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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W- ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

SUGGESTION IN OPPOSITION TO STAY

Comes now the plaintiff Medical Supply and makes the present suggestion in opposition to defendants' motion for stay. Medical Supply opposes the stay for the following reasons:

The defendants' use of *Harlow* is inapplicable to staying discovery between private litigants where there are no defendant government officials entitled to ***qualified immunity***: Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). By official, the doctrine refers to a government official:

> "[I]n *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Court redefined qualified immunity for government officials. Justice Powell's opinion for the Court explained that henceforth, qualified immunity would extend to governmental officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, 102 S.Ct. at 2738."

Schultea v. Wood, 47 F.3d 1427 (C.A.5 (Tex.), 1995).

Tragically, Mr. Powers and Mr. Olthoff have been engaged with Medical Supply's counsel in a two year dialogue over exactly the thread running through *Harlow, Leatherman, Crawford-El* and finally *Currier v. Doran*. The defense counsel aspersed these cases as being civil rights matters unrelated to the pleading standard in antitrust cases. Now, when it suits Mr. Powers, *Harlow* becomes an antitrust pleading

standard requiring this court to weigh the burdens of discovery on the defendants against something other than Federal Rules of Civil Procedure. An interpretation even *Harlow* itself does not support.

> "**A rule requiring plaintiffs to meet a higher evidentiary standard in qualified immunity cases has never been endorsed by the Supreme Court**, and (contrary to the suggestion in Judge Williams's opinion) Harlow itself gives no indication that the Court contemplated such an onerous requirement. Indeed, Judge Williams's opinion completely ignores the fact that, although the Court in Harlow stated that "insubstantial suits against high public officials should not be allowed to proceed to trial," the decision relies on the "firm application of the Federal Rules of Civil Procedure" to achieve this objective. *Harlow*, 457 U.S. at 819-20 n. 35, 102 S.Ct. at 2738-39 n. 35 (internal quotations omitted). Thus, nothing in Harlow gives appellate courts free-reign to perform their own cost-benefit analysis or to select new evidentiary standards out of thin air.
>
> Furthermore, the recent case of *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), broadly repudiates the use of heightened, judge-made standards to fulfill policy-related goals such as those advanced by the judges who view this case differently. **Although *Leatherman* addressed only claims against municipalities, it is significant that the Court explicitly rejected the justifications for a heightened standard that had been offered by the defendants, and instead insisted that the Federal Rules remain the sole touchstone for determining the sufficiency of the plaintiff's case.** As the Court stated, additional requirements can be imposed only "by the process of amending the Federal Rules, and not by judicial interpretation." Id. at 168, 113 S.Ct. at 1163."

Crawford-El v. Britton, 93 F.3d 813 at 862 (C.A.D.C., 1996). The Kansas District Court which followed Mr. Olthoff and Mr. Power instead of Medical Supply's argument. In Medical Supply's unread opposition to Mr. Power's motion for dismissal in *Medical Supply Chain, Inc. v. General Electric, et al*, KS Dist. Case No. 2:03-cv-2324 , Medical Supply stated:

> "The plaintiff believes the Tenth Circuit decision in *Currier v. Doran*, 242 F.3d 905 (10th Cir., 2001), a later case than the court's authority and cited treatise now controls heightened pleading standards for non official immunity and fraud claims in this jurisdiction after *Leatherman* 507 U.S. 163. *Currier v. Doran,* 242 F.3d 905 (10th Cir., 2001). When faced with a 1998 decision by the US Supreme Court again reemphasizing the liberal pleading requirements and destroying exceptions in Crawford-El v. Britton, 118 S. Ct. 1584 (1998), the Tenth Circuit explains how it had in the past responded to *Leatherman* 507 U.S. 163 and found a viable exception limited to a special issue in civil rights cases, that of official immunity. At page 914 of Currier, the 10th circuit explains: "Our reasons for those unanimous rulings apply with equal force to the imposition of a clear and convincing burden of proof in cases alleging unconstitutional motive." At page 916-7, **The *Currier* court resolves that its heightened pleading standards do not survive *Crawford-El Britton*, stating: "Like the D.C. Circuit's heightened proof requirement, this court's heightened pleading requirement finds no support in the Federal Rules of Civil Procedure and constitutes a deviation from the notice-pleading standards of Rule 8. See Fed. R. Civ. P. 8(a) ('A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . .'); Fed. R. Civ. P. 9(b) ('Malice, intent, knowledge, and other condition of mind of a person may be averred generally.')" and returns to the liberal pleading requirement quoting"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.**
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> The plaintiff's amended complaint adequately pleads general and specific intent for both monopolization and attempted monopolization. As stated above in *Currier v. Doran*, 242 F.3d 916-17 (10th Cir., 2001),"

The Kansas trial court found that Medical Supply had failed to adequately plead antitrust claims against the G.E. defendants alleged to have conspired with the nondefendant Neoforma, Inc. a defendant in the present case. Since in antitrust cases, coconspirators are jointly and severally liable for all damages occasioned by their illegal acts, Medical Supply is not required to sue all coconspirators, but may choose to proceed against less than all or even one of them for damages. See *Homeco Developments v. Markborough Properties, Ltd*. 709 F. Supp. 1137. The US Supreme court has made the antitrust pleading standard perfectly clear as Medical Supply answered the Novation defendants on page 2 of Medical Supply's suggestion in opposition to dismissal:

"The defendants seek to have the court contradict a trilogy of recent Supreme Court decisions reflecting the Court's renewed determination to ensure that district judges properly defer to the pleading party in deciding Rule 12(b)(6) motions to dismiss. See *Swierkiewicz v. Sorema N.A*., 534 U.S. 506 (2002); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

> "In the aftermath of Leatherman, antitrust heightened pleading has certainly been curtailed. Finding the Leatherman rationale applicable to antitrust, many lower courts have re-embraced notice pleading and Rule 8 as the appropriate pleading standard in antitrust cases. The Seventh Circuit is illustrative. Soon after Leatherman, the court made clear that the "nascent movement" to add judge made exceptions to notice pleading was now precluded. Consequently, antitrust plaintiffs were not required to plead with particularity. Moreover, the court denounced pre-Leatherman cases applying heightened pleading as no longer authoritative." [footnotes omitted]
> Fairman, Christopher M., The Myth Of Notice Pleading Arizona Law Review pgs. 1018-19, Vol. 45:987 (2003)."

This very issue is on appeal in *Medical Supply Chain, Inc. v. General Electric, et al* and currently before the Tenth Circuit, but in this jurisdiction Medical Supply's current complaint based on later and continuing antitrust misconduct cannot be dismissed for failure to state a claim:

> **Although the complaint was in narrative form, Mr. Jones's recitations clearly identified how each defendant was involved in the conduct about which he complains, which is all the federal rules require.** See Fed. R. Civ. P. 8(a)(2) (complaint must include only "short and plain statement of the claim showing that the pleader is entitled to relief"); *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002) (complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)))

Jones v. Pollard-Buckingham, No. 03-2695 (8th Cir. 11/12/2003) (8th Cir., 2003). Stays of discovery are exceedingly rare outside of securities fraud cases . The defendants seek a protection from Federal Rules of Civil Procedure Congress granted only to securities fraud defendants under the Private Securities Litigation Reform Act (the "PSLRA"), 15 U.S.C. 78u-4 et seq.

> "The PSLRA's stay of discovery procedures was intended by Congress to protect innocent defendants from having to pay nuisance settlements in securities fraud actions in which a foundation for the suit cannot be pleaded; rather than lead to the conclusion that plaintiffs should receive more leniency in amending their pleadings, the stay of discovery procedures adopted in conjunction with

the heightened pleading standards under the PSLRA is a reflection of the objective of Congress "to provide a filter at the earliest stage (the pleading stage) to screen out lawsuits that have no factual basis." [Champion Enters., 145 F.Supp.2d] at 874 (quoting Selected Bill Provisions of the Conference Report to H.R. 1058/§ 240, 141 Cong. Rec. § 19152 (daily ed. Dec. 22, 1995))."

In re Nahc, Inc. Sec. Litig., 306 F.3d 1314, 1332-333 (3d Cir. 2002) (quoting *In re Nahc, Inc. Sec. Litig*., No. 00-4020, 2001 U.S. Dist. LEXIS 16754, at *81-82 (E.D. Pa. Oct. 17, 2001)). Only the defendants US Bancorp NA (NYSE USB), The Piper Jaffray Companies (NYSE PJC) and Neoforma, Inc. (NASDQ NEOF) are publicly traded companies and the plaintiff is not bringing any claims for relief based on securities fraud.

Much of the difficulty all parties have with what occurred in Kansas District court stems from the denial of discovery, including a stay granted by Magistrate O'Hara (lately Managing Partner of Shughart, Thomson and Kilroy, the head of Andrew DeMarea's Overland Park, KS office where he was in charge of hiring) in the *Medical Supply Chain, Inc. vs. GE et al* case, where GE like the Novation defendants today were also represented by John Power. Even in Kansas, stays of discovery are unusual:

Q. Would you deny discovery in a case because of a pendency of a dismissal motion by the opposing party?
A. Well, I have. But as a general proposition the precedent in our district and my policy that the mere pendency of a dispositive motion by itself is not a basis to stay discovery. There's a three part test that we go through to determine whether a particular case discovery ought to be stayed until that dispositive motion is ruled.
Q. But in that case, wasn't it true that Medical Supply's discovery was stayed not on the basis of any action or inaction of mine, but solely-¬

Excerpt from testimony of Magistrate O'Hara from *In the matter of Bret D. Landrith*, Kansas Disciplinary Hearing, January 20th, 2005.

The Eighth Circuit requires discovery before dispositive motions requiring specific knowledge of facts solely in possession of the opposing party may be granted:

"It appears from the record that some discovery was necessary for Iverson to present his fraud claim. He was a salesman and not the keeper of the financial records. The truth of the statements regarding the profitability of the Summit stores and the value of Iverson's rights under the 1988 contract could not be evaluated without access to relevant financial records. Discovery was also relevant to the reasonableness of Iverson's reliance on O'Donnell's statements. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn.1995)."

Iverson v. Johnson Gas Appliance Co., 172 F.3d 524 (C.A.8 (Minn.), 1999).

Both Kansas complaints were dismissed before discovery. The Kansas court stated that the plaintiff had failed to adequately state a claim and in both cases discussed the admonishment of Medical Supply's counsel for failing to investigate the factual basis for his claims. In the complaint before this court, Medical Supply has attributed each significantly material fact alleged to its source. Three consecutive US Senate Antitrust Subcommittee hearings on Novation's anticompetitive conduct in combination with its member hospitals and suppliers, along with government and expert studies accompanied by New York Times investigative reporting has created a prima facie case against the Novation defendants that meets even the irrelevant PSLRA heightened pleading standard.

Contrary to Mr. Olthoff's sanction assertions, Medical Supply has diligently prepared for this case and has evidence supporting its claims, even though the Sherman Act specifically provides for discovery recognizing all the evidence is normally in the hands of the offending monopolists. Attached is the current version of the plaintiff's Rule 26 initial disclosures which are still being updated. EXB 1. A substantial number of witnesses to Novation's antitrust conduct have already been identified and thousands of documents do support the plaintiff's complaint. Defense counsel might do well to familiarize themselves with their clients. Over one hundred thousand distinct products are distributed to hospitals through group purchasing organizations. Novation supplies over two thousand hospitals and another six thousand health systems. Multi-product tying schemes tied to performance rebates and membership payments further multiplies the records or distinct documents that prove Medical Supply's case. Thankfully most records are in the form of Electronic Data Interface compatible electronic files.

The email sent by Medical Supply's counsel(EXB. 2) discusses lessening the burden of discovery by bifurcating summary judgment rounds. The case likely will be resolved on the first round per se claims. When a complained of violation is classified as a *per s*e violation of the antitrust laws the court will not consider elaborate arguments (that are routine in rule of reason cases) that a particular practice is actually pro-competitive. To the contrary, the court will condemn the practice without taking any arguments into account. The purpose of the *per se* rule is to avoid expensive litigation in areas in which it is not likely to be fruitful. Currently the *per se* rule is applied to horizontal price fixing, horizontal territorial or customer

division, vertical price fixing and some concerted refusals to deal and tying arrangements, the conduct alleged against the Novation and US Bancorp defendants.

The defendants are incorrect in their assertion the plaintiff would not be harmed by delaying discovery. Medical Supply is likely to be deprived of its counsel if this case is stayed. As the complaint alleges, Medical Supply's counsel is being prosecuted by the State of Kansas, largely on Magistrate O'Hara's testimony. If this prosecution fails, the state is proceeding on Andrew DeMarea's complaint against Medical Supply' s attorney.

The Tenth Circuit's harshest *sua sponte* sanction in excess of $23,000.00 for appealing a clearly erroneous ruling on the USA PATRIOT Act, even acknowledged by the sanctioning court is also a foreseeable deterrent to Medical Supply obtaining substitute counsel Both Mr. Olthoff and Mr. Power are actively supplementing this deprivation of counsel with their new motions seeking sanctions which of course still don't identify any transactions which might be subject to preclusion by the earlier case. Certainly facts like the defendant's addresses are common to the Kansas litigation, however the transactions had not yet occurred. The Novation defendants and Neoforma, Inc. were also not defendants or in a recognized form of privity that would give rise to preclusion. However, Mr. Olthoff and Mr. Power suggest that somehow their conclusory "same facts" motions to dismiss and for sanctions merit a stay when in fact they violate the defendant counsel's duties under Rule 11.

Finally, despite Mr. Powers pedantic characterizations of hospital supply antitrust as a office space lease problem, Medical Supply has twice lost its capitalization for market entry due to the defendants' prohibited conduct. The three hundred thousand dollars has not been replaced, nor the time lost. Extending this case through a stay of discovery would work a great injustice upon the plaintiff.

CONCLUSION

Whereas for the above stated reasons Medical Supply respectfully requests the court deny the defendants' motion for a stay of all proceedings pending resolution of dispositive motions.

Respectfully Submitted

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Certificate of Service

I certify that on June 7th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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