

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

SAMUEL K. LIPARI,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. 2:07-cv-02146-CM
)	
U.S. BANCORP and)	
U.S. BANK NATIONAL ASSOCIATION,)	
)	
<i>Defendants.</i>)	

NOTICE OF MOTION TO REMAND APPEAL

Comes now the plaintiff appearing *pro se* and gives this court Notice of the plaintiff/appellant's motion to remand appeal filed electronically on August 24, 2008 for the purpose of obtaining the trial court's ruling on the plaintiff's 28 USC § 144 Affidavit. See exb. 1 attached.

Respectfully Submitted,

S/ Samuel K. Lipari

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

CERTIFICATE OF SERVICE

I certify I have sent a copy to the undersigned opposing counsel via electronic filing on 8/25/08.

Mark A. Olthoff, Esq.,
Jay E. Heidrick, Esq.
Shughart Thomson & Kilroy, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, MO 64105

via email
jheidrick@stklaw.com
molthoff@stklaw.com
ademarea@stklaw.com

S/ Samuel K. Lipari

Samuel K. Lipari

United States Court of Appeals for the 10th Circuit

Medical Supply Chain, Inc.)	
Samuel K. Lipari)	
<i>Appellant</i>)	
v.)	Case No. 08-3187
)	
Neoforma, Inc., <i>et al</i>)	
<i>Defendants</i>)	

**MOTION TO REMAND THE APPEAL
FOR RULING ON OPEN 28 USC § 144 AFFIDAVIT**

Comes now the plaintiff/appellant Samuel K. Lipari and makes the following motion to remand the appeal for the limited purpose of allowing the trial court to rule on its open 28 USC § 144 Affidavit.

STATEMENT OF FACTS

1. The plaintiff/appellant had good cause to file an affidavit of prejudice on August, 18, 2008 related to the continuing exercise of trial court jurisdiction over substantive issues of the matter or controversy currently on appeal.
2. *Lipari v. US Bancorp et al.* KS. Dist. Court Case no. 07-cv-02146-CM-DJW is the concurrent jurisdiction state court proceeding removed to the US District Court for the Western District of Missouri and transferred to the Kansas District Court over the timely objections of the plaintiff and while this court exercised exclusive federal jurisdiction over the same matter or controversy styled as *MSCI v. Neoforma Inc. et al*, Tenth Circuit Case No. 06-3331.
3. The plaintiff/appellant did not have knowledge of the trial court’s extra-judicial bias and prejudice that met the evidentiary standard to substantiate a 28

USC § 144 affidavit until actions and conduct of the trial court occurred beginning at 6:30 am on August 18, 2008, injuring the plaintiff/appellant.

14. The plaintiff/appellant filed a timely 28 USC § 144 affidavit of bias and prejudice describing in detail those events and conduct, serving the affidavit on the Clerk of the Kansas District Court and the *Lipari v. US Bancorp et al* defendants at the end of the business day on August 18, 2008.

15. The trial court judge Hon. Carlos Murguia has not yet ruled on the sufficiency of the affidavit.

16. The Chief Judge of the Kansas District Court Judge Kathryn H. Vratil appears to have recused herself in this matter or controversy (05-cv-02299-CM-GLR) on October 20, 2005:

“61 ORDER REASSIGNING CASE. Case reassigned to Judge Carlos Murguia for all further proceedings. Judge Kathryn H. Vratil no longer assigned to case. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry)(ls) (Entered: 10/20/2005)”

MEMORANDUM OF LAW

Lipari v. US Bancorp et al. KS. Dist. Court Case no. 07-cv-02146-CM-DJW is the same “matter or controversy” as *MSCI v. Neoforma Inc. et al.* KS. Dist. Court Case no. 05-cv-02299-CM-GLR (under the matter or controversy standard in *Little Rock School District v. Armstrong*, No. 02-3867EA (8th Cir., 2004)). In *Little Rock School District v. Armstrong*, the Eighth Circuit was required to determine if a “mandamus proceeding in 1987 involved the same ‘matter in controversy’ as the present questions before us for purposes of 28

U.S.C. § 455(b)(2)” *Id* at 4-6. The Eighth Circuit’s analysis would find that because the state law claims are consistent and unchanged (and as yet never ruled on), *Lipari v. US Bancorp et al.* KS. Dist. Court Case no. 07-cv-02146-CM-DJW is the same “matter or controversy” as *MSCI v. Neoforma Inc. et al.* KS. Dist. Court Case no. 05-cv-02299-CM-GLR which is now Tenth Circuit Court of Appeals Case no. 08-3187.

The trial court was deprived of jurisdiction over this matter in controversy on July 11, 2008 under controlling precedent of the Tenth Circuit in *United States v. Prows*, 448 F.3d 1223, 1228 (10th Cir. 2006) (recognizing the general rule that a notice of appeal divests the district court of jurisdiction over substantive claims). See also *Garcia v. Burlington Northern R.R. Co.*, 818 F.2d 713, 721 (10th Cir.1987).

Section 144 requires that where an affidavit of personal bias or prejudice is filed, the trial judge must cease to act in the case and proceed to determine the legal sufficiency of the affidavit. *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir.1978).

In the present matter or controversy the trial court has not ruled on the sufficiency of the affidavit of prejudice. This Circuit has determined partial remand is appropriate for the purpose of allowing the trial court to rule on the affidavit. See *Hall v. Maynard*, 968 F.2d 20 (Unpublished) (C.A.10 (Okla.), 1993) and a copy of which is incorporated into this filing under local rule as exb 1.

Conclusion

Whereas for the above stated reasons the plaintiff respectfully requests that the court remand the present appeal for the limited purpose of allowing the trial judge to rule on the sufficiency of the plaintiff's 28 USC § 144 affidavit.

Respectively submitted,

S/Samuel K. Lipari

Samuel K. Lipari

Pro se

CERTIFICATE OF SERVICE

I certify that in addition to the service requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules, identical copies of the materials submitted to the Clerk in Digital Form were simultaneously provided to counsel for all other parties hereto by e-mail on Aug. 24, 2008.

Mark A. Olthoff, Esq.,
Jay E. Heidrick, Esq.
Shughart Thomson & Kilroy, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, MO 64105

Stephen N. Roberts, Esq.
Natausha Wilson, Esq. Nossaman,
Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower

1001 Fannin
Houston, TX 77002

John K. Power
Husch Blackwell Sanders LLP
1200 Main Street, Suite 2300
Kansas City , MO 64105

S/Samuel K. Lipari
Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Appellant
pro se