

0210- CV-W-ODS on March 9, 2005 against Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association (“VHA”), Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp NA, U.S. Bank National Association, Jerry A. Grundhofer, Andrew Cesare, Piper Jaffray Companies, Andrew S. Duff, Shughart Thomson & Kilroy, P.C., and Novation, LLC. Where defendant Shughart Thomson & Kilroy is incorporated and headquartered in Missouri where the plaintiff resides and where his dissolved company had its principal place of business. See Exb. 1 at pg. 1.

3. This court lacks jurisdiction because by the fraudulent removal (See Exb. 2) of a concurrent jurisdiction state court proceeding styled as *Samuel K. Lipari v US Bank NA, et al* Missouri 16th Cir. State Court Case No. 0616-CV32307 addressing state law claims the District of Kansas U.S. District Court declined to exert jurisdiction over, the defendants have in effect re-filed an issue that has already been decided between the parties by a federal court in *Medical Supply Chain, Inc. v Neoforma, et al*, Kansas District Court case No. 05-2299-CM.

4. This court lacks jurisdiction because on January 12, 2007 the Tenth Circuit Court of Appeals has decided to hear the plaintiff’s appeal of the Kansas District Court decisions in *Medical Supply Chain, Inc. v Neoforma, et al*; Case No. 05-0210- CV-W-ODS now Kansas District Court case No. 05-2299-CM where the appeal is styled as *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al.*, Case No. 06-3331. See Exb. 3.

5. This court lacks jurisdiction to hear this matter because the trial judge is a director or officer of the co-defendant Volunteer Hospital Association or VHA by virtue of the Judge’s position as a directing officer of St. Luke’s Health System a member of the defendant VHA and an owner of the defendant Novation, LLC.

6. The plaintiff made a timely motion to remand his concurrent jurisdiction contract based claims to state court from which they were wrongly removed by the defendants.

7. This trial court has not yet addressed the plaintiff’s motion to remand for lack of jurisdiction.

9. The defendants have refilled their motion to Motion to Dismiss, Strike or Transfer which they filed in this case or controversy when it was styled *Medical Supply Chain, Inc. v Neoforma, et al*; Case No. 05-0210- CV-W-ODS and resulted in an order by Western District Judge Hon. Ortrie D.Smith. The ruling

on the defendants' Motion to Dismiss, Strike or Transfer is an order specifically being appealed by the plaintiff in *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al.*, Case No. 06-3331.

10. The plaintiff is confused and unjustly burdened by the defendants' counsel's misconduct including the refiling of this action without disclosing to the Clerk of the Western District of Missouri that it was previously filed as *Medical Supply Chain, Inc. v Neoforma, et al*; Case No. 05-0210- CV-W-ODS and is still active and by the burden to answer a frivolous dispositive motion to dismiss the plaintiff's state contract claims when the issue of whether they will be heard in federal court has been preclusively decided by Kansas District Court Judge Carlos Murguia, without appeal by the defendants and during the time the plaintiff is burdened with assisting his counsel Dennis Hawver in preparing a Tenth Circuit appellate brief and appendix over this same already decided issue. See Exb. 3

SUGGESTION IN SUPPORT OF STAY

The plaintiff seeks a stay of proceedings that would clearly result in orders by this court in the clear absence of jurisdiction.

This court cannot gain jurisdiction through diversity over the concurrent state action resolving supplemental state law claims the federal court declined to exercise jurisdiction over because diversity did not exist at the time the claims were first filed in the ongoing federal court case *Medical Supply Chain, Inc. v Neoforma, et al*; Case No. 05-0210- CV-W-ODS, now Kansas District Court case No. 05-2299-CM: "... diversity must exist at the time that the action is commenced. See *Richardson*. 946 F. Supp. at 52 (citing *Freeport-McMoran, Inc. v. KN Energy. Inc.*, 498 U.S. 426, 428 (1991))." *Meng v. Schwartz*, Civ. Action No. 01-1715 (RCL) (D. D.C. 2/6/2004) at pg.1 (D.D.C., 2004).

28 U.S.C. § 1291 describes the Tenth Circuit's jurisdiction over the present case or controversy now that the appeal has not been dismissed over the defendants' claims the notice of appeal was not timely:

"§ 1291. Final decisions of district courts

The **courts of appeals** (other than the United States Court of Appeals for the Federal Circuit) **shall have jurisdiction of appeals from all final decisions of the district courts of the United States**, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title." [emphasis added]

The plaintiff certainly intended that the Western District of Missouri Court would hear his antitrust and contract based claims against the defendants and that any disputes would have been

resolved by the Eight Circuit. But, the defendants through their counsel Mark Olthoff fraudulently transferred the controversy to Kansas District Court on the false pretext of “Judicial Economy” and the Kansas District Court, The Kansas Supreme Court and the Tenth Circuit have all been misused to accomplish what now can clearly be seen as the opposite of justice. The defendants’ latest motion and suggestion in support appear to be an ill thought through attempt to continue the same. The plaintiff would be unduly burdened in attempting to answer their spurious legal arguments at the time he must assist in the appeal over the very same issues.

The plaintiff and the court would be better served after a basis for jurisdiction has been decided and the defendants’ answer is clear enough to resolve dispositive motions.

CONCLUSION

The plaintiff respectfully requests that the court stay any further proceedings or in the alternative that this court order the action be remanded to Missouri state court from whence it was removed.

Respectfully submitted,

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Certificate of Service

I certify that on January 30th, 2007 I have served the opposing counsel with a copy of the foregoing notice using the CM/ECF system via the office of the clerk which will send a notice of electronic filing to the following:

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