

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

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

**DEFENDANTS' COMBINED RESPONSE TO
PLAINTIFF'S OBJECTIONS TO MAGISTRATE'S ORDERS**

Defendants, by and through counsel, Shughart Thomson & Kilroy, P.C., file this Combined Response to Plaintiff's Objections to Magistrate's Orders (Doc. Nos. 122 and 123). The Magistrate's Orders should be upheld in their entirety because they are not clearly erroneous, are supported by law, and the Court possesses jurisdiction to issue discovery orders.

I. Procedural Background

The procedural history surrounding the plaintiff's Objections to Magistrate's Orders is summarized below:

- On July 22, 2008, the Court granted, in part, the defendants' Motion to Compel Compliance with Rule 26(a)(1) (Doc. No. 68). In its Order, the Court ordered the plaintiff to supplement his Rule 26 disclosures and to show cause on or before August 13, 2008 why he should not be required to pay a portion of the defendants' attorneys' fees associated with bringing the motion. *See*, Doc. No. 103.
- On August 18, 2008, the defendants filed a Response to the Court's July 22, 2008 Order informing the Court that the plaintiff had not supplemented his Rule 26 disclosures and had not filed any response to the Court's Show Cause Order. *See*, Doc. No. 111.
- On August 18, 2008, this Court issued a Notice and Order to Show Cause related to the plaintiff's non-compliance with its July 22, 2008 discovery order. The Court ordered the plaintiff to show cause to District Judge Carlos Murguia in a pleading filed by August 27, 2008, why this case should not be dismissed pursuant to Fed. R. Civ. P. 37(b)(2)(A). *See*, Doc. No. 114.

- On August 18, 2008, this Court issued a separate Order requiring the plaintiff to pay a portion of the defendants' attorney fees and expenses associated with filing their Motion to Compel Plaintiff's Compliance with Rule 26(a)(1)(A). The Court ordered the defendants to submit an affidavit of fees no later than August 27, 2008 to aid the Court in determining the amount of fees to award. *See*, Doc. No. 115.
- On August 18, 2008, plaintiff filed a document entitled "Response to defendants' assertion re: 111 Response to Order." In this document, the plaintiff attempted to respond to Defendants' Response the Court's July 22, 2008 Show Cause Order (Doc. No. 111). *See*, Doc. No. 113.
- On August 20, 2008, the Court issued a docket entry Order concerning its August 18 Order to Show Cause (Doc. No. 114). The Court indicated that it had reviewed plaintiff's "Response to Defendants' Asserted Non-Compliance with the July 22, 2008 Order" (Doc. No. 113) and informed the plaintiff that the response contained in Doc. No. 113 did not alleviate the plaintiff's requirement to respond to the August 18 Show Cause Order. *See*, Doc. No. 117.
- On August 22, 2008, the plaintiff filed an "Objection to Magistrate's Orders of 8/18/08" (Doc. No. 122). This "Objection" concerns the Magistrate Orders found in Doc. Nos. 114 and 115.
- On August 22, 2008, the plaintiff also filed an "Objection to Magistrate's Order of 8/20/08" (Doc. No. 123). This "Objection" concerns the Magistrate Order found in Doc. No. 117.

Because the plaintiff's objections to the August 18 and August 20 Orders are based on the same facts, argument and legal theories, the defendants offer this combined response.

The Court should uphold the Magistrate's Orders of August 18, 2008 (Doc. Nos. 114 & 115) and August 20, 2008 (Doc. No. 117) because none of the Orders are clearly erroneous, each is supported by law, and the Court has jurisdiction to make and enforce discovery orders in this matter.

II. ARGUMENT

1. The Magistrate's Orders were not clearly erroneous.

Rule 72(a) of the Federal Rules of Civil Procedure provides that a party may serve an objection to a magistrate's order on a non-dispositive issue to the district judge within ten (10) days after being served a copy of the magistrate's order. The Rule provides that the district judge must modify or set aside any part of the Order that "is clearly erroneous or is contrary to law."

In applying the clearly erroneous standard, the district court must affirm the magistrate's decision unless the court "is left with the definite and firm conviction that a mistake has been committed." *See, Ocelot Oil Corp. v. Sparrow Industries*, 847 F.2d 1458, 1464 (10th Cir. 1988). None of Magistrate's Waxse's Orders are erroneous, much less *clearly* erroneous as required by Rule 72(a) and each of the Orders are supported by law.

The Order in Doc. No. 114 required the plaintiff to show cause as to why his case should not be dismissed for failure to comply with the Court's July 22, 2008 discovery Order. When a party fails to comply with a court order, dismissal and an order to show cause are allowable sanctions under Fed. R. Civ. P. 37(b). Therefore, the Court's Order found in Doc. No. 114 is not clearly erroneous and is supported by law.

Likewise, the Order found in Doc. No. 115 required the plaintiff to pay a portion of the reasonable attorney fees associated with defendants' Motion to Compel. The Court has wide discretion in determining whether to award fees associated with a Motion to Compel. *See, e.g.* Fed. R. Civ. P. 37(a)(5)(A). The Court gave the plaintiff an opportunity to be heard in its July 22, 2008 Show Cause Order (Doc. No. 103). But the plaintiff ignored the Court's show cause order and he cannot now assert the Court's order to pay fees is erroneous.

Finally, the Court's August 20, 2008 Order (Doc. No. 117) required the plaintiff to file a separate response to the Show Cause Order of August 18, 2008. A trial court has great deference to administer its docket how it sees fit. *In re Calder*, 973 F.2d 862, 868 (10th Cir. 1992) ("The court has the inherent power 'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'") Therefore, the Court's Order that the plaintiff file a separate response to its August 18, 2008 Show Cause Order is not clearly erroneous and is supported by law.¹

¹ It should be noted that the plaintiff failed to offer any response to the August 18, 2008 Show Cause Order relating to dismissal of his suit (Doc. No. 114).

For these reasons, the Magistrate's Orders of August 18 and 20 (Doc. Nos. 114, 115 and 117) are not clearly erroneous, are supported by law and should be upheld in their entirety.

2. This Court has jurisdiction and may issue orders as it deems fit.

The bulk of plaintiff's argument centers around the Court's authority to issue orders in light of his putative 28 U.S.C. § 144 "Affidavit of Prejudice" (Doc. No. 116). Plaintiff alleges that because he filed an "Affidavit of Prejudice", the Court may not issue further orders until ruling upon the "Affidavit of Prejudice". Plaintiff's interpretation of the law is incorrect.

An affidavit under § 144 only requires a judge to cease proceedings if the affidavit is specific and sets forth sufficient facts demonstrating a personal bias against the party. *See, e.g., U.S. v. Bennet*, 539 F.2d 45, 51 (10th Cir. 1976). If an affidavit is insufficient or simply alleges mere conclusions or unsupported statements, the court may proceed forward. *See, id.*

The plaintiff's affidavit is woefully insufficient. It contains nothing but conclusory and unsupported allegations concerning decisions rendered by this Court and the plaintiff's complaint that the Court has yet to rule on certain motions for protective order. But mere adverse decisions against a party are not sufficient to show bias or prejudice. *See, Winslow v. Lehr*, 641 F. Supp. 1237, 1241 (D. Colo., 1986). The affidavit must show a personal bias against the party, rather than a judicial bias. *See id.* (emphasis added).

The "Affidavit of Prejudice" fails to set forth any specific factual basis as to why either Judge Murguia or Magistrate Waxse would have any personal bias against the plaintiff and, in fact, fails to even allege that either Magistrate Waxse or Judge Murguia do have a personal bias against the plaintiff. Therefore, the "Affidavit of Prejudice" is wholly insufficient and the Court may proceed with this matter.

Plaintiff also alleges that this Court lacks subject matter jurisdiction due to the pending appeal of *Medical Supply II* (after the Court struck his improvidently filed "pleadings"). This

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 3rd day of September, 2008, to:

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

/s/ Jay E. Heidrick
Attorney for Defendants