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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
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.	)
Defendants.	)

Suggestion in Opposition to defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Shughart Thomson & Kilroy, P.C., Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duff Motion To Transfer, Dismiss And/Or Strike

1. The plaintiff has addressed the request to transfer in this action to the Kansas District Court in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference.

2. The plaintiff has addressed the claim and issue preclusion arguments in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference with the addition of the mention that the defendants are seek to contradict *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) which appears in all respects to be a bay horse case:

> "That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct—for example, an abatable nuisance—may frequently give rise to more than a single cause of action. And so it is here. The conduct presently complained of was all subsequent to the 1943 judgment. In addition, there are new antitrust violations alleged here—deliberately slow deliveries and tie-in sales, among others—not present in the former action. While

the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case. In the interim, moreover, there was a substantial change in the scope of the defendants' alleged monopoly; five other producers had granted exclusive licenses to National Screen, with the result that the defendants' control over the market for standard accessories had increased to nearly 100%. Under these circumstances, whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, the 1943 judgment does not constitute a bar to the instant suit.

This conclusion is unaffected by the circumstance that the 1942 complaint sought, in addition to treble damages, injunctive relief which, if granted, would have prevented the illegal acts now complained of. A combination of facts constituting two or more causes of action on the law side of a court does not congeal into a single cause of action merely because equitable relief is also sought. And, as already noted, a prior judgment is res judicata only as to suits involving the same cause of action. There is no merit, therefore, in the respondents' contention that petitioners are precluded by their failure in the 1942 suit to press their demand for injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata."

Lawlor v. National Screen Service Corporation, 349 U.S. 322 at 327-329, 75 S.Ct. 865, 99 L.Ed. 1122 (1955).

3. The plaintiff has addressed the arguments related to the sufficiency of its pleading of its federal actions in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference.

4. The notice pleading requirements of federal claims also extend to the plaintiff's state claims:

"Under the Federal Rules, it is not necessary to plead every fact with formalistic particularity. Fed. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."). Rather, the question for us is whether BJC's complaint put Columbia on notice as to the substance of the claim. *Swierkiewcz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1057-58 (8th Cir. 2002). We conclude that it did. The allegations that BJC had a binding agreement with Columbia, that Columbia breached the agreement,

> and that BJC suffered injury as a result of the breach, are sufficient to satisfy the requirements of Rule 8(a)."

BJC Health System v. Columbia Casualty Company at page 5 (8th Cir., 2003).

5. The plaintiff has addressed the arguments related to the sufficiency of its pleading fraud in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference.

6. In response to the defendants' request to strike allegations related to Magistrate James P. O'Hara and the law firm of "Shughart, Thomson & Kilroy Watkins Boulware, P.C.," for being immaterial, impertinent and scandalous under Rule 12(f). There is no automatic immunity for attorneys from their tortious conduct. *Havens v. Hardesty*, 43 Colo.App. 162, 600 P.2d 116 (1979). The plaintiff calls the defendants' attention to *Handeen v. Lemaire*, 112 F.3d 1339 (C.A.8 (Minn.), 1997) in which the court of appeals found merit to RICO claims against a law firm. See also *Raymark Industries, Inc. v. Stemple*, 714 F.Supp. 460 (Kan., 1988).

7. The plaintiff also requires Shughart, Thomson & Kilroy Watkins Boulware, P.C.'s presence for injunctive relief to prevent indemnification of other defendants' antitrust liabilities in contradiction of public policy. See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 at 1186 (C.A.8 (Minn.), 1979).

Respectfully Submitted

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Certificate of Service

I certify that on April 19th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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