

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FILED

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MICHAEL GANS
CLERK OF COURT

SAMUEL K. LIPARI)
(Assignee of Dissolved)
Medical Supply Chain, Inc.) Case No. 08-03087
Plaintiff) (Appeal from
) Case No. 06-1012-CV-W-FJG
) State Court No. 0616-CV32307
vs.) Originally Case No. 05-0210-
) CV-W-ODS)
US BANCORP. NA)
US BANK. NA)
Defendants)

REPLY TO DEFENDANTS' MOTION TO DISMISS APPEAL

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 motion to dismiss the appeal. The appellee's motion to dismiss is frivolous for the following grounds:

1. The order transferring the state claims removed from the 16th Circuit State of Missouri Circuit court to the Kansas District Court is or will be appealable upon dismissal in the transferee court.
2. The appellant timely appealed the dismissal of his Missouri state law based contract and tortious interference claims by filing a notice of appeal within thirty days of their dismissal in Kansas District Court.

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3. The defendants' argument that the plaintiff is 17 months too late is spurious and contrary to clearly established law preventing appeal of a transfer until the conclusion of litigation in the transferee court. tcr

4. Under the Missouri Supreme Court's determination of Missouri state law and the Kansas District Court's dismissal of complete judicial units makes them ripe for review.

SUGGESTION IN SUPPORT OF THE RIPENESS FOR APPEAL

The defendants engaged in forum shopping and changed the choice of law rules by using a 28 U.S.c. § 1404(a) transfer in a way cautioned against by this court in *Kansas Pub. Emp. Retirement Sys. v. Reimer & Koger Assocs. Inc.*, 61 F.3d 608, 611 at 613 (8th Cir.1995). The defendants obtained transfer of the action after the fraudulent removal from the 16th Circuit Missouri State Court to the Kansas District court to avoid the *stare decisis* effect of *Intern. Casings Group v. Premium Standard Farms*, 358 F.Supp.2d 863 (W.D. Mo., 2005) and *Crestwood Shops. L.L.c. v. Hilkene*, No. WD 65694 (Mo. App. 8/8/2006) applying Missouri's statutory compliance with 15 USC §7001, the federal Electronic Signatures in Global and National Commerce Act, "E-SIGN" in the way the plaintiff had advocated based on the November 28, 2000 writings of Patrick A. Randolph. Jr., a UMKC School of Law Professor. In fact Kansas District Court Judge Carlos Murguia has ruled that the Honorable Nanette K. Laughrey. United States District Judge for the Western District of Missouri's interpretation of Missouri law is "implausible. ,.

I. Reviewability of a transfer order arises after dismissal

Neither the transfer nor the denial of the plaintiff's Motion to Remand can be reviewed until judgment by the transferee court occurs.

A. Denial of Remand

The denial of the plaintiff's motion to remand is an interlocutory order not immediately reviewable. *Chicago, Rock I. & Pac. R. Co. v. Stude*, 346 U.S. 574, 578, 74 S.Ct. 290,293, 98 L.Ed. 317 (1954) and authorities cited thereat (denial of remand not final or appealable if standing alone); *Brough v. United Steelworkers of America*, 437 f.2d 748,749 (1st Cir.1971) (denial of remand is nonappealable interlocutory order). Review of a remand denial is available at the end of the case. See *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir.1981) ("Ordinarily, a district court's refusal to remand an action is not in and of itself a final order and cannot be reviewed unless and until a final judgment has been entered."); *Boone v. Citigroup, Inc.*, 416 f.3d 382,388 (5th Cir.2005) (reviewing denial of remand motion on appeal from final judgment).

As a matter of appellate jurisdiction, § 1291 review is available to the plaintiff raising the remand issue upon entry of a final judgment. See generally 19 James Wm. Moore et al., *Moore's Federal Practice* f 202.1115] (3d ed. 1997) ("An order denying a motion to remand a case to the state court from which it was removed ... may be appealed together with the appeal of the final judgment.") (footnotes omitted).

B. Order Transferring Action to Kansas District Court

A transfer order is an interlocutory order that is not immediately reviewable by appeal. See *D'Ippolito v. American Oil Co.*, 401 F.2d 764-765 (2d Cir. 1968); 17 Moore's Federal Practice 111.60[1] (3d ed. 1999). See also *In re Lieb*, 915 F.2d 180,184 (5th Cir.1990) (noting that a transfer order is not a final judgment and is not immediately appealable). The plaintiffs decision to not seek mandamus review of an interlocutory ruling does not forfeit the opportunity to obtain review on appeal from a final judgment. See 19 Moore 203.32[3][b]: *Arthur v. Nyquist*. 547 F.2d 7. 9 (2d Cir. 1976) (interlocutory appeal permissive, not mandatory).

The Tenth Circuit does not have jurisdiction to review the Missouri District Court's order transferring the action to Kansas District Court:

"We lack jurisdiction to consider Copley's first argument which concerns the North Carolina district court's decision to transfer this case to the Missouri district court. *Technitrol, Inc. v. McManus*, 405 F.2d 84. 87 (8th Cir.1968) ("we have grave doubt whether we have any right to review the validity of a transfer order made by a federal District Court outside the circuit"), cert. denied, 394 U.S. 997. 89 S.Ct. 1591,22 L.Ed.2d 775 (1969); *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253,1257 (4th Cir.1991); *Roojing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 985-86 (11 th Cir.1982):

US. v. Copley, 25 F.3d 660 at 662 (C.A.8 (Mo.), 1994). Similarly the Tenth Circuit Court lacks jurisdiction to review the Missouri District Court's order denying remand. See *St. Jude Medical, Inc. v. Lifecare International*. 250 F.3d 587 at 593 (8th Cir., 2000). Review in the Tenth Circuit would be impractical or unlikely:

"Transferee courts have expressed a strong reluctance to review a transfer order indirectly by means of a motion to retransfer. They have the power to do so if the contention is that the transferor court lacked power to order the transfer rather than merely that the transferor court abused its discretion in applying the statute, but even then the doctrine of law of the case ordinarily will suggest the wisdom of not reexamining the decision of a coordinate court.

15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3846 (2d ed.1986) ... As noted in dicta by the Supreme Court, "transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation. „ *Christianson v. Colt industries Operating Corp.*, 486 U.S. 800. 816, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988)."

Koehler v. Green. 370 F.Supp.2d 904 at 906 (E.D. Mo .. 2005)

11.The Appeal was timely

The plaintiff filed the current notice of appeal on September 5,2008, one day after the September 4th,2008 order dismissing the plaintiffs Missouri state law breach of contract and tortuous interference claims. "Generally, a party in a civil case must file a notice of appeal "within 30 days after the judgment or order appealed from is entered." Fed. R.App. P. 4(a)(1)(A)." *Dieser v. Continental Cas. Co.*, 440 F.3d 920 (8th en. 2006).

III. The assertion the appeal is 17 months late is spurious

The above cited authorities clearly establish that the plaintiff could not have appealed the interlocutory orders of the Western District of Missouri District court denying the motion to remand or transferring the action to Kansas District Court until dismissal of the plaintiff's claims occurred. The defendants' assertion that the plaintiff is 17 months too late is frivolous and intentionally designed to deceive this court.

IV. Dismissal of Complete Judicial Units

The appeal is from the trial court's dismissal of the plaintiffs Missouri state law contract and interference with contract claims. The plaintiff believes the transfer and failure to remand the claims are both now appealable but if not will be in this circuit upon the judgment of the remainder of the claims.

Under Missouri state law the dismissed claims themselves are now appealable. The Missouri Supreme Court's guidance on making a judgment final stating that "a judgment is final only when it disposes of a 'distinct judicial unit.'" See *Lumbermen Mutual Casualty v. Thornton*, 36 S.W.3d 398,402 (Mo.App. 20(0) .. citing *Gibson v. Brewer*. 952 S.W.2d 239, 244 (Mo. bane 1997). The term "distinct judicial unit" means "the final judgment on a claim, and not a ruling on some of several issues arising out of the same transaction or occurrence which docs not dispose of the claim." *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. bane 1997). quoting *Stale ex rei. State Hwy. Comm'n. v. Smith*, 303 S.W.2d 120,123 (Mo.1957). "It is 'differing: 'separate,' 'distinct' transactions or occurrences that permit a separately appealable judgment, not differing legal theories or issues presented for recovery on the same claim." *Id.*

The court's order disposes of distinct "judicial unit[s]," defined as "the final judgment on a claim. and not a ruling on some of several issues arising out of the same transaction or occurrence which does not dispose of the claim." *Penn-Am. Ins. Co. v. The Bar. Inc.*, 201 S.W.3d 91, 95 (Mo. App. 2006); See also *Bell Scott, LLC v. Wood. Wood, & Wood Invs.. Inc.*, 169 S.W.3d 552, 554 (Mo. App. 2005).

CONCLUSION

Whereas for the above stated reasons the plaintiff/appellant respectfully requests the court deny the appellee/defendants' motion to dismiss the appeal.

Respectfully submitted,

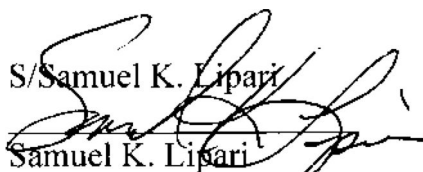
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Pro se

Certificate of Service

I certify that on September 28, 2008 I have served the opposing counsel with a copy of the foregoing via US Mail:

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ATTORNEY FOR DEFENDANTS
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NATIONAL ASSOCIATION

S/Samuel K. Lipari

Samuel K. Lipari

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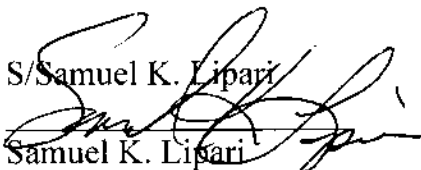
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I certify that on September 28 2008 I have served the opposing counsel with a copy of the foregoing via US Mail:

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