IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-CV-0210-CV-ODS**
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION FOR SANCTIONS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL

The instant motion and these suggestions are not filed lightheartedly. The motion is not brought for tactical advantage but instead to protect these defendants and their counsel from further unwarranted attacks and unnecessary litigation. Plaintiff Medical Supply Chain, Inc. ("Medical Supply Chain"), and its counsel Bret Landrith ("Landrith") should be sanctioned by this Court under Fed. R. Civ. P. 11 and/or 28 U.S.C. § 1927 for their conduct. Rather than heed previous admonitions from the Kansas District Court and the Tenth Circuit Court of Appeals against filing certain claims as they have done in this case, plaintiff and its counsel have filed this lawsuit unnecessarily to continue to harass and annoy these defendants and their counsel through protracted, frivolous and costly litigation. Defendants, thus, request that they be awarded their expenses and reasonable attorneys' fees incurred in defending this lawsuit as well as expenses and attorneys' fees incurred in preparing and presenting the motion and these suggestions in support.

PROCEDURAL BACKGROUND

1. On October 22, 2002, plaintiff, through Landrith, filed a lawsuit against many of these same defendants in the United States District Court for the District of Kansas, styled *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM.

2. Plaintiff filed its thirteen-count Amended Complaint in the District of Kansas on November 12, 2002.

3. On March 27, 2003, defendants moved to dismiss plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted.

4. On June 16, 2003, the Court granted defendants' motion to dismiss. The Court's Memorandum and Order cautioned plaintiff against bringing frivolous claims like these, stating:

> Prior to analyzing plaintiff's legal arguments, the court reminds plaintiff's counsel that, by signing the complaint and any other paper submitted to the court, he has certified, to the best of his belief and after a reasonable inquiry, that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2). *Plaintiff's counsel is advised to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts.*

(Ex. A, June 16, 2003 Memorandum and Order, at p. 11 (emphasis added)).

5. After the Court denied plaintiff's "Motion for New Trial and Motion for Rule 52(b) Amendment of Judgment" on November 19, 2003, plaintiff appealed the dismissal to the Tenth Circuit Court of Appeals.

6. On November 8, 2004, the Tenth Circuit affirmed the Court's June 16, 2003 Order granting defendants' motions to dismiss. Quoting the cautionary language of the District Court's June 16, 2003 Memorandum and Order, the Court of Appeals held that Medical Supply Chain's appeal was "not supported by the law or the facts" and ordered plaintiff's counsel to show cause why he should not be sanctioned for pursuing a frivolous appeal. (Ex. B, Nov. 8, 2004 Order, at p. 3.)

7. In a December 30, 2004 Order, the Tenth Circuit assessed attorneys' fees and double costs against plaintiff's counsel as a sanction, pursuant to Fed. R. App. P. 38. The Tenth Circuit remanded the case to the District Court to determine the amount of attorneys' fees to be awarded as a sanction. (Ex. C.)

8. On January 27, 2005, defendants filed their Motion for Attorneys' Fees, requesting the Kansas District Court to enter an order determining that the amount of defendants' attorneys' fees incurred in opposing plaintiff's frivolous appeal is $23,956.00 and awarding that amount to defendants pursuant to the Court of Appeals' order. The motion was sustained on May 13, 2005.

9. Plaintiff's counsel, Bret Landrith, filed this case on March 7, 2005, asserting the same underlying purported "facts" and conduct and realleged many of the same claims already dismissed by the Kansas District Court and affirmed by the Tenth Circuit Court of Appeals.[1]

STANDARD FOR IMPOSING SANCTIONS

A. Rule 11

Rule 11(b), which applies to pleadings, motions and other papers, provides in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --
>
> (1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations an other factual contentions have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

[1] Plaintiff realleged U.S.A. Patriot Act claims in Count XVI. In dismissing one of the several Patriot Act claims in the earlier litigation, Judge Murgia stated the allegations were "so divorced from rational thought" that further discussion was unnecessary. (Ex. A, pp. 14-15.) Defendants believe that the current U.S.A. Patriot Act claim (Count XVI) is likewise insufficient and plainly not supported by the statute or case law. Likewise, it is clear that the other federal claims are barred by *res judicata* and/or collateral estoppel such that the claims should never have been filed in this Court.

Rule 11 is "intended to be vigorously applied by district courts to curb widely acknowledged abuse resulting from the filing of frivolous pleadings and other papers." *Perkins v. General Motors Corp.*, 129 F.R.D. 655, 658 (W.D.Mo. 1990) (*quoting Aduono v. World Hockey Ass'n.*, 824 F.2d 617, 621 (8th Cir. 1987)). The Rule grants the Court discretion to sanction a party with "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2).

The party or its attorney need not act in subjective bad faith or with malice to trigger a violation of Rule 11. *Perkins*, 129 F.R.D. at 658. "Rather, an objective standard applies and the party or his attorney cannot argue 'that their subjective 'good faith' (i.e., ignorance of the law or legal procedures) somehow excuses their actions." *Id.* (*citing Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987)); *see also McCormick v. City of Lawrence, Kan.*, 218 F.R.D. 687, 690 (D.Kan. 2003) ("A person's actions must be objectively reasonable in order to avoid sanctions under Rule 11."); *White v. General Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1990) ("A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances."). Moreover, "[a]n empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating." *In re Cascade Energy & Metals Corp.*, 87 F.3d 1146, 1151 (10th Cir. 1996) (*quoting Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986)); *see also Monument Builders of Greater Kansas City, Inc. v. American cemetery Assn. of Kansas*, 891 F.2d 1473, 1484-85 (10th Cir. 1989) ("Rule 11 imposes an obligation on the signer of a pleading to conduct a reasonable inquiry into whether the pleading is legally frivolous or factually unsupported.").

Once the Court has found a Rule 11 violation, "imposition of sanctions is mandatory." *Perkins*, 129 F.R.D. at 658 (*citing Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988)).

Moreover, upon finding a violation, the Court may sanction the lawyer, the client, or both. *White*, 908 F.2d at 679 (citation omitted).

Under Rule 11, plaintiff and its counsel were provided notice of this filing and an opportunity to withdraw the objectionable pleading. (Ex. D.) They have, however, refused.

B. 28 U.S.C. § 1927

Title 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Sanctions under § 1927 are discretionary, unlike those under Rule 11, and may be imposed by this Court if it finds that plaintiff's counsel acted either in subjective bad faith or that counsel's conduct was objectively vexatious. *Perkins*, 129 F.R.D. at 657 (citations omitted); *see also Tenkku v. Normandy Bank*, 348 F.3d 737, 743 (8th Cir. 2003) ("Section 1927 warrants sanctions when an attorney's conduct 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'") (*quoting Perkins*). As the *Perkins* decision notes, sanctions under § 1927 have been held appropriate in a variety of circumstances. *Id.* (*citing Taylor v. Belger Cartage Service, Inc*., 102 F.R.D. 172 (W.D.Mo. 1984) (union member's attorney unreasonably and vexatiously multiplied proceedings by filing and pursuing the case)); *Fisher v. CPC International, Inc*., 591 F. Supp. 228 (W.D.Mo. 1984) (all amounts incurred by defendants recoverable as excess costs under § 1927 where action never should have been filed and counsel for plaintiff proceeded recklessly); *see also Tenkku*, 348 F.3d 743-44 (where the Eighth Circuit affirmed the district court's imposition of sanctions, but imposing them on plaintiff's counsel instead of plaintiff, after the trial court noted that plaintiff's counsel's own motion for sanctions "while frivolous of its own accord, is the latest example of a pattern of unnecessary and hostile pleadings the court has been forced to

review in this matter," all of which "created unnecessary and protracted delays in discovery."); *Lee v. First Lenders Ins. Services, Inc*., 236 F.3d 443 (8th Cir. 2001).

Plaintiff's Counsel Has Violated Both Rule 11 and § 1927.

Plaintiff's counsel violated Rule 11 and § 1927 when he filed this lawsuit. Defendants should be awarded sanctions under Rule 11 and their attorneys' fees under § 1927 in this action because plaintiff's counsel has unreasonably and vexatiously multiplied proceedings by filing and pursuing this case after many of the same claims were previously dismissed by the Kansas District Court, with an express admonition to plaintiff's counsel that he was to take greater care to ensure that the claims he brings on his client's behalf are supported by the law and facts. *See* Ex. A, June 16, 2003 Memorandum and Order, at p. 11 (*citing* Rule 11(b)(2)). Succinctly, plaintiff's federal claims were dismissed outright as unsupported by the law or facts. *Id*. The Tenth Circuit affirmed, echoing the district court's cautionary language to plaintiff's counsel in its November 8, 2004 Order (at p. 3) and later imposing sanctions for filing a frivolous appeal. Ex. C, Tenth Circuit's December 30, 2004 Order.

Despite these clear admonitions and the imposition of sanctions, plaintiff has brought essentially the same lawsuit against these defendants in this Court. Plaintiff has also asserted additional claims which are equally devoid of factual or legal support as those previously brought in Kansas. This lawsuit represents just the latest example of a pattern of frivolous and legally and factually baseless pleadings filed by plaintiff's counsel. *See* Defendants' Motion to Dismiss, filed April 4, 2005, incorporated by reference herein (establishing that plaintiff's claims fail to state any claim upon which relief can be granted, are unsupported by the law or the facts, are barred as *res judicata* or under the doctrine of collateral estoppel, and are completely frivolous in nature). Such conduct is exactly the type Rule 11 and § 1927 were designed to redress.

Plaintiff asserts the same underlying purported "facts" and conduct and many of the same claims previously dismissed by the Kansas District Court. Plaintiff reasserts previously dismissed claims under the Sherman Act, the USA Patriot Act, and again seeks injunctive relief. Plaintiff has also "repackaged" the same purported "facts" into new antitrust causes of action, including alleged violations of Missouri's antitrust statutes.

Finally, plaintiff has resorted to filing a RICO claim and even ratcheted up its conduct by asserting claims against the law firm of "Shughart, Thomson & Kilroy, Watkins, Boulware, P.C." ("Shughart Thomson & Kilroy") for having been engaged to defend parties in the prior action. Complaint, Count XV, pp. 107-111. Included among plaintiff's allegations against Shughart Thomson & Kilroy are that, by defending the Kansas lawsuit and purportedly creating and arranging for ethics complaints to be prosecuted by the Kansas Disciplinary Administrator, Shughart Thomson & Kilroy engaged in racketeering. *Id*. Even if these bizarre allegations were taken as true, they are insufficient to state a RICO claim. The claims are wholly spurious.

If that was not enough, plaintiff also implicates a member of the Federal Bench as a participant in the conduct it now claims constitutes racketeering activity. Specifically, plaintiff alleges that Federal magistrate James P. O'Hara, a former partner with Shughart Thomson & Kilroy, provided "false and misleading testimony" to the Kansas Disciplinary Administrator against plaintiff's counsel, Bret Landrith. *Id*. at p. 108, ¶ 579. Not surprisingly, plaintiff fails to identify how the testimony was "false and misleading."

In *KPERS v. Reimer & Koger Assoc., Inc.*, 165 F.3d 627, 630 (8th Cir. 1999), the Eighth Circuit affirmed an award of attorneys' fees and costs under § 1927 on the ground that plaintiff's counsel had unreasonably and vexatiously multiplied the proceedings in filing a subsequent action asserting identical claims which had already been rejected in an earlier suit. Like in *KPERS*, this

Court should decide "enough is enough." Plaintiff and its counsel should be sanctioned, ordered to pay defendants' attorneys' fees and costs, and their Complaint should be stricken.

CONCLUSION

Plaintiff and its counsel have filed this lawsuit without having any factual or legal foundation. In fact, the Kansas District Court and the Tenth Circuit specifically advised plaintiff's counsel of this fact when dismissing plaintiff's lawsuit in Kansas and further admonishing him not to file future baseless claims. Undeterred, plaintiff and its counsel have now engaged in forum shopping to pursue these frivolous claims and bizarre allegations in this Court and to avoid further negative rulings in Kansas. Plaintiff's counsel makes baseless claims against these defendants, their counsel and further alleges a member of the Federal Bench has lied under oath in a disciplinary matter and has engaged in racketeering with private litigants or their counsel. Such vexatious multiplication of these proceedings, unreasonable and bad faith conduct constitutes intentional or reckless disregard of plaintiff's counsel's duties to this Court and has forced defendants to incur substantial expense in defending another of plaintiff's frivolous lawsuits. Plaintiff and its counsel should be sanctioned for this conduct under Rule 11 and § 1927 respectively. An award of attorneys' fees and costs is not only appropriate but necessary in this instance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 3rd day of June, 2005, to:

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