IN THE STATE OF MISSOURI
WESTERN DISTRICT COURT OF APPEALS
AT KANSAS CITY, MISSOURI

Case No. WD70832 (16th Cir. Case No. 0816-04217)

SAMUEL K. LIPARI
Appellant

vs.

NOVATION, LLC; NEOFORMA, INC; GHX, LLC; VOLUNTEER HOSPITAL ASSOCIATION; VHA MID-AMERICA, LLC; CURT NONOMAQUE; THOMAS F. SPINDLER; ROBERT H. BEZANSON; GARY DUNCAN; MAYNARD OLIVERIUS; SANDRA VAN TREASE; CHARLES V. ROBB; MICHEAL TERRY; UNIVERSITY HEALTHSYSTEM CONSORTIUM; ROBERT J. BAKER; JERRY A. GRUNDHOFER; RICHARD K. DAVIS; ANDREW CECERE; COX HEALTH CARE SERVICES OF THE OZARKS, INC.; SAINT LUKE'S HEALTH SYSTEM, INC.; STORMONT-VAIL HEALTHCARE, INC.; SHUGHART THOMSON & KILROY, P.C.; HUSCH BLACKWELL SANDERS LLP

OPENING BRIEF OF THE APPELLANT

Prepared by Samuel K. Lipari
Pro se Plaintiff
3520 NE Akin #918
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com

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Point 1. The trial court erred in adopting the defendants' collateral estoppel of claims arguments for dismissal, because estoppel of "claims" is the doctrine of *res judicata* now called claim preclusion and is inapplicable to the petition , in that the plaintiff/appellant's state law based claims in the present petition were expressly dismissed without prejudice in preceding federal litigation over the plaintiff's Article III case or controversy and the trial court's orders of judgment are reversible under federal and Missouri case precedent. 18

Point 2. The trial court erred in adopting the defendants' collateral estoppel of issues arguments for dismissal, because estoppel of issues is the doctrine of issue preclusion and is inapplicable to the petition , in that the federal court made no findings of fact or law related to the plaintiff/appellant's state law based claims in the present petition which were expressly dismissed without prejudice and the trial courts orders of judgment are reversible under federal

and Missouri case precedent. 29

Point 3. The trial court erred in adopting the defendants' *Noerr- Pennington* Immunity arguments because unlawful acts to influence government for the purpose of monopolization fall within the "sham petitioning" exception to the *Noerr- Pennington* doctrine and is reversible error under controlling federal antitrust law which under § 416.141 RSMo determines the interpretation of the Missouri antitrust statutes. 38

Point. 4 The trial court erred in granting judgment on the pleadings, because defendant's request was an untimely motion to dismiss and the pleadings were still open, in that the Missouri Supreme court and the rules of civil procedure bar granting a dismissal in violation of the time limit in Rule 55.27 (6) or before the pleadings are closed, requiring reversal of the trial court. 43

Point. 5 The trial court erred in denying the proposed amended petition as resubmitted to the court, because the order the court made to resubmit the first amended petition was without trial court jurisdiction while the matter was on appeal and the proposed second amended petition materially conformed to the first amended petition that had earlier been approved creating a reversible error of abuse of discretion, in that the reason used by the court was shockingly arbitrary, capricious and against justice. 50

Point 6. The trial court erred in adopting the defendants' dismissal arguments based on a bar of statutes of limitations which must be reversed because the continuing antitrust conduct, the alleged conspiracy and the accrual of claims made the petition's claims timely in that claims not subject to the savings statute accrued on the last act of a co-conspirator or joint tortfeasor under controlling Missouri authorities. 59

Point 7. The trial court erred in adopting the defendants' sanction depriving the plaintiff/appellant of the right to communicate directly to other parties protected under the US Constitution guaranteed Right to Freedom of Speech requiring reversal of the trial court in that the Missouri Supreme Court rules expressly provide for an unrepresented plaintiff to communicate directly to the defendants. 64

Point 8. The trial court erred in denying the plaintiff/appellant's motion to require defendant Lathrop & Gage, L.C. to provide more definite answers and facts supporting asserted affirmative defenses and must be reversed in that courts lack discretion to Rule 55.27(d) or ignore the pleading sufficiency requirements of Rule 55.08. 73

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Point 10. The trial court erred in adopting the defendants' arguments that *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) had over ruled Missouri's pleading standards for tortuous interference, Prima facie tort; fraud, civil conspiracy and antitrust conspiracy where specific agreements to restrain trade are alleged with supporting facts and requires reversal because Bell Atlantic increased only the federal pleading standard for circumstantial inference of an agreement to restrain trade, adding plausibility not the specific conspiracy agreements averred in the petition to Missouri's sufficiency of claims authorities which have always been fact based and higher than the FRCP Rule 8 Notice Pleading of federal courts 87.

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JURISDICTIONAL STATEMENT

The plaintiff/appellant appeals the dismissal of all claims in his petition alleging violations of Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo and related common law claims resulting from the defendants' continuing Novation LLC cartel hospital skimming scheme and actions to keep the plaintiff, a sole proprietor hospital supply distributor out of the Missouri market for medical supplies purchased by hospitals.

The defendants' Novation LLC cartel extracts fees from hospitals and kickbacks from each manufacturer whose products are purchased at Missouri hospitals under long term anticompetitive contracts that allocate market share. The defendants' Novation LLC cartel adds 20 to 45% to the costs paid by Missouri hospitals and controls the purchasing in over 70% of the state's hospitals. The defendants' Novation LLC cartel however misrepresents in annual reports to its Missouri member hospitals that Novation saves money in the form of rebates.

During the period addressed by this litigation the Missouri hospitals did not report their rebates in their Medicare reimbursement claims through the corruption of the Medicare administrator Blue Cross Blue Shield of Kansas ("BCBSK"). But, because of this misconduct, BCBSK lost the bid to renew the Medicare administration contract.

The Missouri hospitals that were controlling members of the Novation LLC cartel had to replace the corrupt preferential treatment in Medicare claims reimbursement for hospital supplies and attempted to further the Novation LLC monopoly through an unlawful state scheme to administer Medicaid funds and purchase hospital supplies called "Insure-Missouri".

The defendants have interfered with the plaintiff/appellant's contracts and business relationships, including repeatedly depriving him of legal counsel for the purpose of furthering the Novation LLC cartel's monopoly of Missouri hospital supplies.

During the period of monopolization covered by this action and the above stated conduct of the defendants, the plaintiff/appellant was forced to dissolve his corporation and sell hospital supplies as a sole proprietor. Yet, as the petition dismissed by the court reveals, the plaintiff/appellant still experienced and suffered injuries from chargeable antitrust conduct by the defendants.

Additional subsequent and continuing antitrust conduct by the defendants against the plaintiff/appellant to prevent competition in the Missouri market for hospital supplies is detailed in proposed amended petitions which the trial court also dismissed.

Citizens, employers and the State of Missouri have been injured by the defendants' Novation LLC cartel's conduct to artificially inflate hospital supply costs. The injuries have included the loss of healthcare insurance, a resulting loss of life from decreased medical care, and loss of life from shortages of supplies at Missouri hospitals including Truman Medical Center that were not controlling members of the Novation LLC cartel.

The state has lost manufacturing jobs and its auto plants have been shut down because the artificial inflation of hospital supply costs has made Missouri healthcare an uncompetitive input resulting in foreign manufacturers gaining market share previously controlled by Missouri businesses.

The State of Missouri has been injured from the overcharging by the defendants' Novation LLC cartel; the artificial inflation of hospital supplies' impediment to Missouri's duty of providing healthcare to socially and economically disadvantaged citizens; and the loss of tax revenue from the jobs killed by uncompetitive employee healthcare costs caused by the defendants' Novation LLC cartel' hospital skimming.

STATEMENT OF FACTS

1. The verified sworn petition states in detail this Article III controversy's

procedural history of including the plaintiff/appellant's state claims which originally were filed as pendant state claims to federal litigation.

2. The petition's table of contents entry "Procedural History" (legal file page 4) directed the parties and trial court to section 5 at legal file vol. 1 page 14 and to "Appendix I" legal file vol. 1 page 120.

3. Appendix I of the petition entitled "Procedural History" showed the trial court and parties that the action was originally filed as *Medical Supply Chain, Inc. v. US Bancorp, NA et al* KS. Dist. Case No.: 02-2539 on November 2, 2002. Legal File page 120 at ¶2.

4. The "Procedural History" showed the trial court and parties that the antitrust issue for collateral estoppel purposes was the plaintiff/appellant's claim 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, LLC a healthcare group purchasing organization ("GPO") competitor of Medical Supply's in the hospital supply market." Legal File vol. 1 page 120 at ¶6.

5. The petition does not state any current antitrust claims based on the provision of escrow accounts by any current defendant. Legal File pages 12-119.

6. The "Procedural History" showed the trial court and parties that the

plaintiff/appellant then brought damages claims based on the antitrust conduct and pendant state law contract based claims previously dismissed without prejudice in the US District Court for the Western District of Missouri styled *Medical Supply Chain, Inc. v. Novation, et al*, W.D. MO case no. 05-0210. Legal file vol. 1 at page 122.

7. The "Procedural History" showed the trial court and parties that the case was transferred to the District of Kansas at Kansas City, Kansas and recaptioned as

Medical Supply Chain, Inc. v. Novation, et al, KS Dist. Court case no.:05-2299. Legal file vol. 1 page 122 at ¶ 32.

8. The "Procedural History" showed the trial court and parties the *res judicata* and collateral estoppel relevant facts that the Kansas District court "dismissed the federal claims in their entirety for failure to state a claim despite the fact that the compliant 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." Legal file at vol. 1 page 123 at ¶ 32.

9. The "Procedural History" (Legal file vol. 1 at page 124-125 at ¶¶ 35-41) showed the trial court and parties the *res judicata* and collateral estoppel relevant fact that the Article III controversy filed by the plaintiff/appellant on

November 2, 2002 continued on in the Kansas District trial court during the period the defendants sought to have the present petition dismissed:

"35. The plaintiff Samuel K. Lipari undertook to bring the Missouri state law contract based claims as the sole assignee of his now dissolved Missouri corporation in this court acting *pro se* in an action that was captioned *Samuel Lipari* v. *US Bancorp, NA, et al*, 16th Cir Mo. Case no. 0616-CV32307.

36. US Bank and US Bancorp fraudulently removed the action to the US District Court for the District of Missouri asserting diversity but without disclosing to the Clerk of the Western District Court during the *ex parte* removal that the matter had been originally filed in the Western District as *Medical Supply Chain, Inc. v. Novation, et al*, W.D. MO case no. 05-0210 with Missouri resident codefendants.

37. US Bank and US Bancorp through their agent Shughart, Thomson, Kilroy, P.C. fraudulently had the Western District case transferred at US Bank and US Bancorp's false assertion of the interests of justice to the District of Kansas at Kansas City, Kansas where it was recaptioned as *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.:05-2299 and dismissed by the Hon. Judge Carlos Murguia in response to extrinsic fraudulent dismissals filed by Shughart, Thomson, Kilroy, P.C. and Husch

Blackwell Sanders LLP for not having pleading elements.

38. The pleading elements for the federal antitrust and racketeering claims were clearly on the face of the *Medical Supply Chain, Inc. v. Novation, et al* complaint and located where the table of contents identified them, exposing the extrinsic fraud on the Kansas District court.

39. US Bank and US Bancorp through their agent Shughart, Thomson, Kilroy, P.C. fraudulently withheld disclosure from the Clerk of the Western District of Missouri that *Samuel Lipari* v. *US Bancorp, NA, et al*, 16th Cir Mo. Case no. 0616-CV32307 was under exclusive federal jurisdiction in the US Court of Appeals for the Tenth Circuit as *Medical Supply Chain, Inc. v. Novation, et al*. 10th Cir. case no. 06-3331.

40. After removing the plaintiff's state law claims with the false assertion of federal diversity jurisdiction where the plaintiff's federal concurrent action was still under the jurisdiction of the Tenth Circuit which was hearing the plaintiff's appeal, Shughart, Thomson, Kilroy, P.C. again falsely transferred the state action to the Kansas District court misrepresenting to US District Court for Western District of Missouri Hon. Judge Fernando J. Gaitan that the US Bank and US Bancorp sought the case moved in the "interests of justice."

41. The case continues on as *Samuel Lipari* v. *US Bancorp, NA, et al*, KS.

Dist. Court Case No"

10. The petition's Appendix II "Table of Prior and Related Cases" lists the restyling of the plaintiff/appellant's state claims from the same Article III case or controversy on legal file vol. 1 page 127.

11. The Western District Appellate Court has the judicially noticeable *res judicata* and collateral estoppel relevant facts from the US Courts case online index entitled "PACER" that *Samuel Lipari* v. *US Bancorp, NA, et al*, KS. Dist. Court Case No. 07-02146 which continued in trial court until December 17, 2008 when an amended notice of appeal was filed and is presently in the Tenth Circuit Court appeals in a consolidated appeal styled *Samuel Lipari* v. *US Bancorp, NA, et al*, Consolidated Appeal Case Nos. 08-3287, 08-3338 & 08-3345; Appeal from KS Dist. Court Case No. 2:07-cv-02146-CM;Formerly W.D. MO. Case No. 06-1012-W-FJG; Formerly State of Missouri 16th Cir. Case. No. 0616-CV32307;Currently Docket No. 08-3187 (10th Cir.); Formerly Docket No. 06-3331 (10th Cir.); Formerly KS Dist. Court Case No.: 05-2299-CM; Formerly W.D. MO. Case No. 05-0210-ODS.

12. The defendants' motions to dismiss and Lathrop & Gage L.C.'s motion for judgment do not address the *res judicata* and collateral estoppel relevance of *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.:05-2299 continued existence as *Samuel Lipari* v. *US Bancorp, NA, et al*, Consolidated

Appeal Case Nos. 08-3287, 08-3338 & 08-3345. Legal File pages 12- 119.

13. The Western District Appellate Court has the judicially noticeable *res judicata* and collateral estoppel relevant facts from PACER that *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299 continued on in the Kansas federal trial court during the filing of the present petition and the 16th Circuit Missouri trial court's resolution of the defendants' motions to dismiss and Lathrop & Gage L.C.'s motion for judgment until a notice of appeal was filed on July 10, 2008. Legal File vol. 2 pages 241-272;

14. The Western District Appellate Court has the judicially noticeable *res judicata* and collateral estoppel relevant facts from PACER that *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299 was again appealed as *Medical Supply Chain, Inc. v. Novation, et al.* Tenth Circuit Case No 08-3187 which resulted in a judgment on May 18, 2009.

15. The petition's Procedural History showed the trial court and parties the *res judicata* and collateral estoppel relevant facts that in the federal action *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299: "Judge Murguia expressly declined to exert jurisdiction over the state law based claims including the present Missouri state law antitrust claims, tortuous interference with contract, fraud and prima facie tort." Legal file vol. 1 at page 123 at ¶ 32.

16. The defendants' motions to dismiss contain the Westlaw published interim order decision from *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299 ruled on March 7, 2006 (legal file vol. 3 page 438) but do not contain the plaintiff's federal complaint which included state law antitrust and contract related counts as pendant claims.

17. The Westlaw published interim order decision entered into the record as evidence by the defendants order from *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299 ruled on March 7, 2006 does not describe the failure to allege a state relevant market or the failure to allege a sufficient percentage of the Missouri hospital supply market, Missouri nursing home market or Missouri hospital supplies on line market. Legal file vol. 3 page 446-448, ¶¶ 423-430.

18. The Westlaw published interim order decision entered into the record as evidence by the defendants order from *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299 ruled on March 7, 2006 does not describe the failure to state a Missouri antitrust claim regarding any allegations of the defendants' conduct after March 9, 2005 the date the plaintiff/appellant's corporation Medical Supply Chain, Inc. filed for damages in Missouri federal court where the case was captioned *Medical Supply Chain, Inc. v. Novation, et al*, W.D. MO case no. 05-0210. Legal file vol. 3 pages 443 and 443-456 generally.

19. The Westlaw published interim order decision entered into the record as evidence by the defendants order from *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299 ruled on March 7, 2006 contains the collateral estoppel or issue preclusion relevant statement "**The court is *unclear* on the bulk of plaintiff's allegations**" [emphasis added] at legal file vol. 3 page 446, above ¶ 423 which is significant under Missouri collateral estoppel/issue preclusion case law. See Issue II *infra*.

20. The defendants inclusion of a Tenth Circuit US Court of Appeals order (legal file vol. pages) has resulted in the now judicially noticeable fact that former Tenth Circuit Justice Michael W. McConnell has now left the bench (see US Tenth Circuit Press Release and Letter of Resignation http://www.ca10.uscourts.gov/downloads/mcconnell.pdf) and is no longer a judge. 21. The former Chief Clerk of the Court Patrick J. Fisher, Jr. is no longer the Tenth Circuit Clerk both after signing an order in *Medical Supply Chain, Inc. v. US Bancorp, NA, et al,* 112 Fed. Appx. 730 (10th Cir. 2004) sanctioning the plaintiff's former attorney Bret D. Landrith for double attorney's fees and costs totaling $23, 956.00.

22. Landrith's crime according to Justice Michael W. McConnell and Chief Clerk of the Court Patrick J. Fisher, Jr. was for asserting the existence of a private right of action under the USA PATRIOT Act and for asserting co-conspirators identified in the complaint need not be named defendants

contrary to the express language of Congress granting explicit private rights of action in the USA PATRIOT Act, contrary to US Supreme Court and contrary to Tenth Circuit controlling law respectively.

23. The sanctions were then used by State of Kansas officials to influence the tribunal hearing Landrith's disbarment and to deny him Due Process in *In re Landrith*, 124 P.3d 467 (Kan. 2005).

24. The federal complaint on which the defendants base their collateral estoppel of claims argument is not part of the record before the trial court; it is believed by the plaintiff/appellant that no party has introduced it as evidence in support or against judgment but is on the plaintiff/appellant's web site in both Adobe PDF

http://www.medicalsupplychain.com/pdf/MSC%20vs.%20Novation%20et%20al.pdf

, and as a MS Word document at

http://www.medicalsupplychain.com/docs/MSC%20vs.%20Novation%20et%20al.doc

25. The petition's section 7 "Governing Law" (legal file vol. 1 at page 15 at ¶ 27) that showed the trial court and parties that the petition contains new claims based on subsequent antitrust conduct of the defendants and new defendants brought by the plaintiff/appellant as a sole proprietor hospital supply dealer that are not subject to *res judicata* and collateral estoppel bars as a matter of law resulting from US Supreme Court decision on point

confirmed by the Eight Circuit Court of Appeals:

> "27. The petitioner's right to bring new claims based on subsequent conduct of previous defendants is governed by *Lawlor v. National Screen Service Corp*., 349 U.S. 322: *"Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122,. In *Lawlor* five new defendants were brought into the case in the new action. Substantial new antitrust violations subsequent to the termination of the prior litigation were charged."
>
> *Engelhardt, v.Bell & Howell Co*., 327 F.2d 30 at ¶ 42 (8th Cir, 1964)."

26. The petition at Section 2 "Relevant Markets" alleges in detail the collateral estoppel issue of relevant markets in the State of Missouri that describe monopolized markets recognized under controlling antitrust law that are different and cover a later period of time and include new defendants than those ruled on in *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299. See legal file vol. 1, pages 6-13¶¶ 58-107.

27. The petition at Section 2 "Relevant Markets" describes the actionable conduct of the defendants against the plaintiff/appellant specifying the time period: " The defendants have repeatedly violated Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo **during the period of March 25, 2004 through February 25, 2008**" [emphasis added] (legal file vol. I page 12 ¶ 102) and

violations of "Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo caused the foreseeable injury of the petitioner being forced to dissolve Medical Supply Chain, Inc. on January 27th, 2006". Legal file vol. 1 page 12 ¶ 104.

28. The petition at legal file vol. 1 page 12 ¶¶ 102 and 104 shows the trial court and the parties that the complained of violations of Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo against the plaintiff/appellant occurred during the period from January 27th, 2006 to February 25, 2008 when the plaintiff/appellant was a sole proprietor after the plaintiff/appellant had dissolved Medical Supply Chain, Inc.

29. The petition describes in detail the actions of the defendants through their agents and co-conspirators to unlawfully influence government agencies to further their over arching hospital supply monopoly conspiracy goals. Legal file vol. 1 pages 40-56 at ¶¶ 216- 329.

30. The petition at legal file vol. 1page 13 at ¶ 107 expressly gives notice to the trial court and the parties that the petitioner believes the alleged conduct to corruptly influence government officials is outside of *Noerr-Pennington* Doctrine immunity:

> "107. The defendants chose to injure the petitioner by depriving him of state and federal government related benefits and immunities constructively and through bribery and extortion instead of *Noerr-*

Pennington Doctrine protected petitioning.

31. The petition's allegations in ¶¶ 216-329 describe attempted monopolization schemes prohibited under the Missouri Antitrust Statutes to preserve the hospital supply cartel's artificial inflation of hospital supply prices that failed because of the unlawfulness of the state's non-competitive secret procurement bidding in the Insure-Missouri scheme already implemented by former Governor Blunt's administration through Jane Drummond, Director of the Department of Health and Senior Services (DHSS) (*Id*. ¶229) as determined by the Missouri State Legislature (*Id.* ¶¶244-246) and the cancelation of the plan to divert federal Medicare and Medicaid funds to Insure-Missouri without the oversight (*Id.* ¶234) required by the US Congress when (*Id.* ¶248) "Secretary Mike Leavitt communicated to the hospital supply cartel and Governor Matt Blunt that the U.S. Department of Health and Human Services could no longer endorse Missouri opting out of the administration of Medicaid and Medicare funds by federal contractors as had been earlier planned by the Bush administration under Karl Rove."

32. The petition's allegations in ¶¶ 250- 288 describe intentional misrepresentations, perjuries, fraud, retaliations, money laundering and injuries committed by the defendants and their agents in the conduct of their unlawful petitioning and attempts to influence or control government in furtherance of their attempted monopolization schemes that is relevant to the

application of *Noerr-Pennington* Doctrine immunity under Eighth Circuit US Court of Appeals case law (see Issue III *infra*).

33. The plaintiff/appellant's petition (legal file vol. 1 page 15 at ¶ 26) demonstrates he was aware of the pleading requirements of antitrust conspiracy in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) and expressly stated that the petition conformed with these new requirements:

> "26. The petitioner has averred the existence of antitrust conspiracy to the current new antitrust pleading standard under *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1970, 167 L.Ed.2d 929 (2007)."

34. The petition at legal file vol. 1 page 12 ¶¶ 102 and 104 shows the trial court and the parties the plaintiff/appellant's standing to pursue antitrust claims as a sole proprietor and that the complained of violations of Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo against the plaintiff/appellant occurred during the period from January 27th, 2006 to February 25, 2008 when the plaintiff/appellant was a sole proprietor after the plaintiff/appellant had dissolved Medical Supply Chain, Inc.

35. The petition at legal file vol. 1 page 12 ¶ 106 shows the trial court and the parties the plaintiff/appellant's standing to pursue antitrust claims as a continuing target of the defendants:

"106. The petitioner is obstructed from necessary inputs and critical facilities including capitalization for marketing as long as he is deprived of the right to be incorporated under the laws of the State of Missouri by the anticompetitive conduct of the defendants."

36. The Kansas District Court judge in *Lipari v. US Bancorp et al. Case no*. 07-cv-02146-CM-DJW at Order on Dismissal page 2 (legal file vol. 4 page 637-638) ruled that the plaintiff/appellant has standing to represent himself over state law claims assigned to the plaintiff by the dissolved Medical Supply Chain, Inc

37. The petition follows the statement of facts with a section of claims incorporating by reference the preceding facts and laying out each element of each claim from the controlling Missouri pleading authorities as a sub heading followed by supporting facts for that element. Legal file vol. 1 pages 92-107.

38. The petition at Legal file vol. 1 pages 104-105 alleges a specific anticompetitive contract to exclude the plaintiff to support his § 416.031.1 RSMo, and § 416.031.2 RSMo Conspiracy to Violate § 416.031(2) claims:

The defendant Saint Luke's Health System has an anticompetitive or exclusive dealing contract with the hospital supply cartel and with VHA/Novation LLC and is in combination with VHA/Novation LLC. The defendant Saint Luke's Health System currently does over $97 million dollars of business with VHA/Novation LLC "SLHS is a shareholder and owner of VHA/Novation, the largest Group Purchasing Organization (GPO)

in the nation. SLHS accessed 885 VHA/Novation contracts with a total spending of $97 million in 2002. VHA/Novation validates the quality, market share, and availability of the various vendors, and provides SLHS as much as a 6% increase in discounts plus an average 2% rebate for every contract dollar spent, thereby supporting the achievement of SLH objectives. Most key suppliers are accessed through VHA/Novation."

http://baldrige.nist.gov/PDF_files/Saint_Lukes_Application_Summary.pdf at page 7

On information and belief, the VHA Mid-America, LLC hospital defendants Cox Health Care Services Of The Ozarks, Inc. (CoxHealth), and Stormont-Vail Healthcare, Inc. are members of VHA and believe themselves to be "owners" of Novation LLC, receiving 2% in kickbacks on purchases made providing they honor the group boycott agreement of purchasing over 90% of their hospital supplies through Novation, LLC. "

ARGUMENTS

Point 1. The trial court erred in adopting the defendants' collateral estoppel of claims arguments for dismissal, because estoppel of *claims* is the doctrine of *res judicata* now called claim preclusion and is inapplicable to the petition , in that the plaintiff/appellant's state law based claims in the present petition were expressly dismissed without

prejudice in preceding federal litigation over the plaintiff's Article III case or controversy and the trial court's orders of judgment are reversible under federal and Missouri case precedent.

(A) The trial court's erroneous judgment is the order of dismissal dated August 5, 2008 .

Issue I. Whether the trial court could properly grant the defendants' *res judicata* based motions to dismiss the petition based on dismissals of earlier federal antitrust claims in Kansas District court which resulted in the pendant state law based claims being expressly dismissed without prejudice.

(B) Legal Reasons for reversible error

The plaintiff/appellant principally relies on *Andes v. Paden, Welch, Martin & Albano, P.C.*, 897 S.W.2d 19 (Mo. App.W.D., 1995) ; *Hollida v. Hollida*, 190 S.W.3d 550, 556 (Mo.App. 2006); *Kesterson v. State Farm Fire & Casualty Company*, No. WD 66348 (Mo. App. 5/9/2007) and the Restatement (Second) of Judgments § 87.

(C) Summary of why the legal reasons support reversible error.

Standard of Review: This court reviews the motions to dismiss for *res judicata* under the same standards as a motion for summary judgment, as a

question of law subject to this court's *de novo* review giving no deference to the circuit court's ruling and viewing the record in a light most favorable to the appellant against whom the order was made. *Spath v. Norris*, No. WD 68904 at pg. 3 (Mo. App. 3/17/2009).

Facts: On May 2, 2008 the defendants Novation, LLC; Volunteer Hospital Association; VHA Mid-America, LLC; Curt Nonomaque; Thomas F. Spindler; Robert H. Bezanson; Gary Duncan; Maynard Oliverius; Sandra Van Trease; Charles V. Robb; Micheal Terry; University Healthsystem Consortium; Cox Health Care Services Of The Ozarks, Inc.; Saint Luke's Health System, Inc.; Stormont-Vail Healthcare, Inc at pages 246-247 of the legal file in their suggestion in support of dismissal argue the plaintiff/appellant is "collaterally estopped" from asserting the "claims" that were previously brought in the *Medical Supply I* and *II* actions in federal court.

On June 13, 2008, the defendant GHX, LLC in its Motion to Dismiss at legal file pages 367-368 and 370-384 argues the plaintiff/appellant is "collaterally estopped" from asserting the "claims" that were previously brought in the *Medical Supply I* and *II* actions in federal court.

On July 25th, 2008 Neoforma filed a motion and suggestion arguing the plaintiff is "collaterally estopped" from asserting his "claims."

On June 5, 2008 the defendants Piper Jaffray Companies and Andrew Duff incorporated the defenses and arguments raised in the motions for dismissals of the other defendants on legal file page 356 of the Piper Jaffray Companies and Andrew Duff motion to dismiss arguments including that the plaintiff/appellant is "collaterally estopped" from asserting "claims".

On June 13, 2008 the defendants Shughart, Thomson & Kilroy; Jerry Grundhoffer, Richard Davis and Andrew Cecere's filed a Motion To Dismiss also incorporating by reference the same defenses and arguments. See legal file page 385 at ¶ 3.

On August 4, 2008, the plaintiff/appellant Lipari filed a consolidated answer to the defendants entitled Suggestion In Opposition To Defendants' Motions To Dismiss treating the defendants' arguments of "collateral estoppel" of "claims" as suggestions of claim preclusion also commonly called *res judicata*. Legal file vol. 4 pages 567-568.

Rule: Under Missouri law, the defendants assertion of estoppel against bringing a claim because of a prior judgment is *res judicata*: "*Res judicata*, a Latin phrase meaning "a thing adjudicated", prohibits a party from bringing a previously litigated claim. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002). The modern term is "claim preclusion." *Id*. *Kesterson v. State Farm Fire & Cas. Co*., 242 S.W.3d 712 at 715 (Mo., 2008).

The controlling law of this Western District Appellate Court is the Restatement (Second) of Judgments § 87 (1982), "'Federal law determines the effects under the rules of *res judicata* of a judgment of a federal court.' *Cemer v. Marathon Oil Co*., 583 F.2d 830, 831-32 (6th Cir.1978)." *Andes v. Paden, Welch, Martin & Albano, P.C*., 897 S.W.2d 19 at 21 (Mo. App.W.D., 1995).

Under the controlling law of this Western District Appellate Court the trial court was in error to adopt the *res judicata* based motions to dismiss of the new defendants GHX, LLC; VHA Mid-America, LLC; Thomas F. Spindler; Robert H. Bezanson; Gary Duncan; Maynard Oliverius; Sandra Van Trease; Charles V. Robb; Micheal Terry; University Healthsystem Consortium; Cox Health Care Services Of The Ozarks, Inc.; Saint Luke's Health System, Inc.; and Stormont-Vail Healthcare, Inc. who were not parties to the federal litigation. "Missouri courts have cited with approval the language found in RESTATEMENT (SECOND) OF JUDGMENTS Section 49, Comment (a):… But the claim against others who are liable for the same harm is regarded as separate. Accordingly, a *judgment for or against one obligor does not result in merger or bar of the claim that the injured party may have against another obligor*." *Spath v. Norris*, No. WD 68904 at pg. 4 (Mo. App. 3/17/2009) quoting *Hollida v. Hollida*, 190 S.W.3d 550, 556 (Mo.App. 2006).

The Western Court of Appeals has clearly established that *res judicata* does not apply to a later action against co-conspirators or joint tortfeasors not previously sued: "In the case of joint tortfeasors, a plaintiff has the option of suing each tortfeasor separately or suing them in one action. *Arana v. Koerner*, 735 S.W.2d 729, 734 (Mo. W.D. App. 1987) (overruled on other grounds by *Klemme v. Best*, 941 S.W.2d 493 (Mo. banc 1997)). The Western Court of Appeals has established a plaintiff "…may sue one tortfeasor, and assuming he does not fully recover, he may bring a subsequent action against the other tortfeasor." *Kesterson v. State Farm Fire & Casualty Company*, No. WD 66348 (Mo. App. 5/9/2007) (Mo. App., 2007).

It is well established in federal court that subsequent conduct and conduct related to different parties are not subject to *res judicata* (claim preclusion) based on earlier proceedings in other forums:"…claims by JBK based upon acts or incidents occurring after the state court suit, and claims of this nature by the individual plaintiffs based upon acts or incidents occurring at any time, will be unaffected by *res judicata*." *JBK, Inc. v. City of Kansas City, Mo.*, 641 F.Supp. 893 at 899 (W.D. Mo., 1986). The plaintiff/appellant made this argument in his suggestion opposing dismissal at Legal file vol. 4 page 568.

The trial court was in error to adopt the defendants' motions to dismiss based on the *res judicata* effect of federal antitrust rulings in violation of the US Supreme Court. The controlling US Supreme Court ruling regarding subsequent antitrust conduct is *Zenith Radio Corp. v. Hazeltine Research, Inc*., 401 U.S. 321, 338, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971). A new cause of action accrues each time defendants commit a new act that injures the plaintiff. *Id.* The plaintiff/appellant's opposition to dismissal gave notice that *Zenith Radio Corp.* provided the Missouri state court jurisdiction over the subsequent conduct of the defendants and cited this precedent at legal file vol. 4 page 568.

The trial court was in error to adopt the defendants' motions to dismiss based on the *res judicata* effect of federal antitrust rulings in violation of the US Supreme Court in *Lawlor v. National Screen Service*, 349 U.S. 322: "Previous judgments cannot be given the effect of extinguishing claims which did not exist and which could not possibly have been sued upon in the previous case". *Lawlor v. National Screen Service*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955). The plaintiff appellant cited this precedent in his opposition to dismissal legal file vol. 4 page 568 and even on the face of the petition. Legal file vol. 1 page 15

The effect of a later petition alleging subsequent conduct is demonstrated *Spiegel v. Continental Illinois National Bank*, 609 F.Supp. 1083

(D.C.Ill. 1985). “The problem with Continental's *res judicata* defense is that *Spiegel II* is based on acts which occurred after *Spiegel I* was filed. *Id.* at 1085-1086.

The trial court was in error to dismiss the petition because it stated claims against the defendants for continuing antitrust violations. See *Peck v. General Motors Corp*., 894 F.2d 844, 849 (6th Cir. 1990) (*per curiam*). A continuing antitrust violation is one in which the plaintiff's interests are repeatedly invaded. *Id*. at 849 (quoting *Pace Indus., Inc. v. Three Phoenix Co*., 813 F.2d 234, 237 (9th Cir. 1987)). "When a continuing antitrust violation is alleged, a cause of action accrues each time a plaintiff is injured by an act of the defendants." *Barnosky Oils, Inc. v. Union Oil Co. of California*, 665 F.2d 74, 81 (6th Cir. 1981).

The trial court was in error to dismiss the petition because it stated claims against the defendants for new and independent antitrust acts:

> “Because Siemens did not implement the policies announced in the Notification, its statements to DRA, St. Luke's, and Saginaw were new and independent acts that inflicted new and accumulating injury on DXS, not merely reaffirmations of the Notification. *Kaw Valley Elec. Coop. Co. v. Kansas Elec. Power Coop., Inc*., 872 F.2d 931, 934 (10th Cir. 1989).”

DXS Inc. v. Siemens Med. Systems Inc., 100 F.3d 462 at 468 (C.A.6 (Mich.), 1996).

Since the present case is the same Article III controversy as the Medical Supply Chain, Inc. actions, *res judicata* could not yet apply to any of the prior rulings: "It should be noted that *res judicata* cannot be asserted to preclude a claim until a final judgment is rendered in the case one is using to assert res judicata. *Century Fire Sprinklers, Inc. v. CNA/Transp. Ins., Co*., 87 S.W.3d 408, 424 (Mo.App.2002). Similarly, one could not assert res judicata within the same case, even after it is appealed and remanded." *Spino v. Bhakta*, 174 S.W.3d 702 at fn 3 (Mo, 2005).

The prior dismissals of the present state claims without prejudice in federal court was for the intended purpose that the Article III controversy as it encompassed surviving Missouri law based causes of action would be continued in state court. "Where an action has been dismissed but the party asserting the claim intends to continue to assert the claim the action has not been disposed of adversely to the party asserting the claim. This is particularly evident when the cause is in fact reasserted by the commencement of another suit. *Hales v. Raines*, 162 Mo.App. 46, 141 S.W. 917, 920(4) (1911)." *Stix & Co., Inc. v. First Missouri Bank & Trust Co. of Creve Coeur*, 564 S.W.2d 67 at pg. 70 (Mo. App., 1978). At the bottom of legal file page **3** the plaintiff/appellant pointed out to Hon. Judge Manners that "Hon. Judge Carlos

Murguia ruled on Nov. 16, 2007 in *Lipari v. US Bancorp et al*. [KS Dis]Case no. 07-cv- 02146-CM-DJW that "... res judicata does not bar the state law claims that were raised in *Medical Supply I* or *II*"[emphasis added].

Under federal law, there still has not been a final order to which *res judicata* would apply in either *Medical Supply I* or *II*. For purposes of determining the finality of an order, it must dispose of all claims. (Ordinarily, a judgment is not final unless it disposes of all claims against all parties) *Avx Corp. v. Cabot Corp*., 424 F.3d 28 (Fed. 1st Cir., 2005). The Supreme Court case most often cited for the preclusion effect of a prior 12(b)(6) dismissal was a dismissal in entirety:

> "2. The Rule 12(b)(6) dismissal that was the source of the Supreme Court's oft-cited footnote in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), stating that "[t]he dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a `judgment on the merits,'" *id*. at 399 n. 3, 101 S.Ct. 2424, was likewise a dismissal of "all of the actions `in their entirety,'" *id*. at 396, 101 S.Ct. 2424."

Avx Corp. v. Cabot Corp., 424 F.3d 28 at fn 2 (Fed. 1st Cir., 2005). By dismissing Medical Supply's state claims without prejudice in *Medical Supply I* and *II,* a determination not opposed or appealed by the defendants, the

federal trial court elected not to make a preclusive final judgment: "A final judgment embodying the dismissal would eventually have been entered if the state claims had been later resolved by the court." *Avx Corp. v. Cabot Corp*., 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). As a non-final judgment, the *Medical Supply I* and *II* dismissals were mere interim orders. *Id*.

The trial court's orders of dismissal adopting the defendants' claim preclusion or *res judicata* arguments must be reversed because all the orders and judgments are contrary to the current controlling law of the Western District of Missouri Court of Appeals in *Sangamon Associates* on the exact issue of the application of *res judicata* to new facts and new rights arising after the prior dismissal :

> "[R]es judicata extends "`"only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of litigants."'" *Farrow v. Brown*, 873 S.W.2d 918, 921 (Mo. App. E.D. 1994) (quoting *Elam v. City of St. Ann*, 784 S.W.2d 330, 334 (Mo. App. E.D. 1990))."

Sangamon Associates Ltd., et Al. v. Carpenter 1985 Family Partnership Ltd., No. WD69280 at pg. 10 (Mo. App. 2/24/2009). The plaintiff appellant

made this “New sets of facts arising in later incidents” argument on the top of page **4** supporting it with 46 Am. Jur. 2d 841-42, Judgments § 567 (1994).

Conclusion: The trial courts’ August 5, 2008 order of judgment adopting the defendants arguments that the plaintiff/appellant was estopped from bringing state claims including new state antitrust claims against the same and new defendants based on subsequent anticompetitive conduct prohibited under the Missouri Antitrust statutes because of the dismissal of federal antitrust claims over earlier conduct predating the current claims was in error. The judgment dismissing the defendants Novation, LLC; Neoforma, Inc. Volunteer Hospital Association; VHA Mid-America, LLC; Curt Nonomaque; Thomas F. Spindler; Robert H. Bezanson; Gary Duncan; Maynard Oliverius; Sandra Van Trease; Charles V. Robb; Micheal Terry; University Healthsystem Consortium; Cox Health Care Services Of The Ozarks, Inc.; Saint Luke's Health System, Inc.; Stormont-Vail Healthcare, Inc.; GHX, LLC; Shughart, Thomson & Kilroy; Piper Jaffray Companies; Andrew Duff; Jerry Grundhoffer; Richard Davis; and Andrew Cecere with prejudice must be reversed under the controlling law for this jurisdiction.

Point 2. The trial court erred in adopting the defendants’ collateral estoppel of issues arguments for dismissal, because estoppel of issues is

the doctrine of issue preclusion and is inapplicable to the petition , in that the federal court made no findings of fact or law related to the plaintiff/appellant's state law based claims in the present petition which were expressly dismissed without prejudice and the trial courts orders of judgment are reversible under federal and Missouri case precedent.

(A) The trial court's erroneous judgment is the order of dismissal dated August 5, 2008 .

Issue II. Whether the court could properly grant summary judgment over the defendants' motions to dismiss based on collateral estoppel (issue preclusion).

(B) Legal Reasons for reversible error

The plaintiff/appellant principally relies on *Sangamon Associates Ltd., et Al. v. Carpenter 1985 Family Partnership Ltd*., No. WD69280 (Mo. App. 2/24/2009) (subsequent events occur, creating a new legal situation or altering the legal rights); *S.M.B. by W.K.B. v. A.T.W*., 810 S.W.2d 601 (Mo.App.1991) (No issue preclusion where question over whether previous decision went to merits); *Woodson v. City of Independence*, 124 S.W.3d 20 at 29 (Mo. App., 2004) (requirement of adequate factual basis for preclusion); *Spath v. Norris*, No.

WD 68904 (Mo. App. 3/17/2009) (requirement of documentation supporting identity of facts).

(C) Summary of why the legal reasons support reversible error

Standard of Review: "The appellate court reviews the grant of summary judgment essentially de novo*. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993). The record is reviewed in the light most favorable to the party against whom judgment was entered, and the non-movant is given the benefit of all reasonable inferences from the record. *Id*." *Woodson v. City of Independence*, 124 S.W.3d 20 at 26 (Mo. App., 2004).

Facts: The defendants' May 2, 2008; June 13, 2008; and June 5, 2008 motions to dismiss combined the doctrines of both claim and issue preclusion to argue for the dismissal of the plaintiff's claims. See Issue I *supra*.

On August 4, 2008, the plaintiff/appellant Lipari's consolidated answer to the defendants' dismissal motions argued issue preclusion was inapplicable to the plaintiff's state law claims addressing Missouri antitrust prohibited conduct taking place subsequent to the dismissal of the earlier federal claims.

Rule: Collateral Estoppel is also known by its modern term, issue preclusion. See

Sexton v. Jenkins & Assocs., Inc., 152 S.W.3d 270, 273 (Mo. banc 2004). Collateral estoppel bars relitigation of issues that were necessarily and unambiguously decided in a prior proceeding. *Spath v. Norris*, No. WD 68904 at pg. 6 (Mo. App. 3/17/2009).

Collateral Estoppel cannot be applied to judgments obtained through extrinsic fraud or dismissals before discovery and development of facts : "The doctrine requires that the issue **was fully and fairly litigated**, that the issue was essential to the earlier judgment, and that **the earlier judgment be final** and binding on the party against whom it is asserted." *Id*." [Emphasis added]

Sangamon Associates Ltd., et Al. v. Carpenter 1985 Family Partnership Ltd., No. WD69280 at pg. 9 (Mo. App. 2/24/2009).

The Kansas District Court made no determinations on issues regarding the Missouri relative market and indeed dismissed all state law based claims expressly without prejudice:

> "*Sexton v. Jenkins & Associates, Inc*., 152 S.W.3d 270, 273 (Mo. banc 2004). **Dismissal without prejudice usually is not an adjudication on the merits of the claim and does not affect the plaintiff's right to refile the action. *Id*. The issue in this case was never litigated**.

Further, Country is not entitled to relief on the grounds of *res judicata*

because *res judicata* also requires an adjudication on the merits. *Romeo v. Jones*, 86 S.W.3d 428, 432 (Mo.App. E.D.2002)." [Emphasis added]

Burian v. Country Ins. & Financial Services, 263 S.W.3d 785 at fn 1 (Mo. App., 2008).

This court found a similarly undeveloped action that did not lead to a trial on the merits could not result in preclusion: "There is no indication that the issues raised by the Directo plaintiffs were ever reached or decided by the trial court in that case. Vandever's claim is not barred by *res judicata*, nor under Rule 67.03. The *res judicata* claim cannot support the trial court's direction of the verdict." *Vandever v. Junior College Dist. of Metropolitan Kansas City*, 708 S.W.2d 711 at 716 (Mo. App.W.D., 1986).

The controlling law of this Western District court is that: "Under Missouri law, where there is a question whether the previous decision went to the merits of the case, no preclusive effect is given to the earlier decision. See *S.M.B. by W.K.B. v. A.T.W.*, 810 S.W.2d 601, 605 (Mo.App.1991)(citing *Owens v. Government Employees Ins. Co.*, 643 S.W.2d 308, 310 (Mo.App.1982))." See also the Eastern Appellate Court decision *St. Louis Univ. v. Hesselberg Drug Co.*, 35 S.W.3d 451 (Mo. App. E.D., 2000).

The new defendants GHX, LLC; VHA Mid-America, LLC; Thomas F. Spindler; Robert H. Bezanson; Gary Duncan; Maynard Oliverius; Sandra Van

Trease; Charles V. Robb; Micheal Terry; University Healthsystem Consortium; Cox Health Care Services Of The Ozarks, Inc.; Saint Luke's Health System, Inc.; and Stormont-Vail Healthcare, Inc. assert nonmutual collateral estoppel because they were not defendants in *Medical Supply I* and *II.* "Nonmutual collateral estoppel applies when the one of the parties in the second action was not a party to the earlier adjudication. *In re Caranchini*, 956 S.W.2d 910, 912 (Mo. banc 1997)." *Consumer Finance Corporation v. Reams*, No. WD 63487 at fn 3 (MO 2/15/2005), 158 S.W.3d 792 (Mo. App.W.D., 2005).

The doctrine of collateral estoppel or issue preclusion in the defendants' May 2, 2008; June 13, 2008; and June 5, 2008 motions to dismiss state law claims on new conduct that occurred and was pled after the dismissal of the federal actions fail for the same reasons the *res judicata* arguments fail: "When determining whether collateral estoppel applies, the court must consider four factors: "(1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit." *James v. Paul*, 49 S.W.3d 678, 682 (Mo. banc 2001). Collateral estoppel is not applied if such application would be

inequitable. *Id*. at 683. "Each case must be analyzed on its own facts." *Id*." *Woodson v. City of Independence*, 124 S.W.3d 20 at 28-29 (Mo. App., 2004).

The New Facts/New Rights pleaded by the plaintiff/appellant's initial petition in the 16th Circuit as he described subsequent antitrust conduct by the same defendants and additional joint tortfeasors that were not defendants in *Medical Supply I* and *II* federal actions show the trial court was in error under the clearly established controlling law of this jurisdiction:

> "'However, where, **after rendition of a judgment, subsequent events occur, creating a new legal situation or altering the legal rights or relations of the litigants, the judgment may thereby be precluded from operating as an estoppel. In such case, the earlier adjudication is not permitted to bar a new action to vindicate rights subsequently acquired**. In this connection, it has been declared that a judgment is not *res judicata* as to rights which were not in existence at the time of the rendition of the judgment.' *City of Hardin v. Norborne Land Drainage Dist. of Carroll County*, 232 S.W.2d 921, 925-26 (Mo. 1950) (citation omitted)." [Emphasis added]

Sangamon Associates Ltd., et Al. v. Carpenter 1985 Family Partnership Ltd., No. WD69280 at pg. 10 (Mo. App. 2/24/2009)

The controlling law of this Western District Court of Appeals also requires an adequate factual basis to support collateral estoppel in addition to preventing the application of the doctrine to new material facts and new causes of action. These rules were both implicated in *Woodson v. City of Independence*:

> "If the Release applies to the house at 1223 N. Allen Road, then all of the defects found in 1996 were satisfactorily repaired and the 1996 case was finished. Therefore, the dangerous building determination in 2001 must be based on new problems that have since developed. If they are new problems, then the 2001 dangerous building finding is not identical to the 1996 dangerous building finding. Although the final determination is the same, that 1223 N. Allen Road is a dangerous building, a new set of problems led to this determination. Further, if the Release applies to the 1223 house, then this rebuts the City's claim that no repairs were done, which it uses to buttress its claim that these cases are identical."

Woodson v. City of Independence, 124 S.W.3d 20 at 29 (Mo. App., 2004).

This court of appeals further determined that the trial court would have to be reversed where "…the circuit court's judgment provides no explanation to tell us that it resolved the ambiguity" *Woodson, Id.* at fn 9 and

that "Under our standard of review, we are reviewing this de novo and we must make all reasonable inferences in favor of [the plaintiff/appellant]…*ITT Commercial Fin. Corp*., 854 S.W.2d at 376." *Woodson, Id.* at fn 9.

The factual record from other Medical Supply Chain, Inc. litigations was not provided the trial court to sufficiently ascertain which issues had been appropriately determined: ""`The nature of collateral estoppel is that a fact appropriately determined in one lawsuit is given effect in another lawsuit involving different issues.'" *Shores,* 998 S.W.2d at 126 (quoting *State ex rel. O'Blennis v. Adolph,* 691 S.W.2d 498, 501 (Mo.App. 1985)).

Spath v. Norris also follows the rule from *Woodson v. City of Independence*, 124 S.W.3d 20 requiring adequate documentation of the identity of facts determined in the prior litigation for collateral estoppel to apply: "Without a copy of the transcript from *Spath I* and further insight into what proof might be required in the instant action, we cannot speculate as to whether the parties may be collaterally estopped from relitigating factual matters decided in the prior lawsuit." *Spath v. Norris*, No. WD 68904 at pg. 8 (Mo. App. 3/17/2009).

It is beyond reasonable dispute that a dismissal of federal antitrust claims before discovery or presentation of evidence for failing to adequately allege a recognizable relevant national market for hospital supplies during

2002-2005 did not determine the merits or recognizablility of a relevant market for hospital supplies distributed through an electronic marketplace in Missouri or a recognizable geographic relevant market of Missouri hospitals or a recognizable geographic relevant market of Missouri nursing homes in 2006, 2007, 2008 and now 2009, the claims pled in the plaintiff/appellant's initial state petition that the 16th Circuit trial court dismissed due to collateral estoppel in clear error.

Conclusion: The August 5, 2008 order of judgment dismissing the defendants Novation, LLC; Neoforma, Inc.; Volunteer Hospital Association; VHA Mid-America, LLC; Curt Nonomaque; Thomas F. Spindler; Robert H. Bezanson; Gary Duncan; Maynard Oliverius; Sandra Van Trease; Charles V. Robb; Micheal Terry; University Healthsystem Consortium; Cox Health Care Services Of The Ozarks, Inc.; Saint Luke's Health System, Inc.; Stormont-Vail Healthcare, Inc.; GHX, LLC; Shughart, Thomson & Kilroy; Piper Jaffray Companies; Andrew Duff; Jerry Grundhoffer; Richard Davis; and Andrew Cecere with prejudice on the basis of collateral estoppel was in error and must be reversed under the controlling law for this jurisdiction.

Point 3. The trial court erred in adopting the defendants' *Noerr-Pennington* Immunity arguments because unlawful acts to influence

government for the purpose of monopolization fall within the "sham petitioning" exception to the *Noerr- Pennington* doctrine and is reversible error under controlling federal antitrust law which under § 416.141 RSMo determines the interpretation of the Missouri antitrust statutes.

(A) The trial court's erroneous judgments are the order of dismissal dated August 5, 2008 and the order of judgment dated December 29, 2008.

Issue III. Whether the court could properly grant the defendants' motions to dismiss on a new legal theory expanding *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) to immunize unlawful acts to influence government for the purpose of monopolization.

(B) Legal Reasons for reversible error.

The plaintiff/appellant principally relies on *Central Telecommunications, Inc. v. TCI Cablevision, Inc.,* 800 F.2d 711 at 724 (C.A.8 (Mo.), 1986) (illegal acts are not immunized).

(C) Summary of why the legal reasons support reversible error.

Standard of Review: The standard of review is the same as that for summary

judgment under Rule 74.04. *Defino v. Civic Center Corp*., 780 S.W.2d 665 at 67-671 (Mo. App. E.D., 1989).

Facts: The defendants Novation, LLC; Neoforma, Inc. Volunteer Hospital Association; VHA Mid-America, LLC; Curt Nonomaque; Thomas F. Spindler; Robert H. Bezanson; Gary Duncan; Maynard Oliverius; Sandra Van Trease; Charles V. Robb; Micheal Terry; University Healthsystem Consortium; Cox Health Care Services Of The Ozarks, Inc.; Saint Luke's Health System, Inc.; Stormont-Vail Healthcare, Inc.; GHX, LLC; Piper Jaffray Companies; Andrew Duff; Jerry Grundhoffer; Richard Davis; and Andrew Cecere incorporated arguments in their motions to dismiss that the plaintiff/appellant's antitrust counts failed to state a claim because of immunity under the *Noerr-Pennington* doctrine.

The plaintiff/appellant's initial petition and proposed amended petitions stated antitrust claims over conduct expressly and specifically identified as being outside the scope of *Noerr- Pennington* doctrine immunity.

The plaintiff/appellant's consolidated suggestion in opposition made precedent supported arguments against the applicability of *Noerr-Pennington* doctrine immunity.

The plaintiff/appellant's suggestion in opposition to Lathrop & Gage L.C.'s motion for judgment on the pleadings detailed the petitions averments

of unlawful government influence and sham petitioning that constitutes antitrust acts under the Missouri Antitrust statutes and controlling precedents.

Rule: The immunity under *Noerr- Pennington* doctrine does not apply to unlawful influence or acts. *In Re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1313 (8th Cir.1985).

The plaintiff/appellants claims are based on Chapter 416 of RSMo, the Missouri Antitrust Act. The Act closely parallels provisions of the Sherman Act of federal antitrust law. See Title 15 United States Code. The Missouri Act expressly directs that its provisions "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).

Federal courts recognize sham litigation including defenses to antitrust claims and filings by Lathrop & Gage LLP and the other defendant/appellees can be chargeable antitrust conduct:

> "Noerr-Pennington immunity, and the sham exception, also apply to defensive pleadings, *In re Burlington N., Inc*., 822 F.2d 518, 532-33 (5th Cir.1987), because asking a court to deny one's opponent's petition is

also a form of petition; thus, we may speak of a "sham defense" as well as a "sham lawsuit." [Emphasis added]

Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180 (Fed. 9th Cir., 2005).

The antitrust liability of the defendant/appellees can also be recognized in sham petitioning that takes the form of unlawful conduct to influence government entities including disparaging the plaintiff/appellant with judges and their clerks or by making fraudulent representations to government agencies:

"*In Re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1313 (8th Cir.1985) (*Noerr-Pennington* doctrine cannot be extended to "activities which, although 'ostensibly directed toward governmental action,' are actually nothing more than an attempt to harm another" or to "false communications" or to tortious, violent, defamatory or other illegal acts [citations omitted].)"[Emphasis added]

Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 at 724 (C.A.8 (Mo.), 1986).

The plaintiff/appellant's first proposed amended petition makes averments describing in detail the defendant/appellees' continuing unlawful

acts to procure outcomes in litigation that deprive the plaintiff/appellant of the ability to enforce contracts or enjoy the privileges and immunities of a business owner under Missouri law. These fundamental rights are required to compete in the Missouri hospital supply market against the defendants' cartel.

The plaintiff/appellant is also denied equal protection and the privileges of citizenship by the trial court's adoption of the defendants' sham arguments for dismissal and for judgment on the pleadings that contradict clearly established precedent of the Western Court of Appeals and the Missouri Supreme Court and contradict the Missouri Rules of Civil Procedure. As a result the plaintiff/appellant is constructively deprived of the right to incorporate, a practical necessity for investment and credit and a right in which the plaintiff/appellant is repeatedly oppressed through the extortion of the plaintiff's legal representation and interference in prospective business relationships for licensed Missouri counsel. This conduct has resulted in the extrajudicial influence of the trial court and injury to the plaintiff.

Point. 4 The trial court erred in granting judgment on the pleadings, because defendant's request was an untimely motion to dismiss and the pleadings were still open, in that the Missouri Supreme court and the

rules of civil procedure bar granting a dismissal in violation of the time limit in Rule 55.27 (6) or before the pleadings are closed, requiring reversal of the trial court.

(A) The trial court's erroneous judgment is the order of judgment dated December 29, 2008.

Issue IV. Whether the trial court abused its discretion in granting defendant Lathrop & Gage LLP's Request for Judgment before the pleadings were closed and after the time limit for a Rule 55.27 (6) Motion to Dismiss

(B) Legal Reasons for reversible error.

Pennell v. Polen, 611 S.W.2d 323 (Mo.App. W.D.1980) (requirement of Rule 74.04 notice and discovery) See *State ex rel. Ott v. Bonacker*, 791 S.W.2d 494 at 497 (Mo. App. S.D., 1990) (30 day limit under Rule 55.27(a)); *Habahbeh v. Beruti*, 100 S.W.3d 851 (Mo. App., 2003) (pleadings not closed while unserved defendant existed)

(C) Summary of why the legal reasons support reversible error

Standard of Review: "The standard of review when a case is dismissed under Rule 55.27(a)(6) is 'whether, after allowing the pleading its broadest intendment, treating all facts alleged as true and construing all allegations

favorably to plaintiffs, the averments invoke principles of substantive law entitling plaintiffs to relief.'" *Bachtel v. Miller County Nursing Home District*, 2002 MO 1011 at ¶ 25 (MOCA, 2002).

Facts: The defendant Lathrop & Gage, L.C. filed a motion for judgment on the pleadings while the defendant Robert Zollars had not been dismissed and before completion of discovery and before trial.

The plaintiff/appellant filed an objection and suggestion opposing the motion for judgment arguing the motion was actually an untimely motion under Missouri Rules of Civil Procedure Rule 55.27 (6) seeking dismissal because Lathrop & Gage, L.C. claimed the petitioner failed to state a claim upon which relief can be granted; that judgment was improper where material facts were in dispute; that the pleadings had not been closed; and that Zollars was still an undismissed party preventing judgment.

Rule: Any of the eleven defenses enumerated in Rule 55.27 may be raised by way of responsive pleading or motion. *State ex rel. Metal Serv. Ctr. v. Gaertner*, 677 S.W.2d 325, 327 (Mo. banc 1984) (stating that the defenses enumerated in Rule 55.27 may be raised by answer or by motion at the option of the pleader).

The court in *Romero v. Kansas City Station Corp*., 98 S.W.3d 129 at 137 (Mo. App., 2003) after lengthy analysis treated a motion for summary

judgment over lack of subject matter jurisdiction as a motion to dismiss. However the *Romero* court observed that subject matter jurisdiction under Rule 55.27(a)(1), is a question of fact for the trial court, requiring the court to consider and weigh the evidence, including disputed evidence, in deciding whether facts exist supporting subject matter jurisdiction (*id*. at 134) and found that evidence had not been presented.

Here the defendant Lathrop & Gage, L.C. pursued no formal discovery. However the controlling precedent of the Western District of Missouri contained in *Pennell v. Polen*, 611 S.W.2d 323 (Mo.App. W.D.1980) is that Lathrop & Gage, L.C.'s motion could not be treated as a motion for summary judgment without Rule 74.04's notice, particularity, and discovery required by a plaintiff to adequately answer:

> "Moreover, under Rule 55.27(b), if the trial court is going to treat a motion for judgment on the pleadings as a summary judgment motion, the motion should be "disposed of as provided in rule 74.04." Thus, in such a situation, it would appear that the requirements contained in Rule 74.04 for the motion, response, and ruling would be applicable. See *Lawson v. St. Louis-San Francisco Ry. Co.*, 629 S.W.2d 648, 649-50 (Mo.App. E.D.1982).

This Western District Appeals Court considered a similar factual situation in *Pennell v. Polen*, 611 S.W.2d 323 (Mo.App. W.D.1980). There, on the morning of trial, the defendant filed a motion to dismiss for failure to state a cause of action or, alternatively, for summary judgment. *Id*. at 323. The court reversed the trial court, saying, "a summary judgment made and entered on the very day of trial, without other notice to the adversary, or acquiescence, undermines the probity of the procedure and prejudices fairness." *Id*. at 324." See also *Keim v. Big Bass, Inc*., 949 S.W.2d 122 at 124 (Mo. App. E.D., 1997).

Lathrop & Gage, L.C.'s motion for judgment was untimely because the petition was entered as served upon Lathrop & Gage, L.C. on 4/14/08 (see legal file page **4)** and a motion for dismissal was due thirty days later. Instead Lathrop & Gage L.C. filed an answer to the petition on 5/09/08. see legal file page **4.** The present motion was filed on 11/12/08 and is solely a response to the plaintiff's petition which has not been amended since filing on 2/25/08. Lathrop & Gage, L.C. has violated the time limit of Rule 55.27(a):

"A motion making any of these defenses **shall be made within the time allowed for responding to the opposing party's pleading**, or, if no responsive pleading is permitted, within thirty days after the service of the last pleading." [Emphasis added]

Rule 55.27 Defenses And Objections How Presented By Pleading Or Motion For Judgment On The Pleadings. Under the rules of statutory construction, the trial court was required to make a literal, liberal, and fair reading and interpretation of the thirty day requirement in Rule 55.27(a) and deny the defendant's motion as untimely. See *State ex rel. Ott v. Bonacker*, 791 S.W.2d 494 at 497 (Mo. App. S.D., 1990).

Lathrop & Gage, L.C.'s motion for judgment was untimely under Rule 55.27(b). The trial court's error in granting Lathrop & Gage, L.C.'s motion for judgment on the pleadings is shown by the first words of Rule 55.27(b) and the fact that the pleadings had not yet closed: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." [Emphasis added] *Keim v. Big Bass, Inc*., 949 S.W.2d 122 (Mo. App. E.D., 1997). The trial court was subject to the controlling law of the Western District Court of Appeals under *Pennell v. Polen*, 611 S.W.2d 323 (Mo. App.W.D., 1980) that rejects the timeliness of a motion for judgment on the pleadings at the beginning of a trial:

> "We question that the trial court procedure sufficed even as an unadorned motion for judgment on the pleadings under Rule 55.27(b). That rule allows the court to act only within such time as not to delay the trial."

Pennell v. Polen, 611 S.W.2d 323 at fn 2 (Mo. App.W.D., 1980).

The previous appeal between the parties before this court *Lipari vs. VHA-Novation et al*. (WD-70534) was dismissed for lack of jurisdiction because an unserved defendant party, Robert Zollars had not been dismissed and Lathrop & Gage L.C.'s motion for judgment was therefore made while the pleadings were still open. The Western District Court of Appeals' controlling precedent in *Habahbeh v. Beruti*, 100 S.W.3d 851 (Mo. App., 2003) establishes that the pleadings were not closed as long as Robert Zollars had not been dismissed. The trial court was in error to grant judgment for Lathrop & Gage L.C.

Lathrop & Gage L.C.'s answer entered on 5/09/08 disputes many material facts of the plaintiff's petition. The trial court was in error to grant a judgment on the pleadings when there are material facts in dispute: "*Main v. Skaggs Community Hosp*., 812 S.W.2d 185, 186 (Mo.App. 1991). Before a motion for judgment on the pleadings may be granted, all averments in all pleadings must show no material issue of fact exists; that all that exists is a question of law." *RGB2, Inc. v. Chestnut Plaza, Inc*., 103 S.W.3d 420 at pg. 424 (Mo. App., 2003).

The trial court's order on December 29, 2008 and the court's earlier dismissal orders dated August 8, 2008 all did not specifiy a date for the

plaintiff to amend his complaint to cure any deficiencies in pleading as Rule 67.06 commands the court by stating "...and shall specify the time within which the amendment shall be made or amended pleading filed..."[emphasis added].

None of the defendants that obtained a dismiss on August 8, 2008 filed a motion for final judgment in the action as required under as Rule 67.06:"...final judgment of dismissal with prejudice shall be entered on motion..."[emphasis added]. Therefore the pleadings were still open under the Missouri Rules of Civil Procedure when the trial court erroneously granted Lathrop & Gage, L.C. judgment on the pleadings.

Conclusion: The trial court order granting judgment on the pleadings to Lathrop & Gage L.C. must be reversed and remanded because it violates the controlling law of the Western District Court of Appeals.

Point. 5 The trial court erred in denying the proposed amended petition as resubmitted to the court, because the order the court made to resubmit the first amended petition was without trial court jurisdiction while the matter was on appeal and the proposed second amended petition materially conformed to the first amended petition that had earlier been approved creating a reversible error of abuse of discretion,

in that the reason used by the court was shockingly arbitrary, capricious and against justice.

(A) The trial court's erroneous judgments are the order of March 2, 2009 threatening forfeiture made without jurisdiction and the order of judgment dated March 23, 2009.

Issue V. Whether the trial court abused its discretion in denying the proposed amended petitions on the basis of the plaintiff not complying with an order issued during the appeal's divestment of trial court jurisdiction.

B) Legal Reasons for reversible error.

Ferrellgas, Inc. v. Edward A. Smith, P.C., 190 S.W.3d 615 at 619 (W.D. Mo. App., 2006) (Justice); *State v. Biesemeyer*, 136 Mo. App. 668, 118 S.W. 1197 at 1198 (Mo. App., 1909) (Jurisdiction lost during appeal); *Johnson v. Allstate Indemnity Company*, No. ED 90476 (Mo. App. 3/17/2009) (Mo. App., 2009) (Arbitrary and unreasonable).

(C) Summary of why the legal reasons support reversible error.

Standard of Review: This court will "…look to see whether justice is furthered or subverted by the decision" *Ferrellgas, Inc. v. Edward A. Smith, P.C.*, 190 S.W.3d 615 at 619 (W.D. Mo. App., 2006).

Facts: The proposed amended petitions included additional allegations of frauds committed by the defendants to harm the plaintiff's business in Missouri by pleadings filed in jurisdictions where fraud on the court is independently actionable under *U.S. v. Beggerly*, 524 U.S. 38, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998) including the US Court of Appeals for the Tenth Circuit under *United States v. Buck,* 281 F.3d 1336, 1342 (10th Cir.2002) and the US Court of Appeals for the Eighth Circuit under *Nichols v. Klein Tool* :

> "Here, Nichols repeatedly concealed a material fact. Thus, the district court correctly ruled that Nichols committed fraud on the court, or to fit this conclusion into the *Pfizer* rubric, Nichols fabricated testimony in order to prevent Klein Tools from presenting its case."
>
> *Nichols v. Klein Tools, Inc*., 949 F.2d 1047 at 1049 (C.A.8 (Mo.), 1991).

The plaintiff/appellant's proposed amended petitions clarified his existing fraud claims and the fraud averments applying to subsequent conduct by the defendants as required by the Western District Appeals Court case *Taylor v. Richland Motors*, No. WD 64012 (MO 3/22/2005).

The trial made a clerical error in dismissing the plaintiff's proposed second amended petition based on noncompliance with the trial court's March 2nd 2009 order requiring the plaintiff to submit his proposed

amended petition within ten days. See March 2nd Order of Hon. Judge Michael W. Manners.

The March 2nd order incorrectly states that the plaintiff did not submit a copy of the proposed amended complaint. See March 2nd Order of Hon. Judge Michael W. Manners at ¶3 **.**

Hon. Judge Michael W. Manners had previously ruled granting leave to file the First Amended Petition on January 13, 2009. See January 13th , 2009 Order of Hon. Judge Michael W. Manners.

The January 13th, 2009 Order of Hon. Judge Michael W. Manners does not mention an absence of a petition but instead states " Now for good cause and ***being fully advised of the premises***, the court GRANTS the Motion." [Emphasis added]. See January 13th , 2009 Order of Hon. Judge Michael W. Manners.

Rule: The plaintiff/appelant's Notice of Appeal on December 29, 2008 deprived the trial court of jurisdiction to exercise any judicial function in this case and vests that jurisdiction in appellate court. *Rodman v. Schrimpf*, 18 S. W. 3d 570, 572 (Mo. App. 2000).

The trial court made a clerical mistake in clear error that should now be reversed when the court entered the March 2nd, 2009 order specifying

forfeiture if the plaintiff does not provide a renewed Motion for Leave to Amend in ten days. The March 2nd order was a judicial function during the term of an appeal. See

March 2nd Order of Hon. Judge Michael W. Manners.

The trial court was without jurisdiction to enter the March 2nd Order during the term of the Western District Appeal:

> "The law seems well settled that, while a record may be corrected by the trial court after an appeal has been granted, yet the appeal itself is pending in the appellate court from the time of its being granted, and the jurisdiction of the case is with the appellate court. *Ladd v. Couzins*, 35 Mo., loc. cit. 515; *De Kalb Co. v. Hixon*, 44 Mo., loc. cit. 342; *Ross v. Railway Co*., 141 Mo. 397, 38 S. W. 926, 42 S. W. 957; *Sublette v. Railway Co*., 66 Mo. App., loc. cit. 334."

State v. Biesemeyer, 136 Mo. App. 668, 118 S.W. 1197 at 1198 (Mo. App., 1909).

The *Biesemeyer* court further stated that the appeal vested jurisdiction of the case in the appellate court so long as the order granting the appeal remained in force. *Biesemeyer* at 1198 *id*. The Missouri Supreme Court relying on

Biesemeyer determined that "...without authority of law, and that said action and all subsequent proceedings of the circuit court in this cause were illegal and void." [emphasis added] *Dougherty v. Rubber Mfg. Co*., 29 S.W.2d 126 (Mo., 1930).

The Western District recognizes the "…court is constitutionally bound to follow the latest controlling decisions of the Missouri Supreme Court. *Knorp v. Thompson*, 175 S.W.2d 889, 894 (Mo. 1943) …must control the outcome of the present case. *St. Louis Sw. Ry. Co. of Tex. v. Spring River Stone Co*., 154 S.W. 465, 467 (Mo. App. 1913) (Sturgis, J., concurring)." *State v. Aaron*, No. WD 65362 at pg.1 (W.D. of Mo. App. 1/23/2007).

The trial court's text only order on February 25, 2009 (see Appearance Docket at page **??**) revoking the appeal for lack of jurisdiction and determining all pre appeal motions moot was not served on the parties or the plaintiff. Because the plaintiff did not receive notice, the trial court's asserted jurisdiction

to end the term of the appeal was void:

> "*Hoppe v. St. Louis Public Service Co*., 361 Mo. 402, 235 S.W.2d 347 (*banc*. 1950) the Supreme Court declared an order of the trial court setting aside a judgment and granting a new trial entered on the court's own motion but without notice or opportunity to be heard to be null and void

and a violation of due process."

State ex rel. Kairuz v. Romines, 806 S.W.2d 451 at 454 (Mo. App. E.D., 1991). The text only entry and failing to mail or fax notices to the parties or particularly the plaintiff /appellant who's interests were then subsequently materially injured through forfeiture of leave to amend would be void for lack of notice and in violation of the requirement to provide Due Process. In actuality, the Clerk of the Western District Court of Appeals was required to give the appellate parties notice and an opportunity to respond to the Western District Chief Judge's February 25th order and the jurisdiction of the appeal could not be dismissed until the appeals court mandate was issued on March 12, 2009 restoring jurisdiction to

Hon. Judge Michael W. Manners.

The Hon. Judge Michael W. Manners had jurisdiction to correct this mistake or clerical errors leading to the erroneous entry of an order denying the plaintiff's second motion for leave to amend: "A clerical error is an error made in the recording of a judgment; therefore, the correction of a clerical error conforms the record to the judgment of the court." *Pirtle v. Cook*, 956 S.W.2d 235, 241 (Mo. banc 1997) but declined to do so when the plaintiff/appellant sought relief from judgment.

Since the March 2nd order of Hon. Judge Michael W. Manners (exb. 1)

specifying forfeiture if the plaintiff does not provide a renewed Motion for Leave to Amend in ten days was a judicial function during the term of the appeal that even Hon. Judge Michael W. Manners recognized he could not lawfully make having observed the plaintiff's Notice of Appeal "deprived this court of jurisdiction to exercise any judicial function in this case and vests that jurisdiction in appellate court" citing *Rodman v. Schrimpf*, 18 S. W. 3d 570, 572 (Mo. App. 2000) [Emphasis added] and was void and a nullity (see January 14th, 2009 Order of Hon. Judge Michael W. Manners); the March 23rd order finding a fault of the plaintiff for not complying and therefore denying the plaintiff's Second Motion for Leave to Amend was an abuse of discretion.

The abuse of discretion in demonstrably arbitrary and unreasonable: "The trial court is vested with broad discretion to grant leave to amend the pleadings at any stage of the proceedings. *Ferrellgas, Inc. v. Edward A. Smith*, P.C., 190 S.W.3d 615, 618-19 (Mo. App. W.D. 2006).

The absence of jurisdiction even recognized in the same circumstances by the trial court when it had previously ruled before the Western District relinquished jurisdiction is shocking:

"In order to show an abuse of discretion, a party has to demonstrate that the trial court's ruling is so arbitrary and unreasonable as to shock

one's sense of justice and indicate a lack of careful consideration." *Bonney v. Environmental Engineering, Inc*., 224 S.W.3d 109, 116 (Mo. App. S.D. 2007)."

Johnson v. Allstate Indemnity Company, No. ED 90476 at 13 (Mo. App. 3/17/2009) (Mo. App., 2009).

The grant of leave to amend was not futile. The trial court had previously accepted the proposed first amended petition or granted leave to amend without realizing it lacked the jurisdiction to do so. The proposed first amended petition , like the second proposed amended petition corrected the deficiencies raised by the defendants including deficiencies in pleading fraud with specificity. Though the trial court had not provided any findings of law or fact related to the sufficiency of the plaintiff's claims in its orders, the plaintiff 's proposed amendments conformed to the controlling pleading requirements of the Western District appellate court.

In *Taylor v. Richland Motors*, No. WD 64012 (MO 3/22/2005) this court addressed the defendants' fraudulent misrepresentations to third parties that resulted in injury to the plaintiff under Missouri law when the frauds were part of a civil conspiracy scheme that was designed to harm the plaintiff/appellant. The clarifications in the amended petition should have

reinstated the dismissed fraud and antitrust related claims and parties under the controlling law of Western District Appeals.

The plaintiff /appellant's proposed amended complaints also added defendants that participated in the conspiracy to commit antitrust prohibited conduct including frauds to prevent the plaintiff from obtaining the resources to enter the Missouri market for hospital supplies and to deprive him of the ability to enforce contracts required for market entry to compete against the defendants' cartel.

Conclusion: The trial court abused its discretion in denying the plaintiff/appellant leave to amend. The action must be remanded to trial court for further proceedings on the proposed amended petition.

Point 6. The trial court erred in adopting the defendants' dismissal arguments based on a bar of statutes of limitations which must be reversed because the continuing antitrust conduct, the alleged conspiracy and the accrual of claims made the petition's claims timely in that claims not subject to the savings statute accrued on the last act of a co-conspirator or joint tortfeasor under controlling Missouri authorities.

(A) The trial court's erroneous judgments are the order of dismissal dated August 5, 2008 and the order of judgment dated December 29, 2008.

Issue VI: Whether the trial court properly adopted the defendants' dismissal arguments that all claims are barred by the statutes of limitations.

(B) Legal Reasons for reversible error.

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) (accrual begins after last injurious act); *Kansas City v. W.R. Grace & Co*., 778 S.W.2d 264 (Mo. App.W.D., 1989) (five years from the last conspiracy act); *Engelhardt, v.Bell & Howell Co*., 327 F.2d 30 (8th Cir, 1964) (New violations by new defendants continue earlier antitrust conspiracy)

C) Summary of why the legal reasons support reversible error.

Standard of Review: Whether summary judgment is appropriate is a question of law, and, therefore, reviewed de novo. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993).

Facts: The defendants' motions for dismissal and Lathrop & Gage L.C.'s motion for judgment asserted the bar of statutes of limitations as a defense.

The plaintiff/appellant's consolidated suggestion in opposition to dismissal and suggestion opposing judgment on the pleadings showed that

the petition clearly stated dates and alleged subsequent conduct by the existing defendants that place liability of the defendants in their individual capacity and as co-conspirators and joint tortfeasors under jurisdiction of the trial court within the applicable statutes of limitations and savings statutes.

The plaintiff/appellant's consolidated suggestion in opposition to dismissal and suggestion opposing judgment on the pleadings showed that the petition clearly stated the procedural history of previous litigation preserving the plaintiff's earlier claims via savings statutes.

The plaintiff/appellant showed Lathrop & Gage L.C.'s confusion over the express averments in the petition stating that the petitioner was a sole proprietor still being excluded from the Missouri market for hospital supplies as a result of the defendants continuing conduct and new prohibited acts violating the plaintiff/appellant's rights.

Rule: Missouri's antitrust bar is four years. Conspiracy claims have a five year statute of limitation under § 516.120. Section 416.141 of Missouri's Antitrust Statutes requires that §§ 416.011to 416.161 be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes")

Under federal law generally, the four-year period begins when the injurious act is committed. *Zenith Radio Corp. v. Hazeltine Research, Inc*., 401

U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp*., 546 F.2d 570, 572 (4th Cir.1976) (same).

The plaintiff/appellant's petition alleges continuing antitrust acts in furtherance of an overarching conspiracy to overcharge Missouri's hospitals and the public and private insurers paying the costs: "Where a continuing violation of antitrust laws occurs, "each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again." *Klehr v. A.O. Smith Corp*., 521 U.S. 179, 189, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997) (internal citations omitted).

Because the petition alleges continuing monopolization, the trial court was in error to dismiss the plaintiff/appellant's claims as time barred:

> "The plaintiff may then recover for injuries suffered after the overt act, if the injuries occur within the statutory period prior to the date the complaint was filed. See, e.g., *Zenith*, 401 U.S. at 338, 91 S.Ct. 795 (explaining that for a continuing violation, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act"); *Charlotte Telecasters*, 546 F.2d at 572 (explaining that "each refusal to deal gives rise to a claim under the antitrust laws" and that "the statute

of limitations commences to run from the last overt act causing injury to the plaintiffs business")."

Go Computer, Inc. v. Microsoft Corp., 437 F.Supp.2d 497 at 504 (D. Md., 2006).

Lathrop & Gage L.C.'s motion and suggestion for judgment on the pleadings misrepresented the statute of limitations for the petition's claims as expired, despite being served notice that on November 6, 2008 Lathrop & Gage L.C.'s Motion for Security Costs to constituted a later act to injure the plaintiff/appellant by continuing the deprivation of the right to incorporate or to enforce his contractual agreements needed to capitalize his entry into the market for hospital supplies:

"A conspiracy cause of action is governed by the five year statute of limitations of § 516.120. *Rippe v. Sutter*, 292 S.W.2d 86, 90 (Mo.1956). The five year limitation period in a conspiracy action **begins to run upon the occurrence of the last overt act charged resulting in damage to the plaintiff**. *Id*. "When the act which gives the cause of action is not legally injurious until certain consequences occur then the period of limitation will date from the consequential injury ... and ... the resulting damage is sustained and is capable of ascertainment within the

contemplation of the statute [516.100] 4 whenever it is such that it can be discovered or made known." *Id*." [Emphasis added]

Kansas City v. W.R. Grace & Co., 778 S.W.2d 264 at 273-274 (Mo. App.W.D., 1989).

The petition itself expressly states the basis allowing subsequent claims when they accrue to the plaintiff/appellant:

"27. The petitioner's right to bring new claims based on subsequent conduct of previous defendants is governed by *Lawlor v. National Screen Service Corp.*, 349 U.S. 322:

"*Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122,. In *Lawlor* five new defendants were brought into the case in the new action. Substantial new antitrust violations subsequent to the termination of the prior litigation were charged."

Engelhardt, v.Bell & Howell Co., 327 F.2d 30 at ¶ 42 (8th Cir, 1964)."

Petition at ¶ 27 on legal file page **4**.

Conclusion: The trial court made a reversible error adopting the defendants' statute of limitations arguments that resulted in the dismissals of the defendants excluding Zollars.

Point 7. The trial court erred in adopting the defendants' sanction depriving the plaintiff/appellant of the right to communicate directly to other parties protected under the US Constitution guaranteed Right to Freedom of Speech requiring reversal of the trial court in that the Missouri Supreme Court rules expressly provide for an unrepresented plaintiff to communicate directly to the defendants.

(A) The trial court's erroneous judgment is the order of dismissal dated March 23, 2009.

Issue VII. Whether the trial court abused its discretion in denying emails and letters expressly permitted under Missouri Supreme Court Rule 4-4.2: Communication With Person Represented By Counsel.

(B) Legal Reasons for reversible error.

Missouri Supreme Court Rule 4-4.2 (unrepresented party not barred from communication); *Smith v. Kansas City Southern Ry. Co*., 87 S.W.3d 26 (Mo. App., 2002) (Missouri follows ABA Rule 4.2); *E.E.O.C. v. McDonnell Douglas Corp*., 948 F.Supp. 54 (E.D. Mo., 1996)(Direct contact permitted non-lawyers).

(C) Summary of why the legal reasons support reversible error.

Standard of Review: The Western District court will "review *de novo* the trial court's interpretation of Rule 4-4.2…" *Smith v Kansas City Southern Railway Co*. (W.D. of Mo. App., 2002).

Facts: The defendants represented by Husch Blackwell Sanders LLP and the law firm itself a defendant, filed a motion to enjoin the plaintff/appellant from communicating directly to the defendants entitled Motion To Serve Papers On Counsel In Accordance With Missouri Rule Of Civil Procedure 43.01(B)

Husch Blackwell Sanders LLP motion was based on the plaintiff serving a courtesy copy of the discovery against Lathrop & Gage LLP to parties not represented by Lathrop & Gage including Robert H. Bezanson to give them notice that they may wish to contact Lathrop & Gage LLP or their own counsel to assert rights to prevent Lathrop & Gage LLP from failing to assert protections or privileges that may exist over the documents in Lathrop & Gage LLP's possesion sought in the production.

The plaintiff responded with a suggestion in opposition that Rule 43.01(B) was inapplicable and that Missouri Supreme Court Rule 4-4.2 expressly provided an unrepresented party could communicate directly to opposing parties.

The plaintiff also showed that under the facts of the complaint the

plaintiff was injured by not having a counsel, circumstances created by Husch Blackwell Sanders LLP and the other defendants to gain an unlawful advantage over the plaintiff and to prevent him from obtaining redress.

Missouri has adopted ABA model Rule 4.2. The Western District has observed that Missouri's Rule 4-4.2 is identical to the ABA model rule 4.2. See *Smith v. Kansas City Southern Ry. Co*., 87 S.W.3d 266 at pg. 271 (Mo. App., 2002)

The Missouri rule states:

"RULE 4-4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

Rule 4-4.2: Communication With Person Represented By Counsel.

In Comment 4 to Rule 4-4.2: Communication With Person Represented By Counsel, the Missouri Supreme Court has expressly stated the following in order not to be an unconstitutional violation of protected speech against misconduct and violations of law: "**Parties to a matter may communicate directly with each other**"

A judge in the concurrent federal proceeding between the petitioner and the Novation LLC defendants ruled that: “Rule 4.2 generally does not prohibit a party from communicating directly with an opposing party. *Holdren v. General Motors Corp*., 13 F.Supp.2d 1192, 1195-96 (D.Kan.1998)” *Hammond v. City of Junction City, Kansas,* 167 F.Supp.2d 1271 at 1293 (D. Kan., 2001).

A Texas court has observed that the rule does not effect the principal in his communications to a represented party:“Nor does the rule "impose a duty on a lawyer to affirmatively discourage communications between the lawyer's client and other represented persons, organizations, or entities of government.""*News America Pub., Inc., In re*, 974 S.W.2d 97 at 101 (Tex.App.-San Antonio, 1998).

Missouri courts have adopted similar positions:

> “*State ex rel. Atchison, Topeka & Santa Fe R.R. v. O'Malley*, 888 S.W.2d 760 (Mo. App.1994), supports the trial court's order excluding any testimony from House. That case involved an order from the circuit court permitting contact with any railroad employee upon the theory that 45 U.S.C. § 60 (applicable only to FELA cases) superseded Rule 4-4.2 in such type of cases.”

Smith v. Kansas City Southern Ry. Co., 87 S.W.3d 266 at 275 (Mo. App., 2002).

Missouri courts have observed a lack of prohibitions of communications

under 4.2 between parties:

> "Upon review of the rules of professional conduct, the Court concludes that there is nothing that prohibits one party to a litigation from making direct contact with another party to the same litigation. See e.g., Missouri Supreme Court Rules of Professional Conduct Rule 4.2 cmt. ("... parties to a matter may communicate directly with each other...."). These rules are designed to regulate the conduct of lawyers, and simply do not apply to the conduct of nonlawyers. *Massiah v. United States*, 377 U.S. 201, 210-11, 84 S.Ct. 1199, 1205-06, 12 L.Ed.2d 246 (1964) (White, J., dissenting). Therefore, since the only evidence before the Court indicates that the direct communications were initiated by the Defendant, and not by its attorneys, the Court concludes that these communications are permissible under the rules of professional conduct."

E.E.O.C. v. McDonnell Douglas Corp., 948 F.Supp. 54 at 55 (E.D. Mo., 1996).

In order not to be an unconstitutional violation of protected speech against misconduct and violations of law, Missouri rules comment 4 specifically states:

> "[4] Rule 4-4.2 does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters

outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter."

Rule 4-4.2: Communication With Person Represented By Counsel, Comment 4.

Serving a courtesy copy of the discovery against Lathrop & Gage LLP to parties not represented by Lathrop & Gage including Robert H. Bezanson was to give them notice that they may wish to contact Lathrop & Gage LLP or their own counsel to assert rights to prevent Lathrop & Gage LLP from failing to assert protections or privileges that may exist at law. This motive cannot be harassment or improper but instead advances the public policy interest even against the interest of the plaintiff in obtaining discovery of those same documents.

The public interest is in upholding the plaintiff's protected speech to stop continuing wrongdoing. The Novation LLC hospital supply antitrust conspiracy Sherman Act violations are punished as criminal felonies. The Department of Justice is empowered to bring criminal prosecutions under the Sherman Act.

Individual violators can be fined up to $350,000 and sentenced to up to 3 years in federal prison for each offense; corporations can be fined up to $10 million for each offense. The level of participation in a *per se* Sherman I conspiracy like Lathrop & Gage LLP and Husch Blackwell Sanders LLP's continuing

participation in criminal acts with the Novation LLC to exclude the plaintiff/appellant from the Missouri hospital supply market is presumed as a known forseeable consequence of the unlawful acts. See generally *U.S. v. Continental Group, Inc.*, 603 F.2d 444 (C.A.3 (Pa.), 1979).

There would be a natural tendency to want to use Missouri Rule Of Civil Procedure 43.01(B) to enlist the trial court into participating in further unlawful acts against the plaintiff for the purpose of preventing Husch Blackwell Sanders LLP and its clients' hospital supply monopoly from being exposed. However this is against the legislated public policy of the State of Missouri and the Supreme Court of Missouri.

The plaintiff's direct communications to parties serves an important public interest in facilitating the resolution of this matter:

> *"[I]n Siguel v. Trustees of Tufts College*, No. 88-0626-Y, 1990 WL 29199, 1990 U.S. Dist. LEXIS 2775 (D.Mass. Mar. 12, 1990), Judge Young commented that "such **contact among parties is generally**

encouraged as a means of facilitating settlement and of avoiding protracted litigation." *Id*. at 1990 WL 29199, at *2, 1990 U.S. Dist. LEXIS 2775" [Emphasis added]

Northwest Bypass v. U.S. Army Corps of Engineers, 488 F.Supp.2d 22 (D.N.H., 2007).

The sanctioning of the plaintiff to restrain his communications is actually obstruction of justice and against the public policy interest:

", the court of appeals concluded that 18 U.S.C. § 1513(b)(1), retaliation against witnesses, applies in both civil and criminal cases. The court recounted the facts as follows:

While in state prison, Jackie McLeod filed an action, pursuant to 42 U.S.C. § 1983, alleging that Houston County Deputy Sheriff Joe Watson and others had violated his civil rights. Watson testified at the ensuing trial. At the conclusion of the presentation of the evidence, the district judge granted a directed verdict in favor of Watson and the other defendants. Following the verdict, McLeod told Watson that as soon as he was released from prison, he was going to kill him. Watson reported this threat to the district judge and the Federal Bureau of Investigation. McLeod was charged with retaliating against a witness in violation of 18 U.S.C. § 1513(a)(1). *Id*. at 323."

Northwest Bypass v. U.S. Army Corps of Engineers, 488 F.Supp.2d 22 at 30-31 (D.N.H., 2007).

Sanctions such as the order against the plaintiff by Husch Blackwell Sanders LLP are inappropriate and in violation of the trial court's authority under the controlling la of the Western District. See *Smith v. Kansas City Southern Ry. Co*., 87 S.W.3d 266 at fn 8 (Mo. App., 2002).

The Western District recognizes the trial court was not at liberty to rule contrary to the Missouri Supreme Court:

"This court is constitutionally bound to follow the latest controlling decisions of the Missouri Supreme Court. *Knorp v. Thompson*, 175 S.W.2d 889, 894 (Mo. 1943) …must control the outcome of the present case. *St. Louis Sw. Ry. Co. of Tex. v. Spring River Stone Co*., 154 S.W. 465, 467 (Mo. App. 1913) (Sturgis, J., concurring)."

State v. Aaron, No. WD 65362 at pg.1 (W.D. of Mo. App. 1/23/2007).

Conclusion: The trial court's order preventing the pro se plaintiff/appellant from communicating to the parties must be reversed as a violation of the Missouri Supreme Court's rules and the court's express finding that restricting communication between an unrepresented party and the other parties is an unconstitutional violation of protected speech.

Point 8. The trial court erred in denying the plaintiff/appellant's motion to require defendant Lathrop & Gage, L.C. to provide more definite answers and facts supporting asserted affirmative defenses and must be reversed in that courts lack discretion to Rule 55.27(d) or ignore the pleading sufficiency requirements of Rule 55.08.

(A) The trial court's erroneous judgment is the order of denying a more definite answer dated May 29, 2008.

Issue VIII. Whether Rule 55.27(d) required the trial court to order Lathrop & Gage, L.C. to amend its answer and provide more definite answers and to support the affirmative defenses.

(B) Legal Reasons for reversible error.

State ex rel. Harvey v. Wells, 955 S.W.2d 546 (Mo., 1997) (Requirement to enter an order to amend , lack of discretion in Affirmative Defenses)

(C) Summary of why the legal reasons support reversible error.

Standard of Review: "Rule 55.27(d) clearly requires entry of an order that the offending pleading be amended within a period of time. While the trial court is allowed discretion regarding the amount of time within which the

pleading must be amended, and the appropriate sanction in the event the pleading is not amended, the trial court is not allowed the discretion to ignore the fact pleading requirement of Rule 55.08." *State ex rel. Harvey v. Wells*, 955 S.W.2d 546 at 547 (Mo., 1997).

Facts: In their initial but late first responsive pleading, the defendant Lathrop & Gage, L.C. repeatedly denied each material fact related to the chargeable conduct averred by the plaintiff/appellant that Lathrop & Gage, L.C. and Lathrop & Gage, L.C.'s clients participated in.

The defendant Lathrop & Gage, L.C.'s answer did not distinguish between facts known to Lathrop & Gage, L.C.'s attorneys in service to former Governor Blunt and the firm's other clients imputed to be the knowledge of Lathrop & Gage, L.C. and are denied as unknown in the answer and as facts not known to Lathrop & Gage, L.C. and its employees and agents.

Lathrop & Gage, L.C.'s responses lacked the requisite detail to adjudicate the claims of the plaintiff/appellant without invasive discovery that would otherwise be spared Lathrop & Gage, L.C., its attorneys and clients.

Lathrop & Gage, L.C.'s asserted affirmative defenses were conclusory in that they were void of supporting facts.

The plaintiff/appellant filed a timely motion for a more definitive statement of the defendant Lathrop & Gage, L.C.'s answers and averments in support of Lathrop & Gage, L.C.'s affirmative defenses.

Rule: Rule 55.27(d) motion for more definite statement provides a tool to efficiently resolve claims and to lessen the burden of discovery on the parties and the court:

> "The Missouri rules of civil procedure require fact pleading. Rule 55.08 provides: "A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." The goal of fact pleading is the quick, efficient, and fair resolution of disputes. Fact pleading identifies, narrows and defines the issues so that the trial court and the parties know what issues are to be tried, what discovery is necessary, and what evidence may be admitted at trial. *Luethans v. Washington University,* 894 S.W.2d 169, 171-172 (Mo. banc 1995); *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 377 (Mo. banc 1993); *Walker v. Kansas City Star Co*., 406 S.W.2d 44, 54 (Mo.1966) (quoting *Johnson v. Flex-O-Lite Mfg. Corp*., 314 S.W.2d 75, 79 (Mo.1958)).
>
> The proper remedy when a party fails to sufficiently plead the facts is a motion for more definite statement pursuant to Rule 55.27(d).

Rule 55.27(d) provides: " A party may move for a more definite statement of any matter contained in a pleading that is not averred with sufficient definiteness or particularity to enable the party properly to prepare responsive pleadings or to prepare generally for trial when a responsive pleading is not required. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just."

State ex rel. Harvey v. Wells, 955 S.W.2d 546 at pg.546 (Mo., 1997).

The lack of details in the defendant's answer strongly suggests that Lathrop & Gage, L.C., does not understand the gravamen of its answer or the repercussions. There is no reason more Missouri law firms must fall to this controversy like Fortune 100 companies:

"15. See generally LAW GOVERNING LAWYERS § 120(1)(b) ("A lawyer may not knowingly make a false statement of fact to the tribunal."); id. cmt. c ("A lawyer's knowledge. . . . A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is

plainly apparent, for example, by refusing to read a document . . . . A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false."). The Reporter's Note to cmt. c recognizes that some courts have applied a "conscious ignorance" test for knowledge, citing *Wyle v. R.J. Reynolds Indus., Inc*., 709 F.2d 585, 590 (9th Cir. 1983) (in view of other facts known to the law firm, it could not accept at face value client's denial of known fact)."

In re Food Management Group, LLC, Case No. 04-22880 at fn 15 (ASH) (Bankr. S.D.N.Y. 1/23/2008) (Bankr. S.D.N.Y., 2008)

The court has a nondiscretionary duty to order Lathrop & Gage, L.C. to amend its answer and provide more definite responses. Rule 55.27(d) clearly requires entry of an order that the offending pleading be amended within a period of time. While the trial court is allowed discretion regarding the amount of time within which the pleading must be amended, and the appropriate sanction in the event the pleading is not amended, the trial court is not allowed the discretion to ignore the fact pleading requirement of Rule 55.08."

State ex rel. Harvey v. Wells, 955 S.W.2d 546 at pg.546 (Mo., 1997).

Conclusion: The trial court's May 29, 2008 order declining to require Lathrop & Gage L.C. to submit a more definite answer contradicted the controlling law of the Missouri Supreme Court which must control the issue, therefore this court is required to reverse the denial of a more definite answer.

Point 9. The trial court erred in denying the plaintiff/appellant's motion to strike (dismiss) defendant Lathrop & Gage, L.C.'s affirmative defenses for failure to state supporting facts that requires reversal in that clearly established Missouri precedents require insufficiently pled affirmative defenses to be forfeited.

(A) The trial court's erroneous judgment is the order denying dismissal of affirmative defenses dated May 29, 2008.

Issue IX: Whether the trial court abused its discretion in failing to dismiss Lathrop & Gage L.C.'s second through nineteenth affirmative defenses as waived.

B) Legal Reasons for reversible error.

Schimmel Fur Co. v. American Indemnity Co., 440 S.W.2d 932 (Mo.1969) (Requirement of adequate notice not bare legal conclusions); *City of Peculiar v. Effertz Bros. Inc.*, No. WD 67554 (Mo. App. 1/22/2008)(Failure to plead results in waiver); *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, (Mo. banc 1993)(Requirement to provide supporting facts).

(C) Summary of why the legal reasons support reversible error.

Standard of Review: "…the trial court is not allowed the discretion to ignore the fact pleading requirement of Rule 55.08." *State ex rel. Harvey v. Wells*, 955 S.W.2d 546 at 547 (Mo., 1997).

Facts: In their initial but late first responsive pleading, the defendant Lathrop & Gage, L.C. raised nineteen affirmative defenses.

The defendant Lathrop & Gage, L.C.'s first affirmative defense "failure to state a claim" is permissible under controlling case law even though it is devoid of supporting facts and fails as a mater of law.

The defendant Lathrop & Gage, L.C.'s remaining defenses are devoid of a single supporting fact and are conclusory.

The plaintiff filed a timely motion to strike all but Lathrop & Gage, L.C.'s first affirmative defenses.

Rule: Missouri Rule 55.07 requires that "[a] party shall state in short and

plain terms his defenses to each claim." Rule 55.08 requires that a party "plead ... 'matter constituting an avoidance or affirmative defense.' " *Gee v. Gee*, 605 S.W.2d 815, 817 (Mo.App.1980). Finally, Rule 55.11 requires that "[a]ll averments of claim or defense ... shall be limited as far as practicable to a statement of a single set of circumstances." Such rules contemplate that in pleading affirmative defenses, their factual basis must be set out in the same manner as is required for pleading claims. *ITT Commercial Finance v. Mid-Am Marine*, 854 S.W.2d 371, 384 (Mo. banc 1993).

The purpose of such rules is to give notice to the opposing parties in order to be prepared on the issues. *Schimmel Fur Co. v. American Indemnity Co*., 440 S.W.2d 932, 939 (Mo.1969).

The Western District has ruled that failing to plead affirmative defenses causes them to be lost:

> "Rule 55.08 requires that all affirmative defenses be pled in responsive pleadings or be abandoned. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002). Failure to plead affirmative defenses will result in their waiver. *Holdener v. Fieser*, 971 S.W.2d 946, 950 (Mo. App. E.D. 1998); *Leo's Enters., Inc*., 805 S.W.2d at 740."

City of Peculiar v. Effertz Bros. Inc., No. WD 67554 at pg. 1 (Mo. App. 1/22/2008) (Mo. App., 2008).

Lathrop & Gage L.C. failed to plead affirmative defenses as required under Rule 55.08. Rule 55.08 (2004) provides in pertinent part:

> "A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation."

The purpose of Rule 55.08 is to require a defendant raising an affirmative defense to plead the defense so as to give the plaintiff notice of it. *Bailey v. Cameron Mutual Ins. Co*., 122 S.W.3d 599, 604 (Mo.App. E.D.2003).

Lathrop & Gage, L.C.'s affirmative defenses are deficient at law:

"An affirmative defense is asserted by the pleading of additional facts not necessary to support a plaintiff's case which serve to avoid the defendants' legal responsibility even though plaintiffs' [sic] allegations are sustained by the evidence." *Reinecke v. Kleinheider*, 804 S.W.2d 838, 841 (Mo.App.1991). [Emphasis added.] Bare legal conclusions, ..., fail to inform the plaintiff of the facts relied on and, therefore, fail to further the purposes protected by Rule 55.08. *Schimmel Fur Co. v. American Indemnity Co*., 440 S.W.2d 932, 939 (Mo.1969) (rule requires notice of facts relied on so that opposing parties

may be prepared on those issues).

ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 383 (Mo. banc 1993).

The Southern District court found that when affirmative defenses are insufficiently pled and have no supporting facts, they are without significance as material facts for judgment purposes:

> "Mr. and Mrs. Brekke failed to plead any facts in support of their "affirmative defenses." The affirmative defenses were deficient as a matter of law. They amount only to legal conclusions without any factual basis. A motion for judgment on the pleadings does not admit the truth of facts not well pleaded by an opponent nor conclusions of law contained in an opponent's pleading. *Holt v. Story*, 642 S.W.2d 394, 396 (Mo.App.1982); *Helmkamp v. American Family Mut. Ins. Co*., 407 S.W.2d 559, 565-66 (Mo.App.1966). Mr. and Mrs. Brekke's "affirmative defenses" raised no issue of material fact."

Stephens v. Brekke, 977 S.W.2d 87 at pg. 93-94 (Mo. App. S.D., 1998).

Missouri courts have consistently held that deficient affirmative defenses such as those raised by Lathrop & Gage, L.C. in defenses 2 through 19 are without effect and a nullity. This Western District has found deficiently pled affirmative defenses to fail to state a defense:

"Appellants also pled the affirmative defenses of accord and satisfaction, estoppel, waiver, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction in their respective answers to respondent's petition. These defenses were listed as conclusory statements and appellants pled no specific facts to serve as the basis for each defense. Rule 55.08 requires that a

pleading setting forth an affirmative defense shall contain a plain statement of the facts showing that the pleader is entitled to the defense. The factual basis for an affirmative defense must be set out in the same manner as is required for the pleading of claims under the Missouri Rules of Civil Procedure. *Ashland Oil, Inc. v. Warmann*, 869 S.W.2d 910, 912 (Mo.App.1994). Because appellants have not sufficiently pled the alleged affirmative defenses, they fail as a matter of law. See *Id*."

Curnutt v. Scott Melvin Transport, Inc., 903 S.W.2d 184 (Mo. App.W.D., 1995).

The failure to sufficiently plead affirmative defenses was found to prevent summary judgment in *Lumbermens Mut. Cas. Co. v. Thornton* :

"Here, Thornton alleged no facts showing that the adverse interest exception did not apply in this matter. Nor did it allege facts that established that Western Container was otherwise aware of the misrepresentations until after Horton's defalcation was discovered.

> Thus, even if Horton knowingly made knowing misrepresentations to Thornton, Thornton's motion fails because it neglects to present undisputed facts showing that those misrepresentations are legally attributable to Western Container or that Western Container had actual knowledge of the misrepresentations at the time they were made. Having failed to allege sufficient facts to establish that it is entitled to the affirmative defense as a matter of law, Thorton cannot prevail on its motion for summary judgment upon that basis."

Lumbermens Mut. Cas. Co. v. Thornton, 92 S.W.3d 259 at pg. 270 (Mo. App., 2002).

Missouri has long held as a clearly established rule deficient affirmative defenses coupled with an answer that uniformly refutes every material fact is a mere general denial making recognition of alleged affirmative defenses reversible:

> "For the error, then, which permeates all these instructions, and which was present throughout the whole trial, in admitting what are held to be affirmative defenses under a general denial, and in instructing the jury on affirmative defenses, none of which have been pleaded, we are compelled to reverse this case."

People's Bank v. Stewart, 117 S.W. 99 at pg. 103, 136 Mo. App. 24 (Mo.

App., 1909).

Lathrop & Gage L.C.'s asserted affirmative defenses 2-11 are fact based or dependent if they could exist, however Lathrop & Gage L.C. identified no facts or application.

The plaintiff is entirely without information to have notice of Lathrop & Gage, L.C.'s affirmative defenses 7 and 8 regarding settlement. The issue appearing to be raised is indemnification but there is no suggestion as to which defendants are indemnifying Lathrop & Gage L.C. through what if any settlement.

Lathrop & Gage L.C. was in error over settlement as a defense. Indemnification is a direct claim against another party, not an affirmative defense. See e.g., *KC. Landsmen, L.L.C. v. Lowe-Guido*, 35 S.W.3d 917, 921 (Mo.App.2001); *Buchanan v. Rentenbach Constructors, Inc*., 922 S.W.2d 467, 470 (Mo.App.1996); *Cass Bank & Trust Co. v. Mestman*, 888 S.W.2d 400, 403 (Mo.App.1994); *Honey v. Barnes Hosp*., 708 S.W.2d 686, 696 (Mo.App.1986).

Under the controlling case law applicable to the Missouri Rules, Lathrop & Gage, L.C. failed to plead affirmative defenses 2 through 19 and they are now lost:

> "After specifically listing certain affirmative defenses, Rule 55.08 provides that a party must plead "any other matter constituting an

avoidance or affirmative defense." "If a defendant intends to raise a defense based on facts not included in the allegations necessary to support the plaintiff's case, they must be pled under Rule 55.08." *Shaw v. Burlington Northern, Inc*., 617 S.W.2d 455, 457 (Mo.App.1981). A defense, which contends that even if the petition is true, a plaintiff cannot receive the relief sought because there are additional facts which place defendant in a position to avoid legal responsibility, must be set forth in a defendant's answer. Id. Such is the defense at issue here and Plaintiff was obliged to plead it affirmatively. Rule 55.08. This she has failed to do.

"Generally, failure to plead an affirmative defense results in waiver of that defense." *Detling v. Edelbrock*, 671 S.W.2d 265, 271 (Mo. banc 1984); *Lucas v. Enkvetchakul*, 812 S.W.2d 256, 263 (Mo.App.1991). Clearly, Plaintiff recognized the need to plead additional facts which would have allowed her to avoid legal liability as to Karlyn because she pled the matter affirmatively in her answer to Larry's pleading. Based on long standing rules of pleading, Plaintiff waived her "inequitable conduct" defense as to Karlyn unless (1) Karlyn either implied or expressly consented to trying the case on that defense, or (2) the trial court permitted the pleadings to be amended to include the defense. Rule 55.33(b). 5 See *Lucas*, 812 S.W.2d at 263.

Tindall v. Holder, 892 S.W.2d 314 at 328 (Mo. App. S.D., 1994).

Point 10. The trial court erred in adopting the defendants' arguments that *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) had over ruled Missouri's pleading standards for tortuous interference, Prima facie tort; fraud, civil conspiracy and antitrust conspiracy where specific agreements to restrain trade are alleged with supporting facts and requires reversal because Bell Atlantic increased only the federal pleading standard for circumstantial inference of an agreement to restrain trade, adding plausibility not the specific conspiracy agreements averred in the petition to Missouri's sufficiency of claims authorities which have always been fact based and higher than the FRCP Rule 8 Notice Pleading of federal courts .

(A) The trial court's erroneous judgments are the order of dismissal dated August 5, 2008 and the order of judgment dated December 29, 2008.

Issue X: Whether the petition's allegations of conspiracy and the proposed amended petition's clarification of conspiracy to commit fraud comply with *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) and complete the factual allegations for stating each claim against each identified defendant.

(B) Legal Reasons for reversible error.

Gregory v. Dillard's, Inc., No. 05-3910 (8th Cir. 5/12/2009) (Bell Atlantic did not create a heightened standard); *Taylor v. Richland Motors*, No. WD 64012 (MO 3/22/2005) (Pleading co-conspirators to fraud on a third party); *Zipper v. Health Midwest*, 978 S.W.2d 398 (Mo. App.W.D., 1998) (Antitrust and interference pleading standards); *131 Main Street Associates v. Manko*, 897 F.Supp. 1507 at 1534 (S.D.N.Y., 1995) (Vicarious liability for law partners).

(C) Summary of why the legal reasons support reversible error.

Facts: The defendants' motions to dismiss and Lathrop & Gage L.C.'s motion for judgment argue the plaintiff/appellant failed to state any claims because all elements of each claim were not pled against each defendant and that conspiracy was not stated because sufficient facts to *infer* an agreement under *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) were not pled.

The plaintiff/appellant's suggestions in opposition argued the petition alleged express publicized agreements to restrain trade not the circumstantial inference of an agreement in *Twombly*. The suggestions also showed the petition alleged conspiracy and identified the conduct of each specific defendant to complete the conspired violation.

The plaintiff's proposed amended petition clarified the conspiracy to commit fraud by identifying the defendants in the conspiracy to commit fraud

and the specific fraudulent representations those defendants made injuring the plaintiff/appellant.

Rule: 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 has 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). However, the plaintiff/appellant has not seen Missouri state authorities applying *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) but believes Missouri's existing standards for pleading civil conspiracy including *Macke Laundry Serv. Ltd. v. Jetz Serv. Co*., 931 S.W.2d 166, 175 (Mo.App.1996) do not create a heightened pleading standard over *Gregory v. Dillard's, Inc*., No. 05-3910 (8th Cir. 5/12/2009).

The petition clearly avers that Lathrop & Gage and the other defendants are conspirators in the underlying claims of antitrust including § 416.031.1 RSMo; § 416.031.2 RSMo; Conspiracy to Violate § 416.031(2); Tortious Interference with Business Relations; Fraud and Deceit; and Prima Facie Tort which the petition alleges against specifically identified defendants for each count:

> "To state a claim for civil conspiracy, a party must allege (1) an agreement or understanding; (2) between two or more persons; (3) to do an unlawful act or to do a lawful act by unlawful means. *Macke Laundry Serv. Ltd. v. Jetz Serv. Co*., 931 S.W.2d 166, 175 (Mo.App.1996). Civil conspiracy is not actionable by itself because "some wrongful act must have been done by one or more of the alleged conspirators and the

> fact of a conspiracy merely bears on the liability of the various defendants and joint tortfeasors." *Id*. (quoting *Bockover v. Stemmerman*, 708 S.W.2d 179, 182 (Mo.App.1986)). If the underlying claim does not state a cause of action, there can be no claim for civil conspiracy. *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. banc 1996). As the underlying claim for their civil conspiracy theory, Appellants argue that Respondents violated Missouri's Antitrust Law, §§ 416.011 to 416.161, RSMo 1994, and tortiously interfered with Dr. Zipper's contractual expectancy created by the hospital bylaws."

Zipper v. Health Midwest, 978 S.W.2d 398 (Mo. App.W.D., 1998).

Lathrop & Gage L.C. and the other defendant members of the hospital supply cartel erroneously argued that the plaintiff/appellant has failed to make allegations of conduct by the defendants or their employees that led to the injury of the petitioner. At law however even as a latecomer Lathrop & Gage L.C. is liable for the preceding acts of the other petition identified hospital supply cartel members including some of whom are defendants in the plaintiff/appellant's federal litigation and some who are not named as defendants:

> "In non-class actions, late-comers to antitrust conspiracies, who, while knowing of the prior existence of the conspiracy, join it in order to

promote the unlawful object for which it was organized, are liable for everything done during the period of the conspiracy's existence. *Dextone Co. v. Building Trades Council of Westchester County*, 60 F.2d 47 (2d Cir. 1932). This means that proof of the unlawful affiliation is sufficient to render a co-conspirator liable for all damages that the conspiracy caused, regardless of the exact time defendant became a member or the extent of its participation. *Dextone*, supra, at 48. "A person or corporation joining a conspiracy after it is formed and thereafter aiding in its execution, becomes from the time of joining as much a conspirator as if he originally designed and put it into operation." 1 Tuolmin's Antitrust Laws, § 22.14, at 404 (1949). "To establish a combination or conspiracy in restraint of trade, it is not necessary to prove that all of the participants formed or joined the combination simultaneously. A person may be found to have joined a combination or conspiracy which is already in existence. Such a person, by knowingly becoming a party to the combination or conspiracy, becomes liable and responsible in law for those acts of the members of the combination or conspiracy which were performed prior to the time that the new participant joined in it." Antitrust Civil Jury Instructions, A.B.A. Section of Antitrust Law, at 53 (1972), citing *Pacific Lanes, Inc. v. Washington State Bowling Proprietors Assn*., Civil No. 5381 (W.D.Wash.1965)."

In re Nissan Motor Corp. Antitrust Litigation, 430 F.Supp. 231 at 232 (S.D. Fla., 1977).

Lathrop & Gage L.C. was confused about its liability from the acts of Lathrop & Gage L.C.'s employees including both Mark F. "Thor" Hearne, and Kansas State Republican Senator John L. Vratil. Each Defendant is liable for the acts of its officers, employees, and agents. Because a corporation can act only through its agents, it may be held liable for the acts of its officers, employees, and other agents in certain circumstances. *Meyer v. Holley*, 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

Lathrop & Gage L.C. has vicarious liability for Hearne and Vratil's conduct:

> "As Judge Lowe pointed out *Northwestern Nat. Bank of Minneapolis v. Fox & Co.,* 102 F.R.D. 507, 512 (S.D.N.Y.1984), "in the partnership context, the scienter requirement is satisfied as long as the partner or partners actually involved in the wrongdoing acted with scienter." One must distinguish the idea of the mens rea of a crime from the idea of the category of persons who are to be held liable for the crime. It should also be noted that courts have upheld vicarious liability in two areas of the law in which intent must usually be proven in order to establish a

primary violation: antitrust, see ASME, 456 U.S. 556, 102 S.Ct. 1935, and securities, see, e.g., *In re Atlantic Financial Management, Inc.*, 784 F.2d 29 (1st Cir.1986) (Breyer, J.), cert. denied, 481 U.S. 1072, 107 S.Ct. 2469, 95 L.Ed.2d 877 (1987)."

131 Main Street Associates v. Manko, 897 F.Supp. 1507 at 1534 (S.D.N.Y., 1995).

The petition avers knowledge of each of the defendants over critical parts of the monopolization scheme, the general conspiratorial objective of excluding hospital supply competitors and consolidating the cartel's control of the State of Missouri market under Insure Missouri while replacing Neoforma Inc.'s money laundering of member hospital funds with the National Cancer Center designation of the Novation LLC hospital St. Luke's Health System:

"A plaintiff seeking redress need not prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all participants therein." *Hoffman-LaRoche, Inc*., supra, 447 F.2d at 875. An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the

same motives for desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement, it simply must be shown that there was "a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences." *Id*."

Coon v. Froehlich, 573 F.Supp. 918 at 922 (S.D. Ohio, 1983). As conspirators and joint tortfeasors, the other defendants share culpability for the conduct of Lathrop & Gage L.C. and its employees.

The defendants were in error to criticize the complexity of the complaint. See *Schwartz v. Broadcast Music, Inc.,* 180 F.Supp. at 335, recognizing that an antitrust conspiracy may have more than one object directed at one or more victims. Also *Preferred Physicians Mut. Management Group v. Preferred Physicians Mut. Risk Retention*, 918 S.W.2d 805, 815 (Mo.App.1996) is instructive on why the petitioner was forced to describe in detail so many wrongful acts by different conspirators. The conspiracy is not what is actionable. *Id*. An unlawful act done in furtherance of a conspiracy is what is actionable*. Id*. "[T]he conspiracy has to do only with the joint and several liability of the co-conspirators." *Id*.

"The gist of the action is not the conspiracy, but the wrong done by acts in furtherance of the conspiracy or concerted design resulting in damage

to plaintiff. *Shaltupsky v. Brown Shoe Co., supra; Medich* v. *Stippec*, 335 Mo. 796, 73 S.W.2d 998; *Seegers v. Marx & Haas Clothing Co*., supra; *Kansas City v. Rathford*, 353 Mo. 1130, 186 S.W.2d 570."

Gruenewaelder v. Wintermann, 360 S.W.2d 678 at 687-688 (Mo., 1962).

As stated *supra* in Point 5 the proposed amended petition clarified the fraud allegations supplying the who, what, when and where of the material misrepresentations and which defendant conspirators made the misrepresentations to third parties that injured the plaintiff/appellant and clarifying the other specific defendants that while not making the misrepresentation are still properly alleged to be co-conspirators to commit the fraud under the Western District Appeals Court case *Taylor v. Richland Motors*, No. WD 64012 (MO 3/22/2005).

Conclusion: The trial court was in error for adopting the defendants' arguments in the motions to dismiss and for judgment on the pleadings that *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) created a heightened pleading standard over ruling existing Missouri civil conspiracy, conspiracy to commit fraud, Prima facie tort, Tortuous interference, and Antitrust controlling state authorities on sufficiency of pleading.

CONCLUSION

The plaintiff/appellant respectfully requests that the Missouri Judicial Branch begin enforcement of Missouri's Antitrust statutes in the monopolized hospital supply markets by reversing the trial court's dismissals and judgment on the pleadings made in favor of the Novation LLC cartel defendants.

Respectfully submitted,

S/ Samuel K. Lipari
Samuel K. Lipari
Plaintiff/appellant Pro Se

CERTIFICATE OF COMPLIANCE

I hereby certify this brief starting at the jurisdictional statement to the end of the conclusion contains 1, 927 mono space lines and 20,218 words as counted by the Microsoft Word for Mac 2008 software used complying with Rule 84.06(b)(1) and the information required under Rule 55.03.

S/ Samuel K. Lipari
Samuel K. Lipari
Plaintiff/appellant Pro Se

CERTIFICATE OF SERVICE

I certify I have filed ten copies with the court as required under Rule 85.05(a) along with a CD and have served the following counsel a copy of the brief and a digital media copy of the same on the 29th day of June 2009. The files on the CD containing the brief, the petition, the proposed amended petition, the second proposed amended petition, and the third proposed amended petition have been scanned for viruses and I certify that they are virus-free:

John K. Power, Husch Blackwell Sanders LLP, 4801Main St, Ste 1000 Kansas City, MO 64112 Attorney for NOVATION LLC, VHA INC., UNIVERSITY HEALTHSYSTEM CONSORTIUM, VHA MID-AMERICA LLC, THOMAS SPINDLER, ROBERT BEZANSON, GARY DUNCAN, MARYNARD OLIVERIUS, SANDRA VAN TREASE, CHARLES ROBB, MICHAEL TERRY, COX HEALTH CARE SERVICES OF THE OZARKS INC., ST LUKE'S HEALTH SYSTEM INC., STORMONT-VAIL HEALTHCARE INC., ROBERT BAKER, CURT NONOMAQUE, GHX LLC, NEOFORMA INC.

Michael J. Thompson, 4801 Main St, Ste 1000, Kansas City, MO 64112 Attorney for HUSCH BLACKWELL SANDERS LLC

William E. Quirk, Polsinelli, Shughart / Shughart Thomson & Kilroy, P.C. 120 W 12TH ST, Ste 1600, Kansas City, MO 64105 Attorney for SHUGHART, THOMSON & KILROY

Mark A. Olthoff, Polsinelli, Shughart / Shughart Thomson & Kilroy, P.C. 120 W 12TH Street, Ste 1700, Kansas City, MO 64105 Attorney for PIPER JAFFRAY COMPANIES and ANDREW DUFF

Jay E. Heidrick, Polsinelli, Shughart / Shughart Thomson & Kilroy, P.C. 6200 College Blvd., Suite 500, Overland Park, Kansas 66211 Attorney for JERRY GRUNDHOFER, RICHARD DAVIS, ANDREW CECERE,

William G. Beck, Peter F. Daniel, J. Alison Auxter, Lathrop & Gage LC, 2345 Grand Boulevard, Suite 2800, Kansas City, MO 64108 Attorney for LATHROP & GAGE

S/ Samuel K. Lipari
Samuel K. Lipari
Plaintiff/appellant Pro Se
3520 NE Akin Blvd, #918
Lees Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com