

**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' REPLY TO
PLAINTIFF'S RESPONSE TO SHOW CAUSE ORDER**

Defendants, by and through counsel, Shughart Thomson & Kilroy, P.C., file this Reply to Plaintiff's Response to Show Cause Order (Doc. No. 134). The plaintiff's response continues his *ad hominem* attacks on this Court and defendants' counsel. As he has done throughout this litigation, the plaintiff demonstrates his ignorance of federal law and the rules of civil and appellate procedure. First, he argues his appeal of *Medical Supply II* somehow divests this Court of jurisdiction in this case. Second, he misunderstands the law and rules when he argues that the Court issued its August 25, 2008 Show Cause Order (Doc. No. 120) because of fraud or bias against the plaintiff. However, it is clear that the Show Cause Order is a direct result of the plaintiff's inactions, including:

1. his failure to offer any written response to defendants' Request for Production;
2. his failure to appropriately and completely respond to defendants' First Interrogatories;
3. his failure to file any response to defendants' Motion to Compel related to defendants' Interrogatories and Requests for Production;

4. his failure to abide by the Court's July 8, 2008 Order (Doc. No. 96) requiring him to serve supplemental responses to defendants' Interrogatories and to serve written responses to defendants' Request for Production;
5. his failure to respond to the Court's Show Cause Order of July 8, 2008 (Doc. No. 96); and
6. his failure to participate with defendants in drafting a Joint Proposed Pre-Trial Order.

The plaintiff has repeatedly disregarded this Court's authority and throughout this litigation has made unsubstantiated allegations of fraud against the defendants, their counsel and this Court challenging their integrity. There is ample reason in the record justifying the Court's exercise of discretion to dismiss plaintiff's remaining claim as a sanction for his repeated and willful disregard of this Court's authority.

I. THIS COURT POSSESSES SUBJECT MATTER JURISDICTION

The plaintiff incorrectly asserts that the Court's August 25, 2008 Show Cause Order is "void" for lack of subject matter jurisdiction for two reasons. The plaintiff first argues that his recent Notice of Appeal in *Medical Supply II* divests this Court of subject matter jurisdiction. Next, plaintiff argues that his "Affidavit of Prejudice Pursuant to 28 U.S.C. § 144" prevents this Court from issuing any further orders until it has ruled on the Affidavit. But these arguments lack any basis in law and should be rejected.

A. The Plaintiff's Notice of Appeal in *Medical Supply II* Does Not Divest This Court of Jurisdiction.

Plaintiff argues this Court lost subject matter jurisdiction over the case on July 11, 2008 when he filed a Notice of Appeal in *Medical Supply II*, Case No. 05-02299. However, this matter is a separate case than *Medical Supply II*. It has a separate case caption. It has a separate plaintiff. It has different defendants. It has different claims, as this case involves solely state law claims that were dismissed from *Medical Supply II* without prejudice. There is simply no

support for plaintiff's contention that this matter is the same as *Medical Supply II*. But even assuming this case and *Medical Supply II* involve similar facts, the Notice of Appeal in *Medical Supply II* still would not divest this Court of subject matter jurisdiction here. A District Court does not lose jurisdiction if an appeal is taken from a non-appealable Order, or if the appeal is invalid. See *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227, 1229 (10th Cir. 1998). In *Medical Supply II*, plaintiff is attempting to appeal a ruling that struck Lipari's motion to "re-open" the case and also struck his motion to alter or amend judgment pursuant to Rule 59(e) because, as a non-attorney, he could not file pleadings on behalf of a corporate party. *Medical Supply II* was never re-opened and remains closed. The record is clear that this Court has jurisdiction in this case, even accepting plaintiff's outrageous allegations that *Medical Supply II* and this matter are somehow the "same" case.

B. This Court Is Not Required To Halt Proceedings Based on Plaintiff's "Affidavit of Prejudice."

Magistrate Waxse and Judge Murguia are not required to recuse themselves simply because plaintiff filed an Affidavit of Prejudice pursuant to 28 U.S.C. § 144. "There is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). There is no duty for either Magistrate Waxse or Judge Murguia to recue in this case as the plaintiff's Affidavit of Prejudice is procedurally deficient and his allegations of bias are groundless.

1. Plaintiff's § 144 Affidavit is procedurally deficient.

An Affidavit of Prejudice under § 144 must state specific facts that demonstrate a personal bias against a party. *Id.* A court is free to disregard conclusions, rumors, beliefs and opinions, as these are not sufficient to form a basis for disqualification. *Id.* (citing *Burger v. United States*, 255 U.S. 22, 34, 41 S. Ct. 230, 233 (1921)). The affidavit is strictly construed

against the affiant, and there is a substantial burden on the moving party to demonstrate the judge is not impartial. The affidavit must demonstrate a personal bias. Allegations based on a judicial bias or adverse rulings are insufficient. *See, Winslow v. Lehr*, 641 F. Supp. 1237, 1241 (D. Col. 1986); *Smith v. Danyo*, 545 F.2d 83, 87 (3rd Cir. 1978) (“Moreover, the alleged bias must be rooted in extra judicial sources, rather than in judicial actions which can be corrected on appeal.”)

Finally, an Affidavit of Prejudice must be accompanied by a Certificate of Good Faith signed by the attorney. *See* 28 U.S.C. § 144. In the case of *pro se* party, the Certificate of Good Faith may be signed by any member of the Bar of the Court. *See Williams-Murray v. Anthropologie, Inc.*, 2007 W.L. 781913 at *1 (E.D. Pa. 2007) (“Section 144 requires a Certificate of Good Faith to accompany the Affidavit and that, in the case of a *pro se* movant, the Certificate of Good Faith be signed by any member of the Bar of the Court.”) Plaintiff’s Affidavit of Prejudice is procedurally deficient and his allegations of prejudice are frivolous.

Plaintiff’s Affidavit of Prejudice under § 144 is procedurally insufficient. It consists of nothing more than conclusory allegations that are unsupported by any facts. There is no allegation of a personal bias and there is no Certificate of Good Faith accompanying the Affidavit. In fact, there is no motion to recuse pending before this Court. The plaintiff’s Affidavit is procedurally and legally insufficient, and the Court is justified in not considering it.

2 Plaintiff’s allegations of bias in response to his Show Cause Order are frivolous.

The plaintiff’s alleged instances of bias are wholly frivolous. The plaintiff first alleges the Court demonstrated bias against him by ruling on defendants’ Motion to Compel Discovery Responses before plaintiff could file a response. This statement is simply not true. The defendants have filed two Motions to Compel in this case: (1) A Motion to Compel Plaintiff’s

Compliance with Rule 26(a)(1)(a) (Doc. No. 68) and (2) A Motion to Compel Discovery Responses (Doc. No. 85). The docket entries for these Motions show the plaintiff had ample time and opportunity to respond.

The defendants filed their Motion to Compel Compliance with Rule 26(a) on April 22, 2008. *See* Doc. No. 68. Lipari filed his response to that Motion on April 30, 2008. *See* Doc. No. 75. The defendants filed their reply on May 15, 2008 (Doc. No. 79) and the Court issued its Order on July 22, 2008 granting, in part, defendants' motion. (Doc. No. 103). The plaintiff had the opportunity and time to respond to defendants' Motion before the Court's order and, in fact, did so.

The defendants filed their second Motion to Compel discovery responses on May 22, 2008. *See* Doc. No. 85. The Court did not rule on the defendants' Motion to Compel until July 8, 2008. *See* Doc. No. 96. Forty-seven days expired between the time defendants filed their Motion to Compel and when the Court issued its ruling. Yet the plaintiff failed to file any response to defendants' Motion. The plaintiff alleges that "The Court through Magistrate Judge David J. Waxse repeatedly entered an Order on the defendants' fraudulent Motions to Compel before the plaintiff was permitted to make a responding motion under the Kansas District Court's 14-day timing of pleadings rule." *See* Response, Doc. No. 134-2, p. 15, ¶ 58. As shown above, however, the plaintiff had ample time to serve a response but failed to do so. His representations otherwise are untrue.

Next, the plaintiff argues that the Court's Show Cause Order for his failure to participate in drafting a joint pre-trial order is evidence of bias. Again, the facts demonstrate the frivolity of plaintiff's argument. On July 16, 2008, defendants sent Mr. Lipari a draft Pre-Trial Order with instructions that it be returned by July 22, 2008, so any changes could be incorporated and

submitted to the Court by the July 23 deadline. *See* July 16, 2008 email attached as **Exhibit A**. Plaintiff responded on July 18, 2008 by filing several motions, including a Motion to Stay Proceedings. He also indicated that he was objecting to the Pre-Trial Order. *See* Doc. No. 100 and July 18, 2008 email attached as **Exhibit B**. On July 23, 2008, the Court converted the pre-trial conference to a status conference hearing to be held on July 30, 2008 at 10:00 a.m. *See* Doc. No. 104. At the July 30 hearing, the Court denied plaintiff's motion to stay pre-trial proceedings and rescheduled the pre-trial conference for August 14, 2008 at 2:30 p.m. *See* Doc. No. 108. The Order required the parties to submit a draft Pre-Trial Order by August 11, 2008. *Id.* On August 3, 2008, defendants resubmitted the draft Pre-Trial Order to Mr. Lipari with instructions to return it no later than August 7 so any changes could be incorporated by the August 11 deadline. *See* August 3, 2008 email attached as **Exhibit C**. On August 11, 2008, the Court again rescheduled the pre-trial conference until August 28, 2008 at 2:00 p.m. The Court ordered that the parties submit the draft joint Pre-Trial Order no later than August 21, 2008. *See* Doc. No. 109. As of August 21, 2008, the defendants had not heard from Mr. Lipari regarding his portions of the draft Pre-Trial Order other than his July 18 e-mail and previously-overruled motion. Therefore, they submitted the Pre-Trial Order, leaving the plaintiff's sections incomplete, and expressed to the Court the repeated efforts to obtain Mr. Lipari's input. *See* August 21, 2008 email attached as **Exhibit D**. Several hours later that day, Mr. Lipari responded with a separate Pre-Trial Order that he now represents was a "combined Order." However, Mr. Lipari's "combined" Pre-Trial Order remains incomplete and continues to allege that the Court lacks subject matter jurisdiction over this matter. On August 25, 2008, the Court issued a second Show Cause Order to the plaintiff for his failure to participate in the preparation of a joint proposed Pre-Trial Order. *See* Doc. No. 120.

The facts surrounding the drafting and submission of the proposed joint Pre-Trial Order do not show bias on behalf of the Court. Rather, the facts show the plaintiff's repeated refusal to participate in drafting a proposed joint Pre-Trial Order. His allegations of bias are frivolous and should be wholly rejected by this Court.

1. There has been no "disparate enforcement of discovery."

Plaintiff further alleges that this Court has demonstrated bias by its "disparate enforcement of discovery." *See* Doc. No. 134-2, p. 16. Plaintiff argues that the Court has failed to rule on the defendants' Motion for Protective Order, which has denied him discovery. The plaintiff also complains that the defendants have failed to provide him with any documentation in response to his Requests for Production. Neither of these actions show bias on behalf of the Court.

While the defendants' Motions for Protective Order, Doc. Nos. 59 and 82 remain pending, plaintiff's Motion for Protective Order to preclude his deposition also has not been ruled. Doc. No. 80. There can be no bias on behalf of the Court when both parties sit in the same position awaiting the Court's ruling.

Plaintiff's complaints about defendants' alleged non-compliance with discovery also are unfounded. The Motions for Protective Order filed by the defendants did not seek to halt all discovery in this case, but were directed toward specific discovery requests. The plaintiff had the opportunity to conduct other discovery but failed to do so. His unfamiliarity with the Federal Rules of Civil Procedure is not the responsibility of the defendants or this Court. The Plaintiff's allegations of "disparate enforcement of discovery" are baseless. Moreover, defendants produced documents pursuant to Rule 26(a) and plaintiff's unobjected requests.

II. THE AUGUST 25, 2008 SHOW CAUSE ORDER WAS NOT OBTAINED BY FRAUD.

In his Response, the plaintiff alleges the August 25, 2008 Show Cause Order was issued because the defendants committed a “fraud on the Court.” As previously noted herein, these allegations are groundless, raise Rule 11 issues, and are insulting to the defendants and the integrity of this Court. As the Tenth Circuit has stated:

Generally speaking, only the most egregious conduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the Court. Less egregious misconduct, such as non-disclosure to the Court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the Court.

Zurich North America v. Matrix Service, Inc., 426 F.3d 1281, 1291 (10th Cir. 2005).

The defendants have not misrepresented any facts to this Court, much less committed any conduct rising to the level of fraud on the Court. The Order to Show Cause subject to this response stemmed in part from the defendants’ Motion to Compel filed on May 22, 2008. *See* Doc. No. 85. This Motion and the supporting Memorandum were both served on the plaintiff, and the plaintiff had the opportunity to file a response where he could have informed the Court of any alleged fraudulent statements. However, the plaintiff chose not to file any response to defendants’ Motion, and the Court subsequently granted it on July 8, 2008. *See* Doc. No. 96.

In support of his newest fraud argument, the plaintiff submits an unsigned affidavit where he attempts to set forth the procedural history surrounding defendants’ Motion to Compel Compliance With Discovery Request (Doc. No. 85) as well defendants’ Motion to Compel Compliance With Rule 26(a)(1) (Doc. No. 68). The plaintiff’s affidavit is wrought with factual inaccuracies, half-truths and misrepresentations.

First, plaintiff’s affidavit attempts to address the Show Cause Order for plaintiff’s failure to supplement his Rule 26(a)(1)(a) disclosures as ordered on July 22, 2008. *See* Doc. No. 117.

But the issue at hand relates to the Court's August 25, 2008 Show Cause Order (Doc. No. 120). The plaintiff failed to offer any response to the Court's Show Cause Order contained in Doc. No. 117, and plaintiff's arguments regarding his Rule 26 disclosures are therefore irrelevant.

In his unsigned affidavit, the plaintiff argues for the first time that he complied with the defendants' discovery requests and references supplemental responses supposedly served on the defendants via email on May 6, 2008. *See* Exhibit 38 to Doc. No. 136. He then alleges that the defendants fraudulently omitted these supplement disclosures to Magistrate Waxse in their Motion to Compel. *See* Affidavit, Doc. No. 136, p. 4, ¶ 10. But the defendants have never received the May 6, 2008 supplemental responses attached as Exhibit 38 to plaintiff's Affidavit (Doc. No. 136). The defendants have no record that this document was ever provided to them (until the time of plaintiff's response here).

In fact, after receiving plaintiff's Affidavit (Doc. No. 146), the defendants requested Mr. Lipari forward them a copy of the email transmitting Exhibit 38 which he allegedly sent on May 6, 2008. *See* **Exhibit E**. To date, the plaintiff has yet to respond to this request and there is simply no record of this document existing before now. The plaintiff did not file a Certificate of Service indicating he served supplemental responses on the defendants. He also did not file a response to defendants' Motion to Compel, alleging he had served Supplemental Responses. Although on July 10, 2008, the plaintiff filed an objection to the Magistrate's Order compelling further production of documents pursuant to defendants' discovery requests, (Doc. No. 97), nowhere in this objection did the plaintiff state he supplemented his responses on May 6, 2008. This response is the first time plaintiff ever references this document.

Regardless, the May 6, 2008 document is irrelevant. The supplemental responses in it are insufficient, and even if the defendants had received it on May 6, 2008, it would not have prevented the defendants from filing a Motion to Compel. The plaintiff's allegations that the defendants fraudulently withheld the May 6, 2008 document from this Court are groundless. If the plaintiff did in fact supplement his discovery responses on May 6, 2008, he did not point this fact out to the Court at any time prior to this response to Order to Show Cause. Therefore, any allegation of fraud on behalf of the defendants is completely unfounded and demonstrates more desperate attempts by the plaintiff to avoid dismissal.

III. CONCLUSION

Throughout this litigation, the plaintiff has repeatedly engaged in *ad hominem* attacks on defense counsel and insulted the integrity of this Court. His repeated allegations of fraud have no factual support and raise Rule 11 concerns. The Court's August 25, 2008 Show Cause Order was not the result of fraud committed by any party or this Court. The Show Cause Order was issued because the plaintiff has continually and willfully disobeyed the Court's Orders and the Federal Rules of Civil Procedure. The plaintiff should be held accountable for his actions. Unfortunately, monetary sanctions (directed to plaintiff's former counsel and company in the earlier litigation) have not deterred the plaintiff from making frivolous arguments. Therefore, dismissal is the only appropriate sanction and this entire matter should be dismissed with prejudice.

WHEREFORE, for the above stated reasons, the defendants request this Court dismiss this case with prejudice pursuant to Rule 37 of the Federal Rules of Civil Procedure and grant defendants all other relief to which they are justly entitled.

Respectfully submitted,

/s/ Jay E. Heidrick

MARK A. OLTHOFF KS # 70339
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
Telephone: (913) 451-3355
Facsimile: (913) 451-3361

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 filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 22nd day of September, 2008, to:

Mr. Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ Jay E. Heidrick
Attorney for Defendants