

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

SAMUEL K. LIPARI,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. 2:07-cv-02146-CM
)	
U.S. BANCORP and)	
U.S. BANK NATIONAL ASSOCIATION,)	
)	
<i>Defendants.</i>)	

OBJECTION TO MAGISTRATE’S ORDER OF 8/20/08

Comes now the plaintiff appearing *pro se* and while objecting to the jurisdiction of this court after the notice of appeal, makes the following objection to the order dated 08/20/2008 (Doc. 117) by Magistrate Judge David J. Waxse.

STATEMENT OF FACTS

1. The plaintiff made a pretrial affidavit of bias on August 18, 2008.
2. The Hon. Judge Carlos Murguia has not yet responded to the affidavit of bias.
3. The Chief Judge of this District Kansas District Court Judge Kathryn H. Vratil recused herself in this same matter or controversy 05-cv-02299-CM-GLR (under the matter or controversy standard in *Little Rock School District v. Armstrong*, No. 02-3867EA (8th Cir., 2004)) on October 20, 2005:

61 ORDER REASSIGNING CASE. Case reassigned to Judge Carlos Murguia for all further proceedings. Judge Kathryn H. Vratil no longer assigned to case. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry)(ls) (Entered: 10/20/2005)

5. All Kansas District court judges including the Hon. Judge Carlos Murguia recused themselves in the injunctive relief action styled *Landrith v. Stanton Hazlet*, KS Dist. Case No. 04-2215-DVB to prevent the defendants’ disbarment of the plaintiff’s counsel that covered the same conduct as described by the petition in 05-cv-02299-CM-GLR.
6. The order of 08/20/2008 is by Magistrate Hon. Judge David J. Waxse and states:

“08/20/2008
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ORDER regarding 114 Notice and Order to Show Cause. The Court has reviewed Plaintiff’s reply (doc. 113) to Defendants’ response (doc. 111) regarding Plaintiff’s asserted noncompliance with the Court’s 7/22/08 Order (doc. 103). Plaintiff’s filing of the reply does not relieve Plaintiff of the obligation to respond to the Order to Show Cause. Plaintiff shall file his response to the Order to Show Cause on or before 8/27/08. Entered by Magistrate Judge David J. Waxse on 8/20/08. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.)

(mh) (Entered: 08/20/2008)

7. The defendants' law firm Shughart Thomson & Kilroy, P.C. had notice of the petition in Judicial Council The Tenth Circuit Case No. 2008-10-372-08 describing the extrinsic fraud scheme to procure the dismissal of the plaintiff's contract based claims through a fraudulent Motion to Compel production of documents already produced and to answer interrogatories more fully to include addresses of witnesses known to the defendants and which the plaintiff was himself seeking in discovery. See letter of disclosure to Jay E. Heidrick atch. 1 and atch 1 Part B Petition with exhibits Case No. 2008-10-372-08 including exb 36.

"64. The defendants' law firm is aware of the changes made in the judicial council's treatment of judicial misconduct complaints yet they still file pleadings that contain extrinsic fraud believing the respondent will grant them.

See Exb 36.

65. The US Bank and US Bancorp defendants are currently arguing before the respondent in the state contract based claims case for a protective order to evade having to turn over the email contract for the escrow accounts and the written loan application that are the writings of the subject contract dispute because the documents are not "relevant."

66. While this will no doubt lead to new sanctions against the petitioner for "frivolously" arguing the writings to a written contract are relevant and discoverable the danger to justice is that the respondent will severely restrict discovery of the records related to the extrinsic fraud in the preceding litigation used by the defendants to evade their liability under contract and which is inherent in a Missouri state law breach of contract claim as a breach in the UCC duty of good faith and fair dealing.

67. Because the respondent and US Bancorp defense counsel failed to research the applicable law, they thought their plan of having the federal racketeering claims over misconduct in the litigation including extrinsic fraud and depriving the petitioner of counsel dismissed would prevent the petitioner from proving their unlawful behavior."

Atch 1 Part B Petition ¶¶ 64-66 at pg. 19-20

8. The Magistrate Hon. Judge David J. Waxse and Jay E. Heidrick were given notice that the law firm Shughart Thomson & Kilroy, P.C. was proceeding in a crime against the court and that the order to compel had been obtained through extrinsic fraud on the court. Atch, 2.

9. Despite the exposure of their plan to procure dismissal of the plaintiff's claims through extrinsic fraud, the defendants' law firm Shughart Thomson & Kilroy, P.C. proceeded with the scheme by filing the motion at 6:30 am on 8/18/08 that on its face reveals the deception and the expectation that Hon. Judge David J. Waxse will participate in the extrinsic fraud on the court, the motion faults the plaintiff for not producing the documents already served on both the magistrate and the defendants in the settlement brief and information not required in response to interrogatories including addresses unknown to the plaintiff and the pro se plaintiff's legal theories but expressly not seeking the sanction of dismissal Shughart

Thomson & Kilroy, P.C. had previously arranged for outside of court. See atch. 3

10. Despite conclusive notice that the matter or controversy was in appeal and that this court was thereby deprived of jurisdiction, Magistrate Hon. Judge David J. Waxse participated in the extrinsic or extrajudicial fraud by ruling on the motion filed earlier that morning by the defendants. See atch. 4 Order of Magistrate Hon. Judge David J. Waxse.

11. Fearing the extrinsic fraud on the court scheme had been derailed by the plaintiff's notice that the appeal had not been dismissed and other filings of the plaintiff on 8/18/08; Shughart Thomson & Kilroy, P.C.'s attorney Jay E. Heidrick filed a redundant motion to require the plaintiff to show cause in which Heidrick unconsciously has revealed the fraud on the court used to obtain the order to compel and the order of Hon. Judge Carlos Murguia to deny the objection to Hon. Judge David J. Waxse's order to compel production by omitting the demand for the documents Shughart Thomson & Kilroy, P.C. had already been served and which the defendants US Bank NA and US Bancorp had corruptly destroyed committing spoliation even after being noticed to preserve the electronic discovery by the plaintiff. See atch. 5. Jay E. Heidrick Motion to Require Show Cause

12. The Jay E. Heidrick Motion to Require Show Cause also reveals the fraud scheme to dismiss the contract claims that depended on Magistrate Hon. Judge David J. Waxse's participation even after receiving notice that the scheme was extrinsic fraud on the court because Shughart Thomson & Kilroy, P.C.'s motion now states the true goal of the scheme -the dismissal of the plaintiff's contract claims as a sanction for complying with discovery, even though US Bank and US Bancorp have breached even the case management order contract and have not produced any discovery or even the documents they specify they will use in their Rule 26(a)(1) disclosure; just as the defendants have had this court repeatedly sanctioned for being correct on the law. See exb. 5. Jay E. Heidrick Motion to Require Show Cause

13. Facts outside of the affidavit of prejudice are known to Magistrate Hon. Judge David J. Waxse and Hon. Judge Carlos Murguia including why the plaintiff's concurrent state antitrust claims were dismissed without findings of law or fact by the state court Hon. Judge Manners and that like the plaintiff's federal antitrust and racketeering claims were dismissed for not having pled elements clearly on the face of the complaint where the table of contents specified, the plaintiff's federal racketeering claims were dismissed by the W. D. of Missouri Chief Judge Hon. Judge Feranado J. Gaitan in a temporal relationship exceeding

that rejected in *Glass v. Pfeffer*, 849 F.2d 1261 at 1268 (C.A.10 (Kan.), 1988) and giving rise to the appearance of a lack of independence or extra judicial bias and prejudice by this court. See atch. 6. Notice of Appeal in *Lipari v. Novation LLC* and atch. 7,8 and 9 Rule 59(e) Motion and Answer Suggestions.

MEMORANDUM OF LAW

The plaintiff has filed an affidavit under 28 USC § 144 over the court's proceeding to exert jurisdiction in a biased and prejudiced manner against the plaintiff despite being given conclusive notice that the plaintiff's appeal has not been dismissed as sought by the defendants (the plaintiff supplied the court a copy of the August 11, 2008 Order of the Tenth Circuit) and this court was under the controlling law of this circuit deprived of jurisdiction on July 11, 2008. See Plaintiff's Objection to Magistrate's Order of 08/18/08.

The affidavit was irrefutably timely being before the term in which the case is to be heard and on the same day that the plaintiff acquired conclusive evidence requiring recusal of the District Court judge court.

The District Court Judge Hon. Judge Carlos Murguia,(not Magistrate Hon. Judge David J. Waxse) is required to determine whether the affidavit is sufficient. The judge against whom an affidavit under § 144 is filed must pass upon the legal sufficiency of the facts alleged. *Green v. Murphy*, 259 F.2d 591, 593 (3 Cir. 1958). Because Hon. Judge Carlos Murguia is required to examine the circumstances and information beyond the affidavit and that information which is known to Hon. Judge Carlos Murguia alone, the affidavit has not yet been ruled on:

"1 The Ninth Circuit in *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980), outlined the procedures for recusal of a federal judge. The court explained that **a motion brought under Sec. 144 will raise a question concerning recusal under Sec. 455(b)(1) as well; the test for personal bias or prejudice is the same in both. Sec. 455 modifies Sec. 144 in requiring the judge to go beyond the Sec. 144 affidavit and consider the merits of the motion pursuant to Sec. 455(a) and (b)(1).** [Emphasis added]"

Gerald v. Duckworth, 46 F.3d 1133 at fn 1 (C.A.7 (Ind.), 1994).

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

The plaintiff's complaint, unchanged since its initial filing in Independence, Missouri gives notice to Hon. Judge Carlos Murguia of the existence 28 U.S.C. Section 455 bias.

“31. No further court action occurred in the Medical Supply action until the petitioner's counsel had been disbarred, then Kansas District Court Judge Carlos Murguia began in earnest making rulings with the visible purpose of dismissing the action for the lack of counsel and completing the removal of representation participated in by the Kansas District court and to further its adversarial interest in the petitioner's proceeding.

32. The Kansas District Court Judge Carlos Murguia dismissed the federal claims in their entirety for failure to state a claim despite the fact that the complaint was identical in elements of pleading for its claims to the complaint filed in *Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al*, 8th Cir. 03- 1441 and 03-1554 and Judge Murguia expressly declined to exert jurisdiction over the state law based claims.

33. The Kansas District court retained jurisdiction over the federal action to sanction Medical Supply's former counsel and SAMUEL K. LIPARI for among other reasons, witnessing his counsel's disbarment but then because of a timely motion for reconsideration ruled Medical Supply Chain, Inc. would be sanctioned.”

Plaintiff's Petition at pg. 8 ¶¶ 31-33.

The significance of Hon. Judge Carlos Murguia not making rulings in the prior litigation was to facilitate the defendants' scheme to deprive the plaintiff of counsel by preventing the discovery related to the racketeering claims over the defense counsel Shughart, Thomson & Kilroy, P.C.'s conduct to cause the plaintiff's counsel's disbarment as described in detail in the later dismissed for not having required pleading elements clearly on the face of the 05-cv-02299-CM-GLR complaint.

Hon. Judge Carlos Murguia has been discovered by the plaintiff on August 18, 2008 to be giving the appearance of using the same tactic of not ruling on the plaintiff's objections to the defendants' frivolous discovery protective orders as part of an extrajudicial scheme to cause the plaintiff's contract claims to be dismissed through the extrinsic fraud of failing to produce documents already produced to the defendants and the magistrate.

The extra-judicial nature of Hon. Judge Carlos Murguia's appearance of bias and prejudice against the plaintiff and of presiding over this action without independence is the temporally related dismissal of racketeering claims by W. D. of Missouri Chief Judge Hon. Judge Fernando J. Gaitan, the judge that refused to remand the plaintiff's state law claims despite their concurrent jurisdiction before the US Court of Appeals of the Tenth Circuit and instead transferred them to the District of Kansas. Hon. Judge Fernando J. Gaitan dismissal as detailed in atch 9 also dismisses the plaintiff's racketeering claims for not containing elements clearly present on the face of the complaint.

Prior Extrajudicial Source Bias

The court has participated in an extrajudicial source of prejudice and bias through extrinsic fraud by the defendants to procure an order to compel production of documents already produced and addresses or legal theories in response to interrogatories. The defendants procured these orders through extrinsic fraud or fraud on the court. "...that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Great Coastal Exp., Inc. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 675 F.2d 1349 at 1356 (C.A.4 (Va.), 1982) "Fraud is regarded as extrinsic or collateral where it prevents a party from having a trial or from presenting his cause of action or his defense, or induces him to withdraw a defense, or operates upon matters pertaining not to the judgment itself, but to the manner in which it was procured." *Muncrief v. Mobil Oil Company*, 421 F.2d 801 at fn 2 (10th Cir., 1970). Kansas courts have defined extrinsic fraud as "some act or conduct of the prevailing party which has prevented a fair submission of the controversy." *Hood v. Hood*, 335 F.2d 585 at 591 (10th Cir., 1964).

The procurement of the order to compel was "fraud extrinsic to the matters tried and determined by the other court and which caused the court to render a wrong judgment, such as the successful party through fraud or deception preventing the unsuccessful from presenting his case " described in *Johnson v. First National Bank in Wichita, Kansas*, 223 F.2d 31 at 34 (10th Cir., 1955).

In *Knapp v. Kinsey*, 232 F.2d 458, 465 (6th Cir.), cert. denied, 352 U.S. 892, 77 S.Ct. 131, 1 L.Ed.2d 86 (1956), reversing a lower court because of bias appearing during the trial, the court recognized the 'close analogy' between bias developed during trial, which requires reversal, and bias evident prior to trial, which requires disqualification under Section 144. The critical formulation of bias sufficient to reverse was forcefully expressed by the court:

"Whether unconsciously or otherwise, (the trial judge) failed from the start of the trial to view this case with the impartiality between litigants that the defendants were entitled to receive. His active participation in the case and in the questioning of witnesses exceeded what was reasonably necessary to obtain a clear understanding of what their testimony was and fully justifies appellants' complaint that at times 'he, figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff.' Although appellees' counsel did not ask or need such assistance, and apparently at times realized the possible prejudice to their cause, the prejudicial effect to appellants' rights requires a reversal of the judgment.

Id. at 467.

Where such advocacy bias 'exist(s) before the trial it furnishes the basis for disqualification of the judge to conduct the trial. Section 144, Title 28, U.S. Code.' *Id.* at 465. Especially from a due process perspective, it seems clear that the 'judicial proceeding' rule can extend no further than is necessary to preserve the functional ability of the courts to try cases. *Mitchell v. Sirica*, 502 F.2d 375 (C.A.D.C., 1974)

A favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment. (That explains what some courts have called the "pervasive bias" exception to the "extrajudicial source" doctrine. See, e. g., *Davis v. Board of School Comm'rs of Mobile County*, 517 F. 2d 1044, 1051 (CA5 1975), cert. denied, 425 U. S. 944 (1976).).

CONCLUSION

Whereas the trial judge has not reviewed the plaintiff's affidavit of prejudice or has not made an order regarding that review, under 28 USC § 144 there are no further proceedings in this court and because this court lost jurisdiction due to the notice of appeal filed on July 11, 2008, the magistrate's order is void for want of jurisdiction.

Respectfully Submitted,

S/ Samuel K. Lipari

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CERTIFICATE OF SERVICE

I certify I have sent a copy to the undersigned opposing counsel via electronic filing on 8/22/08.

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S/ Samuel K. Lipari

Samuel K. Lipari

Attachments:

Atch 1 email to Shughart Thomson Kilroy Disclosing Petition
Atch 1 Part A Judicial Ethics Complaint
Atch 1 Part B Petition
Atch 1 Part C Exhibits
Atch 1 Part D Exhibits 2
Atch 2 Letter of July-22-08
Atch 2 Exb 1 02-3443 Order *Medical Supply Chain, Inc. v. US Bancorp, NA.*
Atch 2 Exb. 2 Authority for investigation research
Atch 3 Response to Show Cause Order
Atch 4 Order to Show Cause
Atch 5 Lipari Motion For Order To Show Cause
Atch 6 Missouri Notice of Appeal
Atch 7 Lipari v GE Rule 59(e) Motion
Atch 8 Lipari Rule 59(e) Reply Suggestion
Atch 9 Reply Suggestion to Seyfarth Shaw