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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(Kansas City)

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff,*	)
v.	) Case No. 07-CV-02146-CM-DJW
US BANCORP and US BANK NATIONAL ASSOCIATION *Defendants,*	)

OBJECTION TO STAY OF' DISCOVERY UNDER RULE 72.1.4

Comes now the plaintiff Samuel K. Lipari and makes the following respectful objection to the magistrate's order staying discovery. The absence of jurisdiction during the pendency of this matter in appeal makes the magistrate's stay clearly erroneous or contrary to law. The absence of jurisdiction makes the order void ab intio. Furthermore, the plaintiff gives notice to the defendants that failure to comply with Rule 26 is actionable.

STATEMENT OF FACTS

1. This matter is a subset of the state claims last brought before this court in *Medical Supply Chain, Inc. v. Novation. et al,* formerly W.O. MO case no. 05-0210, then KS Dist. Court case no.05-2299, now 10th CiT. case no. 06- 3331.

2. The Western Missouri District Court transferring this matter to this court after the defendants removed it from the 16th Circuit Missouri State Court found the matter ,vas identical.

3. *Medical Supply Chain, Inc.* v, *Novation, et al,* is before the Tenth Circuit Court of Appeals on the plaintiffs notice of appeal.

4. The defendants made no cross appeal.

5. This court is delaying the plaintiff's relief on state contract based claims to which the plaintiff has a clearly established constitutionally guaranteed property right.

6. The plaintiff is injured by the delay.

MEMORANDUM IN SUPPORT OF OBJECTION

As a general rule, an effective notice of appeal divests the district court of jurisdiction over the matter forming the basis for the appeal. See, e.g., *Marrese* v, *American Academy of Orthopaedic Surgeons,* 470 U.S. 373,378-79, 105 S.Ct. 1327, 1331,84 L.Ed.2d 274 (1985); *Island Creek Coal Sales Co.* v. *City of Gainesville,* 764 F.2d 437,439 (6th Cir.), cert. denied, 474 U.S. 948, 106 S.Ct. 346, 88 L.Ed.2d 293 (1985); *Ced's Inc. v. United States Environmental Protection Agency,* 745 F.2d 1092, 1095 (7th Cir.1984), cert. denied, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

This court cannot expand its relief for the defendants to alter its earlier order dismissing the state law claims without prejudice because the defendants did not seek a reconsideration or new trial and did not cross appeal. The trial court during the pendency of this matter in appeal has only the power to enforce its order dismissing this action without prejudice so that it can be brought in Missouri State court (remand) *N.L.R.B.* v, *Cincinnati Bronze, lnc.,* 829 F.2d 585 at 589 (C.A.6 (Ohio), 1987).

The magistrate's order expanding the dismissal without prejudice and suspending or staying the self executing effect of Rule 26 mandating discovery on the state law claims is void. Expansion of a district court's judgment are not permitted while an appeal is pending. See, *e.g., Ced's Inc.,* 745 F.2d at 1095-96 (district court issued new conclusions of law after original judgment was entered and notice of appeal was filed; new judgment was void because district court was without jurisdiction to amend the original order); *Gryar v Odeco Drilling, Inc.,* 674 F.2d 373,375 (5th Cir.1982) (per curiam) (amended judgment entered during pendency of appeal was void; amended order conflicted with terms of original order on appeal); *Mcc.latchy Newspapers v. Central Valley Typographical Union No.* 46,686 F.2d 731, 734-35 (9th Cir.) (amended order issued after filing of notice of appeal was void), cert. denied, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982).

The magistrate is in clear error regarding the likelihood of the plaintiff's success. The defendants are not even eligible for relieffrom the dismissal without prejudice in the present Tenth Circuit appeal; *Morley Construction Co. v. Maryland Casualty Co.,* 300 U.S. \85,57 S.Ct. 325, 81 L.Ed. 593 (1937). The opinion begins by stating the question before the Supreme Court: "The power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal is here to be admeasured." rd. at 187,57 S.Ct. at 326 (emphasis added). The Court went on to hold that the appellate court had no such power, stating:

> "Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' *United States* v. *American Railway Express Co.,* 265 U.S. 425,435,44 S.Ct. 560, 564, 68 L.Ed. 1087 [1924]. What he may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' *Ibid.* The rule is inveterate and certain."

Id. at 190-91,57 S.Ct. at 327-28. The cross-appeal requirement is one governing the power or jurisdiction of the appellate court: *E.F Operating Corp.* v. *American Buildings,* 993 F.2d 1046, 1049 & n. 1 (3d Cir.), cert. denied, 510 U.S. 868, 114 S.Ct. 193, 126 L.Ed.2d 151 (1993); Francis v. Clark Equipment Co., 993 F.2d 545, 552-53 (6th Cir.1993); *New Castle County* v. *Hartford Acc. & lndem. Co.,* 933 F.2d 1162, 1206 (3d Cir.1991); *Rollins* v. *Metropolitan Life Ins. Co.,* 912 F.2d 91L 917 (7th Cir.1990); *Young Radiator Co.* v. *Celotex Corp.,* 881 F.2d 1408, 1415-17 (7th Cir.1989); *Broth. of Maintenance Employees* v. *St. Johnsbury & Lamoille,* 806 F.2d 14, 15-16 (2d Cir.1986) (at least where no cross-appeal by any party); *Benson* v. *Armantrout,* 767 F.2d 454,455 (8th Cir.1985); *Savage* v. *Cache Valley Daily Ass'n,* 737 F.2d 887, 888-89 (10th Cir.1984); *Securities and Exchange Commission* v, *Youmans,* 729 F.2d 413,415 (6th Cir.1984) (citing Morley); *Martin* v. *Hamil.* 608 F.2d 725, 730-31 (7th Cir.1979)(citing Morley); *Zapico* v. *Bucyrus-Erie Co.,* 579 F.2d 714, 725-26 (2d Cir.1978); Gomez v. Wilson, 477 F.2d 411,414 n. 10 (D.C.Cir.1973); *Whitehead v. American Security and Trust Company,* 285 F.2d 282, 285-86 (D.C.Cir.1960).

The plaintiff also gives notice that the magistrate's void ruling does not immunize the defendants. The magistrate's ruling in the absence of jurisdiction is a nullity.:

> "...judgments rendered by a court lacking jurisdiction are void. *Burnham v.Super. Ct. ofCa!',495* U.S. 604,608, llO S.Ct. 2105,109 L.Ed.2d 631 (1990); Williams v. Life Say. & Loan, 802 F.2d 1200, 1202 (lOth Cir.1986). "Traditionally [this] proposition was embodied in the phrase coram non judice, 'before a person not ajudge' - meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment." *Burnham,* 495 U.S. at 608, 110 S.Ct. 2105 (emphasis in original)."

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The controlling law of this circuit is that the defendants' actions threatening the plaintiff and seeking to impair the plaintiffs clearly established constitutional rights to speech and property within this litigation are not immune:

> "While there are many persuasive policy arguments in favor of granting immunity to private threats of litigation, these do not override the clear language of the First Amendment ...ln summary, we hold that when the basis for immunity is the right to petition, purely private threats of

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The void stay does not shield the defendants from liability for their predicate acts of racketeering fraud under t 8 U.S.c. § 1962(c) in the incomplete Rule 26 disclosure omitting names and addresses of defendant employees identified in the complaint and the failure to provide the plaintiff documents identified in the complaint. By doing so the defendants knowingly created a false disclosure defrauding the court and obstructing justice. *Pope* v, *Federal Express Corp.,* 138 F.R.D. 675 (W.D.Mo. 1990), aff'd in relevant part, 974 F.2d 982 (8th Cir.1992).

The defendants' and their agents' current misconduct in failing to produce discovery is admissible as evidence in *Medical Supply Chain. Inc.* v. *Novation, et al,* KS Dist. Court case no.05-2299. See *United States* v. *Finestone,* 816 F.2d 583, 587 (I 1th CiT.) (Un indicted prior acts "were admissible to prove a pattern of racketeering activity and overt acts, elements of the ... RICO conspiracy. Furthermore, those events were admissible to prove the membership and participation in the RICO conspiracy ...."), cert, denied, 484 U.S. 948, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987), reh'g denied. 485 U.S. 972, 108 S.Ct. 1252, 99 L.Ed.2d 449 (1988); *United States* v. *Neapolitan.* 791 F.2d 489, 501 (7th Cir.) (Unindicted acts "would be admissible as circumstantial evidence that [defendant] was a member of a conspiracy."), cert. denied, 479 U.S. 940, 107 S.Ct. 422,93 L.Ed.2d 372 (1986)

Similarly the defendants' baseless request for a stay after repeatedly being served notice them the defendants' failure to seek relief from the dismissal without prejudice in *Medical Supply Chain. Inc.* v. *Novation, et al,* KS Dist. Court case no.05-2299 deprived them of later collateral attacks. The defendants pleadings as intentionally false efforts to harm the plaintiff through delay and obstruction are also admissible. See *Carter* v. *Hewitt,* 617 F.2d 961, 967 (3d Cir.1980) (Prior false complaints were admissible because they "prove the plans [to file false complaints] directly and not inferentially [and therefore], they fall outside the scope of[R]ule 404. The [complaints] are not evidence of other acts used as indirect proof ofa plan, but direct evidence of the existence of the plan itself.").

The plaintiff has had enough of the defendants' pleadings asserting positions contrary to clearly established controlling law and of the defendants' answers completely devoid of case law and will bring

racketeering counts against all responsible for the conduct and resulting injury when the plaintiffs cause of action over this new misconduct accrues.

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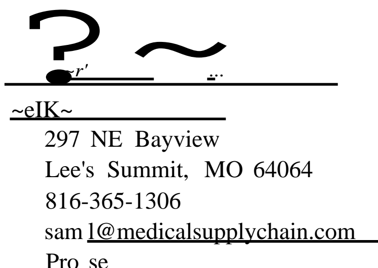
CONCLUSION

Whereas for the above reasons, the magistrate's order staying discovery should be overruled. Additionally the defendants are on notice that they have failed to meet their duties under Rule 26 and that this court is without jurisdiction to relieve the defendants of any liability for their misconduct in failing to disclose information and produce documents to the plaintiff.



~eIK~
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
sam 1@medicalsupplychain.com
Pro se

CERTIFICATE OF SERVICE

[certify I have served a copy of this objection to magistrate's order to the opposing counsel listed below via U.S. Mail on May 29th, 2007.

Mark A. Olthoff
Jay E. Heidrick
Shughart Thomson & Kilroy, PC--Kansas City
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105
816-421-3355
Fax: 816-374-0509
Email: molthoff@stklaw.com

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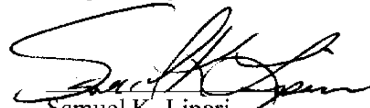
Respectfully submitted,



Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

CERTIFICATE OF SERVICE

I certify I have served a copy of this objection to magistrate's order to the opposing counsel listed below via U.S. Mail on May 29th, 2007.

Mark A. Olthoff
Jay E. Heidrick
Shughart Thomson & Kilroy, PC--Kansas City
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105
816-421-3355
Fax: 816-374-0509
Email: molthoff@stklaw.com

SAMUEL K. LIPARI