



UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI

SAMUEL K. LIPARI)
(Assignee of Dissolved)
Medical Supply Chain, Inc.))
<i>Plaintiff</i>) Case No. 06-1012-CV-W-FJG
) State Court No. 0616-CV32307
)
vs.) (Properly Case No. 05-0210-
) CV-W-ODS)
US BANCORP, NA)
USBANK,NA)
<i>Defendants</i>)

REPLY TO DEFENDANTS' ANSWER

Comes now the plaintiff Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and makes the following reply to the defendants US Bancorp NA and US Bank, NA's suggestion opposing remand.

DISPUTED CONTENTIONS

Plaintiff reasserts and clarifies the following contentions that appear to be disputed by the defendants:

1. Case No. 06-10 12-CV-W-FJG is a later filed action duplicating the state law claims in Case No. 05-0210- CV-W-ODS (now Kansas District Court case No. 05-2299-CM) arising from the same transactions and comprises the same case or controversy.
2. The defendants' answer to the state complaint and defendants' reply to the plaintiff's motion to remand both openly state the federal jurisdiction over this controversy should be in Kansas District court.
3. The federal jurisdiction over this controversy is exclusively in Kansas District Court and Judge Carlos Murguia's dismissal of state law claims without prejudice under 28 USC § 1367 (c) was suspended by the plaintiff's Motion for Reconsideration.
4. The Tenth Circuit in the related action *Medical Supply Chain, Inc. v. US Bancorp NA, et al.* Case No. 02-3443 (See Exb. 1) ruled that the plaintiff's motion for reconsideration "suspended the finality" of the trial court order.
5. The Tenth Circuit order (See Exb. 1) stating the clearly established rule that was served on the defendants and their present counsel Mark A. Olthoff(MO lic. #38572) and Andrew M. DeMarea (MO lic. #38572).

#45217) of the law firm Shughart Thomson & Kilroy, P.C. who are responsible for knowing that their assertion that Kansas District Court does not have jurisdiction over the present action is false.

6. *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-2299-CM (formerly W.D. Mo. Case No. 05-0210- CV-W-ODS) the first filing of the present state claims against US Bank NA and US Bancorp NA is on appeal before the Tenth Circuit, maintaining exclusive federal jurisdiction over the parties in Kansas District Court and the Tenth Circuit Court of Appeals.

7. Mark A. Olthoff(MO lie. #38572) and Andrew M. Demarea (MO lie, #45217) neglected to appeal Judge Carlos Murguia's dismissal of state law claims without prejudice under 28 USC § 1367 (c).

8. A named defendant in *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-2299-CM is the Missouri headquartered law firm Shughart Thomson & Kilroy, P.C. in privity with the present defendants and which defeated federal diversity jurisdiction in both the complaint's federal and state law antitrust claims, the latter of which would also be in state court if the Tenth Circuit appeal is dismissed.

9. At the time Shughart Thomson & Kilroy, P.C.'s employee Mark A. Olthoff (MO lic. #38572) filed a notice of removal on behalf of the present defendants US Bank NA and US Bancorp NA, federal trial court jurisdiction still existed in *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-2299-CM by virtue of the plaintiff's Tenth Circuit appeal.

10. By refiling the present state law based claims, the defendants US Bank NA and US Bancorp NA through Shughart Thomson & Kilroy, P.C. and Mark A. Olthoff(MO lie. #38572) violated the order of Hon. Judge Smith transferring the plaintiff's case or controversy (*Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-2299-CM formerly W.D. Mo. Case No. 05-0210- CV-W-ODS) to the District of Kansas and Judge Carlos Murguia'S order declining supplemental jurisdiction under 28 USC § 1367 (c).

11. Dismissal of the plaintiff's appeal in the Tenth Circuit would extinguish federal jurisdiction because Mark A. Olthoff (MO lie. #38572) and Andrew M. Demarea (MO lie. #45217) are precluded by the res judicata effect of failing to seek reconsideration or appeal of Judge Carlos Murguia's dismissal under 28 USC § 1367 (c).

12. The plaintiff's success in a Tenth Circuit Appeal would return jurisdiction to Kansas District Court over the plaintiff's state law claims presently before the court, through improper removal from the concurrent jurisdiction of state court.

13. The plaintiff did not make the patently absurd argument that a party's local counsel defeats diversity jurisdiction through privity, the existing concurrent federal jurisdiction over the plaintiff's claims includes named defendants not present in the state case, including the Missouri defendant Shughart Thomson & Kilroy, P.e.

14. The plaintiff in his Motion for Remand never argued this case should be remanded because US Bank as a national association defeats diversity jurisdiction. The US Supreme court determined it does not.

SUGGESTIONS WARRANTING REMAND

The plaintiff observes that the defendants have provided no authority for suspending the effect of 28 USC § 1367 (c) and have failed to assert any special considerations warranting an exception to the well settled comity between two federal courts rule that the first federal court to obtain jurisdiction over a filed federal complaint has priority over its federal litigation.

Comity between Federal Courts

Here cases involving identical issues are pending before two federal district courts, "though no precise rule has evolved, the general principle is to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In most "cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it." *Smith v. M'lver*, 22 U.S. (9 Wheat.) 532, 535 (1824). The Eighth Circuit Court of Appeals has recognized 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).

The prevailing standard is that "in the absence of compelling circumstances," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1174 (11th Cir.1982), the first-filed rule should apply. *Northwest Airlines v. American Airlines*, 989 F.2d 1002, 1005 (8th Cir.1993) (quoting *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488-89 (8th Cir.1990)); see *Keymer v. Management Recruiters In'l, Inc.*, 169 F.3d 501,503 n. 2 (8th Cir.1999) (stating this rule and citing *Northwest Airlines*); *Midwest Motor Express, Inc. v. Central States Southeast and Southwest Areas Pension Fund*, 70 F.3d 1014, 1014 [(8th Cir.1995); *Boatmen's First* 57 F.3d 638, 641 (8th Cir.1995)' *Nat'l Bank of Kansas City v. Kansas Pub. Employees Retirement Sys.*, 57 F.3d 638, 641 (8th Cir.1995) (same). Thus, the

first-filed rule requires that the concurrent cases be brought by the same parties and embrace the same issues.

Samuel Lipari is the successor in interest to the original plaintiff Medical Supply Chain, Inc. and is a party in the current Tenth Circuit appeal, otherwise US Bank NA and US Bancorp NA are a sub set of defendants from the first filed case. See *Midwest Motor Express*, 70 F.3d at 1017; accord *Keymer*, 169 F.3d at 503 n. 2 ("The first-filed rule gives priority, when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction in order to conserve judicial resources and avoid conflicting rulings."); *Anheuser-Busch, Inc. v. Supreme Int'l Corp.*, 167 F.3d 417, 419 (8th Cir.1999) ("The well-established rule is that in cases of concurrent jurisdiction, 'the first court in which jurisdiction attaches has priority to consider the case.'") (quoting *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488 (8th Cir.1990)) (internal quotations omitted).

The absence of any authority supporting the defendants' objection to the basis the plaintiff sought remand on does no service to the court. Similarly, the defendants' counsel Mark A. Olthoff(MO lie. #38572) refilled this action with claims that had already been filed in the Western District of Missouri between the same parties without disclosing such to the Clerk of the Court or in the removal notice addressed to the Judges of the Western District of Missouri signed by Mark A. Olthoff(MO lie. #38572). This conduct is described at length in *Disability Advocates and Counseling v. Betancourt*, 379 F.Supp.2d 1343 (S.D. Fla., 2005). Mark A. Olthoff(MO lie, #38572) is clearly attempting to repeatedly deceive the court.

28 USC § 1367

The defendants have conclusorily dismissed the plaintiff's controlling case law that the Kansas District Court retains exclusive federal jurisdiction over all claims arising under the same case or controversy even during periods it does not choose to exercise it because the court can change that decision at any time:

"While the district court's power to exercise jurisdiction under the "same case or controversy" requirement in 28 U.S.e. § 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). [Emphasis added]

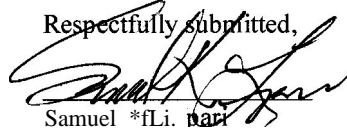
Innovative Home Health Care, Inc. v. P.T-OT Associates of the Black Hills, 141 F.3d 1284 at 1287-88 (C.A.8 (S.D.), 1998).

Consequently the defendants are attempting to deceive this court again when they argue that because the state claims were dismissed without prejudice they can be removed in a second federal action. The claims are still subject to the first court's jurisdiction under *United Mine Workers* and the reconsideration and appeal suspended the effect of or finality of the first court's order dismissing the state law claims.

Conclusion

The plaintiff respectfully requests that this action be remanded to Missouri state court from where it was removed.

Respectfully submitted,



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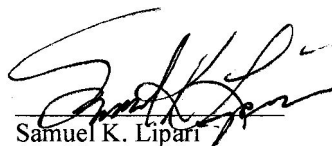
Prose

Certificate of Service

I certify that on January 4, 2007 I have served the opposing counsel with a copy of the foregoing notice using the CMIECF system via the office of the clerk, which will send a notice of electronic filing to the following:

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