

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

MEDICAL SUPPLY CHAIN, INC.,

*Plaintiff-Appellant,*

v.

US BANCORP, NA; US BANK PRIVATE CLIENT GROUP;  
CORPORATE TRUST; INSTITUTIONAL TRUST AND CUSTODY;  
MUTUAL FUND SERVICES, LLC.; PIPER JAFFRAY; ANDREW  
CESERE; SUSAN PAINE; LARS ANDERSON; BRIAN KABBES;  
UNKNOWN HEALTHCARE SUPPLIER,

*Defendants-Appellees.*

**ANSWER TO SHOW CAUSE ON SANCTIONS**

At the close of the US Senate Judiciary Committee's Antitrust Subcommittee's hearing entitled "Hospital Group Purchasing: How to Maintain Innovation and Cost Savings" on Tuesday, September 14, 2004, the subcommittee's chair suggested that the 1.8 trillion dollar market's anti-competitive behavior might be better corrected with private antitrust litigation than with new legislation. The plaintiff-appellant Medical Supply Chain, Inc. believes the Sherman Act prohibits the admitted conduct of the defendants in keeping Medical Supply Chain, Inc. from competing with the defendants' openly publicized combination to restrain trade in hospital

supplies which included the threat of malicious USA PATRIOT Act reporting and the repudiation of the defendants' contract to provide Medical Supply Chain, Inc. escrow accounts required for capitalizing its market entry.

Plaintiff and plaintiff's counsel continue to recognize and assert that the district court erred by: 1) dismissing plaintiff's antitrust claims by imposing a heightened pleading standard, and 2) finding no private right of action under the USA Patriot Act.

Plaintiff filed this appeal that is supported by the law and the facts. Plaintiff incorporates by reference plaintiff's appellate opening and reply briefs along with the supporting record contained in the appendices for docket # 03-3342 and docket # 02-3443 including the evidentiary attachments of both parties in support of their motions for pre-hearing relief.

The defendant U.S. Bank was in contract with Medical Supply Chain, Inc. to provide escrow accounts. U.S. Bank broke the contract, Medical Supply Chain, Inc.'s complaint (written shortly after to obtain emergency injunctive relief and avoid the resulting irreparable harm<sup>1</sup>) alleged the

---

<sup>1</sup> The defendant US Bancorp Piper Jaffray's adverse admission of economic research reveals that a web based electronic marketplace for hospital supplies like Medical Supply Chain, Inc. would eliminate 83 billion dollars in inefficiency. Plaintiff's Amended Complaint ¶27.

breaking of the contract was a result of exclusive dealing agreements between the defendants which included Unknown Healthcare Supplier. “[T]he exclusive dealing arrangement itself satisfies the § 1 requirement of coordinated action.” *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, No. 02-9222 at pg. 45 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004).

Medical Supply’s complaint satisfied the two or more independent actors requirement for a Sherman 1 prohibited combination. To prove a § 1 violation, a plaintiff must demonstrate: (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade. See *Tops Mkts.*, 142 F.3d at 95; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993).

The plaintiff’s complaint in the alternative alleged the actions of the defendant US Bancorp companies as a single firm in breaking the contract violated Sherman 2:

“The leading case imposing § 2 liability for refusal to deal with competitors is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U. S. 585, in which the Court concluded that ***the defendant's termination of a voluntary agreement with the plaintiff*** suggested a willingness to forsake short-term profits to achieve an anticompetitive end.” [emphasis added]

*Verizon Communications Inc. v. Law Offices of Trinko*, 540 U.S. \_\_\_\_  
(U.S. 1/13/2004) (2004).

Finally, the plaintiff and plaintiff's counsel decline to accept Hon. Judge John C. Porfilio's revisionist pronouncement about the lack of a private right of action in the USA PATRIOT Act.

Public Law 107–56 “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001” contains at least two private rights of action<sup>2</sup>; SEC. 223. CIVIL LIABILITY FOR CERTAIN UNAUTHORIZED DISCLOSURES and the plaintiff's often averred malicious reporting to which there is a private right in SEC. 355 which states “(3) MALICIOUS INTENT.—Notwithstanding any other provision of this subsection, voluntary disclosure made by an insured depository institution, and any director, officer, employee, or agent of such institution under this subsection concerning potentially unlawful activity that is *made with malicious intent*,

---

<sup>2</sup> Additional private rights of action are communicated in sections that immunize “good faith” disclosure of information from third parties. The qualifying of immunity to third parties' causes of action for civil liability are expressions of Congressional intent for private rights of action; *i.e.* § 215 of USA Patriot amends FISA § 501(e) (as amended): “A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production.”

*shall not be shielded from liability from the person identified in the disclosure.*” [ emphasis added ].

Plaintiff’s counsel calls this court’s attention to the fact that irreparable harm has been suffered by the plaintiff and the nation’s hospitals, including loss of human lives while respectful requests for relief have been met with the trial court’s dismissal, this court’s denial of pre-hearing relief <sup>3</sup> and the present decision.

The plaintiff’s counsel has responded with timely well researched pleadings based upon a thorough investigation of the facts and applicable law. Medical Supply Chain, Inc. will continue to seek a hearing from a court that will do the same.

Respectfully Submitted

S/Bret D. Landrith

---

Bret D. Landrith  
Kansas Supreme Court ID # 20380  
# G33,  
2961 SW Central Park,  
Topeka, KS 66611  
1-785-267-4084  
landrithlaw@cox.net

---

<sup>3</sup> The trial court based its dismissal in part upon this court’s denial of pre hearing relief in #02-3443, a decision the plaintiff’s memorandums of 6/26/03 and 7/10/03 showed surprisingly contradicted Tenth Circuit controlling authority.

**Certificate of Service**

I certify I have served two copies of this pleading upon opposing counsel listed below via U.S. Mail on November 10<sup>th</sup>, 2004.

Mark A. Olthoff  
Shughart Thomson & Kilroy, PC--Kansas City  
Twelve Wyandotte Plaza  
120 West 12th Street  
Kansas City, MO 64105  
816-421-3355  
Fax: 816-374-0509  
Email: molthoff@stklaw.com