

(Rev. 3/3/08)

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

PRETRIAL ORDER FORM

**PLEASE REVIEW THE ATTACHED PRETRIAL ORDER FORMAT, ALONG WITH
FED. R. CIV. P. 16 AND D. KAN. RULES 16.1 AND 16.2,
AND FOLLOW ALL BRACKETED INSTRUCTIONS.**

Before the pretrial conference, the parties must confer, draft, and timely submit to the court a proposed pretrial order in accordance with the scheduling order and D. Kan. Rule 16. The proposed pretrial order is to be a joint effort of all parties. The parties have an equal obligation to cooperate fully in drafting the pretrial order and to submit an agreed order that the judge can sign at the pretrial conference. It is essential that each party's factual contentions and legal theories be included. If the parties disagree on any particulars, they shall submit a single proposed order with bracketed notations revealing the nature of the disagreement in sufficient detail to enable the court to resolve the dispute at the conference. Submission of separate orders is not acceptable.

By the date set in the scheduling order, counsel for the defendant(s) shall submit the parties' proposed pretrial order (formatted in WordPerfect 9.0, or earlier version) as an attachment to an Internet e-mail sent to the e-mail address of the judge who will conduct the pretrial conference, as listed in paragraph II(E)(2)(c) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases* ("administrative procedures guide"). The proposed pretrial order shall not be filed with the Clerk's Office. The proposed pretrial order shall be in the form attached to this cover memorandum. Counsel and all unrepresented parties shall affix their signatures according to the procedures governing multiple signatures set forth in paragraphs II(C) of the administrative procedures guide.

Do not precede the title of the proposed order with words such as "Plaintiff's," "Defendant's" or "Proposed."

(Rev. 3/3/08)

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

SAMUEL K. LIPARI,)	
)	
)	Plaintiff,
)	
v.)	Case No. 07-CV-02146-CM-DJW
)	
U.S. BANCORP, and)	
)	
U.S. BANK NATIONAL ASSOCIATION,)	
)	
Defendants.)	

PRETRIAL ORDER

Pursuant to Fed. R. Civ. P. 16(e), a pretrial conference was held in this case on July 30, 2008, before the Honorable David Waxse, U.S. Magistrate Judge.

[**Plaintiff:** The plaintiff objects to holding a pretrial conference. The plaintiff has consistently argued that the federal court lacks jurisdiction over his concurrent state court action which was erroneously removed from the State of Missouri 16th Circuit court on the grounds of diversity and has only the jurisdiction over these claims as pendant state law claims dismissed without prejudice in *MSC v. Neoforma, Inc.* Case No. 05-2299. However, this court lost jurisdiction over this matter in controversy on July 11, 2008 under controlling precedent of the Tenth Circuit in *United States v. Prows*, 448 F.3d 1223, 1228 (10th Cir. 2006) (recognizing the general rule that a notice of appeal divests the district court of jurisdiction over substantive claims).”

This court erroneously continued to exert jurisdiction but on August 11, 2008 the Tenth Circuit issued an order in *MSCI v Neoforma, Inc.* Case No. 08-3187 denying dismissal of the appeal. This court’s jurisdiction under Case No. 07-CV-02146-CM-DJW as a removed state court action over 05-2299’s pendant state law claims is impacted by the special rule applicable to exclusive jurisdiction over federal antitrust claims *Holmes Financial Associates, Inc. v. Resolution Trust Corp.*, 33 F.3d 561 (C.A.6 (Tenn.), 1994) and this court will permanently lose

jurisdiction 1) under the exclusive federal jurisdiction rule, 2) the reversal of the dismissal of the plaintiff's federal and pendant claims in 05-2299, and 3) the recognition that the removal never had the required complete diversity of citizenship for 28 U.S.C. § 1332 and must be remanded under 28 U.S.C. § 1447 (c)'s requirement that "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded".

The appeal concerns whether this is the same matter in controversy as *MSCI v. Neoforma et al* Case No. 05-2299 and whether substantive claims related to substantive claims still included in this case over the same conduct (aspects of the issues involved in the appeal halting this court under *U.S. v. Salzano*, 994 F.Supp. 1321 (D. Kan., 1998)) were lawfully dismissed in light of the US Supreme Court's overturning of the Tenth Circuit Rule 12(b)(6) standard or practice used by this court in *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007). This court's orders subsequent to the July 11, 2008 Notice of Appeal are "null and void" under *Garcia v. Burlington Northern R.R. Co.*, 818 F.2d 713, 721 (10th Cir.1987).]

This pretrial order shall supersede all pleadings and control the subsequent course of this case. It shall not be modified except by consent of the parties and the court's approval, or by order of the court to prevent manifest injustice. *See* Fed. R. Civ. P. 16(d); D. Kan. Rule 16.2(c).

1. APPEARANCES.

The plaintiff, Samuel Lipari, appeared at the pretrial conference *pro se*. The defendants, U.S. Bancorp & U.S. Bank National Association, appeared through counsel, Mark Olthoff and Jay Heidrick.

2. NATURE OF THE CASE.

[Insert a brief statement, preferably in one sentence, which characterizes the type of action involved, e.g., "This is a Title VII employment case involving claims of race and sex discrimination." It is not necessary or appropriate to set forth a narrative of the facts and legal conclusions as claimed by plaintiff, or that plaintiff's claims are disputed by defendant.]

This is a claim for breach of contract and intentional torts stemming from the defendants' alleged refusal to provide escrow accounts to the plaintiff's former company in October 2002 and alleged disclosure of trade secrets.

3. PRELIMINARY MATTERS.

a. Subject Matter Jurisdiction. Subject matter jurisdiction is invoked under 28 U.S.C. § 1332. Defendants contest this court's subject matter jurisdiction in that the plaintiff lacks standing to bring this claim.

b. Personal Jurisdiction. The court's personal jurisdiction over the parties is not disputed.

c. Venue. The parties stipulate that venue properly rests with this court.

d. Governing Law. Subject to the court's determination of the law that applies to the case, the parties believe and agree that the substantive issues in this case are governed by Missouri law.

[Describe what law applies to this case, or to particular claims or defenses. If disputed, briefly state the issue presented and whether the court has ruled on the issue.]

4. STIPULATIONS.

[Separately state and letter each stipulation, including the following, where appropriate and as agreed to by the parties in this case.]

a. The parties have not agreed on any uncontroverted facts.

b. The parties have not stipulated to any exhibits that constitute business records within the scope of Fed. R. Evid. 803(6).

c. Copies of exhibits may be used during trial in lieu of originals.

d. The parties have not stipulated to the admission of any trial exhibits.

e. By no later than 12:00 p.m. each day of trial, the parties shall confer and exchange a good faith list of the witnesses who are expected to testify the next day of trial.

5. FACTUAL CONTENTIONS.

a. Plaintiff's Contentions.

[Provide a concise, non-argumentative narrative statement of plaintiff's version of the ultimate facts as they pertain to the pertinent issues of this case. "Ultimate" facts are those that are necessary to determine issues in the case, as distinguished from evidentiary facts supporting them, i.e., it is neither necessary nor appropriate to recite every factual nuance that will be presented at trial. In simple cases, these contentions typically should be no more than 3-4 paragraphs, and even in complex cases they should be no more than 4-5 pages.]

b. Defendants' Contentions.

In October 2002, Samuel Lipari approached U.S. Bank to consider an agreement whereby U.S. Bank would provide escrow accounts for his business, Medical Supply Chain, Inc. Mr. Lipari sought the escrow accounts to hold "tuition" money that would be paid by candidates or students that Medical Supply Chain, Inc. would train and educate.

At or about the same time, Medical Supply Chain also sought to obtain a line of credit from U.S. Bank. While at the branch in Independence, Missouri, Mr. Lipari claims he provided branch officials a copy of Medical Supply Chain's business plan so bank officials could consider it in determining whether to provide the line of credit.

Mr. Lipari and certain U.S. Bank employees, namely Brian Kabbes, discussed the potential escrow agreement. A sample contract was drafted by Medical Supply and some preliminary negotiations ensued. The sample contract was a three party contract proposed between U.S. Bank, Medical Supply and the individual "student" who would deposit the escrow funds. Ultimately, U.S. Bank and Lipari did not reach an agreement on the escrow accounts and U.S. Bank informed Mr. Lipari of this decision on October 15, 2002. The contract was never executed by any party. Likewise, U.S. Bank never approved Mr. Lipari for the line of credit. U.S. Bancorp had no involvement in these negotiations and was not a party to the proposed escrow agreement.

After two failed attempts to bring this suit in the name of Medical Supply Chain, Mr. Lipari now brings this suit as the alleged assignee of the assets of his dissolved

corporation. But Mr. Lipari lacks standing to bring this claim as corporate dissolution does not automatically assign the claims to Mr. Lipari and he has provided no proof of an express assignment.

The defendants deny they breached any agreement or committed any tortious act. There was never any agreement from U.S. Bank to provide either the escrow accounts or the line of credit. There is no signed contract between the parties and U.S. Bank never made any verbal agreements with Mr. Lipari. Medical Supply never paid U.S. Bank any escrow fees and there is no evidence that any of the purported candidates agreed to the proposed escrow accounts or intended to deposit any “tuition” money into the accounts. There is no allegation that U.S. Bancorp had any involvement with either the line of credit or the escrow accounts.

The defendants had valid business reasons that justified their decisions to decline the escrow accounts and plaintiff’s request for financing. These business reasons were reasonable and appropriate under the circumstances.

While the plaintiff alleges he provided Medical Supply’s purported business plan, defendants contend the plan (or portions of it) had been previously distributed to outside third parties and cannot be classified as trade secret information. Nor did they disclose it. Regardless, the defendants did not wrongfully use, disclose or misappropriate any trade secret information. There is no evidence that anyone outside of U.S. Bank received the business plan.

Finally, defendants contend that the plaintiff has not suffered any legally cognizable or submissible damages. Because the funds to be deposited by the candidates were to be held in escrow, the funds did not belong to Medical Supply Chain and it cannot claim those funds as damages. While it is possible some unknown funds may have been used as capital in Medical Supply Chain’s nascent business operations, Medical Supply Chain’s alleged damages would then be limited to future lost profits.

However, plaintiff has not disclosed his damages calculations as required by Fed. R. Civ. P. 26(a) or in other discovery. Any claim for future lost profits is wholly speculative and Mr. Lipari has failed to designate any expert to provide opinion testimony on this issue.

6. THEORIES OF RECOVERY.

a. List of Plaintiff's Theories of Recovery. Plaintiff asserts that [he] [she] [it] is entitled to recover upon the following theory [alternative theories]:

[Provide a complete but concise list, preferably in a single sentence or in "bullet point" format, of plaintiff's theories of recovery, with each theory of recovery correlated to a particular count of the complaint, e.g., "Defendant terminated plaintiff's employment in violation of Title VII, specifically, by discriminating against her based on race (Count 1 of complaint) and sex (Count 2 of complaint)." If certain counts of the complaint have been abandoned by plaintiff, or dismissed by the court, indicate that here. If this case involves counterclaims, cross-claims, or third-party claims, then similar lists for those theories of recovery should be set forth in separate subparagraphs.]

Count I. Cause of action for breach of contract

Count II. Cause of action for fraud

Count III. Cause of action for trade secret misappropriation under section 417.450 RSMO of the Uniform Trade Secrets Act.

Count IV. Cause of action for breach of fiduciary duty

Count V. Cause of action for prima facie tort

[Plaintiff. Proposed amended counts:

Count VI. Cause of action for declaratory and injunctive relief against US Bank NA and US Bancorp that Subtitle b, section 351 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 amendment of 31 U.S.C. §5318(g) violates the First and Fifth Amendments of the United States Constitution.

Counts to be restored through appeal (in parentheses is the number from the original *MSCI v Novation LLC* complaint):

COUNT VII (I). Combination and conspiracy in restraint of trade or commerce (15 U.S.C. §§ 1,15)

Group Boycott Under Sherman 1

Allocation of Customers Under Sherman 1

Horizontal Price Restraint Under Sherman 1

Vertical Price Restraint Under Sherman 1

Tying Agreements Under Sherman 1

COUNT VIII (II). Injunctive relief for combination and conspiracy in restraint of trade or commerce (15 U.S.C. §§ 1,26)

COUNT IX (III). Damages For Monopolization (15 U.S.C. §§ 2,15)

Threat of USA PATRIOT Act Suspicious Activity Reporting

Violation of §802 of The USA PATRIOT Act

The Filing of a Malicious USA PATRIOT Act Suspicious Activity Report (SAR)

Harassing Medical Supply and its Agents Outside of This Action

Unilateral Refusal To Deal

COUNT X (IV). Injunctive relief for monopolization (15 U.S.C. §§ 2,26)

COUNT XI (V). Damages for interlocking directors (15 U.S.C. § 19)

COUNT XII (VI). Damages for combination and conspiracy in restraint of trade or commerce (26 MO. § 416.031(1), § 416.121(1),(1))

COUNT XIII (VII) Injunctive relief for combination and conspiracy in restraint of trade or commerce (26 MO. § 416.031(1), § 416.071(1), (2), § 416.121(1)(1)).

COUNT XIV (VIII) Damages for monopolization (26 MO. § 416.031(2), § 416.121(1),(1)).

COUNT XV (IX) Injunctive relief for monopolization (26 MO. § 416.031(2), § 416.071(1), (2), § 416.121(1),(2))

COUNT XVI (X). Damages for tortuous interference with contract or business expectancy (GE Sale of Lease, Property and Mortgage)

COUNT XVII (XV). Damages for Racketeering Influenced Corrupt Organization (RICO) conduct. (18 U.S.C. § 1962(c), 18 U.S.C. § 1962(d))

COUNT XVIII (XVI). Damages for malicious filing of a suspicious activity report (SAR) under the USA PATRIOT ACT (Pub. L. No. 107-56 (2001), 18 U.S.C. § 1030 (e), 31 U.S.C. § 5318 (g)(3)).]

b. Essential Elements of Plaintiff's Theories of Recovery

[For each theory of relief, the parties should carefully consider the controlling precedents and jury instructions and be fully conversant with the essential elements that must be proven to establish a prima facie case. If a particular element is uncontroverted, that should be noted parenthetically in the listing of elements. This format should be repeated, with separately lettered subparagraphs, for each theory of relief. If this case involves counterclaims, cross-claims, or third-party claims, a similar articulation of the applicable essential elements of such claims should be set forth in separate subparagraphs.

In most cases, if the parties research the law and then confer in good faith about the applicable essential elements, they should be able to recite the elements on an agreed basis. However, if the parties disagree, that should be reflected in this part of the pretrial order, with the parties citing the authorities that support their respective positions.]

A. Essential Elements of Plaintiff's First Theory of Recovery Count I Breach of Contract. Subject to the court's determination of the law that applies to this case, the parties agree [plaintiff believes] that, in order to prevail on this theory of recovery, plaintiff has the burden of proving the following essential elements from *Midwest Bankcentre v. Old Republic Title*, 247 S.W.3d 116 at 128 (Mo. App., 2008):

- 1) the existence of an enforceable contract between the parties;
- 2) mutual obligations arising under the terms of the contract;

- 3) one party's failure to perform the obligations imposed by the contract;
- 4) the resulting damage to the other party.

Breach of Contract Duty of Fair Dealing

- 1) Implied in every contract is a covenant of good faith and fair dealing, requiring that the performance and enforcement terms be carried out in good faith. *Schell v. LifeMark Hospitals of Missouri*, 92 S.W.3d 222, 229 (Mo.App. W.D.2002)
- 2) the covenant prevents one party to a contract from exercising a judgment conferred by the express terms of the agreement in a manner that evades the spirit of the transaction or denies the other party the expected benefit of the contract. *Envil. Prot., Inspection, and Consulting, Inc. v. City of Kansas City*, 37 S.W.3d 360, 366 (Mo.App. W.D.2000)

B. Essential Elements of Plaintiff's Second Theory of Recovery Count II Fraud.

Subject to the court's determination of the law that applies to this case, the parties agree [plaintiff believes] that, in order to prevail on this theory of recovery, plaintiff has the burden of proving the following essential elements under *Murray v. Crank*, 945 S.W.2d 28, 31 (Mo.App. E.D.1997):

- 1) a false, material representation;
- 2) the speaker's knowledge of its falsity or his/her ignorance of the truth; 3) the speaker's intent that his/her representation should be acted upon by the hearer in the manner reasonably contemplated;
- 4) the hearer's ignorance of the falsity of the representation;
- 5) the hearer's reliance on the representation being true;
- 6) the hearer's right to rely thereon;
- 7) the hearer's consequent and proximately-caused injuries.

C. Essential Elements of Plaintiff's Third Theory of Recovery Count III. Trade secret misappropriation under section 417.450 RSMO of the Uniform Trade Secrets Act. Subject to the court's determination of the law that applies to this case, the parties agree [plaintiff believes] that, in order to prevail on this theory of recovery, plaintiff has the burden of proving the following essential elements:

1) The defendants misappropriated a trade secret as proscribed in Mo. Stat. Ann. § 417.453(2) (West 2001).

(a) Acquisition of a trade secret of a person by another person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) Disclosure or use of a trade secret of a person without express or implied consent by another person who:

a. Used improper means to acquire knowledge of the trade secret; or

b. Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake; or

c. At the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:

i. Derived from or through a person who had utilized improper means to acquire it;

ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

iii. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

Mo. Stat. Ann. § 417.453(2) (West 2001).

2) The misappropriated information was a trade secret under *Nat'l Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 18 (Mo.banc 1966)

a. “[A] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” Id.

b. Factors to consider in determining whether the information is the holder's trade secret include:

(1) the extent to which the information is known outside of the holder's business;

(2) the extent to which it is known by employees and others involved in the holder's business;

(3) the extent of measures taken by the holder to guard the secrecy of the information;

(4) the value of the information to the holder and to the holder's competitors;

(5) the amount of effort or money expended by the holder in developing the information; and

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

D. Essential Elements of Plaintiff's First Theory of Recovery Count IV. Breach of Fiduciary duty. Subject to the court's determination of the law that applies to this case, the parties agree [plaintiff believes] that, in order to prevail on this theory of recovery, plaintiff has the burden of proving the following essential elements:

1) For breach of fiduciary duty is asserted as a tort claim, the proponent must establish that:

(a) a fiduciary duty existed between it and the defending party;

- (b) that the defending party breached the duty; and
- (c) that the breach caused the proponent to suffer harm. *Grewell v. State Farm Mut. Auto. Ins. Co.*, 162 S.W.3d 503, 508 (Mo.App.2005).

2) Existence of a fiduciary duty determined by:

- (a) A fiduciary relationship arises from the parties' relationship such as an agent to his principal, or
- (b) Where one places trust in another so that the latter gains superiority and influence over the former, and
- (c) the agent has the power to affect the legal relations of the principal
- (d) Once an agency relationship has been established, a fiduciary relationship arises as a matter of law. *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386 at 394-395 (Mo. App. E.D., 1998)
- (e) An escrow agent is a fiduciary under an escrow agreement. *Wagner v. Mortgage Information Services, Inc.*, No. WD 67717 (Mo. App. 6/24/2008)
- (f) Escrow agreement can be written or oral. "However, as in *Eastern Atlantic*, 727 S.W.2d at 423, involving escrow agents, the duty... would have arisen from either a written or oral contract." *State Resources v. Lawyers Title Ins.*, 224 S.W.3d 39 at 48-49 (Mo. App., 2007).

E. Essential Elements of Plaintiff's First Theory of Recovery Count V. Prima facie tort. Subject to the court's determination of the law that applies to this case, the parties agree [plaintiff believes] that, in order to prevail on this theory of recovery, plaintiff has the burden of proving the following essential elements under *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 at 315 (Mo., 1993):

- 1) an intentional lawful act by defendant;
- 2) defendant's intent to injure the plaintiff;

3) injury to the plaintiff; and

4) an absence of or insufficient justification for defendant's act.

[**Plaintiff:** Remaining claims essential elements will be delineated when the court regains jurisdiction over them.]

7. DEFENSES.

a. List of Defendants' Defenses and Affirmative Defenses. Defendants assert the following defenses and affirmative defenses:

[**Plaintiff:** Defendants are estopped from asserting affirmative defenses denying validity or effect of contract to provide escrow accounts. Defendants have designated the emails establishing the contract to provide escrow agency and accounts as evidence. The escrow contract email and escrow agreement sent out to plaintiff's candidates after Kabbes' approval contained the change requested by Kabbes benefiting US Bank by designating the US Bancorp owned fund. "...in *Dunn*, the Supreme Court of Missouri observed that "[b]y accepting benefits, a party may be estopped from questioning the existence, validity, and effect of a contract." *Dunn*, 112 S.W.3d at 437." *Netco, Inc. v. Dunn*, No. 26064 (MO 4/15/2005)]

i. The plaintiff lacks standing to maintain this claim;

[**Plaintiff:** under Missouri law the plaintiff is the party in interest through both assignment and equity after dissolution and thereby entitled to bring this action in his own name. *Carolan v. Nelson*, 226 S.W.3d 923 at 926 (Mo. App., 2007)]

ii. There was never an agreement to provide escrow services between Medical Supply and the defendants;

iii. The proposed escrow agreement was a three-party contract and there was never a third party to the agreement;

iv. Plaintiff has not been damaged;

v. Any alleged damages are speculative as a matter of law;

[Plaintiff: under Missouri law the plaintiff's anticipated profits are recoverable, the owner's spread sheet in the business plan is sufficient to determine the amount. *BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179 at 196 (Mo. App., 2007)]

vi. Defendants did not make a material false statement to the plaintiff or Medical Supply's representatives;

[Plaintiff:The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved. *Freeman v. Myers*, 774 S.W.2d 892, 894 (Mo. App. W.D. 1989)(quoting Restatement (Second) of Torts section 533 (1977)). *Wagner v. Mortgage Information Services, Inc.*, No. WD 67717 (Mo. App. 6/24/2008)]

vii. Plaintiff did not reasonably rely upon any material false statement made by the defendants to its detriment;

viii. The defendants committed no malicious or intentional act to injure the plaintiff;

ix. Medical Supply did not transmit any trade secret information to the defendants;

x. The defendants did not misappropriate or disclose any of Medical Supply's alleged trade secrets;

xi. The plaintiff's breach of contract claim is barred for lack of consideration;

xii. The plaintiff's breach of contract claim is barred under the statute of frauds;

[**Plaintiff:** Escrow agreement can be written or oral. “However, as in *Eastern Atlantic*, 727 S.W.2d at 423, involving escrow agents, the duty...would have arisen from either a written or oral contract.” *State Resources v. Lawyers Title Ins.*, 224 S.W.3d 39 at 48-49 (Mo. App., 2007).]

xiii. The defendants did not owe a fiduciary to the plaintiff;

[**Plaintiff:** An escrow agent is a fiduciary under an escrow agreement. *Wagner v. Mortgage Information Services, Inc.*, No. WD 67717 (Mo. App. 6/24/2008)]

xiv. The defendants did not breach any alleged fiduciary duty;

xv. The plaintiff has failed to properly allege fraud under Fed. R. Civ. P. 9(b);

xvi. The defendants had a valid business decision to not provide the alleged escrow accounts to the plaintiff and were reasonable in their decision;

xvii. The plaintiff’s claim for future damages is speculative and conjectural;

xviii. The plaintiff has failed to mitigate his damages;

[**Plaintiff:** No duty to mitigate damages on breach of fiduciary duty.

Wagner v. Mortgage Information Services, Inc., No. WD 67717 (Mo. App. 6/24/2008)]

xix. The claimed escrow contract had a cancellation provision that was validly exercised by defendants;

xx. Defendant U.S. Bancorp had no involvement in the escrow transaction;

xxi. Plaintiff and defendants were not in a fiduciary relationship;

xxii. Plaintiff’s claims are barred by the parol evidence rule.

xxiii. Plaintiff’s claims for *prima facie* tort are barred by reason of justification or privilege and defendants’ good faith.

xxiv. Plaintiff's claim for punitive damages fails as a matter of law.

[Provide a complete but concise list, preferably in a single sentence or in "bullet point" format, of all of the defendant's defenses, regardless of whether the defense is a mere denial of a certain claim or whether the defense is affirmative in nature. When applicable, list the specific grounds of comparative fault. If this case involves counterclaims, cross-claims, or third-party claims, then similar lists of defenses should be set forth in separate subparagraphs.]

b. Essential Elements of Defendants' First Affirmative Defense, Failure

to Mitigate Damages. Subject to the Court's determination of the law that applies to this case, the defendants believe that, in order to prevail on this affirmative defense, defendants have the burden of proving the following essential elements:

- First, plaintiff failed to seek alternate banks to provide the escrow services and the line of credit, and

[Plaintiff: No requirement at law mitigation had to be with a bank and not GE Capital or Escrow Agency through Shook Hardy & Bacon law firm]

- Second, plaintiff thereby failed to use ordinary care, and

[Plaintiff: Ordinary care can countenance reasonable reliance on USA PATRIOT Act "SAR" threat by US Bancorp excluding plaintiff from banks]

- Third, plaintiff thereby sustained damage that would not have occurred otherwise. MAI 32.29

[Plaintiff: Complaint alleges plaintiff successfully mitigated is damages by obtaining contractual property and financing rights from General Electric but for US Bancorp through their counsel Shughart Thomson & Kilroy interfering with plaintiff's GE contracts and interfering in subsequent redress.]

c. Essential elements of Defendants' Second Affirmative Defense, Lack

of Standing. Subject to the Court's determination of the law that applies to this case, the defendants believe that, in order to prevail on this affirmative defense, defendants have the burden of proving that the plaintiff does not possess a valid assignment of right to this claim from Medical Supply.

[Plaintiff: under Missouri law the plaintiff is the party in interest through both assignment and equity after dissolution and thereby entitled to bring this action in his own name. *Carolán v. Nelson*, 226 S.W.3d 923 at 926 (Mo. App., 2007)]

d. Essential elements of Defendants' Third Affirmative Defense, Statute of Frauds. Subject to the Court's determination of the law that applies to this case, the defendants believe that, in order to prevail on this affirmative defense, defendants have the burden of proving the following elements:

- The transaction for escrow services was a credit agreement to provide financial services; and

[**Plaintiff:** Escrow agreement is not a credit agreement under Missouri Law]

- There is no written contract setting forth the terms of the agreement.

[**Plaintiff:** Contract to provide escrow agreements is in writing via successive emails under E-Sign Act and Missouri state law]

[**Plaintiff:** Escrow agreement can be written or oral. "However, as in *Eastern Atlantic*, 727 S.W.2d at 423, involving escrow agents, the duty...would have arisen from either a written or oral contract." *State Resources v. Lawyers Title Ins.*, 224 S.W.3d 39 at 48-49 (Mo. App., 2007).]

e. Essential elements of Defendants' Fourth Affirmative Defense, Valid Business Justification. Subject to the Court's determination of the law that applies to this case, the defendants believe that, in order to prevail on this affirmative defense, defendants have the burden of proving there was a valid business reason for declining Medical Supply's request for escrow services.

[This information should only be provided for those defenses that are truly affirmative in nature, meaning those on which the party defending a particular claim bears the burden of proof, e.g., waiver. For each affirmative defense, the parties should carefully consider the controlling precedents and jury instructions and be fully conversant with the essential elements that must be proven. If a particular element is uncontroverted, that should be noted parenthetically in the listing of elements. This format should be repeated, with separately lettered subparagraphs, for each affirmative defense. If this case involves counterclaims, cross-claims, or third-party claims, a similar articulation of the applicable essential elements of the pleaded affirmative defenses should be set forth in separate subparagraphs.]

In most cases, if the parties research the law and then confer in good faith about the applicable essential elements, they should be able to recite the elements on an

agreed basis. However, if the parties disagree, that should be reflected in this part of the pretrial order, with the parties citing the authorities that support their respective positions.]

8. FACTUAL ISSUES.

One or more of the parties believe that the following material issues will need to be resolved at trial by the trier of fact if summary judgment is not granted:

a. Did the defendants and Medical Supply Chain reach an agreement to provide escrow services? If so, was the agreement executed in writing?

b. If an agreement existed, did the defendants properly cancel the alleged agreement to provide escrow services?

c. Did the defendants commit any intentional or malicious act toward Medical Supply?

d. Did the defendants make any intentional material misrepresentations to Medical Supply with the intent to induce Medical Supply to act or refrain from acting in a particular manner?

e. Did Medical Supply rely on any alleged material misrepresentations made by the defendants to its detriment?

f. Has the plaintiff suffered any damages, and if so, what is the amount of such damages?

g. Did the defendants have valid business justifications for declining the escrow agreement?

h. Did the Medical Supply mitigate its alleged damages?

i. Did Medical Supply provide the defendants with trade secret information and if so, did the defendants misappropriate or disclose that trade secret information to third parties?

[The court expects the parties to confer in good faith and then formulate a joint list the major factual issues that are reasonably expected to determine the outcome of the case at

trial. Even in complex cases, the court anticipates that this list should contain no more than 10 such issues.

Issues should only be included here if there is a good faith disagreement by the parties. If an essential element of a theory of relief or affirmative defense is uncontroverted, that element should not be reflected as a factual issue.

In most cases, some issues will apply to all of the pleaded theories of relief and defenses, e.g., “Whether plaintiff suffered damages as a result of defendant’s conduct and, if so, the nature and extent of those damages.” However, the parties should indicate whether an issue applies only to particular theory of relief or affirmative defense. In any event, these issues should be specifically framed, e.g., “Did defendant have actual notice of the allegedly dangerous condition on its premises before plaintiff slipped and fell, as alleged in Count 1 of plaintiff’s complaint?”

Although the parties might disagree about the existence or description of such issues, do not submit separate lists for plaintiff and defendant; simply list all issues that any party believes exist. The only objection in this part of the pretrial order should be if a proposed factual issue has not been fairly preserved by the pleadings.]

9. LEGAL ISSUES.

One or more of the parties believe that the following are the significant legal or evidentiary issues that will need to be resolved by the court in this case, whether on summary judgment motion or at trial:

- a.** Is there a valid assignment of right to this cause of action between plaintiff and Medical Supply sufficient to give plaintiff standing to bring this claim?
- b.** Are the plaintiff’s alleged damages speculative as a matter of law?
- c.** Did the defendants owe Medical Supply a fiduciary duty?
- d.** Does the plaintiff have sufficient evidence for each element of his pleaded causes of action to avoid summary judgment?
- e.** Is the plaintiff’s claim for breach of oral contract barred by the statute of frauds?

[Here again, the court expects the parties to confer in good faith and then formulate a list of the major legal issues that are reasonably expected to determine the outcome of the case. Even in complex cases, the court anticipates that this list should contain no more than 10 such issues.

Some issues will apply to all of the pleaded theories of relief and defenses, but counsel should indicate whether an issue applies only to a particular theory of relief or affirmative defense. In any event, these legal issues should be specifically framed, e.g., "Whether the oral contract alleged by the plaintiff in Count 2 of its complaint is barred by the Statute of Frauds provision found in section 2-201 of the Uniform Commercial Code." If defendant asserts that plaintiff has failed to state a claim upon which relief can be granted, defendant must articulate exactly which essential elements of a prima facie case plaintiff has not pleaded or is unable to prove.

Although the parties might disagree about the existence or description of such issues, do not submit separate lists for plaintiff and defendant; simply list all issues that any party believes exist. The only objection in this part of the pretrial order should be if a proposed legal issue has not been fairly preserved by the pleadings.]

10. DAMAGES.

a. Plaintiff's Damages.

[State the injuries suffered, loss sustained, and/or the nature of the damages sustained. Include the dollar amount of damages and/or any other relief requested. This should be a specific, itemized list. In addition, state whether plaintiff claims an entitlement to attorneys' fees and, if so, the specific statutory or other basis for such fees.]

Breach of contract, fraud, and statutory violations are not inconsistent legal theories of recovery a plaintiff asserting all of those claims is not required to make an election of remedies and may recover consequential damages in addition to actual damages and benefit-of-the bargain damages. *Ullrich v. Cadco, Inc.*, 244 S.W.3d 772 at pg. 779 (Mo. App., 2008).

Anticipated profits of a commercial business are recoverable if the plaintiff can prove with reasonable certainty that (1) the defendant's conduct caused some loss of profit; and (2) the extent of the loss. *Refrigeration Industries, Inc. v. Nemmers*, 880 S.W.2d 912, 920 (Mo.App. W.D.1994).

"Once the plaintiff has established the fact of lost profits, to establish the amount of lost profit with reasonable certainty, "all that is required by Missouri courts" is that it be supported by the best evidence available. *Refrigeration Industries*, 880 S.W.2d at 920 (emphasis added); see also *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 55 (Mo. banc 2005); *Smith Moore & Co. v. J.L. Mason Realty & Inv., Inc.*, 817 S.W.2d 530, 534 (Mo.App. E.D.1991) (reasoning that "the requirement that damages be shown with certainty is on the fact of damages

and not on the particular amount.") As we held in *Smith Moore & Co. v. J.L. Mason Realty & Investment, Inc.*, a plaintiff produces the best evidence available when he or she produces "all relevant facts tending to show the extent of damages and one is not excused for a breach of contract resulting in damages simply because those damages may not be established with certainty." 817 S.W.2d at 534. Moreover, a "business owner's testimonial evidence is sufficient to provide the trier of fact with a rational basis for estimating damages to the plaintiff, including lost profits." *Parshall v. Buetzer*, 195 S.W.3d 515, 522 (Mo.App. W.D.2006) (internal citations omitted)."

BMK Corp. v. Clayton Corp., 226 S.W.3d 179 at 196 (Mo. App., 2007)

b. Defendant's Damages.

None claimed.

[State "None claimed" if appropriate. If defendant is asserting a counterclaim for damages, however, state the specific injuries suffered, loss sustained, and/or the nature of any damages sustained and claimed by defendant. Include the dollar amount of damages and/or any other relief requested. This should be a specific, itemized list. In addition, regardless of whether defendant has asserted a counterclaim, state whether defendant claims an entitlement to attorneys' fees and, if so, the specific statutory or other basis for such fees.]

11. NON-MONETARY RELIEF REQUESTED, IF ANY.

None.

[State "None" if only money damages are sought. Otherwise, specify any non-monetary relief sought by any party, e.g., injunctive relief, specific performance, or rescission. Include an explanation of the statutory and other bases for the requested non-monetary relief. For example, in the context of a request for a permanent injunction, explain the nature of the irreparable injury, and how the injury outweighs any potential damage to the opposing party.]

12. AMENDMENTS TO PLEADINGS.

[Defendants None.]

[**Plaintiff** Complaint is to be amended as follows: Count VI is added with the plaintiff's cause of action for declaratory and injunctive relief against US Bank NA and US Bancorp that Subtitle b, section 351 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 amendment of 31 U.S.C. §5318(g) violates the First and Fifth Amendments of the United States Constitution.

On March 26, 2008, the plaintiff made a motion for leave to amend his pleading subsequent to the court's ruling on the defendants' second Motion to Dismiss there has been no ruling on the motion to dismiss and this motion was denied without prejudice.

On July 18th, 2008 the plaintiff made a second motion to amend his pleading for declaratory and injunctive relief which was denied in a void order after this court lost jurisdiction.]

13. DISCOVERY.

Under the scheduling order and any amendments, all discovery was to have been completed by July 1, 2008. Discovery is incomplete in that the following motions are currently pending:

a. Defendants' Motion for Protective Order relating to Plaintiff's First Requests for Production, Doc. No. 59, filed March 17, 2008.¹²

b. Defendants' Motion to Compel Compliance with Fed. R. Civ. P. 26(a), Doc. No. 68, filed April 22, 2008.³⁴

[**Defendants** ¹ In addition to seeking a Protective Order on these document requests, the defendants also served formal objections to the requests. The plaintiff has not filed a Motion to Compel and has therefore waived any right to challenge the objections pursuant to D. Kan. R. 37.1(b). Thus, this Motion is largely moot.]

[**Plaintiff** ² The production of documents was stayed after filing of the request for protective order under Rule 26(c) pursuant to D. Kan. R. 26.2, the plaintiff timely opposed each protective order and under D. Kan. R. 26.2 the issue is awaiting resolution by the court.]

c. Plaintiffs' Motion for Protective Order regarding Defendants' Notice of Deposition, Doc. No. 80 filed May 16, 2008.

d. Defendants' Motion for Protective Order regarding Plaintiff's Notice of Deposition, *Duces Tecum* for a Corporate Designee, Doc. No. 82 filed May 19, 2008.⁵

Additional depositions may therefore be necessary, depending on the Court's ruling on these Motions.

Unopposed discovery may continue after the deadline for completion of discovery so long as it does not delay the briefing of or ruling on dispositive motions, or other pretrial preparations. Under these circumstances, the parties may conduct discovery beyond the deadline for completion of discovery if all parties are in agreement to do so, but the court will not be available to resolve any disputes that arise during the course of this extended discovery.

[State that discovery is "complete" in the usual case. However, if discovery is incomplete and one or more of the parties proposes that discovery be extended generally or for limited purposes, state specifically what further discovery remains to be completed and whether any party objects to such discovery. In addition, state when that discovery can be completed and why, in the exercise of due diligence, the proposed discovery could not have been completed by the deadline earlier set by the court.]

14. WITNESSES AND EXHIBITS.

a. Final Witness and Exhibit Disclosures Under Rule 26(a)(3).

Defendants submitted their preliminary witness and exhibit lists on May 16, 2008, pursuant to the Court's Scheduling Order. Plaintiff filed no witness or exhibit list. The

[**Defendants**³ Discovery has closed and the deadline for dispositive motions is August 15, 2008. Therefore, the plaintiff would not be able to use any withheld information in any trial, hearing or motion pursuant to Fed. R. Civ. P. 37(c)(1) and this Motion is therefore also largely moot.]

[**Plaintiff**⁴ Plaintiff complied with Rule 26(a), the defendants and magistrate were served the requested documents prior to the motion to compel. Discovery was stayed by unresolved protective orders under D. Kan. R. 26.2

[**Plaintiff**⁵ See plaintiff's footnote 2, plaintiff timely opposed Rule 30(d) protective order and awaits resolution by the court under D. Kan. R. 26.2.]

parties' final witness and exhibit disclosures pursuant to Fed. R. Civ. P. 26(a)(3)(A) shall be filed no later than 21 days before trial. With regard to each witness disclosed under Fed. R. Civ. P. 26(a)(3)(A)(i), the disclosures also shall set forth the subject matter of the expected testimony and a brief synopsis of the substance of the facts to which the witness is expected to testify. Witnesses expected to testify as experts shall be so designated. Witnesses and exhibits disclosed by one party may be called or offered by any other party. Witnesses and exhibits not so disclosed and exchanged as required by the court's order shall not be permitted to testify or be received in evidence, respectively, except by agreement of counsel or upon order of the court. The parties should bear in mind that seldom should anything be included in the final Rule 26(a)(3)(A) disclosures that has not previously appeared in the initial Rule 26(a)(1) disclosures or a timely Rule 26(e) supplement thereto; otherwise, the witness or exhibit probably will be excluded at trial. *See* Fed. R. Civ. P. 37(c)(1).

b. Objections. The parties shall file any objections under Fed. R. Civ. P. 26(a)(3)(B) no later than 14 days before trial. The court shall deem waived any objection not timely asserted, unless excused by the court for good cause shown.

c. Marking and Exchange of Exhibits. All exhibits shall be marked no later than 5 business days before trial. The parties shall exchange copies of exhibits at or before the time they are marked. The parties shall also prepare lists of their expected exhibits, in the form attached to this pretrial order, for use by the courtroom deputy clerk and the court reporter. In marking their exhibits, the parties shall use pre-assigned ranges of numbered exhibits. Exhibit Nos. 1-400 shall be reserved for plaintiff; Exhibit Nos. 401-800 shall be reserved for defendant. Each exhibit that the parties expect to offer shall be marked with an exhibit sticker, placed in a three-ring notebook, and tabbed with a numbered tab that corresponds to the exhibit number. The parties shall prepare exhibit books in accordance with the requirements of the judge who will preside over trial. The

parties shall contact the judge's courtroom deputy clerk to determine that judge's specific requirements.

d. Designations of Deposition Testimony.

i. Written Depositions. Consistent with Fed. R. Civ. P. 26(a)(3)(A)(ii), any deposition testimony sought to be offered by a party other than to impeach a testifying witness shall be designated by page and line in a pleading filed no later than 21 days before trial. Any counter-designation in accordance with Fed. R. Civ. P. 32(a)(6), and any objections to the designations made by the offering party, shall be filed no later than 14 days before trial. Any objections to counter-designations shall be filed no later than 5 business days before trial. Before filing any objections, the parties shall have conferred in good faith to resolve the dispute among themselves. No later than 3 business days before trial, to facilitate the court's ruling on any objections to designations or counter-designations, the party seeking to offer the deposition testimony shall provide the trial judge a copy of each deposition transcript at issue. Each such transcript shall be marked with different colored highlighting. Red highlighting shall be used to identify the testimony that plaintiff has designated, blue highlighting shall be used for defendants and green highlighting shall be used to identify the objections to any designated testimony. After receiving and reviewing these highlighted transcripts, the court will issue its rulings regarding any objections. The parties shall then file the portions of the depositions to be used at trial in accordance with D. Kan. Rule 32.1.

ii. Videotaped Depositions. The paragraph immediately above applies to videotaped depositions as well as written deposition transcripts. After the court issues its rulings on the objections to testimony to be presented by videotape or DVD, the court will set a deadline for the parties to submit the

videotape or DVD edited to reflect the designations and the court's rulings on objections.

15. MOTIONS.

a. Pending Motions.

- i. Defendants' Motion to Dismiss, Doc. No. 43, filed December 19, 2007.
- ii. Defendants' Motion for Protective Order relating to Plaintiff's First Requests for Production, Doc. No. 59, filed March 17, 2008.
- iii. Defendants' Motion to Compel Compliance with Fed. R. Civ. P. 26(a), Doc. No. 68, filed April 22, 2008.
- iv. Plaintiffs' Motion for Protective Order regarding Defendants' Notice of Deposition, Doc. No. 80 filed May 16, 2008.
- v. Defendants' Motion for Protective Order regarding Plaintiff's Notice of Deposition, *Duces Tecum* for a Corporate Designee, Doc. No. 82 filed May 19, 2008.

b. Additional Pretrial Motions.

After the pretrial conference, the parties intend to file the following motions:

Defendants:

1. Motion for Summary Judgment;
2. Motion *in limine* regarding undisclosed witness and exhibits;
3. Motion *in limine* regarding plaintiff's claimed damages.

[Specifically list all motions that the parties reasonably expect to file after the pretrial conference and before trial. At the pretrial conference, a date will be fixed for filing all motions and supporting memoranda for which a deadline has not already been set.]

The dispositive motion deadline, as established in the scheduling order and any amendments, is August 15, 2008.

Consistent with the scheduling order filed earlier in this case, the arguments and authorities section of briefs or memoranda submitted in connection with all further motions or other pretrial matters shall not exceed 30 pages, absent an order of the court.

c. Motions Regarding Expert Testimony. Not applicable. No party has designated experts.

d. Motions in Limine. All motions in limine, other than those challenging the propriety of an expert witness, shall be filed no later than 14 days before trial. Briefs in opposition to such motions shall be filed within the time period required by D. Kan. Rule 6.1(d)(1), or at least 5 business days before trial, whichever is earlier. Reply briefs in support of motions in limine shall not be allowed without leave of court.

16. TRIAL.

a. This case has been set for trial to begin on March 2, 2009

b. Trial will be by jury.

c. Estimated trial time is 1 week.

d. Trial will be in Kansas City, Kansas, or such other place in the District of Kansas where the case may first be reached for trial.

e. Not all of the parties are willing to consent to the trial of this case being presided over by a U.S. Magistrate Judge, even on a backup basis if the assigned U.S. District Judge determines that his or her schedule will be unable to accommodate any trial date stated above.

f. Because of constraints on the judiciary's budget for the compensation of jurors, in any case in which the court is not notified of a settlement at least 1 full business day prior to the scheduled trial date, the costs of jury fees and expenses will be assessed to the parties, or any of them, as the court may order. *See* D. Kan. Rule 40.3.

17. SETTLEMENT.

a. Status of Settlement Efforts.

On February 10, 2008, the plaintiff submitted his settlement demand and copied the Court on his correspondence. Plaintiff's settlement demand was wholly rejected on February 18, 2008 by the defendants. No other settlement discussions have taken place.

The defendants contend that plaintiff's settlement demand is unreasonable and they are therefore incapable of making a counter-offer.

Given the wide differences between the parties' position, it is unlikely that future settlement discussions will occur. Likewise, the parties do not believe mediation or other form of ADR would be beneficial in this case.

[Do not disclose the specific amount of any given offer or counter-offer. However, summarize all settlement efforts to date, including the following: (1) the good faith efforts to resolve this matter in which the parties have participated, including the date when the parties participated in mediation, and the identity of the mediator; (2) the date when the parties last exchanged written, good faith settlement proposals; (3) the parties' views concerning future settlement negotiations and prospects for settlement; and (4) unless mediation and/or any other method of alternative dispute resolution would be futile, the parties' plan for mediation and/or any other method of alternative dispute resolution (including the name of the person chosen to conduct the chosen process, the date on which the process will occur, and the party representatives who will participate).]

b. Mediation and/or Other Method of Alternative Dispute Resolution.

Mediation is not ordered.

18. FURTHER PROCEEDINGS AND FILINGS.

a. Status and/or Limine Conference. Relatively close to the date of trial, the trial judge will schedule a status and/or limine conference [for _____, 20__, at _____].

b. Trial Briefs. A party desiring to submit a trial brief shall comply with the requirements of D. Kan. Rule 7.6. The court does not require trial briefs but finds them helpful if the parties anticipate that unique or difficult issues will arise during trial.

c. Voir Dire. Due to substantially differing views among judges of this court concerning the extent to which counsel will be allowed to participate in voir dire, counsel are encouraged to contact the trial judge's law clerk or courtroom deputy (in accordance with the preference of the particular trial judge) to determine what, if anything, actually

needs to be submitted by way of proposed voir dire questions. Generally, proposed voir dire questions only need to be submitted to address particularly unusual areas of questioning, or questions that are likely to result in objections by the opposing party.

d. Jury Instructions.

- i. Requests for proposed instructions in jury cases shall be submitted in compliance with Fed. R. Civ. P. 51 and D. Kan. Rule 51.1. Under D. Kan. Rule 51.1, the parties and the attorneys have the joint responsibility to attempt to submit one agreed set of preliminary and final instructions that specifically focuses on the parties' factual contentions, the controverted essential elements of any claims or defenses, damages, and any other instructions unique to this case. In the event of disagreement, each party shall submit its own proposed instructions with a brief explanation, including legal authority as to why its proposed instruction is appropriate, or why its opponent's proposed instruction is inappropriate, or both. Counsel are encouraged to contact the trial judge's law clerk or courtroom deputy (in accordance with the preference of the particular trial judge) to determine that judge's so-called standard or stock instructions, e.g., concerning the jury's deliberations, the evaluation of witnesses' credibility, etc.; it is not necessary to submit such proposed jury instructions to the court.
- ii. Proposed instructions in jury cases shall be filed no later than 3 business days before trial. Objections to any proposed instructions shall be filed no later than 1 business day before trial.
- iii. In addition to filing the proposed jury instructions, the parties shall submit their proposed instructions (formatted in WordPerfect 9.0, or earlier version) as an attachment to an Internet e-mail sent to the e-mail address of the assigned trial judge listed in paragraph II(E)(2)(c) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*.

19. OTHER.

a. Conventionally Filed Documents. The following documents shall be served by mail and by fax, email or hand-delivery on the same date they are filed with the court if they are filed conventionally (i.e., not filed electronically): final witness and exhibit disclosures and objections; deposition designations, counter-designations, and objections; motions in limine and briefs in support of or in opposition to such motions; trial briefs; proposed voir dire questions and objections; proposed jury instructions and

objections; and proposed findings of fact and conclusions of law. In addition, a party filing a trial brief conventionally shall deliver an extra copy to the trial judge's chambers at the time of filing.

b. Miscellaneous.

None.

[Identify any significant matter affecting trial of the case not properly noted elsewhere. Otherwise, simply state: "None." This part of the pretrial order may also include additional language that is required by the judge to whom the case is assigned. For example, in cases tried before Judge Belot or Judge Crow, the language set out below should be used.]

20. POSSIBLE ADJUSTMENT OF DEADLINES BY TRIAL JUDGE.

With regard to pleadings filed shortly before or during trial (e.g., motions in limine, trial briefs, proposed jury instructions, etc.), this pretrial order reflects the deadlines that the court applies as a norm in most cases. However, the parties should keep in mind that, as a practical matter, complete standardization of the court's pretrial orders is neither feasible nor desirable. Depending on the judge who will preside over trial, and what adjustments may be appropriate given the complexity of a particular case, different deadlines and settings may be ordered. Therefore, from the pretrial conference up to the date of trial, the parties must comply with any orders that might be entered by the trial judge, as well as that judge's trial guidelines and/or exhibit instructions as posted on the court's Internet website:

(<http://www.ksd.uscourts.gov/chambers>).

IT IS SO ORDERED.

Dated this ____ day of _____, 20 __, at _____, Kansas.

The Honorable David J. Waxse
U. S. Magistrate Judge

SUMMARY OF DEADLINES AND SETTINGS

Event	Deadline/Setting
Extended deadline to complete any remaining discovery (if applicable)	
Mediation/settlement conference (if applicable)	
Dispositive motions (e.g., summary judgment)	
Motions challenging admissibility of expert testimony	
Trial	
Status and/or limine conference (if presently set)	
Final witness & exhibit disclosures	21 days before trial
Objections to final witness & exhibit disclosures	14 days before trial
Exhibits marked	5 business days before trial
Deposition testimony designated	21 days before trial
Objections to deposition designations, along with any counter-designations	14 days before trial
Objections to counter-designations of deposition testimony	5 business days before trial
Submission of disputed deposition designations to trial judge	3 business days before trial
Motions in limine	14 days before trial
Briefs in opposition to motions in limine	5 business days before trial, unless due earlier under D. Kan. Rule 6.1(d)(1)

SUMMARY OF DEADLINES AND SETTINGS

Proposed jury instructions	3 business days before trial
Objections to proposed jury instructions	1 business day before trial
Preliminary sets of proposed findings of fact and conclusions of law in bench trials	5 business days before trial

(Revised 5/93)

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

SAMUEL K. LIPARI,)
)
Plaintiff,)
)
v.) Case No. 07-CV-02146-CM-DJW
)
U.S. BANCORP, and)
)
U.S. BANK NATIONAL ASSOCIATION,)
)
Defendants.)

EXHIBIT SHEET

Case No: 07-CV-02146-CM-DJW _____ Exhibits

No.	Description	I.D.	Off.	Adm.	Deposition or Witness

No.	Description	I.D.	Off.	Adm.	Deposition or Witness