United States Court of Appeals

For the Tenth Circuit

Docket No. 04-3075 and 04-3102 (10th Cir.)

Case No.: 03-2324

Medical Supply Chain, Inc.

v.

The General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C., and Jeffrey R. Immelt

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Appeal from
the United States District Court
for the District of Kansas

APPELLANT BRIEF

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On the brief

APPELLANT

No Oral Argument Requested.

Exb 6

ARGUMENT

I. Whether the trial court erred in dismissing Medical Supply's Antitrust Claims.

ARGUMENT I, STANDARD OF REVIEW

Chemical Weapons Working Group, Inc. v. United States Dep't of the Army, 111 F.3d 1485, 1490 (10th Cir. 1997).

Yoder v. Honeywell, Inc. 104 F.3d 1215,1224 (10th Cir.)

Yoder, 104 F.3d at 1224

Full Draw Prod. v. Easton Sports Inc., 182 F.3d 745 at 750 (10th Cir., 1999).

SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996).

Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., 711 F.2d 989, at 994(11th Cir. 1983)

St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am., 795 F.2d 948, 953 (11th Cir. 1986)

Covad Communications Co. v. Bellsouth Corp., at ¶21 2002 C11 260 (USCA11, 2002).

George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 554 (2d Cir. 1977).

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993).

Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, at 782 (7th Cir.1994).

George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 (2d Cir. 1998).

Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976).

Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511 at 1518 (C.A.10 (Colo.), 1995).

Statutes

FED .R. CIV. P. Rule 12(b)(6)

FED .R. CIV. P. 8(a)(2)

Other Authorities

Charles Alan Wright, Law of Federal Courts Sec. 68, at 475-76 (5th ed. 1994)

PRIOR OR RELATED APPEALS

This is the first of two appeals resulting from the trial court's Memorandum and Order of Dismissal dated 1/29/04 and Judgment dated 2/13/04. Medical Supply entered its Notice of Appeal on 2/13/04 Case No. 04-3075 and GE entered its Notice of Appeal on 2/27/04, Case No. 04-3102.

STATEMENT OF APPELLATE JURISDICTION

"The district court had original jurisdiction over the antitrust claims pursuant to 28 U.S.C. § 1337, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367. We have jurisdiction under 28 U.S.C. § 1291." [footnote omitted] *Full Draw Prod. v. Easton Sports Inc.*, 182 F.3d 745 at 749 (10th Cir., 1999).

The trial court issued its Memorandum and Order of Dismissal dated 1/29/04 and Judgment dated 2/13/04. Medical Supply entered its Notice of Appeal on 2/13/04 and GE entered its Notice of Appeal on 2/27/04.

STATEMENT OF ISSUES PRESENTED

Whether Medical Supply's Amended Complaint Alleged GE Defendants' Participation in Group Boycott to Bar Entry Into the Market of Hospital Supplies in E-Commerce? and Whether Medical Supply's Amended Complaint Alleged GE Defendants' Monopolization of Hospital Supplies in E-Commerce?

STANDARD OF REVIEW

The appellate court upholds a dismissal under Fed. R. Civ. P. 12(b)(6) only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief," *Full Draw Prod. v. Easton Sports Inc.,* 182 F.3d 745 at 750 (10th Cir., 1999).

STATEMENT OF THE CASE

This is an action against General Electric, its CEO Jeffrey Immelt and two of its subsidiaries for group boycott and other antitrust prohibited actions in the creation and enforcement of a hospital supply cartel called G.H.X., LLC revealed through General Electric's breach of a business relationship established with Medical Supply. Once Jeffrey Immelt

discovered Medical Supply was the last independent electronic marketplace and targeted by the cartel, he caused the breach of an agreement to purchase a lease in antitrust prohibited conduct. "[A]llegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws."[1]

The General Electric defendants' common ownership did not shield them from liability for acting in concert with the independent G.H.X., LLC. After *Copperweld*, Sherman § 1 liability still exists when the "original anticompetitive purpose of a combination is evident from the affiliated corporations' subsequent conduct" and "Common ownership and control were irrelevant because restraint of trade was "the primary object of the combination," which was created in a " 'deliberate, calculated' " manner."[2]

STATEMENT OF FACTS

The following facts were alleged by the appellant Medical Supply as plaintiff in its amended complaint. The facts are restated here in substantially the same form as in the complaint but with the additional of subject headings in bold and the addition of material facts alleged in the

[1] *Covad Communications Co. v. Bellsouth Corp.*, 2002 C11 260 at ¶¶ 62 and 63 (USCA11, 2002)

[2] Chief Justice Burger, Majority Opinion, *Copperweld v. Independence Tube*, 104 S.Ct. 2731, 81 L.Ed.2d 628 at 761-762 (1984)

attachments to the amended complaint of a contract[3] requiring participation in G.H.X., LLC and Neoforma and an affidavit containing the two full press releases judicially noticeable as being the official statements of publicly traded companies and identified as such.

MEDICAL SUPPLY CHAIN, INC., (herein "Medical Supply"), is an e-commerce vendor, replaces a store or distributor as a more efficient and intelligent distributor of hospital supplies. Suppliers offer their products and services through Medical Supply Chain, Inc. and hospitals purchase their supplies through Medical Supply Chain, Inc. **V I pg. 52 §3**

Medical Supply's technology is superior allowing for greater market efficiency and transparency than GE's electronic marketplace called GHX, L.L.C. Medical Supply's founder spent 10 years developing it and for the last three years, Medical Supply has been incorporated, completing the research and development for commercialization. Medical Supply's first entry into the hospital supply market was halted in October 2002 by members of GE's cartel directly affiliated with the other electronic marketplace, Neoforma. GE appeared to be acting independently of Neoforma, when it accepted Medical Supply's proposal for a lease buy out

[3] In *Vigano v. Wylain, Inc*., an unexecuted contract attachment to the complaint sufficiently gave notice under FRCP 8 and "…correctly placed before the jury the question of the existence *vel non* of a contract..": *Vigano v. Wylain, Inc*., 633 F.2d 522 (C.A.8 (Mo.), 1980)

and financing, but similarly repudiated a contract for essential facilities, preventing entry into the hospital supply market at great sacrifice when Medical Supply was not in a position to find an alternative. (Neoforma's financial partner, US Bancorp Piper Jaffray, has attested to a threat of filing a Suspicious Activity Report or "SAR," against Medical Supply under the USA PATRIOT Act, which would destroy Medical Supply's ability to process hospital and supplier purchasing transactions. In an affidavit by Piper Jaffray Vice President and Chief Counsel submitted in *Medical Supply vs. US Bancorp et al* No. 02-3443 (10th Cir.), Piper Jaffray argues to file a "SAR" at any time it sees fit. Medical Supply is seeking to be protected from Piper Jaffray's extortion and any malicious use of the USA PATRIOT Act. The October 2002 and June 2003, distinct antitrust injuries to Medical Supply prevented it from beginning its operations each time and realizing the expectations of its investors and stakeholders. **V I pg. 53 §4**

Jeffrey R. Immelt, Chief Executive Officer, General Electric Company (herein "GE"). Mr. Immelt has been a long time employee of the many divisions and entities of General Electric Company. In 1997 Mr. Immelt was made president of GE Medical, the subsidiary corporation owned and controlled by GE responsible for selling products to the healthcare industry. In or about 1998 GE directed Immelt to identify the

form of internet business model that would be a threat to GE Medical's profit margin. Mr. Immelt directed a study that determined that an internet marketplace which was independent of manufacturers and existing healthcare group purchasing organizations would threaten GE by causing prices to be much lower and by freeing hospitals, clinics and doctors from having to purchase products only from channels controlled by GE. These customers would then have access to competing products. Mr. Immelt found GE Medical's healthcare industry customers were rapidly adopting the Internet for purchasing decision making. GE made Immelt and his managers wargame out strategies to prevent an internet based competitor with a more efficient business model from entering the hospital supply market. **V I pg. 54 §5**

As part of that strategy, Immelt spent $50,000,000.00 in 1999 on web site, database and internet communications technologies. **V I pg. 54 §5**

Jeffrey Immelt And GE's Creation Of A Combination With Its Competitors To Boycott Medical Supply

GE founded a cartel or trust with its horizontal and vertical competitors, centered around an electronic marketplace that now has over 80% of the hospital e-commerce market. The purpose of this cartel is to prevent new entrants to the hospital supply ecommerce market and to maintain uncompetitive higher prices on hospital supply commodities. The

cartel maintains control over its members pricing, volume, distribution and customer data to enforce the allocation of customers and to exclude nonmember competitors. The cartel requires tying contracts so suppliers and customers are required to join and are forced to do business through the cartel's e-commerce marketplace. When GE's Medical divisions discovered GE Corporate had made a contract with Medical Supply Chain, Inc., they got Jeffrey R. Immelt's office to order that it not be performed to harm a competitor entering their markets. GE's refusal to deal and group boycott, preventing Medical Supply's entry into a market GE has monopoly power in is a violation of the Sherman and Clayton Antitrust Acts. **V I pg. 51 §1**

The second part of the strategy Immelt developed and implemented under the direction of GE was to organize GE Medical's competitors and combine with them to create a preemptive internet marketplace where prices could be protected from competitive pressure caused by new market entrants and market shares could be preserved by the assignment of territories and the allotment of product markets. Immelt presided over the formation of this cartel and the engineering of the conspiracy to rig prices and markets through exchange of price, volume and other product data in a per se restraint of trade. See *United States v. Andreas*, 216 F.3d 645 (7th Cir., 2000). **V I pg. 55 §6**

Jeffrey Immelt and GE's Registration and Incorporation of the Combination or Agreement to Restrain Trade as G.H.X.,LLC

Mr. Immelt signed and oversaw the preparation of documents incorporating the conspiracy as Global Health Exchange, LLC in 2000. Mr. Immelt oversaw GE's capitalization of the cartel, and caused the articles of incorporation and the operating agreement to secure GE's control of the entity, including the placement of an interlocking board of directors with the other founders of the trust and made the explicit requirement an officer of GE is on the board of directors. **V I pg. 55 §7**

Press Released Statements Regarding G.H.X., LLC From The Contents of the Attached Affidavit of Lynn Everard

Affidavit Part A Press Release of General Electric and its competitors: "Johnson & Johnson, GE Medical Systems, Baxter International Inc., Abbott Laboratories and Medtronic, Inc. announced today that they are creating a global healthcare exchange that will be an independent Internet-based company. This new privately-held trading exchange will help healthcare providers make quicker, more efficient purchasing decisions by simplifying business processes and providing a single source for customers' healthcare purchases." And "This exchange is a big part of the solution--access to state-of-the-art supply chain management and clinical content without the capital expense." "Healthcare requires the speed of the Internet and the

staying power of trusted, experienced industry leaders. This venture combines both, and is the perfect extension to our long-standing customer relationships. We all have a stake in the future of healthcare," said Jeff Immelt, president and CEO, GE Medical Systems. “The exchange is being established with equity investments by the founding companies” “The exchange will be supported by the combined resources of GE Global Exchange Services, and the strategic alliance between Ariba (NASDAQ: ARBA), IBM (NYSE: IBM), and i2 (NASDAQ: ITWO). Johnson & Johnson (NYSE: JNJ), GE Medical Systems (NYSE: GE), Baxter International Inc. (NYSE: BAX), Abbott Laboratories (NYSE: ABT) and Medtronic, Inc. (NYSE: MDT) are equal shareholders in the privately- held company.” Major Medical Products and Services Companies Establish Global Healthcare Exchange 3/29/2000 NEW YORK, Mar 29, 2000 (BUSINESS WIRE) **V.I pg. 108-110**

Affidavit Part B Press Release of the publicly traded company, Neoforma, Inc. “Under the terms of the three-year agreement, Neoforma’s current and future marketplaces will interface with GHX’s supplier connectivity portal and AllSourceTM catalog, the industry’s most up-to-date and accurate electronic catalog. GHX will license portions of Neoforma’s innovative NeoConnectTM solution suite, which supports the rapid

integration of trading partners for supply chain collaboration. Neoforma and GHX will market this integrated solution to existing and prospective customers. The two organizations also intend to jointly develop, market and sell technology and supply chain solutions" "To participate in the integrated solution, hospitals and suppliers will have agreements with both GHX and Neoforma." Global Healthcare Exchange and Neoforma Sign Definitive Agreement to Provide First Comprehensive, Integrated Supply Chain Solution for Healthcare Alliance will accelerate benefits and adoption of e-commerce for marketplace participants Denver, Colo. and San Jose, Calif. - August 29, 2001 **V.I pg. 111-112**

The Qui Tam Averment That Jeffrey Immelt and GE's Purpose in Restraining Trade With G.H.X.,LLC Was to Defraud Medicare in Illegally Inflated Claims

Mr. Immelt knew that the illegitimate increased cost of hospital supplies due to the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause and is causing Medicare to be defrauded out of billions of dollars over paid in artificially inflated claims for devices and procedures utilizing the cartel's supplies. **V I pg. 55 §8**

Mr. Immelt knew the decreased access to healthcare resulting from the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause employers and health insurers to

reduce coverage and benefits to the nation's citizens leading to injury and death. **V I pg. 55 §9**

Mr. Immelt became CEO of The General Electric Company in September 2001. Under Immelt's leadership, GE's Global Exchange's inefficient and technologically inferior internet marketplace for its appliances was sold off. Immelt, however continued GE's support and participation in GHX, LLC. Immelt's purpose was to prevent other healthcare internet marketplaces from providing competition in hospital supplies. Immelt also expanded the membership to include non-manufacturer members, including the Group Purchasing Organizations that distributed most of the nation's hospital supplies. Immelt caused GHX, LLC. to be even more protective against internet competitors by requiring members to force their customers and suppliers to make anticompetitive contracts with other member companies. **V I pg. 56 §10**

Jeffrey Immelt's Scheme To Maintain the Monopoly In E-Commerce By Requiring All Customers to Be Members of Both Neoforma and G.H.X., LLC Customer In A Tying Agreement

Immelt allied GHX, LLC with the other internet marketplace, Neoforma, Inc. to control 80% of the existing hospital supply e-commerce market. Immelt made GHX, LLC. require customers to join both the former competing internet marketplace, Neoforma and GHX, LLC.'s internet

marketplaces. **See Attachment 2**, Marketplace @Novation, Master Supplier Agreement, Schedule B. In this way, GE could allocate customers and suppliers among the members of GHX, LLC and obtain real time price and volume data to enforce the cartel's goal of illegitimately higher hospital supply prices. **V I pg. 56 §10**

Contents of Attachment 2 Contract Requiring Neoforma Customers to Enroll in G.H.X., LLC

Excerpt from Marketplace@Novation Contract

"SCHEDULE B – INTEGRATED SOLUTION PARTICIPATION
1. Integrated Solution Participation
1.1 By executing this Schedule B, Supplier elects to participate in Marketplace@Novation and access the Services through the alliance established between the Global Healthcare Exchange, LLC ("GHX") and Neoforma to integrate and connect GHX's electronic trading exchange with the Marketplace@Novation ("Integrated Solution").
1.2 Supplier shall be eligible to participate in Marketplace@Novation and access the Services through the Integrated Solution only if Supplier executes a User Agreement with GHX ("GHX User Agreement").
2. Resolution of Inconsistencies. The terms of the GHX User Agreement shall control with respect to any inconsistency between the terms of the GHX User Agreement and Sections 4.3, 4.5 and 4.6 of this Agreement.
3. Cooperation. Supplier shall use commercially reasonable efforts to cooperate with GHX and Neoforma so that some or all of the Services may be provided to Supplier through the Integrated Solution within sixty (60) days of the Effective Date of this Agreement." **V I pg. 105**

Mr. Immelt knew the gravamen of his actions when the trade unions of GE held a two day, nationwide strike on January 14 th, 2003 to call

attention to the high cost of healthcare and the rapid price increases for American working families. This effort to call public attention to the crisis cost the life of a GE worker. Kjeston Michelle Rodgers, a member of IUE-CWA Local 83761, was hit by a police car and killed while on the picket line. **V I pg. 56 §11**

Mr. Immelt's violations of 15 U.S.C. § 1, injuring healthcare supply consumers; including hospitals and patients, in addition to competitors like Medical Supply Chain, Inc. is egregious conduct equivalent to felony. Antitrust Procedures and Penalties Act, Pub.L.No. 93-528, § 3, 88 Stat. 1706, 1708. **V I pg. 57 §12**

As CEO, under the Sarbanes-Oxley Act of 2002 Mr. Immelt is responsible for putting in place antitrust compliance procedures. Mr. Immelt failed to stop GE's pernicious antitrust misconduct of price fixing, group boycott refusals to deal and customer allotment, endangering the investment of the corporation's stock holders and injuring the public by preventing competition and efficient delivery of hospital supplies. Mr. Immelt allowed his authority to be used to command GE corporate, its capital and transportation subsidiaries to repudiate a contract designed to capitalize Medical Supply Chain, Inc.'s entry into the hospital supply market to

prevent Medical Supply from introducing competition and efficiency into that market. **V I pg. 57 §13**

Jeffrey Immelt and GE's Intentional Obstruction of Justice Through Intimidation

When Medical Supply Chain, Inc. prepared to seek redress in court for its injury, Mr. Immelt through his agents caused Medical Supply Chain, Inc., a victim of GE's deliberate actions to be threatened and intimidated in conduct equivalent to the felony of 18 U.S.C. § 1503 Obstruction of Justice with the intent of preventing Medical Supply Chain, Inc. and its counsel from bringing these charges and to cause them to be withdrawn. By deliberately refusing to cite any authority, case law or statute that Medical Supply's claims were invalid or frivolous, Mr. Immelt through his agents attempted to make GE's victims believe that they would be sanctioned and fined not on the basis of law but on GE's power over the legal system. **V I pg. 57 §14**

GENERAL ELECTRIC COMPANY, (herein "GE"), registered agent address for Kansas, The Corporation Company, Inc., 515 S Kansas Ave., Topeka, Ks 66603. **GE was a dominant medical device manufacturer and medical equipment and electrical equipment supplier to North American hospitals. GE ceased to be a manufacturer and became a distributor of parts, assemblies, products, systems and**

credit services to hospitals. GE established monopolies in many product lines for hospitals but feared other distributors would bypass GE and buy the same parts, assemblies, products, systems from foreign sources and sell them to North American hospitals at lower prices in competition with GE. To prevent this, GE made alliances with the dominant distributors for hospitals called GPO's because they were intended to be group-purchasing cooperatives (organizations). GE and the other dominant manufacturers gave the management of these GPO's kickbacks to prevent direct competition in distribution, preserve their loyalty and to protect the inflated prices. However, GE saw that the captive customers of these GPO's were growing dissatisfied at the inefficiency and the failure to achieve group purchasing discounts. To protect against other market entrants, GE formed Global Health Exchange L.L.C. as an electronic market place promising online distribution at lower prices to hospitals. GE owns shares of stock in the privately held company and provided the initial capitalization. As an alliance of a handful of dominant manufacturers (now distributors) the actual goal was to preempt the fledgling e-commerce companies from entering the electronic distribution of hospital supplies. GE found the technology of GHX, Inc. was inadequate to outperform new entrants and aligned itself with Neoforma, Inc., the electronic marketplace co-opted by

the dominant GPO's in an alliance to exchange data among suppliers to reinforce cost structures as inflated as those of the GPO's. GHX, L.L.C. at the direction and approval of GE has retaliated against suppliers who endanger the marketplace with competitive prices. GHX, L.L.C. at the direction and approval of GE has excluded competitors including Retractable Technologies, Inc. and Maximo for failing to give kick backs to the cartel. Death and injury resulted from the failure of hospitals to obtain these medical devices held out by GHX. GHX, L.L.C. at the direction and approval of GE has excluded Medical Supply Chain, Inc. from entering the market by not allowing Medical Supply to offer GE Capital Healthcare credit to its potential customers in April of 2002, by refusing to offer US Bancorp Piper Jaffray services to Medical Supply in June 2002 and by repudiating essential escrow contracts required by Medical Supply to capitalize its entry into market in October 2002. (US Bancorp has interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX L.L.C.; Novation and Premier. US Bancorp helped Novation acquire control of Neoforma and partner it with GHX, L.L.C. creating a monopoly of over 80% of healthcare e-commerce market). GE repudiated a contract, sacrificing $15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against

GHX, L.L.C. and Neoforma. The healthcare market is worth 1.3 trillion dollars. GE acted on the tremendous windfall to preserve its monopoly. George Fricke is GE's property manager. **V I pg. 58 §15**

While GE is a diverse conglomerate, in 1993, the majority of its income was derived from the capitalization and finance of unrelated companies and individuals that are customers of its financial services divisions. **V I pg. 59 §16**

GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORPORATION, (herein "GE Capital") registered agent address for Kansas, The Corporation Company, Inc., 515 S Kansas Ave., Topeka, Ks 66603. GE Capital is a subsidiary of GE performing GE's commercial lending operations. GE in accepting Medical Supply's proposal, committed GE Capital to provide a 5.4% interest rate mortgage for $6.4 million dollars on the building at 1600 NE Coronado, in Blue Springs, MO. GE Capital had its loan officer Doug McKay from their Overland Park, KS office contact Mr. Lipari of Medical Supply. **V I pg. 59 §17**

GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING, L.L.C. (herein "GE Transportation") registered agent address for Kansas, The Corporation Company, Inc., 515 S Kansas Ave., Topeka, Ks 66603. GE Transportation acquired the building and its transferable lease when it

bought the railroad signal company Harmon Industries, Inc. and dismissed its employees. GE Transportation sought to escape the $5.4 million dollar liability of the remaining 7-year lease because of the $50,000 to $60,000 dollar a month lease and insurance on the building that had not been occupied for over 8 months with no sub lease offers. Previously the building had been under utilized while GE dismissed Harmon's staff. The high monthly cost was making the subsidiary fail to meet GE's economic performance requirements and hurting the conglomerate's bottom line and share price. **V I pg. 60 §18**

Business Relationship Allegations

On or about June 1st, 2002, Mr. Lipari, CEO of Medical Supply Chain, Inc. contacted the leasing agent Cohen & Esrey Property Management regarding a building located at 1600 N.E. Coronado Drive in Blue Springs, MO. The leasing agent indicated the building was already leased but that the lessee could and would like to sub-lease the building. The building was not occupied so Mr. Lipari made a verbal offer to sub-lease a portion of the building. The leasing agent declined his offer indicating the existing lessee would not accept anything less than sub-leasing the entire building. **V I pg. 60 §19**

On or about April 1st, 2003 Mr. Lipari contacted the new leasing agent (B.A. Karbank & Company) in the event the new agent had different instructions regarding a sub-lease of the property located at 1600 N.E. Coronado Drive in Blue Springs, MO. The new leasing agent told him that GE was the lessee seeking to sub-lease the building due to their vacating the building after GE Transportation bought out Harmon Industries. The building was still not occupied so again Mr. Lipari made a verbal offer to lease a portion of the building. The leasing agent declined his offer indicating GE Corporate Properties would not accept anything less than leasing the entire building. **V I pg. 61 §20**

On or about April 7th Mr. Lipari contacted GE and spoke with the GE property manager, George Frickie regarding Medical Supply's interest in sub-leasing the building. George Frickie indicated again that GE would not be interested in sub-leasing a portion of the building but rather would be interested in leasing the entire building. Mr. Lipari requested the name of the owners and Mr. Frickie gave him the name and number of Barry Price with Cherokee Properties L.L.C. Mr. Lipari contacted Mr. Price, he was referred to Scott Asner who also had a substantial interest in the building. While speaking with Mr. Asner he provided Mr. Lipari the background and current details on the building lease with GE, terms and a price to purchase

the building. The lease was transferable and GE was still obligated for 7-years out of a 10-year lease. Mr. Asner agreed to sell Medical Supply the building for the remaining balance of the GE 7-year lease ($5.4 million) and provided Mr. Lipari with a letter of intent to sell the building to Medical Supply. **V I pg. 61 §21**

On or about April 15th, Mr. Lipari contacted Mr. Frickie with GE Commercial Properties and indicated that he had an interest in purchasing the building. Mr. Lipari ask Mr. Frickie if GE had an interest in buying out the remainder of their lease so that Medical Supply could occupy the building following the purchase. Mr. Frickie offered GE's lease payments for the remainder of 2003 ($350,000) as a buy out offer. **V I pg. 62 §22**

On or about May 1st, 2003 Mr. Lipari tentatively contacted several local Banks, knowing that US Bank had threatened his company with a malicious USA PATRIOT Act report to keep Medical Supply from entering the hospital supply market where US bank was affiliated with Neoforma, an existing electronic marketplace for healthcare supplies. Mr. Lipari knew Medical Supply could not get a loan because of the threat and extortion, but knew he needed input from bankers familiar with the commercial real estate market in Blue Springs. Mr. Lipari felt Medical Supply could form a holding company to obtain the property without US Bank realizing he could

enter the hospital supply market. Mr. Lipari spoke with Allen Lefko President of Grain Valley Bank, Pat Campbell branch manager of Gold's Bank and Randy Castle Senior Vice-President of Jacomo Bank. Each of the banks indicated a wiliness to provide the mortgage because they felt the property was worth far more than the price offered by Cherokee Properties L.L.C., but the mortgage was too large for the regulatory size of their bank and they each suggested a national bank as an alternative. Due to US Bank's extortion and racketeering, including the pretext and very real threat of a malicious USA PATRIOT Act suspicious activity report (SAR) against Medical Supply since Mr. Lipari had tried to enter the hospital supply market in October of 2002, Mr. Lipari knew he was unable to solicit a national bank for the real estate loan. **V I pg. 62 §23**

On or about May 7th, Medical Supply contracted a financial consultant (Joan Mark) for advice on how to put a mortgage together to buy the building which has a 7-year revenue stream from GE in the amount of $5.4 million, the identical amount offered to purchase the building and for which Medical Supply had a letter of intent from the owner Cherokee Properties L.L.C. Mrs. Mark suggested Mr. Lipari propose a mortgage arrangement directly to George Frickie with GE Corporate. Mrs. Mark explained how a purchase of the $10 Million dollar property for $5.4 Million

was a great deal for any mortgage lender. Mrs. Mark also explained if GE provided a $5.4 million dollar mortgage on a $10 million dollar property and eliminated a $5.4 million dollar lease obligation that GE would directly benefit from a $15 million dollar swing to their balance sheet. **V I pg. 63 §24**

Allegation of Contract Under The E-Sign Act, 15 U.S.C. 7001

On or about May 15th, 2003, Medical Supply's corporate counsel sent a proposed transaction to George Frickie outlining the terms of its proposal:

> Dear Mr. Fricke:
>
> I am writing on behalf of Medical Supply Chain, Inc. with a proposal to release GE from a seven-year 5.4 million dollar obligation on 1600 N.E. Coronado Dr., Blue Springs MO. We have spoke with the City of Blue Springs economic development officer and the city attorney. Medical Supply Chain, Inc. has also obtained a letter of intent from the building's owner, Cherokee South, L.L.C. (Barry Price/Scott Asner) to purchase the building.
>
> We offer to release GE from its lease and 5.4 million dollar obligation, providing GE pays Medical Supply Chain, Inc. at closing for the remainder of the 2003 lease and transfers title to the building's furnishings. This offer is contingent on GE's acceptance by 3pm (EST), Friday, May 23rd; the City of Blue Spring's approval of Medical Supply Chain's purchase and occupation of the building and is contingent upon GE Capital securing a twenty year mortgage on the building and the property with a first year moratorium.
>
> Medical Supply Chain, Inc. believes this arrangement will result in a net gain in revenue for GE and GE's Capital services was our first choice for the commercial mortgage when our area bankers advised us the building and the property at 6.2 million dollars was substantially less than its market value of 7.5 million dollars, but would require a commercial lender. Medical Supply Chain, Inc. has

no existing debt and a valuation of thirty two million dollars. See attachment 1.

GE Capital or its underwriter would need to provide Medical Supply Chain, Inc. a twenty-year mortgage at 5.4 % on the full purchase price of 6.4 million dollars, with a moratorium on the first full year of mortgage payments. The City of Blue Springs would be paid the balance of lease payments for the land ($800,000.00) or in the alternative, the mortgage will include an escrow account to complete the lease and purchase of the land on its original terms. GE Capital can provide or designate the closing agent and would be required to provide 5.4 million dollars to Cherokee South, L.L.C. and your division's check for the remainder of the lease payable to Medical Supply Chain, Inc. along with a bill of sale for the buildings furniture and equipment. This closing would need to be completed by June 15th, 2003.

Please contact us at your receipt of this offer and provide us a contact person for GE Capital or its mortgage agent.

Bret D. Landrith (**V I pg. 63 §25)**

Contents of Attachment 1 in the Offer Accepted By General Electric

"The Legal Action

Medical Supply Chain, Inc. planned to enter the market December 1 st 2002 but was temporarily stopped in October by a consortium in the hospital supply marketplace that had determined Medical Supply Chain Inc.'s business model would cost them over 23 billion dollars annually in lost profit. In fact, Medical Supply Chain, Inc. was the only remaining web based electronic marketplace they had not acquired. The consortium's attempt to stop Medical Supply Chain, Inc. violated antitrust laws and the defendants are being prosecuted in Medical Supply Chain, Inc. v. US Bancorp, et al for the business plan expectation damages, the injury to hospitals and other business associates along with attorney's fees. To date, after 6 months of legal action, the defendants have admitted their conduct and have failed to provide a defense at law and no counterclaims have been made against Medical Supply Chain, Inc. Medical Supply has invested over 260,000 dollars and the damages sought are in excess of 1. 7 Billion

dollars and are trebled under antitrust laws. Medical Supply Chain, Inc. plans to discover evidence on other hospital supply distributors to prevent future obstructions and enjoys favorable publicity with the nation's leading hospital groups and medical device manufacturers who see Medical Supply Chain, Inc. as a positive and reputable reformer the hospital supply marketplace badly needs." **V I pg. 88**

The Executive Summary furnished to General Electric included Medical Supply's market description:

"A HUGE MARKET POTENTIAL exists in the healthcare market because it represents over $200 billion in annual transactional supply-chain activity including medical & non-medical products. Industry experts expect this to increase to $360 billion annually by the year 2009. Many of the existing 6,000 Health systems (hospitals) are spending in excess of 20% on needless and inflationary process costs. Management has identified several health systems out of 6,000 currently utilizing similar strategies and initiatives as those developed by the company. These health systems have documented over 20% in total supply-chain cost reduction." **V I pg. 89**

And financial projections from which the "business leaders" (*infra*) of General Electric evaluated the resources of Medical Supply and from which they made the decision to accept Medical Supply's offer:

"60 MONTH FORWARD REVENUES

TERM	ANNUAL	CUMULATIVE
Year 1	$2,901,600	$2,901,600
Year 2	$27,366,576	$30,268,176
Year 3	$74,798,940	$105,067,116
Year 4	$140,683,980	$245,751,096
Year 5	$223,728,060	$469,479,156**" V I pg. 90**

Acceptance of Contract Allegations

The afternoon of May 15th, Mr. Frickie responded, leaving a taped voicemail message and stating he had spoke with the business leaders at GE corporate and that they will accept Medical Supply's proposal.

> May 15th 2003-George Frickie "Bret, George Frickie, ah.... I know I sent you an email saying that my counsel way out ah...and I followed up with another email but I spoke to the business leaders and we will accept that transaction ah... let's start the paper work ah... if you want to do some drafting of lease termination or if you would like us to do that, give me a holler 203-4314452." (**V I pg. 64 §26**)

The second e-mail Mr. Frickie referenced on the phone conversation explicitly stated that GE would accept Medical Supply's proposal and initialed the written acceptance in addition to the electronic signature file for the e-mail:

> From: Fricke, George (CORP)
> To: Bret Landrith
> Cc: Newell, Andrew (TRANS) ; Payne, Robert J (TRANS) ; Davis, Tom L (TRANS) ; Jakaitis, Gary (CORP)
> Sent: Thursday, May 15, 2003 6:05 PM
> Subject: RE: Lease buyout GE/Harmon building
>
> Bret, I would like to confirm our telephone conversation in that GE will accept your proposal to terminate the existing Lease. Robert Payne GE Counsel will start working on the document. He is out of the office until Monday the 19th. GCF (**V I pg. 64 §27**)

Manifestation, Mutual Performances And Reliance Allegations

On or about May 20th, 2003, Medical Supply was given a walk through of the property to inventory the buildings furniture and fixtures and discuss building maintenance and operational procedures. Tom Davis, the

property manager for GE Transportation in Blue Springs and John Phillips, the GE Transportation building maintenance engineer provided a three-hour walk through in addition to the building maintenance and operational procedures. John Philips also provided the construction blue prints of the building and allowed Mr. Lipari to make copies. Mr. Lipari returned the blueprints after copies were made. They both stated they were being dismissed from employment with GE since they would no longer be needed. **V I pg. 64 §28**

On May 22nd, 2003 Mr. Lipari spoke to Doug McKay with GE Capital who had called earlier that week with regard to the mortgage outlined in Medical Supply's proposal. Mr. McKay asked that Mr. Lipari send the company information regarding the mortgage. Mr. Lipari indicated that he could meet him the following Tuesday because Medical Supply had a loan package for him that included its financials, the proposal that George Frickie and GE's business leaders accepted, the letter of intent from the owners and our Dunn & Bradstreet report showing Medical Supply's good credit and strong financial condition. Mr. Lipari gave the information to Mr. McKay and Mr. McKay indicated he needed to speak with GE Transportation to see how they wanted to handle the terms of the accepted proposal. **V I pg. 65 §29**

Interference With Business Relationship and Breach Allegations

On or about June 2nd, 2003 Mr. Lipari called McKay to see how they were doing on closing and McKay indicated that the person he needed to speak with was at corporate and that he needed to speak with him before moving forward. As the June 15, 2003 closing date approached, Medical Supply had not received any definitive closing date so Medical Supply's corporate counsel called and sent George Frickie and email stating that a delay in closing would not effect the lease buyout of $350,000. Medical Supply's counsel later again called Mr. Frickie when he receive no response and Mr. Frickie became extremely angry and hung up the phone. **V I pg. 65 §30**

The Refusal to Confirm or Deny Repudiation

Medical Supply then proceeded to speak with GE's counsel Kate O'Leary to determine if the contract had been repudiated. Supporting statutes and the antitrust basis and damages implications were explained to Ms O'Leary. Medical Supply gave GE a deadline of June 10th to clarify whether there had been a repudiation. Mrs. O'Leary later faxed a letter on the 10th requesting that Medical Supply not speak to anyone at GE and that any correspondence relating to this matter be directly to her. Medical Supply then emailed a letter stating that if no earnest money were deposited to

indicate the contract was not being repudiated, Medical Supply would file on June 16th for antitrust and breach of contract. **V I pg. 65 §30**

SUMMARY OF ARGUMENTS

Medical Supply asserts that the trial court failed to recognize the adequately plead Group Boycott conducted by the General Electric defendants in concert with G.H.X., LLC and Neoforma, horizontal competitors of Medical Supply. Secondly, Medical Supply asserts that the trial court failed to recognize the adequately plead claims of monopolization that subject a single firm to antitrust liability.

I. Whether Medical Supply's Amended Complaint Alleged GE Defendants' Participation in Group Boycott to Bar Entry Into the Market of Hospital Supplies in E-Commerce

The trial court dismissed Medical Supply's amended complaint out of clear factual error and an incorrect application of federal antitrust law. At page 5 of the Memorandum and Order, the court states:

> "Plaintiff never alleges that any of the named defendants either possess or are attempting to possess market power in the relevant market of "hospital supplies delivered through e-commerce in North America." The fact that defendant GE owns an interest in GHX, the percentage of which plaintiff does not allege, does not make defendant GE (let alone the other defendants) a competitor in the market in which GHX allegedly competes." **V2 pg. 491**

The court mistook the General Electric division that sold hospital supplies in E-Commerce called GE Global Exchange Services for the

similarly named Global Exchange Services, LLC the entity the court referred to as G.H.X. LLC (See *infra*) and the court misunderstood the allegations made by Medical Supply against the General Electric defendants as competitors in e-commerce hospital supplies for their concerted conduct with G.H.X., LLC as the appellant will more fully explain below:

a. The complaint identified two Internet or Web based electronic marketplaces for healthcare supplies in E-Commerce that General Electric directly distributes hospital supplies through- G.H.X., LLC *and* its own GE Global Exchange Services

The trial court made a clear error of fact in dismissing Medical Supply's action against the General Electric defendants because General Electric was not alleged to itself be a distributor of hospital supplies. The amended complaint averred General Electric distributed hospital supplies through GE Global Exchange Services during the time of the complained of conduct:

> "As part of that strategy [to compete with other internet hospital supply distributors], Immelt spent $50,000,000.00 in 1999 on web site, database and internet communications technologies." **V I pg. 54 §5**

Even after Jeffrey Immelt went on to organize the separate company Global Health Exchange, LLC or G.H.X., LLC when shortened to its initials and which was named after Jack Welch's (GE's previous CEO) pioneering electronic marketplace GE Global Exchange Services which sold all of GE's

division's products, including GE Medical's, the General Electric electronic marketplace continued to exist and support G.H.X., LLC as stated in attachment 3 to the amended complaint:

> "The exchange [G.H.X., LLC] will be supported by the combined resources of **GE Global Exchange Services**, and the strategic alliance between Ariba (NASDAQ: ARBA), IBM (NYSE: IBM), and i2 (NASDAQ: ITWO). Johnson & Johnson (NYSE: JNJ), GE Medical Systems (NYSE: GE), Baxter International Inc. (NYSE: BAX), Abbott Laboratories (NYSE: ABT) and Medtronic, Inc. (NYSE: MDT) are equal shareholders in the privately- held company." (emphasis added) **V.I pg. 108-110**

The body of the amended complaint discusses Jeffrey Immelt's steps over time to get rid of the General Electric marketplace GE Global Exchange, but without discovery or even an answer to the complaint, it is not clear when he succeeded in jettisoning it, or if GE continues to own and control part of it, or if GE retained the electronic marketplace for hospital supplies (that portion that "supports" G.H.X., LLC):

> "Under Immelt's leadership, **GE's Global Exchange's** inefficient and technologically inferior internet marketplace for its appliances was sold off. Immelt, however continued GE's support and participation in GHX, LLC. Immelt's purpose was to prevent other healthcare internet marketplaces from providing competition in hospital supplies." (emphasis added) **V I pg. 56 §10**

b. The Amended Complaint's Averment of Defendants' Creation of and Participation in an Agreement With Horizontal Competitors to Restrain Trade in Hospital Supplies, Including Those Delivered Through E-Commerce

Medical Supply's Amended Complaint alleged that the appellees General Electric Company and Jeffrey Immelt were manufacturer/distributors of hospital supplies, that they had created an electronic marketplace for distribution of the supplies in E-Commerce, sold hospital supplies through E-Commerce as a single firm, created an agreement with their manufacturer/distributor competitors and the electronic marketplace Neoforma to distribute hospital supplies through E-Commerce and monopolize the hospital supply market and exclude competitor web based distributors the group boycott had targeted, specifically Medical Supply. The agreement was alleged to be overt and announced in press releases and articles by the General Electric appellees. The Amended Complaint alleges the General Electric defendant/appellees even registering and incorporating the agreement, naming the trust G.H.X., LLC and dividing shares among each of the manufacturer/distributors.

Medical Supply argued in trial court that the defendant/appellee's agreement and actions against Medical Supply in combination with G.H.X., LLC and Neoforma was a restraint of trade prohibited under §§ 1 and 2 of The Sherman Act.

In *Copperweld Corp. v. Independence Tube Corp.*; 467 U.S. 752 (1984), Chief Justice Burger stated that a single enterprise or combination

for an illegal purpose is different from the overturned "intraenterprise conspiracy doctrine" and that Sherman § 1 liability still exists when the "original anticompetitive purpose of a combination is evident from the affiliated corporations' subsequent conduct." The footnotes to Chief Justice Burger's lead opinion in *Copperweld,* 467 U.S. 752 indicate that the original evil sought to be prohibited by Senator Sherman, the "trust" or combination of otherwise competing firms is still vibrant law:

> "4. Under the arrangements condemned in *Northern Securities Co. v. United States,* 193 U.S. 197, 354 (1904) (plurality opinion),
>
> > 'all the stock [a railroad holding company] held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose.'
>
> In *Standard Oil Co. v. United States,* 221 U.S. 1 (1911), and *United States v. American Tobacco Co.,* 221 U.S. 106 (1911), the trust or holding company device brought together previously independent firms to lessen competition and achieve monopoly power. Although the Court in the latter case suggested that the contracts between affiliated companies, and not merely the original combination, could be viewed as the conspiracy, *id.* at 184, **the Court left no doubt that "the combination, in and of itself," was a restraint of trade and a monopolization**, *id.* at 187." [emphasis added]

Copperweld Corp. v. Independence Tube Corp.; 467 U.S. 752 at FN 4 (1984).

Medical Supply's amended complaint alleges the creation of the agreement as G.H.X., LLC "the combination, in and of itself" *id.* that allocated its shares to its member manufacturer/distributor competitors:

> "We all have a stake in the future of healthcare," said Jeff Immelt, president and CEO, GE Medical Systems. "The exchange is being established with equity investments by the founding companies"
> ***
> Johnson & Johnson (NYSE: JNJ), GE Medical Systems (NYSE: GE), Baxter International Inc. (NYSE: BAX), Abbott Laboratories (NYSE: ABT) and Medtronic, Inc. (NYSE: MDT) are equal shareholders in the privately- held company." **V.I pg. 108-110**

and the tying contracts or agreements between the affiliated companies (*supra*):

> "To participate in the integrated solution, hospitals and suppliers will have agreements with both GHX and Neoforma." **V.I pg. 111-112**

in the averment that GE and Immelt acted against Medical Supply as part of their group boycott agreement with G.H.X. LLC and in the attached unexecuted example contract from Novation (The monopolist GPO) requiring customers of Neoforma to enroll in the competitor electronic marketplace G.H.X., LCC.

General Electric's Instrumentality G.H.X., LLC

Medical Supply adequately alleges that G.H.X. LLC as created by the General Electric defendants and their hospital supply manufacturer/distributor competitors was an instrumentality created to

illegally restrain trade. As an alleged instrumentality the court should disregard the nature of G.H.X. LLC as a limited liability corporation. Kansas law would apply the alter ego doctrine, finding liability for the General Electric defendants:

> "... [T]he doctrine of *alter ego* fastens liability on the individual who uses a corporation merely as an instrumentality to conduct his own personal business, such liability arising from fraud or injustice perpetrated not on the corporation but on third persons dealing with the corporation. Under it the court merely disregards corporate entity and holds the individual responsible for his acts knowingly and intentionally done in the name of the corporation."

Kilpatrick Bros., Inc. v. Poynter, 205 Kan. 787, 797, 473 P.2d 33 (1970).

The Tenth Circuit has indicated it would similarly utilize the alter ego to address the General Electric defendants' misuse of G.H.X., LLC:

> "The Third Circuit has stated that the equitable tool of piercing the corporate veil on the basis of the alter ego theory is appropriately utilized 'when the court must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime.' *Publicker Industries v. Roman Ceramics,* 603 F.2d 1065, 1069 (3rd Cir. 1979); *quoting Zubik v. Zubik,* 384 F.2d 267, 272 (3rd Cir. 1967), *cert. denied* 390 U.S. 988, 88 S.Ct. 1183, 19 L.Ed.2d 1291 (1968). In *Trustees of The Colorado Cement Masons Apprentice Trust Fund, et al. v. Burton Levy, et al.,* Nos. 78-1057 and 78-1058, *unpublished* (10th Cir., Aug. 17, 1979) the Tenth Circuit held that 'in order to establish as a matter of law that the corporate veil should be pierced and that an individual should be held liable for actions that were carried out in the name of the corporation, *it must appear that the corporation was being misused in some manner.* For example, that its funds were being

> diverted or a fraud, constructive or express, was being carried out. Slip op. at 7 (emphasis added)."

Schmid v. Roehm GmbH, 544 F.Supp. 272 at 275-276 (Kan., 1982)

Under Missouri law, the particular misuse of G.H.X., LLC by the General Electric defendants to monopolize an industry against antitrust public policy would result in summary determination of intentional fraud, a factor in determining whether to disregard the separate corporate existence of G.H.X. LLC as a barrier to the liability of the General Electric defendants:

> "Historically, Missouri, where the subject building is located, has treated combination in restraint of trade as equivalent to conspiracy, or more precisely, a fraudulent conspiracy: 'The Missouri anti-trust act (Rev. Stat. of 1899, §§ 8968, 8971) provides that any person or corporation which shall form a combination in restraint of trade shall be deemed guilty of a conspiracy to defraud,...' *Standard Oil Company of Indiana v. State of Missouri No 47 Republic Oil Company v. State of Missouri* No 48, 224 U.S. 270, at 272, 32 S.Ct. 406, 56 L.Ed. 760 (1912)."

"Plaintiff's Answer Memorandum To Defendants' Motion For Dismissal And Answer To Defendants Motion For Sanction" pg. 24 (**V I pg. 313**). The Missouri legislature's summary "*shall be deemed guilty of a conspiracy to defraud*" is an appropriate treatment of *per se* Sherman § 1 Group Boycott prohibited conduct where the organizer or architect of the agreement, Jeffrey Immelt has eliminated any possibility of doubt about the existence of the agreement or combination to restrain trade's existence by

registering the agreement or combination as a limited liability corporation and then directing General Electric to act against General Electric Transportation's (and GE's) own declared legitimate business interests to breach an agreement discovered by General Electric to be necessary for Medical Supply to enter the market for hospital supplies.

Persuasive contemporary authority indicates that General Electric cannot escape federal antitrust liability for what it does in concert with or through G.H.X. LLC. on the basis that G.H.X. LLC as an electronic marketplace or "Business to Business" (B2B) exchange is a separate corporation:

> "However, while industry coalition B2Bs may consider themselves as independent of their corporate parents, antitrust enforcers are not likely to view coalition B2Bs as individual actors. Rather, the agencies are more likely to view such B2Bs much in the same way as group purchasing or other joint ventures among competitors. As such, a coalition B2B's refusal to deal with certain competitors may be viewed as a group boycott or concerted refusal to deal - conduct that is traditionally prohibited under the Sherman Act… See *Fashion Originators' Guild of Am. v. Federal Trade Comm'n*, 312 U.S. 457, 467-68 (1941); *Klor's Inc. v. Broadway-Hale Stores, Inc*., 359 U.S. 207, 212 (1959)."
>
> Martin Dajani [4] *Beyond Covisint - Antitrust Scrutiny of B2B Exchanges.*

[4] F. Martin Dajani, a member of the District of Columbia and Missouri Bars, is an attorney in the Washington, D.C. office of Piper Marbury Rudnick & Wolfe LLP, where he practices in the Antitrust and Trade Regulation Group. Prior to joining PMRW, Mr.

The pre *Copperweld* case *LEEWARD PETROLEUM. Ltd V. MENE GRANDE OIL CO*, 415 F.Supp. 158 concerned a parent company that became involved in contract negotiations of its subsidiary. Because the allegations created the possibility the corporate veil might be pierced by corporate fraud the court declined the motion to dismiss:

> "Gulf by its actions during the negotiations became a principal on the contract between Meneg and Leeward, and might therefore be liable on the contract itself. *See generally, Fluor Corp. v. United States ex rel. Mosher Steel Co.,* 405 F.2d 823 (9th Cir. 1969). In addition, if Leeward shows that Meneg fraudulently claimed an act of state on Gulf's orders, a showing of corporate fraud sufficient to pierce the corporate veil might be made out. At this stage of the proceedings, the issue is not the likelihood of plaintiff's prevailing, but whether plaintiff may be allowed to present evidence. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96 (1974). Judged by this standard, the motion to dismiss Count 2 must be denied."

Leeward Petroleum. Ltd V. Mene Grande Oil Co, 415 F.Supp. 158 at 162-3 (D. Delaware 1976)

c. The Amended Complaint Adequately Alleged Medical Supply was the Defendants' Perceived Competitor in the Relevant Market of Hospital Supplies Through E-Commerce

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Dajani was an attorney with the Federal Trade Commission Bureau of Competition, where he was the lead attorney in the FTC's investigation of Covisint. Mr. Dajani is a graduate of the University of Missouri-Columbia and a former Missouri Assistant Attorney General.

The complaint alleges that General Electric ordered Jeffrey Immelt when he managed GE Medical to identify a Web based electronic marketplace like Medical Supply as a competitor to GE and made him create a war plan to obstruct Medical Supply's entry into market:

> "Mr. Immelt directed a study that determined that an internet marketplace which was independent of manufacturers and existing healthcare group purchasing organizations would threaten GE by causing prices to be much lower and by freeing hospitals, clinics and doctors from having to purchase products only from channels controlled by GE. These customers would then have access to competing products. Mr. Immelt found GE Medical's healthcare industry customers were rapidly adopting the Internet for purchasing decision making. GE made Immelt and his managers wargame out strategies to prevent an internet based competitor with a more efficient business model from entering the hospital supply market." **V I pg. 54 §5**

The Tenth Circuit has treated perceived competitors as horizontal competitors under the Sherman Act:

> "Blue Cross challenges Wesley's standing on the ground that it "was not in the relevant market selected by the court, health care financing, either as a consumer or as a competitor." Brief of Appellants at 33. While it is true that Wesley was not itself a direct participant in the provision of health care financing, it was, by virtue of its affiliation with HCA and HCP, a perceived competitor of Blue Cross. Indeed, as the district court stated, "that is the precise reason [Blue Cross] undertook the conduct at issue in this case." *Reazin II*, 663 F.Supp. at 1426 n. 17. In any event, as the Supreme Court has specifically held, an antitrust plaintiff need not necessarily be a competitor or consumer. See *McCready*, 457 U.S. at 472, 102 S.Ct. at 2544. Where the plaintiff's injury is "inextricably intertwined" or "so integral an aspect of the conspiracy alleged" plaintiff has established an antitrust injury. Id. at 484, 479, 102 S.Ct. at 2551, 2548. Here, Wesley's claimed injuries were an "integral aspect" of the conspiracy to restrain trade in

the health care financing market. Indeed, Wesley was the direct victim of Blue Cross' actions. See *Associated Gen. Contractors*, 459 U.S. at 529-30 n. 19, 103 S.Ct. at 904 n. 19. There was also evidence that Blue Cross specifically intended to harm Wesley."

Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 899 F.2d 951, 962-3(C.A.10 (Kan.), 1990) as quoted in Plaintiff's Answer Memorandum To Defendants' Motion For Dismissal And Answer To Defendants' Motion For Sanction pg. 16-17. **V 2 pg. 305-306**

The trial court was in error in its belief only a competitor could bring a Sherman 1 complaint:

"Plaintiffs correctly contend the conspiratorial conduct in this case, between BCBSK and St. Francis and St. Joseph Hospitals, contains elements of both vertical and horizontal impacts because the Saints are direct competitors of Wesley Medical Center. Secondly, the purpose of this agreement was not to design and implement an efficient distribution system for BCBSK's own insurance products, but to sanction a perceived competitor and deter competition in the health care financing market. Third and finally, refusals to deal by other Blue Cross and Blue Shield systems across the company have not only been held a violation of § 1, but under certain circumstances have been held per se violations, as discussed in *Reazin I,* 635 F.Supp. at 1322-27 (citing *Glen Eden Hospital v. Blue Cross & Blue Shield of Michigan,* 740 F.2d 423 (6th Cir.1984), and *St. Bernard Gen. Hospital v. Hospital Service Assn.,* 712 F.2d 978 (5th Cir.1983), *cert. denied* 466 U.S. 970, 104 S.Ct. 2342, 80 L.Ed.2d 816 (1984))."

Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 663 F.Supp. 1360 at Page 1411 (Kan., 1987).

d. The Amended Complaint Adequately Alleged General Electric As A Hospital Supplier Boycotted Medical Supply

According to General Electric's Agreement With G.H.X. LLC , Making GE a Horizontal Competitor

The amended complaint alleges that General Electric and Jeffrey Immelt formed the cartel G.H.X., LLC to sell GE's hospital supplies in E-commerce. In this role, General Electric is a supplier and G.H.X., LLC is a customer of General Electric (like Medical Supply would be, if permitted to enter the market) and General Electric is alleged to have boycotted Medical Supply in conformance with its contract with G.H.X., LLC :

> "The defendants willfully acquired and maintained that power by forming the cartel GHX, Inc. to buy an inferior electronic marketplace and exchanging ownership interests with suppliers and distributors that previously were competitors. The defendants further acted to maintain that monopoly by repudiating Medical Supply's financing and lease buy out agreement with full knowledge that Medical Supply had been previously prevented from entering the hospital supply e-commerce market by other cartel members of GHX, Inc." **Vol I pg. 70 § 37**

> GE appeared to be acting independently of Neoforma, when it accepted Medical Supply's proposal for a lease buy out and financing, but similarly repudiated a contract for essential facilities, preventing entry into the hospital supply market at great sacrifice when Medical Supply was not in a position to find an alternative." **V I pg. 53 §4**

> "GE founded a cartel or trust with its horizontal and vertical competitors, centered around an electronic marketplace that now has over 80% of the hospital e-commerce market. The purpose of this cartel is to prevent new entrants to the hospital supply ecommerce market and to maintain uncompetitive higher prices on hospital supply commodities. The cartel maintains control over its members pricing, volume, distribution and customer data to enforce the allocation of customers and to exclude nonmember competitors. The cartel

> requires tying contracts so suppliers and customers are required to join and are forced to do business through the cartel's e-commerce marketplace. When GE's Medical divisions discovered GE Corporate had made a contract with Medical Supply Chain, Inc., they got Jeffrey R. Immelt's office to order that it not be performed to harm a competitor entering their markets. GE's refusal to deal and group boycott, preventing Medical Supply's entry into a market GE has monopoly power in is a violation of the Sherman and Clayton Antitrust Acts." **V I pg. 51 §1**

The Tenth Circuit has recognized that when a supplier like General Electric acts against a customer at the direction of another customer, the restraint becomes horizontal:

> "...if the action of a ...supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier." [Emphasis supplied].

Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380 at 388 (C.A.10 (Okl.), 1985).

The trial court's characterization of General Electric's actions as that of a supplier privileged to select its distributors in non *per se* vertical restraint is in error. Medical Supply had no distribution agreement with General Electric and the business relationship established and later breached was not one to sell General Electric's medical products. General Electric's ultimate actions were to eliminate every e-commerce alternative to G.H.X., LLC with the exception of Neoforma, to which it subsumed into the G.H.X. LLC cartel.

Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982) recognized that in certain circumstances, the elimination of an intermediary effectively destroys competition. In such cases, the distributor's knowledge (like Medical Supply's XML or web based supply chain integration) or authority (as a neutral marketplace) makes it an integral part of the competitive structure and its injury is heavily intertwined with the core injury perpetrated by antitrust violators. To deny standing to the intermediary is to sanction the diminution of competition where it matters the most.

The Court in *McCready* acknowledged that if an end-user is not the best protector of choice and price in the relevant market, competition may be effectively preserved by another kind of plaintiff. As the Court observed in *SAS,* "The most obvious reason for conferring standing on a second-best plaintiff is that, in some general category of cases, there may be no first best with the incentive or ability to sue." *SAS of Puerto Rico,* 48 F.3d at 45, *citing Associated General,* 459 U.S. at 542, 103 S.Ct. 897.

McCready-like standing applies when the flash point of competition lies outside of the customer or consumer. *McCready,* as well as the other vertical distributor exceptions, affirm that the intermediary must either be a damaged participant in the very market in which competition is diminished (that is, it must share characteristics of parties injured by horizontal conspiracies) or stand in the shoes of endusers who cannot or will not sue. See *Serpa Corp. v. McWane, Inc.*, 14 F.Supp.2d 147 at 151-152 (D. Mass. 1998)

Medical Supply is alleged to be attempting to enter the E-commerce hospital supply marketplace the General Electric defendants wish to restrain competition in and also to be the effective plaintiff for 2000 hospitals that are losing money as a result of the General Electric defendants' actions.

e. The Amended Complaint Adequately Alleged Medical Supply Was Obstructed From Entry into the Relevant Market of Hospital Supplies Through E-Commerce by the Intentional Acts of the Defendants

The amended complaint alleges intentional conduct of the General Electric defendants in nakedly restraining trade. The formation of G.H.X., LLC was the open creation of a cartel with the existing manufacturer/distributors of the hospital supply market:

> "The purpose of the defendants' creation of a cartel or trust among their competitors was to keep prices of hospital supplies high without

> competition and to allocate customers, suppliers and distribution channels among the cartel members by contracts in a *per se* violation of 15 U.S.C. § 1." **Vol I pg. 67 § 33**

The amended complaint alleges the violence of breaching a contract to provide inputs known by the defendants to be essential to Medical Supply's entry into the market of hospital supplies distributed through e-commerce. This hostile acts toward Medical Supply were committed after Medical Supply informed the defendants of the antitrust laws prohibiting the conduct and the monetary damages the conduct would cause Medical Supply. The trial court's belief that because the contract did not concern the hospital supply commodities to be delivered in E-commerce that there was no violation of Sherman §§ 1 and 2 or 15 U.S.C. § 13(e) is in error. The General Electric defendants' refusal to deal in a "collateral transaction" is the *sine qua non* of concerted refusal to deal or boycott:

> "Conduct constitutes a "boycott" where, in order to coerce a target into certain terms on one transaction, parties refuse to engage in other, unrelated or collateral transactions with the target. [*Hartford Fire Ins. v. California*, 509 U.S. 764 at 802-03, 113 S.Ct. 2891 at 2912, 125 L.Ed.2d 612 (1993)]…Specifically, it is 'the refusal to deal beyond the targeted transaction that gives great coercive force to a commercial boycott: unrelated transactions are used as leverage to achieve the terms desired.' Id.; *Uniforce*, 87 F.3d at 1298 (establishing that a 'boycott' is the 'refusal to deal in a collateral transaction as a means to coerce terms respecting a primary transaction')"

Slagle v. ITT Hartford, 102 F.3d 494 at 498 to 499 (C.A.11 (Fla.), 1996).

The amended complaint alleged that the General Electric defendants had sought to accomplish their antitrust injury of Medical Supply by breaching their agreement to purchase the remainder of their lease from Medical Supply. The failure to perform under the lease contract was not exempt from *per se* Sherman § 1 liability:

> "We also approve the district court's ruling that the concerted scheme to withhold a lease from IBI was a *per se* violation of section 1. "Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA*, 468 U.S. at 103-04, 104 S.Ct. at 2962 (footnote omitted). Thus, a court's task is to distinguish between "naked" restraints of trade and those restraints that may have a salutary effect on competition or productivity. *Polk Bros., Inc. v. Forest City Enterprises, Inc*., 776 F.2d 185, 188-89 (7th Cir.1985). The district court found that there were no redeeming virtues to the agreement not to provide IBI with a stadium lease and, significantly, defendants have not challenged this finding or in any way suggested that such virtues existed."

Fishman v. Estate of Wirtz, 807 F.2d 520 at 541 (C.A.7 (Ill.), 1986)

The amended complaint is replete with averments of the General Electric defendants' motive and intent to commit antitrust injury against Medical Supply, however there is no need to allege the elements of conspiracy, including intent where combination has been alleged:

> "…plaintiff alleges that defendants entered into combinations and contracts in restraint of trade. There is no need to show a common purpose in order to prove the absence of independent action because the relevant merger or contract amply demonstrates that there was no independence of action. Additionally, there is no need to demonstrate

a unity of purpose to establish a conspiracy because conspiracy is not alleged."

Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81 at 92 (S.D.N.Y. 1995).

f. The Amended Complaint Adequately Pled Breach of Contract for the Purpose of Antitrust Injury

The trial court failed to recognize the antitrust relevancy of Medical Supply's averments that the General Electric defendants breached the agreements to buy the lease from Medical Supply and the agreement to provide a mortgage for the purpose of inflicting antitrust injury on Medical Supply and to keep Medical Supply from entering the market for hospital supplies through e-commerce.

"We note that *Stein v. Pac. Bell Tel. Co*., 173 F. Supp. 2d 975, 983 (N.D. Cal. 2001), the district court held that plaintiff had stated a valid antitrust claim on refusal-to-deal facts similar to those in the present case. In *Stein*, according to the plaintiff, Pacific Bell "entered into these optional and voluntary [1996 Act] agreements and then breached them or proceeded to engage in bad faith conduct in carrying them out, without any business justification and with the intent to destroy its competitors . . . so as to unlawfully maintain its monopoly." *Id.* Citing *Aspen*, the plaintiff claimed that such conduct violated Section 2 of the Sherman Act because Pacific Bell was "attempting to exclude rivals on some basis other than efficiency," thus making its conduct "predatory." *Id*. The Stein court held that even accepting *Goldwasser* in its entirety, the plaintiff had stated a valid claim. Id. at 983-84 ("*Goldwasser* did not consider whether violations of the 1996 Act, if done in a `predatory' manner as defined in Aspen Skiing, can make up an independent basis for liability under the Sherman Act. The plaintiffs in *Goldwasse*r did not allege, as Stein

> alleges here, that the defendant breached interconnection agreements in bad faith and engaged in other exclusionary practices.").
>
> In essence, BellSouth asks this Court to conclude that it is impossible to find a refusal to deal where the defendant has formed an agreement with the plaintiff, in this case an agreement pursuant to the strictures of the 1996 Act. For the reasons stated above, we conclude that allegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws."

Covad Communications Co. v. Bellsouth Corp., 2002 C11 260 at ¶¶ 62 and 63 (USCA11, 2002). The trial court should not have dismissed the complaint when breach of an agreement for the purpose of causing antitrust injury had been adequately alleged.

II. Whether Medical Supply's Amended Complaint Alleged GE Defendants' Monopolization of Hospital Supplies in E-Commerce.

The trial court did not address the appellant Medical Supply's Sherman 2 antitrust claims of monopolization through Concerted Refusal to Deal, Refusal to Deal in Furtherance of a Monopoly, Refusal To Deal/Denial of Unique Financial Instrument, Conspiracy in Restraint of Trade, Restraint of Trade Through Monopoly, Restraint of Trade Through Attempted Monopolization, Single firm Refusal to Deal, Refusal to Deal "Change of Pattern", Refusal to Deal Denial of A Facility Under 15 U.S.C. § 13(e).

The court asserted fundamental defects existed barring Medical Supply's antitrust claims. First, the failure to allege the defendants or their affiliate companies possess market power:

> "As previously stated, plaintiff never alleges that any of the named defendants either possess or are attempting to possess market power in the relevant market of 'hospital supplies delivered through ecommerce in North America.'" **V2 pg. 493**

and the belief of the court that the alleged conduct of the General Electric defendants in no way prevented Medical Supply from entering the market for hospital supplies in e-commerce:

> "There simply exists no allegation that defendants had the ability, through their denial of financing or the lease of office space, to lessen or destroy competition in the market of hospital supplies through ecommerce. *Coastal Fuels v. Caribbean Petroleum Corp*., 79 F.3d 182, 196 (1 st Cir. 1996) ("To determine whether a party has or could acquire monopoly power in a market, 'courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.'") (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)). Accordingly, even assuming as true the facts alleged in the Amended Complaint, the court concludes that defendants' conduct was not unlawful under the federal antitrust laws." **V 2 pg. 494**

The appellant Medical Supply asserts that the trial court was in clear error. The amended complaint alleged that the General Electric defendants entered a business relationship with Medical Supply, then used the knowledge gained from the relationship to intentionally destroy Medical Supply's plan to enter the market for hospital supplies through e-commerce

which the General Electric defendants were alleged to control 80% of. The violence against Medical Supply was taken with full knowledge of the Neoforma/Novation/ US Bancorp attempt to destroy Medical Supply and that Medical Supply was the last remaining independent E-Commerce distributor.

CONCLUSION

The repeated refusal of the trial court to permit the development of Medical Supply's actions against the US Bancorp and General Electric defendants was contrary to all case law and federal statute. No writing in any pleading was given consideration that might have jeopardized the swiftest possible transfer of the actions in total to the appellate court.

The lack of a single validation of Medical Supply's belief that redress was possible took a terrible human toll on its stakeholders and counsel. The possibility of reform in the industry was repeatedly set backwards as all eyes looked to each abrupt repudiation in these two actions. The trial court's written orders acknowledged the injury to consumers, including even death from the conduct alleged by Medical Supply. Inconceivably, it appeared that the Kansas District Court was unwilling to devote resources to such a serious issue.[5] A theory has however developed that the Group Boycott

[5] Letter to Chef Judge, Hon. John W. Lungstrum, Nov. 7th, 2003 **V2 pg. 506-7**

claims were clearly *per se* and judicially noticeable as not subject to reasonable denial to a degree unrealized by even Medical Supply's counsel. The need to further develop the case was unnecessary and delayed hearing before august antitrust tribunal available in the Tenth Circuit, which had the experience and diverse business practice knowledge required to pronounce Sherman § 1 prohibited antitrust conduct as *per se*.

This theory explains what can be seen as judicial economy in avoiding the resources expended without fruit in *In re Indepen. Serv. Organiz. Antitrust Litigation*, 964 F.Supp. 1454 (Kan., 1997) and allowing the determination or judgment to be made where if General Electric is found to have violated Sherman § 1, relief would be difficult to delay. The problem with the theory however is the disbelief that the Kansas District Court could have expected Medical Supply, the only plaintiff the cartel could not silence under existing contracts, could sustain its prosecution against such insurmountable odds. However Medical Supply has lived up to that expectation and with this appeal, places its claims before this court for resolution.

PRAYER FOR RELIEF

The appellant respectfully requests the court find for Medical Supply on the 15 U.S.C. §§1 and 2 Group Boycott/concerted refusal to deal claims

and grant injunctive relief, declaratory relief and treble monetary damages sought in the complaint along with interest, costs and *pendente lite* attorneys fees. Medical Supply also requests the court remand back the remaining federal claims, including the Medicare Qui Tam claim and state claims for discovery, amendment and further prosecution.

Respectfully Submitted,

S/Bret D. Landrith

_____

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I, the undersigned, do hereby certify that I caused two true and correct copies of the foregoing and a complete appendix to be deposited in the US Mail on May 25th, 2004 and mailed to the following:

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