

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

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No: 08-3428

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Samuel K. Lipari,  
Plaintiff - Appellant

v.

US Bancorp, NA; US Bank NA,  
Defendants - Appellees

**APPELLANT'S MOTION TO RECALL THE MANDATE**

Comes now the plaintiff-appellant, Samuel K. Lipari appearing pro se and for good reason respectfully requests that this court recall its mandate of December 2, 2008.

**STATEMENT OF FACTS**

1. The Kansas District court entered its memorandum and order regarding dismissal of the action on November 26, 2008. See exb. 1 Kansas District Court Memorandum and Order.

2. The Plaintiff-Appellant has not withdrawn his voluntary dismissal with prejudice of his remaining claims in Kansas District court.

3. The Plaintiff-Appellant has filed a Second Amended Notice of

Appeal in the Western District of Missouri addressing the Kansas District Court's subsequent order on December 3, 2008. See exb. 2 Second Amended Notice of Appeal.

4. The Assistant Clerk of the Western District of Missouri Lori Carr did not forward the Notice of Appeal to the Eighth Circuit Court of Appeals instead Lori Carr has noted that on instruction of "Chambers" the Second Amended Notice was sent to Kansas District Court. See exb. 3 Text Entry on Docket.

### **SUGGESTION OF LAW**

This court's recall of a mandate is rare and appropriate only in the light of substantial injustice. *Walker v. Lockhart*, 726 F.2d 1238 (C.A.8 (Ark.), 1984). The plaintiff-appellant has suffered substantial injustice and has been denied Due Process when his second amended notice of appeal was not forwarded to this court but instead sent to the Kansas District Court. See exb. 3. This court can see that the Kansas District Court ordered the plaintiff-appellant to lose property including \$700 in costs when the Kansas District Court never had subject matter jurisdiction. See exb. 1. The interests of justice and judicial economy are not served by repeated appeals resulting from the Western District chambers' extra judicial communications (see exb. 3) with the Kansas District Court for the purpose of evading review or to

extort the plaintiff-appellant from filing an appeal.

The Kansas District Court may retain jurisdiction over the proceeding for the purpose of disciplining the parties' legal representatives for making findings regarding legal fees in regard to sanctions but lost subject matter jurisdiction after the plaintiff-appellant's filed his notice of appeal. The notice is being held in abeyance by the Tenth Circuit in *Lipari v US Bank et al*, C.A.10 case no. 08-3287 on the plaintiff-appellant's assertion the Kansas District court never acquired diversity jurisdiction over the plaintiff-appellant's concurrent state claims removed from state court and transferred to Kansas District Court from the Western District of Missouri while an appeal was pending in the plaintiff-appellant's first filed federal action on the same case or controversy.

The Kansas District Court's memorandum and order, while redundant in the plaintiff-appellant's reasoned view after the voluntary dismissal under Rule 41(a)(2) on October 15, 2008 based on Kansas District Court precedent:

“The Kansas District court's own precedent is that only a motion under 41(a)(2) seeking dismissal without prejudice requires a court order:

Under Rule 41(a)(2), "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Thus, a dismissal **without prejudice** under Rule 41(a)(2) depends on the Court's discretion.”  
[Emphasis added]

*103 Investors I, L.P. v. Square D Co.*, 222 F.Supp.2d 1263 at 1270-1271 (D. Kan., 2002).

The memorandum and order of November 26, 2008 (exb. 1) now with certainty concludes the Kansas District Court action. A substantial public interest exists in seeking review of the Western District of Missouri's transfer of the action in light of the exclusive jurisdiction of the Tenth Circuit over the matter in controversy and the long established first to file doctrine.

The second amended Notice of Appeal should revive an appeal previously premature notice of appeal *Lewis v. B. F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir. 1988) (en banc) ("In the situation like that before us, in which the other claims were effectively dismissed after the notice of appeal was filed, we believe Fed. R. App. P. 4(a)(2) permits the interpretation that the notice of appeal, filed prematurely, ripens and saves the appeal. . . . In such cases generally we will consolidate or companion the earlier appeal with any subsequent appeals arising out of the same district court case."). The transfer is now ripe for appeal under *Van Orman v. Purkett*, 43 F.3d 1201 at 1203 (C.A.8 (Mo.), 1994).

The plaintiff-appellant's view is that this substantial public interest merits review in the Eight Circuit Court of Appeals or the US Supreme

Court and that the Kansas District Court has long since lost the opportunity to delay that review.

Respectfully submitted

S/ Samuel K. Lipari

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Pro se

### **Certificate of Service**

I certify that on December 8, 2008 I have served the opposing counsel with a copy of the foregoing notice using the US Postal Service having sent the copy with postage prepaid to the following:

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ATTORNEY FOR DEFENDANTS  
U.S. BANCORP AND U.S. BANK  
NATIONAL ASSOCIATION

S/ Samuel K. Lipari

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Samuel K. Lipari

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**SAMUEL K. LIPARI,**

**Plaintiff,**

**v.**

**US BANCORP NA and  
US BANK NA,**

**Defendants.**

**CIVIL ACTION**

**No. 07-2146-CM**

**MEMORANDUM AND ORDER**

Plaintiff Samuel K. Lipari filed the instant action in Jackson County Circuit Court on November 28, 2006 (Jackson County Case No. 0616-CV-32307) against defendants US Bancorp NA and US Bank NA. This matter is before the court on plaintiff's Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2) (Doc. 147).

**I. Factual Background**

On December 13, 2006, defendants removed the action to the United States District Court for the Western District of Missouri, Western Division, on the basis of diversity. On April 10, 2007, the United States District Court for the Western District of Missouri transferred the case to this court pursuant to 28 U.S.C. § 1404(a). On September 4, 2008, the court dismissed all of plaintiff's claims except plaintiff's misappropriation of trade secrets claim (Doc. 137). On October 15, 2008, plaintiff filed a Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2). In plaintiff's stipulation, he withdraws his Motion for Leave to Amend Complaint, which had not been ruled on, and stipulates to the dismissal of his misappropriation of trade secrets claim with prejudice. He also states that "the plaintiff realizes that his claims for damages against the defendants under Count

III Trade Secrets Misappropriation Under Section 417.450 RSMO of The Uniform Trade Secrets Act are now dismissed with prejudice under Rule 41(a)(2).” He further states, “The court must now end its conduct toward the parties in relationship to resolving any claim brought by plaintiff. Those claims have now been removed from this proceeding.” In defendants’ response to plaintiff’s stipulation, defendants agree to join the stipulation but only on the condition that the order of dismissal “reflect that plaintiff has been ordered to pay defendants’ attorneys’ fees for his non-compliance as ordered in Doc. No. 115, as well as all applicable costs of the action” (Doc. 153). In his reply, plaintiff disputes the fees and does not agree to dismiss the claims with defendants’ conditions (Doc. 155).

After filing his stipulation of dismissal and before defendants could respond to the stipulation, plaintiff appealed this lawsuit to the Tenth Circuit Court of Appeals. On November 14, 2008, the Tenth Circuit Court of Appeals abated the appeal pending this court’s resolution of plaintiff’s Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2) (Doc. 147).

## **II. Judgment Standard**

Pursuant to Federal Rule of Civil Procedure 41(a)(1), a plaintiff can only voluntarily dismiss a case without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Under Rule 41(a)(2), the court may allow a plaintiff to voluntarily dismiss an action “upon such terms and conditions as the court deems proper.” Fed. R. Civ. P. 41(a)(2). “The rule is designed primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.” *Brown v. Baeke*, 413 F.3d 1121, 1123 (10th Cir. 2005) (quotation omitted). The court should grant a motion for voluntary dismissal “[a]bsent ‘legal prejudice’ to the defendant.” *Id.* (quotation omitted).

When determining “legal prejudice” the court is obligated to consider the novelty of the circumstances of the case. *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997). The court should consider the relevant factors, including: “the opposing party’s effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the present stage of litigation.” *Id.* (citing *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.*, 77 F.3d 354, 358 (10th Cir. 1996)).

Under Rule 41(a)(2), the court may impose terms upon the dismissal of a plaintiff’s claim, such as payment of attorneys’ fees or a limitation on the refiling of certain claims. *See Gonzales v. City of Topeka Kan.*, 206 F.R.D. 280, 283 (D. Kan. 2001) (citing 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2366, at 305–314 (1995)). *Id.* (quoting *American Nat. Bank and Trust Co. v. Bic Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991)). “Conditions are designed to alleviate any prejudice a defendant might otherwise suffer upon refiling of an action.” When the court decides to impose such terms, it must give the plaintiff an opportunity to withdraw its request for dismissal. *See id.*

### **III. Analysis**

This matter cannot be voluntarily dismissed under Rule 41(a)(1) because defendants have answered the complaint and the parties have not filed a joint stipulation of dismissal. Thus, the court will consider plaintiff’s request to dismiss the lawsuit under Rule 41(a)(2). After reviewing the record, the court cannot say that plaintiff’s proposed voluntary dismissal is “[a]bsent ‘legal prejudice’ to the defendant.” On August 18, 2008, the court ordered plaintiff to pay reasonable attorneys’ fees and expenses related to defendants’ Motion To Compel Compliance with Rule 26(a)(1). The court ordered the parties to file pleadings regarding the appropriate amount of the fees and expenses. On November 26, 2008, Magistrate Judge Waxse ordered plaintiff to pay defendant’s reasonable attorneys’ fees and expenses in the amount of \$700 (Doc. 158).

The court finds that at this stage of the proceedings any voluntary dismissal must recognize the Judge Waxse's November 26, 2008 order regarding attorneys' fees and include an order for plaintiff to pay defendants' attorneys' fees and expenses as set forth in that order. At the time plaintiff filed his stipulation, Judge Waxse had awarded defendants their fees but had not set the amount. Because plaintiff was unaware of the amount of fees he would be required to pay when he filed his stipulation for an order of dismissal, plaintiff should have an opportunity to withdraw his stipulation. Plaintiff shall have up to and including December 10, 2008 to withdraw his stipulation for order of dismissal. If plaintiff fails to withdraw his stipulation, the court will dismiss plaintiff's misappropriation of trade secrets claim—the only claim remaining in this action—and order plaintiff to pay the reasonable attorneys' fees and expenses as ordered in the Judge Waxse's November 26, 2008 order.

**IT IS THEREFORE ORDERED that plaintiff shall have up to and including December 10, 2008 to withdraw his stipulation for order of dismissal. If plaintiff fails to withdraw his stipulation, the court will dismiss this action and order plaintiff to pay the reasonable attorneys' fees and expenses as ordered in the Judge Waxse's November 26, 2008 order.**

Dated this 26th day of November 2008, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
**United States District Judge**

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

SAMUEL K. LIPARI,	)	
	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	Case No. 4:06-cv-01012-FJG
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
<i>Defendants.</i>	)	

**PLAINTIFF'S SECOND AMENDED NOTICE OF APPEAL**

Comes now the plaintiff Samuel K. Lipari appearing pro se and gives an amended notice of appeal to supplement the orders sought to be appealed to include the subsequent orders by the Kansas District Court magistrate upholding the defendants' automatic protective orders and ordering the plaintiff to show cause, awarding \$700.00 in attorney fees and the trial judges' memorandum and order.

Respectfully submitted,

S/Samuel K. Lipari  
Samuel K. Lipari  
Plaintiff  
*Pro se*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was served via email, on this 3rd day of December, 2008 to:

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	(Entered: 12/02/2008)
12/05/2008	***Remark: Plaintiff's Second Amended Notice of Appeal was received by this court and then forwarded this date to the District of Kansas for processing at the instruction of chambers. (Carr, Lori) (Entered: 12/05/2008)

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