

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMUEL K. TJPARI)
(Assignee of Dissolved)
Medical Supply Chain, Inc.)) Case No. 08-03428
<i>Pia in tiji</i>) (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. INC.)
US BANK. NA)
<i>Defendants</i>)

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 October 24, 2008 motion to dismiss the appeal.

STATEMENT OF FACTS

1. The plaintiff voluntarily dismissed his motion to amend his petition to include claims for fraud and challenging the constitutionality of the USA PATRIOT Act subtitle b, section 351 of 31 U.S.C. ~5318(g) which had not been answered by the defendants or subjected to a defendants' motion for summary judgment under Rule 41(a)(1)(ii) on October 15, 2008.

2. The plaintiff voluntarily dismissed his remaining claim for Trade Secret Misappropriation Under Section 417.450 RSMO of The Uniform Trade Secrets Act with prejudice under Rule 41(a)(2) on October 15, 2008.

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U.S. COURT OF APPEALS
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3. The defendants US Bank NA and US Bancorp Inc. joined in stipulating to the Rule 41(a)(1)(ii) dismissal of the plaintiffs proposed amended claims and conditionally stipulated to the dismissal of the plaintiffs Count III claims for Trade Secret Misappropriation Under Section 417.450 RSMO of The Uniform Trade Secrets Act with prejudice under Rule 41(a)(2) on October 21, 2008. See exb. 1.

4. The US Court of Appeals for the Tenth Circuit on October 17, 2008 has recognized a challenge to its own jurisdiction (raised in the plaintiffs notice) over an appeal from the Kansas District Court captioned *Lipari v US Bank et al*, C.A.10 case no. 08-3287 which the plaintiff believes is the absence of the Kansas District Court jurisdiction over the transferred case and issued an order by Ms. October 17, 2008 Elisabeth A. Shumaker, Clerk of the Court requiring the parties to simultaneously brief the issue of jurisdiction by November 7, 2008. See exb. 2.

5. The defendants' current motion to dismiss the appeal raises the issue of whether a transfer can be appealed at the conclusion of a case on its merits, a resolution of which in the defendants' favor would reverse a prior panel of this court in *Van Orman v. Purkett*, 43 F.3d 1201 (C.A.8 (Mo.), 1994) and would require an *en banc* hearing according to the practice of the Eighth Circuit described in *Us. v. Powell*, 761 F.2d 1227 at 1236 (C.A.8 (Ark.), 1985). not the three judge panel specified under Federal Rules of Appellate Procedure Local Rule 27(8)(c).

SUGGESTION IN OPPOSITION TO DISMISSAL

The action removed to the Western District of Missouri and then transferred to the Kansas District Court has now concluded in a judgment on the merits ripe for appeal or in the alternative the plaintiff's notice of appeal is dormant until the case is ended.

Under the controlling case law for the Kansas District Court where this matter was transferred in the order now sought to be appealed, a voluntary dismissal with prejudice does not require an order:

"The Kansas District court's own precedent is that only a motion under 41(a)(2) seeking dismissal without prejudice requires a court order:

Under Rule 41(a)(2). "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Thus, a dismissal without prejudice under Rule 41(a)(2) depends on the Court's discretion."

103 Investors t. L.P. v. Square D Co., 222 F.Supp.2d 1263 at 1270-1271 (D. Kan., 2002).

While the defendant's attempt to make the dismissal with prejudice conditioned on award of attorney's fees, the Tenth Circuit rule in *Aero Tech, Inc. v. Estes*, 110 F.3d 1523 and at 1511 (10th Cir. (Colo.), 1997) is that fees with a voluntary dismissal with prejudice are improper:

"Today, we continue to adhere to the rule that a defendant may not recover attorney's fees when a plaintiff dismisses an action with prejudice absent exceptional circumstances. When a plaintiff dismisses an action without prejudice, a district court may seek to reimburse the defendant for his attorney's fees because he faces a risk that the plaintiff will refile the suit and impose duplicative expenses upon him. See *Cauley*, 754 F.2d at 771-72. In contrast, when a plaintiff dismisses an action with prejudice, attorney's fees are usually not a proper condition of dismissal because the defendant

cannot be made to defend again. *Id.* Of course, when a litigant makes a repeated practice of bringing claims and then dismissing them with prejudice after inflicting substantial litigation costs on the opposing party and the judicial system, attorneys' fees might be appropriate. But such an exceptional circumstance is not present here. Accordingly, we conclude that the district court did not abuse its discretion in denying attorneys' fees under Rule 41 (a)(2),"

AeroTech, Inc. v. Estes, 110 F.3d 1523 (C.A.10 (Colo.), 1997). The Tenth Circuit has determined that fees as a condition of dismissal are normally only appropriate in voluntary dismissals without prejudice. See *U.S. ex rei Stone v. Rockwell Intern. Corp.*, 282 F.3d 787 (10th Cir., 2002).

The plaintiff's stipulation of dismissal with prejudice is a judgment on the merits. See *Astron Indus. Associates, Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 at 960 (C.A.5 (Fla.), 1968), *Pultney Arms LLC v. Shaw Industries Inc.*, 3:00cv2052(JBA) at pg.1 (D. Conn. 9/6/2002) (D. Conn. 2002). Certainly at the point the defendants joined in the stipulation of dismissal, despite seeking attorney's fees, the stipulation became a judgment on the merits under this circuit's precedent in *Gioia v. Blue Cross Hospital Service, Inc. of Mo.*, 641 F.2d 540 at (C.A.8 (Mo.), 1981) *Royal Insurance Company of America v. Kirksville College of Osteopathic Medicine, Inc.*, 2002 C08 996 (USCA8, 2002):

"As the district court recognized, an order granting partial summary judgment dismissing one of several claims or parties is normally not final and appealable. See, e.g., Fed. R. Civ. P. 54(b). However, "[p]reclusion seems warranted so long as the court clearly intended to terminate all proceedings as to the claims or parties involved and no attempt to appeal was thwarted" WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D § 4432, at p. 60 (2002). Here, Lewistown filed a motion asking the state court to reconsider its adverse ruling. Had this motion been denied, Lewistown could have appealed the

trespass ruling at the end of the case. Instead, the parties settled, and the trespass claim was dismissed with prejudice. At that point, the partial summary judgment ruling became final. See *ill/agee v. Blue Ridge Prof! Bldg. Co.*, 821 S.W.2d 839, 842 (Mo. 1991). No attempt to appeal was thwarted because all parties, including Kirksville, stipulated to its dismissal with prejudice before the state court ruled on Lewistown's motion to reconsider. ,.

Royal Insurance Company of America v. Kirksville College a/Osteopathic Medicine. Inc., 2002 C08 996 at " 26 (USCA8, 2002). The Eight Circuit has recognized "Rule 41 (b) transforms certain procedural dismissals which were not considered adjudications on the merits at common law into adjudications on the merits in federal court." *Knox v. Lichtenste in*, 654 F.2d]9 at 22 (C.A. 8 (Mo.), 1981).

A stipulation of dismissal is effective immediately upon filing and no judicial approval is required. *In re Wolf*, 842 F.2d 464. 466 (D.C.Cir.1988). The tiling of a stipulation for dismissal deprives the court of jurisdiction over the matter stipulated. *Kokkonen v. Guardian Life Insurance Company of America*, 114 S.Ct. 1673,128 L.Ed.2d 391, 511 U.S. 375: 1673. 1675.128 L.Ed.2d 391 (1994) (the court may not even retain jurisdiction to enforce the settlement from which the stipulation derives unless that jurisdiction is expressly reserved with the consent of the parties). Sec *In the Matter of West Texas Marketing Corp.*, 12 r.3d 497. 50 I (5th Cir.1994) ("when the parties voluntarily agreed to a dismissal, under Federal Rules of Civil Procedure 41(a)(I)(ii) ..., any further actions by the court were superfluous. Therefore, the dismissal order entered by the bankruptcy court is rendered irrelevant to the question of the finality of the judgment." (Citations

omitted): *McCall-Bey v. Franzen*. 777 F.2d 1178, 1185 (7th Cir.1985) (if the parties' stipulation had been filed before the judge's order, that order would have been a nullity).

Appellate jurisdiction began when the plaintiff timely filed a notice of appeal Rule following the plaintiffs voluntary dismissal of the remaining claims under F.R.A.P. Rule 4 (a)(2):

"4. Appeal as of Right-s-When Taken

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(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order-but before the entry of the judgment or order-is treated as filed on the date of and after the entry."

If the plaintiff's notice of appeal was premature, it is dormant pending the Kansas District Court's ruling on any outstanding tolling motion, the only one of which would be construing the defendants' assertion of conditioning the stipulation with prejudice on the award of attorney's fees as a motion for judgment or a motion for attorneys' fees, both of which are listed under F.R.A.P. Rule 4 (a)(4)(A), specifically F. R. Civ. P. Rule 50 (b) and Rule 54 respectively. The Eighth Circuit recognizes that either cause the motion to lie dormant until the district court rules:

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The Tenth Circuit has the same controlling rule in *Lewis v. B. F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir. 1988) (en banc) (Hln the situation like that before us, in which the other claims were effectively dismissed after the notice of appeal was filed, we believe Fed. R. App. P. 4(a)(2) permits the interpretation that the notice of appeal, filed prematurely, ripens and saves the appeal. ... In such cases generally we will consolidate or companion the earlier appeal with any subsequent appeals arising out of the same district court case.").

The defendants have repeated their spurious assertion that the plaintiff cannot appeal the transfer from the Western District of Missouri to the Kansas District Court because he did not appeal the transfer within 30 days of the order transferring the case to Kansas District Court issued on April 4, 2007 that the defendants also raised in their motion to dismiss the plaintiff's appeal in *Lipari v US Bank et al*, C.A.8 case no. 08-03087. It has been clearly established in this jurisdiction (as it has in all other circuits examined) that an order of transfer is interlocutory and cannot be appealed until the case has been resolved on its merits. See *United States Fire Ins. Co. v. American Family Life Assurance Co.*, 787 f.2d 438.439 (8th Cir.1986) (per curiam) (dismissing appeal of transfer order from Western District of Missouri to Western District of Georgia as interlocutory and not appealable as a final judgment); *Fischer v. First Nat'l Bank of Omaha*, 466 F.2d 511, 511 (8th Cir.1972) (per curiam) (dismissing appeal and stating that an

order by a district court transferring an action to another district pursuant to 28 U.S.C. Sec. 1406(a) is interlocutory and nonappealable).

The defendants improperly seek to have the motion panel overturn the published appellate decision of this court in *Van Orman v. Purkett*, 43 F.3d 1201 (C.A.8 (Mo.). 1994).

"Because the transfer order in the present case is not a final, appealable order, we have no present jurisdiction to review the order. 6 It may be reviewed, however, for abuse of discretion in any appeal that Van Orman may take from the final disposition of his habeas petition. *Parker v. Singletary*, 974 F.2d 1562, 1581-82 (11th Cir.1992) (per curiam) (court considered, in prisoner's appeal from denial of petition for habeas relief, whether district court abused its discretion in ordering pursuant to Sec. 2241 (d) the transfer of the petition to another same-state district with concurrent jurisdiction); *Middlebrooks v. Smith*, 735 F.2d 43 L 432-33 (11th Cir.1984):

Van Orman v. Purkett.A» F.3d 1201 at 1203 (C.A.8 (Mo.). 1994).

For this court to overturn its prior established decisions on the requirement of a party to wait until a case is concluded on its merits before appealing by granting the defendants' motion, the court would require an *en bane* hearing according to the practice of the Eighth Circuit described in *U.s. v. Powell*, 761 f.2d 1227 at 1236 (C.A.8 (Ark.), 1985). not the thrcjudge panel specified under Federal Rules of Appellate Procedure Local Rule 27(B)(c). The plaintiff respectfully requests that the defendants be required to Petition for *En Bane* Disposition under F.R.A.P. RULE 35A and that the plaintiff be given the opportunity to respond.

Respectfully submitted,

~~f_____


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Pro se

Certificate of Service

I certify that on October 28,2008 I have served the opposing counsel with a copy of the foregoing notice using the US Postal Service having sent the copy with postage prepaid to the following:

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A1TORNEY FOR DEFENDANTS
U.S. HANCORP AND U.S. BANK
NATIONAL ASSOCIA nON


Samuel K. Libari

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

SAMUEL K. LIPARI.)
)
Plaintiff.)
)
vs.) Case No. 07-CY-02146-CM-OJW
)
U.S. BANCORP, and)
)
U.S. BANK NATIONAL ASSOCIATION,)
)
Defendants.)

DEFENDANTS' RESPONSE TO AND CONDITIONAL JOINDER IN PLAINTIFF'S
STIPULATION FOR VOLUNTARY DISMISSAL WITH PREJUDICE
UNDER FRCP 41(A).

Defendants, by and through their attorney's, Shughart, Thomson & Kilroy, now file this response to and conditional joinder in plaintiff's stipulation for voluntary dismissal with prejudice under FRCP 41(a). Defendants state as follows:

- I. On September 4, 2008, the Court dismissed four of the five counts in plaintiff's Complaint.
2. On October 15, 2008, plaintiff filed a pleading styled "Stipulation for Order of Dismissal of Remaining Claims Pursuant to Federal Rule of Civil Procedure 41(A)(2)." See Doc. No. 147. In this stipulation, the plaintiff attempts to voluntarily dismiss with prejudice his claim in Count III for misappropriation of trade secrets, which is the only remaining claim in this suit.

3. Rule 41 (a) of the Federal Rules of Civil Procedure states that, after the opposing party has answered or filed a motion for summary judgment, dismissal may be accomplished only by stipulation or court order.

4. Rule 41 (a)(2) grants the Court authority to condition dismissal upon terms the Court deems proper.

5. Given the lengthy history of contentious litigation among these parties, defendants believe that justice requires conditions be placed upon the plaintiff's request for dismissal. In this case alone, the Court has determined that defendants are entitled to attorney fees for plaintiff's non-compliance with discovery (Doc. No.115); the Court has issued show cause orders why the case should not be dismissed for plaintiff's non-compliance (Doc. Nos. 114 & 120); and the Court has recently ordered plaintiff(again) to show cause why he should not be required to pay defendants' attorneys' fees for non-compliance with discovery (Doc. No. 145). These ruling are in addition to the previous sanctions levied against the plaintiff's former company and his former attorney in *Medical Supply I & II*. Justice and equity demand that plaintiff not be permitted to avoid his conduct that has increased defendants' costs in this litigation and taken up so much of the Court's time and resources.

6. Defendants join in plaintiff's voluntary dismissal with prejudice. However, any order or judgment of dismissal should reflect that plaintiff has been ordered to pay defendants' attorneys' fees for his non-compliance as ordered in Doc. No. 115, as well as all applicable costs of the action.

Respectfully submitted,

s/ Jay E. Heidrick
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KS #20770

ATTORNEYS FOR DEFENDANTS
U.S. RANCORP and
U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served via electronic mail this 21st day of October, 2008, to:

Mr. Samuel K. Lipari
3520 NE Akin Boulevard
Suite 918
Lee Summit, MO 64064

s/ Jay E. Heidrick
Attorney for Defendants

UNITED STATES COURT OF APPEALS

October 17, 2008

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

SAMUEL K. LIPARI,

Plaintiff - Appellant,

v.

No. 08-3287

US BANCORP NA; US BANK NA,

Defendants - Appellees.

ORDER

The plaintiff in Case No. 07-CV -2146 in the U.S. District Court for the District of Kansas filed a "Notice of Appeal" designating various orders of the district court he seeks to appeal. Preliminary documents were transmitted to this court and this appeal was opened. However, it is less than completely clear that all claims as to all parties in the underlying case have been disposed of. Without a final disposition of all claims as to all parties, appellate jurisdiction would be lacking in this case. See, e.g., B. Willis, C.P.A., Inc. v. BNSF Ry. Corp., 531 F.3d 1282, 1295 -96 (10th Cir. 2008).

It appears that the district court entered an order on September 4, 2008, that dismissed all claims of the plaintiff "except plaintiff's misappropriation of trade secrets claim." *Order*, p. 13. However, the plaintiff then filed a "Stipulation" on

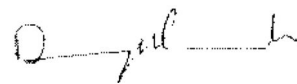
October 15, 2008 in which he states that he "stipulates a dismissal of Count III Trade Secrets Misappropriation." *Stipulation*, p. 2. The next day, on October 16, 2008, the plaintiff filed a notice of appeal.

Nevertheless, it does not appear that the district court has entered a ruling on the stipulation to dismiss the remaining claim.

Within twenty-one days from the date of this order, the parties are directed to file memoranda expressing their respective positions on this court's jurisdiction to hear an appeal at this time. The memoranda are limited to appellate jurisdiction, and may not address any issues relating to the merits of the appeal. The filing of preliminary documents will proceed, but any briefing on the merits is abated pending the disposition of jurisdictional issues or until further order of the court.

If indeed all claims as to all parties have in essence been disposed of, it might be in the best interests of all concerned to, if necessary, ask the district court to address the stipulation and if appropriate, enter a final judgment order in order to clarify the issue of appellate jurisdiction.

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court



by:
Douglas E. Cressler
Chief Deputy Clerk

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MIF Realty L.P. v. Rochester Associates, 92 F.3d 752 at 755 (C.A.8 (Minn.), 1996).

The Tenth Circuit has the same controlling rule in *Lewis v. B. F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir. 1988) (en banc) ("In the situation like that before us, in which the other claims were effectively dismissed after the notice of appeal was filed, we believe Fed. R. App. P. 4(a)(2) permits the interpretation that the notice of appeal, filed prematurely, ripens and saves the appeal. . . . In such cases generally we will consolidate or companion the earlier appeal with any subsequent appeals arising out of the same district court case.").

The defendants have repeated their spurious assertion that the plaintiff cannot appeal the transfer from the Western District of Missouri to the Kansas District Court because he did not appeal the transfer within 30 days of the order transferring the case to Kansas District Court issued on April 4, 2007 that the defendants also raised in their motion to dismiss the plaintiff's appeal in *Lipari v US Bank et al*, C.A.8 case no. 08-03087. It has been clearly established in this jurisdiction (as it has in all other circuits examined) that an order of transfer is interlocutory and cannot be appealed until the case has been resolved on its merits. See *United States Fire Ins. Co. v. American Family Life Assurance Co.*, 787 F.2d 438, 439 (8th Cir.1986) (per curiam) (dismissing appeal of transfer order from Western District of Missouri to Western District of Georgia as interlocutory and not appealable as a final judgment); *Fischer v. First Nat'l Bank of Omaha*, 466 F.2d 511, 511 (8th Cir.1972) (per curiam) (dismissing appeal and stating that an

order by a district court transferring an action to another district pursuant to 28 U.S.C. Sec. 1406(a) is interlocutory and nonappealable).

The defendants improperly seek to have the motion panel overturn the published appellate decision of this court in *Van Orman v. Purkett*, 43 F.3d 1201 (C.A.8 (Mo.), 1994).

“Because the transfer order in the present case is not a final, appealable order, we have no present jurisdiction to review the order. 6 It may be reviewed, however, for abuse of discretion in any appeal that Van Orman may take from the final disposition of his habeas petition. *Parker v. Singletary*, 974 F.2d 1562, 1581-82 (11th Cir.1992) (per curiam) (court considered, in prisoner's appeal from denial of petition for habeas relief, whether district court abused its discretion in ordering pursuant to Sec. 2241(d) the transfer of the petition to another same-state district with concurrent jurisdiction); *Middlebrooks v. Smith*, 735 F.2d 431, 432-33 (11th Cir.1984).”

Van Orman v. Purkett, 43 F.3d 1201 at 1203 (C.A.8 (Mo.), 1994).

For this court to overturn its prior established decisions on the requirement of a party to wait until a case is concluded on its merits before appealing by granting the defendants' motion, the court would require an *en banc* hearing according to the practice of the Eighth Circuit described in *U.S. v. Powell*, 761 F.2d 1227 at 1236 (C.A.8 (Ark.), 1985), not the three judge panel specified under Federal Rules of Appellate Procedure Local Rule 27(B)(c). The plaintiff respectfully requests that the defendants be required to Petition for *En Banc* Disposition under F.R.A.P. RULE 35A and that the plaintiff be given the opportunity to respond.

Respectfully submitted,



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Pro se

Certificate of Service

I certify that on October 28, 2008 I have served the opposing counsel with a copy of the foregoing notice using the US Postal Service having sent the copy with postage prepaid to the following:

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ATTORNEY FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION



Samuel K. Lipari

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

SAMUEL K. LIPARI.)	
)	
)	Plaintiff.
)	
vs.)	Case No. 07-CV-02146-CM-DJW
)	
U.S. BANCORP, and)	
)	
U.S. BANK NATIONAL ASSOCIATION,)	
)	
)	Defendants.

**DEFENDANTS' RESPONSE TO AND CONDITIONAL JOINDER IN PLAINTIFF'S
STIPULATION FOR VOLUNTARY DISMISSAL WITH PREJUDICE
UNDER FRCP 41(A).**

Defendants, by and through their attorneys, Shughart, Thomson & Kilroy, now file this response to and conditional joinder in plaintiff's stipulation for voluntary dismissal with prejudice under FRCP 41(a). Defendants state as follows:

1. On September 4, 2008, the Court dismissed four of the five counts in plaintiff's Complaint.
2. On October 15, 2008, plaintiff filed a pleading styled "Stipulation for Order of Dismissal of Remaining Claims Pursuant to Federal Rule of Civil Procedure 41(A)(2)." *See* Doc. No. 147. In this stipulation, the plaintiff attempts to voluntarily dismiss with prejudice his claim in Count III for misappropriation of trade secrets, which is the only remaining claim in this suit.

3. Rule 41(a) of the Federal Rules of Civil Procedure states that, after the opposing party has answered or filed a motion for summary judgment, dismissal may be accomplished only by stipulation or court order.

4. Rule 41(a)(2) grants the Court authority to condition dismissal upon terms the Court deems proper.

5. Given the lengthy history of contentious litigation among these parties, defendants believe that justice requires conditions be placed upon the plaintiff's request for dismissal. In this case alone, the Court has determined that defendants are entitled to attorney fees for plaintiff's non-compliance with discovery (Doc. No.115); the Court has issued show cause orders why the case should not be dismissed for plaintiff's non-compliance (Doc. Nos. 114 & 120); and the Court has recently ordered plaintiff (again) to show cause why he should not be required to pay defendants' attorneys' fees for non-compliance with discovery (Doc. No. 145). These ruling are in addition to the previous sanctions levied against the plaintiff's former company and his former attorney in *Medical Supply I & II*. Justice and equity demand that plaintiff not be permitted to avoid his conduct that has increased defendants' costs in this litigation and taken up so much of the Court's time and resources.

6. Defendants join in plaintiff's voluntary dismissal with prejudice. However, any order or judgment of dismissal should reflect that plaintiff has been ordered to pay defendants' attorneys' fees for his non-compliance as ordered in Doc. No. 115, as well as all applicable costs of the action.

Respectfully submitted,

s/ Jay E. Heidrick

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ATTORNEYS FOR DEFENDANTS
U.S. BANCORP and
U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served via electronic mail this 21st day of October, 2008, to:

Mr. Samuel K. Lipari
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s/ Jay E. Heidrick

Attorney for Defendants

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

October 17, 2008

**Elisabeth A. Shumaker
Clerk of Court**

SAMUEL K. LIPARI,

Plaintiff - Appellant,

v.

No. 08-3287

US BANCORP NA; US BANK NA,

Defendants - Appellees.

ORDER

The plaintiff in Case No. 07-CV-2146 in the U.S. District Court for the District of Kansas filed a "Notice of Appeal" designating various orders of the district court he seeks to appeal. Preliminary documents were transmitted to this court and this appeal was opened. However, it less than completely clear that all claims as to all parties in the underlying case have been disposed of. Without a final disposition of all claims as to all parties, appellate jurisdiction would be lacking in this case. See, e.g., B. Willis, C.P.A., Inc. v. BNSF Ry. Corp., 531 F.3d 1282, 1295-96 (10th Cir. 2008).

It appears that the district court entered an order on September 4, 2008, that dismissed all claims of the plaintiff "except plaintiff's misappropriation of trade secrets claim." *Order*, p. 13. However, the plaintiff then filed a "Stipulation" on

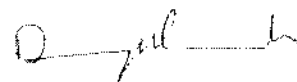
October 15, 2008 in which he states that he “stipulates a dismissal of Count III Trade Secrets Misappropriation.” *Stipulation*, p. 2. The next day, on October 16, 2008, the plaintiff filed a notice of appeal.

Nevertheless, it does not appear that the district court has entered a ruling on the stipulation to dismiss the remaining claim.

Within twenty-one days from the date of this order, the parties are directed to file memoranda expressing their respective positions on this court’s jurisdiction to hear an appeal at this time. The memoranda are limited to appellate jurisdiction, and may not address any issues relating to the merits of the appeal. The filing of preliminary documents will proceed, but any briefing on the merits is abated pending the disposition of jurisdictional issues or until further order of the court.

If indeed all claims as to all parties have in essence been disposed of, it might be in the best interests of all concerned to, if necessary, ask the district court to address the stipulation and if appropriate, enter a final judgment order in order to clarify the issue of appellate jurisdiction.

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court



by:
Douglas E. Cressler
Chief Deputy Clerk