

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

SAMUEL K. LIPARI,)	
)	
Appellant,)	
)	
v.)	Case No. 08-3087
)	
U.S. BANCORP and U.S. BANK)	
NATIONAL ASSOCIATION,)	
)	
Appellees.)	

APPELLEES' MOTION TO DISMISS

Appellees U.S. Bancorp and U.S. Bank National Association, pursuant to Fed. R. App. P. 27 and Eight Circuit Local Rule 47(A), hereby move to dismiss the appellant's appeal. As grounds for this motion, appellees state:

1. On September 5, 2008, appellant filed his notice of appeal from the Western District of Missouri. Specifically, appellant appeals from the District Court's April 4, 2007 interim order denying appellant's motion for remand and transferring this case to the District of Kansas. (Exhibit A hereto.)

2. This Court is without jurisdiction to decide this appeal in that this matter has been pending in the United States District Court for the District of Kansas since its transfer from the Western District of Missouri on April 9, 2007 and receipt in the District of Kansas April 10, 2007. (Exhibit B (Missouri docket sheet) and Exhibit C (Kansas docket sheet) hereto reflecting physical transfer of files.) As a result, this case has not been pending within the district courts of the Eighth Circuit for more than 17 months.

3. The District Court for the Western District of Missouri did not certify any order for immediate interlocutory appeal under 28 U.S.c. § 1292(b). Appellant did not file a writ request in this Court asking that the District Court be prohibited from accomplishing the transfer

set forth in its April 4, 2007 order. Nor is the order one of the types that is immediately appealable under 28 U.S.c. § 1292(a).

4. This Court is without jurisdiction to decide the appeal in that there is not a final judgment disposing of all claims against all parties. On September 4, 2008, the United States District Court for the District of Kansas entered its Memorandum and Order dismissing all but one of the plaintiff's claims. (Exhibit D hereto.) Count IV, purporting to assert a claim for misappropriation of trade secrets, remains pending in the Kansas federal court.

5. Accordingly, because the Court lacks jurisdiction to hear this appeal, it should be dismissed.

BACKGROUND

The appellant's litigation with these defendants has consumed nearly six years and is reflected in several orders and decisions. *See Medical Supply Chain, Inc. v. US Bancorp. et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003), (*IT'd* 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished) (Exhibit E); *Medical Supply Chain, Inc. v. Novation, et al.*, 419 F. Supp.2d 1316 (D. Kan. 2006), *appeal dismissed* 508 F.3d 572 (10th Cir. 2007). The suit pertinent to this appeal was filed in 2006, removed to federal court and remains pending in the United States District Court for the District of Kansas. (Exhibits A, B, D.)

BASIS FOR DISMISSAL

An appeal should be dismissed when this Court lacks jurisdiction to hear it. This matter is a prime example. Mr. Lipari's claims have been pending (and continue to pend) in the United States District Court for the District of Kansas since April 2007. (Exhibits A-D.) While the notice of appeal purports to challenge interim orders of the United States District Court for the Western District of Missouri, namely its decisions denying remand and ordering transfer, Exhibit A, there is not an appealable order from which the appellant may seek this Court's

review. See *Midwest Motor Express, Inc. v. Central States Southeast and Southwest Pension Fund*, 70 F.3d 1014,1016 (8th Cir. 1996)(transfer orders generally not immediately reviewable); *Saab v. Home Depot U.S.A.*, 469 F.3d 758, 759 (8th Cir. 2006)(orders denying remand ordinarily not immediately appealable).¹ Even if appellant could have sought review of the Missouri federal court order denying remand and transferring this matter to the District of Kansas, either by interlocutory appeal or extraordinary writ, his notice of appeal to this Court some 17 months after the case has been transferred to and litigated in the Kansas federal court is untimely and without merit. See *Integrated Health Servs. of Cliff Manor, Inc. v. THCI Company, LLC*, 417 F.3d 953, 957 (8th Cir. 2005).

An equally compelling reason to dismiss this appeal is the admitted fact that the matter pending in the United States District Court for the District of Kansas has not been fully terminated. No judgment has been entered. While the Court recently dismissed five of the six counts in plaintiffs complaint, Count IV remains pending. (Exhibit D.) Because there is not a final judgment disposing of all claims against all parties, plaintiffs notice of appeal is premature, see *Action Electric, Inc. v. Local 292, Int'l B'hood of Elec. Workers*, 818 F.2d 15, 16 (8th Cir. 1987), in addition to being filed in the wrong Court.

THIS APPEAL IS FRIVOLOUS

Unquestionably, the instant notice of appeal is futile. More than that, the inexplicable delay in seeking appellate review from orders entered by the Missouri federal court seventeen months ago raises this filing to the level of frivolity. It is plain that the appellant cannot seek relief in this Court where the Missouri federal court had lost its jurisdiction for nearly a year and a half. See *Integrated Health Servs. of Cliff Manor, Inc.*, 417 F.3d at 957; *Midwest Motor*

¹ The district court did not certify the order for appeal under 28 U.S.C. § 1292(b) and the order is not otherwise immediately appealable under 28 U.S.C. § 1292(a).

Express, Inc., 70 F.3d at 1016; *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982). Having no legal or factual basis, the appeal is frivolous within the meaning and intent of Fed. R. App. P. 38.

WHEREFORE, appellees U.S. Bancorp and U.S. Bank National Association request that this Court dismiss appellant's appeal and for such other relief as the Court deems just and proper.

Isi Mark A. Olthoff
MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.c.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

JAY E. HEIDRICK MO #54699
SHUGHART THOMSON & KILROY, PC.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR APPELLEES U.S. BANCORP
AND U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the above and foregoing was delivered via United States mail, postage prepaid, this 16th day of September, 2008, to:

Mr. Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

Appellant

*l*si Mark A. Olthoff
Attorney for Appellees U.S. Bancorp and U.S. Bank
National Association