

ANSWER TO SHOW CAUSE ORDER OF 8/25/08

Comes now the plaintiff appearing *pro se* and makes the following answer to the trial court order to show cause by bringing the trial court's attention to its lack of jurisdiction to proceed further with the matter or controversy until the court makes a ruling on the plaintiff's 28 U.S.C. § 144 affidavit of prejudice and that this court lost jurisdiction after the plaintiff filed a notice of appeal on July 11, 2008 in this matter or controversy styled *MSC v. US Bancorp et al* Case No. 05-02299. The plaintiff gives notice to that the court's present show cause order is "null and void" under *Garcia v. Burlington Northern R.R. Co.*, 818 F.2d 713, 721 (10th Cir.1987).

I. COMPLETE ABSENCE OF SUBJECT MATTER JURISDICTION

1. The plaintiff hereby respectfully informs the court that as a federal trial court, the court is currently and has always been without jurisdiction over *Lipari v. US Bancorp, Inc. et al*; Case No. 2:07-cv-02146-CM and that its orders have been *ultra vires*.

2. The "threshold question in every federal case" is whether a federal court has the authority to adjudicate the lawsuit. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975).

A. Loss of Jurisdiction After Notice of Appeal

3. The plaintiff filed a notice of appeal on July 11, 2008 in this same matter or controversy under the rule in *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 (Fed. 1st Cir., 2005) that an Article III case or controversy continues until the resolution of all claims including pendant state law based claims which neither the court or defendants have refuted and for 28 U.S.C. §§ 144, 455 bias and prejudice purposes is the same matter or controversy under *Little Rock School District v. Armstrong*, No. 02-3867EA (8th Cir., 2004) which this court and the defendants have refused to address. See **exb.1** Notice of Appeal.

4. The US Supreme Court has determined that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); see also *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir.1989) ("[T]he filing of a notice of appeal only divests the district court of jurisdiction respecting the questions raised and decided in the order that is on appeal.").

B. This court’s initial jurisdiction violated exclusive jurisdiction of the Tenth Circuit

5. Even before the 1979 amendment to the Federal Rules of Civil Procedure, it was generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56 at 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) which this court did to frustrate substantive justice in the plaintiff’s 2002 Interlocutory appeal and to discredit the plaintiff with a dismissal to prejudice the appeals panel against the plaintiff in *Medical Supply Chain, Inc. v. US Bancorp, NA, et al* 112 Fed. Appx. 730 (10th Cir. 2004).

6. This court exerted jurisdiction over Case No. 2:07-cv-02146-CM while *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05-2299 containing the same state law claims and concerning the same issues was before the Tenth Circuit US Court of Appeals as *Medical Supply Chain, Inc. v. Neoforma et al* Case No. 06- 3331.

7. 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).”

8. 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 also prevented 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)

C. This court’s jurisdiction violates the “First to File” rule

9. This court exercised jurisdiction over this matter or controversy in violation of the “first to file rule”.

8. The plaintiff originally brought this matter or controversy to the Kansas District Court on October 22, 2002 where the plaintiff sought anticipatory injunctive relief under the Sherman Antitrust Act and declaratory relief over the plaintiff's state law contract and trade secret misappropriation claims. The matter or controversy was styled *Medical Supply Chain, Inc. v. US Bancorp, NA, et al*, case no. 02-2539-CM.

9. The plaintiff's state law claims, having been dismissed in *Medical Supply Chain, Inc. v. US Bancorp, NA, et al*, case no. 02-2539-CM without prejudice were re-filed in the Western District of Missouri along with the plaintiff's now ripe federal antitrust and racketeering damages claims. The matter or controversy was styled *Medical Supply Chain, Inc. v. Neoforma et al*, W. Dist. of MO Case No. 05-0210-CV-W-ODS.

10. The Western District of Missouri Judge, Hon. Ortrie D. Smith made a ruling on June 15, 2005 transferring the case, finding the matter or controversy to be identical (appearing to describe the mirror image factor under the first- to-file rule):

“Mere disappointment with the result of a case does not give a party the right to file an almost an identical second cause of action and, moreover, does not entitle a party to forum shop. Based on the District of Kansas' extensive experience with the almost identical previous lawsuit and in the interest of justice, the above-captioned matter is transferred to the District of Kansas.”

Order of Transfer, *Medical Supply Chain, Inc. v. Neoforma et al*, W. Dist. of MO Case No. 05-0210-CV-W-ODS.

11. After the plaintiff's matter or controversy was then dismissed by the Hon. Carlos Murguia on 03/07/2006 in the matter or controversy styled *Medical Supply Chain, Inc. v. Neoforma et al*, KS Dist. Court Case No. 05-2299, the plaintiff filed motions for reconsideration which were ruled on 8/07/2006 then an appeal on 9/08/2006.

12. The trial court continued to exert jurisdiction over *Medical Supply Chain, Inc. v. Neoforma et al*, KS Dist. Court Case No. 05-2299 and sanctions including attorneys' fees are not yet resolved.

13. The plaintiff's Missouri state claims against US Bank NA and US Bancorp were filed in Independence, Missouri on November 28, 2006 and styled as *Samuel Lipari v. US Bancorp, NA, et al*, 16th Cir Mo. Case no. 0616-CV32307.

14. The matter or controversy was fraudulently removed to the United States District Court, Western District of Missouri on December 13, 2006 and restyled as *Samuel Lipari v. US Bancorp, NA, et al*, W.D. MO Case No. 06-1012-CV-W-FJG.

15. The matter or controversy was ostensibly removed by the defendants under 28 U.S.C. § 1446 through their counsel Mark A. Olthoff MO lic. #38572 of Shughart Thomson & Kilroy, P.C. by the false assertion of diversity under 28 U.S.C. § 1332 even though there are other defendants and state claim defendants in this matter or controversy that are domiciled in the State of Missouri.

16. Mark A. Olthoff MO lic. #38572 of Shughart Thomson & Kilroy, P.C. fraudulently withheld from the Clerk of the Court of the Western District of Missouri the jurisdictional information that the federal action in the District of Kansas over the same matter or controversy was still ongoing even though as an officer of the court appearing ex parte Olthoff had a duty to disclose to the Clerk of the W.D. of Missouri the information relevant to rejecting jurisdiction. See **exb. 2** US Bank Notice of Removal.

17. The plaintiff on December 18, 2006 filed a Motion for Remand bringing attention to the Western District of Missouri court that it was without federal jurisdiction:

“The plaintiff respectively calls attention to the court that the plaintiff’s claims removed from Missouri State Court by defendants US Bancorp, NA and US Bank, NA are supplemental state law based claims originally filed in this court as *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210- CV-W-ODS, now Kansas District Court Case No. 05-2299-CM. The Kansas District Court has continuing supplemental jurisdiction under 28 U.S.C. § 1367(a) and the court’s current order (Doc 78 Filed 03/07/2006) declining federal jurisdiction was not objected to or appealed by the defendants.”

Exb.3 Plaintiff’s Motion to Remand at pg. 1

18. The defendants then obtained transfer of the matter or controversy to the District of Kansas, over the objections of the plaintiff under 28 U.S.C. § 1404(a), which provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Section 1404(a) affords the district court broad discretion to adjudicate motions to transfer based upon a case-by-case review of convenience and fairness. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir.1991).

1. First-to File Rule Clearly established in the Tenth Circuit

19. The “First to File Rule is clearly established to be the controlling authority in this circuit:

“The court’s analysis of whether the interests of justice favor deciding these issues in this court or in California is informed by the first-to-file rule. This rule "is a factor that typically determines, in the

absence of compelling circumstances, which of two concurrent federal court actions should proceed to judgment." *Smart v. Sunshine Potato Flakes, L.L.C.*, 307 F.3d 684, 687 (8th Cir.2002) (quotation and citation omitted); *P & P Indus. v. Sutter Corp.*, 179 F.3d 861, 870 (10th Cir.1999)"

Big Dog Motorcycles, L.L.C. v. Big Dog Holdings, 351 F.Supp.2d 1188 (D. Kan., 2005).

20. Hon. Judge Carlos Murguia was aware of the controlling Tenth Circuit authority and the doctrinal bar against exerting jurisdiction over at the time the Kansas District Court started hearing motions in the matter or controversy now styled *Lipari v. US Bank, NA et al*, Case No. 2:07-cv-02146-CM.

"Federal courts have developed a general rule to apply to situations in which essentially the same issues and litigants are involved in two substantially identical causes of action before federal courts in different districts. The first-to-file rule provides that the court where jurisdiction first attaches should make the determination of the appropriate venue to decide the case, and the second court will decline to act until proceedings in the first court terminate. See *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 692 (10th Cir.1965); see, also *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161 (10th Cir.1982); *Custom Energy, LLC v. Liebert Corp.*, No. Civ. A. 98-2077-GTV, 1998 WL 295610 (D.Kan. June 2, 1998)."

Ed Tobergte Associates v. Zide Sport Shop of Ohio, 83 F.Supp.2d 1197 (D. Kan., 1999).

21. The court in *Mohr v. Margolis, Ainsworth & Kinlaw Consulting* observed that the Tenth Circuit outlined how to approach cases where there may be duplicate proceedings:

"Federal courts have recognized that, as courts of coordinate jurisdiction and equal rank, they must be careful to avoid interfering with each other's affairs in order "to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result." *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 917 (5th Cir.1997) (quotation omitted). To aid in achieving this goal, the "first-to-file" rule permits a district court to decline jurisdiction where a complaint raising the same issues against the same parties has previously been filed in another district court. *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir.1991). However, "simply because a court is the first to obtain jurisdiction does not necessarily mean that it should decide the merits of the case." *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1164 (10th Cir.1982)."

Mohr v. Margolis, Ainsworth & Kinlaw Consulting, 434 F.Supp.2d 1051 at 1061 (D. Kan., 2006).

2. First-to File Rule Clearly established in the Eighth Circuit

22. Practitioners and judges in the Eighth Circuit, including the Western District of Missouri are under controlling precedent that the first-to file rule governs the resolution of concurrent jurisdiction. "The well-established rule is that in cases of concurrent jurisdiction, 'the first court in which jurisdiction attaches has priority to consider the case.' *Orthmann v. Apple River Campground Inc.*, 765 F.2d 119, 121 (8th Cir.1985)." *Williams v. Security Nat. Bank*, 314 F.Supp.2d 886 at 895 (N.D. Iowa, 2004).

23. The Hon. Fernando J. Gaitan, Jr. was given notice that the "first-to-file" rule was the controlling authority in the Eight Circuit by the plaintiff in the plaintiff's reply suggestion in support of

remand. See **exb. 4** Plaintiff's Reply to Defendants' Answer Case 4:06-cv-01012-FJG (Doc. 12-1) Filed 01/04/2007 on pg. 4.

D. The effect of 28 U.S.C. § 1631 over invalid transfer between courts

24. This court lacks jurisdiction because at the time the matter or controversy styled *Samuel Lipari v. US Bancorp, NA, et al*, W.D. MO Case No. 06-1012-CV-W-FJG was transferred to it, this court lacked jurisdiction over case no. 06-1012-CV-W-FJG (restyled as the Kansas District Court case *Lipari v. US Bancorp, Inc. et al*; Case No. 2:07-cv-02146-CM) under *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); *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) and *Garcia v. Burlington Northern R.R. Co.*, 818 F.2d 713, 721 (10th Cir.1987) as shown *supra*.

25. The US Supreme Court has clearly established that jurisdiction must be in existence at the time of transfer for the transferor court to validly transfer a case and at the time of transfer for the transferee court to validly exercise jurisdiction:

“In the normal meaning of words this language of Section 1404(a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted.”

It is not to be doubted that the transferee courts, like every District Court, had jurisdiction to entertain actions of the character involved, but it is obvious that they did not acquire jurisdiction over these particular actions when they were brought in the transferor courts. The transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, or if validly transferred thereto under § 1404(a).”

Hoffman v. Blaski Sullivan v. Behimer, 363 U.S. 335 at 343, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960).

1. The transfer will be reviewable in 10th Cir. Court of Appeal

26. Once the files in a case are transferred physically to the court in the transferee district, the transferor court loses all jurisdiction over the case, including the power to review the transfer. *Roofing & Sheet Metal Serv.*, 689 F.2d at 988-89; *In Re Nine Mile Limited*, 673 F.2d 242, 243 (8th Cir.1982); *In re Southwestern Mobile Homes*, 317 F.2d 65, 66 (5th Cir.1963). *Hyde Constr. v. Koehring Co.*, 348 F.2d 643, 648 (10th Cir.1965), rev'd on other grounds, 382 U.S. 362, 86 S.Ct. 522, 15 L.Ed.2d 416 (1966). The date the papers in the transferred case are docketed in the transferee court, not the date of the transfer order, consequently forms the effective date that jurisdiction in the transferor court is terminated. *Lou v. Belzberg*,

834 F.2d 730, 733 (9th Cir.1987), cert. denied, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988); 15 Federal Practice and Procedure Sec. 3846 at 357. *Cf Robbins v. Pocket Beverage Co.*, 779 F.2d 351, 355 (7th Cir.1985) (district court retained jurisdiction to vacate its transfer order where motion for reconsideration was granted before files were received by transferee court).

27. The date the papers in the transferred case are docketed in the transferee court also forms the effective date that appellate jurisdiction in the transferor circuit is terminated; the transfer order becomes unreviewable as of that date. *Belzberg*, 834 F.2d at 733; *In re Sosa*, 712 F.2d 1479, 1480 (D.C.Cir.1983); *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C.Cir.1974) (en banc); 15 Federal Practice and Procedure Sec. 3846 at 357.

2. The transfer will be reviewable in 8th Cir. Court of Appeals

28. While any sanction or other order on the merits of this matter or controversy will be reviewable on appeal to the Tenth Circuit, the determination that this court does not have jurisdiction will permit appeal from to the Eight Circuit US Court of Appeals. See generally *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509 at fn 14 (C.A.10 (Okl.), 1991).

29. The policy rationale for this is strong. The plaintiff's cause was of intense state interest for the State of Missouri. The interests of justice in resolving the claims were repeatedly frustrated and criminally interfered with by the Missouri law firms Husch Blackwell Sanders LLP, and Shughart Thomson & Kilroy PC, and Lathrop & Gage LC along with Shughart Thomson & Kilroy PC's successor in interest Polsinelli Shalton Flanigan Suelthaus PC.

“14 Of course, a district court retains the inherent authority under Rule 11 to sanction unethical conduct practiced before it, even if the court lacks jurisdiction to rule on the merits of the case. See *Cooter & Gell v. Hartmarx Corp.*, --- U.S. ----, 110 S.Ct. 2447, 2457, 110 L.Ed.2d 359 (1990).”

Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509 at fn 14 (C.A.10 (Okl.), 1991).

D. Colorado River abstention doctrine inapplicable

30. The defendants seek to have this court participate in fraudulently procuring a dismissal of the plaintiff's state law claims in Case No. 2:07-cv-02146-CM while continuing to exercise jurisdiction over the plaintiff in *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05-2299 as concurrent parallel actions, however the defendants due to a fraudulent removal now have the state claims in this federal court not a state court.

31. As part of its analysis in *Bauxities*, the Third Circuit set out the general rule regarding concurrent parallel actions. It stated, "[W]here the judgment sought is strictly *in personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other." *Compagnie des Bauxites de Guinea v. Insurance Company of North America*, 651 F.2d 877, 887 (3d Cir. 1981), *aff'd* on other grounds, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) (quoting *Princess Lida v. Thompson*, 305 U.S. 456, 466, 59 S.Ct. 275, 83 L.Ed. 285 (1939)). See *General Elec. Co. v. Deutz Ag*, 129 F.Supp.2d 776 at fn 7 (W.D. Pa., 2000).

32. The Colorado River abstention doctrine, enumerated *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), grants a federal court the discretion to avoid duplicative litigation in federal court of a matter more properly decided in parallel litigation in state court. See *Beavers v. Arkansas State Bd. of Dental Exam'rs*, 151 F.3d 838, 841 n. 7 (8th Cir.1998); *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops., Inc.*, 48 F.3d 294, 297 (8th Cir.1995). However, "the potential for conflict" between a federal action and a parallel state action, standing alone, does not "justify staying of the exercise of federal jurisdiction" under the Colorado River abstention doctrine. *Federated Rural Elec. Ins. Corp.*, 48 F.3d at 297 (citing *Colorado River*, 424 U.S. at 816, 96 S.Ct. 1236, 47 L.Ed.2d 483). As the Supreme Court explained in *Colorado River*:

"Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. This difference in general approach between state-federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."

Colorado River, 424 U.S. at 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (citations omitted).

33. The Supreme Court explained in *Colorado River* a federal court may abstain in order to conserve federal judicial resources only in "exceptional circumstances." See, e.g., *Colorado River*, 424 U.S. at 813, 96 S.Ct. 1236; *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 727 (8th Cir.2001) ("A federal court should decline jurisdiction [on the basis of *Colorado River* abstention] only under exceptional circumstances."); *Federated Rural Elec. Ins. Corp.*, 48 F.3d at 297 (also stating the "exceptional circumstances" standard). Those "exceptional circumstances" must be such that "repair to the State court would clearly serve an important countervailing interest." *Federated Rural Elec. Ins. Corp.*, 48 F.3d at 297

(quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr.*, 460 U.S. 1, 14, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), in turn quoting *Colorado River*, 424 U.S. at 813, 96 S.Ct. 1236).

34. The defendants have never argued “exceptional circumstances” required the trial judge to stay proceedings in *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No. 05-2299 and the plaintiff continues to and has been vigorous in vindicating his rights from both federal and state causes of action in Case No. 05-2299.

35. The trial court was never lawfully able to stay *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No. 05-2299 while proceeding with the present caption or styling of the action as Case No. 2:07-cv-02146-CM.

E. Dismissal of pendant state claims still retains their jurisdiction under 28 U.S.C. § 1367

36. Hon. Judge Carlos Murguia lost jurisdiction due to the fact that *Medical Supply Chain, Inc. v. Neoforma et al*, KS Dist. Court Case No. 05-2299 which has original jurisdiction over the plaintiff’s state law claims was in appeal at the time of transfer and is currently on appeal. This is true even though the state law claims were dismissed without prejudice by Hon. Judge Carlos Murguia in Case No. 05-2299 under 28 U.S.C. § 1367(a) subsection(c)(3):

“28 U.S.C. § 1367(a) (1993). Subsection (c) provides exceptions to the above mandatory command, granting district courts discretion to reject supplemental jurisdiction if:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). This subsection "plainly allows the district court to reject jurisdiction over supplemental claims only in the four instances described therein." *McLaurin v. Prater*, 30 F.3d 982, 985 (8th Cir.1994).

While the district court's power to exercise jurisdiction under the "same case or controversy" requirement in 28 U.S.C. § 1367(a) is one ordinarily resolved on the pleadings, the court's decision to exercise that jurisdiction "is one which remains open throughout the litigation." *United Mine Workers v. Gibbs*, 383 U.S. 715, 727, 86 S.Ct. 1130, 1139-40, 16 L.Ed.2d 218 (1966) (discussion of pendent jurisdiction and discretionary power of federal trial court to refuse to hear state law claims, now codified by 28 U.S.C. § 1367).”

Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284 at 1287 (C.A.8 (S.D.), 1998).

37. The plaintiff has given the court and the defendants repeated notice of this basis for the fact that at law jurisdiction over these state law claims continues in *Medical Supply Chain, Inc. v. Neoforma et al*, KS Dist. Court Case No. 05-2299.

38. In the plaintiff's Motion to Remand, the plaintiff served notice on the defendants and the Hon. Judge Fernando Gaitan, Jr. that the removal was defective for want of jurisdiction:

"Here the defendants' removal suffers from a jurisdictional defect. This is not a qualifying action because of the continuing jurisdiction of *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM over these state law claims under 28 U.S.C. § 1367 is well established: "Upon the dismissal of the Magnuson-Moss claims, this court continued to have subject matter jurisdiction under 28 U.S.C. § 1367, because we had not yet "decline[d] to exercise supplemental jurisdiction" under 28 U.S.C. § 1367(c). That this court has throughout also had supplemental jurisdiction over the pendent state law claims pursuant to 28 U.S.C. § 1367 is, furthermore, reflected in the plain language of § 1367(a), which states that **"in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy"** (emphasis added). Thus this court has always had subject matter jurisdiction over all the claims in this case, initially through original jurisdiction, and later through supplemental jurisdiction, which continues to the present time." [Emphasis added]

In re Ford Motor Company Ignition Switch Products Liability Litigation, MDL No. 1112 at pg. 1(D. N.J. 8/27/1998) (D.N.J., 1998). "

Exb. 3 Motion to Remand Case 4:06-cv-01012-FJG at pg. 4

39. See also **exb. 4** Plaintiff's Reply to Defendants' Answer Case 4:06-cv-01012-FJG (Doc. 12-1) Filed 01/04/2007 on pg. 4-5.

40. In *Ross v. Colorado Outward Bound School, Inc.*, 822 F.2d 1524, 1526-27 (10th Cir.1987), the court stated that by enacting "the Federal Courts Improvement Act of 1982, ... Congress gave broad authority to permit the transfer of an action between any two federal courts. 28 U.S.C. § 1631 controls the action of a federal court when it finds that it lacks jurisdiction but that another federal court has jurisdiction." *Id.* at 1526. See also *Viernow v. Euripides Development Corp.*, 157 F.3d 785 at 793 (C.A.10 (Utah), 1998).

F. Dismissal of Appeal Case No. 08-3187 Quenches Removal Jurisdiction

41. The Tenth Circuit is currently hearing an appeal of *Medical Supply Chain, Inc. v. Neoforma et al*, KS Dist. Court Case No. 05-2299 in *MSCI v Neoforma, Inc. et al* Case No. 08-3187.

42. The removal of the present mater or controversy currently styled *Lipari v. US Bank, NA et al*, Case No. 2:07-cv-02146-CM is from the concurrent state court action over the plaintiff's pendant state claims in *Medical Supply Chain, Inc. v. Neoforma et al*, KS Dist. Court Case No. 05-2299.

1. *Res judicata* would end the defendants' claim of jurisdiction

43. A dismissal of the plaintiff's appeal would be a final judgment on the plaintiff's federal claims and result in *res judicata* preclusion of removal jurisdiction for diversity as the plaintiff informed the court in his Motion for Remand that the defendants had failed to appeal the dismissal and therefore would lose their access to federal court if the plaintiff's appeal was unsuccessful:

"II. US Bank NA and US Bancorp NA Failed to Appeal the Dismissal

In the Tenth Circuit where the defendants US Bank NA and US Bancorp NA represented there as here by Mark A. Olthoff (MO #38572) were presented with the order by Judge Carlos Murguia permitting the plaintiff to file his contract and fiduciary claims in state court (See Exb. 1 Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19). The defendants were required to appeal the decision to retain the state claims in federal court:

"Here, Cannondale sought final disposition on the merits as to all claims, but the district court granted summary judgment only on the federal claim. The court dismissed without prejudice the state law claims. As a result, Cannondale received only a part of what it sought. This disposition left Cannondale open to precisely what happened in this case, a second litigation. Cannondale was sufficiently aggrieved by this result, and consequently has standing to appeal. See *Jarvis*, 985 F.2d at 1425 ("In this case, a successful appeal by Nobel would eliminate any possible re-filing . . . in state court[, and because] avoiding a state court suit would substantially reduce Nobel's future litigation costs, we find that Nobel has the requisite stake in this appeal."); *Disher v. Information Res., Inc.*, 873 F.2d 136, 138-39 (7th Cir. 1989) (defendant prevailing on summary judgment on all but two claims may appeal dismissal without prejudice because the decision is not entirely in the defendant's favor by exposing the defendant to further litigation). Accordingly, we have jurisdiction over this appeal under 28 U.S.C. § 1291."

Amazon Inc. v. Dirt Camp Inc., 273 F.3d 1271 at 1276 (10th Cir., 2001)"

Exb. 3 Motion to Remand Case 4:06-cv-01012-FJG at pg. 6

44. The defendants' and the court know the federal jurisdiction will have been forfeited by *res judicata* on the denial of the plaintiff's appeal to keep alive his federal antitrust and RICO claims:

"The necessity of appeal to thwart a follow on state court action has been established in the Tenth Circuit since 1992:

"(FN1). Although dismissals without prejudice are not usually considered final decisions, and therefore not appealable, "where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable."

Amazon, Inc. v. Dirt Camp, Inc., 273 F.3d 1271, 1275 (10th Cir. 2001). Where, as here, the district court dismissed a state claim without prejudice after granting summary judgment on the federal claims, and where the dismissal without prejudice was not sought by plaintiff for purposes of manufacturing finality, we may exercise appellate jurisdiction. See *id.* & n.4 (citing *Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1424 (10th Cir. 1993) and *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992))."

BUI v. IBP Inc. at fn 1 (2002). The plaintiff appealed, suspending the effect of Judge Murguia's dismissal of federal claims, which the defendants contest and the Tenth Circuit action is captioned *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al.*, Case No. 06-3331. Only upon the success of the plaintiff's appeal can the defendants return these state claims to federal court."

Exb. 3 Motion to Remand Case 4:06-cv-01012-FJG at pg. 6

2. Lack of Complete Diversity at inception

45. The defendants and court are also on notice diversity jurisdiction is lacking because complete diversity between the parties does not exist:

“Diversity jurisdiction still does not exist, despite the movement of pendant (supplemental) claims to state court:

“It is a well-settled rule that diversity of citizenship is determined as of the date the action is commenced. *Fidelity & Deposit Co. of Maryland v. City of Sheboygan Falls*, 713 F.2d 1261, 1266 (7th Cir.1983); *Benskin v. Addison Township*, 635 F.Supp. 1014, 1017 (N.D.Ill.1986); C.A. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3608 (2d ed. 1984). At the time plaintiff commenced this suit, there was no diversity of citizenship between the parties and therefore no basis for diversity jurisdiction. It does not matter that plaintiff amended his complaint after he moved to Ohio. The amendment relates back to the date the lawsuit was commenced. See Fed.R.Civ.P. 15(c). There still was no diversity jurisdiction.

Oliney v. Gardner, 771 F.2d 856, 858-59 (5th Cir.1985); Wright, Miller, & Cooper, § 3608 at 458-59.

There is no diversity jurisdiction over Disher's state law claims; there is only pendent jurisdiction over those claims.”

Disher v. Information Resources, Inc., 691 F.Supp. 75 at 81. (N.D. Ill., 1988). Here, the claims were filed with the Missouri domiciled defendant Shughart, Thomson & Kilroy as a defendant. Diversity did not exist. Nor does it exist at the time of removal of the concurrent state case because the US District Court still has original federal question jurisdiction over all supplemental claims under 28 U.S.C. § 1367(a). Alternatively the Missouri domiciled defendant Shughart, Thomson & Kilroy is in Privity with the state law claim defendants and by virtue of Mark A. Olthoff's (Mo. Lic #38572) entry of appearance, directly represented in state court.

Exb. 3 Motion to Remand Case 4:06-cv-01012-FJG at pg. 6-7

G. Effect of Lack of Jurisdiction

46. The Supreme Court held in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998), that the existence of subject-matter jurisdiction is a threshold inquiry which must precede any merits-based determination. This requirement is "inflexible and without exception." *Id.* at 95 (internal quotation marks omitted). If the district court lacked jurisdiction, it had no authority to rule on the merits of plaintiffs' claims. *Id.* at 101-02 ("For a court to pronounce upon [the merits] when it has no jurisdiction to do so is . . . for a court to act ultra vires"). Further, if the district court lacked subject-matter jurisdiction over plaintiffs' action, our jurisdiction on appeal is limited to "correcting the error of the lower court in entertaining the suit." *Id.* at 95 (internal quotation marks omitted).

47. The controlling Tenth Circuit authority is stated in *Basso v. Utah Pwr. & Lt. Co.*, 495 F.2d 906, 909 (10th Cir.1974) ("A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.") (emphasis added).

48. The Hon. Judge Carlos Murguia is required to independently determine the lack of the court's jurisdiction. See *Lopez v. Behles (In re Amer. Ready Mix, Inc.)*, 14 F.3d 1497, 1499 (10th Cir. 1994) (holding that appellate court has independent duty to examine its own jurisdiction even where neither party consents and both are prepared to concede it).

49. Because the district court lacks jurisdiction over the plaintiffs' lawsuit, it lacks authority to sanction or dismiss the action "with prejudice," which is a dismissal on the merits. See *Steel Co.*, 523 U.S. at 94-96.

50. Without jurisdiction, Hon. Judge Carlos Murguia is required to remand the action to state court. Section 1447(c) specifically allows district courts to order remand if there has been a "defect in removal procedure," or if it determines, at any time prior to final judgment, that it "lacks subject matter jurisdiction." Hon. Judge Carlos Murguia's remand based on 28 U.S.C. 1447(c) is not reviewable. *Albertson's, Inc. v. Carrigan*, 982 F.2d 1478, 1479-80 (10th Cir. 1993). *Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1184 (10th Cir. 1998).

H. Remand is Mandatory

51. Federal courts are courts of limited subject matter jurisdiction. See U.S. Const. art. III, § 2. In order for a party to properly maintain a lawsuit in federal court, the court must have and retain subject matter jurisdiction over the case at all times during the litigation. Fed.R.Civ.P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

52. The plaintiff filed a timely motion for remand. See **exb. 3** Plaintiff's motion to remand. "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time prior to final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall be remanded*. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c) (emphasis supplied).

II. Continuing Jurisdiction violates 28 U.S.C. § 144 and § 455

53. The Hon. Judge Carlos Murguia is continuing to make rulings in this proceeding directly and through the magistrate without having ruled on the sufficiency of the plaintiff's 28 U.S.C. § 144 Affidavit of Prejudice. See **exb.5** Affidavit of Prejudice (116).

A. Loss of Jurisdiction After 28 U.S.C. § 144 Affidavit

54. The District Court by its Order to Show Cause is violating 28 U.S.C. § 144's express command "...such judge shall proceed no further therein..." that under the controlling law of this circuit requires the trial judge to evaluate the sufficiency of the plaintiff's affidavit of prejudice (exb. 2) when Hon. Judge Carlos Murguia has not ruled on its sufficiency:

"Section 144 requires that where an affidavit of personal bias or prejudice is filed, the judge must cease to act in the case and proceed to determine the legal sufficiency of the affidavit. He is not, however, allowed to pass upon the truth of its statements. *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921); *United States v. Ritter*, 540 F.2d 459, 461-62 (10th Cir.), cert. denied, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976)."

Bell v. Chandler, 569 F.2d 556 at 559 (C.A.10, 1978).

55. The extra judicial bias and prejudice witnessed by the plaintiff is not the manifested in or the result of any order of the trial court on 8/18/08 but is instead the further pursuit of a scheme where the defendants through their law firm Shughart, Thomson & Kilroy. P.C have influenced the court through extrinsic fraud to have the trial court make a ruling in response to a future show cause order (the present order) to sanction the plaintiff and dismiss the plaintiff's contract based claims. See **exb. 6** Objection to Magistrate's Order of 8/20/08.

56. The extra judicial bias and prejudice was also identified in the plaintiff's 28 U.S.C. § 144 affidavit of prejudice as the continued exercise of jurisdiction over this matter by the magistrate at the direction of the trial court even though the court had earlier on 8/18/08 received notice that the plaintiff's appeal had not been dismissed. See **exb. 7** Plaintiff's Response to Defendants' Show Cause Reply with attached notice of 8/11/08 Tenth Circuit Order **exb. 7-1**

B. Conduct Manifesting 28 U.S.C. § 455 Appearance of Bias

57. The court has consistently acted in a way an impartial observer would conclude appears to be biased or prejudiced against the plaintiff from an extra-judicial source.

1. The orders are made immediately after the defendants' motions to compel

58. As shown in the plaintiff's affidavit supporting his answer to this show cause order, the court through Magistrate Judge David J. Waxse repeatedly entered an order on the defendants' fraudulent Motions to Compel before the plaintiff was permitted to make a responding motion under the Kansas District Court's 14 day timing of pleadings rule.

59. The overt conduct an impartial observer would find to be biased or prejudiced against the plaintiff 28 U.S.C. § 455 includes the court's finding in its 8/25/08 Order to Show Cause that the plaintiff did not participate in a joint pretrial order even though the plaintiff and defendants had agreed to do so and the defendants without notice to the plaintiff sent a pretrial order to the Hon. Magistrate Judge David J. Waxse on 8/21/08 at 12:31pm. See **exb. 8** Defendants' unilateral pretrial order and Affidavit **Exhibit 50**. August 21, 2008 Email of PTO From Defendants to Magistrate Waxse.

2. The plaintiff delivered a joint proposed pretrial order

61. The plaintiff shortly thereafter at 1:54pm on the same day sent the defendants and Hon. Magistrate Judge David J. Waxse the plaintiff's combined order at the stage of completion and which contained both the defendants and the plaintiff's portions. See **exb. 9** Plaintiffs' combined pretrial order and **Exhibit 51**. August 21, 2008 Email of Joint PTO From Plaintiff to Magistrate Waxse.

62. The parties' proposed pretrial order was not yet due, the plaintiff had until the end of the day and the parties still had the opportunity to exchange PTO forms, as it was, the plaintiff was the only party to submit a combined PTO see minute order of 8/07/08:

"08/07/2008 109 ORDER: The Telephone Pretrial Conference set for 8/14/2008 is hereby rescheduled for 8/28/2008 at 02:00 PM before Magistrate Judge David J. Waxse. Proposed Pretrial Order due by 8/21/2008. Dispositive motion deadline continued to 9/5/2008. Jury Trial continued to 4/6/2009 at 01:30 PM in Courtroom 463 (CM) before District Judge Carlos Murguia. Entered by Magistrate Judge David J. Waxse on 8/7/08. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (ll) (Entered: 08/07/2008)

63. This finding of the trial judge in the 8/25/08 Show Cause Order is under the controlling law of this circuit a manifestation of conduct an impartial observer would reasonably infer the trial judge's bias and prejudice against the plaintiff from and specifically observe that the plaintiff is repeatedly faulted and punished for misconduct by the defendants is evidence of an extra judicial pre existing bias:

“The trial judge must recuse himself when there is the appearance of bias, regardless of whether there is actual bias. *Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir.1995). "The test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir.1987) (citation omitted). If the issue of whether § 455 requires disqualification is a close one, the judge must be recused. *Nichols*, 71 F.3d at 352.”

U.S. v. Cooper, 283 F.Supp.2d 1215 at 1223 (D. Kan., 2003).

64. In an unbiased and unprejudiced court, the party that did not comply with the Rule 16 scheduling order, in this instance the US Bancorp defendants would be sanctioned:

“Rule 16(f), which authorizes sanctions for violations of pretrial orders issued pursuant to this Rule, states in relevant part (with emphasis added):

If a party or party's attorney fails to obey a scheduling or pretrial order, . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).²⁰ In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.”

Tracinda Corp. v. Daimlerchrysler Ag, 502 F.3d 212 at 240-241 (3rd Cir., 2007).

3. The disparate enforcement of discovery

65. The plaintiff made a request on 2/13/08 for the production of documents and names and addresses of witnesses in this action that were relevant to the resolution of the plaintiff's state law based claims under Rule 26. See **exb. 10** (doc. 53) Notice of Service of Discovery Document and Service Request.

66. An independent observer could find the conduct of the court in vigorously providing orders on the defendants' motions to compel discovery and to otherwise sanction the plaintiff for answering interrogatories and sharing with the defendants all documents and information in the possession or knowledge of the plaintiff as evidence of a pre-existing bias or prejudice under 28 U.S.C. § 455 from an extra-judicial source.

67. An independent observer could find the conduct of the court in refusing or avoiding ruling on the plaintiff's timely Objections to the Defendants' Motions for Protective Orders (doc. 65 filed on 03/27/2008, **exb. 11** Response to Motion for Protective Order) to be evidence of a pre-existing bias or prejudice under 28 U.S.C. § 455 from an extra-judicial source.

68. An observer with knowledge of the facts would find that the court's conduct in refusing to rule on the plaintiff's challenge to the defendants' “automatic” blanket protective order would be the court's

knowledge that the defendants' "automatic protective order" is frivolous and a law based resolution would entitle the plaintiff to discovery including documents request for production #14, evidencing a pre-existing bias or prejudice or prohibited interest under 28 U.S.C. § 455 that is extra-judicial:

"14. All phone calls, voice messages, logs, emails, and letters of *ex parte* communications by the defendants and their agents to employees of the Kansas State Judicial branch and to employees of the U.S. District Court for the Western District of Missouri, U.S. Court of Appeals for the Eighth Circuit, the Kansas District Court and the Tenth Circuit Court of appeals and the contents of any communication oral or otherwise to any of the above by attorneys on behalf of the defendants concerning the plaintiff, his dissolved company, witnesses or former counsel, including communications by:

a. Susan C. Hascall, formerly of Shughart Thompson and Kilroy, P.C. with law clerks and other employees of the U.S. Court of Appeals for the Tenth Circuit from 12/02/2003 to 10/13/2005;

b. Steven D. Ruse, KS lic. #11461, of Shughart Thomson & Kilroy, P.C. to Hon. Judge Carlos Murguia from October to December of 2002;

c. Andrew M. DeMarea, KS lic. #16141 of Shughart Thompson & Kilroy to Hon. Magistrate James P. O'Hara from November 2004 to January 2005; to John J. Ambrosio, KS. Lic #07489 of Ambrosio & Ambrosio, Chtd.;

d. Mark A. Olthoff, KS lic. #70339 to US District Court Magistrate James P. O'Hara from October 2004 to March, 2005; employees and agents of the Kansas Disciplinary Administrator's office and the Johnson County Kansas Discipline Committee including Rex A. Sharp KBA#12350 of Gunderson, Sharp & Walke, L.L.P in October, November and December 2007."

exb. 10 Notice of Service of Discovery Document and Service Request at pg 4-5.

69. An observer with knowledge of the facts would find that the court's conduct in refusing to rule on the plaintiff's challenge to the defendants' "automatic" blanket protective order would be the court's knowledge that the plaintiff is entitled to discovery of the defendants' documents related to *ex parte* contacts with government officials evidencing a pre-existing bias or prejudice or prohibited interest under 28 U.S.C. § 455 that is extra-judicial:

"h. Official Misconduct

The defendants complain some Kansas District Court officials are witnesses to conduct described in the complaint. Also that the plaintiff is seeking records of *ex parte* communications. The public has a strong interest in assessing the truthfulness of allegations of official misconduct, and whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely. "[A]ccess to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." *Braun v. City of Taft (Polston)*, 154 Cal.App.3d 332, 341, 201 Cal.Rptr. 654 (1984) (quoting Cal.Gov't Code § 6250). The federal government also has "an interest in maintaining the integrity of state and federal law enforcement institutions. Misconduct by individual officers, incompetent internal investigations, or questionable supervisory practices must be exposed if they exist." *Skibo v. City of New York*, 109 F.R.D. 58, 61 (E.D.N.Y.1985).

No one has taken the initiative to simply undo the egregious and indefensible actions that have taken place extrinsic to this action for the purposes of denying the plaintiff counsel and placing his

replacement counsel in jeopardy. The defendants have not even sought to undo their sanction orders. The plaintiff has not been contacted to be a witness to any investigation regarding what went on here in the Kansas District court. This civil suit and the opportunity to present evidence to a jury is the only vehicle for obtaining justice over this misconduct.”

exb. 10 Response to Motion for Protective Order at pg. 7.

C. Abdication of the court’s responsibility to oversee the discovery process

70. The court’s refusal to rule on the plaintiff’s timely objections to the defendants’ prohibited at law blanket “automatic protective orders” are not orders but instead conduct that would cause an independent observer to find such selective inaction evidenced a pre-existing bias or prejudice or prohibited interest under 28 U.S.C. § 455 that is extra-judicial.

71. Alternatively, the parties would be relieved of any obligations or orders under discovery until an impartial court ended the abdication of the court’s responsibility to oversee both parties participation in discovery.

1. Absence of basis for Protective Orders

72. Protective orders are entered by the District Court pursuant to Fed.R.Civ.P. 26(c). Rule 26(b) is liberally interpreted to permit wide-ranging discovery of information even though the information may not be admissible at the trial. *Jones v. Commander, Kansas Army Ammunitions Plant*, 147 F.R.D. 248, 250 (D. Kan. 1993).

73. Federal Rule of Civil Procedure 26(c) governs the granting of a protective order. A protective order should be granted when the moving party establishes "good cause" for the order and "justice requires [a protective order] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Fed. R. Civ. P. 26(c). However, before a protective order issues, the moving party must show a particular and specific need for the protective order, as opposed to making stereotyped or conclusory statements. *Skellerup Indus. Ltd. v. City of Los Angeles*, 163 F.R.D. 598, 600 (C.D. Cal. 1995); *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990).

74. By not ruling on the defendants’ motions for protective orders including impermissible blanket discovery orders including information cited by the defendants in the Defendants Rule 26(a)(1) disclosures, the trial court has "abdicate[d] its responsibility to oversee the discovery process”

“District courts have discretion to issue protective orders consistent with the limitations set forth in Fed. R. Civ. P. 26(c). After reviewing its order we cannot say that the district court "abdicate[d] its responsibility to oversee the discovery process and to determine whether filings

should be made available to the public." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). The government showed good cause for the need to protect confidential materials produced during discovery, and the court's order "provide[d] a mechanism for the parties to challenge the designation of confidentiality as to particular items of information." Order, No. CIV-97-849-L, at 6 (W.D. Okla. Aug. 18, 2001)."

Trentadue v. Lee, No. 01-6444 at pg. 1(Fed. 10th Cir. 2/3/2005) (Fed. 10th Cir., 2005).

2. "Automatic Protective Orders" do not relieve court of its responsibility

75. "Automatic Protective Orders" are not entered by the defendants but instead by the court after reviewing their basis and the opposing party's challenge:

"Generally, "[a]s long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed." *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir.1990). "[M]odification of a protective order, like its original entry, is left to the discretion of the district court." *Id.*"

Abraham v. Intermountain Health Care Inc., 461 F.3d 1249 at 1268 (10th Cir., 2006).

76. An impartial observer would conclude that in this proceeding only the defendants are to have discovery contradicting Rule 26 and evidenced a pre-existing bias or prejudice or prohibited interest under 28 U.S.C. § 455 that is extra-judicial.

77. The plaintiff has met the requirements of disclosure and production under Rule 26:

"Rule 26(a)(1) only requires automatic disclosure of "the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses." Fed.R.Civ.P. 26(a)(1)(A)."

Cummings v. General Motors Corp., 365 F.3d 944 (10th Cir., 2004).

III. Present Show Cause Order Procured Through Fraud On The Court

78. The defendants' procurement of the present order to show cause through repeated frauds on the court renders the order to show cause and the court's preceding discovery orders against the plaintiff void.

79. This court has had notice that the removal was obtained through the fraud of the defendants through their counsel Mark Olthoff omitting the existence of the Kansas District Court action, then in appeal before the Tenth Circuit to the Clerk of the Western District of Missouri, preventing her from ascertaining the lack of federal jurisdiction over the concurrent state court action of a federal proceeding where an appeal vested exclusive jurisdiction in the appellate court of another circuit. See **exb. 3** Plaintiff's Motion to Remand Case 4:06-cv-01012-FJG; **exb. 12** Lipari Reply To Defendants' Remand Answer Case 4:06-cv-01012-FJG ; **exb. 13** Lipari Reply To Defendants' Remand Answer Exb. 1; **exb. 14** Lipari

Objection To Stay of Discovery Under Rule 72.1.4; **exb. 15** Lipari Letter to Clerk on Case Assignment Error.

80. This court has had notice that a Stay of Discovery Order (**exb. 16** Order on Lipari Motion to Stay Discovery) by deceiving the Hon. Magistrate David J. Waxse was falsely procured by the officers of the court representing the defendants, injuring the plaintiff:

“Plaintiff does not consent for the reasons detailed in 3(c) above regarding ADR and because on May 7th, 2007, Mark A. Olthoff KS lic. #70339, Andrew M. DeMarea KS lic. #16141 and Jay E. Heidrick KS lic #20770 falsely misrepresented the law to Magistrate David J. Waxse that the plaintiff’s complaint was barred by res judicata despite the express dismissal without prejudice identified in the complaint ¶ 32 , that Magistrate Waxse had jurisdiction to stay discovery despite the exclusive federal jurisdiction of the Tenth Circuit identified in ¶ 34 of the complaint and that the plaintiff lacked standing as an assignee to the rights of the dissolved corporation. Mark A. Olthoff KS lic. #70339 and Andrew M. DeMarea KS lic. #16141 had been previously served the clear controlling authority contradicting their misleading assertions in the Western District of Missouri, yet made the misrepresentations again in this court after the case was transferred as part of an intentional scheme to interfere with the machinery of justice. Magistrate David J. Waxse was deceived by the misrepresentation and in an order dated May 24th, 2007 suspended Discovery as an appropriate measure for a case likely to be dismissed.

The plaintiff was injured by Mark A. Olthoff KS lic. #70339, Andrew M. DeMarea KS lic. #16141 and Jay E. Heidrick KS lic #20770 misrepresentations in having his redress continually postponed and thereby being prevented from entering the hospital supply market. This was fraud on the court. *Weese v. Schukman*, 98 F.3d at 553 (C.A.10 (Kan.), 1996). The plaintiff believes the presiding US District Judge is subject to a challenge to the outcome upon review and where in the Tenth Circuit, appeals from clear error in hospital supply cases are themselves sanctioned, the US Judicial Conference has now provided an additional safeguard in favor of justice.”

Exb. 17 Report of Parties Planning Conference (January 7, 2008) at pg. 23

81. The court has had notice its previous orders of sanctions and dismissals of actions against the plaintiff and his predecessor interest Medical Supply Chain, Inc. were obtained through the extrinsic fraud of the defendants.

82. The court has had notice that the defendants attempted to deceive this court through extrinsic fraud in the defendants’ second motion to dismiss. See **exb. 18** Lipari Response to Second Motion to Dismiss (generally) and pg.s 19-20 and defendants’ fraudulent destruction of electronic documents the defendants were on notice prior to the April 21, 2003 Report Of Parties' Planning Meeting attached as an exhibit to the plaintiff response to the second motion to dismiss.

83. This court had notice and the plaintiff's attached affidavit (**exb. 19** Affidavit of Samuel K. Lipari) and its evidentiary exhibits provides a proof that the defendants' Motions to Compel were fraudulent and the discovery enforcement orders obtained by the defendants were procured through fraud on the court by officers of this court representing the defendants.

A. Elements of Fraud on the Court

84. The elements of the defendants' fraud on the court crime against this court and against the plaintiff are delineated by *In re Food Management Group, LLC*, Case No. 04-22880 (ASH) (Bankr. S.D.N.Y. 1/23/2008):

“Successfully alleging fraud on the court requires (1) a misrepresentation to the court by the defendant; (2) a description of the impact the misrepresentation had on proceedings before the court; (3) a lack of an opportunity to discover the misrepresentation and either bring it to the court's attention or bring an appropriate corrective proceeding; and (4) the benefit the defendant derived from the misrepresentation. *In re Ticketplanet.com*, 313 B.R. 46, 64 (Bankr. S.D.N.Y. 2004) (citing *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895, 899-900 (2d Cir. 1985)). An attorney's knowledge or sponsorship of misdeeds by their clients, including a client's nondisclosure of material information when appearing before a court, may be grounds for alleging fraud on the court against the attorney. *H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118-19 (6th Cir. 1976) (noting that allegations regarding an attorney's knowledge and/or sponsorship of a client's inconsistent testimony at trial and failure to disclose known, material documents in discovery could constitute fraud on the court, but finding no evidence thereof on the record to support relief from judgment under FED. R. CIV. P. 60(b)); *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944) (holding that Court of Appeals could vacate its own judgment of patent infringement, long after the court's term ended, upon proof that (1) the plaintiff in a patent infringement case was the true author of an article used to support the validity of the patent, (2) plaintiff's attorney failed to disclose this fact to the Court of Appeals while the case was pending, and (3) the article was used by the Court of Appeals as a basis for reversing a previous district court decision holding the patent was invalid after the district court did not consider the article in rendering its decision), overruled on other grounds by *Standard Oil of Cal. v. United States*, 429 U.S. 17, 18 (1976).”

In re Food Management Group, LLC, Case No. 04-22880 (ASH) at pg. 57 (Bankr. S.D.N.Y. 1/23/2008).

85. The plaintiff's attached affidavit (**exb. 19** Affidavit of Samuel K. Lipari) and its evidentiary exhibits provides details of each material fraudulent misrepresentation by the defendants through their officers of the court, the date it was made to the court and the court's subsequent reliance on the fraud to the injury of the plaintiff.

B. Effect of the Defendants Fraud on the Court

86. Fraud upon the court makes void the orders and judgments of that court. Under Federal law, when any officer of the court has committed "fraud upon the court", the orders and judgment of that court are void, of no legal force or effect. "[A] decision produced by fraud on the court is not in essence a decision at all." *Kenner v. Commissioner of Internal Revenue*, 387 F.2d 689, 691 (7th Cir. 1968), cert. denied, 393 U.S. 841, 89 S.Ct. 121, 21 L.Ed.2d 112." *United Business Communications v. Racal-Milgo, Inc.*, 591 F.Supp. 1172 at 1183 (D. Kan., 1984).

87. The repeated frauds on this courts by officers of the court representing the defendants are a pattern that form a fraudulent scheme to procure a judgment dismissing the plaintiff's claims as a sanction for discovery misconduct committed by the defendants themselves: "We conclude, as did the Supreme Court in *Hazel-Atlas*, that[t]his is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-acquired evidence is believed possibly to have been guilty of perjury. Here ... we find a deliberately planned and carefully executed scheme to defraud [a court]." 322 U.S. at 245, 64 S.Ct. at 1000." *United Business Communications v. Racal-Milgo, Inc.*, 591 F.Supp. 1172 at 1187 (D. Kan., 1984).

IV. Substantial Justification

88. Even late document production, which violated the District Court's scheduling order, can be found to be "substantially justified." See *Fitz, Inc. v. Ralph Wilson Plastics Co.*, 174 F.R.D. 587, 591 (D.N.J.1997) (noting that, in the context of Rule 37 sanctions, "substantial justification" occurs when there is a "genuine dispute concerning compliance") (citing *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)).

89. Here the plaintiff was substantially justified in the conduct the court has issued a show cause order to sanction the plaintiff for having both complied with the defendants' requests for production, answered the defendants' interrogatories, answered the defendants' two "Golden Rule" letters and complied with all the orders of Hon. Magistrate Judge David J. Waxse.

90. The dispute over the plaintiff's compliance was based solely on false representations as the plaintiff's affidavit supporting his show cause response shows in detail.

91. The plaintiff has disputed the court's error regarding its rulings on discovery both over the adoption of false representations by the defendants and the lack of jurisdiction by the court to make findings or orders.

Respectfully Submitted,

S/ Samuel K. Lipari

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