

**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 THE MAGISTRATE’S ORDER
COMPELLING DISCOVERY AND SANCTIONING THE PLAINTIFF**

Comes now, the plaintiff Samuel K. Lipari appearing pro se and respectfully objects to the magistrate’s order compelling discovery and sanctioning the plaintiff.

STATEMENT OF FACTS

1. The defendants have turned over none of the central documents described in the complaint and requested by the plaintiff.
2. The requested documents that have not been produced including the written contracts for a corporate checking account, the written contract for the US Bank Five Star Guarantee, the written contract for the loan financing secured with the escrow accounts, the MSCI nondisclosure contract, and the escrow agreement are in the possession of the defendants but have been denied as not existing in the defendants’ second motion to dismiss, violating Rule 26’s mandatory disclosure requirement.
3. The defendants have also filed a frivolous blanket motion to protect seeking relief from any discovery and from revealing the spoliation of electronic and paper documents they were under notice to preserve.
4. Upon receiving the plaintiff’s notice to depose US Bancorp, the defendants sent the plaintiff a letter objecting to the deposition and production of supporting documents based on a frivolous assertion that the plaintiff did not specify the subject matter despite the plaintiff’s listing of the paragraphs of the complaint US Bancorp will be questioned over and frivolously asserting a blanket protection.
5. The defendants then filed a notice to depose the plaintiff seemingly for the purpose of demonstrating that this forum is biased or otherwise prejudiced against the plaintiff.

6. The plaintiff conferred by replying to the defendants' objections and counseling Shughart, Thomson & Kilroy, P.C. that its conduct in seeking the deposition of the plaintiff while denying even the least invasive form of deposition, that of a corporate entity by the plaintiff was evidence of Shughart, Thomson & Kilroy, P.C. intentionally participating in 28 U.S.C. §455(a) bias or prejudice.

7. The plaintiff sought to contact the defendants' counsel by phone but did not resolve the dispute.

8. The plaintiff will be prejudiced by the dispositive motion schedule which has not been changed and will allow the defendants evidence in summary judgment motion trials while depriving the plaintiff of evidence to support his summary judgment motion that would allow this action to conclude before going to jury and by depriving the plaintiff of evidence to refute the continued willingness of Shughart, Thomson & Kilroy, P.C. attorneys to make the grossest misrepresentations of fact to defraud the court.

9. The plaintiff is without legal representation at the proposed deposition solely because of the misconduct of the defendants described at length in the complaint and the preceding antitrust action, the plaintiff attempted to substitute with Dennis Hawver with the knowledge that Hawver would be retiring and leaving the country, however Hawver was impaired by this court's unlawful threats to injure the plaintiff and his counsel for being right at law in *Medical Supply Chain, Inc. v Neoforma et al.*

10. The plaintiff attempted to obtain replacement counsel and as documented in the settlement brief, the defendants through Shughart, Thomson & Kilroy, P.C. made *ex parte* misrepresentations to potential counsel solely to prevent the plaintiff from obtaining replacement counsel.

MEMORANDUM OF LAW

Rule 37(b) of the Federal Rules of Civil Procedure allows a court to order the payment of attorneys' fees as a sanction for failing to obey an order to provide or permit discovery. Fed.R.Civ.P. 37(b)(West 2004). A magistrate judge's determination to award attorneys' fees as a discovery sanction pursuant to this Rule is a non-dispositive matter, which the district court reviews under the clearly erroneous standard. *Thomas E. Hoar Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir.1990) (citations omitted). See also, *Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th Cir.1997)(noting that discovery orders are non-dispositive and magistrate judges have the authority to order discovery sanctions). A determination is "clearly erroneous" when, although there is evidence to support it, the court, after reviewing all the

evidence, is left with the definite and firm conviction that the magistrate judge made a mistake. *Harvard Pilgrim*, 318 F.Supp.2d at 2-3(citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

The plaintiff served the documents specifically requested by the defendants to both the magistrate and defendants as attachments to the settlement brief requested by the magistrate. See exb 1. Settlement brief.

The magistrate appears not to have read this settlement brief and has not made his ordered determination on whether mediation is feasible because the magistrate appears to adopt the defendant's mistake and confusion over the contract executed by US Bank to provide escrow accounts which under E-Sign and Missouri controlling law is an email repeatedly provided the defendants' counsel and the blank escrow form mailed to the MSCI's prospective representatives.

The magistrate's order unjustly sanctions the plaintiff with legal fees for documents he has already provided before they were requested and denies the plaintiff equal protection of law where the defendants were on notice they had to preserve their electronic documents (a tape recording and records from the 2003 case management proceeding before the same magistrate document this notice). The defendants have cited these same documents as exhibits for their defense yet despite the requirements of Rule 26 and the plaintiff's requests for production, the defendants have not produced them and spoliation appears to have occurred.

In denying the plaintiff the electronic records sought consistently since filing this action in 2002, the magistrate is overturning his own published and reviewed decisions on electronic records that have been favorably cited by courts around the nation and upheld by the Tenth Circuit.

Whereas for the following reasons the plaintiff respectfully requests that the magistrate's order be reversed and that all parties be entitled to discovery.

Respectfully Submitted,

S/ Samuel K. Lipari

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via email, on this 10th day of

July, 2008 to:

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