United States Court of Appeals

For the Tenth Circuit

Docket No. 03-3342 (10th Cir.)

Case No.: 02-2539-CM

Medical Supply Chain, Inc.

v.

US Bancorp, NA; US Bank; Private Client Group, Corporate Trust, Institutional Trust And Custody, And Mutual Fund Services, LLC.; US Bancorp Piper Jaffray; Jerry A. Grundhofer; Andrew Cesere; Susan Paine; Lars Anderson; Brian Kabbes; and Unknown Healthcare Supplier

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Appeal from the
United States District Court
District of Kansas

BRIEF OF THE APELLANT

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On the brief

STATEMENT REGARDING ORAL ARGUMENT

Counsel does not request oral argument.

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CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

CORPORATE DISCLOSURE STATEMENT UNDER F.R.A.P. 26.1

Medical Supply Chain, Inc. has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRIOR OR RELATED APPEALS

Interlocutory appeal case no. 02-3443, dismissed as moot.

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).

Medical Supply filed its notice appealing the trial court's 06/16/2003 Docket# 34 Order Granting 21 Motions To Dismiss on 11/21/2003 Docket# 42 Notice Of Appeal 06/16/2003, following the trial court's 11/19/2003 Docket# 41 Memorandum And Order denying Medical Supply's Motion For New Trial.

STATEMENT OF ISSUES PRESENTED

Whether the trial court erred in dismissing Medical Supply's Antitrust Claims by imposing a heightened pleading standard. Whether the trial court erred in finding no private right of action under the USA PATRIOT ACT.

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

On October 22, 2002, Medical Supply Chain, Inc. filed a complaint for urgent injunctive relief preventing US BANCORP NA, *et* al from denying Medical Supply banking services and obstructing its entry into commerce through violations of the Sherman, Clayton, and Hobbs Acts. On November 12, 2002, Medical Supply amended its complaint to include declaratory relief and refined its antitrust claims to include allegations and facts making a *prima facie* case that US Bancorp had violated 15 U.S.C. §§ 1,2 and 13, 18 U.S.C. § 1951(b)(2).

STATEMENT OF FACTS

Medical Supply Chain, Inc. (Medical Supply) is an electronic marketplace for hospital supplies. Aplt. Apdx. v1 C ¶¶ 10, 27. After five years developing the technology, it attempted to capitalize its entry into the hospital supply market at the moment it saw hospitals were seeking alternatives to healthcare group purchasing organizations ("GPO's") as a result of a New York Times series exposing the harmful effects of GPO's and a series of US Senate Judiciary Antitrust sub-committee hearings were critically reviewing the anti-kickback[1] safe harbor under Medicare for GPO's. Aplt. Apdx. v1 C ¶¶26,C En.vii and viii. US Bancorp Piper Jaffray received Medical Supply's executive summary and forward financials but refused to return any calls about investment banking services. Aplt. Apdx. v1 C ¶39. Medical Supply then created its own capitalization plan utilizing

[1] 42 U.S.C. 1320a-7b. Criminal penalties for acts involving Federal health care programs.

escrow accounts from the corporate trust division of US Bank, its corporate bank for the deposit of its candidate representative's certification funds. Aplt. Apdx. v1 C ¶¶42-45. US Bank's loan department accepted under a confidentiality agreement, Medical Supply's business plan describing in detail its national market strategy, its industry allies, future customers and the cost savings its web based marketplace would bring hospitals and it approved Medical Supply for partial financing based on Medical Supply's business plan and forward financial statement for the portion of escrow funds Medical Supply's certification agreement provided Medical Supply the right to retain. Aplt. Apdx. v1 C ¶52. US Bancorp Piper Jaffray's Senior Analyst, Daren Marhula estimated $23 billion of the total spent on medical supplies is pure process and procurement costs, and about half of this cost could be eliminated by ordering supplies over the Internet. Aplt. Apdx. v1 C ¶27.

US Bancorp's trust department repudiated its contract to provide Medical Supply quarterly escrow accounts for its certification candidates, after approving the escrow account contracts to be sent to Medical Supply's most promising prospective candidates. In tape recorded conversations explaining the basis for the repudiation, US Bancorp trust officers stated that the USA PATRIOT Act, "know your customer" requirements prevented US Bancorp from providing Medical Supply the accounts. Aplt. Apdx. v1 C ¶¶ 53-60. Medical Supply informed them that the act did not apply to the Medical Supply escrow accounts and the portion that might had been indefinitely postponed by the Department of the Treasury. US

Bancorp still refused to provide any escrow accounts at any price to Medical Supply but still provides other existing and new corporate customers escrow accounts. Aplt. Apdx. v1 C ¶¶ 60-61.

Medical Supply discovered US Bancorp publicizes anticompetitive agreements involving healthcare suppliers and has placed its officers on the boards of the two dominant GPO's, Premier and Novation, Inc., and that US Bancorp has assisted them in acquiring healthcare electronic marketplaces to prevent competition that would lower hospital supply prices and expand the range of products hospitals could purchase. Aplt. Apdx. v1 C ¶¶ 3,81,82,86.

Medical Supply brought this action to prevent US Bancorp and the Unnamed Healthcare Supplier customer of US Bancorp accused of directing US Bancorp to obstruct or delay Medical Supply from entering the hospital supply market from irreparably harming Medical Supply, its associates, stake holders and future hospital customers. Aplt. Apdx. v1 C ¶¶ 195-210. US Bancorp has opposed every measure of preliminary and pre-hearing injunctive relief that might salvage the forward financials or future expectations Medical Supply and US Bank jointly agreed upon for escrow accounts and limited financing. Medical Supply has maintained it cannot go to another bank with US Bancorp and Unknown Healthcare Supplier's threat of a US PATRIOT Act suspicious activity report. Aplt. Apdx. v1 C ¶¶ 126-128. The secret report would destroy any chance of clearing the tens of millions of dollars of monthly on line financial transactions around the world, required to be an effective competitor to GPOs. Aplt. Apdx. v1

C ¶¶36,57 The fear of a suspicious activity report kept the law firm of Shook, Hardy and Bacon from substituting as escrow agent to replace US Bancorp's trust department. Aplt. Apdx. v1 C ¶129 Later, a competing healthcare electronic marketplace, Neoforma, Inc., identified in the complaint against US Bancorp Aplt. Apdx. v1 C¶¶26-29 in an openly publicized contract with General Electric Company, a healthcare manufacturer and distributor of hospital supplies, repudiated a written contract to purchase a lease from Medical Supply as part of a non-bank agreement to capitalize Medical Supply's entry into the market for hospital supplies. Motion for New Trial Aplt. Apdx. v.2, AA pg. 28, AA Attachment 4.

US Bancorp has admitted it has not provided the escrow accounts. US Bancorp has never offered a pro-competitive justification for refusing to do so, merely a business justification because of the know your customer reporting requirements under the USA PATRIOT Act. Docket #13 Defendants Answer to Complaint Apdx. v2 M. The answer denies the existence of a contract based on the writing requirements of the statute of frauds. Docket #13 Defendants Answer to Complaint Apdx. v2 M ¶70. US Bancorp has not answered clear authority that Kansas and Missouri exempt escrow accounts from their statutes of frauds. Docket #27 Plaintiff's Reply To Dismissal Motion Apdx. v2 U. Piper Jaffray's Deputy General Counsel stated Piper Jaffray is "making markets", that Piper Jaffray has not filed a suspicious activity report but that "US Bancorp Piper Jaffray or its affiliates should not be foreclosed from doing so…" Affidavit of Mark Reed,

Attch. D ¶¶ 3,7 to Appellee's Memorandum in Opposition to Appellant's Motion for Emergency Preliminary Injunctive Relief. Case No. 02-3443, (10th Cir.). No officer has attested that US Bancorp did not file a USA PATRIOT Act suspicious activity report against Medical Supply.

On July 16th, 2003, the national policy debate on the appropriateness of the Medicare anti-kickback safe harbor for group purchasing convened again before the subcommittee of the Senate Committee on the Judiciary without Medical Supply's presence as a competitor in the hospital supply marketplace:

"How important is the E-Commerce monopoly to those who control it? Over the past year one start-up company has been blocked twice from market entry. The first time, a bank tied to an investment house that has seventy percent of its holdings in health care suppliers refused to provide the company with simple escrow services through a blatant misapplication of the USA Patriot Act. Most recently an international conglomerate that is a founder of GHX was willing to take a $15 million dollar loss on a real estate deal just to keep this company out of the market." Testimony Lynn James Everard, Hospital Group Purchasing: Has the Market Become More Open to Competition?, United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition and Business and Consumer Rights July 16, 2003

SUMMARY OF ARGUMENTS

Medical Supply asserts that the trial court declined to recognize statements throughout its brief that fulfilled requirements for pleading antitrust violations. In dismissing Medical Supply's claims for failing to plead particular phrases with certain words and reciting Medical Supply's statements in its memorandum and order without according their anticompetitive meaning, the trial court reveals that

it is applying a heightened pleading standard that does not conform to Rule 8 of the Federal Rules of Civil Procedure.

Additionally, Medical Supply asserts that the malicious use of the USA PATRIOT Act is actionable under antitrust law and that Congress provided for a private right of action in the enactment.

I. Whether the trial court erred in dismissing Medical Supply's antitrust claims by imposing a heightened pleading standard?

The trial court granted US Bancorp, *et al's* motions to dismiss for failure to plead a conspiracy under §§ 1 and 2 of the Sherman Antitrust Act, for failure to plead "the existence of a pricing agreement, or agreement of any kind" (Docket# 34 Order Granting Motions to Dismiss Aplt. Apdx v2 Part Z,pg.s 5,6) under § 1 of the act. The trial court indicated it was unsure of what Medical Supply's § 2 claims were but "construes them" as attempting to state a claim of combination or conspiracy to monopolize" and found that Medical Supply failed to "allege that defendants both controlled prices and excluded competition", failed to plead the existence of a relevant product market, geographic market, state "that defendant's alleged market power stems from defendants' willful acquisition or maintenance of that monopoly power rather than from defendants development 'of a superior product, business acumen, or historic accident," nor allege that defendants have a "dangerous probability of succeeding" as required under § 2 of the act. (*Id.*,pg.s 7-9). Finally, the court dismissed Medical Supply's claims under 15 U.S.C. 13(e) of

the act because the complained denial of escrow accounts was a “financial service” not a commodity subject to the act.

The trial court dismissed Medical Supply’s complaint under Rule 12(b)(6). “Rule 12(b)(6) dismissals are particularly disfavored in fact-intensive antitrust cases. In *Quality Foods* [*Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp*., S.A., 711 F.2d 989,(11th Cir. 1983)], which involved claims under sections 1 and 2 of the Sherman Act, this Court stated that ‘the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low.’ 711 F.2d at 994. ‘authorized by the Federal Rules of Civil Procedure, the liberal rules as to the sufficiency of a complaint make it a rare case in which a motion [to dismiss] should be granted.’ *St. Joseph's Hosp*. [*Inc. v. Hosp. Corp. of Am*] , 795 F.2d [948,] at 953 (footnote omitted).” [emphasis added] *Covad Communications Co. v. Bellsouth Corp*., at ¶21 2002 C11 260 (USCA11, 2002).

No heightened pleading requirements apply in antitrust cases. "[A] short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules." *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 554 (2d Cir. 1977). “[J]udicial attempts to apply a heightened pleading standard in antitrust cases had been "scotched" by the Supreme Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and that after *Leatherman*, an antitrust plaintiff need not include

"the particulars of his claim" to survive a motion to dismiss. [*Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, (7th Cir.1994).] 33 F.3d at 782. It is instead sufficient for the plaintiff to include in its complaint only "a short and plain statement of the claim" showing an entitlement to relief. FED .R. CIV. P. 8(a)(2)" *Apani Southwest, Inc., Plaintiff-Appellant, v. Coca-Cola Enterprises, Inc., No. 01-11026* (5th Circuit, August 12, 2002).

The Tenth Circuit decision in *Currier v. Doran*, 242 F.3d 905 (10th Cir., 2001), 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 Plaintiff's Motion For New Trial Pg. 4-5 Aplt Apdx v2 AA4,5. Furthermore, "[i]n antitrust cases in particular, the Supreme Court has stated that `dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" *George Haug Co. v. Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 139 (2d Cir. 1998) (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976)). See, e.g., Charles Alan Wright, Law of Federal Courts Sec. 68, at 475-76 (5th ed. 1994) (arguing that district courts should not require more detailed pleadings in complex antitrust and securities litigation than they do in cases of ordinary complexity, and collecting cases)." *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 at 1518 (C.A.10 (Colo.), 1995).

A. Medical Supply stated a claim for *per se* Concerted Refusal to Deal violation of 15 U.S.C. § 1 and 15 U.S.C. § 2 (Sherman Act)

Plurality of Actors Medical Supply's amended complaint did not fail to plead the plurality of actors required for an averment of Group Boycott or Refusal to Deal. The trial court is in legal and factual error when it states that Medical Supply stated " all individuals named as defendants are officers and employees of US Bancorp." The complaint consistently uses the word "individual" to refer to human being defendants, distinguishing them from corporations. The plaintiff named nine defendant persons[2] under the antitrust statutes. Five were corporate entities, one of which; Unknown Healthcare Entity, was alleged to be a horizontal competitor of Medical Supply[3] and not a subsidiary of US Bancorp, therefore fulfilling the two or more requirement for conspiracy or combination if law required each conspirator or combination member to be named as a defendant. However, there is no requirement that plaintiffs identify in a pleading or name as defendants the conspirators of a parent company and its subsidiaries under §§ 1 and 2 of The Sherman Act. *Lowell v. American Cyanamid Co.*, 177 F.3d 1228 (C.A.11 (Ala.), 1999) (2,500 §1 Sherman Act unnamed coconspirators) *Fontana*

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[2] Section 8 of the Sherman Act states: "That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, and the laws of any State, or the laws of any foreign country.

[3] ¶30 of Plaintiff's Amended Complaint alleges that Unknown Healthcare Entity communicated to US Bancorp NA, its employees or its subsidiaries about Medical Supply to obstruct or delay Medical Supply's entry into commerce. Further the paragraph states that Unknown Healthcare Entity and its corporate directors and executives are assisted by US Bancorp NA in obtaining ownership shares in companies Unknown Healthcare Entity allows to enter the healthcare marketplace.

Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 at 478 (C.A.7 (Ill.), 1980), Cessna and its subsidiary, only defendants).

In addition to naming an independent coconspirator (Unknown Healthcare Supplier) as a defendant, the amended complaint identified horizontal competitors of Medical Supply in the market for hospital supplies and agreements and contracts with the named defendants that were anticompetitive in that their purpose was to exclude potential competitors. Those named entities were the healthcare group purchasing organizations (GPO's) Premier and Novation, Premier's electronic marketplace subsidiary Medibuy and Novation's electronic marketplace subsidiary Neoforma both of which utilize internet technology for selling hospital supplies online like Medical Supply.

Existence of An Agreement Medical Supply's amended complaint pled the existence of an agreement of US Bancorp and Medical Supply which was used to wreak antitrust injury upon Medical Supply and many anticompetitive agreements between Medical Supply's competitors and US Bancorp to exclude competitors including Medical Supply and prevent competition in the hospital supply market.

The agreement to provide escrow accounts that would have permitted Medical Supply to capitalize its entry into the hospital supply market with the deposits of its representatives was a written electronic contract and valid under both Kansas and Missouri's Statute of Frauds requirements relating to bank deposit accounts was broken by US Bancorp, despite the fiduciary nature of an escrow agreement at the direction of Medical Supply's competitor Unknown

Healthcare Entity to prevent or delay Medical Supply's entry into the hospital supply market. "[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." *Covad Communications Co. v. Bellsouth Corp*., at ¶63 2002 C11 260 (USCA11, 2002). There is no requirement to prove an enforceable contract: "As such, there is no need for any contract obligation, only that a violation of the antitrust laws be alleged. *Vines v. General Outdoor Advertising Co*., 2 Cir., 1948, 171 F.2d 487." *Steiner v. 20th Century-Fox Film Corp*., 232 F.2d 190 at 195 (C.A.9 (Cal.), 1956)

The agreements between US Bancorp and Unknown Healthcare Supplier and between US Bancorp and Premier, Novation, Neoforma, Inc., Medi-Buy, and Commerce One to exclude Medical Supply (Aplt. Apdx. v1 C ¶¶81,82,86) and other entrants into the market for hospital supplies as alleged in the complaint, make US Bancorp and its subsidiaries horizontal competitors of Medical Supply when they deny the escrow accounts to Medical Supply at the direction of Unknown Healthcare Supplier to restrain competition: "…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).

An agreement to raise prices of healthcare capitalization shares is plead in C¶81 between the defendants and the electronic marketplace Medibuy, created by the hospital supply monopolist Premier (both of which are direct horizontal competitors of Medical Supply) and Commerce One, an electronic marketplace technology inferior to Medical Supply's but required by Premier and Medibuy. The agreement described is one to "create a false increase in the prices of Commerce One shares," elsewhere described in the complaint as "laddering" and is an averment of an agreement to raise prices in a relevant market described in the complaint; the market for healthcare technology capitalization. See Aplt. Apdx. v1, C pg. 34-5. An agreement is also pled in C¶¶26-29 of the amended complaint between the defendants and Neoforma, Inc. (Aplt. Apdx. v1, C pg. 10-12). The litigation referred to in C¶81 became consolidated with a similar lawsuit against the underwriting of Neoforma, Inc. Market manipulation claims were found to be adequate against the defendants that utilized "Tie-in Agreements and to pay Undisclosed Compensation in order to receive an initial allocation of stock. Subsequent purchases, at escalating prices, falsely inflated the price of the shares." *In Re Initial Public Offering Securities Lit.,* 241 F. Supp. 281 at pg. 297,427, 429. The related class actions from *In re Initial Public Offering Antitrust Litig.*, 01 Civ. 2014 (WHP), 01 Civ. 11420 (WHP), 2003 WL 22474835 (S.D.N.Y. Nov. 3, 2003) alleging that these concerted agreements to falsely increase the market price of capitalization shares were conduct prohibited under the Sherman Act failed because the court found securities regulation preempted antitrust regulation of

publicly traded securities. Medical Supply attempted to use the escrow accounts to privately or internally capitalize its entry into the hospital supply market.

Per Se Violations The amended complaint alleges per se violations of 15 U.S.C. §§ 1 and 2 where it avers the defendants acted in combination or conspiracy with others in refusing to provide escrow accounts and investment banking services to Medical Supply. The amended complaint alleges the defendants and their combination have monopoly power in the healthcare capitalization market and the hospital supply markets and have exclusive access to the banking and financial infrastructure that Medical Supply cannot duplicate (after the defendants destroyed Medical Supply's plan to capitalize its market entry through escrow accounts), meeting the threshold from *Northwest Wholesale Stationers*:"market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted." *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.,* 472 U.S. 284, 296, 105 S.Ct. 2613, 2621, 86 L.Ed.2d 202 (1985).

The horizontal concerted refusal to deal alleged by Medical Supply requires *per se* treatment. "Business and economic justifications for such conduct are irrelevant, and a showing of adverse effect on competition is unnecessary. Kitner Federal Antitrust Law § 10.30 at 168"*Green County Memorial Park v. Behm Funeral Homes*, 791 F.Supp. 1276 at 1284-5(W.D. Pa. 1992). A restraint may be in violation of the Sherman Act because it is solely a naked restraint of trade so offensive to competition as to be unreasonable per se, or because it runs afoul of

the more detailed rule of reason inquiry. *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 457-58, 106 S.Ct. 2009, 2017, 90 L.Ed.2d 445 (1986). Conduct is unreasonable *per se* when it "always or almost always tend[s] to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc*., 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1 (1979).

In its 1999 decision in *California Dental Association v. FTC* (1999, No. 97-1625, 526 U.S. 756), the U.S. Supreme Court described the unlawful conduct in *FTC v. Indiana Federation of Dentists* ("IFD"), 476 U.S. 447 (1986) as "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire." The Court placed *IFD* in a string of cases where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," and could be condemned after only a "quick look."

"The *per se* rules avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable.' *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958)" *Federal Trade Commission v. v. Federal Trade Commission*, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990)

Courts have long experience with banking, capitalization of entry into market, trust departments and escrow accounts. *Per Se* Refusal to Deal violations of 15 U.S.C. §1 can be easily recognized in banking when common finance and

credit practices are deviated from. *Neel v. Waldrop*, 639 F.2d 1080 at 1082,1085 (4th Cir. (S.C.)1981).

The newness of the web based electronic marketplace, internet storefront or business to business (B2B) nature of Medical Supply's selling of hospital supplies to create extreme price efficiencies or lower costs to consumers, does not create issues surrounding joint ventures and groups of competitors creating exclusionary alliances to control markets and prices. These antitrust concerns are no different than courts have always dealt with in the market distribution of products:

> "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 Dajani1Beyond Covisint - Antitrust Scrutiny of B2B Exchanges

A boycott by a single trader constitutes the necessary combination in restraint of trade if it is carried out through coercion, threats or intimidation upon the target's suppliers. (*Albrecht v. Herald Co.* (1968) 390 U.S. 145, 149- 150, 88 S.Ct. 869, 19 L.Ed.2d 998; *Klor's v. Broadway-Hale, supra*, 359 U.S. at p. 209; A would-be boycotter may be enjoined from attempting to violate the antitrust laws. (*Lorain Journal v. United States* (1951) 342 U.S. 143, 144-145, 72 S.Ct. 181, 96 L.Ed. 162.

In *Klor's, Inc. v. Broadway-Hale Stores, Inc*. 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed. 2d 741 (1959) ("Klor's "), the refusal to deal was created by a horizontal competitor of a small retailer when the larger competitor directed its suppliers to not to sell to Klor. US Bancorp's use of the threat of a suspicious activity report coerced Shook, Hardy and Bacon into not providing escrow agency services to Medical Supply (C¶67) and prevents or threatens to prevent third party banks from providing escrow accounts or financial services to Medical Supply. The member manufacturers of the Medical Device Manufacturers Association who were instrumental in exposing the harmful effects of the healthcare supply monopoly, including preventing lifesaving medical technology from market when manufacturers failed to pay kickbacks and give up equity reported in the New York Times articles and Senate Judiciary antitrust subcommittee hearings are prevented from having the freedom to sell their products through Medical Supply's electronic marketplace, because Medical Supply has been deprived of its capitalization and prevented from entering the market for hospital supplies in the United States. Neoforma, Inc., shown in the amended complaint to be in an agreement to exclude competition in the hospital supply market with US Bancorp and Unknown Healthcare Supplier also tried to finish off Medical Supply by causing General Electric to breach its contract to purchase a lease from Medical Supply, destroying a non-bank attempt to capitalize Medical Supply's entry into the hospital supply market on June 16th 2003. See Docket # 35 Motion for New Trial Aplt. Apdx. v.2, AA pg. 28, AA Attachment 4. In *Klor's*, the Court listed

three reasons for condemning the boycott in addition to its monopolistic tendency. The boycott deprived Klor's of its freedom to buy goods in an open, competitive market. It was likely to drive Klor's out of business. And, it deprived the manufacturers and distributors of their freedom to sell to Klor's. (359 U.S. at p. 213.) All three of which are present in the Medical Supply Amended Complaint.

§2 Combination and Single Firm Violations The amended complaint charges the defendants with violations of 15 U.S.C. § 2 both as a combination and as a single firm refusing to deal horizontally as a combination in (Docket# 3 Plaintiff's Amended Complaint, Aplt. Apdx. v1)C¶ 93 and vertically in C¶ 94. The trial court did not recognize a distinction between combination and conspiracy. The trial court also did not recognize Medical Supply's alternative single firm allegations based on *Aspen Skiing* (10th Cir.) denial of essential facility or *Aspen Skiing* (Sup.Ct.) monopolist's refusal to deal without pro competitive reason all of which are prohibited by 15 U.S.C. § 2.

Combination At page 9 of the trial court's Memorandum and Order dismissing Medical Supply's federal claims (**Z pg. 9**) the court indicates its basis for the combination or conspiracy requirement is in actuality only conspiracy as it defines from *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kan.*, 891 F2d 1473, 1484 (10th Cir. 1989). Medical Supply in its § 2 claims alleges combination. There is no need to allege the elements of conspiracy 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).

Eskofot further cautions against merging combination and conspiracy:

"Defendants attempt to collapse the independent bases that combination and contract provide for the existence of a section one violation. If plaintiff always needed to demonstrate that there existed a unity of purpose between defendants and others, then all combination and contract claims would necessarily encompass a conspiracy claim." *Id*, 872 F. Supp. 81 at fn13 (S.D.N.Y. 1995).

Medical Supply's amended complaint avers that the defendants are a combination, even resembling a "Keiretsu" or "Chaebol," and stating; "The Defendants' vertically integrated monopoly acting in consort with their healthcare suppliers and distributors *combine* in efforts to prevent MSCI from entering into commerce through the misuse of the USA Patriot Act are extorting property from MSCI, its associates and customers." Docket # 3 Plaintiff's Amended Complaint Aplt. Apdx.v.1§C ¶114.

Overt Acts The amended complaint included counts alleging the defendants committed obstruction of Medical Supply's entry into the market through racketeering extortion prohibited by the Hobbs Act (Count III), a related allegation that the defendants violated the Sherman and Hobbs Act to influence public policy, specifically the US Senate Antitrust hearings reviewing the anti-kickback safe harbor enjoyed by the group purchasing organizations and therefore is in violation of the USA PATRIOT Act's section 802 prohibition against violating

criminal laws to influence public policy (Count VI),. Finally, the complaint alleges that US Bancorp uses the threat of a USA PATRIOT Act suspicious activity report in a continuing act to prevent Medical Supply from gaining access to the banking services it needs to compete in the market for hospital supplies. (Count V), Docket# 3 Plaintiff's Amended Complaint, Aplt. Apdx. v1C¶¶125-128.

Dangerous Probability The complaint alleges that Medical Supply was the last hospital supply electronic marketplace not acquired by Premier and Novation with the assistance of US Bancorp. Aplt. Apdx. v1C¶¶10,41

Relevant and Geographic Markets No protective orders have been agreed to and since a major part of the action was to stop the misappropriation of the business plan with its detailed national marketing plan for Internet based sales of hospital supplies already in possession of US Bancorp and evidence indicated was being distributed by US Bancorp to Medical Supply's competitors, (Aplt. Apdx. v1C¶¶73,74)it had not been made an attachment to pleadings. The complaint on its face indicates a national market for both relevant markets-hospital supplies and the capitalization of healthcare technology companies. See Aplt. Apdx. v1C¶¶36,38, The *Full Draw* court examined a district courts finding that Sherman 2 geographic market was insufficiently pled and found they were adequate though lacked clarity;"[w]hat is determinative is whether... it cannot be said that defendants did not have fair notice of [the plaintiff's] claims.' *Monument Builders of Greater Kansas City, Inc. v. American Cemetery Assn. of Kansas*, 891 F.2d 1473, 1481

(10th Cir. 1989)" *Full Draw Prod. v. Easton Sports Inc.,* 182 F.3d 745 at 755-756 (10th Cir., 1999).

Dismissal is frequent when implausible limitation of a market is attempted. *Todd v. Exxon Corp*., 275 F.3d 191 at 200 (2nd Cir., 2001). The trial court unusually dismissed Medical Supply's claims because it did not limit its relevant markets (national in nature) to a particular locality.

B. Whether Medical Supply stated a claim for Single Firm Refusal to Deal or Denial of Essential Facility 15 U.S.C. § 2 (Sherman Act)

Unilateral Anticompetitive Conduct As stated in plurality of actors *supra,* Medical Supply has pled that US Bancorp and Unknown Healthcare Supplier have combined to exclude Medical Supply horizontally in refusing to deal (per se / no defense) and C¶ 94 vertically, (the rule of reason / burden shifts to defense to prove competition not harmed); and as separate entities acting in concert (C¶ 96 and C¶ 97) through conspiracy to exclude Medical Supply horizontally (*per se* / no defense). The purpose of the defendants' conduct is alleged to be both 15 U.S.C. § 2 monopolization (intent presumed) and 15 U.S.C. § 2 attempted monopolization (specific intent required). The amended complaint (like the first complaint) alleges that defendants obtained monopoly power in the healthcare capitalization and the hospital supply relevant markets, stating that US Bancorp and Unknown Healthcare Supplier had monopoly power in the market for healthcare technology capitalization and the market for hospital supplies (C ¶ ¶ 20-30, 78, 79, 82), setting prices (C ¶¶ 80, 81, 84) and excluding competitors (C ¶ 87) refused to

deal with Medical Supply Chain by first not providing venture fund services (C ¶ 39) then not providing escrow accounts (C ¶ ¶ 53-61, 84, 86-88).

Medical Supply's amended complaint stated it was not able to obtain alternative escrow accounts in the limited time available after the defendants' repudiation of their contract to provide them to Medical Supply. Medical Supply was unable to have the law firm Shook, Hardy and Bacon substitute for the escrow agent because of fears even this substantial law firm had over the specter of a USA PATRIOT Act suspicious activity report threatened by the defendants. C¶67 Later, the combination caused the breach of Medical Supply's nonbank capitalization contract with General Electric in a separate predicate act. See Docket # 35 Motion for New Trial Aplt. Apdx. V.2, AA pg. 28, AA Attachment 4. Because Medical Supply did not obtain escrow accounts, it could not obtain capitalization to enter the market for hospital supplies, even though it had successfully developed the technology for an electronic marketplace after a five year investment. Aplt. Apdx. v1, C ¶27.

Aspen Skiing The trial court is in error in failing to find a viable §2 single firm refusal to deal claim over essential facilities in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co*., 738 F.2d 1509, 1522-23 (10th Cir.1984) or just plain §2 refusal to deal by a single firm with market power and without a procompetitive justification**,** *Aspen Highlands Skiing Corp. v. Aspen Skiing Co*., 472 U.S. at pg. 611-612.

US Bancorp's healthcare technology capitalization market power was pled by the averment that Medical Supply is deprived escrow accounts from any bank while under threat of a US Bancorp malicious suspicious activity report which keeps Medical Supply from being able to capitalize its entry into the downstream hospital supply relevant market and by the averments related to US Bancorp's extortion (Aplt. Apdx. v1, C ¶ 85) of the healthcare technology company Antigenics. "The second amended complaint's allegation that defendants' boycott successfully drove Full Draw from the market illustrates defendants' ability to exclude competition against AMMO's trade show. " See *Full Draw Prod. v. Easton Sports Inc*., 182 F.3d 745 at 757 (10th Cir., 1999).

Like the "all Aspen Ski pass," (or coupon in the Supreme Court) in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co*., 738 F.2d 1509, 1522-23 (10th Cir.1984), the escrow account with a partial security interest for a line of credit was an essential facility (Medical Supply required it to enter the relevant market for healthcare supplies and it was a product in the relevant market of healthcare capitalization the defendants controlled) and as the plaintiff's amended complaint stated "…a unique, novel or custom escrow financial instrument in the commercial money market with sufficient economic power to give rise to a claim under the Sherman Act as contemplated [the plaintiff has argued effectively that the escrow accounts had the qualities the Supreme Court found missing in the steel house financing that was the subject of *Fortner*, tying is irrelevant] in *United States Steel*

Corporation v. Fortner Enterprises, Inc., 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977).” [emphasis added] Aplt. Apdx. v1, C ¶ 85, pg. C37.

INJURY The trial court does not recognize Medical Supply’s injury in the hospital supply market resulting from the anticompetitive conduct of US Bancorp and Unnamed Healthcare Supplier in their alleged combination to prevent healthcare technology companies from being capitalized independent of their control which the trial court sees as not relevant. However the 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).

This injury is recognized by the supreme court in *Blue Shield v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977): "Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations ... would be likely to cause.' " [emphasis added] *McCready*, 457 U.S. at 479, 102 S.Ct. at 2548 (quoting *Brunswick Corp*., 429 U.S. at 489, 97 S.Ct. at 697) and the Tenth Circuit; “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).

Medical Supply's injury is also the injury of the 2000 hospitals that were hurt by not having hospital supplies at a low enough cost to prevent their institutions from losing money and risking closure under *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.,* 18 F.3d 260, 263 (4th Cir.1994) (Standing for prospective customer injury on RICO statutes having a common antitrust basis.)

Summation Medical Supply believes the amended complaint is adequate to withstand Rule 12(b)(6) dismissal on its claims. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive of the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. [*Conley*] 355 U.S. at 47-48, 78 S.Ct. at 103 (footnotes omitted). Therefore, we hold the allegations gave fair notice of the basis of the claim sufficient to withstand the motion to dismiss." *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1373 (C.A.10 (Colo.), 1980)

II. Whether the trial court erred in finding no private right of action under the USA PATRIOT ACT?

The Appellant has maintained there is a private right of action for monetary damages under the USA PATRIOT Act where a bank uses the threat of a

malicious suspicious activity report ("SAR") or files an SAR to hurt a perceived competitor. See ¶ 10.4, pg. 22, Plaintiff's Reply to Defendant's Motion to Strike, December 6, 2002. This private right of action against a monopolist making a sham petition or false official act to create a barrier to competition existed prior to Congress's passage of the USA PATRIOT Act. Congress expressly expanded the application of antitrust laws to banks under the Gramm-Leach-Bliley Act, repealing their previous grant of immunity under the Glass-Stegal Act.

US Bancorp cannot be protected by implied antitrust immunity. Implied antitrust immunity is "strongly disfavored, and [has] only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). Implied antitrust immunity is found only where there is a "pervasive regulatory scheme," where an antitrust exemption is "necessary to make the [statute] work," and "even then only to the minimum extent necessary." *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 26 (2d Cir.), cert. denied, 474 U.S. 1006 (1985).

There is no express bar to antitrust actions contained in the USA PATRIOT Act. The requirement to report suspicious activity does not remove liability for intentionally inaccurate reporting injuring an American business in the class the statute is designed to protect. Without an express immunity from antitrust liability, no Treasury Department or US Bancorp Anti Money Laundering compliance officer can immunize US Bancorp. Antitrust defendants "cannot avoid liability for their actions because requested by some public official to do so. . . . Only

Congress can lift the restrictions which find expression in the Sherman Act." *Eugene Dietzgen Corp. v. FTC*, 142 F.2d 321, 329 (7th Cir.), cert. denied, 323 U.S. 730 (1944); see *Consumers Union v. Rogers*, 352 F. Supp. 1319, 1323 (D.D.C. 1973)(President cannot grant antitrust immunity without statutory authority).

The enactment provides for a private right of action against the maker of a malicious suspicious activity report, limiting the safe harbor provided under the safe harbor for suspicious activity reports provided under § 351(a)(3) (31 U.S.C. §5318(g)(3)(A). See ¶ 12, pg. 26, Plaintiff's Reply to Defendant's Motion to Strike, December 6, 2002

Parts of the USA Patriot Act contain reasonableness standards for data sharing, limiting the safe harbor supporting Medical Supply's interpretation of private civil liability for a malicious USA PATRIOT Act "SAR" report:

"In contrast, other parts of the USA PATRIOT Act specifically include standards limiting the applicable safe harbor, such as in Section 355 "which provides that with respect to an employment reference, an institution shall not be shielded from liability if a disclosure is made with "malicious intent." Moreover, in section 314(a), Congress included specific standards with respect to information shared among financial institutions, regulators and law enforcement, and described the information subject to such disclosures as 'reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities…the final portion of section 314(b) does except from the safe harbor violations of the section

generally."Heather Smith, Esq. ,Data Sharing-Assessing Patriot Act's Safe Harbor. Winstead Sechrest & Minick.

PRAYER FOR RELIEF

The appellant respectfully requests the court find for Medical Supply on the 15 U.S.C. §§1 and 2 concerted refusal to deal claims and grant the injunctive, 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 and state claims for further prosecution.

Respectfully submitted,

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