IN THE STATE OF MISSOURI
WESTERN DISTRICT COURT OF APPEALS

SAMUEL K. LIPARI	)	
	)	
Petitioner	)	**Case No.**
	)	
vs.	)	W.D. Case no. WD70832
	)	
NOVATION LLC, *et al*	)	16th Cir. Case No. 0816-04217
	)	
Respondent	)	

APPLICATION FOR TRANSFER TO MISSOURI SUPREME COURT UNDER RULE 83.02

Is transfer sought prior to opinion _____ or after opinion X

The date the record on appeal was filed 3/30/2009

The date the Court of Appeals opinion was filed 3/09/2010

The date the motion for rehearing was filed and ruled on N/A

The date the application for transfer was filed in the

Court of Appeals 3/23/2010

and ruled on N/A

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WHETHER A COURT CAN NULLIFY MISSOURI ANTITRUST STATUTES §§ 416.011 TO 416.161 BY EXERCISING DISCRETION TO DISMISS CLAIMS SUFFICIENTLY PLED UNDER CONTROLLING PRECEDENT

The appellees were dismissed from the 16th Circuit court for failure to state a claim. The Western District Court of Appeals upheld the trial court. The dismissal is an exercise of discretion to disregard elements pled according to the requirements in *Zipper v. Health Midwest*, 978 S.W.2d 398 (Mo. App.W.D., 1998). The dismissal by the court that has the effect of nullification of the antitrust statues, an area of law that the State of Missouri legislature and Missouri courts pioneered as a means of preserving the cost controlling benefits of competition.

The appeals court opinion raises for the first time a federal issue by materially basing its affirmation on specific defects in the pleading by the appellant a *pro se* petitioner whose petition alleges was repeatedly unlawfully deprived of Missouri licensed counsel by the defendants denying the appellant his Due Process, First and Sixth Amendment rights under the US Constitution, raising a right to review of this court's failure to enforce these rights by the US Supreme Court under *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

The present budget of Missouri is in crisis over the revenue creating jobs lost and escalating costs of healthcare resulting from restraint of trade in supplies, the largest component of healthcare costs.

STATEMENT OF FACTS

1. The appellant's petition stated allegations of a specific agreement by the defendants to unlawfully restrain trade in hospital supplies in the geographic market of the State of Missouri. See Legal File vol. 1 pages 104-105.

2. The appellant's petition stated numerous averments of supporting facts substantiating the allegation that the defendants had monopoly share of the hospital supply market that was greater than 70% giving the defendants the power to restrain trade: *i.e*. Legal File vol. 1 pages 49, 50, 99 (80% of the hospital supply market, 100% of the electronic market for hospital supplies), 105, and ¶¶ 356, 357.

3. The appellant's petition stated numerous averments of supporting facts relative to specific individual defendants of when they entered into the alleged agreement to restrain trade in hospital supplies in the relative market and the unlawful acts each defendant to attempt the monopolization and to exercise the continuing monopoly.

4. The appellant's petition stated in detail the harm to Missouri citizens from the artificially inflated hospital supply costs that led to Medicaid recipients being cut from benefits and the budgetary crisis currently being experienced in the Missouri State Legislature from the factory jobs lost because of the lack of competition to control costs for healthcare in Missouri.

5. The appellant's petition stated in detail the injury to himself as a sole proprietor dealer of hospital supplies excluded from the market by the defendants' antitrust conspiracy and unlawful acts to unreasonably restrain trade in the period

covered by the initial petition (January 27th, 2006 to February 25, 2008) and continuing through the period covered by each successive amended petition to March, 2009. See Legal File vol. 1 page 12 ¶¶ 102 and 104 and vol. 4 pages 547, 549, 562. 573, 165 at ¶¶ 23, 39. 165, 230

6. Each petition and amended petition stated the elements for a violation of Missouri State statutes §§ 416.011 TO 416.161 prohibitions against conspiracy to restrain trade, monopoly and attempted monopoly under the element's stated in the controlling state and federal precedents in numbered headings with the supporting averments of facts located in the petition's table of contents. See Legal File vol. 1 pages 12 ¶¶ 102

7. Each petition on its face gave notice of conformance with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) where the appellant was alleging a specific agreement entered into by the defendants to participate in the Novation LLC cartel, not the possibility of an agreement inferred by conduct that concerned the court in *Twombly*. See Legal File vol. 1 page 15 at ¶ 26.

8. Neither the order of the trial court of the appellate court resulted in opening access to the Missouri market for hospital supplies monopolized by the defendants' cartel.

SUGGESTION IN SUPPORT

The appellant was entitled to proceed in state court on claims expressly dismissed by federal court without prejudice and preclusion of claims and on ***subsequent*** antitrust conduct. See *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

The appellant's attempted monopolization claims were not barred by the *Noerr-Pennington* doctrine from *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127, 136, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) which does not immunize unlawful acts (Legal File vol. 1 pages 40-56 at ¶¶ 216- 329) to influence government for the purpose of monopolization. However the petition needed to provide supporting facts to allow a court to determine the monopolizations schemes including state government officials such as the "Insure Missouri", the proposed cancer research center, and the repeated deprivation of counsel from the plaintiff were unlawful, thus the necessity for a longer petition.

Upholding the appellate court on this last factor (deprivation of counsel for redress) will entitle the appellant to review in the U.S. Supreme Court under 28 U.S.C. 1257 (3) because the state chartered law firms and state licensed attorneys that repeatedly deprived the appellant of counsel have now benefited from that infringement on the appellant's federally protected rights under the Due Process clause; the Sixth and First Amendments of the US Constitution since the fruit of that misconduct – a deficiency in the appellant's *pro se* petition is the foreseeable

result and sole objective of the defendants in furthering their antitrust conspiracy to prevent the appellant from entering the market for hospital supplies.

The appellant hereby expressly raises this federal claim resulting from the W.D. of Missouri Appeals court decision the appellant now seeks to review. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897).

The appellant respectfully believes the trial court and appellate courts were in error and have ruled contrary to *stare decisis* rulings on the point of law[1] regarding the trial court's discretion to dismiss antitrust claims containing the elements of each violation under Missouri State statutes §§ 416.011 TO 416.161 that conform to the elements required *Zipper v. Health Midwest*, 978 S.W.2d 398 (Mo. App.W.D., 1998).

The petition also stated the elements required to state a claim under federal precedent in accordance with the Missouri Antitrust Act provision sufficiency of claims "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." § 416.141 RSMo 1978. *Fischer, Etc. v. Forrest T. Jones & Co*., 586 S.W.2d 310, 313 (Mo. banc 1979).

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[1] "We recognize that generally, when a point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from…" *Porter v. Erickson Transport Corp*., 851 S.W.2d 725 at 736 (Mo. App. S.D., 1993)

The elements for each antitrust claim including standing and conspiracy are pled to the requirements of the currently controlling federal antitrust cases *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959) *;Gen. Indus. Corp. v. Hartz Mountain Corp.,* 810 F.2d 795, 806-807 (8th Cir.1987); *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp*., 995 F.2d 425, 438-40 (3d Cir.1993); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd*., 924 F.2d 1484, 1491 (9th Cir. 1991); *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc*., No. 03-14588 (Fed. 11th Cir. 6/30/2004) (non market conspirators); and *Central Telecommunications, Inc. v. TCI Cablevision, Inc*., 800 F.2d 711 at 724 (C.A.8 (Mo.), 1986).

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) does not provide a basis for a Missouri court to reject a petition alleging a specific express agreement to restrain trade. The *Twombly* decision applies only to whether a complaint plausibly ***inferred*** a conspiracy to restrain trade.

The Eighth Circuit has recently reviewed the changes in pleading resulting from *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) and has resolved whether federal courts must impose a heightened pleading standard including the detailed factual allegations and specific facts the defendants argued required the plaintiff/appellant's conspiracy allegations to be dismissed over:

> "After *Twombly*, we have said that a plaintiff "must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims . . ., rather than facts that are merely consistent with such a right." *Stalley v.*

Catholic Health Initiative, 509 F.3d 517, 521 (8th Cir. 2007); *Wilkerson v. New Media Tech. Charter Sch*., 522 F.3d 315, 321-22 (3d Cir. 2008). **While a plaintiff need not set forth "detailed factual allegations,"** *Twombly*, 127 S. Ct. at 1964, **or "specific facts" that describe the evidence to be presented**, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam), the complaint must include sufficient factual allegations to provide the grounds on which the claim rests. *Twombly*, 127 S. Ct. at 1965 n.3" *Gregory v. Dillard's, Inc*., No. 05-3910 (8th Cir. 5/12/2009).

The plaintiff/appellant in his initial petition and proposed amended petitions met the standard of including sufficient factual allegations to provide the grounds for his claims required in *Gregory v. Dillard's, Inc*., No. 05-3910 (8th Cir. 5/12/2009).

Missouri's existing standard for pleading civil conspiracy including *Macke Laundry Serv. Ltd. v. Jetz Serv. Co*., 931 S.W.2d 166, 175 (Mo.App.1996) does not create a heightened pleading standard over *Gregory v. Dillard's, Inc*., No. 05-3910 (8th Cir. 5/12/2009). And the petition and amended petitions met the requirement to provide supporting factual averments to substantiate the plausibility of the defendants' conduct being part of a complex antitrust conspiracy to restrain trade under *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

Respectively submitted,

S/Samuel K. Lipari

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 23rd day of March 2010, by email, hand delivered and or first class mail postage prepaid to:

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