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

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

DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO TRANSFER, DISMISS AND/OR STRIKE

Defendants' motion to transfer, dismiss or strike should be granted. Plaintiff fails to meaningfully address defendants' core legal arguments. Instead, plaintiff conjures up fanciful conspiracy theories, supposed intimidation encouraged by the Kansas judiciary (in this case and in other cases completely unrelated to this litigation) and purported mysterious disappearances as grounds for denying defendants' motion. Plaintiff also relies upon inapplicable or overruled decisions and misapplies the case law cited in its opposition to defendants' motion. Accordingly, this case should be transferred to the District of Kansas for further disposition or dismissed altogether.

I. This Case Should be Transferred to The District of Kansas.

This case should be transferred to the Court that is most familiar with the facts, parties and counsel–the United States District Court for the District of Kansas. Plaintiff even admits that "[b]oth of these complex litigations share common issues of law and fact." Plaintiff's Sugg. in Opp. to Novation, *et al.*'s Motion to Transfer Venue and/or to Dismiss, at p. 5 (referring to the similar Kansas and Missouri federal actions). Plaintiff's argument in opposing transfer, based upon a supposed "pattern and practice of intimidating witnesses and their counsel in Kansas District [C]ourt

cases" (*id.*) as outlined in the affidavit of Sam Lipari, plaintiff's president, fails to demonstrate any sound reason why the case should not be sent to the Court that in effect has already handled it.

First, Mr. Lipari's caustic affidavit is not grounded in fact and should be disregarded. In it, he asserts:

- "Bias reached the Office of the Clerk for the Tenth Circuit Court of Appeals . . . ." (Lipari Affidavit, p. 2, ¶ 4);
- "Open hostility exhibited by the Kansas District Court and Tenth Circuit personnel against the claims of [Medical Supply Chain] and . . . Kansas government attorneys were enlisted to retaliate against [Bret Landrith] for bringing these claims . . . ." (*Id.* at p. 3, ¶ 5);
- "The City of Topeka and the Topeka office of the US Attorney threatened and intimidated other witnesses . . . because of their testimony in Mr. Landrith's cases . . . ." (*Id.* at ¶ 7);
- "When the defendants realized they had to answer [Medical Supply Chain's] action in Missouri, [Lipari] experienced intensified presence of law enforcement officials. Including uniformed and plain-clothes surveillance . . . ." (*Id.* at p. 9, ¶ 23);
- Defendants requested surveillance of Lipari's home and were "targeting" his fiancée and her daughter (*id.* at p. 10, ¶ 26);
- Felony obstruction of justice and conspiracy involving the Kansas Disciplinary Administrator's Office, Shughart Thomson & Kilroy and Federal Magistrate O'Hara (*id.* at pp. 11-12, ¶ 30); and
- Lipari's claim that "I have feared for my life during parts of this litigation especially after calling the Ft. Worth, TX office of the US Attorney to ask to speak to the attorney that issued the criminal subpoenas against my cases defendants and being told she was dead and then finding out that the FCA attorney had died shortly before her. . . " and that witnesses would be placed in "jeopardy" if the case were allowed to proceed in Kansas "as a result of the hostility the Kansas District court has for victims of witness intimidation and harassment and the obvious willingness of the Kansas judicial branch to assist in the harassment and intimidation." *Id.* at p. 13, ¶ 33.

Based upon these wild allegations in the affidavit, plaintiff argues, "[o]bviously, a transfer to the District Court of Kansas cannot be in the interest of justice." Sugg. in Opp., at p. 4. Contrary to its

unfounded assertions, however, because the Kansas District Court is thoroughly familiar with plaintiff's claims and allegations, transfer is warranted.

Second, plaintiff argues that the Kansas District Court does not have "sufficient resources" to handle this litigation. *Id*. at p. 4. As "evidence" supporting this contention, plaintiff relies upon a letter its counsel sent to Chief Judge John Lungstrum on November 7, 2003, that went unanswered. Again, contrary to the argument, the Kansas District Court docketed the case, held two hearings and reviewed multiple pleadings before dismissing the suit. Plaintiff's disappointment in the result and Mr. Landrith's unanswered correspondence are not competent evidence that the Kansas Federal Courts are too taxed to handle plaintiff's case a second time.

Finally, plaintiff relies upon *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc*., 594 F.2d 1179 (8th Cir. 1979), as a basis for denying transfer. Specifically, plaintiff cites the Eight Circuit's "rule that contribution may be enforced among joint tortfeasors in an antitrust action." Plaintiffs' Sugg. in Opp. to Novation, *et al.*'s Motion to Transfer Venue and/or to Dismiss, at p. 5. While it is not clear why this "rule" is important to plaintiff, *Professional Beauty Supply* has been overruled on the issue of contribution in antitrust cases. *Texas Industries, Inc. v. Radcliffe Materials, Inc*., 451 U.S. 630 (1981) (holding federal antitrust laws do not allow a defendant a right to contribution from other participants in an unlawful antitrust conspiracy). With respect to the indemnification "rule," plaintiff argues that this case must remain in the Western District of Missouri because "Medical Supply . . . seeks to enjoin indemnification of defendants." Plaintiff's Sugg. in Opp. to Novation, *et al.*'s Motion to Transfer Venue and/or to Dismiss, at p. 5. However, the issue of indemnification is also one that does not affect plaintiff because it is an issue to be addressed solely among defendants, if it is an issue at all. Moreover, the rule regarding indemnification is one

of federal law, as discussed in *Texas Industries*, and is not one that differs from circuit to circuit. As such, this is not a valid basis upon which to deny transfer.

For the reasons set forth in their Motion and Suggestions in Support, the defendants' motion to transfer should be granted.

II. Plaintiff Does Not Allege any New or Different Conduct on the Part of These Defendants in This Lawsuit that was not Alleged in the Kansas Lawsuit.

Plaintiff does not specifically address the arguments these defendants made in their Suggestions in Support of the Motion to Transfer, Dismiss or Strike. It instead incorporates the oppositions to other defendants' motions. To that extent, these defendants also incorporate the other defendants' suggestions and reply suggestions as if fully set forth herein.

Plaintiff does argue, however, that the defendants "seek to contradict" *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955). That argument is meritless. In *Lawlor*, the Supreme Court held that a prior judgment "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id*. at 328. Unlike *Lawlor*, however, collateral estoppel and/or *res judicata* bar the claims asserted by the plaintiff here because *no* new claims, or conduct resulting in the assertion of new claims, are alleged to have arisen with respect to these defendants since the entry of the previous judgment. The earlier lawsuit was based upon the same conduct, transaction, set of operative facts and claims at issue here.[1] That plaintiff may have "repackaged" some of the alleged conduct into different theories or causes of action does not shield it from dismissal through application of *res judicata* and/or collateral estoppel.

[1] Plaintiff's allegation that it could not have known of its damages until January 21, 2005 when Magistrate O'Hara testified in plaintiff's counsel's disciplinary hearing (Compl. ¶ 613) is completely belied by the fact that the same damage claims were filed in the earlier lawsuit.

In dismissing the 2002 case, the District Court of Kansas held that plaintiff failed to state a claim for relief under each of the federal antitrust acts alleged and that there was no private right of action under the USA Patriot Act or Hobbs Act. The Tenth Circuit affirmed. Despite this, plaintiff now reasserts many of the same causes of action here which are based upon defendants' same alleged conduct. Further, the Missouri antitrust claim, "interlocking directorate" claim and RICO claim are all based upon defendants' same alleged conduct as asserted in the Kansas case and could have been brought in the Kansas District Court when this case was first filed. As such, all of plaintiff's claims, those which are simply reasserted and those which may have been re-pleaded into new claims and causes of action, should be dismissed.

III. Plaintiff's Claims and Allegations Against "Shughart, Thomson & Kilroy Watkins Boulware" and Federal Magistrate James P. O'Hara Should be Dismissed and/or Stricken.

Plaintiff's Complaint imaginatively references far-fetched conspiracies against plaintiff and plaintiff's attorney as the "grounds" for making allegations against Magistrate O'Hara and for its claims against "Shughart Thomson & Kilroy Watkins Boulware." Because these allegations and claims are not only illusory, but also immaterial, impertinent and scandalous, they should be dismissed and/or stricken.

Plaintiff argues in its suggestions in opposition that "[t]here is no automatic immunity for attorneys for their tortious conduct." Sugg. in Opp., at p. 3, ¶ 6. Plaintiff then cites inapposite case law that does not salvage its claims. In fact, the cases plaintiff cites actually support dismissal of all claims against Shughart Thomson & Kilroy, which is named as a defendant in this lawsuit simply because this firm competently represented defendants in plaintiff's first frivolous lawsuit in Kansas. An attorney representing a party who is alleged to have been involved in a RICO enterprise is an insufficient basis for RICO liability. In *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997), the Eighth Circuit held that "an attorney or other professional does not conduct [a RICO] enterprise's

affairs [and thus, incur liability] through run-of-the-mill provision of professional services." *Id*. at 1348 (citations omitted); *see also Raymark Industries v. Stemple*, 714 F. Supp. 460, 474 (D. Kan. 1988) (also cited by plaintiff and holding that "the court . . . has serious doubts as to any possible liability [for alleged RICO violations]on the part of the local counsel against whom no intentional wrongdoing has been alleged.") (citation omitted). Plaintiff has alleged nothing against Shughart Thomson & Kilroy beyond its actions in effectively defending these defendants in plaintiff's Kansas lawsuit. Such allegations simply do not rise to the level of "participation" (either knowing or unknowing) in a RICO enterprise.

Havens v. Hardesty, 600 P.2d 116 (Colo. App. 1979), also mentioned in plaintiff's suggestions in opposition, apparently is cited for the proposition that, under Colorado state law, an attorney may be held personally liable for his or her intentional torts. *Id*. at 164-65. However, Shughart Thomson & Kilroy's representation of these defendants in the Kansas lawsuit is an insufficient basis for an intentional tort claim under Missouri law. Plaintiff fails to identify any theory upon which the defendants' law firm owed plaintiff any duty of care let alone how it was breached or caused damages.

Because the allegations against "Shughart Thomson & Kilroy Watkins Boulware" and Magistrate O'Hara are bogus, they should be dismissed or stricken.

CONCLUSION

The defendants' motion has gone largely unchallenged. Even where there is some opposition, plaintiff offers nothing other than an affidavit containing unsupported and wild allegations of conspiracy, intrigue, witness intimidation, and unexplained disappearances. Plaintiff fails to offer competent, coherent argument or applicable legal authority sufficient to overcome Defendants' Motion to Transfer, Dismiss and/or to Strike. Defendant's motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 4th day of May, 2005, to:

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