is that you guys, you or her or combination thereof, had no problem with this and it should be a slam-dunk, to quote her exactly."

Bret Landrith MSCI; "but, but before we go farther down this line, obviously you don't have your new business development guy in there so you can help document why it was good of you not to take on our new business and we are sort of flabbergasted that you got any reason not to take on our business and we are sorry we are with you, but we are with you for at least these ten people."

Brian Kabbes US BANCORP; "Excuse me"

Lars Anderson US Bancorp; "you do want, on what basis do you consider us to be with you guys, I mean in any cap... in this transaction."

Bret Landrith MSCI; "well we have our sole banking relationship with you and we have shared an incredible amount of trust with you and divulged our business practices model and everything to you and are corporate financials, we knew that a large major competitor of ours is headquartered in St. Louis and we had no concept that there would be a conflict of interest issue, but a... a....

Lars Anderson US Bancorp; "We don't have a conflict of interest."

Bret Landrith MSCI; "this comes out of left field that you are accusing us of being Arab terrorist or something and not wanting to set up a basic account your bread and butter services of your department, I think you are taking on other customers this year sometime, if you are still going to have a trust office in St. Louis, and we are sort of

surprised you are not taking us on and we can't imagine a reason for it.

Lars Anderson US Bancorp; "Ok, well I think Brian's conveyed..."

Bret Landrith MSCI; "well those are pretty bad reasons and those end up with a demand letter, and yes there will be extensive chronology and we will explain trust obligations and fiduciary duties and where we think we were in contract and we think we will have an explanation that wins."

Lars Anderson US Bancorp; "well we are not the right people to talk to about that, we are just..."

Bret Landrith MSCI; "all right well, like I said earlier, I don't see any point in having a discussion about that, obviously you guys provide a service, you got your new business development guy there on this phone call, either you are talking to us about the services you are going to provide, or what we need to do to be your customer."

Lars Anderson US Bancorp; "so your, what your what are you stating at this point, that you are going to..."

Bret Landrith MSCI; "we got ten people that..."

Lars Anderson US Bancorp; "to force us to provide these services, or what, I don't understand now what you want."

Bret Landrith MSCI; "your, your characterizing that as a threat, there are no threats here, our business future depended on these ten people for the next six months or year revenue, you took them out you didn't even threaten us before you did it, so we will try and save what we can, but probably since you got your team there you ought to think about how to make us a customer at least for these ten so that we can remediate this damage."

Lars Anderson US Bancorp; "well we certainly never contracted with you or these ten people."

Bret Landrith MSCI; "well I think we go to a referee on that, first you get the demand letter, you get to respond to your version and then we go to a forum where they will make a ruling."

Sam Lipari MSCI; "and, and if I might add something here, this patriot act, that was identified as a reason for not extending the escrow services to us might you guys explain how that applies to a company that has been incorporated and in good standing for three years in the state of Missouri, in addition to the fact that we have a trail of where the funds come from, we also have signatures on both financial and criminal discovery of these individuals where anyone can run a background check or financial background on these individuals. I mean I am just really concerned

why this patriot act was brought into this when we don't have anything to do with that.

Lars Anderson US Bancorp; "we were not trying to relate the Patriot Act specifically to your status of business or your integrity it only..."

Sam Lipari MSCI; "well according to Ed Higgins, he didn't see how this, where this even came from."

Bret Landrith MSCI; "what other customers has this been an issue with for you and maybe you shouldn't be dealing with those types of customers?"

Lars Anderson US Bancorp; "The patriot act, when it was put in place, caused us to have a clear set of rules on how we take on business."

Sam Lipari MSCI; "well according to Ed Higgins, he doesn't think that the Patriot Act has anything remotely to do with Medical Supply Chain, and what we are trying to do here."

Bret Landrith MSCI; "but, since you mentioned it the other day, we started looking at who you got investments in, and you got some investments in some healthcare entities that are under the gun, they have either been indicated for anti-trust violations or illegal kick-back schemes and for us now looking at space alien excuse for not having our trust accounts hosted by you, we are starting to think conflict of interest explains it."

Lars Anderson US Bancorp; "yea, you know what...we are not sure...what's your..."

Bret Landrith MSCI; "yea, it is pretty serious and it goes beyond contract damages ok."

Lars Anderson US Bancorp; "we are not the right people to talk to if you..."

Bret Landrith MSCI; "I know you may not be the right people to talk about trust, that is why I was trying to get your Vice Chairman, still haven't gotten to him, hopefully we can get this resolved today."

Lars Anderson US Bancorp; "we have already spoken with him and explained the situation, if you want to talk about other things in the Bank and our policies, whatever, I mean."

Bret Landrith MSCI; "no, I think we are going to focus on the Trust Department on US Bank for sometime here, it is probably a three-year process, but we will get to know each other quite well."

Lars Anderson US Bancorp; "do you have any other questions today?"

Bret Landrith MSCI; "No, you called us."

Lars Anderson US Bancorp; "well we were just returning your call to Andy Ceccere".

Bret Landrith MSCI; "well I think he ought to personally talk to us cause we are still not getting a good explanation here."

Lars Anderson US Bancorp; "you are not looking for a good explanation you are looking to force us to do the transaction."

Bret Landrith MSCI; "no, you guys are the ones that don't even threaten you just kill, but we are still wondering how we can fix this."

Sam Lipari MSCI; "yea, we need, the problem here is that we have these a..., we basically have a..., out of 300 resumes we've pined it down to approximately 15 of which 10 we sent out the contract and the escrow and then you guys decide that you don't want to do the escrow over a Patriot Act that we don't have anything do with in the first place, now you claim that we do and be on, I...I still don't understand where you are coming from that standpoint, but that is ok, in the mean time we tried to explain the situation and in fact we spoke with Ed, now who is Ed Higgins,

Brian Kabbes US BANCORP; "He is ahead of personal trust in St. Louis."

Sam Lipari MSCI; "Ok, well when we spoke with Ed, Ed seemed to feel as though this doesn't have anything to do with the Patriot Act, and basically, that is what we are saying, but I will indicate to you this....Becky had already established the fact that Brian you and her had talked last week and you didn't see any problem with it and if you didn't see any problem with it, you also suggested we make a change on #10 of the escrow agreement, so that we could leverage the asset to create a line of credit here at the local level, a... and everything seemed to be going in order and then all of a sudden you guys come back and say well you are not going to do it and you guys want to basically climb behind the Patriot Act as a basis for your decision, but Patriot Act doesn't have anything to do with what we are doing.

Brian Kabbes US BANCORP; "first off, that was a minor, that was part of our reason that was a minor reason..."

Sam Lipari MSCI; "well, if, if I quote Becky correctly this morning on her conversation, it was the fact that you don't know who all is involved in the Company, you don't know where these, where the Executives are that are running this company, in other words, you didn't have background information on the company itself to set up the trust, that, why is that any of your business in the first places as it relates to setting up an escrow? That's my question, and again I think we are going to find out that we are

going to constantly come back to this issue where you have a conflict of interest and because of your knowing our business model and how we are arriving at generating revenue and so on and so forth that you basically kill our escrow, so by killing our escrow, especially in this particular situation on these ten that we have sent the information out to, you have essentially cut off at least \$300 and possibly \$450 thousand dollars."

Bret Landrith MSCI; "but they were our ten best you know, former principal of IBM, and people we hand picked from all over the country at the best change of getting our hundreds of millions of dollars or revenue we count on in the next couple of years."

Sam Lipari MSCI; "so all the conversations that we have documented since last week, have basically indicated that you had no problem in doing the escrow in the first place, in fact, Bryan you and I hammered out a Cost and Price and I would think..."

Brian Kabbes US BANCORP; "you are missing a very important part of that, twice I said to you I need to run this past something, and I stopped you and said it a second time."

Sam Lipari MSCI; "ok well then let me ask you this Brian, why won't you just set the escrow up? Why? We don't have anything to do with the...a..."

Brian Kabbes US BANCORP; "well"

Sam Lipari MSCI; "there is a conflict of interest Brian, and you know there is, and I don't know why you are hiding behind the Patriot Act because the Patriot Act doesn't have anything to do with us, and you know it doesn't, and I am upset about it, I have spent two weeks working with Becky and Doug and You and everybody else, we've got basically \$300 to \$450 thousand dollars in the pipeline here that has been basically cutoff cause we don't have an escrow for these people to deposit and we are going to have to go back to them to try and save them if we can, and if we can't all this is really kind of a mute issue, it is just a fact that you don't want to do business with us because you have a conflict of interest with other companies that are doing banking business with you and frankly, you are right, if we ever get our business model off the ground, we are going to put them out of business, in fact, we may not have to the Justice Department has already indicted them, the Federal Trade Commission is after them, and not Medicare and Medicaid is after these GPO's. In addition to that, I have a glass pipe line to the New York Times, so if we really want to bring everybody into this thing and really nail down what is going on we can. All we asked for was a

simple escrow so that we had a place to put our certification program candidates until they receive the weeks worth of training and we were able to identify whether or not they were going to be part of our organization or not. That is all we asked you people to do, instead, you guys have carried this thing farther, in other words, you want to know more information about the company, or you want to know about our background, or you want to know whose involved in this because there is a conflict of interest and that is the only reason you guys wouldn't provide these services. You would provide them for anyone else that walked in off of the street, but you have a conflict. So admit you have a conflict and let's move on. If you don't have a conflict, then set the escrow up."

Lars Anderson US Bancorp; "Sam, this is Lars, Brian and I have talked about this since he bounced the transaction off of me to find out if we should do the deal and I couldn't see good reason to do the deal, but we have never talked about any kind of conflict of interest. I don't even know where you are coming from that standpoint."

Brian Kabbes US BANCORP; "I don't have any idea what he is talking about."

Bret Landrith MSCI; "I understand you are not admitting it yet, but you have not come up with a plausible non-protectoral reason to not set up escrow accounts. We are going to be looking at..."

Brian Kabbes US BANCORP; "we have to know our customers I have to have complete information and to know our customers and to know who we are doing business with."

Bret Landrith MSCI; "I don't think a US Bank knows too much about US Bank, but in terms of, we filled out credit application you got business plan, you got all that information, and once you got all that information then we are surprised you are not accepting the account."

Lars Anderson US Bancorp; "we take on a trust business stand alone, and we have our own acceptance criteria and it's got nothing to do with what someone else got your financials or whatever...."

Bret Landrith MSCI; "like I said, I don't think US Bank is a coherent entity and I am really alarmed at some of the laissez-faire lack of control of practices that you have and I am sure we are going to see a lot of disturbing things, unless you are here are calling us to set up some trust accounts we will probably do our next communications in correspondence."

Lars Anderson US Bancorp; "Ok, well we are trying to explain to you today the reason why we are not taking on the account."

Sam Lipari MSCI; "and what is that reason exactly, because we have gone""

Transcript of tape recorded telephone conference.

216. MSCI and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation to not enforce US BANK's promise with the defendants' officer Brian Kabbes upon learning that US BANK was not going to provide the escrow services. MSCI and and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of US BANK's Commercial Trust department and instead contacted US BANCORP NA's Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan Paine.

217. The defendants US BANCORP NA and US BANK caused this fraudulent misrepresentation to be communicated to MSCI with knowledge of its falsity or reckless disregard as to whether it was true or false to the point of not checking and realizing that the increased duties of the "know your customer" for new account holders had not been enacted.

218. Or, in the alternative the defendants caused this fraudulent misrepresentation to be communicated with reckless disregard as to whether it was true or false to

the point of not checking and realizing MSCI and Sam Lipari were established existing customers of US BANK the increased duties of the "know your customer" did not apply to.

219. US BANK and US BANCORP intentionally deceived MSCI and SAMUEL LIPARI over the pretext of the USA PATRIOT Act as a false reason to breach the contract to provide escrow accounts because the defendants knew or should have known that it is well established that a change in federal law does not excuse breach of a banking contract.

220. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage hospital suppliers US BANCORP PIPER JAFFRAY a wholly owned subsidiary of US BANCORP had invested in and underwritten.

221. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage US BANCORP PIPER JAFFRAY and US BANCORP relationships with the hospital Group Purchasing Organization ("GPO") Novation, LLC.

222. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage US BANCORP PIPER JAFFRAY and US BANCORP relationships with the hospital

Group Purchasing Organization ("GPO") Neoforma, Inc. (now acquired by GHX, LLC an electronic healthcare marketplace created by The General Electric Company, "GE")

223. MSCI and SAMUEL LIPARI relied on the Defendants fraudulent misrepresentation to MSCI and SAMUEL LIPARI's detriment.

224. MSCI and SAMUEL LIPARI were harmed by the Defendants' actions, resulting in the immediate loss of from three hundred thousand to four hundred and fifty thousand dollars and the inability to act on the opportunity it had planned to realize with the funds, including the recruitment and training of a nationwide network of independent representatives and the revenue the representatives would create through MSCI's entry into commerce.

COUNT III

CAUSE OF ACTION FOR TRADE SECRET MISAPPROPRIATION UNDER SECTION 417.450 RSMO OF THE UNIFORM TRADE SECRETS ACT

225. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

226. Plaintiff hereby re-alleges the averments of facts in the following counts and incorporates them herein.

227. The Defendants have misappropriated MSCI's business plan and associate program containing MSCI's trade secrets.

228. The Defendants have made use of MSCI's trade secrets through unauthorized copying and transmittal.

229. The Defendants directed Douglas Lewis to disassemble MSCI's Business Plan and Associate Program and make copies and or fax their contents in violation of SAMUEL LIPARI's oral instructions to Douglas Lewis and the notice of limitations of disclosure, use, transmittal and copying expressly stated on the covers and in the bodies of the above documents.

230. US BANK exceeded its authorized use and copied and or transmitted the above documents to the defendant US BANCORP and its officers Lars Anderson, Susan Paine and Brian Kabbes.

231. The Defendants directed Douglas Lewis to disassemble MSCI's Business Plan and Associate Program and make a derivative analysis document containing MSCI's trade secret and or fax their contents in violation of Sam Lipari's oral instructions to Douglas Lewis and the notice of limitations of disclosure, use, transmittal and copying expressly stated on the covers and in the bodies of the above documents.

232. The defendant US BANCORP NA, its officers Lars Anderson, Susan Paine and Brian Kabbes and its subsidiary US BANCORP PIPER JAFFRAY acquired unconsented knowledge of MSCI's trade secrets and made use thereof.

233. The Defendants were at the time attempting to settle litigation through payment of several million dollars for theft of customer information in an unrelated class action lawsuit giving rise to MSCI's heightened fears of being materially injured if its trade secrets are not recovered and their dissemination is not disclosed.

COUNT IV
CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

234. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

235. US BANCORP through its investment banking subsidiary US BANCORP PIPER JAFFRAY dominated the capitalization of health care technology companies.

236. US BANCORP through its relationship directly with Novation, LLC and through its subsidiary US BANCORP PIPER JAFFRAY's relationship with Novation, LLC dominated the access to the nationwide hospital supply market.

237. Until April 28, 2003 when US BANCORP PIPER JAFFRAY settled charges it was guilty of aiding and abetting efforts to defraud investors and manipulating investment research, US BANCORP through its investment banking subsidiary US BANCORP PIPER JAFFRAY was able to dominate investor research and exclude potential competitors to

Novation, LLC's control of the market for hospital supplies from having a market for securities.

238. SAMUEL LIPARI placed his trust in US BANK and US BANCORP to provide escrow services to MSCI in his plan to alternatively capitalize MSCI's entry into the market for hospital supplies through the participation of its certification candidates who would function as MSCI's marketing representatives.

239. US BANCORP's corporate trust division acting through US BANK was a trustee of the highest order to MSCI by virtue of US BANK's contract with SAMUEL LIPARI to provide MSCI escrow services.

240. In forming the trust relationship with MSCI, US BANK and US BANCORP asked for and obtained from SAMUEL LIPARI all of MSCI's confidential information relating to the escrow accounts and MSCI's certification candidates.

241. US BANK was a trustee of the highest order to MSCI by virtue of US BANK's officer Douglas Lewis' promise to SAMUEL LIPARI that US BANK would safeguard MSCI's confidential business plan.

242. US BANCORP and US BANK violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as an escrow services provider to MSCI when US BANCORP and US BANK improperly

used a change in federal law as a pretext to breach US BANCORP and US BANK's agreement to provide escrow services.

243. US BANCORP and US BANK violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as an escrow services provider to MSCI when US BANCORP and US BANK fraudulently claimed a change in federal law excused their breach US BANCORP and US BANK's agreement to provide escrow services, knowing the change did not render performance impossible and knowing that a change in law or regulations did not relieve the defendants of their duty to perform under the escrow contract.

244. US BANK violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as custodian of MSCI's confidential trade secrets contained in MSCI's business plan and MSCI's certification program when it reproduced the trade secrets and transmitted them to US BANCORP offices outside of the Independence, Missouri office of Douglas Lewis.

245. US BANCORP violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as custodian of MSCI's confidential trade secrets contained in MSCI's business plan and MSCI's certification program when it received the MSCI trade

secrets transmitted to them by Douglas Lewis and disseminated them to hospital suppliers and GPO's competing with MSCI.

246. US BANCORP and US BANK violated their duty of undivided loyalty to MSCI and to the escrow beneficiaries thereof by engaging in self-dealing by requiring the escrow account funds to be invested in a fund owned by US BANCORP without disclosure of US BANCORP's interest.

COUNT V

CAUSE OF ACTION FOR PRIMA FACIE TORT

247. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

248. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

249. US BANK and US BANCORP's Prima Facie Tort Part 1

1) Intentional lawful acts were committed by US BANK and US BANCORP including:

a refusing to provide escrow account services;

b. circulating derogatory financial information about MSCI.

c. placing warning notes against MSCI's officers on US BANK's computer system

d. disparaging MSCI's legal claims against US BANK and US BANCORP

e. causing a Kansas attorney disciplinary complaint to be filed against MSCI's counsel

f. preventing MSCI from obtaining a loan secured with escrow account funds as they were released to MSCI.

2) US BANK and US BANCORP's committed these lawful acts with intent to injure the MSCI;

3) US BANK and US BANCORP's acts caused injury to MSCI and SAMUEL LIPARI

4) There is an absence of justification and in the alternative insufficient justification for US BANK and US BANCORP's acts.

a. MSCI had good credit.

b. MSCI was a registered Missouri corporation in good standing.

c. MSCI was being kept out of the market for hospital supplies by the concerted action off its competitors and their publicized exclusive agreements over hospital supplies with US BANCORP and US BANCORP PIPER JAFFRAY.

e. The defendants' agent Shughart Thomson & Kilroy did not have good faith cause to make an ethics complaint against MSCI's counsel for appealing the Kansas District Court's clear error.

250. US BANK and US BANCORP's injury from US BANK and US BANCORP's Prima Facie Tort was great and contrary to public policy, causing injury to the state's social and economic interests.

1) the nature and seriousness of the harm to MSCI was great, the company could not afford to hire employees or enter the market after having \$350,000.00 to \$450,000.00 abruptly taken from it; MSCI could not realize the returns on over ten years of its founder's research and development. MSCI's stake holders were prevented from recovering their inputs.

2) the interests promoted by the US BANK and US BANCORP's conduct are the felonious manipulation of hospital supply prices at the foreseeable risk of permanent injury and death to healthcare consumers across the nation;

251. While the reconsideration of transfer motion was being argued in federal court, the first 65,000 Missouri residents were cut off of Medicaid benefits on July 1, 2005.

252. 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.

253. 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].

254. Patients are the consumers in the market for hospital supplies that is the primary relevant market of Medical Supply's antitrust claims against the defendants US BANK, US BANCORP and their coconspirators.

255. Doctor Moskowitz also stated; "The Missouri Legislature is wrestling with the most critical domestic issue of our time.

256. It is literally a life and death issue for tens of millions of Americans.

257. 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."

3) the character of the means used by US BANK and US BANCORP were in bad faith and deceptive; and

4) US BANK and US BANCORP's motive was to take advantage of confidential information and power it had acquired over MSCI to keep MSCI from displacing relationships and income US BANCORP had obtained through its subsidiary US BANCORP PIPER JAFFRAY's manipulation of healthcare technology stocks and exclusive dealing with Novation, LLC.

VIII. Prayer for relief

258. Under *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910 (Mo App 1994) US Bank and US BANCORP are responsible for the expectation damages of the forward projections that it had accepted at the time it entered into contract with Medical Supply. The plaintiff is able to prove Medical Supply Chain Inc.'s projected profits with reasonable certainty.

259. Lost future profits may be used as a method of calculating damage where no other reliable method of valuing the business is available, see *Albrecht v. The Herald Co.*, 452 F.2d 124 at 129 (8th Cir. 1971).

Expectation Damages

260. The monetary relief sought is the contract expectation damages as determined by the business plan and forward

financials in possession of US BANK and US BANCORP at the time the escrow was accepted and the contract was formed from the US BANK and US BANCORP defendants.

Punitive Damages For Misappropriation of Trade Secrets

261. MSCI's business plan and associate program are trade secrets and will be made available to the court and defendants for in camera inspection.

262. Mr. LIPARI seeks the lost profits that can be determined with reasonable certainty that MSCI would have made for the next four years of operations, had it been allowed to enter the market for hospital supplies from the US BANK and US BANCORP defendants.

263. The total damages from US BANCORP and US BANK Defendants sought by the plaintiff Mr. LIPARI is four hundred and fifty million dollars (\$450,000,000).

264. The plaintiff seeks any other relief the court believes is just.

Respectfully Submitted,

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

Attachments: Exhibit 1 Executive summary of Medical Supply Business Plan

REQUEST FOR JURY

The plaintiff respectfully requests a jury decide all questions of fact.

Samuel K. Lipari

Plaintiff has served a copy of this complaint upon the

Office of the Comptroller of the Currency
1301 McKinney Street, Suite 3450
Houston, TX 77010-9050

VERIFICATION

State of Missouri)
) SS
County of Jackson)

I Samuel K. Lipari being of lawful age and being first duly sworn upon my oath, state that I have read the above and foregoing petition and attachments and find the statements therein to be true and correct to the best of my information, knowledge and belief.

Samuel K. Lipari

Subscribed and sworn to before me on this _____ day of November, 2006

Notary

Commission expires:

**IN THE UNITED STATES COURT
DISTRICT OF KANSAS**

SAMUEL K. LIPARI	)	
(Assignee of Dissolved	)	
Medical Supply Chain, Inc.)	)	
<i>Plaintiff</i>	)	Case No.
	)	
vs.	)	<u>Contract Breach</u>
	)	
US BANCORP, NA	)	<u>Jury Requested</u>
US BANK, NA	)	
<i>Defendants</i>	)	

PETITION

Comes now the petitioner, SAMUEL K. LIPARI on his personal property interest as the sole assignee of rights for the dissolved Missouri Corporation Medical Supply Chain, Inc. where he was the founder and Chief Executive Officer and appears *pro se*.

This is a petition against the defendants for Breach Of Contract, Fraud, Trade Secret Misappropriation Under R.S.Mo. § 417.450, Breach Of Fiduciary Duty, and Prima Facie Tort.

I. Jurisdiction

1. This court has jurisdiction over questions of Missouri common law in escrow contracts and Missouri statutory law on trade secrets raised in a timely manner by a plaintiff that has never slept on his rights.
2. The injury complained of occurred on December 1, 2002.
3. The defendants are moneyed corporations having banking powers and subject to the statute of limitations of six years in R.S.Mo. § 516.420.
4. The trade secret misappropriation complained of was discovered on November 6, 2002.
5. The defendants if not subject to the statute of limitations of six years in R.S.Mo. § 516.420 are subject to the five year statute of limitations in R.S.Mo. § 417.461.

II. Venue

6. The plaintiff makes a well pleaded complaint claiming state common law and state statutory causes of action over breach of contract to provide escrow services, fraud, trade secret misappropriation

under R.S.Mo. § 417.450, breach of fiduciary duty, and prima facie tort taking place in Jackson County. The plaintiff's complaint is against defendants that regularly do business in Jackson County, Missouri.

7. Venue is proper in this court.

III. Procedural History

8. Plaintiff, in the name of his Missouri corporation Medical Supply Chain, Inc. ("Medical Supply") brought an action to enjoin possible conduct by the defendants and to declare rights of parties under the subject contract of this claim in a federal action in the US District Court for Kansas in October 2002.

9. Medical Supply's first action for injunctive and declaratory relief in the U.S. District Court for the District of Kansas was captioned *Medical Supply Chain, Inc. v. US Bancorp, NA et al* KS. Dist. Case No.: 02-2539

10. Medical Supply sought 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 TRO was denied.

11. The defendants' later conduct breaking the contract 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.

12. Medical Supply's cause was controversial because it was an action to seek an injunction against breaking a contract to provide escrow accounts in furtherance of a boycott by 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.

13. Also identified in the complaint was Novation's captive e-commerce marketplace Neoforma, Inc. directly competing with Medical Supply on the Internet.

14. Medical Supply sought an interlocutory appeal on the denial of injunctive relief without a memorandum and order or findings of law and fact *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 02-3443.

15. Medical Supply also sought interim pre-hearing relief in the Tenth Circuit seeking to prevent the defendants from filing a malicious USA PATRIOT Act Suspicious Activity Report that would destroy the

Medical Supply's ability to obtain escrow arrangements, higher level banking and international fund transfer services elsewhere to accomplish its capitalization and conduct hospital supply transactions. The pre-hearing relief opposed by the defendants was denied and the interlocutory appeal was dismissed as moot.

16. Medical Supply appealed the dismissal of its injunctive and declaratory relief action *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 03-3342.

17. The Tenth Circuit upheld the trial court's dismissal without findings of law or fact and made a show cause order why Medical Supply and its counsel should not be sanctioned for a frivolous appeal.

18. Medical Supply answered the show cause order asserting the trial court had applied the incorrect legal standard and had misstated the USA PATRIOT Act.

19. The Tenth Circuit found that Medical Supply had pled a conspiracy that included a separate legal entity, contradicting the trial court's ruling and the Tenth Circuit panel found that Medical Supply was correct in the existence of private rights of action under the USA PATRIOT Act.

20. Instead of correcting its ruling and ordering that Medical Supply was entitled to injunctive and declaratory relief, the Tenth Circuit panel ordered that Medical Supply's counsel receive its most serious sanction for a frivolous appeal.

21. Medical Supply sought *en banc* rehearing of its appeal, giving notice that the panel's ruling had no preclusive effect for the parties regarding the future action for monetary damages in the Western District of Missouri. Neither the court nor opposing counsel contradicted Medical Supply's ripeness analysis.

22. The court declined to rehear the case *en banc*.

23. Medical Supply then brought its now ripe damages claims against US BANK and US BANCORP along with its existing pendant state law contract and trade secret misappropriation claims in the Western District of Missouri.

24. The case was transferred to the District of Kansas at Kansas City, Kansas to Kansas District Court Judge Kathryn H. Vratil who made no rulings delaying the opportunity to obtain discovery on the defendants' participation in the wrongful disbarment of Medical Supply's counsel for almost a year.

25. Kansas District Court Judge Kathryn H. Vratil then participated in an *ex parte* discussion on the day of the disbarment oral argument with personnel and justices of the Kansas Supreme Court, disparaging

Medical Supply's counsel without his knowledge or opportunity to question Kansas District Court Judge Kathryn H. Vratil's testimony in conduct designed to cause Medical Supply's counsel to be disbarred without due process.

26. Kansas District Court Judge Kathryn H. Vratil then removed herself from the case on October 20, 2005 minutes before the Kansas Supreme Court justices heard Medical Supply's counsel's oral argument. A transcript of the hearing which was resultantly delayed will give light to these unusual events.

27. The petitioner's case was then transferred to Kansas District Court Judge Carlos Murguia where he took no action for many months until immediately after Medical Supply's counsel was reciprocally disbarred by the Kansas District Court without disclosing to Medical Supply's counsel that Kansas District Court Judge Kathryn H. Vratil had participated in *ex parte* testimony over Medical Supply's counsel's "incompetence".

28. The Kansas District Court refused to postpone its decision on reciprocally disbarring Medical Supply's counsel until the Tenth Circuit ruled on the appeal of *Bolden v. City of Topeka* where Medical Supply's counsel representing James Bolden challenged Judge Kathryn H. Vratil's findings of law in that case and where Magistrate Judge James O'Hara, a managing partner in the defendants' law firm Shugart Thomson & Kilroy authored a case management recommendation condemning Medical Supply's counsel for properly relying on controlling case law on alternative state law service of process.

29. The Kansas District court also interfered and obstructed providing records to the Tenth Circuit court for the appeal in *Bolden v. City of Topeka* during and after the state proceedings to disbar Medical Supply's attorney causing the Tenth Circuit to have to postpone the briefing schedule of James Bolden's appeal.

30. The Kansas District Court Judge Kathryn H. Vratil was ultimately overruled on two issues appealed by the petitioner and James Bolden's now disbarred counsel and the decision *Bolden v. City of Topeka*, 441 F.3d 1129. (10thCir.2006) has been favorably cited by the Sixth Circuit.

31. No further court action occurred in the Medical Supply action until the petitioner's counsel had been disbarred, then Kansas District Court Judge Carlos Murguia began in earnest making rulings with the visible purpose of dismissing the action for the lack of counsel and completing the removal of

representation participated in by the Kansas District court and to further its adversarial interest in the petitioner's proceeding.

31. The Kansas District Court Judge Carlos Murguia dismissed the federal claims in their entirety for failure to state a claim despite the fact that the complaint was identical in elements of pleading for its claims to the complaint filed in *Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al*, 8th Cir. 03-1441 and 03-1554 and Judge Murguia expressly declined to exert jurisdiction over the state law based claims.

32. The Kansas District court retained jurisdiction over the federal action to sanction Medical Supply's former counsel and SAMUEL K. LIPARI for among other reasons, witnessing his counsel's disbarment but then because of a timely motion for reconsideration ruled Medical Supply Chain, Inc. would be sanctioned.

33. Medical Supply Chain, Inc. and SAMUEL K. LIPARI as successor in interest gave notice of appeal of the federal court decision on September 8, 2006 and SAMUEL K. LIPARI's federal law based claims over the injuries to his former corporation are currently before the Tenth Circuit Court of Appeals in *Medical Supply Chain, Inc. v. Novation, et al*, (formerly W.D. MO case no. 05-0210, then KS Dist. Court case no.:05-2299, now 10th Cir. case no. 06- 3331.

IV. PARTIES

34. Mr. SAMUEL K. LIPARI was the Chief Executive Officer of the Missouri Corporation Medical Supply Chain, Inc.

35. Medical Supply Chain, Inc. was dissolved by Mr. LIPARI on January 27th, 2006.

36. Mr. LIPARI is the assignee of all interests and rights held previously by the Missouri Corporation Medical Supply Chain, Inc. under *Smith v. Taylor-Morley, Inc.*, 929 S.W.2d 918 (Mo. App. E.D., 1996).

37. Defendant US BANCORP, NA (US Bancorp) NYSE symbol USB is a bank holding corporation headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402.

38. Defendant US BANK, NA is a Delaware Corporation organized under the National Bank Act, 12 U.S.C. §§ 21-216d, headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402 and is a Missouri resident residing at 3640 S Noland Rd, Independence, 64055 Its telephone is (816) 521-3310

VI. STATEMENT OF FACTS

40. US BANK and US BANCORP had knowledge of Medical Supply.
41. US BANK and US BANCORP had Medical Supply's internal capitalization plan.
42. US BANK and US BANCORP offered escrow services.
43. The plaintiff had a meeting of the minds with US BANK and US BANCORP.
44. SAMUEL LIPARI negotiated with Brian Kabbes to reduce the escrow fee per account since all escrow accounts would be identical, and US BANK had refused to have the funds in a single account.
45. Brian Kabbes agreed to lower the fee for US Bank's escrow agent services from the normal of \$1,500 to \$600 per account and no hidden or additional transaction or disbursement fees.
46. After reviewing the escrow contract, on or about 10/5/02 Brian Kabbes communicated to SAMUEL LIPARI that the language of paragraph 10 "Security Interests" should be changed so that a security interest for US BANK could be created in the \$5,000 portion of the escrow that became Medical Supply's property the moment a candidate submitted their certification funds into escrow.
47. US Bank and US Bancorp received a benefit from the escrow contract by the plaintiff's changing of the escrow agreement to facilitate US Bank's making of loans to the plaintiff.
48. Medical Supply altered its escrow contract to conform to Brian Kabbes' suggestion and on or about 10/7/02 emailed the changes to Brian Kabbes.
49. Brian Kabbes and US BANK were identified as the escrow agent in the escrow agreement and Brian Kabbes' address was included in the body of the agreement.
50. The defendants orally confirmed the existence of the escrow contract.
51. Becky Hainje said she had talked to Brian Kabbes and he had told her there would be no problems with the escrow accounts, that they were a "slam dunk."
52. In addition to receipt of a benefit from the contract to provide escrow accounts and services the defendants US Bank and US Bancorp asked for and obtained the benefit of designating the deposit of funds into a fund owned by US Bancorp.
53. On or about 10/9/02 Brian Kabbes called to request an additional change in the escrow contract.
54. Kabbes supplied a specified US Treasury fund investment language for the funds while the funds were in the custody of US Bank Trust Department, without disclosing the treasury funds vehicle was also

owned by US Bancorp which profited from steering US Bank's trust business into the treasury funds vehicle.

Defendants' Misappropriation Of Trade Secrets

55. On or about Thursday 10/10/02, Samuel Lipari delivered the Medical Supply business plan and associate program to Douglas Lewis, at the US Bank, Noland road office to apply for the agreed upon commercial line of credit based on the portion of the escrow accounts Medical Supply would retain from its associate program.

56. The business plan and associate program booklets each had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained in them.

57. A letter of introduction also stated the contents were protected and restricted disclosure and possession of the materials.

58. Two more folders contained the good standing documentation Brian Kabbes requested and the associate program contracts that were sent to the candidates.

59. Douglas Lewis asked how many candidates Medical Supply had and SAMUEL LIPARI reached into his brief case and held up the ten folders of applicants who had committed to sending in their funds by November 1st and five others who were in the final stages.

60. SAMUEL LIPARI further explained that he planned to start a new certification group each quarter.

61. SAMUEL LIPARI was given a loan application and agreed to and did return the application the next day.

Repudiation of Agreement to Provide Escrows

62. On or about Tuesday 10/15/02 Brian Kabbes called SAMUEL LIPARI and informed him that US Bank had turned down the escrow accounts because of the USA PATRIOT Act.

63. When asked to clarify, he said the know your customer requirements had changed and US Bank could not set up the escrow accounts for Medical Supply.

64. The plaintiff attempted to cover or mitigate its losses from US Bank and US Bancorp's breach by finding another escrow agent to administer the escrow accounts.

65. Medical Supply contacted an attorney, familiar with the healthcare supply chain research and development done by SAMUEL LIPARI at the law firm of Shook, Hardy and Bacon and asked if his firm could act as escrow agent for accounts to be set up in US Bank.

66. The Shook, Hardy and Bacon attorney said the bank is better prepared to provide escrow services, fearing the liabilities and risks for an escrow agent where the USA PATRIOT Act had been invoked and declined to act as escrow agent.

67. On Thursday 10/24/02 Medical Supply filed for urgent injunctive relief against US BANCORP NA, its subsidiaries and named employees.

Defendants' Intellectual Property Misappropriation

68. Realizing there was no immediate solution to this matter, and the fact that a previous business model pricing system developed by SAMUEL LIPARI in 1993-1995 was appropriated by HSCA, Medecon and Cardinal Healthcares' subsidiary Owen Healthcare through exploitation of a confidential business relationship and then taken later by many other GPOs.

69. On or about 11/6/02 SAMUEL LIPARI visited US BANK, Noland road branch to retrieve the documents left by him following the meeting with Douglas Lewis on 10/10/02.

70. Douglas Lewis gave the documents back to SAMUEL LIPARI.

71. SAMUEL LIPARI specifically ask if the documents were copied or faxed and Douglas Lewis said he put all of the information in his analysis and Samuel Lipari left the bank.

72. Upon returning to Medical Supply's office SAMUEL LIPARI inspected the documents and found that the binders had been separated and copies or faxes had been made of the associate program and the business plan documents.

73. There were also tractor marks from a copy or fax machine on the back of the entire associate program and the business plan pages.

74. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied.

75. There were no marks tractor marks on the back of these documents.

76. Medical Supply became fearful of where these documents were sent and who has reviewed them.

77. The documents that were copied or faxed contain all confidential details to the business, business model, management team, investors, industry experts, advisors, business practices, market strategies, revenue model, service structure, formula, algorithms and financials including 5 year details, 5 year condensed and break even analysis.

78. SAMUEL LIPARI became fearful this information would fall into the wrong hands further blocking or eliminating entry to market.

79. On or about 11/7/02 SAMUEL LIPARI received a complimentary D&B report dated 10/31/02 on Medical Supply.

80. The report indicated Medical Supply started in 2000 and has a clear credit history and a strong financial condition.

81. The defendants subjected MSCI to threatened and or actual USA PATRIOT Act Suspicious Activity Reporting (S.A.R.) with the knowledge that such reporting would harm or destroy MSCI's ability to capitalize its entry into the market for hospital supplies.

82. Never the less, on or about May 1st, 2003 Samuel Lipari again attempted to substitute or cover the defendants breach, this time with a capitalization plan involving the purchase of an office building at 1600 N.E. Coronado Drive in Blue Springs.

83. On or about May 7th, 2003 MSCI's loan consultant Joan Mark explained if the General Electric Company provided a \$5.4 Million dollar mortgage on a \$10 Million dollar property and eliminated a \$5.4 Million dollar lease obligation that GE would directly benefit from a \$15 Million dollar swing to their balance sheet.

84. Samuel Lipari negotiated a contract to purchase 1600 N.E. Coronado Drive creating for MSCI \$350,000.00 in funds earned in the purchase bargain from selling the termination of the building's ten year \$5.4 million dollar lease with the building's tenant GE Transportation to its parent corporation, the General Electric Company (GE), which also agreed to provide MSCI a purchase mortgage as part of its contract with MSCI to release GE Transportation from the ten year lease.

85. When GE entered into the contract with MSCI, knowing of the S.A.R. threat by US BANK and US BANCORP related to GE by Samuel Lipari.

86. GE on May 15th, 2003 agreed to buy the deeply discounted remainder of the lease and fund MSCI's

mortgage to purchase the office building at 1600 N.E. Coronado Drive after performing diligence over the executive summary of MSCI's business plan and affirming MSCI would be able to repay the mortgage based on MSCI's value proposition and the opportunity in the market for an independent hospital supply electronic marketplace on the internet.

87. Later, GE Medical and its former president Jeffrey R. Immelt, now CEO of GE learned that GE corporate had capitalized MSCI's entry into the hospital supply marketplace when GE's former CEO Jack Welch had specifically instructed Jeffrey R. Immelt to distribute GE Medical's equipment and supplies on the internet first in GE's electronic marketplace Global Exchange and then to form GHX,LLC as an electronic marketplace, both because Jack Welch feared an independent hospital supplier creating an electronic marketplace that would provide lower prices selling supplies from GE's competitors.

88. GHX, L.L.C. was capitalized by and remains under the control of GE and Jeffrey R. Immelt which retains a directorship on the board of the privately held company.

89. With GE and Jeffrey R. Immelt's approval GHX, L.L.C. had subsequently formed a joint venture with the remaining electronic marketplace for hospital supplies, Neoforma, Inc. part of a healthcare technology company capitalization syndicate with US BANCORP's Piper Jaffray and together in an agreement, GHX, L.L.C. and Neoforma allocated market share of the nation's hospitals between each other.

90. GE repudiated its contract, sacrificing \$15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against GHX, L.L.C. and Neoforma in the market for hospital supplies.

91. MSCI sought to enforce its contract with GE and recover damages in federal court so tat MSCI would still be able to enter the market for hospital supplies and capitalizing its electronic marketplace.

92. Samuel Lipari filed a *lis pendens* notice in the Jackson County Register of Deeds office based on his state law and antitrust claims in the US District Court.

93. The defendants US BANCORP and US BANK along with Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff coordinated their defense of Medical Supply's action for injunctive and declaratory relief with the GE defendants Jeffrey R. Immelt, GE, GHX, GE Healthcare, GE Capital and GE Transportation who inconceivably attached the Medical Supply complaint and order to their 12(b)6 motion to dismiss in Medical Supply's separate action against Jeffrey R. Immelt, GE, GHX, GE Capital and GE Transportation.

94. On January 29, 2004, March 4, 2004, April 2, 2004 US Bancorp's counsel, Nicholas A.J. Vlietstra and Piper Jaffray's counsel Reed coordinated their appeal (10th C.C.A. 03-3342) with the GE defense. The GE defendants included the action against the US BANCORP defendants and Unknown Healthcare Provider as a related appellate case in (10th C.C.A. 04-3075) and used the US BANCORP order as a basis for a cross appeal (10th C.C.A. 04-3102) challenging the failure of the trial court to grant sanctions against Medical Supply."

95. A cartel of hospital suppliers organized in an anticompetitive agreement as members of GE's GHX,LLC and including the University Hospital Consortium (UHC), Robert J. Baker, the Volunteer Hospital Association (VHA, Inc.), Novation LLC, Neoforma, Inc. and Robert J. Zollars renewed their conscious commitment to a common scheme designed to achieve an unlawful objective of keeping Medical Supply out of the market for hospital supplies by reviewing the case against US BANCORP and consulting with representatives for the defendants US BANCORP and US BANK along with Jerry A. Grundhoffer, Andrew Cesere, the Piper Jaffray Companies and Andrew S. Duff.

96. The cartel decided to rely on the continuing efforts to illegally influence the Kansas District Court and Tenth Circuit Court of Appeals to uphold the trial court's erroneous ruling.

97. The cartel also renewed their efforts to have Medical Supply's sole counsel disbarred, knowing that an extensive search for counsel by Medical Supply had resulted in 100% of the contacted firms being conflicted out of opposing US BANCORP and actually effected a frenzy of disbarment attempts against Medical Supply's counsel in the period from December 14, 2004 to February 3rd, 2005, originating from US BANCORP and US BANK's agent Shughart Thomson and Kilroy's past and current share holders."

98. The former eighteen year Shughart Thomson & Kilroy shareholder acting as magistrate on the GE case denied Medical Supply discovery and the court did not even permit discovery when the dismissal attachments necessitated conversion of the GE motion to one for summary judgment.

VII. CLAIMS

70. Plaintiff alleges the following claims against the defendants US BANK and US BANCORP upon information and belief that discovery will support findings against the defendants.

COUNT I
CAUSE OF ACTION FOR BREACH OF CONTRACT

71. Plaintiff hereby re alleges the preceding averments of facts and incorporates them herein.

72. The Defendants breached their contract with Medical Supply (MSCI) which interests are now assigned to SAMUEL LIPARI to provide MSCI with a full range of business banking services, including corporate trust services and escrow agency to be performed lawfully and professionally with a “five star guarantee” of quality of service.

73. This contract was executed in writing by the Defendants and MSCI when their respective agents opened the Medical Supply Chain Corporate checking account.

74. The Defendants breached their contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates.

75. The Defendant’s Vice President Brian Kabbes and Samuel Lipari came into formation of a written contract for escrow account services when both had agreed upon some or all of the terms in exchanges of email including: the composition of the escrow form, the language limiting the liability of US BANK and the escrow agent, the language designating US BANK’s compensation for its duties in any legal disputes arising between the parties, the directions for US BANK’s investment of long term held funds, the directions for US BANK’s investment of short term held funds, the selection of investment vehicles for both funds respectively, the name and address of BRIAN KABBES as escrow agent on the escrow form, the name and address of US BANK as escrow depository on the escrow form, the price term US BANK is charging for the agreed upon escrow service and the price term and payment schedule for maintaining the account.

76. The Defendants performed diligence to determine whether to accept the contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates.

77. The Defendants required only one item to be rectified for approval; a current good standing status from the Missouri Secretary of State, which MSCI provided, satisfying their sole open element.

78. The Defendants approved MSCI’s escrow form for delivery along with MSCI’s associate contract to MSCI’s independent representative candidates for their examination and submission for review to their personal legal counsel. After entering into a contract with MSCI, the defendants breached the contract and

did not provide the escrow accounts.

79. The Defendants breached the contract to provide escrow accounts to MSCI when the defendants discovered MSCI would reduce hospital supply prices nationwide with an internet based electronic marketplace.

80. MSCI attempted to cover or substitute as described in the statement of facts, seeking the services of Shook, Hardy & Bacon, then the defendants' own law firm to administer escrow accounts unsuccessfully.

81. MSCI then attempted to cover or substitute by obtaining the capitalization for entry to market through a real estate transaction with GE which breached its contract when it also discovered MSCI would reduce hospital supply prices nationwide with an internet based electronic marketplace.

COUNT II
CAUSE OF ACTION FOR FRAUD

82. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

83. The Defendant US BANCORP injured MSCI with a fraudulent misrepresentation material to their transaction of escrow agency and escrow account hosting through US BANK for MSCI and SAMUEL LIPARI.

84. Then Brian Kabbes speaking as a Vice President of US BANK falsely represented to MSCI that US BANK and the commercial trust department would not perform as escrow agent or host MSCI's escrow accounts because of the "know your customer provisions" diligence requirements of the USA PATRIOT Act had come into effect and made it impossible for the bank to perform this service for MSCI.

208. The defendants' officers Lars Anderson and Susan Paine made this fraudulent misrepresentation through the defendant Brian Kabbes by directing him to give this reason to MSCI's chief executive officer, SAMUEL LIPARI.

86. The defendant US BANCORP's officer Andrew Cesere directed the defendants' officers Lars Anderson, Susan Paine And Brian Kabbes not to retract this fraudulent misrepresentation when it had been questioned by MSCI and SAMUEL LIPARI and to maintain the misrepresentation in their capacity as managing speaking officers for US BANCORP NA, US BANK.

87. The defendants' officers Andrew Cesere, Lars Anderson, Susan Paine and Brian Kabbes caused this fraudulent misrepresentation to be communicated to SAMUEL LIPARI with the intention to induce MSCI

to refrain from enforcing US BANK's agreement to provide MSCI escrow agency services and escrow account hosting.

88. On 10-24-02 the defendants officer Brian Kabbes communicated to MSCI and SAMUEL LIPARI that US BANK's corporate trust division (US BANCORP) would not provide the escrow accounts because of the "know your customer" provision of the USA PATRIOT Act prevents them from providing the agreed upon escrow accounts.

89. MSCI and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation to not enforce US BANK's promise with the defendants' officer Brian Kabbes upon learning that US BANK was not going to provide the escrow services. MSCI and and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of US BANK's Commercial Trust department and instead contacted US BANCORP NA's Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan Paine.

90. The defendants US BANCORP NA and US BANK caused this fraudulent misrepresentation to be communicated to MSCI with knowledge of its falsity or reckless disregard as to whether it was true or false to the point of not checking and realizing that the increased duties of the "know your customer" for new account holders had not been enacted.

91. Or, in the alternative the defendants caused this fraudulent misrepresentation to be communicated with reckless disregard as to whether it was true or false to the point of not checking and realizing MSCI and Sam Lipari were established existing customers of US BANK the increased duties of the "know your customer" did not apply to.

92. US BANK and US BANCORP intentionally deceived MSCI and SAMUEL LIPARI over the pretext of the USA PATRIOT Act as a false reason to breach the contract to provide escrow accounts because the defendants knew or should have known that it is well established that a change in federal law does not excuse breach of a banking contract.

93. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage hospital suppliers US BANCORP PIPER JAFFRAY a wholly owned subsidiary of US BANCORP had invested in and underwritten.

94. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage US BANCORP PIPER JAFFRAY and US BANCORP relationships with the hospital Group Purchasing Organization (“GPO”) Novation, LLC.

95. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage US BANCORP PIPER JAFFRAY and US BANCORP relationships with the hospital Group Purchasing Organization (“GPO”) Neoforma, Inc. (now acquired by GHX, LLC an electronic healthcare marketplace created by The General Electric Company, “GE”)

96. MSCI and SAMUEL LIPARI relied on the Defendants fraudulent misrepresentation to MSCI and SAMUEL LIPARI’s detriment.

97. MSCI and SAMUEL LIPARI were harmed by the Defendants’ actions, resulting in the immediate loss of from three hundred thousand to four hundred and fifty thousand dollars and the inability to act on the opportunity it had planned to realize with the funds, including the recruitment and training of a nationwide network of independent representatives and the revenue the representatives would create through MSCI’s entry into commerce.

FRAUDS COMMITTED IN KANSAS CITY, KANSAS

98. On April 22, 2008 the defendants US BANK and US BANCORP through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 filed a Motion to Compel one day in advance of providing plaintiff with a Golden Rule Letter notice, preventing the plaintiff from having the opportunity to correct any deficiencies.

99. On July 8, 2008 The Honorable Magistrate Judge David J. Waxse filed a Memorandum and Order based on the fraudulent misrepresentations by the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. showing Magistrate Judge David J. Waxse was deceived by the defendants’ fraud on the court, July 8, 2008 “Memorandum and Order”.

100. On August 20, 2008 the defendants through their agent the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. in a pleading by Shughart Thomson & Kilroy, P.C. Associate Jay E. Heidrick, KS Atty. Lic. #20770 filed a Motion for Order to Show Cause misrepresenting to the court

that the plaintiff had not served requested answers to the defendants' interrogatories as part of the defendants' scheme to complete repeated frauds on the court for the purpose of procuring a dismissal through fraud. August 20, 2008 "Defendants Motion to Show Cause".

101. On August 25, 2008 The Honorable Magistrate Judge Waxse filed the Second Notice and Order to Show Cause dated August 25, 2008 "Second Notice and Order to Show Cause".

102. The plaintiff was injured by the fraud, he had to prepare a lengthy answer and affidavit and reproduce at great expense 12,000 documents documenting his compliance with discovery, the requests of the defendants and the orders of the court in a desperate to prevent dismissal of his claims.

103. The plaintiff was injured by the fraud of the defendants when the court now having the evidence through the show cause answer irrefutably showing that the plaintiff was in an enforceable contract for escrow accounts with evidence proving his claims and damages and recognizing the law firm of Jack Kilroy, Jr. President and CEO of Shughart Thomson & Kilroy, P.C. had committed repeated frauds on the court then had to save Shughart Thomson & Kilroy, P.C. by dismissing the plaintiff's claims on the impermissible second Rule 12(b)(6) motion for claims that would have been found to have been properly pled in the Western District of Missouri US District Court and in Missouri State court.

104. The plaintiff suffered damages by the US BANCORP and US BANK defendants' fraud of four hundred and fifty million dollars (\$450,000,000) the value of his contract claims at the time his action was transferred to Kansas District Court.

COUNT III
CAUSE OF ACTION FOR TRADE SECRET MISAPPROPRIATION UNDER
SECTION 417.450 RSMO OF THE UNIFORM TRADE SECRETS ACT

105. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

106. Plaintiff hereby re-alleges the averments of facts in the following counts and incorporates them herein.

107. The Defendants have misappropriated MSCI's business plan and associate program containing MSCI's trade secrets.

108. The Defendants have made use of MSCI's trade secrets through unauthorized copying and transmittal.

109. The Defendants directed Douglas Lewis to disassemble MSCI's Business Plan and Associate Program and make copies and or fax their contents in violation of SAMUEL LIPARI's oral instructions to Douglas Lewis and the notice of limitations of disclosure, use, transmittal and copying expressly stated on the covers and in the bodies of the above documents.

110. US BANK exceeded its authorized use and copied and or transmitted the above documents to the defendant US BANCORP and its officers Lars Anderson, Susan Paine and Brian Kabbes.

111. The Defendants directed Douglas Lewis to disassemble MSCI's Business Plan and Associate Program and make a derivative analysis document containing MSCI's trade secret and or fax their contents in violation of Sam Lipari's oral instructions to Douglas Lewis and the notice of limitations of disclosure, use, transmittal and copying expressly stated on the covers and in the bodies of the above documents.

112. The defendant US BANCORP NA, its officers Lars Anderson, Susan Paine and Brian Kabbes and its subsidiary US BANCORP PIPER JAFFRAY acquired unconsented knowledge of MSCI's trade secrets and made use thereof.

113. The Defendants were at the time attempting to settle litigation through payment of several million dollars for theft of customer information in an unrelated class action lawsuit giving rise to MSCI's heightened fears of being materially injured if its trade secrets are not recovered and their dissemination is not disclosed.

COUNT IV
CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

114. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

115. US BANCORP through its banking subsidiary US BANK NA contracted with the plaintiff to provide escrow agency and to administer escrow accounts.

116. US BANK AND US BANCORP received a benefit from the contract to provide escrow accounts and services the defendants and a benefit of designating the deposit of funds into a fund owned by US Bancorp.

117. US BANK NA breached its fiduciary duty to the plaintiff by denying the existence, effect and benefits of that contract.

118. US BANK NA breached its fiduciary duty to the plaintiff by giving the plaintiff a false reason why US BANCORP and US Bank NA would not honor the contract to provide escrow agency and to administer escrow accounts.

119. US BANK and US BANCORP breached their fiduciary duty to the plaintiff by failing to disclose US BANCORP owned the fund designated for the escrow deposits.

COUNT V
CAUSE OF ACTION FOR PRIMA FACIE TORT

120. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

121. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

122. US BANK and US BANCORP's Prima Facie Tort Part 1

1) Intentional lawful acts were committed by US BANK and US BANCORP including:

- a refusing to provide escrow account services;
- b. circulating derogatory financial information about MSCI.
- c. placing warning notes against MSCI's officers on US BANK's computer system
- d. disparaging MSCI's legal claims against US BANK and US BANCORP
- e. causing a Kansas attorney disciplinary complaint to be filed against MSCI's counsel
- f. preventing MSCI from obtaining a loan secured with escrow account funds as they were released to MSCI.

2) US BANK and US BANCORP's committed these lawful acts with intent to injure the MSCI;

3) US BANK and US BANCORP's acts caused injury to MSCI and SAMUEL LIPARI

4) There is an absence of justification and in the alternative insufficient justification for US BANK and US BANCORP's acts.

- a. MSCI had good credit.
- b. MSCI was a registered Missouri corporation in good standing.
- c. MSCI was being kept out of the market for hospital supplies by the concerted action off its competitors and their publicized exclusive agreements over hospital supplies with US BANCORP and US BANCORP PIPER JAFFRAY.

e. The defendants' agent Shughart Thomson & Kilroy did not have good faith cause to make an ethics complaint against MSCI's counsel for appealing the Kansas District Court's clear error.

123. US BANK and US BANCORP's injury from US BANK and US BANCORP's Prima Facie Tort was great and contrary to public policy, causing injury to the state's social and economic interests.

1) the nature and seriousness of the harm to MSCI was great, the company could not afford to hire employees or enter the market after having \$350,000.00 to \$450,000.00 abruptly taken from it; MSCI could not realize the returns on over ten years of its founder's research and development. MSCI's stake holders were prevented from recovering their inputs.

2) the interests promoted by the US BANK and US BANCORP's conduct are the felonious manipulation of hospital supply prices at the foreseeable risk of permanent injury and death to healthcare consumers across the nation;

124. While the reconsideration of transfer motion was being argued in federal court, the first 65,000 Missouri residents were cut off of Medicaid benefits on July 1, 2005.

125. 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.

126. 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].

127. Patients are the consumers in the market for hospital supplies that is the primary relevant market of Medical Supply's antitrust claims against the defendants US BANK, US BANCORP and their coconspirators.

128. Doctor Moskowitz also stated; "The Missouri Legislature is wrestling with the most critical domestic issue of our time.

129. It is literally a life and death issue for tens of millions of Americans.

130. 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.”

3) the character of the means used by US BANK and US BANCORP were in bad faith and deceptive; and

4) US BANK and US BANCORP's motive was to take advantage of confidential information and power it had acquired over MSCI to keep MSCI from displacing relationships and income US BANCORP had obtained through its subsidiary US BANCORP PIPER JAFFRAY's manipulation of healthcare technology stocks and exclusive dealing with Novation, LLC.

VIII. Prayer for relief

131. Mr. LIPARI seeks the lost profits that can be determined with reasonable certainty that MSCI would have made for the next six years of operations, had it been allowed to enter the market for hospital supplies from the US BANK and US BANCORP defendants.

132. The total damages from US BANCORP and US BANK Defendants sought by the plaintiff Mr. LIPARI is four hundred and fifty million dollars (\$950,000,000).

133. The plaintiff seeks any other relief the court believes is just.

Respectfully Submitted,

S/ Samuel K. Lipari

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

REQUEST FOR JURY

The plaintiff respectfully requests a jury decide all questions of fact.

S/ Samuel K. Lipari

Samuel K. Lipari

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT
INDEPENDENCE

SAMUEL K. LIPARI	)	
(Statutory Trustee of Dissolved	)	
Medical Supply Chain, Inc.)	)	
<i>Plaintiff</i>	)	Case No.0616-
	)	CV07421
	)	
vs.	)	
	)	
GENERAL ELECTRIC COMPANY,	)	
GENERAL ELECTRIC CAPITAL	)	
BUSINESS ASSET FUNDING CORPORATION,	)	
GE TRANSPORTATION SYSTEMS	)	<u>Contract Breach</u>
GLOBAL SIGNALING, L.L.C.	)	
CARPET n, MORE	)	<u>Jury Requested</u>
STEWART FOSTER	)	
HEARTLAND FINNCIAL	)	
<i>Defendants</i>	)	

PETITION

Comes now the petitioner, SAMUEL K. LIPARI in his role as a statutory trustee for the dissolved Missouri Corporation Medical Supply Chain, Inc. where he was the founder and Chief Executive Officer and appears *pro se*.

I. Jurisdiction

1. This court has jurisdiction over questions of Missouri common law in real estate purchase contracts raised in a timely manner by a plaintiff that has never slept on his rights.

II. Venue

2. The plaintiff makes a well pleaded complaint claiming a state common law cause of action over a breached real estate contract on property located in Jackson County.

3. The plaintiff's complaint is against defendants that regularly do business in Jackson County, owned or controlled real property in Jackson County or resided in Jackson County, Missouri.

4. Venue is proper in this court.

III. Procedural History

5. Plaintiff brought this claim under state law in a federal action in the US District Court for Kansas (*Medical Supply Chain, Inc. v. General Electric Company, et al.*, case number 03-2324-CM) within a week of the June 15, 2003 breach. The trial court dismissed the plaintiff's federal antitrust based claims and expressly dismissed the plaintiff's state law claims without prejudice stating GE's requests for sanctions was inappropriate where the plaintiff's contract claims could have merit.

6. The Tenth Circuit upheld the trial court's express dismissal without prejudice of the state law claims but reversed the trial court on sanctions.

7. The GE defendants threatened to bring sanctions after remand and to take the plaintiff's counsel's house if all claims including the state claims were not dropped.

8. The plaintiff demonstrated that the sanction order was in contradiction to Tenth Circuit authority and if sanctions were issued they would be a trespass at law. They were not issued.

9. The plaintiff sought to have these claims added to a related antitrust action (*Medical Supply Chain, Inc. v. Neoforma, et al.*, case number 05-2299) first through combination with the remanded case against the GE defendants and then through raising new federal claims against the GE defendants on September 15th, 2005 in the related antitrust action.

10. The trial court ordered the federal claims dismissed and again expressly declined to exercise jurisdiction over the state claims on March 7th, 2006.

11. The case remains open for the purposes of sanctioning the plaintiff and his former counsel.

IV. PARTIES

12. Mr. LIPARI was Chief executive officer of the Missouri Corporation Medical Supply Chain, Inc.

13. Medical Supply Chain, Inc. was dissolved by Mr. LIPARI on January 27th, 2006. See Exb. 1.

14. Mr. LIPARI is the statutory trustee of the Missouri Corporation Medical Supply Chain, Inc. under Section 351.526 RSMo.

15. GENERAL ELECTRIC COMPANY, (herein "GE"), Missouri registered agent: C T CORPORATION SYSTEM, 314 NORTH BROADWAY, ST. LOUIS, MO 63102.

16. GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORPORATION, (herein "GE CAPITAL") Missouri registered agent: The Company Corporation 120 SOUTH CENTRAL AVENUE CLAYTON, MO 63105.

17. GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING, L.L.C. (herein "GE TRANSPORTATION") Missouri registered agent C T Corporation System, 120 SOUTH CENTRAL AVENUE, CLAYTON MO 63105

18. CARPETS n' MORE Inc. Stewart Foster 9700 Keystone Dr. Lee's Summit, MO 64086

19. HEARTLAND FINANCIAL 1600 N.E. Coronado Drive in Blue Springs, MO 64015

V. INTRODUCTION

20. Mr. LIPARI dissolved company Medical Supply Chain, Inc. (Medical Supply) formed a written contract via email with GE and GE TRANSPORTATION to buy a \$10 million dollar building at 1600 N.E. Coronado Drive in Blue Springs, MO for \$5 million and simultaneously to sell GE TRANSPORTATION a release from its ten year lease for a deeply discounted value.

21. The GE entities knew Medical Supply intended to use the transaction to capitalize its entry into the hospital supply market and that it was the victim of antitrust conspirators using the USA PATRIOT ACT to prevent it from getting capital by conventional means. GE corporate "business leaders" approved the transaction obligating GE CAPITAL's underwriting based on Mr. LIPARI'S business plan and Medical Supply's ability to pay as detailed in Medical Supply's forward looking financials.

22. The e-mail was a written contract meeting the Missouri Statute of Frauds and under Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq.

23. Both the GE entities and Medical Supply partially performed the terms of the contract. GE caused the breach of the contracts when GE Medical and the electronic hospital supply marketplace GHX LLC created by GE interfered to prevent Medical Supply from getting capitalization through the contract to enter the hospital supply marketplace. GHX, GE and GE Medical are openly part of a hospital supply cartel that had previously prevented Medical Supply from capitalizing its entry into the hospital supply market.

24. Medical Supply is entitled to its contract expectations *Albrecht v. The Herald Co.*, 452 F.2d 124 at 129 (8th Cir. 1971) including its business plan forward looking financials under *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910 (Mo App 1994) and GE Capital has specifically been subjected to business plan expectation damages in Missouri State Court: *Rasse v. GE Capital Small Business Finance Corp.*, 2002 MO 808 (MOCA, 2002). See appendix 1.

25. A Missouri federal court decided an electronic contract/electronic signature case under federal and state electronic contract laws and the Missouri statute of frauds as Medical Supply advocated: *International Casings Group, Inc., v. Premium Standard Farms, Inc.*, 358 F. Supp. 2d 863; 2005 U.S. Dist. LEXIS 3145, February 9, 2005 See appendix 2.

VI. STATEMENT OF FACTS

26. The plaintiff through his now dissolved corporation made a contract with the defendants to sell GE TRANSPORTATION'S remaining ten year lease at a deep discount benefiting GE in exchange for GE'S funding of the plaintiff's purchase of the building through GE'S business lending subsidiary, GE CAPITAL.

**FORMATION OF A CONTRACT BETWEEN THE PLAINTIFF AND THE
DEFENDANTS TO EXCHANGE GE TRANSPORTATION'S REMAINING LEASE
AND FUND THE PURCHASE OF 1600 N.E. CORONADO BUILDING**

27. On or about June 1st, 2002, Mr. LIPARI, in his role as CEO of Medical Supply Chain, Inc. contacted the leasing agent Cohen & Esrey Property Management ("Cohen") regarding a building located at 1600 N.E. Coronado Drive in Blue Springs, MO.

28. Cohen indicated the building was already leased but that the lessee could and would like to sub-lease the building.

29. The building was not occupied so Mr. LIPARI made a verbal offer to sub-lease a portion of the building.

30. Cohen declined his offer indicating the existing lessee would not accept anything less than sub-leasing the entire building.

31. On or about April 1st, 2003 Mr. LIPARI contacted the new leasing agent, B.A. Karbank & Company ("Karbank") in the event the new agent had different instructions regarding a sub-lease of the property located at 1600 N.E. Coronado Drive in Blue Springs, MO.

32. The new leasing agent Karbank told Mr. Lipari that GE was the lessee seeking to sub-lease the building due to their vacating the building after GE TRANSPORTATION bought out Harmon Industries.

33. The building was still not occupied so again Mr. LIPARI made a verbal offer to lease a portion of the building.

34. Karbank declined his offer indicating GE Corporate Properties would not accept anything less than leasing the entire building.

35. On or about April 7th, 2003 Mr. LIPARI contacted GE and spoke with the GE property manager, Mr. GEORGE FRICKIE regarding Medical Supply's interest in sub-leasing the building.

36. Mr. FRICKIE indicated again that GE would not be interested in sub-leasing a portion of the building but rather would be interested in leasing the entire building.

37. Mr. LIPARI requested the name of the owners and Mr. FRICKIE gave him the name and number of Mr. BARRY PRICE with Cherokee Properties L.L.C.

38. Mr. LIPARI contacted Mr. BARRY PRICE, and he was referred to Mr. SCOTT ASNER who also had a substantial interest in the building.

39. While speaking with Mr. ASNER he provided Mr. LIPARI the background and current details on the building lease with GE, terms and a price to purchase the building.

40. The lease was transferable and GE was still obligated for 7-years out of a 10-year lease.

41. Mr. ASNER agreed to sell Medical Supply the building for the remaining balance of the GE 7-year lease (\$5.4 million) and provided Mr. LIPARI with a letter of intent to sell the building to Medical Supply.

42. On or about April 15th, 2003 Mr. LIPARI contacted Mr. FRICKIE with GE Commercial Properties and indicated that he had an interest in purchasing the building.

43. Mr. LIPARI asked Mr. FRICKIE if GE had an interest in buying out the remainder of their lease so that Medical Supply could occupy the building following the purchase.

44. Mr. FRICKIE offered GE's lease payments for the remainder of 2003 (\$350,000) as a buy out offer.

45. On or about May 1st, 2003 Mr. LIPARI tentatively contacted several local Banks, knowing that US Bank had threatened his company with a malicious USA PATRIOT ACT report to keep Medical Supply from entering the hospital supply market where US bank was affiliated with Neoforma, an existing electronic marketplace for healthcare supplies.

46. Mr. LIPARI knew Medical Supply could not get a loan because of the threat and extortion of the USA PATRIOT ACT, but knew he needed inputs from bankers familiar with the commercial real estate market in Blue Springs, MO.

47. Mr. LIPARI felt Medical Supply could form a holding company to obtain the property without US Bank realizing, and could then enter the hospital supply market.

48. Mr. LIPARI spoke with Mr. ALLEN LEFKO President of Grain Valley Bank, Mr. PAT CAMPBELL branch manager of Gold's Bank and Mr. RANDY CASTLE Senior Vice-President of Jacomo Bank.

49. Each of the banks indicated a wiliness to provide the mortgage because they felt the property was worth far more than the price offered by Cherokee Properties L.L.C., but the mortgage was too large for the regulatory size of their bank and they each suggested a national bank as an alternative.

50. Due to US Bank's extortion and racketeering, including the pretext and very real threat of a malicious USA PATRIOT ACT "suspicious activity report" (SAR) against Medical Supply since Mr. LIPARI had tried to enter the hospital supply market in October of 2002, Mr. LIPARI knew he was unable to solicit a national bank for the real estate loan.

51. On or about May 7th, 2003 Medical Supply contracted a financial consultant (Mrs. JOAN MARK) for advice on how to structure a mortgage to buy the building which has a 7-year revenue stream from GE in the amount of \$5.4 Million

dollars, the identical amount offered to purchase the building and for which Medical Supply had a letter of intent from the owner Cherokee Properties L.L.C.

52. Mrs. Mark suggested Mr. LIPARI propose a mortgage arrangement directly to Mr. FRICKIE with GE Corporate.

53. Mrs. Mark explained how a purchase of the \$10 Million dollar property for \$5.4 Million dollars was a great deal for any mortgage lender.

54. Mrs. MARK also explained if GE provided a \$5.4 Million dollar mortgage on a \$10 Million dollar property and eliminated a \$5.4 Million dollar lease liability that GE would directly benefit from a \$15 Million dollar positive swing to their balance sheet.

A. Offer

55. On or about May 15th, 2003, Medical Supply's corporate counsel sent a proposed transaction to Mr. FRICKIE outlining the terms of Medical Supply's proposal (Exb. 2):

Dear Mr. Fricke:

I am writing on behalf of Medical Supply Chain, Inc. with a proposal to release GE from a seven-year 5.4 million dollar obligation on 1600 N.E. Coronado Dr., Blue Springs MO. We have spoke with the City of Blue Springs economic development officer and the city attorney. Medical Supply Chain, Inc. has also obtained a letter of intent from the building's owner, Cherokee South, L.L.C. (Barry Price/Scott Asner) to purchase the building. We offer to release GE from its lease and

5.4 million dollar obligation, providing GE pays Medical Supply Chain, Inc. at closing for the remainder of the 2003 lease and transfers title to the building's furnishings. This offer is contingent on GE's acceptance by 3pm (EST), Friday, May 23rd; the City of Blue Spring's 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.

Medical Supply Chain, Inc. believes this arrangement will result in a net gain in revenue for GE and GE's Capital services was our first choice for the commercial mortgage when our area bankers advised us the building and the property at 6.2 million dollars was substantially less than its market value of 7.5 million dollars, but would require a commercial lender. Medical Supply Chain, Inc. has no existing debt and a valuation of thirty two million dollars. See attachment 1.

GE Capital or its underwriter would need to provide Medical Supply Chain, Inc. a twenty-year mortgage at 5.4% on the full purchase price of 6.4 million dollars, with a moratorium on the first full year of mortgage payments. The City of Blue Springs would be paid the balance of lease payments for the land (\$800,000.00) or in the alternative, the mortgage will include an escrow account to complete the lease and purchase of the land on its original terms. GE Capital can provide or designate the closing agent and would be required to provide 5.4 million dollars to Cherokee South, L.L.C. and your division's check for the remainder of the lease payable to Medical Supply Chain, Inc. along with a bill of sale for the buildings furniture and equipment. This closing would need to be completed by June 15th, 2003. Please contact us at your receipt of this offer and provide us a contact person for GE Capital or its mortgage agent.

Bret D. Landrith

B. Oral Acceptance Affirming Meeting of the Minds

56. The afternoon of May 15th, 2003 Mr. FRICKIE responded, leaving a taped voicemail message and stating he

had spoke with the "business leaders" at GE corporate and that they will accept Medical Supply's proposal (Exb. 3):

May 15th, 2003-George FRICKIE "Bret, George FRICKIE, ah.... I know I sent you an email saying that my counsel is out ah...and I followed up with another email but I spoke to the business leaders and we will accept that transaction ah... let's start the paper work ah... if you want to do some drafting of lease termination or if you would like us to do that, give me a holler 203-431-4452."

C. Verification, A Writing Meeting Statute of Frauds

57. The second e-mail Mr. FRICKIE referenced on the phone conversation explicitly stated that GE would accept Medical Supply's proposal and initialed the written acceptance in addition to the electronic signature file for the e-mail (Exb. 4):

"From: Fricke, George (CORP) To: Bret Landrith
Cc: Newell, Andrew (TRANS) ; Payne, Robert J (TRANS) ; Davis, Tom L (TRANS) ; Jakaitis, Gary (CORP) Sent: Thursday, May 15, 2003 6:05 PM Subject: RE: Lease buyout GE/Harmon building Bret, I would like to confirm our telephone conversation in that GE will accept your proposal to terminate the existing Lease. Robert Payne GE Counsel will start working on the document. He is out of the office until Monday the 19th. GCF"

D. Conduct Consistent With Contract

58. On or about May 20th, 2003, Medical Supply was given a walk through of the property to inventory the buildings furniture and fixtures and discuss building maintenance and operational procedures.

59. Mr. TOM DAVIS, the property manager for GE TRANSPORTATION in Blue Springs and Mr. JOHN PHILLIPS, the GE TRANSPORTATION building maintenance engineer provided a three-hour walk through in addition to the building maintenance and operational procedures.

60. Mr. Philips also provided the construction blueprints of the building and allowed Mr. LIPARI to make copies.

61. Mr. LIPARI returned the blueprints after copies were made.

62. Mr. DAVIS and Mr. PHILLIPS both stated they were being dismissed from employment with GE since they would no longer be needed.

63. On May 22nd, 2003 Mr. LIPARI spoke to Mr. DOUG MCKAY with GE Capital who had called earlier that week with regard to the mortgage outlined in Medical Supply's proposal.

64. Mr. MCKAY asked that Mr. LIPARI send his company information regarding the mortgage.

65. Mr. LIPARI indicated that he could meet him the following Tuesday because Medical Supply had a loan package for him that included its financials, the proposal that Mr. FRICKIE and GE's business leaders accepted, the letter of intent from the owners Cherokee Properties LLC and Medical

Supply's Dunn & Bradstreet report showing Medical Supply's good credit rating and strong financial condition.

66. Mr. LIPARI gave the information to Mr. McKAY and Mr. McKAY indicated he needed to speak with GE TRANSPORTATION to see how they wanted to handle the terms of the accepted proposal.

E. Conduct Suggesting Repudiation

67. On or about June 2nd, 2003 Mr. LIPARI called Mr. McKAY to see how they were doing on closing and Mr. McKAY indicated that the person he needed to speak with was at corporate and that he needed to speak with him before moving forward.

68. As the June 15th, 2003 closing date approached, medical Supply had not received any definitive closing date so Medical Supply's corporate counsel called and sent Mr. FRICKIE an email stating that a delay in closing would not effect the lease buyout of \$350,000.

69. Medical Supply's counsel later again called Mr. FRICKIE when he received no response and Mr. FRICKIE became extremely angry and hung up the phone.

70. Medical Supply then proceeded to speak with GE's counsel Mrs. KATE O'LEARY to determine if the contract had been repudiated.

71. Supporting statutes and the antitrust basis including damage implications were explained to Ms. O'LEARY.

72. Medical Supply gave GE a deadline of June 10th, 2003 to clarify whether there had been contract repudiation. Mrs. O'LEARY later faxed a letter on June 10th, requesting that Medical Supply not speak to anyone at GE or its affiliates and that any correspondence relating to this matter be directed to her.

73. Medical Supply then emailed a letter stating that if no earnest money were deposited to indicate the contract was not being repudiated, Medical Supply would file its claims on June 16th, 2003 for antitrust and breach of contract.

74. GE repudiated its contract, sacrificing \$15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against GHX, L.L.C. and Neoforma in the market for hospital supplies.

75. Mr. LIPARI filed a lis pendens in the Jackson County Register of Deeds office based on his state law claims in the US District Court. See Exb. 5.

76. The defendant Carpet n' More Inc. STEWART FOSTER placed the building up for sale with actual or imputed knowledge of Medical Supply's claims.

77. The defendants have occupied the building at 1600 NE Coronado preventing plaintiff from receiving the value of his bargain and with actual or imputed knowledge of Medical Supply's claims.

78. In March, 2006 GE CAPITAL funded the purchase of Neoforma, an electronic marketplace competitor of Medical Supply Chain, Inc.

79. Neoforma has never been profitable: "Neoforma's balance sheet shows a cumulative loss of nearly \$739 million dollars as of Sept. 30, 2004." Healthcare Purchasing News March 2005.

80. "In 2005, in accordance with GAAP, Neoforma's net loss and net loss per share were \$35.9 million dollars and \$1.81 per share respectively, an improvement from the \$61.2 million dollar net loss and \$3.17 net loss per share recorded in the prior year." Neoforma, Inc. press release SAN JOSE, CA USA 02/26/2003.

VII. CAUSE OF ACTION FOR BREACH OF CONTRACT

81. Mr. LIPARI hereby re-alleges the averments of fact above and makes the following allegations:

A. Meeting of Minds

82. Mr. FRICKIE, property manager for THE GENERAL ELECTRIC COMPANY who Medical Supply had been told by Mr. FRICKIE and his agents, was the authority for the building

at 1600 NE Coronado Dr. telephoned Medical Supply Chain's Missouri headquarters and placed a message on its answering machine stating he had been instructed by "GE business leaders" to accept Medical Supply's proposal and he was calling to do so.

83. Medical Supply Chain Inc. and Mr. LIPARI reasonably believed Mr. FRICKIE had authority to enter into contract over the building at 1600 NE Coronado Dr. and Mr. LIPARI honored the contract in reliance upon Mr. FRICKIE's statements about his authority and the acceptance of the contract by GE.

B. Contract Was Signed and in Writing

84. Then, Mr. FRICKIE sent a written acceptance via e-mail with his initials added a signature at the end of the email message. No terms were disputed and the acceptance confirmed THE GENERAL ELECTRIC COMPANY would make its subsidiary GE TRANSPORTATION L.L.C. pay \$350,000 for the buy out of the lease and its GE Capital subsidiary provide the \$6.4 million dollar mortgage and closing at 5.4% for twenty years with a first year moratorium on payments.

85. Mr. FRICKIE's signed written acceptance referenced the proposal he had received from Medical Supply earlier that day.

86. This set of documents became a bilateral contract completed with the last act exchanging mutual promises (*D.L. Peoples Group, Inc. v. Hawley*, — So.2d — (2002 WL 63351, Ct. App., Fla., 2002) enforceable for the sale of the lease interest and the benefit of the bargain obtained by Medical Supply under its clear and complete terms meeting the writing requirements of a real estate purchase contract in Missouri and the writing and definiteness requirement of a credit agreement under Missouri statute RMS 432.045.2 .

87. The formation of an enforceable contract in a set of documents created in correspondence is well settled See *Estate of Younge v. Huysmans*, 127 N.H. 461, 465-66, 506 A.2d 282, 284-85 (1965) .

88. Since state law requires a writing, the e-mail acceptance and signature of Mr. FRICKIE is valid and enforceable under 15 USC §7001, the federal Electronic Signatures in Global and National Commerce Act, widely known as "E-SIGN." Section 101(a) of E-SIGN states that:

"(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

C. Mutual Consideration Through Exchange of Promises

89. Medical Supply performed as required, introducing itself to the City of Blue Springs Economic Development.

90. The City of Blue Springs Economic Development Director approved of the use of the building for a national corporate headquarters of a hospital supply chain technology company capable of producing above living wage jobs for the community.

91. The City of Blue Springs Attorney agreed that the proposed use was suitable.

92. Mr. LIPARI committed to purchase the building from its owner in reliance on the contract with GE TRANSPORTATION made open partial performance of the contract by opening the building for a three hour briefing on the operation and maintenance of the building's complex systems.

93. This briefing was made by GE TRANSPORTATION'S Blue Springs property manager and the building's maintenance engineer, both of whom told Medical Supply's Mr. LIPARI that they had been terminated and will be leaving employment with GE TRANSPORTATION the following month because they were no longer needed.

94. GE CAPITAL partially performed as required and made an appointment with Mr. LIPARI in its Overland Park,

Kansas office where Mr. LIPARI took the building's blueprints furnished him by GE TRANSPORTATION, the building's physical description and photo furnished by Mr. FRICKIE of GE corporate and Medical Supply's corporate records for the loan.

95. The GE CAPITAL loan officer Mr. DOUGLAS McKAY discussed the terms and questioned Mr. LIPARI in detail about the US Bank lawsuit. Mr. LIPARI explained why under the threat by US Bank of a malicious USA PATRIOT ACT suspicious activity report, Medical Supply could not risk going to a bank until the lawsuit was settled.

96. Mr. McKAY agreed the USA PATRIOT ACT had no valid relationship to Medical Supply's involvement with US Bank and stated he would obtain the additional requirements GE CAPITAL required from Mr. FRICKIE and GE TRANSPORTATION. Mr. McKAY indicated it could take longer to close but he would check into it.

97. Medical Supply communicated to its stakeholders, business associates, potential customers, and the owners of the building that it had obtained the financing and made commitments in reliance of GE's performance on the contract.

D. Indications of Repudiation

98. No letter similar to that which Mr. McKAY had described was received from GE CAPITAL by the June 15th contract deadline and no notice of rejection of credit has been received.

99. Mr. FRICKIE communicated by phone and e-mail that the GE CAPITAL performance would be at arm's length but since the financing was the benefit bargained for by Medical Supply, this did not contradict the contract.

E. Breach

100. When doubts about GE' intent to honor the contract arose, counsel for GE, GE TRANSPORTATION and GE CAPITAL each refused to confirm the repudiation.

101. The proposal accepted by Mr. FRICKIE on behalf of GE's business leaders contained the executive summary of Medical Supply's business plan, including an explanation of the antitrust lawsuit with US Bancorp, et al and the financial projections for Medical Supply's entry into market.

102. The GE defendants willfully breached their contract with Medical Supply Chain, Inc. and Mr. LIPARI with full knowledge of the benefit of the bargain negotiated upon by Mr. LIPARI and his expectations in reliance upon the contract.

VIII. Prayer for relief

103. Under *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910 (Mo App 1994) GE is responsible for the expectation damages of the forward projections that it had accepted at the time it entered into contract with Medical Supply. Medical Supply is able to prove its projected profits with reasonable certainty.

104. Lost future profits may be used as a method of calculating damage where no other reliable method of valuing the business is available, see *Albrecht v. The Herald Co.*, 452 F.2d 124 at 129 (8th Cir. 1971).

Expectation Damages

105. The monetary relief sought is the contract expectation damages as determined by the business plan summary and forward financials in possession of GE at the time the proposal was accepted and the contract was formed from the GE defendants.

106. Mr. LIPARI seeks the lost profits that can be determined with reasonable certainty that it would have made for the next four years of operations, had it been allowed to enter the market from the GE defendants.

107. In addition to this amount, Mr. LIPARI seeks the equity it would have gained from the purchase of the building, and the cash payment for the remainder of the lease from the GE defendants.

108. The total damages from the GE Defendants sought by the plaintiff Mr. LIPARI is four hundred and fifty million dollars (\$450,000,000).

Specific Performance

109. Mr. LIPARI seeks the lease hold currently occupied by Heartland Financial be vacated.

110. Mr. LIPARI seeks that the court orders CARPET & MORE to make whole Heartland Financial for the loss of their lease and or ownership.

111. The plaintiff seeks any other relief the court believes is just.

Respectfully Submitted,

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

REQUEST FOR JURY

The plaintiff respectfully requests a jury decide all questions of fact.

Samuel K. Lipari

TABLE OF ATTACHMENTS

Exb. 1	Medical Supply Chain, Inc. January 27 th , 2006 Corporate Dissolution by Secretary of State
Exb. 2	May 15 th , 2003 Medical Supply Offer to GE
Exb. 3	Executive Summary & 5 Year Forward Financials
Exb. 4	May 15 th , 2003 Mr. GORGE FRICKIE Voicemail & e- mail Confirming Voicemail Message Accepting Medical Supply Offer
Exb. 5	Jackson County Lis Pendens on 1600 NE Coronado Blue Springs, MO
Appendix 1	<i>Rasse v. GE Capital Small Business Finance Corp.</i> , 2002 MO 808 (MOCA, 2002).
Appendix 2	<i>International Casings Group, Inc., v. Premium Standard Farms, Inc.</i> , 358 F. Supp. 2d 863; 2005 U.S. Dist. LEXIS 3145, February 9, 2005

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI**

Medical Supply CHAIN, INC.,	)	
<i>Plaintiff,</i>	)	
v.	)	Case No. 05-0210-CV-W-ODS
NOVATION, LLC	)	Attorney Lien
NEOFORMA, INC.	)	
ROBERT J. ZOLLARS	)	
VOLUNTEER HOSPITAL ASSOCIATION	)	
CURT NONOMAQUE	)	
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)	
ROBERT J. BAKER	)	
US BANCORP, NA	)	
US BANK	)	
JERRY A. GRUNDHOFFER	)	
ANDREW CESERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY	)	
WATKINS BOULWARE, P.C.	)	
<i>Defendants.</i>	)	

COMPLAINT

Comes now the plaintiff Medical Supply Chain, Inc., through its counsel, Bret D. Landrith and makes the following complaint for federal antitrust and state contract related claims.

Outline of Petition

Jurisdiction

- 1.** Subject Matter Jurisdiction
- 2.** Personal Jurisdiction
- 3.** Venue
- 4.** Governing Law

Facts

- 1.** Parties
 - a.** Plaintiff
 - b.** Defendants
 - c.** Coconspirators Not Named As Defendants In This Action
- 2.** The Relative Markets
 - a.** The Nationwide Hospital Supply Market
 - b.** The Nationwide e-commerce Hospital Supply Market
 - c.** The Upstream Healthcare technology Company Capitalization Nationwide Market
- 3.** Anticompetitive Activity in the Subject Relevant Markets
 - a.** The Harm To Buyers In The Market
 - i.** The Harm to Hospitals
 - ii.** The Harm To Healthcare Services Consumers
 - iii.** Loss of Healthcare Insurance
 - iv.** The Injury To Healthcare Insurance Plans
 - v.** The Loss Of Life From Decreased Access To Healthcare
 - b.** The Harm to Medical Supply
 - c.** The Need For Private Antitrust Enforcement
 - i.** The Limited Resources Of The US Department Of Justice

ii. The Deaths of The FCA Attorneys

4. Background Procedural History
 - a. Procedural History
 - b. The Legal Basis For Now Ripe Monetary Damages Submitted to The Tenth Circuit
5. The Hospital Group Purchasing Enterprise To Artificially Inflate Prices
 - a. The defendants' hospital group purchasing enterprise
6. The Origin of Technology That Made GPO's Obsolete And Eliminated Two Distribution Levels
7. The Defendants Foreclosure of Competition In The Market For Hospital Supplies Through Exclusionary Contracts and Loyalty Agreements That Have The Same Exclusionary Effect.
8. The Monopolization Of The Hospital Supply Industry By The Defendants In Conspiracies And Combinations With Premier, GHX, LLC and Their Predecessor Corporations

Events

1. Andrew S. Duff And Piper Jaffray's Concerted Refusal To Deal.
2. US Bank's Concerted Refusal To Deal.
3. US Bancorp, Andrew Cesere and Jerry Grundhoffer's Concerted Refusal To Deal.
4. The Defendants' Acceptance of Liability For Medical Supply's Business Plan Damages.
5. The Defendants' Theft of Medical Supply's Intellectual Property.
6. The Effects of the Plan To Financially Destroy Medical Supply.
7. US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer Realize Because Of The Prospective Injunctive Relief Action Their Antitrust Liability To Medical Supply And The Requirement At Law That They Divest Piper Jaffray At A \$750 Million Dollar Loss.
8. US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer Realize Because Of The Prospective Injunctive Relief Action Their Antitrust Liability To Medical Supply And The Requirement At Law That They Divest Piper Jaffray At A \$750 Million Dollar Loss.
9. Piper Jaffray And Andrew S. Duff Realize Because Of The Prospective Injunctive Relief Action Their Antitrust Liability To Medical Supply And The Requirement At Law That They Divest Their Healthcare Venture Fund, Losing \$225,000,000.00 (255 million dollars) In Assets.
10. Medical Supply Informs Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma that it has been unsuccessful in obtaining prospective injunctive and declaratory relief against their coconspirators Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer and that the conspirators are jointly and severally liable for the damages Medical Supply sought to avoid.
11. Medical Supply is granted a Rehearing in Tenth Circuit. That Afternoon UHC and VHA Realize Because of Medical Supply's Demand Letter That They Are Required At Law To Divest Neoforma and Both UHC and VHA Make an Emergency Announcement of An Agreement to Dispose of Neoforma at a \$150,000,000.00 (150 million dollar) loss.
12. Novation, LLC realizes Because of Medical Supply's Demand Letter That Its Relationship With Neoforma and Its Long Term Anticompetitive Contract Are Illegal Antitrust prohibited Conduct Without Redeeming Value and Announces It Will Review Neoforma's Value Creation.
13. Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma decide to continue to rely on Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer's corrupt scheme to influence the court.
14. Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma's Utilization of Ongoing Sham Petitioning By Shughart, Thomson & Kilroy, Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer To Deprive Medical Supply of Counsel.
15. The Impending Threat Of Monopolization of the Market For Hospital Supplies In E-Commerce.

Summary Of Claims

Claims For Relief

COUNT I

Damages For Combination And Conspiracy

In Restraint Of Trade Or Commerce

(15 U.S.C. §§ 1,15)

Group Boycott Under Sherman 1

Allocation of Customers Under Sherman 1

Horizontal Price Restraint Under Sherman 1
Vertical Price Restraint Under Sherman 1
Tying Agreements Under Sherman 1

COUNT II
Injunctive Relief For Combination And Conspiracy
In Restraint Of Trade Or Commerce
(15 U.S.C. §§ 1,26)

COUNT III
Damages For Monopolization
(15 U.S.C. §§ 2,15)
Threat of USA PATRIOT Act Suspicious Activity Reporting
Violation of §802 of The USA PATRIOT Act
The Filing of a Malicious USA PATRIOT Act Suspicious Activity Report (SAR)
Harassing Medical Supply and its Agents Outside of This Action
Unilateral Refusal To Deal

COUNT IV
Injunctive Relief For Monopolization
(15 U.S.C. §§ 2,26)

COUNT V
Damages For Interlocking Directors
(15 U.S.C. § 19)

COUNT VI
Damages For Combination And Conspiracy
In Restraint Of Trade Or Commerce
(26 MO. § 416.031(1), § 416.121(1),(1))

COUNT VII
Injunctive Relief For Combination And Conspiracy
In Restraint Of Trade Or Commerce
(26 MO. § 416.031(1), § 416.071(1), (2), § 416.121(1)(1))

COUNT VIII
Damages For Monopolization
(26 MO. § 416.031(2), § 416.121(1),(1))

COUNT IX
Injunctive Relief For Monopolization
(26 MO. § 416.031(2), § 416.071(1), (2), § 416.121(1),(2))

COUNT X
Damages For Tortuous Interference With
Contract Or Business Expectancy

COUNT XI
Damages For Breach Of Contract

COUNT XII
Damages For Breach Of Fiduciary Duty

COUNT XIII
Damages For Fraud And Deceit

COUNT XIV
Damages For Prima Facie Tort

COUNT XV
Damages For Racketeering
Influenced Corrupt Organization (RICO) Conduct
(18 U.S.C. § 1962(c), 18 U.S.C. § 1962(d))

COUNT XVI
DAMAGES FOR MALICIOUS FILING OF A SUSPICIOUS ACTIVITY
REPORT (SAR) UNDER THE USA PATRIOT ACT
(Pub. L. No. 107-56 (2001), 18 U.S.C. § 1030 (e), 31 U.S.C. § 5318 (g)(3))

Tolling Of Applicable Statutes Of Limitations
Prayer For Relief

Conclusion
Demand For Trial By Jury
Designation Of Place Of Trial

JURISDICTION

1. **Subject Matter Jurisdiction.** This complaint is filed and this action instituted under Sections 4 and 15 of the Clayton Act (15 U.S.C. SS 14 and 26) to recover damages for injuries to plaintiff's business and property by reason of the violations by the defendants of Sections 1 and 2 of the Sherman Act (15 U.S.C. SS 1, 2), and to enjoin the defendants from continuing to commit such violations in the future and the Declaratory Judgment Act, 28 U.S.C. SS 2201 and 2202. Jurisdiction of this Court is proper under 15 U.S.C. SS 15 and 26, 28 U.S.C. SS 1331, 1332 and 1337, and the doctrine of pendent jurisdiction. The amount in controversy exceeds \$75,000.00, exclusive of interest and costs.
2. The business and acts of the defendants described herein are conducted in, and affect commerce between and among, the various states of the United States and between the United States and foreign nations and their territories. The unlawful acts of the defendants alleged hereinafter have restrained interstate trade and commerce.
3. This complaint includes claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 196, et seq., a federal question with an amount in controversy exceeding \$75,000.00, exclusive of interest and costs.
4. This complaint includes claims under The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (The USA PATRIOT Act) Pub. L. No. 107-56 (2001), a federal question with an amount in controversy exceeding \$75,000.00, exclusive of interest and costs.
5. In connection with the acts alleged in this complaint, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications and the facilities of interstate commercial carriers.
6. This complaint includes claims based on the existence of a written contract under Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq. involving a contract made in interstate commerce and affecting commerce among several states with an amount in controversy exceeding \$75,000.00, exclusive of interest and costs.

7. **Personal Jurisdiction.** The court has personal jurisdiction over the parties who are in the territorial limits of the United States and who have sufficient contacts with the State of Missouri.
8. **Venue.** Many of the acts charged herein, occurred in substantial part in the District for Western Missouri and the District of Kansas. Defendants conducted other substantial business within this District and the plaintiff's corporate headquarters are within this district.
9. **Governing Law.** This court has jurisdiction over supplemental state law based claims arising from the common law of trusts, contracts and fiduciary duty under 28 U.S.C. § 1367. The Laws of the State of Missouri apply to the plaintiff's state law claims and govern their resolution.

FACTS

1. PARTIES

a. Plaintiff

10. Plaintiff Medical Supply Chain, Inc. (Medical Supply), is a Missouri Corporation with corporate headquarters at 1300 NW Jefferson Court, Blue Springs, MO 64015.

b. Defendants

11. Defendant Novation LLC. (Novation) is a company headquartered at 125 East John Carpenter Frwy Suite 1400 Irving, TX 75062.
12. Defendant Neoforma Inc. (Neoforma) NYSE Symbol NEOF, 3061 Zanker Road, San Jose, California 95134.
13. Defendant Robert J. Zollars is CEO of Neoforma, 3061 Zanker Road, San Jose, California 95134.
14. Defendant Volunteer Hospital Association of America, Inc. (VHA Inc.) is a corporation headquartered at 220 E. Las Colinas Blvd., Irving, TX 75039.
15. Curt Nonomaque, President and CEO, VHA Inc., 220 E. Las Colinas Blvd., Irving, TX 75039.
16. Defendant University Healthsystem Consortium (UHC) is a company headquartered at 2001 Spring Road, Suite 700 Oak Brook, Illinois 60523-1890.
17. Robert J. Baker, President and CEO of UHC, 2001 Spring Road, Suite 700 Oak Brook, Illinois 60523.
18. Defendant US Bancorp, NA (US Bancorp) NYSE symbol USB is a bank holding corporation headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402.

19. Defendant US Bank, NA is a Delaware Corporation organized under the National Bank Act, 12 U.S.C. §§ 21-216d, headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402.
20. Defendant Jerry A. Grundhoffer, the President and Chief Executive Officer of US Bancorp. His offices are at 800 Nicollet Mall, Minneapolis, MN 55402. He is not a citizen of Missouri.
21. Defendant Andrew Cesere is Vice Chairman of US Bancorp trust division. His offices are at 800 Nicollet Mall, Minneapolis, MN 55402. He is not a citizen of Missouri.
22. Defendant Piper Jaffray Companies, (Piper Jaffray) NYSE symbol PJC is a company located at 800 Nicollet Mall, Minneapolis, MN 55402.
23. Defendant Andrew S. Duff, CEO of Piper Jaffray, 800 Nicollet Mall, Minneapolis, MN 55402. He is not a citizen of Missouri.
24. Shughart Thomson & Kilroy Watkins Boulware, P.C., (Shughart, Thomson & Kilroy) is a company located at 120 W. 12TH STE 1600, Kansas City MO 64105
- c. Coconspirators Not Named As Defendants In This Action**
25. Premier, Inc. (Premier) 12225 Camino Real, San Diego, CA 92130.
26. Global Health Exchange LLC (GHX), 11000 Westmoor Circle, Suite 400 Westminster, Colorado 80021.
27. General Electric Company, (GE) NYSE symbol GE, 3135 Easton Turnpike, Fairfield, CT 06828-0001.
28. GE Healthcare, global headquarters, Chalfont St. Giles, United Kingdom, USA headquarters, Technologies: Waukesha, Wisconsin.
29. General Electric Capital Business Asset Funding Corporation, (GE Capital), 3135 Easton Turnpike, Fairfield, CT 06828-0001.
30. GE Transportation Systems Global Signaling, L.L.C. (GE Transportation) 3135 Easton Turnpike, Fairfield, CT 06828-0001.
31. Jeffrey R. Immelt, CEO of GE and former president of (GE Healthcare) 3135 Easton Turnpike, Fairfield, CT 06828-0001.
32. Robert Betz, president of Robert Betz Associates, Inc.

2. THE RELATIVE MARKETS

a. The Nationwide Hospital Supply Market

33. The market for hospital supplies includes all products used in the provision of healthcare services at doctor's offices, clinics, nursing homes, hospitals and health systems made up of multiple hospitals and outpatient facilities, nationwide.

34. Hospital supplies include everything from consumable bandages, dressings and pharmaceuticals to facility supplies including linens, instruments, test equipment, cleaning supplies, food and permanently installed laboratory equipment and physical plant machinery.

35. Currently, the market for hospital supplies is 1.8 trillion dollars in expenditures annually.

36. Two hospital group purchasing organizations, Novation, Inc. and Premier Inc. which originated as cooperative buyer's agents for hospitals currently control which products are available to 70% of the nation's hospitals.

b. The Nationwide e-commerce Hospital Supply Market

37. The e-commerce market includes all the products in the range of hospital supplies described above when they are selected from on line catalogs or purchased through Internet and World Wide Web communications from an electronic marketplace.

38. The e-commerce market also includes supply chain management software used in healthcare to enhance the advantages of web based suppliers over traditionally distributed goods which adds value in the form of obtaining product information, aggregating comparable or substitutable products to maximize competition in pricing, bidding, ordering, shipping, fulfillment and logistics.

39. The use of artificial intelligence software by electronic marketplaces radically increases the efficiency and decreases the costs of products available through traditional distribution systems.

40. Originally there were over a hundred e-commerce electronic marketplaces for hospital supplies. Now there are just two, Neoforma, Inc. the web based supplier controlled by Novation and GHX, LLC a web based supplier controlled by Premier and other members in a joint venture of formerly competing hospital manufacturers and suppliers.

41. Medical Supply and its founder Samuel Lipari created the concept of an electronic marketplace for hospital supplies based on an insurance clearing house model in 1995 but has been prevented from entering the market independent from the control of Novation and Premier.

c. The Upstream Healthcare technology Company Capitalization Nationwide Market

42. The ability to finance research and development and to create working technological solutions is commonly shouldered by the entrepreneur, his family and friends until the technology can be demonstrated and its utility can be quantified.

43. Healthcare technology companies and supply chain management companies (throughout this complaint, supply chain management companies will refer to companies with software applications that manage hospital supplies in the healthcare industry) create products that can be used throughout the nation, meeting a universal demand and necessitate capitalization to reach that market quickly as opposed to attempting to grow from region to region as a bricks and mortar retail store or services industry business might. Failure of the healthcare technology or supply chain management company to meet the demand for its product results in competitors substituting other technological solutions and meeting the demand before the entrepreneur can pay the cost of his research and development or repay the sources of capital used in entering the market.

44. US Bancorp NA and Piper Jaffray concentrated 70% of their investment in healthcare and created a 150 million dollar healthcare technology venture fund to capitalize healthcare technology and supply chain management companies.

45. US Bancorp Piper Jaffray was the leading capital source for healthcare technology companies and for supply chain management software that could be adapted to healthcare.

46. US Bancorp Piper Jaffray also provided research to institutional investors and published coverage of publicly traded healthcare technology companies that gave it the power to dominate the early stage capitalization of privately owned healthcare technology companies and whether the company would be selected for an initial public offering, the largest capitalization event for an entrepreneur and whether a market would be made or demand exist for the shares of the offering once they were marketed.

3. ANTICOMPETITIVE ACTIVITY IN THE SUBJECT RELEVANT MARKETS

47. “Most health care costs are covered by third parties. And therefore, the actual user of health care is not the purchaser of health care. And there's no market forces involved with health care.” President George W. Bush, Second Presidential Debate, October 14, 2004

48. 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

49. 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]

50. She was called back on July 16, 2003 because of the Judiciary’s Antitrust Subcommittee concerns that GPO monopoly power and unethical conduct is still starving their healthcare technology competitors of capitalization.

51. US Bancorp Piper Jaffray was fined for acts of extortion against a healthcare technology company attempting to capitalize itself with another investment bank 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.”

52. In August of 2000 Piper Jaffray proffered positive research to ThermaSense, a medical technology it was interested in providing investment-banking services to. Piper Jaffray won the business of the firm, and \$3.8 million in investment banking fees. Such exchanges of positive research for investment banking business constitute “conflict of interest” by fair dealing standards.

53. Premier helped to set up American Pharmaceutical Partners in 1996, then steered hospital business to it. For this help and an initial \$100 investment, Premier received American Pharmaceutical stock that was worth \$46 million when the company went public in 2001. Premier also receives a percentage of the money that hospitals spend buying American Pharmaceutical's drugs. William J. Nydam, once an executive vice president of Premier, received stock options as an American Pharmaceutical director. He has since left

Premier, but his options were worth \$1.2 million at the stock's initial offering price. Palmer Ford, who worked for Premier's venture capital unit, received an undisclosed number of American Pharmaceutical options for consulting work after he had left the buying group. Mary Williams Walsh, "When a Buyer for Hospitals Has a Stake in Drugs It Buys", NY Times March 26, 2002.

54. Two Medical Supply legal actions to enjoin the Defendants from causing the breach of contracts to capitalize Medical Supply's entry to market 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.

55. 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."

56. 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]

57. The US Attorney that obtained the criminal subpoenas was found dead in her home the day before the third senate subcommittee hearing in healthcare group purchasing organizations that took place September 14, 2004.

58. The claim that hospital group purchasing organizations save hospitals money or have ever saved money has been shown to be without a rational basis. See Defining and Measuring Product-Based Cost Savings in the Health Care Supply Chain by Lynn James Everard, (February, 2005): "An overwhelming 94 percent of respondents believe that their GPO saves them money," Everard reports. "Yet only 29% said they actually knew how much money their GPO had saved them – and 80 percent of those said they knew how much, because their GPO told them."

a. The Harm To Buyers In The Market

i. The Harm to Hospitals, Nursing Homes and Home Healthcare Services:

59. The combinations and or conspiracies of the defendants' Group Purchasing Enterprise produced adverse, anti-competitive effects by preventing the efficiency of competitive electronic commerce in the relevant United States hospital supply market resulting in excess charges from artificially inflated costs averaging 20% to 40% and in some goods excess charges of 50%, reducing the bottom line profit and loss statements of U.S. hospitals by an average of 5% and forcing over 2000 North American hospitals to operate at an unsustainable loss, endangering the nation's access to healthcare, increasing the cost of care and health insurance and forcing the closing and merging of treatment centers, resulting in needless suffering and death.

The Monopoly's artificial inflation of Hospital Supply Costs (Excluding Prescription Drugs):

60. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospitals to be overcharged \$30,000,000,000.00 (thirty billion dollars) in 2002.

61. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospitals to be overcharged \$32,200,000,000.00 (thirty two billion, two hundred million dollars) in 2003.

62. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospitals to be overcharged \$34,500,000,000.00 (thirty four billion, five hundred million dollars) in 2004.

The Monopoly's artificial inflation of Nursing Home and Home Health Costs (Excluding Prescription Drugs):

63. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused nursing home and home health services to be overcharged \$8,200,000,000.00 (eight billion, two hundred million dollars) in 2002.

64. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused nursing home and home health services to be overcharged \$9,400,000,000.00 (nine billion, four hundred million dollars) in 2003.

65. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused nursing home and home health services to be overcharged \$10,000,000,000.00 (ten billion dollars) in 2004.

The Monopoly's artificial inflation of Prescription Drugs:

66. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospital supply consumers to be overcharged \$40,000,000,000.00 (forty billion dollars) in 2002.

67. The defendants in combinations or conspiracies with hospital suppliers, distributors and manufacturers caused hospital supply consumers to be overcharged \$45,000,000,000.00 (forty five billion dollars) in 2003.

68. The defendants in combinations or conspiracies with hospital suppliers, distributors and manufacturers caused hospital supply consumers to be overcharged \$50,100,000,000.00 (fifty billion, one hundred million dollars) in 2004.

ii. The Harm To Healthcare Services Consumers

69. A study released February 2, 2005 stated about half of bankruptcies filed in 2001 were because of medical bills, according to a study published Wednesday on the Health Affairs Web site, the Chicago Tribune reports (Rubin, Chicago Tribune, 2/2). For the study, researchers from Harvard Medical School and Harvard Law School surveyed 1,771 U.S. residents who filed for bankruptcy in 2001 and interviewed 931 of them (Abelson, New York Times, 2/2).

70. People interviewed had cases involving injury or illness, unpaid medical bills of more than \$1,000 in the two years prior to filing for bankruptcy, loss of two weeks of work because of illness or injury or

mortgaging of a home to pay medical bills, the Los Angeles Times reports (Dickerson, Los Angeles Times, 2/2).

71. According to the study, 46.2% of people reporting bankruptcy in 2001 cited illness and medical bills as the cause the rate rose to 54.5% when births, deaths and gambling addictions were considered as factors, the AP/San Jose Mercury News reports (Jewell, AP/San Jose Mercury News, 2/2). The number of bankruptcies filed in the United States tripled between 1980 and 2001, to nearly 1.5 million couples and individuals. The number of medical-related bankruptcies increased twenty-threefold during that period, the study says (Los Angeles Times, 2/2).

iii. Loss of Healthcare Insurance

72. Approximately 81.8 million Americans -- one out of three people under 65 years of age -- were uninsured at some point of time during 2002-2003, according to a report released June 16, 2004 by the Health Consumer Organization Families USA.

73. The report, based mainly on Census Bureau data, showed that most of these uninsured individuals lacked coverage for lengthy periods of time: Almost two-thirds (65.3 percent) were uninsured for six months or more; and over half (50.6 percent) were uninsured for at least nine months.

74. Four out of five of the uninsured were in working families, according to the report. Of those working families, the report found that significant portions of the middle class were uninsured. For example, among people with incomes between 300 and 400 percent of the federal poverty level (between \$55,980 and \$74,640 in annual income for a family of four in 2003), more than one out of four were uninsured over the past two years.

75. Governor Sebelius indicated the stakes involved in being uninsured: "Tens of millions of Americans -- and hundreds of thousands of Kansans -- are regularly risking their health and financial security because the cost of health insurance is too often out of their reach," she said.

iv. The Injury To Healthcare Insurance Plans

Medicare

76. In 2002, the defendants in combination and or conspiracies with hospital suppliers, distributors and manufacturers caused Medicare to be overcharged for hospital care \$13,920,000,000.00 (thirteen billion, nine hundred twenty million dollars), caused Medicare to be overcharged for nursing home and

home health care \$3,845,000,000.00 (three billion, eight hundred forty five million dollars) and caused Medicare to be overcharged for prescription drugs \$5,663,000,000.00 (five billion, six hundred sixty three million dollars).

77. In 2003, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused Medicare to be overcharged for hospital care \$14,832,000,000.00 (fourteen billion, eight hundred thirty two million dollars), caused Medicare to be overcharged for nursing home and home health care \$4,052,000,000.00 (four billion fifty two million) and caused Medicare to be overcharged for prescription drugs \$6,272,000,000.00 (six billion, two hundred seventy two million dollars).

78. In 2004, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused Medicare to be overcharged for hospital care \$15,864,000,000.00 (fifteen billion, eight hundred sixty four million dollars), caused Medicare to be overcharged for nursing home and home health care \$4,316,000,000.00 (four billion, three hundred sixteen million dollars) and caused Medicaid to be overcharged for prescription drugs \$7,000,000,000.00 (seven billion dollars).

Private Insurance

79. In 2002, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused Private Insurers to be overcharged for hospital care \$12,710,000,000.00 (twelve billion seven hundred ten million dollars), caused Private Insurers to be overcharged for nursing home and home health care \$3,488,000,000.00 (three billion, four hundred eighty eight million dollars) and caused Private Insurers to be overcharged for prescription drugs \$30,742,000,000.00 (thirty billion seven hundred forty two million dollars).

80. In 2003, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused private insurers to be overcharged for hospital care \$13,542,000,000.00 (thirteen billion, five hundred forty two million dollars), caused private insurers to be overcharged for nursing home and home health care \$3,675,000,000.00 (three billion, six hundred seventy five million dollars) and caused private insurers to be overcharged for prescription drugs \$34,048,000,000.00 (thirty four billion, forty eight million dollars)

81. In 2004, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused private insurers to be overcharged for hospital care \$13,539,000,000.00 (thirteen

billion five hundred thirty nine million dollars), caused private insurers to be overcharged for nursing home and home health care \$3,914,000,000.00 (three billion, nine hundred fourteen million dollars) and caused private insurers to be overcharged for prescription drugs \$38,095,000,000.00 (thirty eight billion ninety five million dollars).

Medicaid

82. In 2002, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused Medicaid to be overcharged for hospital care \$3,631,000,000.00 (three billion, six hundred thirty one million dollars), caused Medicaid to be overcharged for nursing home and home health care \$1,699,000,000.00 (one billion, six hundred ninety nine million dollars) and caused Medicaid to be overcharged for prescription drugs \$4,045,000,000.00 (four billion forty five million dollars).

83. In 2003, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused private Medicaid to be overcharged for hospital care \$3,869,000,000.00 (three billion, eight hundred sixty nine million dollars), caused Medicaid to be overcharged for nursing home and home health care \$1,790,000,000.00 (one billion, seven hundred ninety million dollars) and caused Medicaid to be overcharged for prescription drugs \$4,480,000,000.00 (four billion, four hundred eighty million dollars).

84. In 2004, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused Medicaid to be overcharged for hospital care \$4,138,000,000.00 (four billion, one hundred thirty eight million dollars), caused Medicaid to be overcharged for nursing home and home health care \$1,907,000,000.00 (one billion, nine hundred seven million dollars) and caused Medicaid to be overcharged for prescription drugs \$5,000,000,000.00 (five billion dollars).

85. On January 26, 2005, Governor Blunt of Missouri was forced to propose removing thousands of people from Medicaid insurance. The state-federal program provides health care for the disabled, the blind, some elderly people and low-income families with children. Also cut would be adults who are considered medically unemployable but haven't yet qualified as disabled. Medically unemployable persons often rely on the special coverage while they await federal decisions on whether they are disabled. The governor would eliminate podiatry, dental care and rehabilitation services for adults. Also, some services would be subject to small co-payments and deductibles. In all, the state's need to make Medicaid cuts would save

\$626 million in state and federal funds. But even with the cuts, Blunt said, the \$5.3 billion program would consume 26 percent of the total state budget.

v. The Loss Of Life From Decreased Access To Healthcare

86. The rise in healthcare costs of which hospital supply inflation is a significant contributing factor led to a reported 18,000 deaths a year in the USA resulting from 40 million Americans being uninsured in 2001. See “Study Blames 18,000 deaths in USA on Lack of Insurance”, USA Today, May 23, 2002.

87. In 2002, the number of uninsured increased to 43.6 million Americans and without decreases in the mortality rates of untreated illnesses or observed improvements in public health systems, the number of deaths resulting from the lack of affordable health insurance was 19,962.

88. The following year, 2003, the number of uninsured Americans increased to 45 million, resulting in an expected 20,603 deaths resulting from the lack of affordable health insurance.

89. During the period of time in which Medical Supply has been foreclosed from competing in the market for healthcare supplies as a result of the actions of the defendants, at least 41, 206 Americans have died as a result of the increasing cost of hospitalization and medical care of which artificially inflated hospital supply costs are a significant contributing factor.

vi. The Harm to Medical Supply

90. The actions taken by the Defendants have resulted in dramatic losses to Medical Supply its stakeholders, associates, suppliers and customers. Under traditional Clayton Antitrust Act damages calculations, the Defendants have caused substantial short and long-term losses that are not recoverable due to Medical Supply’s injury and delay in obtaining banking services. Medical Supply has directly suffered \$2,901,600 in damages the 1st year, \$27,366,576 in damages the 2nd year, \$74,798,940 in damages the 3rd year plus forward financial damages in the fourth year of \$140,443,9800 and \$223,488,060 in the fifth year as a combined total of \$468,099,156 and trebled are \$1,404,297,468.

91. As a direct result of Medical Supply’s injury, its associates also are damaged due to the actions of the Defendants. Losses include an average of 40-60 hours per week participation in Medical Supply’s evaluation and hiring practices; in addition to due diligence and market evaluation activities. Losses of revenue for associates are \$93,085,831 trebled are \$279,257,493.

92. As a direct result of Medical Supply's injury, its consultants and suppliers have been harmed by Medical Supply's inability to fulfill success agreements and service contracts due to the actions of the Defendants. Medical Supply consultants and suppliers have performed several thousand hours in services that are contractually due and Medical Supply is unable to perform as a result of the actions of the Defendants. These consultants and suppliers depend on Medical Supply to meet its obligations and the actions of the Defendants are preventing Medical Supply from doing so.

93. The direct result of Medical Supply injury and inability to perform its services to customers are the lost savings and additional revenue Medical Supply generates for its customers through its services. Losses to Medical Supply customers are directly due to the actions of the Defendants and are 20% of the total supplies health systems currently pay out annually or \$4,425,655,560 trebled are \$13,276,966,680.

94. Medical Supply's customers are healthcare systems consisting of hospital groups. The actions of the Defendants to preserve an anticompetitive marketplace in healthcare supplies keep in jeopardy over 2000 of the nation's 5,700 hospitals. The resulting closings of some or most of these hospitals due to unsustainable supply costs will significantly harm public access to healthcare, increasing loss of life and unnecessary injury.

b. The Need For Private Antitrust Enforcement

95. At the close of the US Senate Judiciary Committee's Antitrust Subcommittee's hearing entitled "Hospital Group Purchasing: How to Maintain Innovation and Cost Savings" on Tuesday, September 14, 2004, the subcommittee's chair suggested that the 1.8 trillion dollar market's anti-competitive behavior might be better corrected with private antitrust litigation than with new legislation.

i. The Limited Resources Of The US Department Of Justice

96. Two US Attorneys that appeared connected to the criminal investigation of Novation, LLC have died and three more in the Ft Worth office of the US Department of Justice with antitrust expertise have been dismissed.

97. The Ft. Worth US Attorney's office has been at the epicenter of where civil antitrust actions by manufacturers foreclosed from group purchasing organization distribution systems have been litigated

and is believed to have been the center of effort behind the government's criminal investigation of hospital supply relationships.

98. On October 18, 2004 Leonard Senerote, A former U.S. Army Special Forces officer who was an expert in complex securities cases and an antitrust trial attorney, Michael Uhl and Michael Snipes, veteran prosecutors with expertise in white collar fraud and corruption were announced as separating from the Ft. Worth Office of the US Attorney.

ii. The Deaths of The FCA Attorneys

99. The Dallas Morning News described the office as already reeling from the unexpected deaths of criminal chief Shannon Ross [the source of the widespread criminal inquiry into medical supplies and False Claims Act violations against Medicare] and civil and False Claims Act litigator Thelma Louise Quince Colbert. Ms. Ross, who had been feeling ill, was found September in her home. Ms. Colbert accidentally drowned a month earlier in July.

100. Medical Supply does not believe there is currently an active criminal investigation of the supplier side of hospital Medicare false claims.

4. BACKGROUND

a. Procedural History

Medical Supply filed its first action for injunctive and declaratory relief in the U.S. District Court for the District of Kansas, *Medical Supply Chain, Inc. v. US Bancorp, NA et al* KS. Dist. Case No.: 02-2539

101. Medical Supply sought 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.

102. Medical Supply's cause was controversial because it was an action to seek an injunction against breaking a contract to provide escrow accounts in furtherance of a boycott by 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. Also identified in the complaint

was Novation's captive e-commerce marketplace Neoforma, Inc. competing with Medical Supply on the web.

103. Medical Supply sought an interlocutory appeal on the denial of injunctive relief without a memorandum and order or findings of law and fact *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 02-3443. Medical Supply also sought interim pre-hearing relief in the Tenth Circuit. The pre-hearing relief was denied and the interlocutory appeal was dismissed as moot.

104. Medical Supply appealed the dismissal of its injunctive and declaratory relief action *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 03-3342. The Tenth Circuit upheld the trial court's dismissal without findings of law or fact and made a show cause order why Medical Supply and its counsel should not be sanctioned for a frivolous appeal.

105. Medical Supply answered the show cause order asserting the trial court had applied the incorrect legal standard and had misstated the USA PATRIOT Act. The Tenth Circuit found that Medical Supply had pled a conspiracy that included a separate legal entity, contradicting the trial court's ruling and the Tenth Circuit panel found that Medical Supply was correct in the existence of private rights of action under the USA PATRIOT Act. However, instead of correcting its ruling and ordering that Medical Supply was entitled to injunctive and declaratory relief, the Tenth Circuit panel ordered that Medical Supply's counsel receive its most serious sanction for a frivolous appeal.

106. Medical Supply sought en banc rehearing of its appeal, giving notice that the panel's ruling had no preclusive effect for the parties regarding the future action for monetary damages in the Western District of Missouri. Neither the court nor opposing counsel contradicted Medical Supply's ripeness analysis. The court declined to rehear the case en banc and Medical Supply is now seeking Supreme Court review.

b. The Legal Basis For Now Ripe Monetary Damages Submitted to The Tenth Circuit

107. 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: "...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).

108. 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 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 completes the lack of preclusive effect of the appeal court decision.

5. THE HOSPITAL GROUP PURCHASING ENTERPRISE TO ARTIFICIALLY INFLATE PRICES

109. During October 22 thru October 24 in 1979, a little known hospital logistics industry organization called the Group Purchasing Group held a conference in Vacation Village, San Diego California. At that event a seven page document was circulated among representatives of cooperative hospital purchasing groups which originated as buying agents for hospitals that became the blueprint for nationwide fraudulent price collusion in hospital supplies.

110. The recipients of the document were officials in Sun Health, American Medical Systems, HSCA, Cardinal and other precursors to today’s two dominant hospital group purchasing organizations (GPO’s), Novation and Premier. Eventually the document recipients would become the key officials in the later group purchasing organizations Amerinet, Novation and Premier and in oligarch hospital supply manufacturers including Johnson & Johnson and Baxter.

111. The document itself was presented as the perfect “sales story.” Ways to communicate to hospitals that group purchasing cooperatives were creating value for their members. However, the document was

instead employed as a blueprint for fraud. The membership “value” for hospitals being communicated was a deception about the cost of commodities sold through the cooperative.

112. The fraudulent scheme described a method for creating a false baseline for commodity pricing from an average of the purchase price of units of goods by kind taken from a broad sample of the goods as purchased in many hospitals in a variety of locations and in varying quantities. The data would then be used to create a manipulated average well above an easily obtainable volume discount.

113. The victim prospective hospital would also be subjected to the frightening prospects of price increases and shortages that would certainly befall hospitals that did not join the security of the purchasing cooperative.

114. The cooperative would then negotiate a “discounted” price below the false baseline and declare the difference as the “savings” to the hospital. The cooperatives derived the “savings” from manipulated baseline costs of goods distributed and therefore had to disconnect the savings expectations of their member hospitals from an easily comparable commodity price. This “savings” was delivered to the member hospitals in the form of periodic, usually quarterly refunds, rebates and dividends.

115. The secret document described the upward manipulation of their customers’ expected costs as price “inflation.” The scheme included steadily increasing the baselines used to assist members and prospective members to compare the cooperative’s prices. This deception was described as “inflation based savings.”

116. The cooperatives exploited the foreseeable effect of this delayed repayment to hospitals. Hospitals billed third party payers including the government’s healthcare insurance funds Medicare, Medicaid and Champus the cooperative contract price or even the artificially inflated baseline price instead of the actual cost to the hospital once the delayed rebate was subtracted. The scheme depended upon the hospitals certifying to Medicare that the bills being presented for patient care conformed to the government’s accounting safeguards, including the Medicare Antikickback act.

117. To co-opt administrative officials in hospitals, hospital groups and independent distribution networks, the cooperatives and later the dominant GPO’s would encourage and facilitate maintaining two sets of books by issuing two different reports. One for the chief executive of the hospital or hospital group

that fully detailed the various refunds, rebates, dividends, cash and cash equivalent payments and another for the materials director showing the units purchased at the cooperative price.

118. The attendees that employed the perfect sales story were able to insert their cooperative between the hospital and its suppliers and extract a membership fee. The precursor group purchasing organizations effectively sold “rebates” rather than price efficiency to their members. The business model was profitable for the cooperatives but had the potential of becoming extremely profitable if competition could be consolidated and the increased control of hospital supply distribution could be used to extract fees from product manufacturers.

119. The firm of Robert Betz Associates was utilized during 1985-86 to obtain a regulatory safe harbor from the Federal Trade Commission and the Department of Justice from the Medicare Antikickback statute to give the appearance of legitimacy to the Vacation Village conference attendees practice of paying periodic refunds, rebates and dividends to member hospitals. Robert Betz was successful and as a direct result of his efforts, Department of Justice False Claims Act prosecutions have never since targeted the GPOs or their supplier cartel members.

120. Once some kickbacks in the form of administrative fees to cooperatives were officially allowed, the original Vacation Village conference attendees were able to use their illegally inflated revenue stream to acquire their law abiding hospital supply competitors and a frenzy of mergers and acquisitions resulted in two dominant group purchasing organizations, Premier and Novation, LLC that control 70% of the national market in hospital supplies.

121. Premier and Novation, LLC are required under the Antikickback safe harbor to disclose administrative fees in excess of 3% that are added to the cost of goods sold through their distribution networks. Premier and Novation, LLC have however expanded the fees charged member hospitals in the price of goods sold to include 12 to 15 separate “non administrative fees.” The names of the fees charged include “marketing,” “conversion” “stocking” “tracing” and other legitimate sounding supplemental costs and some overtly illegitimate fees including “channel fees” and “patronage fees”, however all such charges are outside of the safe harbor.

122. Premier and Novation, LLC use their market power to extract fees from manufacturers to have their products distributed through the monopolized distribution networks. The dominant GPO’s have

expanded the Vacation Village “inflation savings” scheme to include managing suppliers to the group purchasing organization with planned price increases. Premier and Novation, LLC choose market leaders, a manufacturer with the largest market share to be the sole providers of each line of products used by their thousands of member hospitals.

123. The market leader is encouraged to set an increased list price for each good distributed by the GPO and to plan periodic increases in the list price. Premier and Novation, LLC then give the market leader a long term exclusive contract designed to eliminate competition for the market of goods used by the member hospitals. The market leader is secretly charged sizable fees by Premier and Novation, LLC for having its products distributed through the group purchasing organization. The market leader’s contract price to the member hospitals has been increased to include this fee to Premier and Novation, LLC and by design, the contract price always compares favorably to the manufacturer’s list price to further the “savings” deception on GPO members.

124. The “inflation savings” scheme is perpetuated to this day by annual inflation forecasts created and distributed by Premier and Novation, LLC. The documents appear to be legitimate economic forecasts to aid hospital-purchasing directors and include macroeconomic analysis of economic conditions that have the potential to effect product prices. For those uninitiated into the secrets of the fraud, the long-term contracts with the hospital’s GPO either Premier or Novation, LLC appear to have protected the hospital against the full effect of projected increases in the manufacturer’s list prices.

125. The fraud however is easily verified. The economic forecasts of Novation LLC and Premier speak for themselves. The lists of products and services and the projected price changes invariably show price increases exceeding the annual inflation index rate for the contract protected hospital supply market leader manufacturers and below annual inflation index price changes for non-hospital supply specialty items, even declining prices in some markets with competition. To offset these glaringly obvious comparisons, Novation LLC and Premier make much use (misuse) of macro inflationary data to project increases in commodities they do not control.

126. As an example, Novation LLC’s 2005 projections utilize temporary surges in products like farm produce from fuel cost increases in 2004 to creatively portray large increases in products not under contract providing cover for the fraudulently increased prices of the GPO’s participating suppliers.

127. Novation LLC and Premier also utilize a broad range of antitrust prohibited devices to coerce their member hospitals into continuing to be subjected to the artificially inflated healthcare supply costs.

Hospitals are deceived into upgrading their dues based memberships into “shareholder” status and a higher rate of refunds, rebates, dividends, cash and cash equivalent payments.

128. Because of this illegal product-tying scheme, hospitals are forced to buy products they would not have otherwise purchased, fearing they will lose their vested interests in what are in actuality fictitious or deceptive rebates and discounts.

129. The hospitals are not given meaningful data regarding the perceived “savings” and are prevented from realizing they are paying their own refunds out of inflated costs at either membership and share holder remuneration rates.

130. Hospitals and hospital groups that achieve shareholder status are deceived into thinking that they will lose an “investment” in the achieved shareholder status if they withdraw from the GPO. However, there is no retainable value in the shares of the GPO. Neither Novation LLC or Premier is publicly held and the “shares” are a Sherman Act prohibited tying device to prevent competition.

131. Another device to prevent competition in the hospital supply markets for Novation LLC and Premier members is the allocation of markets among participating suppliers and the GPO’s themselves. As part of their membership agreements Novation LLC and Premier require hospitals to obtain typically 6% of a product from a supplier that is not the GPO’s contracted market leader. Other contract requirements include participating in a smaller GPO to a limited share of the hospital’s purchases so that no hospital or hospital group is supplied exclusively by Premier or Novation, LLC to deceive the hospitals into thinking they are not monopolized and to provide a much lower volume inferior choice.

132. The contracts utilized by Novation LLC and Premier reward hospitals and hospital groups for increasing the market shares of selected product lines sold through the GPO’s. Hospital rebate, refund, dividend cash and cash substitute kickbacks are increased depending on how much use of the targeted products are increased.

133. Finally, Novation LLC and Premier employ contracts with harsh terms including severe discipline for hospitals and hospital groups that obtain products or services from competitive markets outside of the

GPO. The sanctions can include embargo of supplies, stiff financial penalties and probationary periods of adverse financial terms as penalties for participating in a competitive market.

a. The defendants' hospital group purchasing enterprise

134. Robert J. Baker, UHC, Curt Nonomaque and VHA distribute hospital supplies by corrupting administrators in health systems (hospitals, hospital groups and independent distribution networks) that support the provision of services or provide services to Medicare, Medicaid and Champus funded patients. UHC and VHA employ marketing schemes that provide remunerations to healthcare systems under contracts in violation of the federal Anti-Kickback Act, 42 U.S.C. § 1320a-7b.

135. Robert J. Baker, UHC, Curt Nonomaque and VHA encourage health systems to violate § 1320a-7b(b)(1) by receiving unlawful remunerations which are labeled as “rebates” and are paid periodically based on the products used by the health system and its loyalty to the terms of the anticompetitive exclusive agreement with the group purchasing organization, UHC, VHA or Premier which control 70% of the hospital supply market.

136. Robert J. Baker, UHC, Curt Nonomaque and VHA encourage their member hospitals to believe the group purchasing organizations are saving money by communicating the “value” of the rebates they are receiving as contrasted against the constantly increasing prices of hospital supplies allowed into UHC, VHA’s distribution system.

137. The corrupting subtext of Robert J. Baker, UHC, Curt Nonomaque and VHA’s marketing scheme is knowingly encouraging that third party payers, chiefly Medicare, Medicaid and Champus are billed for the artificially inflated list price, not the actual cost to the health system once the cash and cash substitute remunerations are factored in.

138. Robert J. Baker, UHC, Curt Nonomaque and VHA violate § 1320a-7b(b)(2) because they knowingly and willfully pay and offer to pay the unlawful remunerations. To provide cover for the spiraling prices in the product lists of chosen hospital suppliers who are protected from competition in UHC and VHA’s captive market, Robert J. Baker, UHC, Curt Nonomaque and VHA generate flawed studies that extol the discount in the form of rebates as a savings over the monopoly “list” price for healthcare supplies.

139. The constant threat to the corrupt marketing scheme employed by UHC and VHA is access to real data from which to evaluate the actual costs imposed upon member hospitals by the artificially inflated distribution system, which would be destabilized by independent actions of participating hospitals and suppliers.

140. Robert J. Baker, UHC, Curt Nonomaque and VHA have protected against this destabilizing by forcing hospitals and suppliers into long-term anticompetitive exclusive dealing contracts that harshly penalize every violation. Out of a misguided fear of antitrust liability, the contracts typically assign market share limiting each health system to 95% of its purchasing through the dominant group purchasing organization and require a token share of products to be purchased through a “competing” group purchasing organization.

141. Robert J. Baker, UHC, Curt Nonomaque and VHA have also commanded loyalty among member health systems by making cash and cash substitute payments to health system board members and chief administrators in return for participation in the cost inflation scheme.

142. Many forms of the Defendants’ cash and cash substitute payments to hospital administrators are concealed as “consulting contracts” and are not reported to Medicare, Medicaid or Champus or subtracted from the costs of hospital supplies transferred to third party payers.

143. Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC have made use of payments to a third party in which hospital CEO’s are stakeholders in order to conceal the commercial bribe nature of the payments. An organization called the Healthcare Research and Development Institute (www.hrdi.com) has existed since the late 1990s. HRDI has approximately 35 members who are hospital CEOs (many are heavily involved in supporting GPOs). The Institute's clients are large manufacturers, publishers, and large consulting firms. Each client pays the Institute and the members of the Institute, who are also its shareholders, are paid out of the profits of the organization. For hospital CEOs to personally receive payments from companies that they do business with is a serious conflict of interest and a failure to fulfill their fiduciary responsibility.

144. UHC, VHA and Premier insist that the Antikickback Act provides a safe harbor for marketing programs offering discounts to health care providers and that its program was designed to take advantage of this safe harbor. See 42 U.S.C. § 1320a7b(b)(3)(A); 42 C.F.R. § 1001.952(h).

145. The rewards Robert J. Baker, UHC, Curt Nonomaque, VHA have given to health systems, hospital board members and purchasing managers have been paid in “cash or cash equivalents” and sometimes equity (stock shares) extorted from healthcare technology companies permitted to sell through the distribution system. This appears to be inconsistent with the group purchasing systems’ safe harbor theory. See 42 C.F.R. § 1001.952(h)(5)(i) (“The term discount does not include – Cash payment or cash equivalents (except that rebates as defined in [42 C.F.R. § 1001.952(h)(4)] may be in the form of a check).”).

146. Robert J. Baker, UHC, Curt Nonomaque and VHA also have protected their monopoly markets by forming a joint venture with each other, acquiring an electronic marketplace that could be co-opted as a false storefront for their illegal marketing scheme and finally by joining a joint venture created by the dominant suppliers with their competitor group purchasing organization, Premier.

147. UHC and VHA knowingly created an antitrust prohibited joint venture limited liability company called Novation, LLC for the purpose of unlawfully setting prices for hospital supplies sold through the formerly competing group purchasing organizations UHC and VHA’s 2000 member hospitals.

148. Novation, LLC limited the suppliers whose products could have access to purchasing managers in the 2000 member hospitals. Novation, LLC used its power to determine which products were sold to the member hospitals not to command the best supplier pricing or fulfillment, but instead to guarantee that approved suppliers would participate in planned upward manipulation of list prices so that Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC could sell “discounts” or “rebates” to their member hospitals.

149. Robert J. Baker, UHC, Curt Nonomaque and VHA operated Novation LLC to control transactions between suppliers and member hospitals utilizing facsimile telephony (fax) and Electronic Data Interchange (EDI) ordering and fulfillment to keep track of hospital purchasing data and police supplier fulfillment and product pricing to ensure healthcare product prices were being continually manipulated upwards (artificially inflated).

150. When web based business to business electronic marketplaces showed the potential to dramatically increase hospital supply purchasing efficiency and lower hospital supply prices by facilitating direct communications between hospital groups and many competing product suppliers, Robert J. Baker,

UHC, Curt Nonomaque, VHA and Novation LLC actively prevented Neoforma.com, an electronic marketplace that enabled hospital supplies to be purchased on the web from having access UHC and VHA's member hospital market and from carrying the products of Novation's suppliers.

151. Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC's power to exclude entrants from their market with long term anticompetitive contracts and a centralizing price controlling joint venture, allowed Neoforma.com to be taken over in a scheme to utilize the new web based electronic marketplace as a mere "storefront" for the existing inefficient bricks and mortar group purchasing organization Novation LLC and therefore secure UHC and VHA's price inflation scheme.

152. US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray And Andrew S. Duff participated in a syndicate to make a market in an initial offering of publicly traded shares for Neoforma, LLC and to manipulate the stock prices in an illicit "laddering" scheme of prearranged market purchases to deceive stock investors into buying the shares at rapidly increasing share prices. US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff profited from this deceptive manipulation by receiving blocks of shares in Neoforma.com which they inflated in a "pump and dump scheme" through Piper Jaffray's false recommendations to institutional fund managers and individual investors in reports about the bright future for the company without disclosing the brokerage's conflict of interest and participation in the prior arranged scheme to keep Neoform.com from reaching its potential to increase hospital supply efficiency. Instead, the Defendants planned to suppress Neoforma.com's technology to preserve Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC's corrupt inefficiencies. US Bancorp and Piper Jaffray were fined and paid \$32.5 million fine to settle these securities fraud charges brought by with the SEC, NASD, NYSE, NASAA, and the New York Attorney General for the fraudulent research.

153. In March, 2000, Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma into deceiving the board of directors of Eclipsys, a software application company with superior technology to Neoforma.com and a positive cash flow into merging with Neoforma.com based on a long term contract to pay Neoforma.com a quarterly payment for providing an electronic marketplace on the web that Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC could control.

154. Neoforma, Inc.'s acquisition of Eclipsys and its stream of income was a threat to US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray And Andrew S. Duff's substantial interests in the hospital supply and hospital supply in e-commerce markets. With Eclipsys, Robert Zollar had the potential to compete with GPO's and bypass US Bancorp and Piper Jaffray's ability to extort equity from new market entries trying to supply hospitals.

155. A negative analyst report on the merger by Piper Jaffray was used to control Robert Zollars and Neoforma, Inc. Investors did not understand that Novation LLC controlled what companies had access to thousands of hospitals and that Eclipsys superior technology was not as valuable to its directors as the ability to gain access to the monopolized hospital supply market. Investors expressed dismay concerning the Merger Agreement as follows:

"Investors may be unsettled by combining Eclipsys' relatively high-margin software and services business with Neoforma's extremely low-margin online [business-to-business] exchange. Furthermore, ECLP shareholders are frustrated about the ownership split between [Neoforma] and [Eclipsys]. Neoforma and Eclipsys are getting 37% and 28% of the combined company, respectively."

156. Similarly, a March 30,2000 report issued by analyst Caren Taylor, of E-Offering entitled "Neoforma to Acquire Eclipsys and Healthvision - - What's Wrong With This Picture?" stated:

"As we take a step back and look at the big picture, we think there is something fundamentally wrong with this deal. We understand that Neoforma has had a difficult time accessing the buyer market, and we had heard recently that the company might miss their earnings target this quarter. In addition, we are somewhat dismayed by the behavior of Eclipsys - - first its initiation of a takeover bid of Shared Medical Systems Corp., which was dropped as of today, and now this sudden agreement to be acquired by Neoforma.com. This has left us wondering about the underlying issues within the Eclipsys organization. We would certainly not want to be the owners of these two stocks."

157. The detriment to Eclipsys shareholders was also recognized in a March 30,2000 analyst report issued by Pacific Growth Equities, in which Eclipsys was lowered to a "Neutral" rating from its previous "Buy" rating. In a paragraph entitled "Terms are disappointing for Eclipsys shareholders", the report stated:

"The terms of the deal call for Eclipsys to receive 1.34 shares of the new Company for each of its 37.5 million shares (50.25 million shares), Novation to receive 69.3 million shares, Healthvision (excluding the amounts attributable to Eclipsys and the VHA) to receive 0.444 shares for each share and Neoforma.com to control the rest for a total share count of 2 10 million shares. Because these companies are all valued very differently - a classic old economy and new economy merger - attributing relative value is tricky. However, Neoforma.com, a leader among the emerging online marketplaces, was essentially still in "show me" mode and had little revenue. On the other hand, Eclipsys was a profitable company with one of the strongest franchises at \$250 million in revenue last year...[t]hus we believe with less than 25% in the new company, the terms of the transaction are disappointing for Eclipsys shareholders."

158. In addition, Eclipsys shareholders cannot rely on increased medical supply orders from the Novation agreement to fill in the gaps of the Merger Agreement. As explained in a March 30,2000 Reuters article, it is not clear how much revenue Neoforma can count on from the Novation arrangement. The article added mistakenly that with respect to the Novation deal, “Novation really can’t prevent their hospital customers from buying wherever they want to buy”

159. Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC agreed to a plan where Eclipsys would instead partner with Neoforma, Inc. and preserve the Defendants’ corrupt inefficiencies in exchange for a long term contract with quarterly payments of member hospital funds through Novation, LLC.

160. US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray And Andrew S. Duff deceived purchasers of Neoforma.com’s stock into thinking the firm’s e-commerce technology would provide efficiency in the delivery of hospital supplies while knowing that no measurable difference in efficiency exists in the software technology EDI already employed by Novation LLC and the e-commerce html based software employed by Neoforma.com. US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff knew the only advantage leading to efficiency e-commerce software had over EDI was in facilitating the competition that Novation LLC’s control of Neoforma.com was designed to prevent.

161. US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray And Andrew S. Duff also benefited because 70% of their venture funds were invested in healthcare technology companies and in exchange for their participation in the UHC and VHA scheme to keep hospital supply costs inflated, Piper Jaffray’s healthcare technology companies received long term exclusive and anticompetitive contracts with Novation, LLC. This allowed US Bancorp and Piper Jaffray to profit greatly from underwriting the healthcare technology and supply chain management companies’ initial public offerings.

6. The Origin of Technology That Made GPO’s Obsolete And Eliminated Two Distribution Levels Facilitating Automated Competitive Direct Purchasing In An Electronic Marketplace

162. On July 17, 1993 Physicians Management Group was founded to supply doctor’s offices, clinics and nursing homes with discounted healthcare supplies at costs rivaling the volume purchasing enjoyed by hospitals. The founders recruited Samuel Lipari, who would later found the plaintiff Medical Supply for his expertise in mass merchandising, grocery and automotive distribution.

163. Samuel Lipari recognized that the volume pricing in even large group purchasing organizations failed to provide significant cost savings and Physicians Management Group was able to profit by splitting the savings its customers realized over volume pricing.

164. Samuel Lipari discovered that for every product line and from almost every vendor in the broad spectrum of hospital supplies from bedding, to pharmaceuticals, to instruments and even including food and janitorial supplies, the price of goods sold through hospital group purchasing organizations and even their contract suppliers and manufacturer's catalog price was substantially higher than the discounts he could obtain. Samuel Lipari found it easy to beat the "volume discounts" on even very small quantity purchases for widely dispersed customers with disproportionately high handling and transportation costs.

165. In order to increase Physicians Management Group's recognizable savings to aid its customers in evaluating value over products sourced from other vendors, Samuel Lipari innovated the use of separate fees for Physicians Management Group's management, storage and delivery of healthcare supplies to allow customers to directly compare unit costs with other purchasing organizations. This innovation was a great aid to small doctor's practices and rural nursing homes which were empowered to make purchasing decisions on a direct comparison of value in cost per unit of product with the nation's larger volume hospital supply organizations while having the logistics costs of managing contracts, fulfillment, storage and delivery separated out in observable fees that could be tracked and competitively evaluated. Physicians Management Group's logistics services could then be partially or completely substituted with more competitive local alternatives.

166. The demand for Physicians Management Group's business model as an alternative supplier grew faster than the fledgling company with no access to operating capital could sustain. The first 25 independent representatives who had self financed their representation, a practice common among manufacturer's representatives in the automotive and mass merchandizing industries brought in four million dollars in contracts within the first 90 days and Physicians Management Group began shipping products to their clients.

167. Physicians Management Group's hospital group purchasing organization (GPO) supplier was Health Services Corporation of America (HSCA). Despite being one of the largest GPOs at the time with the most volume from which to leverage lowest prices HSCA's contract prices for its member customers

were not as good as those Physicians Management Group obtained on purchases outside of the GPO. Even though Physicians Management Group was only fulfilling the requirements of small volume doctor's offices, clinics and nursing homes.

168. Without access to operating capital to sustain the high demand and growth, Physicians Management Group ceased operations and began returning all unshipped products to the appropriate manufacturer. Physicians Management Group Inc. filed for financial relief on October 15, 1996 and that relief was granted and the file closed on April 09, 1997.

169. On October 24, 1995 Samuel Lipari incorporated Medical Supply Management in the State of Missouri, a healthcare supplier that used technology to bundle services to assist hospitals, nursing homes, surgery centers and physician offices purchase track and pay for supplies again innovating and adopting the role suppliers in the vastly more competitive mass merchandizing industry create value for their customers reducing administrative and product costs.

170. The effect of bundling services to purchase track and pay for supplies, utilizing Samuel Lipari's proprietary software was a revolutionary value adding innovation radically increasing efficiency and reducing costs that rendered group purchasing organizations obsolete. Group purchasing organizations operating without supply chain management software were physically unable to manually offer these value adding services, even with their enormous administrative offices and staff. Hospitals, unlike retail stores where supplier management of purchasing, tracking and paying for supplies as a competition enhancing service to customers originated, do not have the primary function of selling products. When suppliers start to purchase, track and pay for supplies as an included service for hospitals, hospital staffing can concentrate on the primary value creating function of providing healthcare services. The savings realized became exponential.

171. Group purchasing organizations and suppliers began a refusal to deal strategy to foreclose the new supply chain technology from the market for hospital supplies. Although HSCA had indicated a willingness to provide Medical Supply Management a membership in its GPO as they had done earlier for Physicians Management Group, HSCA later breached the membership contract with Medical Supply Management, stating the GPO was getting too much pressure from several suppliers.

172. Medical Supply Management replaced HSCA with MedEcon as its GPO, and as a member of MedEcon, Medical Supply Management's clients were entitled to contract pricing according to MedEcon's Manufacturer Agreements to supplement direct purchasing negotiated by Medical Supply Management itself.

173. As a supplier for health systems (hospital chains, hospitals, clinics and nursing homes) Medical Supply Management was what the industry labels an "independent distribution network." However, unlike other suppliers in healthcare, Medical Supply Management did not make exclusive contracts with particular manufacturers extracting profit from the rebate or kick back payment for exclusive access to a market. Medical Supply Management's compensation was driven only by its performance in saving costs for its customers. Consequently, Samuel Lipari's software was engineered as a "clearing house" resembling an insurance claims processing center of the period where many active competitors utilize the center as a neutral utility. This was the first electronic marketplace in healthcare supplies and it was not based on the GPO model of extracting fees for anticompetitive advantage and monopolization. Later in 2001, the defendant US Bancorp and Piper Jaffray did a study authored by their senior analyst Daren Marhula and determined the model would save twenty three billion dollars a year over the current inefficient distribution system.

174. MedEcon like other GPO's had not invested in efficiency creating technologies like Medical Supply Management's supply chain management software due to the lack of competition in the market for hospital supplies. However, MedEcon enlisted Medical Supply Management transaction accounting and reporting data to police their suppliers' contract pricing compliance, giving birth to the current practice of GPOs to use electronic marketplace software to enforce anticompetitive minimum price maintenance in Sherman Act prohibited vertical price fixing between manufacturers, suppliers and vendors selling to hospitals through Neoforma, Inc. or GHX LLC's electronic marketplace.

175. Owen Healthcare, Inc., a wholly owned subsidiary of Cardinal Health, Inc., took a great interest in Medical Supply Management's business model. On the pretense of building a relationship with Medical Supply Management that would allow Samuel Lipari to sell Owen's lines of pharmaceuticals as an independent distribution network, Owen Healthcare obtained Medical Supply's business plan and proprietary information developed as of 1995.

176. Cardinal Health, Inc. utilized the information in the business plan describing the clearinghouse model and Robert Zollars, a Cardinal employee left Cardinal and later joined Neoforma, Inc. that had started up in 1996 to sell hospital supplies through the internet in an electronic marketplace.

177. A July 29, 1996 letter to Dennis M. Egan of Health Services Corporation of America (HSCA) described Medical Supply Management's use of the Web for customer ordering:

"The Contract portfolio information MSM clients will receive from HSCA will be utilized as follows:

The contract portfolios will reside on MSM server and will include all product data (Vendor, Product ID, Description, Unit of Measure, etc.). The product information (excluding pricing, terms and conditions) will be accessible on the World Wide Web and only after a client locates products on the World Wide Web, will the client then negotiate EDI with MSM server and MSM server provide pricing. Pricing will be provided via Internet through a (SS) link."

7. The Defendants Foreclosure of Competition In The Market For Hospital Supplies Through Exclusionary Contracts and Loyalty Agreements That Have The Same Exclusionary Effect

178. Novation and Neoforma create distribution agreements with incumbent and market leading device makers that amount to exclusionary agreements with hospitals given the arrangements between Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker and their member hospitals.

179. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker also enter into explicit exclusionary contracts with incumbent and market leading device manufacturers for a given product with which member hospitals are obliged to comply by agreement and/or coercive threats of expulsion or penalties for deviations.

180. Explicit exclusionary contracts are created when Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker forbid member hospitals from buying outside the cartel, either explicitly or by a practice of imposing penalties if they do.

181. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker exercise their power as exclusive purchasing agents for hospitals by declining to approve competing devices in a given product market,

effectively imposing sole source device contract on member hospitals even when they do not do so explicitly.

182. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker exclude suppliers by agreement by allowing member hospitals to buy from other hospital supply vendors including Medical Supply but only for product categories not covered by the defendants cartel.

183. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker create some exclusionary contracts that are not imposed on member hospitals. Instead these member hospitals are free to accept or reject those exclusionary contracts on a contract-by-contract basis. Even with these “voluntary” exclusionary contracts which often cover multiple products and manufacturers, impose retroactive penalties on deviation, and ban even considering rival products effectively bind member hospitals even when rivals for some products later offer a better and cheaper product.

184. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker in exchange for fees and commercial bribes from manufacturers also use incentives to join exclusionary contracts that anticompetitively exclude device rivals, harm consumers, and harm hospitals as a group.

185. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker get members to accept exclusionary contracts by co-opting hospital system directors and decision makers with cash and cash substitute payments often in the guise of consulting contracts, giving hospitals other compensating benefits, disfavoring hospitals who do not join the exclusionary scheme, and/or giving hospitals who do join a share of the supracompetitive profits earned from downstream consumers.

186. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker overtly illegal forms of exclusive dealing proceed through voluntary agreements with multiple willing hospital buyers even though the long run result is a reduction of competition harmful to the ultimate consumer and often to the hospital buyers themselves.

187. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake deceive governmental oversight by making anticompetitive agreements that do not require purchasing 100% from one manufacturer, but instead some other high percentage like 90 or 95%.

188. The defendants use a private brand through Novation, LLC called Novaplus. The Novaplus Pulse Oximetry Letter of Commitment (requiring 95% minimum of annual oximetry sensor purchases from Tyco-Nellcor, which had 88% of market); The defendants Novation Opportunity ® Spectrum I Portfolio Participation Agreement (requiring 95% minimum spanning 12 product categories; The Ethicon-Novation Commitment Document (offering different discounts for Novation hospitals buying 90 or 95% of sutures from Ethicon, which had 81% of suture market)

189. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake's exclusive dealing arrangements cause anticompetitive harm by raising costs for Medical Supply, other distributors, suppliers and manufacturers. The defendants accomplish their monopolization scheme by denying rivals the economies of scale they need to compete effectively.

190. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake create exclusive contracts by Volunteer Hospital Association and University Healthsystem Consortium's general terms of the Novation membership or the defendants' contracts for particular product areas also often require the hospital to use Novation as its sole purchasing agent for the covered product categories. In Novation's Opportunity ® Spectrum I Portfolio Participation Agreement it states "Participant declares Novation as its sole supply cost management company for the purchase of products in the OPPORTUNITY product categories. . . . Participant will purchase OPPORTUNITY ® products though Novation purchasing arrangements and will not purchase OPPORTUNITY products or any products that compete with OPPORTUNITY products though any other supply cost management company."

191. Some of Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake's hospital agreements provide that a

signing hospital cannot solicit rival bids, examine rival products, or even entertain rival proposals to prevent Medical Supply or other Web based suppliers from providing competing product pricing.

192. Novation's Opportunity ® Spectrum I Portfolio Participation Agreement states "Participant will not . . . participate in competitive product evaluations for OPPORTUNITY products." Novation's Opportunity ® Spectrum II Portfolio Participation Agreement (same); Supply Partner Terms of Participation Opportunity ® Spectrum I Portfolio states **"Health care organization agrees not to cause supply partner to incur defensive selling costs during the term of this Agreement (such as can be caused by entertaining proposals from other vendors or conducting product evaluations) . . ."** [emphasis added].

193. The defendants' Supply Partner Terms of Participation Opportunity ® Spectrum II Portfolio states the same. See, e.g., Letter from James Bradley of Stuart Cardiology Group to Jake Langer of Biotronik, Feb. 26, 2001 ("Hospital has entered into a GPO Novation contract, which provides only a single cardiac rhythm device vendor. The hospital is enforcing a 100% compliance to this vendor even though the actually contract states 95% compliance.")

194. The defendants use contracts designed so that a hospital cannot consider rival products, to make it impossible for the hospital to obtain products outside of the agreement made with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake even though on paper, the market is not restrained for the remaining 5-10%. The defendants' agreements in practice rival devices are often 100% excluded from hospitals despite the nominal right to buy 5-10% from them.

195. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake conceal their exclusionary agreements by not requiring an absolute obligation to buy a high percentage from the favored supplier, but instead provide loyalty rebates if that high percentage is met. The Novapulse Pulse Oximetry Letter of Commitment (discount contingent on 95% compliance). Novation's Opportunity ® Spectrum I Portfolio Participation Agreement also stated the same.

196. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake use loyalty rebates as a more

sophisticated penalty on noncompliance than that imposed under a traditional illegal exclusive agreement to restrain trade, and one that is far more enforceable to boot.

197. With loyalty rebates, Novation can unilaterally impose a penalty for noncompliance by just withholding the quarterly or annual rebate without even going to court, and can easily prove in court the amount of past rebates that must be returned. In this way courts become the defendants instrument of monopolization.

198. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake use a termination penalty making the defendants' exclusive dealing agreements violate the Sherman Antitrust Act. The defendants add additional penalties that are more enforceable including loyalty rebates tat increase the exclusionary effect.

199. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake use loyalty rebates that are conditional on the buyer taking all or a high percentage of its purchases from a favored supplier and amount to *de facto* exclusive dealing. IIIA Areeda & Hovenkamp, Antitrust Law ¶768B3, AT 151 (1996); XI Hovenkamp, Antitrust Law ¶1807, at 115-18 (1998).

200. The defendants' loyalty payments are used to inflate prices. (1) Here the rebates or discounts are conditioned on purchasing a high share of the buyer's purchases from the supplier. Thus, this is not a per item price cut that can be met by any equally efficient rival for any future purchases. Because the loyalty rebates are conditioned on getting a high share of the buyer's purchases, they leave rivals with access to only a lower share, which may not sustain economies of scale. When they do so, such loyalty rebates exclude rivals by worsening the rivals' efficiency.

201. (2) Once the hospital has committed to the arrangement, the rebates on all the hospital's past purchases are contingent on it meeting the loyalty threshold. Because loyalty commitments can last for five to seven years, a failure to comply can result not only in losing any rebate already earned in the current year but a demand for a return of all the rebates paid in all past years too. Novation's Opportunity ® Spectrum I Portfolio Participation Agreement states "all earned incentive payments received by the Participant will be subject to repayment if Participant fails to comply for the full [five-year] term of the OPPORTUNITY

portfolio” with a 95% purchase commitment and other requirements; Novation’s Opportunity ® Spectrum II Portfolio Participation Agreement states the same.

202. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake use the threat to reclaim all those rebates on past purchases to induce their member hospitals not to switch to making future purchases from a rival that is just as efficient and offering a lower price, effectively foreclosing Medical Supply from the market for hospital supplies.

203. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake’s exclusionary programs cover multiple products and manufacturers rather than just one. Sometimes the defendants and a given incumbent manufacturer gives rebates or discounts on a whole product line if the buyer commits to making a high percentage of their purchases from that manufacturer through Novation or Neoforma for each product in the line. [Ethicon-Novation Commitment Document (offering highest discount for Novation hospitals that buy 95% of sutures and 85% of endomechanical products from Ethicon, which had 81% of suture market and 61% of endomechanical products)]

204. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake even sometimes give rebates or discounts on menu of products from different manufacturers if the hospital commits to buying a high percentage of each product from the corresponding manufacturer on the menu. Novation’s Opportunity ® Spectrum I Portfolio Participation Agreement employs a 95% purchase commitment applies for twelve product categories covering five different manufacturers, though with one manufacturer for each product category. Novation’s Opportunity ® Spectrum II Portfolio Participation Agreement uses an 85-95% purchase commitment applying to 14 product categories covering 7 manufacturers.

205. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake’s market foreclosure agreements applying to multiple products do not differ from a single product exclusive dealing arrangement, but only worsen the anticompetitive consequences. Through these programs, the defendants impose a penalty for a hospital or health system’s failure to meet the threshold for any one product and in a multiple product

loyalty agreement includes withholding or reclaiming rebates not only for that product but for all the other products as well. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake can then exacerbate the penalty for noncompliance after the rebates have been earned.

206. The defendants have foreclosed competition in the market for hospital supplies so that even at the very beginning of a rebate period, Medical Supply could not compete by simply offering a price on one of the products that matches or beats the price the incumbent manufacturer and Novation or Neoforma is charging for that product net of the program discount.

207. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake use their tremendous market power of over 2000 hospitals and multiple product rebates or package discounts as an illegal tying agreement described in *X Areeda, Elhauge & Hovenkamp, Antitrust Law* ¶1758b, at 343-346 (1996).

208. The defendants' scheme is designed to keep a more efficient Web based vendor or suppliers from providing products to hospitals at lower prices than the cartel. For the hospital would have to take into account that even if it gets a better price from using the rival for that product, it loses the discount on all the other products in the program. The defendants' multi-product rebates are equivalent to sidepayments given to hospitals and health systems in exchange for agreeing to enhance the manufacturer selling through Novation and Neoforma's market power by excluding other sources in one product, with the sidepayments compensating these hospitals and health systems for the fact that this scheme increases the price they pay for the product whose market power was enhanced.

209. More generally, as noted above, even when a hospital does not formally make a multi-product commitment, Novation and Neoforma pressure or threaten with expulsion any member hospitals who do not comply with the commitment obligations made on any of the defendants' exclusionary agreements with incumbent manufacturers. Every single product exclusionary agreement of the defendants is effectively the same as a multi-product one and violates Sherman 1.

210. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake have inserted themselves between the manufacturer and consuming hospitals to extract fees from incumbent manufacturers. These fees or

commercial bribes are solicited by Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake and are partially forwarded to member hospitals and more efficiently to hospital decision makers for high share commitments that are not volume-based at all, and are in actuality not rebates or discounts but a system of graft.

211. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake and their officers with the assistance of US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have obtained cash and cash equivalents such as stock-options, warrants, or investment interests in the manufacturers favored by Novation and Neoforma's commitment programs.

212. The fees and bribes solicited by the defendants from favored manufacturers includes making monetary investments in the defendants' owned businesses including Neoforma, Inc., and giving Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff favorable business terms on other unrelated deals.

213. US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff also employed another tactic to extort funds from manufacturers and suppliers to enter the cartel. US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have hosted annual healthcare conferences where healthcare technology companies seeking capitalization were forced to pay US Bancorp Piper Jaffray for underwriting their public offerings and favorable analyst coverage marketed as "independent" research to create demand for their shares as a pre initial public offering investment for qualified investors and most importantly to obtain an introduction to Novation and Neoforma officials to be favored by Novation's commitment programs.

214. US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff were paid large sums for a private meeting with Novation officials or for a prospective healthcare technology company's membership in a GPO institute for evaluating technologies.

215. Manufacturers and suppliers are forced to pay Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake fixed amounts that are not linked to volume in the form of: (1) fees given to have products considered, (2) annual administration fees, (3) marketing or endorsement fees, and (4) licensing fees for use of the NovaPlus brand name.

216. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake arrange for selected manufacturers and suppliers to pay hospitals fixed fees that are not dependent on the volume of sales in exchange for their commitment to achieving the target market shares. The fact that the payments given for loyalty commitments often are not proportional to volume worsens the anti-competitive effects. The defendants' side-payments that are unrelated to sales volume are used because they are a more effective means of dividing monopoly profits created by seller-buyer collusion designed to enhance Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake's market power.

217. Sometimes Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake make agreements where the *de facto* exclusivity for any given product is granted not to one incumbent manufacturer or supplier, but to two of them. The defendants at times enforce a duopoly in some products to protect those manufacturers from competition by rivals and entrants. Regardless, the motive of the defendants is to restrict output and increase prices just as where the defendants enforce an absolute monopoly in a product or product line."

218. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake have offered to allow rival products from unfavored manufacturers and suppliers to be offered if they would agree to increase their prices dramatically to levels higher than that being charged by the incumbent manufacturers and suppliers who benefit from the exclusionary agreements. For example, Retractable Technologies reported that Novation finally said it would agree to use safer needle technology from Retractable Technologies, but only if it were sold under Novation's private label for a price 270% higher than Retractable wanted to charge. Thomas Shaw, "Examine the 'questionable' side of GPOs," Commentary, Dallas Business Journal (March 15,

1999) Mark Smith, "Innovative medical products: a clash of blood and money," Houston Chronicle (April 18, 1999).

8. The Monopolization Of The Hospital Supply Industry By The Defendants In Conspiracies And Combinations With Premier, GHX, LLC and Their Predecessor Corporations

219. On September 28, 1998, Richard A. Heard, Senior Vice President, Diversified Services obtained via subterfuge the business plan and model created by Samuel Lipari for Medical Supply Management for the Defendants using a false offer to buy out the company from Samuel Lipari.

220. On November 23 and 24th, 1998, the Defendants obtained a demonstration in Salt Lake City, Utah of Samuel Lipari's software that allowed purchases of hospital supply products to be purchased and managed via pc computers instead of the existing costly mainframes still used by the Defendants and their member hospitals and manufacturers to this day.

221. No agreement was finalized because with the demonstration and intellectual property obtained by the defendants through Richard A. Heard and Owen Health, a subsidiary of Cardinal which would later be part owned by the Defendant Novation, the Defendants had obtained the information they needed to prevent Medical Supply from obtaining capital to enter the marketplace by implementing their own electronic exchanges, diluting the value of Samuel Lipari's innovation with false substitutes that maintained the group purchasing organization enterprise of the Defendants to artificially inflate hospital supply costs.

222. In June 1999, MedAssets was formed, it acquired the two GPO's InSource and Axis Point Health Services and then Health Services Corporation of America (HSCA) that had provided supplies to Samuel Lipari's two earlier companies in May 2001.

223. On June 28, 1999, Neoforma, Inc. announced that it has elected Robert J. Zollars to the position of Chairman, President and Chief Executive Officer. He succeeds Jeff Kleck, Ph.D., co-founder of Neoforma. Zollars joins Neoforma from his position as an E.V.P. and Group President at Cardinal Health, Inc.

224. On March 7, 2000, Medibuy.com Inc. (Medibuy) a vendor of Internet-based health care supply purchasing software announced it was acquiring Premier Health Exchange LLC, the electronic commerce subsidiary of San Diego-based Premier Inc.

225. On September 1, 2000, Medibuy announced it was acquiring empactHealth.com, a Nashville, Tenn.-based purchasing Web portal started by hospital chain HCA--The Hospital Co. Shareholders of the

privately held empactHealth.com, including HCA, will receive approximately 23% of medibuy.com.

HCA's ownership interest in medibuy.com will total approximately 16%. Under the agreement, San Diego-based medibuy.com will become the exclusive electronic commerce partner to HCA's 204 hospitals, as well as several members of HCA's group purchasing organization, including LifePoint Hospitals, Triad Hospitals and Health Management Associates.

226. On February 6, 2000, Empacthealth announced that Columbia/HCA Healthcare Corp. is pumping up to \$40 million into empactHealth.com, which will charge hospitals and vendors a fee for ordering supplies online. Columbia/HCA, the nation's largest for-profit hospital company, will be the firm's first customer.

227. On March 30, 2000, EmpactHealth announced today that it has signed a founding partner agreement with Health Management Associates (HMA), the premier operator of acute care hospitals in the Southeast and Southwest areas of non-urban America. Under the terms of the agreement, HMA will exclusively implement and use empactHealth's empactBuy solution for the online requisitioning, ordering and purchasing of all medical and non-medical supplies and services for the company's 32 acute care hospitals, and any facilities HMA adds in the future. HMA will also become a founding partner and an equity shareholder in empactHealth.

228. In the same announcement empactHealth stated it is a leading healthcare e-procurement company that synchronizes the business processes of healthcare buyers and suppliers to reduce costs and increase efficiency at both ends of the healthcare supply chain. The company has already signed a large critical mass of committed buyers, including more than 240 Columbia/HCA and Health Management Associates facilities that will use empactBuy, exclusively, as their e-procurement solution. In addition, empactHealth has commitments from Johnson & Johnson, Baxter, and Medline and a number of other suppliers to integrate their ERP business processes with empactSupply. empactHealth offers healthcare-specific e-procurement solutions based on foundation technology from Commerce One and adds valuable functions such as business intelligence, contract management, and inventory management. The company is Nashville-based and privately funded.

229. On March 29, 2000, Global Healthcare Exchange (GHX) was founded as a Limited Liability Company or a trust by five major healthcare manufacturing competitors: Johnson & Johnson Health Care

Systems; GE Medical Systems; Baxter Healthcare Corp.; Medtronic USA, Inc. and Abbott Exchange, Inc. Much of the capitalization came from GE, the parent company of GE Medical. The name was also copied from GE's existing internet marketplace for hospital supplies Global Exchange and was part of a plan created by Jeffrey Immelt, then GE Medical president and now CEO of GE to prevent competition from electronic marketplaces that were independent from the manufacturers ability to control hospital supply distribution with kickbacks and commercial bribes.

230. On March 30, 2000 Neoforma announced the merger with Eclipsys Corporation (NASDAQ: ECLP) and HEALTHvision, Inc. In conjunction with the agreements, Neoforma.com announced that it has signed an exclusive 10-year strategic agreement to provide e-commerce services for the 6,500 healthcare organizations participating in the purchasing programs of Novation, LLC, the world's largest buyer of medical supplies and the supply company of national healthcare alliances VHA Inc. and University HealthSystems Consortium (UHC). The companies later decided not to merge and instead to form a combination to jointly control the market for hospital supplies in e-commerce among Novation, LLC's customers.

231. On March 31, 2000 The New Healthcare Exchange was formed as a consortium of four of the US largest health care distributors, which include AmeriSource Health, Cardinal Health, Fisher Scientific International; and McKesson HBOC.

232. On May 25, 2000 Neoforma announced that it has reaffirmed its exclusive 10-year agreement to provide e-commerce procurement services for Novation. Neoforma.com also announced modifications to the structure and terms of its stock and warrant transactions with VHA Inc. and University HealthSystem Consortium (UHC), the national healthcare alliances that own Novation. Much of the public offering was subscribed to or purchased by Novation with funds owned by UHC and VHA member hospitals and without their knowledge and approval. The capitalization of Neoforma as a direct consequence rose to 1.2 billion dollars.

233. Neoforma also announced on May 25, 2000 that Eclipsys Corporation and HEALTHvision, Inc. agreed by mutual consent to terminate, effective immediately, their proposed mergers announced March 30, 2000. Instead, Neoforma.com, Eclipsys and HEALTHvision have entered into a strategic commercial relationship that will include a co-marketing and distribution arrangement between Neoforma.com and

HEALTHvision. The arrangement includes the use of Eclipsys' eWebIT™ enterprise application integration (EAI) technology and professional services to enhance the integration of legacy applications with Neoforma.com's e-commerce platform.

234. Under the terms of the modified Novation agreements, VHA will receive 46.3 million shares, representing approximately 36% of Neoforma.com, and UHC will receive 11.3 million shares, representing approximately 9% of Neoforma.com. In addition, under new warrants to be issued to VHA and UHC, VHA and UHC will have the opportunity to earn up to 30.8 million and 7.5 million additional Neoforma.com shares, respectively, over a four-year period by meeting certain performance targets. These targets are based upon the historical purchasing volume of VHA- and UHC-member healthcare organizations that sign up to use Neoforma.com's e-commerce exchange. The targets increase annually to total healthcare organizations representing approximately \$22 billion of combined purchasing volume at the end of the fourth year. The warrants will have a strike price of \$0.01. On a pro forma basis, including shares issuable upon the exercise of Neoforma.com's existing options and warrants, and VHA and UHC earning all of the shares underlying the performance-based warrants, Neoforma.com would have approximately 175 million shares outstanding.

235. The May 25, 2000 announcement also revealed the interlocking directors used by the Defendants to restrain trade in hospital supplies. In connection with the new agreements, two of the seven seats on the Neoforma.com Board of Directors will be filled by VHA designees after closing of the transaction. Subject to certain exceptions, VHA has agreed to vote any Neoforma.com shares it owns in excess of 20% of outstanding Neoforma.com stock in the same proportion as all other stockholders. Subject to certain exceptions, UHC has agreed to vote any Neoforma.com shares it owns in excess of 9% of outstanding Neoforma.com stock in the same proportion as all other stockholders. VHA and UHC have also agreed to certain other restrictions on acquisitions and transfers of Neoforma.com stock.

236. Mark McKenna, Novation's president, said, "We are excited about the advantages and value that our relationship with Neoforma.com offers our members in managing their supply expenses and inventories. We have already made significant progress in our relationship with Neoforma.com, including the establishment of supplier and buyer relationship management teams and a targeted implementation strategy. We anticipate members will be able to begin conducting purchase transactions as early as the third

quarter of this year."

237. Curt Nonomaque, VHA executive vice president, noted, "We believe the increased efficiencies, reduced costs and ease-of-use features that Neoforma.com's B2B technology provides will significantly benefit both Novation's member organizations as well as other health care providers. In addition, VHA is creating a separate cooperative pool and will distribute Neoforma.com stock to our members in proportion to their dollar volume of purchases through Neoforma to further align incentives. In addition, the new strategic partnership involving Neoforma.com, HEALTHvision and Eclipsys offers additional benefits for healthcare organizations seeking to integrate and use Internet technology. These agreements build on existing customer relationships with HEALTHvision and Eclipsys that provide the Web-based solutions that enable hospitals to connect with their physicians and communities."

238. Edward Schwartz, executive vice president at UHC, indicated, "We're pleased that the relationship with Neoforma.com is moving forward and that UHC's members will be able to gain value from it. We're also excited to announce that the first organization to sign up for the exchange through Novation is a UHC member, the Medical College of Virginia Hospitals in Richmond, Virginia."

239. Scott Decker, HEALTHvision chief executive officer, said, "We're pleased that through our relationships with Neoforma.com and Eclipsys we will be able to offer customers a comprehensive e-Health solution. HEALTHvision's customers will be able to quickly take advantage of Neoforma.com's expertise in supply chain management because Neoforma.com's contributions will nicely complement our existing services. HEALTHvision currently provides Web-based services to more than 1,200 hospitals, and the potential addition of e-commerce capabilities has already generated a great deal of interest and demand."

240. According to Zollars, the agreement with Novation creates immediate potential scale for Neoforma.com's e-commerce platform, as Novation represents more than 30% of U.S. procurement in healthcare with a membership that includes many of the nation's largest and most respected healthcare organizations and physicians. Novation also brings an existing base of relationships with a wide range of healthcare suppliers, essential to the success of an e-commerce offering. Novation plans to be active in recruiting other suppliers to the Neoforma.com marketplace. Novation already provides its alliance members with highly regarded and utilized Web-enabled tools, including an online catalog, Web-based

tools for cross-referencing and standardization.

241. On September 01, 2000, Medibuy announced that shareholders of the privately held empactHealth.com, including HCA, will receive approximately 23% of medibuy.com. HCA's ownership interest in medibuy.com will total approximately 16%. Under the agreement, San Diego-based medibuy.com will become the exclusive electronic commerce partner to HCA's 204 hospitals, as well as several members of HCA's group purchasing organization, including LifePoint Hospitals, Triad Hospitals and Health Management Associates. medibuy.com will integrate empactHealth.com's technology into its products and services.

242. On April 2001 Broadlane an electronic marketplace that comprises Tenet Healthcare Corp., Community Health Systems, Kaiser Permanente, Iasis Healthcare, Paracelsus Healthcare, Cleveland Clinic Foundation, Universal Health Services, Intermountain Health Care and Continuum Health Partners is formed.

243. On March 26, 2001 Medibuy and Premier announced the launch of Premier Exchange, an Internet portal providing electronic commerce services to Premier's 1,850 alliance members. San Diego-based Premier is a purchasing coalition for health care organizations. Medibuy, also in San Diego, is an electronic procurement vendor offering online supply ordering and management. Medibuy earlier this year acquired Premier's start-up online supply division.

244. On April 30, 2001 HealthNexis is created. Formerly the New Health Exchange, was founded in April 2000 by four of the nation's largest healthcare companies: AmeriSource Health Corporation (NYSE: AAS), Cardinal Health, Inc. (NYSE: CAH), Fisher Scientific International, Inc. (NYSE: FSH), and McKesson HBOC, Inc. (NYSE: MCK).

245. On November 26, 2001 Global Healthcare Exchange and Health Nexis announced they will combine their operations into a single Internet-based exchange, according to the organizations. Supplier members of both organizations will be connected to GHX's 70 integrated delivery networks (IDNs), which currently represent approximately 600 hospitals. The combined entity will operate as Global Healthcare Exchange LLC and will be headquartered in Westminster, Colorado. The merger announcement follows recent GHX alliances with Neoforma Inc. and AmeriNet Inc. Says GHX president Mike Mahoney, "Connectivity, participation, and cooperation among all members of the supply chain is critical for e-

commerce to reach its full potential. HealthNexis and its membership of leading healthcare companies provide considerable e-commerce technology solutions and supply chain expertise. This combination reinforces GHX's commitment to building an open and neutral healthcare exchange to drive supply chain savings."

246. On October 09, 2002 Global Healthcare Exchange, LLC (GHX) and Neoforma, Inc. announced they have signed a definitive agreement to create the first comprehensive, integrated supply chain solution for the healthcare industry. Neoforma and GHX expect the strategic alliance to accelerate the adoption of e-commerce by hospitals and suppliers, accelerating supply chain cost savings. The agreement enables Neoforma's hospital customers, including the 514 hospitals currently contracted to use the Neoforma-powered Marketplace@Novation™, to transact business with GHX's growing network of healthcare supplier members through the integrated solution, without the added cost of implementing and maintaining separate Internet connections. GHX's connected suppliers will be able to sell their products to Neoforma's current and future hospital customers through one Internet-based exchange, reducing implementation costs and simplifying the e-commerce strategy for these suppliers. GHX has signed more than 100 leading supplier members.

247. On December 11, 2002 Global Healthcare Exchange, LLC (GHX) and Medibuy, Inc. announced they have signed a definitive agreement to merge their two companies. The new company will be called Global Healthcare Exchange, LLC (GHX). Owned by many of the world's largest healthcare suppliers and providers, GHX and Medibuy will combine their respective Internet-based trading exchanges to create the largest single exchange in healthcare. More than 1400 hospitals and other healthcare facilities and 100 suppliers have already selected GHX or Medibuy as their preferred solution for purchasing healthcare products and supplies. Through this merger, the newly created exchange will provide a means for all participants in the healthcare supply chain, including provider organizations, manufacturers, group purchasing organizations (GPOs) and distributors, to benefit from improved efficiencies, cost reductions, process automation, and the adoption of industry standards.

248. The same December 11, 2002 announcement described the owners of GHX: "Originally founded in March 2000 by five major healthcare manufacturers: Johnson & Johnson Health Care Systems; GE Medical Systems; Baxter Healthcare Corp.; Medtronic USA, Inc.; Abbott Exchange, Inc., GHX has since

realized its vision of being owned by representatives of the entire supply chain, including manufacturers, distributors, providers and group purchasing organizations. In addition to the founders, the original equity owners included: Siemens; Becton, Dickinson & Co.; Boston Scientific Corp., Tyco Healthcare Group, LP; Guidant Corp.; C.R. Bard, Inc.; B Braun Medical Inc. In December 2001, GHX combined business operations with the distributor-created exchange, HealthNexis, adding AmerisourceBergen Corp.; Cardinal Health, Inc.; Fisher Scientific International, Inc.; and McKesson Corp. to its list of owners. A year later, a merger with Medibuy Inc. rounded out the current ownership roster with the addition of Premier, Inc., one of the nation's largest group purchasing organizations, and HCA, a national integrated delivery network (IDN).

249. While adopting Medical Supply's neutral marketplace concept, the same announcement reveals that GHX still maintains and is an instrument for enforcing the Defendant Novation and the unnamed coconspirator Premier's anticompetitive pricing achieved through contracts that horizontally and vertically fix prices:

250. "How does GHX benefit group purchasing organizations (GPOs)? GPOs are working with GHX to develop integrated contract management and other e-commerce services that enable their hospital members to more easily and efficiently **purchase contracted products at the agreed upon price.**"

[Emphasis added]

251. On April 11, 2003, GHX, MedAssets HSCA announced that they have formed a Strategic Alliance. Global Healthcare Exchange and MedAssets HSCA, the St. Louis-based group purchasing organization, announced they have formed a strategic alliance they say will make e-commerce services available to more than 16,000 healthcare providers. Under the terms of the agreement, MedAssets has selected GHX as an integrated e-commerce solution for members of its GPO. As a result, MedAssets members will be able to purchase products via GHX's Internet-based trading exchange using pricing data contained in the CDQuick E-Catalog, supplemented by the accurate product data in the GHX AllSource catalog.

EVENTS

252. On or about 3/12/2002, and following 3 years of R&D Samuel Lipari, President and CEO of Medical Supply Chain, Inc. (Medical Supply) began a process of selecting a corporate bank for the rollout

of its healthcare supply chain empowerment program that produces significant benefits to healthcare and its patients. He sought input from associates and advisors concerning selection of an appropriate national bank that would be capable of a full range of corporate banking services, including nation wide checking, escrow services, short and long term credit facilities, receivables financing and international clearing of transactions between thousands of health systems and their suppliers. Several national banks were evaluated but US Bancorp NA was selected because it also had an investment banking relationship with Piper Jaffray. Piper Jaffray had targeted healthcare customers and participated as underwriter and funds manager for pre IPO healthcare manufacturers and service providers and US Bancorp NA acted as underwriter for corporate bonds of healthcare companies.

253. On or about 4/15/02 Samuel Lipari arranged for Medical Supply's corporate account to be opened at US Bank's SW Topeka branch. The account was opened in the name of Medical Supply Chain, Inc., using Medical Supply's federal tax I.D. number with a cashier's check in the name of Medical Supply's agent and drawn on Miner's State Bank of Frontenac Kansas for \$7,500.00.

254. On or about 4/25/02 Samuel Lipari opened a personal account in his name at US Bank's neighborhood branch at 3640 S. Noland Road, Independence, MO. Before opening the checking account, the US Bank employee reviewed Samuel Lipari's account application and submitted Samuel Lipari's personal data to Chex Systems, Inc. for a background check, evaluation and verification of eight years of his previous banking history at other banking institutions. Samuel Lipari was approved for a personal checking account and an electronic debit card. Samuel Lipari initially used the personal account to pay expenses of Medical Supply with reimbursement from the corporation.

1. Andrew S. Duff And Piper Jaffray's Concerted Refusal To Deal

255. On 6/5/02 Samuel Lipari contacted Piper Jaffray's Minneapolis headquarters to speak to Heath Lukatch, managing director of the Piper Jaffray healthcare venture fund about Medical Supply being considered as a venture capital candidate. He was instructed to send an executive summary of his business plan via email. Samuel Lipari sent the summary and financial projections for Medical Supply with a restriction on disclosure notice. Piper Jaffray made no response to the receipt of the executive summary and financial projections from Medical Supply's business plan. Samuel Lipari again telephoned the Minneapolis offices of the Piper Jaffray venture fund managers and his calls were not taken and not

returned. Samuel Lipari also attempted to speak to a Piper Jaffray venture fund manger in their San Francisco office but again, his calls were not taken or returned.

256. On 7/9/02 Samuel Lipari and Medical Supply were visited by a Merger and Acquisitions attorney for another San Francisco venture capital firm and after extensive discussions with her at Medical Supply's Blue Springs, MO headquarters on the need to quickly enter the healthcare supply chain market and take advantage of the opportunity created by the healthcare industry's sudden willingness to reject the existing Group Purchasing Organizations, and after the New York Times had begun uncovering corruption revelations in the market. However the discussions revealed the current condition of venture funding and IPO underwriting was very troubling. At the time of these meetings the first news of WorldCom's debacle was breaking. Medical Supply's management felt with the exception of Piper Jaffray, which concentrated its investments in healthcare, that much of the assets venture funds reported were in fact overvalued equities in telecom technology companies and that the collapse of WorldCom would further depress the venture capital markets.

257. The venture capital M&A attorney questioned Samuel Lipari about the overtures of large companies seeking to acquire Medical Supply. Samuel Lipari recounted the contacts made with Supply Solution, a Michigan based company focused on expanding integration in the healthcare industry, GoCoop/Avendra a Florida based company providing e-procurement/group purchasing in the hospitality industry and also wanted to integrate in the healthcare industry, both of which were seeking go to market partners in healthcare, Owen Healthcare the pharmaceutical distribution subsidiary acting for Cardinal and Cerner, a Kansas City healthcare company with enterprise resource planning software that is based on an older operating system, called EDI that is inferior to Medical Supply's web based services and poorly suited for electronic commerce.

258. Cerner had bought out Mitch Cooper & Associates, a healthcare supply chain consulting company and seemed to be trying to acquire the capability to create an electronic healthcare marketplace.

259. Samuel Lipari told the VC attorney that Medical Supply would not compromise itself by being aligned with any existing healthcare supplier. Medical Supply has the solution and he did not want to be tainted with companies that support the high cost healthcare problem. He also recounted how start up healthcare electronic marketplace firms with technology similar to Medical Supply like Empacthealth and

Medibuy had been bought up by GPOs for tens of millions of dollars, but that once they were no longer independent, their market potential was eliminated and the technology was used by GPO firms to deceive health systems into thinking their GPO partner was attempting to increase its economic efficiency when in fact they continued to restrict trade in support of monopolizing markets.

260. Medical Supply resolved to develop a way to internally capitalize a roll out of its supply chain empowerment program and supply chain management technology. Medical Supply settled on a plan that would utilize the value of its healthcare supply chain intellectual property and offer a comprehensive year long education and healthcare supply chain certification program to independent representatives.

261. This plan would put representatives in the field nationwide that possess the knowledge and skills to relate to all levels of management in healthcare systems and assist in the adoption of Medical Supply's supply chain empowerment program. The independent representatives would pay for their certification and fund their own marketing and sales operations, consistent with distribution systems that rely on independent manufacturer's representatives. Since Medical Supply's web services were new to the market, Samuel Lipari decided that it would be critical for the certification fee to be held in escrow until the candidates had a chance to meet Medical Supply's certification team and have a chance to see if they would succeed in mastering healthcare supply chain empowerment knowledge. After a week long intensive seminar, the candidates would have the opportunity to decide whether or not to commit to the certification program and Medical Supply would have the opportunity to reject any candidates it felt would not succeed in the program.

262. Medical Supply developed a curriculum and contracted with the industry's foremost logistics and supply chain experts to provide instruction during the weeklong seminar and assist and advise candidates throughout the certification process. Medical Supply made arrangements to include information and presenters from companies with expertise in financial analysis of healthcare purchasing, including strategic sourcing and human resource evaluations so that the representatives would be able to represent products and technology services outside of Medical Supply's capabilities that would complement Medical Supply's supply chain empowerment program in allowing a health system/hospital to break free of its GPO supplier.

263. Beginning 8/1/02 Medical Supply advertised nationwide to recruit experienced account executives and sales professionals and processed hundreds of applicants with detailed evaluation of resumes, job

history and financial disclosure applications. For the first of what were to be quarterly classes, Medical Supply selected 15 candidates that had the potential to succeed as independent representatives for its services. After numerous telephone interviews ten applicants had committed to becoming certification candidates and attend the certification class starting the first week of December/02. During this same time, Medical Supply was preparing the escrow account system that the candidates would utilize.

2. US Bank's Concerted Refusal To Deal

264. On or about 10/1/02 Medical Supply contacted Chris Walden of the Noland Road, Independence MO branch of US Bank for direction on escrow accounts and commercial banking services. Medical Supply was referred to Becky Hainje a US BANCORP "Private Banker" and on or about 10/3/02 Becky Hainje contacted Samuel Lipari and told him she would arrange to put him in contact with the persons in different departments of US Bank that could provide Medical Supply the services Medical Supply requested and needed. She connected Medical Supply with Brian Kabbes in St. Louis who was responsible for US Bank commercial trust accounts in Missouri and Kansas. She also connected Medical Supply with Douglas Lewis, responsible for commercial loans in the Noland Road office.

265. Samuel Lipari described Medical Supply's need for escrow accounts to Brian Kabbes and emailed him an escrow contract that Medical Supply counsel had prepared for its candidates. Brian Kabbes asked questions about the candidates, the certification program and how many candidates had been selected so far. Samuel Lipari negotiated with Brian Kabbes to reduce the escrow fee per account since all escrow accounts would be identical, and US Bank had refused to have the funds in a single account. Brian Kabbes agreed to lower the fee for US Bank's escrow agent services from the normal of \$1,500 to \$600 per account and no hidden or additional transaction or disbursement fees.

266. After reviewing the escrow contract, on or about 10/5/02 Brian Kabbes communicated to Samuel Lipari that the language of paragraph 10 "Security Interests" should be changed so that a security interest for US Bank could be created in the \$5,000 portion of the escrow that became Medical Supply's property the moment a candidate submitted their certification funds into escrow. Medical Supply altered its escrow contract to conform to Brian Kabbes' suggestion and on or about 10/7/02 emailed the changes to Brian Kabbes. Brian Kabbes and US Bank were identified as the escrow agent in the escrow agreement and Brian Kabbes' address was included in the body of the agreement.

267. On or about 10/8/02 Samuel Lipari spoke again to Becky Hainje about Medical Supply's need for a business line of credit based on the Medical Supply portion of the escrow assets. Becky Hainje said she had talked to Brian Kabbes and he had told her there would be no problems with the escrow accounts, that they were a "slam dunk." She suggested Samuel Lipari call Doug Lewis and make an appointment to apply for the line of credit, which was based on the escrow account assets.

268. On or about 10/9/02 Brian Kabbes called to request an additional change in the escrow contract. He supplied a specified US Treasury fund investment language for the funds while the funds were in the custody of US Bank Trust Department. Medical Supply agreed to the additional change and modified the investment instructions exactly as Brian Kabbes instructed. Medical Supply also ask if there were any other changes needed before Medical Supply sent the contracts out to its certification candidates. Brian Kabbes said there would be no other changes and asked why Medical Supply was sending the candidates the escrow contract. Medical Supply explained that the contracts were going out with the certification program agreement so candidates would have a chance to review the information before their November 1st deadline, which required their funds to be in the US Bank escrow accounts. Brian Kabbes acknowledged the explanation and agreed to look over the release document Medical Supply developed that candidates would execute following the weeklong evaluation seminar to be held the first week of December.

269. During this conversation, Brian Kabbes also requested Medical Supply's current corporate good standing documentation from the Missouri Secretary of State's Office. Medical Supply agreed to send him the reinstatement and tax clearance documents on Friday 10/11/02 and that Samuel Lipari was meeting with Doug Lewis on the afternoon of Thursday 10/10/02 to set up the credit facility using the escrow accounts as security. Samuel Lipari told Brian Kabbes he would have Doug Lewis send the requested information to Brian Kabbes on 10/11/02. Brian Kabbes made no statement that US Bank had yet to approve Medical Supply 's escrow accounts and sought no additional information.

270. On or about Thursday 10/10/02, Samuel Lipari delivered the Medical Supply business plan and associate program to Douglas Lewis, at the US Bank, Noland road office to apply for the agreed upon commercial line of credit based on the portion of the escrow accounts Medical Supply would retain.

271. The business plan and associate program booklets each had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained in them.

272. A letter of introduction also stated the contents were protected and restricted disclosure and possession of the materials. Two more folders contained the good standing documentation Brian Kabbes requested and the associate program contracts that were sent to the candidates.

273. Doug Lewis asked how many candidates Medical Supply had and Samuel Lipari reached into his brief case and held up the ten folders of applicants who had committed to sending in their funds by November 1st and five others who were in the final stages.

274. Samuel Lipari further explained that he planned to start a new certification group each quarter. Samuel Lipari was given a loan application and agreed to and did return the application the next day.

275. On or about Tuesday 10/15/02 Brian Kabbes called Samuel Lipari and informed him that US Bank had turned down the escrow accounts because of the USA PATRIOT Act. When asked to clarify, he said the know your customer requirements had changed and US Bank could not set up the escrow accounts for Medical Supply.

276. Samuel Lipari was shocked and stunned and handed away the phone, where Brian Kabbes repeated again The Patriot Act as the reason the accounts were denied.

277. Later that morning Samuel Lipari called Becky Hainje and asked if she could see what happened. Samuel Lipari explained that Medical Supply was counting on the escrow accounts and that the line of credit depended on them too. He said he could not believe the USA PATRIOT Act could be a reason that applied to Medical Supply. She said she would call and see what happened.

278. Becky Hainje called back and left a taped recording on the Medical Supply answering system and listed the reasons Brian Kabbes told her. She said the reasons were the lack of a "relationship with the Bank... that the principals involved with the business were people unknown to the bank, but the main reason is to know your customer "Patriot Act" that was enacted after 9/11, and which we could not really give all the correct answers on the source and flow of money.

3. US Bancorp, Andrew Cesere and Jerry Grundhoffer's Concerted Refusal To Deal

279. On or about 10/15/02 Medical Supply found Andrew Cesere was the head of US Bancorp trust department on the US Bank web site and at 4 p.m. called his secretary Barb in Minneapolis. He was unavailable so Medical Supply asked her to leave instructions for him to call Samuel Lipari about Medical Supply's corporate escrow account rejection at 9 a.m. the following morning.

280. Barb asked for more details concerning the problem. She said Mr. Cesere had a morning meeting but she would get the message to him. At 4:30 p.m. she called back and asked for additional information and the names of the people Medical Supply had dealt with so that Mr. Cesere could inquire about the problem.

281. At 9 a.m. the following morning on or about 10/16/02 Ed Higgins called, leaving a tape-recorded message on Medical Supply's answering system identifying him as the executive vice president of Midwest trusts for US Bank. Samuel Lipari, believing that the USA Patriot Act had probably been used to reject the escrow accounts because of his family sir name which is also the name of a small group of Islands in the Mediterranean Sea and which ends in "ari" like many Moslem sir names of people of Arabic descent, activated a tape recorder with a built in microphone and called Mr. Higgins back on the speaker phone.

282. Each subsequent call to US Bank in which Samuel Lipari participated was also recorded by him to document what he suspected was discrimination based on his national origin or ethnic descent.

283. Ed Higgins listened to Samuel Lipari after stating he was an attorney and how long he had been working in trust banking, agreed with him that he saw no reason why the USA Patriot Act would apply to Medical Supply.

284. Samuel Lipari explained that Medical Supply needed additional US Bank services including credit facilities, receivables financing and clearing and settlement services for approximately 90 million worth of transactions in the first year of operations. He said he would check into the matter and call Samuel Lipari back later that day.

285. Instead of Ed Higgins, Brian Kabbes called back with Lars Anderson who he identified as head of corporate trust new business development person and Susan Paine who he said he reported to, both on the line with him. Medical Supply explained that at the time of his previous call, it was not realized that the escrow account contracts that US Bank had approved had already been sent out to the candidates in reliance on US Bank's agreement to host the escrow accounts.

286. Lars Anderson expressed some irritation that Medical Supply had contacted the head of the trust unit about the rejection of escrow accounts. Lars Anderson said the bank had never been on board and it was not a done deal. Brian Kabbes denied that there had been an agreement; he said he had twice told Samuel Lipari.

287. Lars Anderson said that there had never been a signed off agreement to provide the service and that there had never been any bid for it. Medical Supply contradicted that and said the price for the service had been quoted by Brian Kabbes and after negotiating, a specific amount had been agreed upon.

288. Samuel Lipari also told them Brian Kabbes provided and requested changes to the escrow and that Brian Kabbes had told Becky Hainje it was a “slam dunk.”

289. During the call Medical Supply attempted several times to work out any misunderstandings and set up at least the 10 accounts Medical Supply had relied on US Bank for and that US Bank had known about and that Medical Supply was now in danger of being irreparably harmed.

290. Medical Supply stated that the Patriot Act did not apply and that Medical Supply was in actuality an established US Bank customer and that Medical Supply had been in a trust relationship with US Bank and the bank even had its business plan and information about its proprietary business model.

291. Brian Kabbes said that the trust department was a “stand-alone unit” and had its own criteria for accepting customers. US Bank refused to reverse its decision.

292. Medical Supply pointed out that it had not received a true reason for denial of the accounts and that the reason given was a pretext at best.

293. Viewing US Bank’s actions, Medical Supply stated they could only be explained by a conflict of interest due to US Bancorp’s existing healthcare investments and involvement. Medical Supply felt extremely disturbed by the apparent out come of this situation, there was not enough time to establish a new banking relationship with another nationally recognized Bank and Medical Supply would loose substantial momentum.

294. Medical Supply had spent several months building up to roll out it’s supply chain empowerment program and felt to change a trust relationship in the middle will be devastating to it’s entry to market. Medical Supply researched over 300 resumes only to find 30 that appeared to be qualified.

295. On or about 10/17/02 Samuel Lipari telephoned Douglas Lewis and told him what had happened. Doug said he had sent Brian Kabbes the good standing documentation but not the business plan and associate program. Samuel Lipari instructed him not to send the business plan and associate program materials to the corporate trust office of US Bank in St. Louis because of previous losses of intellectual property from unauthorized business plan dissemination.

296. Samuel Lipari told Douglas Lewis that Medical Supply would be litigating over the escrow decision and planned to renew its application for a line of credit once it had the situation straightened out.

297. Samuel Lipari suggested he might find another bank but Douglas Lewis said that would make the line of credit difficult. Samuel Lipari further instructed Douglas Lewis to hold on to the materials and keep anyone else from having access to them. Douglas Lewis agreed and stated he would keep the business plan materials safe.

298. On or about 10/18/02 Medical Supply drafted a letter and sent it to Jerry A. Grundhoffer, the President and Chief Executive Officer of US Bancorp NA with a copy being sent to Andrew Cesere, explaining the staggering damages US Bancorp would be liable for in imminent litigation due to the refusal to provide escrow accounts to Medical Supply. Medical Supply suggested an alternative of fact finding depositions to take place in St. Louis, MO before the end of the day Tuesday 10/22/02, believing US Bank to be misinformed about the USA Patriot Act and any reason for denying the escrow accounts.

299. US Bancorp Trust Department corporate counsel, Kristen Strong replied Friday 10/18/02 via fax and priority delivery with a letter denying US Bancorp NA was in contract with Medical Supply and that if any law suit is filed to address service for the trust department to her at her office.

300. Medical Supply called the trust department counsel Monday 10/21/02 to ask for service addresses of the other named entities and employees. Kristen Strong said the same address would be good for all and then proceeded to ask what the causes of action were. Medical Supply explained that it was chiefly an antitrust action based on the Sherman, Clayton and Hobbs Act and that causes of action under the USA Patriot Act were also a basis for the suit.

301. Kristen Strong was surprised Medical Supply was told the USA Patriot Act had been given as the reason for the denial of escrow account service but reiterated that there was no contract in her view and she saw no basis for the other causes of action. Medical Supply stated that it would fax the complaint to her at

the time the action was filed at the end of business Thursday 10/24/02, but they were still waiting for Mr. Gunderson to select the alternative of mutual fact finding to promote a resolution of the matter without litigation.

302. Kristen Strong stated that the depositions would not lead to any meaningful explanation, that Medical Supply had her letter explaining US Bank's reason for denying the escrow accounts and that the bank reserved the right to choose whom it served.

303. Medical Supply reminded her that US Bancorp had extensive investments in healthcare and that choosing not to provide a service to a competitor is actionable under antitrust law.

304. Kristen Strong warned Medical Supply Not To Contact Anyone At US Bank And Said If Medical Supply filed an action against US Bancorp NA, she would send a letter to the judge in advance of her answer to our complaint saying we had *ex parte* communications.

305. Medical Supply stated that it had not had any communications with US Bank employees since receiving her reply on Friday 10/18/02. However, Medical Supply was an account holder at US Bank and would continue to have communications with US Bank regarding its other bank business.

306. Medical Supply reminded her that US Bancorp had extensive investments in healthcare distributors and that choosing not to provide a service to a competitor is actionable under antitrust law.

307. Medical Supply contacted an attorney, familiar with the healthcare supply chain research and development done by Samuel Lipari at the law firm of Shook Hardy and Bacon and asked if his firm could act as escrow agent for accounts to be set up in US Bank. He said the bank is better prepared to provide escrow services, fearing the liabilities and risks for an escrow agent where the USA PATRIOT Act had been invoked and declined to act as escrow agent.

308. On Thursday 10/24/02 Medical Supply filed for urgent injunctive relief against US BANCORP NA, its subsidiaries and named employees. Medical Supply counsel contacted US Bank counsel Kristin Strong to clarify the clerk of the court's questioning of service and to attempt to schedule a hearing. Ms. Strong said she would call the following morning Friday 10/25/02 to answer the question about service. She did not call and took the day off. Medical Supply counsel called her on Monday morning 10/28/02 at which time she said the case had been transferred to outside counsel and gave the phone number to Medical Supply.

309. On or about 10/28/02 Medical Supply contacted US Bancorp's retained counsel and explained that there were questions about service and that Medical Supply was seeking to schedule a hearing that week for its requested relief to stop the harm it was suffering and to avoid a terminal outcome for the company. US Bancorp's counsel said he had to travel and was unsure of his schedule but by the next day he might know of a time he could make a hearing. Without hearing from the opposing counsel, Medical Supply became concerned and sent an email on or about 10/29/02 suggesting portions of the injunctive relief it seemed likely the two parties could agree on and explaining the harm it was suffering and what delaying the relief beyond critical dates would inflict on Medical Supply, its associates and customers.

4. The Defendants' Acceptance of Liability For Medical Supply's Business Plan Damages

310. The email explained the losses as follows: the damages of failing to receive the \$350,000 to \$450,000 it depended on November 1st and the resulting effects of that delay on its projected financials including lost profit of \$51,795,005.00, lost increase in average valuation of \$155,385,015.00, Candidate lost revenue of \$15,499,788.00.

311. The email explained that these injuries would be far greater if a December 1st deadline is missed. However, if the company does not recover from US Bank's denial of the escrow accounts the total third year losses of the company would be as follows: lost profits \$51,795,005.00, loss of increased company avg. valuation of \$155,385,015.00, Candidate lost revenue of \$15,499,788.00 and Customer losses of \$697,486,200.00.

312. On or about Wednesday 10/30/02, US Bancorp's counsel sent a letter to the court dismissive of Medical Supply's complaint and stating that it would oppose all requested relief.

313. On or about Thursday 10/31/02, Medical Supply called US Bancorp's counsel explaining the necessity of the relief sought and specifically the relief requested under paragraph 66 seeking to stop US Bank from reporting negative information about Medical Supply under the USA PATRIOT Act.

314. US Bancorp's counsel reiterated his belief Medical Supply needed to find another bank and that no liability existed. Medical Supply's counsel explained that Samuel Lipari will not risk a hundred million dollar company that requires high level banking services to future damage from a secret USA PATRIOT Act report that has misinformation in it and would create a black mark preventing them from ever being able to do any business.

315. US Bancorp's counsel said it would not agree to even just the relief sought in paragraph 66. Medical Supply asked US Bancorp's counsel if his firm would act as an escrow agent for accounts to be deposited in US Bank, since Shook Hardy and Bacon had declined to do so. US Bancorp's counsel refused to do so stating that US Bank did not owe any duty to Medical Supply.

5. The Defendants' Theft of Medical Supply's Intellectual Property

316. Realizing there was no immediate solution to this matter, and the fact that a previous business model pricing system developed by Samuel Lipari in 1995 was appropriated by HSCA, Medecon and Cardinal Owen Healthcare through exploitation of a confidential business relationship and then taken later by many other GPOs.

317. On or about 11/6/02 Samuel Lipari visited US Bank, Noland road branch to retrieve the documents left by him following the meeting with Doug Lewis on 10/10/02. Doug Lewis gave the documents back to Samuel Lipari.

318. Samuel Lipari specifically ask if the documents were copied or faxed and Doug Lewis said he put all of the information in his analysis and Samuel Lipari left the bank. Upon returning to Medical Supply's office Samuel Lipari Inspected the documents and found that the binders had been separated and copies or faxes had been made of the associate program and the business plan documents.

319. There were also tractor marks from a copy or fax machine on the back of the entire associate program and the business plan pages.

320. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied. There were no marks on the back of these documents.

321. Medical Supply became fearful of where these documents were sent and who has reviewed them. The documents that were copied or faxed contain all confidential details to the business, business model, management team, investors, industry experts, advisors, business practices, market strategies, revenue model, service structure, formula, algorithms and financials including 5 year details, 5 year condensed and break even analysis.

322. Samuel Lipari became fearful this information would fall into the wrong hands further blocking or eliminating entry to market.

6. The Effects of the Plan To Financially Destroy Medical Supply

323. On or about 11/7/02 Samuel Lipari received a complimentary D&B report dated 10/31/02 on Medical Supply. The report indicated Medical Supply started in 2000 and has a clear credit history and a strong financial condition.

324. On November 18, 2002, Medical Supply obtained a TRO hearing on its request for preliminary injunctive relief. Medical Supply sought urgent preliminary injunctive relief from trade secret misappropriation and urgent preliminary injunctive relief from USA PATRIOT Act reporting.

325. Medical Supply had second preliminary injunction hearing at 12:00 p.m. on December 12, 2002. Medical Supply again sought urgent preliminary injunctive relief from trade secret misappropriation and urgent preliminary injunctive relief from USA PATRIOT Act reporting, but was denied.

326. On December 17, 2002 Medical Supply filed a notice of interlocutory appeal to The Tenth Circuit Court of Appeals.

327. On June 16, 2003, the Kansas District Court dismissed Medical Supply's action for injunctive and declaratory relief.

328. After losing a motion for new trial, Medical Supply filed a timely notice for appeal on November 21, 2003.

329. On January 7th, 2004, the Tenth Circuit dismissed the interlocutory appeal as moot due to the superceding appeal of the action's dismissal.

7. US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer Realize Because Of The Prospective Injunctive Relief Action Their Antitrust Liability To Medical Supply And The Requirement At Law That They Must Divest Piper Jaffray At A \$750 Million Dollar Loss

330. Jerry Grundhoffer, the CEO of US Bancorp NA realized that his acquisition of Piper Jaffray in a scheme to exploit US Bank essential facilities as the eight largest national bank in America and use its deposits as a guarantor of capital in underwriting initial public offerings (IPO's) of healthcare technology and supply chain companies and to support those IPO's with Piper Jaffray's essential facility of providing investor research had made US Bank and US Bancorp NA liable under antitrust law for its injury to Medical Supply.

331. Jerry Grundhoffer attempted to sell Piper Jaffray first to Royal Bank of Canada and then to A.G. Edwards & Sons, Inc., seeking a purchase price \$100 million dollars less than US Bancorp had acquired Piper Jaffray for.

332. In December of 2002 Samuel Lipari, CEO of Medical Supply communicated with Gordon M. Nixon and Irving Weiser of the Royal Bank of Canada (RBC) explaining Medical Supply's action against Piper Jaffray and offering to work with RBC if they decided to purchase Piper Jaffray in the hope that RBC would "prevent similar conflicts of interest from ever occurring and to ensure healthcare company securities are not marketed on the basis of illicit anticompetitive contracting advantages."

333. In December 2002 Samuel Lipari, CEO of Medical Supply contacted Robert L. Bagby and Douglas L. Kelly of A.G. Edwards & Sons, Inc. about the action against Piper Jaffray offering to work to resolve any claims:

"We believe we will prevail in our antitrust and contract related claims. The portion of liability for these staggering damages that will be apportioned to US Bancorp Piper Jaffray INC causes us great concern for your company should it acquire Piper Jaffray. A.G. Edwards has responsible corporate governance standards in place and has long served its customers without reproach. I will be happy to work with you and your counsel to resolve Piper Jaffray's involvement in these anticompetitive acts."

334. Jerry Grundhoffer sought and obtained an agreement with Piper Jaffray's C level officers subrogating US Bancorp NA and US Bank's future antitrust judgment liability to Medical Supply from Jerry Grundhoffer to Piper Jaffray.

335. Having no other alternative and realizing that liability to Medical Supply in antitrust continued to accumulate as long as the two companies were commonly owned, US Bancorp announced on February 19th, 2003 that Piper Jaffray was being spun off or separated from US Bancorp NA.

336. On December 31st 2003, US Bancorp announced the completion of its spin off of Piper Jaffray, trading on the NYSE as an independent public offering January 2, 2004.

8. US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer Realize Because Of The Prospective Injunctive Relief Action Their Antitrust Liability To Medical Supply And The Requirement At Law That They Must Divest Piper Jaffray At A \$750 Million Dollar Loss

337. GE And GHX, LLC acted against their own short term profit interest and in knowing coordination with Neoforma, Inc. in an intentional effort to deprive Medical Supply in June 2003 of its contracted or bargained for capitalization of \$350,000.00 to enter the market for hospital supplies, just as Neoforma, Inc. (Unknown Healthcare Entity) and US Bancorp, et al had through combination or conspiracy deprived Medical Supply of another \$350,000.00 obtained through the contract for escrow accounts in November 2002.

338. The Defendants Foreclosure of Medical Supply's Attempt Following Attempt To Enter Into the Market For Hospital Supplies and Hospital Supplies in E-Commerce.

339. While seeking a new corporate headquarters for Medical Supply in May 2002 Mr. Lipari discovered an unused building in the same Blue Springs suburb of Kansas City, Missouri. The building had been purpose built to house information technology workers and had the infra structure including adequate communications connections and an electric plant for Medical Supply's servers.

340. GE Transportation acquired the building and its transferable lease when it bought the railroad signal company Harmon, Inc. and got rid of its employees. GE Transportation sought to escape the \$5.4 million dollar liability of the remaining 7 year lease because of the \$50,000.00 to \$60,000.00 dollar a month payments and insurance on the building that had not been occupied for over 8 months with no sub lease offers. Previously the building had been under utilized while GE reduced Harmon's staff. The high monthly cost was making the subsidiary fail to meet GE's economic performance requirements and hurting the conglomerate's bottom line and share price.

341. On or about June 1st, 2002, Samuel Lipari, CEO of Medical Supply Chain, Inc. contacted the leasing agent Cohen & Essrey Property Management regarding a building located at 1600 N.E. Coronado Drive in Blue Springs, MO. The leasing agent indicated the building was already leased but that the lessee could and would like to sub-lease the building. The building was not occupied so Mr. Lipari made a verbal offer to sub-lease a portion of the building. The leasing agent declined his offer indicating the existing lessee would not accept anything less than leasing the entire building.

342. On or about April 1st, 2003 Mr. Lipari contacted the new leasing agent (B.A. Karbank & Company) in the event the new agent had different instructions regarding a sub-lease of the property located at 1600 N.E. Coronado Drive in Blue Springs, MO. The new leasing agent told him that GE was the lessee seeking to sub-lease the building due to their vacating the building after GE Transportation bought out of Harmon Industries. The building was still not occupied so again Mr. Lipari made a verbal offer to lease a portion of the building. The leasing agent declined his offer indicating GE Corporate Properties would not accept anything less than leasing the entire building.

343. On or about April 7th Mr. Lipari contacted GE and spoke with the GE property manager, George Frickie regarding Medical Supply's interest in sub-leasing the building. George Frickie indicated again that

GE would not be interested in sub-leasing a portion of the building but rather would be interested in leasing the entire building. Mr. Lipari requested the name of the owners and Mr. Frickie gave him the name and number of Barry Price with Cherokee Properties L.L.C. Mr. Lipari contacted Mr. Price, he was referred to Scott Asner who also had a substantial interest in the building. While speaking with Mr. Asner he provided Mr. Lipari the background and current details on the building lease with GE, terms and a price to purchase the building. The lease was transferable and GE was still obligated for 7-years out of a 10-year lease. Mr. Asner agreed to sell Medical Supply the building for the remaining balance of the GE 7-year lease (\$5.4 million) and provided Mr. Lipari with a letter of intent to sell the building to Medical Supply.

344. On or about April 15th, Mr. Lipari contacted Mr. Frickie with GE Commercial Properties and indicated that he had an interest in purchasing the building. Mr. Lipari ask Mr. Frickie if GE had an interest in buying out the remainder of their lease so that Medical Supply could occupy the building following the purchase. Mr. Frickie offered GE's lease payments for the remainder of 2003 (\$350,000) as a buy out offer.

345. On or about May 1st, 2003 Mr. Lipari tentatively contacted several local Banks, knowing that US Bank had threatened his company with a malicious USA PATRIOT Act report to keep Medical Supply from entering the hospital supply market where US bank was affiliated with Neoforma, an existing electronic marketplace for healthcare supplies. Mr. Lipari knew Medical Supply could not get a loan because of the threat and extortion, but knew he needed input from bankers familiar with the commercial real estate market in Blue Springs. Mr. Lipari felt Medical Supply could form a holding company to obtain the property without US Bank realizing he could enter the hospital supply market. Mr. Lipari spoke with Allen Lefko President of Grain Valley Bank, Pat Campbell branch manager of Gold's Bank and Randy Castle Senior Vice-President of Jacomo Bank. Each of the banks indicated a willingness to provide the mortgage because they felt the property was worth far more than the price offered by Cherokee Properties L.L.C., but the mortgage was too large for the regulatory size of their bank and they each suggested a national bank as an alternative. Due to US Bank's extortion and racketeering, including the pretext and very real threat of a malicious USA PATRIOT Act suspicious activity report (SAR) against Medical Supply since Mr. Lipari had tried to enter the hospital supply market in October of 2002, Mr. Lipari knew he was unable to solicit a national bank for the real estate loan.

346. On or about May 7th, Medical Supply contracted a financial consultant (Joan Mark) for advice on how to put a mortgage together to buy the building which has a 7-year revenue stream from GE in the amount of \$5.4 million, the identical amount offered to purchase the building and for which Medical Supply had a letter of intent from the owner Cherokee Properties L.L.C. Mrs. Mark suggested Mr. Lipari propose a mortgage arrangement directly to George Frickie with GE Corporate. Mrs. Mark explained how a purchase of the \$10 Million dollar property for \$5.4 Million was a great deal for any mortgage lender. Mrs. Mark also explained if GE provided a \$5.4 million dollar mortgage on a \$10 million dollar property and eliminated a \$5.4 million dollar lease obligation that GE would directly benefit from a \$15 million dollar swing to their balance sheet.

347. Without realizing the existence of a combination and conspiracy between the Defendants, including the existence of a secret market allocating and tying agreement between Neoforma, Inc. and G.E and Premier's electronic market place, GHX, LLC. Samuel Lipari prepared an offer on the building for GE Transportation.

348. The afternoon of May 15th, Mr. Frickie responded, leaving a taped voicemail message and stating he had spoke with the business leaders at GE corporate and that they will accept Medical Supply's proposal.

May 15th 2003-George Frickie

"Bret, George Frickie, ah.... I know I sent you an email saying that my counsel way out ah...and I followed up with another email but I spoke to the business leaders and we will accept that transaction ah... let's start the paper work ah... if you want to do some drafting of lease termination or if you would like us to do that, give me a holler 203-431-4452."

349. The second e-mail Mr. Frickie referenced on the phone conversation explicitly stated that GE would accept Medical Supply's proposal and initialed the written acceptance in addition to the electronic signature file for the e-mail:

From: Fricke, George (CORP) To: Bret Landrith Cc: Newell, Andrew (TRANS) ; Payne, Robert J (TRANS) ; Davis, Tom L (TRANS) ; Jakaitis, Gary (CORP)
Sent: Thursday, May 15, 2003 6:05 PM
Subject: RE: Lease buyout GE/Harmon building Bret, I would like to confirm our telephone conversation in that GE will accept your proposal to terminate the existing Lease. Robert Payne GE Counsel will start working on the document. He is out of the office until Monday 19th. GCF

350. On or about May 20th, 2003, Medical Supply was given a walk through of the property to inventory the buildings furniture and fixtures and discuss building maintenance and operational procedures. Tom Davis, the property manager for GE Transportation in Blue Springs and John Phillips, the GE

Transportation building maintenance engineer provided the three-hour walk through in addition to the building maintenance and operational procedures. John Philips also provided the blue prints of the building and allowed me to make copies. Mr. Lipari returned the original blue prints after he made copies. They both stated they were being dismissed from employment by GE since they would no longer be necessary.

351. On May 22nd, 2003 Mr. Lipari spoke with Doug McKay with GE Capital who had called earlier that week with regard to the mortgage outlined in Medical Supply's proposal. Doug asked that Mr. Lipari send our company information regarding the mortgage. Mr. Lipari indicated that he could meet him the following Tuesday because Medical Supply had a loan package for him that included its financials, the proposal that George Frickie and GE's business leaders accepted, the letter of intent from the owners and our Dunn & Bradstreet report showing Medical Supply's good credit and strong financial condition. Mr. Lipari gave the information to McKay and McKay indicated he needed to speak with GE Transportation to see how they wanted to handle the terms of the accepted proposal.

352. On or about June 2nd, 2003 Mr. Lipari called McKay to see how they were doing on closing and McKay indicated that the person he needed to speak with was at corporate and that he needed to speak with him before moving forward.

353. As the June 15, 2003 closing date approached, medical Supply had not received any definitive closing date so Medical Supply's corporate counsel called and sent George Frickie an email stating that a delay in closing would not effect the lease buyout of \$350,000. Medical Supply's counsel later again called Mr. Frickie when he received no response and Mr. Frickie became extremely angry and hung up the phone.

354. Medical Supply then proceeded to speak with GE's counsel Kate O'Leary to determine if the contract had been repudiated. Supporting statutes and the antitrust basis and damages implications were explained to Ms O'Leary.

355. Medical Supply gave GE a deadline to June 10th to clarify whether there had been a repudiation. Mrs. O'Leary later faxed a letter on the 10th requesting that Medical Supply not speak to anyone at GE and that any correspondence relating to this matter be directly to her. Medical Supply then emailed a letter stating that if no earnest money were deposited to indicate the contract was not being repudiated, Medical Supply would file on June 16th for antitrust and breach of contract.

356. George Fricke, property manager for The General Electric Company who Medical Supply had been told by Fricke and his agents, was the authority for the building at 1600 NE Coronado Dr. telephoned Medical Supply Chain's Missouri headquarters and placed a message on its answering machine stating he had been instructed by "business leaders" to accept Medical Supply's proposal and he was calling to do so. Then, George Fricke sent a written acceptance via e-mail with his initials added a signature at the end of the email message. No terms were disputed and the acceptance confirmed The General Electric Company would make its subsidiary GE Transportation LLC. pay \$350,000 for the buy out of the lease and its GE Capital subsidiary provide the \$6.4 million dollar mortgage and closing at 5.4% for twenty years with a first year moratorium on payments. In diversity actions, the Court applies the substantive law, including choice of law rules, that Kansas state courts would apply. See *Moore v. Subaru of Am.*, 891 F.2d 1445, 1448 (10th Cir. 1989). Kansas courts apply the doctrine of *lex loci contractus*, which requires that the Court interpret the contract according to the law of the state in which the parties performed the last act necessary to form the contract. See *Missouri Pac. R.R. Co. v. Kansas Gas and Elec. Co.*, 862 F.2d 796, 798 n.1 (10th Cir. 1988) (citing *Simms v. Metropolitan Life Ins. Co.*, 9 Kan. App. 2d 640, 642-43, 685 P.2d 321 (1984)).

357. George Fricke's signed written acceptance referenced the proposal he had received from Medical Supply earlier that day. The set of documents then became an bilateral contract completed with the last act exchanging mutual promises (*D.L. Peoples Group, Inc. v. Hawley*, — So.2d — (2002 WL 63351, Ct. App., Fla., 2002) enforceable for the sale of the lease interest and the benefit of the bargain obtained by Medical Supply under its clear and complete terms meeting the writing requirements of a real estate purchase contract in Missouri and the writing and definiteness requirement of a credit agreement under Missouri statute RMS 432.045.2 .

358. The formation of an enforceable contract in a set of documents created in correspondence is well settled See *Estate of Younge v. Huysmans*, 127 N.H. 461, 465-66, 506 A.2d 282, 284-85 (1965). Since state law requires a writing, the e-mail acceptance and signature of George Fricke is valid and enforceable under 15 USC §7001, the federal Electronic Signatures in Global and National Commerce Act, widely known as "E-SIGN." Section 101(a) of E-SIGN states that "(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in

electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

359. Medical Supply had performed as required, introducing itself to the City of Blue Springs Economic Development, and committed to purchase the building from its owner in reliance on the contract with GE, GE Transportation made open partial performance of the contract by opening the building for a three hour briefing on the operation and maintenance of the building's complex systems. This briefing was made by GE Transportation's Blue Springs property manager and the building's maintenance engineer, both of whom told Medical Supply's CEO Samuel Lipari that they had been terminated and will be leaving employment with GE Transportation the following month because they were no longer needed.

360. GE Capital partially performed as required and made an appointment with Samuel Lipari in its Overland Park, Kansas office where Mr. Lipari took the building's blueprints furnished him by GE Transportation, the building's physical description and photo furnished by George Fricke of GE corporate and Medical Supply's corporate records for the loan.

361. The GE Capital loan officer Douglas McKay discussed the terms and questioned Mr. Lipari in detail about the lawsuit. Mr. Lipari explained why under the threat by US Bank of a malicious USA PATRIOT Act suspicious activity report, Medical Supply could not risk going to a bank until the lawsuit was settled. Douglas McKay agreed the USA PATRIOT Act had no valid relationship to Medical Supply's involvement with US Bank and stated he would obtain the additional requirements GE Capital required from George Fricke and GE Transportation. McKay indicated it could take longer to close but he would check into it.

362. Medical Supply communicated to its stakeholders, business associates, potential customers, and the owners of the building that it had obtained the financing and made commitments in reliance of GE's performance on the contract.

363. No letter similar to that which Mr. McKay had described was received from GE Capital by the June 15th contract deadline and no notice of rejection of credit has been received. George Fricke communicated by phone and e-mail that the GE Capital performance would be at arm's length but since the financing was the benefit bargained for by Medical Supply, this did not contradict the contract. When

doubts about GE' intent to honor the contract arose, counsel for GE, GE Transportation and GE Capital each refused to confirm the repudiation.

364. The proposal accepted by George Fricke on behalf of GE's business leaders contained the executive summary of Medical Supply's business plan, including an explanation of the antitrust lawsuit with US Bancorp, et al and the financial projections for Medical Supply's entry into market. Under *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910 (Mo App 1994) GE is responsible for the expectation damages of the forward projections that it had accepted at the time it entered into contract with Medical Supply. Medical Supply is able to prove its projected profits with reasonable certainty. Lost future profits may be used as a method of calculating damage where no other reliable method of valuing the business is available, see *Albrecht v. The Herald Co.*, 452 F.2d 124 at 129 (8th Cir. 1971) cited for this purpose by 10th Cir.

365. GE, the parent company of GE Transportation was a dominant medical device manufacturer and medical equipment and electrical equipment supplier to North American hospitals. GE ceased to be a manufacturer and became a distributor of parts, assemblies, products, systems and credit services to hospitals. GE established monopolies in many product lines for hospitals but feared other distributors would bypass GE and buy the same parts, assemblies, products, systems from foreign sources and sell them to North American hospitals at lower prices in competition with GE To prevent this, GE made alliances with the dominant distributors for hospitals called GPO's including the Defendant Novation, LLC because they were intended to be group purchasing cooperatives (organizations). GE and the other dominant manufacturers gave the management of these GPO's including the Defendant Novation, LLC kickbacks to prevent direct competition in distribution, preserve their loyalty and to protect the inflated prices. However, GE saw that the captive customers of these GPO's including the Defendant Novation, LLC were growing dissatisfied at the inefficiency and the failure to achieve group purchasing discounts. To protect against other market entrants, GE formed Global Health Exchange LLC. as an electronic market place promising online distribution at lower prices to hospitals. GE owns shares of stock in the privately held company and provided the initial capitalization. As an alliance of a handful of dominant manufacturers (now distributors) the actual goal was to preempt the fledgling e-commerce companies from entering the electronic distribution of hospital supplies.

366. G.E. had also formed its own electronic marketplace called Global exchange and continues to market hospital supply products over the internet from its corporate web site as a distributor of other manufacturers' hospital supply products.

367. GE found the technology of GHX, Inc. was inadequate to outperform new entrants and aligned itself with the Defendant Neoforma, Inc., the electronic marketplace co-opted by the dominant GPO's including the Defendant Novation, LLC in an alliance to exchange data among suppliers to enforce cost structures as inflated as those of the GPO's. GHX, LLC at the direction and approval of GE has retaliated against suppliers who endanger the marketplace with competitive prices. GHX, LLC. at the direction and approval of GE has excluded competitors including Retractable Technologies, Inc. and Masimo for failing to give kick backs to the cartel. Death and injury resulted from the failure of hospitals to obtain these medical devices.

368. GHX, LLC. at the direction and approval of GE in a conspiracy and combination with the Defendants has excluded Medical Supply Chain, Inc. from entering the market by not allowing Medical Supply to offer GE Capital Healthcare credit to its potential customers in April of 2002, and by refusing to offer US Bancorp Piper Jaffray services to Medical Supply in June 2002 in a conspiracy with the Defendants and by repudiating essential escrow contracts required by Medical Supply to capitalize its entry into market in October 2002. (US Bancorp has interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX LLC.; the Defendant Novation and Premier. US Bancorp helped the Defendant Novation acquire control of the Defendant Neoforma and partner it with GHX LLC. creating a monopoly of over 80% of healthcare e-commerce).

369. GE at the direction of the Defendants including Neoforma and Novation LLC caused its subsidiary GE Transportation to repudiate the contract to buy the lease from Medical Supply, sacrificing \$15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against GHX, LLC. and Neoforma. The market is worth 1.8 trillion dollars. GE acted on the tremendous windfall to preserve its monopoly. George Fricke is GE Corporate's property manager.

9. Piper Jaffray And Andrew S. Duff Realize Because Of The Prospective Injunctive Relief Action Their Antitrust Liability To Medical Supply And The Requirement At Law That They Divest Their Healthcare Venture Fund, Losing \$225,000,000.00 (255 Million Dollars) In Assets

370. The Defendants The Piper Jaffray Companies and Andrew S. Duff attempted to contract with the Defendant US Bancorp to guarantee the bank holding company's liability to Medical Supply but discovered it could not continue to incur liability to Medical Supply for participating in the scheme to monopolize the markets in hospital supplies and hospital supplies in e-commerce and announced it was withdrawing from the conspiracy and combination's scheme to monopolize the capitalization of healthcare technology and supply chain management companies.

371. On October 13, 2004, Piper Jaffray announced it was relinquishing its healthcare technology capitalization subsidiary, Piper Jaffray Ventures.

372. Founded in 1992, Piper Jaffray Ventures manages over \$225 million in capital dedicated exclusively to funding innovative, emerging growth companies in the medical technology, biotechnology and healthcare services sectors. Through Piper Jaffray Ventures, The Piper Jaffray Companies actively participated in and held seats on the boards of directors of their client companies, facilitating the monopolization of the markets for hospital supplies and hospital supplies in e-commerce.

373. Through Piper Jaffray Ventures, The Piper Jaffray Companies was also able to extract fees for access to an extensive network of industry contacts including Novation, LLC, UHC, VHA and Neoforma.

374. The Piper Jaffray Companies also used Piper Jaffray Ventures to capitalize healthcare technology and supply chain management companies that became part of the Defendants' combination and conspiracy to restrain trade with US Bancorp NA.

10. Medical Supply Informs Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma that it has been unsuccessful in obtaining prospective injunctive and declaratory relief against their coconspirators Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer and that the conspirators are jointly and severally liable for the damages Medical Supply sought to avoid.

375. On December 14, 2004, Medical Supply served a demand letter Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma giving notice to these defendants of Medical Supply's claims against them. Medical Supply informed the defendants that it has been unsuccessful in obtaining prospective injunctive and declaratory relief against their coconspirators Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer and that the conspirators are jointly and severally liable for the damages Medical Supply sought to avoid.

11. Medical Supply is granted a Rehearing in Tenth Circuit. That Afternoon UHC and VHA Realize Because of Medical Supply's Demand Letter That They Are Required At Law To Divest

Neoforma and Both UHC and VHA Make an Emergency Announcement of An Agreement to Dispose of Neoforma at a \$150,000,000.00 dollar loss.

376. On January 25th in an emergency late afternoon press announcement after hearing Medical Supply's Tenth Circuit decision would be reheard, Neoforma, Inc. stated:

"Neoforma Hires Merrill to Mull Options

Associated Press
01.11.2005, 04:52 PM

Neoforma Inc., a provider of supply-chain management solutions for the health-care industry, on Tuesday said it hired Merrill Lynch & Co. as its financial adviser to help it explore options, including a sale or merger.

Neoforma said that any transaction must be approved by VHA Inc. and the University HealthSystem Consortium - national health-care alliances which own a majority of the company's outstanding shares and own Neoforma's largest customer, the supply company Novation.

The company said that there is no assurances that any transaction will occur."

Before Medical Supply's antitrust actions were brought, Neoforma and Robert Zollars boasted of the monopolization of the e-commerce market for hospital supplies accomplished by alliances with other monopolists including the Defendant Novation, LLC:

CEO explains reasons why long-term investor should be looking at Neoforma Full article published: 12/20/2001 ROBERT J. ZOLLARS is Chairman and Chief Executive Officer of Neoforma, Inc.

Mr. Zollars: To start with, Neoforma is a 2001 Internet success story, and we're the leader in healthcare B2B. Neoforma builds and operates Internet marketplaces that empower healthcare trading partners to optimize their supply chain. So simply put, we help hospitals buy their supplies more efficiently and more effectively.

TWST: Could you give us a sense of the competitive landscape?

Mr. Zollars: About a year or so ago, there were probably 100 companies competing for this opportunity, and today you have less than a handful. As you look at the metrics that we're enjoying right now, as of October 18, Neoforma has over 700 trading partners; that includes 563 hospitals under contract, 333 live using the technology, and 130 suppliers. To give you an idea of scale, that means in our third quarter, we processed over 500,000 order documents that included 1.5 million line items. So, clearly, by any measure, we're out in front of the rest of the pack, which is exciting for us.

TWST: What were the steps you took to achieve this dominant position?

Mr. Zollars: I think the most important thing is we have great partners. First of all, we're partnered with Novation. Novation is the number one group purchasing organization in the country, or GPO. It covers roughly one-third of the market. It's members buy approximately \$36 billion a year in medical supplies and equipment, and just over a year ago we signed an agreement with Novation to be it's exclusive e-commerce partner for 10 years. We're now one year into that agreement and have generated some great results together, as I just mentioned. The other great partner we have is GHX, the Global Health Exchange, an industry supplier consortium. It was founded by General Electric, Johnson & Johnson, Baxter, Abbott and Medtronic, and up until August, had been competing with