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

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|---|---|
| SAMUEL K. LIPARI | ) |
| (Assignee of Dissolved | ) |
| Medical Supply Chain, Inc.) | ) Case No. 08-3287 |
| *Plaintiff* | ) ( Appeal from KS Dist. Case |
| | ) Case No. 07-CV-02146) |
| *vs.* | ) |
| | ) |
| US BANCORP, INC. | ) |
| US BANK, NA | ) |
| *Defendants* | ) |

**APPELLANT'S MEMORANDUM**
**IN SUPPORT OF LIMITED APPELLATE JURISDICTION**

Comes now the appellant Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and makes the following memorandum of law in support of appellate jurisdiction for the limited purpose of remanding the case back to Kansas District Court with instructions to transfer it back to the Western District of Missouri.

## INTRODUCTION

The appellant asserts that this court has properly received the preliminary record of this action from a timely notice of appeal under F.R.A.P. Rule 4 but now has the first responsibility of evaluating its own jurisdiction and must find that appellate jurisdiction is lacking. Not because of the presence or absence of an order of judgment from the trial court. The appellant respectfully distinguishes *B. Willis, C.P.A., Inc. v. BNSF Railway Corporation*, No. 06-5015 (10th Cir. 7/16/2008) where the notice of appeal was premature due to a claim left open

requiring resolution by the trial court from the appellant's present notice of appeal in the wake of a stipulation of dismissal that resolved all remaining claims and a subsequent responsive ruling by the trial court. A separate judgment is rendered unnecessary by F.R.A.P. Rule 4, the Kansas District Court's precedent and the controlling case law of this court.

Instead, the Tenth Circuit Court of Appeals lacks jurisdiction because the trial court never obtained jurisdiction over the matter or controversy of the removed concurrent Missouri state court proceeding since the same matter or controversy's federal jurisdiction was exclusively vested in this court under the appeal *Medical Supply Chain, Inc. v. Neoforma et al*. 10th Cir. Case No. 06-3331.

At the time the action was improperly removed from Missouri state court without the existence of diversity jurisdiction, this court had exclusive federal jurisdiction and no US District court could continue to make substantive rulings on the issues arising from the same facts and circumstances as the issues in appeal. This same matter or controversy is presently under the exclusive federal jurisdiction of this court in *Medical Supply Chain, Inc. v. Neoforma*, *Inc. et al* 10th Cir. Case No. 08-3187 and the first filed federal action *Medical Supply Chain, Inc. v. Neoforma*, *Inc. et al* KS Dist. Court case no. 05-2299 from which the appeals have been taken has remained active.

The appellant respectfully asserts this court must remand the action back to the Kansas District Court with instructions to transfer the action back to the US District Court for the Western District of Missouri where the plaintiff has timely

appealed the removal and transfer in *Lipari v. US Bank NA, et al* 8th Cir. Court Case No. 08-03428.

The appellant makes reference by volume and page number to the trial record of this action *Lipari v US Bank NA et al* KS Dist. Case No. 07-2146 included without objection by the appellees in the appellant's appeal appendix for *Medical Supply Chain, Inc. v. Neoforma*, *Inc. et al* 10th Cir. Case No. 08-3187 (This court may take judicial notice of its own records from the appeal of another case between the same parties in order that the controversy might not be prolonged) *Divide Creek Irr. Dist. v. Hollingsworth*, 72 F.2d 859 at 862-863 (10th Cir., 1934).

## STATEMENT OF FACTS

1. The present appeal is from Kansas District Court Case No. 07-2146.

2. The appellant's same claims were previously before the Kansas District Court as 05-2299 which were before this court as Tenth Circuit Case No. 06-3331 at the time the Kansas District Court asserted jurisdiction over Case No. 07-2146 and began making orders to resolve substantive issues between the parties over the repeated objections of the plaintiff. See Aplt. Apdx. Vol. XX 7856-7861; Vol. IX 3263-3266; Vol. IX 3323-3326; Vol. IX 3339- Vol. IX 3796; Vol. X 3896- Vol. XI 4009.

3. The appellant's claims were transferred from the US District Court for the Western District of Missouri Case No. 06-1012 over the objections of the appellant who had given notice to the Western District of Missouri court that it

lacked jurisdiction to rule on the appellee's motion to dismiss because federal jurisdiction was exclusively before the Tenth Circuit Court of Appeals and that since the plaintiff was still challenging the Kansas District Court's dismissal of his claims, the Western District Court's assertion of jurisdiction was violating the fist to file doctrine protecting comity between federal jurisdictions. See Aplt. Apdx. Vol. XIX 7567-7586.

4. The appellant also filed a timely motion seeking remand of the Western District of Missouri Case No. 06-1012 for lack of diversity jurisdiction to the State of Missouri 16th Circuit Court where the appellant had brought his Missouri state law based claims as a concurrent state jurisdiction proceeding on the state claims which had been dismissed without prejudice by the Kansas District Court in 05-2299. See Aplt. Apdx. Vol. XIX 7567-7586.

5. The Missouri resident appellant based his timely remand motion's assertion that diversity jurisdiction was not in existence because Missouri resident defendants were part of the same case or controversy before the Kansas District Court in 05-2299 and Tenth Circuit Case No. 06-3331 at the time of removal and those same defendants were later made defendants in the Missouri State Court for the 16th Circuit court over the same factual allegations as in Kansas District Court 05-2299 and subsequent conduct, having been placed under yet another case number (Missouri State 16th Circuit Court Case No. 0816-cv-04217 on Feb. 25th, 2008) due to the improper removal. See Aplt. Apdx. Vol. XX at pg. 7951.

6. An appeal of the removal of Missouri State 16th Circuit Court Case No. 0816-cv-04217 to the Western District of Missouri as W.D. Case No. 06-1012 and transfer to the Kansas District Court is currently before the US Eighth Circuit Court of Appeals as Case No. 08-03428 where the appellant is challenging the lack of federal diversity jurisdiction, the improper substantive jurisdiction asserted by the Western District Court during the pendency of the exclusive federal jurisdiction over the same matter in controversy in *Medical Supply Chain, Inc. v. Neoforma et al*. 10th Cir. Case No. 06-3331; and the Western District court's violation of the "First to file doctrine" to preserve federal comity.

7. Following the appellant's stipulation of dismissal of all remaining claims on October 15, 2008, the trial court made a responsive order on October 16, 2008 addressing the stipulation's reference to the Kansas District Court Local Rule "automatic" protective orders that had eliminated all discovery for the appellant despite repeated objections and without court review, rendering the prosecution of the action futile. See **exb. 1** Order on Protective Order Sanctioning the Appellant.

8. On October 17, 2008 Ms. Elisabeth A. Shumaker, Clerk of the Tenth Circuit Court issued an order requesting memorandum from the parties on the existence of appellate jurisdiction. See **exb. 2** Order of the Clerk

9. The appellant invited the appellees to join in a request for an order of dismissal the appellee's declined but then joined in the stipulated dismissal of the the appellant's claims under F.R.Civ. P. Rule 41(a)(1)(ii) and conditionally joined in the dismissal of trade secret claims under with prejudice under F.R.Civ. P. Rule

41(a)(2) on October 21, 2008 (no counterclaims had been raised). See **exb. 3** Appllee's Joint Stipulation.

10. The Tenth Circuit Court has jurisdiction over the present matter or controversy in the related appeal *Medical Supply Chain, Inc. v. Neoforma*, *Inc. et al* 10th Cir. Case No. 08-3187.

11. The Kansas District Court has not exercised jurisdiction over Kansas District Court Case No. 07-2146 during a time when the appellant's claims were not before this court as *Medical Supply Chain, Inc. v. Neoforma*, *Inc. et al* 10th Cir. Case No. 06-3331 or 10th Cir. Case No. 08-3187 or being litigated as an active controversy in *Medical Supply Chain, Inc. v. Neoforma*, *Inc. et al*, Kansas District Court Case No. 05-2299, circumstances repeatedly brought to the notice of the Kansas District Court in every reply, answer or objection.

**MEMORANDUM IN SUPPORT OF ASSERTED JURISDICTION**

On October 15, 2008, the appellant filed a stipulation of dismissal with prejudice of his remaining claim under 41(a)(2) and under 41(a)(1)(A)(i) withdrew his motion to amend the complaint to include a claim that had not been answered and to which the defendants had not yet sought summary judgment of. The trial court then made a subsequent order on October 16, 2008 addressing the basis for the appellant's dismissal-- the futility of effectively being denied all discovery. See **exb. 1** Order on Protective Order Sanctioning the Appellant.

The appellant after reading the order then returned to the Kansas District court and filed the notice of appeal having a grave concern that the trial court in

the absence of jurisdiction and without any active claims was going to proceed to make discovery rulings and continue with pretrial proceedings that might interfere with the appellant's adjudication of claims currently before the Missouri state and federal courts. The notice of appeal halted the Kansas District Court and gave this court jurisdiction to review the orders of the trial court under F.R.A.P. Rule 4 (a)(2):

> " Rule 4. Appeal as of Right—When Taken
> (a) Appeal in a Civil Case. (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."

The trial court if it had jurisdiction, lost it after the remaining claims were dismissed by the plaintiff. "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. Lichtenstein*, 654 F.2d 19 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 filing 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). See *In the Matter of West Texas Marketing Corp.*, 12 F.3d

497, 501 (5th Cir.1994) ("when the parties voluntarily agreed to a dismissal, under Federal Rules of Civil Procedure 41(a)(1)(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 following the plaintiff's voluntary dismissal of the remaining claims or under F.R.A.P. Rule 4 (a)(2) becomes effective on the day the court enters judgment.

If the plaintiff's notice of appeal was premature, it is dormant pending the Kansas District Court's ruling on any outstanding tolling motion. 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 Clerk of the Court has suggested in her October 17, 2008 order that the court's recent ruling in *B. Willis, C.P.A., Inc. v. BNSF Railway Corporation*, No. 06-5015 (10th Cir. 7/16/2008) is applicable. In *Willis* the court also recognizes the

prematurely filed notice of appeal ripens after the claims are disposed of or after a F.R.A.P. Rule 4 (a)(4)(A) motion is resolved. See *B. Willis, C.P.A., Inc. v. BNSF Railway Corporation* at page 20. The only one of which would be construing the appellees' assertion of conditioning the stipulation with prejudice on the award of attorneys' 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.

While the appellee's attempt to qualify the dismissal with prejudice is properly a motion after the notice of appeal that might have had the effect of tolling the appeal, under the controlling case law for the Kansas District Court, 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." [Emphasis added]

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

While the defendants attempt to make the dismissal with prejudice conditioned on award of attorneys fees, the Tenth Circuit rule in *AeroTech, Inc. v. Estes*, 110 F.3d 1523 and at fn 1 (C.A.10 (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 attorneys' 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 attorneys' 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, attorneys' 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 rel 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).

The trial court never acquired jurisdiction over the transferred action because the plaintiff had filed a notice of appeal in the same matter or controversy before the same trial judge. The US Supreme Court has determined that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); see also

*New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir.1989) ("[T]he filing of a notice of appeal only divests the district court of jurisdiction respecting the questions raised and decided in the order that is on appeal."). The trial court erroneously exerted jurisdiction over Case No. 2:07-cv-02146-CM while *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05-2299 containing the same state law claims and concerning the same issues was before the Tenth Circuit US Court of Appeals as *Medical Supply Chain, Inc. v. Neoforma et al* Case No. 06- 3331.

The plaintiff has consistently argued that the federal district court lacked jurisdiction over his concurrent state court action which was erroneously removed from the State of Missouri 16th Circuit court on the grounds of diversity and had only the jurisdiction over these claims as pendant state law claims dismissed without prejudice in *MSC v. Neoforma, Inc.* Case No. 05-2299. However, the district court certainly lost 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)."

The trial court erroneously continued to exert jurisdiction over the transferred state claims even though on August 11, 2008 the Tenth Circuit issued an order in *MSCI v Neoforma, Inc*. Case No. 08-3187 denying dismissal of the appeal. The trial court's jurisdiction under Case No. 07-CV-02146-CM-DJW as a removed state court action over 05-2299's pendant state law claims was also

prevented by the special rule applicable to exclusive jurisdiction over federal antitrust claims described in *Holmes Financial Associates, Inc. v. Resolution Trust Corp*., 33 F.3d 561 (C.A.6 (Tenn.), 1994).

This court lacks jurisdiction because at the time the matter or controversy styled *Samuel Lipari v. US Bancorp, NA, et al*, W.D. MO Case No. 06-1012-CV-W-FJG was transferred to the Kansas District court, the Kansas District court lacked jurisdiction over case no. 06-1012-CV-W-FJG (restyled as the Kansas District Court case *Lipari v. US Bancorp, Inc. et al*; Case No. 2:07-cv-02146-CM) under *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); *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) and *Garcia v. Burlington Northern R.R. Co.*, 818 F.2d 713, 721 (10th Cir.1987) as shown *supra*.

The US Supreme Court has clearly established that jurisdiction must be in existence at the time of transfer for the transferor court to validly transfer a case and at the time of transfer for the transferee court to validly exercise jurisdiction:

> "In the normal meaning of words this language of Section 1404(a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted.'
>
> It is not to be doubted that the transferee courts, like every District Court, had jurisdiction to entertain actions of the character involved, but it is obvious that they did not acquire jurisdiction over these particular actions when they were brought in the transferor courts. The transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, or if validly transferred thereto under § 1404(a)."

*Hoffman v. Blaski Sullivan v. Behimer*, 363 U.S. 335 at 343, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960).

The Kansas District court never acquired jurisdiction due to the fact that Medical Supply Chain, Inc. v. Neoforma et al, KS Dist. Court Case No. 05-2299 which has original jurisdiction over the plaintiff's state law claims was in appeal at the time of transfer and is currently on appeal. This is true even though the state law claims were dismissed without prejudice by the same trial court judge in Case No. 05-2299 under 28 U.S.C. § 1367(a) subsection(c)(3):

> "28 U.S.C. § 1367(a) (1993). Subsection (c) provides exceptions to the above mandatory command, granting district courts discretion to reject supplemental jurisdiction if:
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
>
> 28 U.S.C. § 1367(c). This subsection "plainly allows the district court to reject jurisdiction over supplemental claims only in the four instances described therein."

*McLaurin v. Prater*, 30 F.3d 982, 985 (8th Cir.1994).

While a district court's power to exercise jurisdiction under the "same case or controversy" requirement in 28 U.S.C. § 1367(a) is one ordinarily resolved on the pleadings, the court's decision to exercise that jurisdiction "is one which remains open throughout the litigation." *United Mine Workers v. Gibbs*, 383 U.S. 715, 727, 86 S.Ct. 1130, 1139-40, 16 L.Ed.2d 218 (1966) (discussion of pendent jurisdiction and discretionary power of federal trial court to refuse to hear state

law claims, now codified by 28 U.S.C. § 1367).” *Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills*, 141 F.3d 1284 at 1287 (C.A.8 (S.D.), 1998).

The appellant gave the Kansas District court and the appellees repeated notice that at law jurisdiction over the appellant’s state law claims continues in *Medical Supply Chain, Inc. v. Neoforma et al*, KS Dist. Court Case No. 05-2299.

The appellees’ removal suffered from a jurisdictional defect. The concurrent Missouri state proceeding was not a qualifying action because of the continuing jurisdiction of *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM over the appellant’s state law claims under 28 U.S.C. § 1367 is well established:

> “Upon the dismissal of the Magnuson-Moss claims, this court continued to have subject matter jurisdiction under 28 U.S.C. § 1367, because we had not yet "decline[d] to exercise supplemental jurisdiction" under 28 U.S.C. § 1367(c). That this court has throughout also had supplemental jurisdiction over the pendent state law claims pursuant to 28 U.S.C. § 1367 is, furthermore, reflected in the plain language of § 1367(a), which states that **"in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction *that they form part of the same case or controversy*"** (emphasis added). Thus this court has always had subject matter jurisdiction over all the claims in this case, initially through original jurisdiction, and later through supplemental jurisdiction, which continues to the present time.” [Emphasis added]

*In re Ford Motor Company Ignition Switch Products Liability Litigation*, MDL No. 1112 at pg. 1(D. N.J. 8/27/1998) (D.N.J., 1998).

Diversity jurisdiction does not exist, despite the movement of pendant (supplemental) claims from KS Dist. Court Case No. 05-2299 to state court:

> "It is a well-settled rule that diversity of citizenship is determined as of the date the action is commenced. *Fidelity & Deposit Co. of Maryland v. City of Sheboygan Falls*, 713 F.2d 1261, 1266 (7th Cir.1983); *Benskin v. Addison Township*, 635 F.Supp. 1014, 1017 (N.D.Ill.1986); C.A. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3608 (2d ed. 1984). At the time plaintiff commenced this suit, there was no diversity of citizenship between the parties and therefore no basis for diversity jurisdiction. It does not matter that plaintiff amended his complaint after he moved to Ohio. The amendment relates back to the date the lawsuit was commenced. See Fed.R.Civ.P. 15(c). There still was no diversity jurisdiction.
>
> *Oliney v. Gardner*, 771 F.2d 856, 858-59 (5th Cir.1985); Wright, Miller, & Cooper, § 3608 at 458-59.
>
> **There is no diversity jurisdiction over Disher's state law claims; there is only pendent jurisdiction over those claims**." [Emphasis added]

*Disher v. Information Resources, Inc*., 691 F.Supp. 75 at 81. (N.D. Ill., 1988). Here, the claims were filed in KS Dist. Court Case No. 05-2299 with the Missouri domiciled defendant Shughart, Thomson & Kilroy as a defendant. Diversity did not exist. Nor did it exist at the time of removal of the concurrent state case because KS Dist. Court Case No. 05-2299 (now being appealed) still has original federal question jurisdiction over all supplemental claims under 28 U.S.C. § 1367(a).

If the trial court lacked subject-matter jurisdiction over appellant's action, in KS Dist. CaseNo. 07-CV-2146, this court's jurisdiction on appeal is limited to "correcting the error of the lower court in entertaining the suit." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998) (internal quotation marks omitted).

The controlling Tenth Circuit rule is stated in *Basso v. Utah Pwr. & Lt. Co*., 495 F.2d 906, 909 (10th Cir.1974) ("A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.") (emphasis added). See also *Lopez v. Behles* (*In re Amer. Ready Mix, Inc*.), 14 F.3d 1497, 1499 (10th Cir. 1994) (holding that appellate court has independent duty to examine its own jurisdiction even where neither party consents and both are prepared to concede it). Because the district court lacked jurisdiction over the appellant's lawsuit in KS Dist. CaseNo. 07-CV-2146, it lacks authority to sanction or dismiss the action “with prejudice," which is a dismissal on the merits. See *Steel Co*., 523 U.S. at 94-96.

**CONCLUSION**

Whereas this court having opened an examination of jurisdiction and having received notice jurisdiction never was present in the lower court, must find that the appeal is timely and not premature over the lack of a judgment the trial court lacks jurisdiction to render, the appellate court respectfully is required to remand the action with instructions to transfer it back to the Western District of Missouri.

Respectfully submitted,

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**Certificate of Service**

I certify that on November 6, 2008 I have served the opposing counsel with a copy of the foregoing notice using email to the following:

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DJW/1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

**SAMUEL K. LIPARI,**

**Plaintiff,**

**v.**

**U.S. BANCORP, N.A., et al.,**

**Defendants.**

**CIVIL ACTION**

**No. 07-2146-CM-DJW**

**MEMORANDUM AND ORDER**

This matter is before the Court on Defendants' First Motion for Protective Order (doc. 59), Plaintiff's Motion for Protective Order (doc. 80), and Defendants' Second Motion for Protective Order (doc. 82). For the reasons set forth below, the Court grants Defendants' First Motion for Protective Order as to both Defendants. The Court also grants Defendants' Second Motion for Protective Order, but only as to Defendant U.S. Bancorp N.A. Finally, the Court denies Plaintiff's Motion for Protective Order.

## I. Background Information

Plaintiff filed this action on April 10, 2007 in the Circuit Court of Jackson County, Missouri. Defendants removed the action to the Western District of Missouri, and the action was ultimately transferred to this Court. Plaintiff's Petition asserts claims for breach of contract, fraud, misappropriation of trade secrets under Mo. Rev. Stat. §417.50, breach of fiduciary duty, and prima facie tort. On September 4, 2008, the Court dismissed all of Plaintiff's claims except for his misappropriation of trade secrets claim.

**Exhibit 1**

## II. Standard for Ruling on a Motion for Protective Order

Federal Rule of Civil Procedure 26(c)(1) provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."[1] The party seeking a protective order has the burden to show good cause for it.[2] To establish good cause, a party must make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements."[3]

The court has broad discretion to decide when a protective order is appropriate and what degree of protection is required.[4] The Supreme Court has recognized that "[t]he trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."[5] Notwithstanding this broad grant of discretion, a court may issue a protective order only if the moving party demonstrates that the basis for the protective order falls within one of the specific categories enumerated in the Rule, i.e., that the requested order is necessary to protect the party "from annoyance, embarrassment, oppression, or undue burden or expense."[6]

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[1]Fed. R. Civ. P. 26(c)(1).

[2]*Reed v. Bennett*, 193 F.R.D. 689, 691 (D. Kan. 2000).

[3]*Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 (1981).

[4]*MGP Ingredients, Inc. v. Mars, Inc.*, 245 F.R.D. 497, 500 (D. Kan. 2007) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)).

[5]*Seattle Times*, 467 U.S. at 36.

[6]*ICE Corp. v. Hamilton Sundstrand Corp.*, No. 05-4135-JAR, 2007 WL 1652056, at *3 (D. Kan. June 6, 2007) (quoting Fed. R. Civ. P. 26(c)); *Aikens v. Deluxe Fin. Servs., Inc.*, 217 F.R.D.
(continued...)

## III. Defendants' First Motion for Protective Order (doc. 59)

### A. Introduction

Defendants seek a protective order relieving them of the obligation to respond to Plaintiff's First Request for Production of Documents ("First Request"), which were served on Defendants on February 13, 2008. Defendants filed the instant Motion for Protective Order on February 17, 2008, asserting that the fourteen requests contained in the First Request are facially overbroad and unduly burdensome and that the documents requested have no relevance to the claims and defenses asserted in the case.

Defendants contend that the requests are facially over broad and unduly burdensome because they use "omnibus" terms such as "related to," "regarding," and "concerning" to modify a vast category of documents. For example, Request No. 1 seeks "[a]ll records, forms, statements, applications, credit reports, correspondence, call records, documents . . . *related to* all accounts and transactions of the plaintiff Samuel K. Lipari, his former attorney Bret D. Landrith and the plaintiff's now dissolved Missouri corporation Medical Supply Chain, Inc."[7] In a similar vein, Request No. 9 seeks "[a]ll communications with the Royal Bank of Canada and the Edward Jones Co. *concerning* the potential sale of US Bancorp Piper Jaffray."[8]

Defendants argue that the requests do not comply with Federal Rule of Civil Procedure 34, which requires that requests for production describe the documents sought with "reasonable

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[6](...continued)
533, 534 (D. Kan. 2003).

[7]Req. No. 1, attached as Ex. A. to Defs.' Mot. for Protective Order (doc. 61) (emphasis added).

[8]Req. No. 9, attached as Ex. A. to Defs.' Mot. for Protective Order (doc. 61) (emphasis added).

particularity." They also maintain that answering these overly broad requests would subject them to undue burden and expense, particularly since the documents requested are not relevant to the claims or defenses asserted in the lawsuit.

Plaintiff counters that the omnibus terms his requests use (e.g., "regarding" and "concerning") are neither overly broad nor unduly burdensome because those terms are used to modify narrowly tailored categories of documents. Plaintiff asserts that the requested documents are relevant to his claims and therefore discoverable. More specifically, Plaintiff argues that the requests are relevant to show the intent and circumstances of Defendants in forming and breaching the contracts alleged in his Petition. He also claims they are relevant to show Defendants' alleged bad faith, as it pertains to his breach of contract and breach of fiduciary claims. Finally, Plaintiff argues that Defendants have failed to provide adequate evidentiary support to show how they will be unduly burdened if required to answer the requests.

**B. Applicable Law**

This Court has held on numerous occasions that a discovery request is overly broad and unduly burdensome on its face if it uses an omnibus term such as "relating to," "pertaining to," or "concerning" to modify a general category or broad range of documents or information.[9] The Courts' decisions reason that such broad language "make[s] arduous the task of deciding which of numerous documents may conceivably fall within its scope."[10] A request that seeks all documents "relating to" or "concerning" a broad range of items "requires the respondent either to guess or move

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[9]*See, e.g.*, *Johnson v. Kraft Foods N. Am., Inc.*, 238 F.R.D. 648, 658 (D. Kan. 2006); *Cardenas v. Dorel Juvenile Group, Inc.*, 232 F.R.D. 377, 381-82 (D. Kan. 2005); *Sonnino v. Univ. of Kan. Hosp. Auth.,* 221 F.R.D. 661, 667-68 (D. Kan. 2004); *Aikens,* 217 F.R.D. at 538).

[10]*See, e.g.*, *Cardenas*, 232 F.R.D. at 382 (quoting *Audiotext Commc'ns Network, Inc. v. U.S. Telecom, Inc*., No. Civ. A. 94-2395-GTV, 1995 WL 625962, at *6 (D. Kan. Oct. 5, 1995)).

through mental gymnastics . . . to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request."[11] Such a request violates the basic principle of Federal Rule Civil Procedure 34(b)(1)(A) that document requests "must describe with reasonable particularity each item or category of items" to be produced.[12] In contrast, a request that uses an omnibus phrase to modify a sufficiently specific type of information, group of documents, or particular event will not be deemed objectionable on its face.[13]

In addition, this Court has held that "relevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party."[14] When the discovery sought appears relevant on its face, the party resisting the discovery has the burden to establish that the requested discovery does not come within the scope of relevance as defined under Rule 26(b)(1), or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.[15] Conversely, when the relevancy of the discovery request is not

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[11] *Id.* (quoting *Audiotext,* 1995 WL 18759, at *6. *Accord Aikens,* 217 F.R.D. at 538.

[12] *Naerebout v. IBP, Inc.*, Civ. A. No. 91-2254-L, 1992 WL 754399, at *10 (D. Kan. Aug. 19, 1992) (quoting Fed. R. Civ. P. 34(b)).

[13] *Cardenas,* 232 F.R.D. at 381-82; *Sonnino v. Univ. of Kan. Hosp. Auth*., 221 F.R.D. 661, 667-68 (2004).

[14] *Cardenas*, 232 F.R.D. at 382 (citing *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 652 (D. Kan. 2004); *Sheldon v. Vermonty*, 204 F.R.D. 679, 689-90 (D. Kan. 2001).

[15] *Cardenas*, 232 F.R.D. at 382; *Owens*, 221 F.R.D. at 652.

readily apparent on its face, the party seeking the discovery has the burden to show the relevancy of the request.[16]

**C. Analysis**

The Court finds that the relevance of the documents sought in these requests is not apparent from the face of the requests. Thus, Plaintiff has the burden to show how they are relevant. At best, Plaintiff shows they may have some relevance to his breach of contract and breach of fiduciary duty claims. Those claims, however, are no longer part of this lawsuit, and Plaintiff's action is now limited to his trade secret misappropriation claim. The Court does not find that any of the fourteen requests at issue are relevant to that claim.

Furthermore, the Court finds that the requests are, on their face, so broad and open-ended that Defendants cannot possibly fully determine — without undue burden — which documents would be responsive. Plaintiff's use of omnibus terms such "related to" and "concerning" do not modify a specific document or event, or even discrete or narrow categories of documents. Rather, those terms modify very general and vast categories of documents. The Court therefore concludes that the requests are so all-encompassing as to be unduly burdensome on their face. The Court also finds that they violate Rule 34's mandate that the requests "describe with reasonable particularity each item or category of items" to be produced.[17]

The Court is not persuaded by Plaintiff's argument that a protective order should not issue because Defendants fail to provide adequate evidentiary support to show how they will be unduly burdened if required to respond to the requests. It is well settled that a party resisting *facially*

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[16]*Cardenas*, 232 F.R.D. at 382-83; *Owens*, 221 F.R.D. at 652.

[17]Fed. R. Civ. P. 34(b)(1)(A).

overbroad or unduly burdensome discovery need not provide specific, detailed, or evidentiary support.[18]

In light of the foregoing, the Court finds that Defendants have established that they will be subject to undue burden if they are required to respond to these facially overbroad document requests. This is particularly true in light of the fact that the requested documents are not relevant to the one remaining claim in this action, i.e., Plaintiff's misappropriation of trade secret claim. Nor or they relevant to any of the defenses asserted in this lawsuit. The Court therefore holds that Defendants have established the good cause necessary to support the issuance of a protective order. Defendants' First Motion for Protective Order is granted, and Defendants are relieved of the obligation to respond to any of the document requests contained in Plaintiff's First Request.

## IV. Plaintiff's Motion for Protective Order (doc. 80)

Plaintiff seeks a protective order relieving him of the obligation to appear for his deposition. Defendants filed a notice on May 9, 2008 to take Plaintiffs' deposition on May 28, 2008 (doc. 76). Plaintiff filed the instant motion, arguing that he "is entitled to a protective order preventing the defendants from deposing him until the defendants have consented to jurisdiction under Rule 26 and 30 which applies to both the plaintiff and the defendants equally."[19] In support of this proposition, Plaintiff argues that Defendants have objected to certain of his discovery requests and have refused to give him discovery to which he is entitled. He also claims that Defendants have filed a "frivolous *per se* blanket protective order suspending the plaintiff's discovery."[20] Apparently, Plaintiff is

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[18]*See, e.g.*, *Aikens,* 217 F.R.D. at 537-38; *Mackey v. IBP, Inc*., 167 F.R.D. 186, 198 (D. Kan. 1996).

[19]Pl.'s Mot. for Protective Order (doc. 80) at p. 2.

[20]*Id*.

referring to the Motion for Protective Order (doc. 59), which is discussed above in Part III of this Order.

The Court finds Plaintiff's arguments unavailing. To the extent Plaintiff contends Defendants have objected to, and owe him, discovery, Plaintiff may file the appropriate motions,[21] and the Court will determine what discovery is owed. To the extent Plaintiff claims Defendants have filed a frivolous motion for protective order, the Court has granted that motion in this Order. Finally, and more importantly, it is well settled that "[a] party . . . may not withhold discovery solely because it has not obtained to its satisfaction other discovery."[22] Consequently, even if Defendants are withholding discovery from Plaintiff, it is *not* grounds for Plaintiff to delay his deposition. Accordingly, the Court finds that Plaintiff has failed to show good cause for the requested protective order. Plaintiff's Motion for Protective Order is therefore denied.

## V. Defendants' Second Motion for Protective Order (doc. 82)

### A. Introduction

Defendants seek a protective order vacating the Notice of Deposition Duces Tecum (doc. 71) that Plaintiff filed on April 30, 2008. The deposition notice requests that Defendant U.S. Bancorp N.A. ("U.S. Bancorp") produce a corporate representative at its corporate headquarters in Minneapolis, Minnesota, to provide deposition testimony pursuant to Rule 30(b)(6). It also asks

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[21]Any such motions must, of course, comply with the requirements of D. Kan. Rule 37.1. Subsection (b) of that rule provides that any motion to compel must be filed within thirty days of the default or service of the response at issue, unless the time for filing is extended by the Court for good cause shown.

[22]*Bohannon v. Honda Motor Co.*, 127 F.R.D. 536, 538 (D. Kan. 1989); *accord Western Res., Inc. v. Union Pac. R. Co.,* No. 00-2043-CM, 2001 WL 1723817, at *2 (D. Kan. Dec. 4, 2001); *Pulsecard, Inc. v. Discover Card Servs., Inc*., 168 F.R.D. 295, 308 (D. Kan. 1996); *Audiotext Commc'ns Network, Inc. v. U.S. Telecom, Inc., No.* 94-2395-GTV, 1995 WL 625953, at *1 (D. Kan. Oct. 5, 1995).

U.S. Bancorp  to produce certain documents at the deposition.   More specifically, the notice requests that U.S. Bancorp produce a representative who "can answer the plaintiff's questions on the conduct of U.S. Bancorp current or former employees, the employees of its subsidiaries and the conduct of its agents described with detail in ¶¶ 1-263 of the plaintiff's complaint."[23]  The notice also requests that U.S. Bancorp produce a corporate representative "familiar with all documents in its possession or control or the possession of its agents related to the conduct of its agents described with detail in ¶¶ 1-263 of the plaintiff's complaint."[24]  Finally, the notice asks U.S., Bancorp to "provide all documents in its possession or control or the possession of its agents related to the conduct of its agents described with details in ¶¶ 1-263 of the plaintiff's complaint."[25]

Defendants argue that a protective order is warranted for three reasons.  First, the deposition notice fails to describe the topics of inquiry with reasonable particularity as required by Rule 30(b)(6).  Second, the request for documents is facially overbroad and unduly burdensome.  Third, Plaintiff's unilateral choice of Minneapolis as the site of the deposition is unduly burdensome in that no corporate representative with knowledge of the requested facts resides in Minnesota, and no discovery response has shown that any such representative resides there.

Plaintiff does not address Defendants' arguments in is his response.[26]  Rather, Plaintiff states that Defendants have failed to disclose documents pursuant to Rule 26(a)(1) and failed to provide

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[23]*See* Depo. Notice (doc. 71) at p. 1.

[24]*Id.*

[25]*Id.*

[26]*See generally* Pl.'s Opposition to Defs.' Supp. Protective Order Request (doc. 89).

addresses for the individuals they have disclosed. He also argues that the instant motion is an "attempt[] to obtain an impermissible blanket order against all discovery."[27]

**B. Applicable Law**

Federal Rule of Civil Procedure 30(b)(6) sets forth the procedure for deposing a business organization such as U.S. Bancorp. The Rule provides as follows:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, . . . and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. . . . The persons designated must testify about information known or reasonably available to the organization.[28]

In order for Rule 30(b)(6) to function effectively, "the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute."[29] Once notified as to the reasonably particularized areas of inquiry, the responding corporation or business organization "must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation."[30]

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[27]*Id*. at p. 1.

[28]Fed. R. Civ. P. 30(b)(6).

[29]*McBride v. Medicalodges, Inc*., 250 F.R.D. 581, 584 (D. Kan. 2008) (citing *E.E.O.C. v. Thorman & Wright Corp.*, 243 F.R.D. 421, 426 (D. Kan. 2007); *Sprint Commc'ns Co., L.P. v. The-globe.com, Inc*., 236 F.R.D. 524, 528 (D. Kan. 2006)).

[30]*McBride*, 250 F.R.D. at 584 (quoting *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)).

"The effectiveness of the Rule bears heavily upon the parties' reciprocal obligations."[31] Only when the requesting party has "reasonably particularized" the subjects about which it wishes to inquire can the responding party produce a deponent who has been suitably prepared to respond to questioning within the scope of inquiry.[32] An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task.[33] When the notice is overbroad, the responding party is unable to identify the outer limits of the areas of inquiry noticed, and designating a representative in compliance with the deposition notice becomes impossible.[34]

**C. Analysis**

Before addressing the merits of the dispute, the Court notes that *both* Defendants have filed the Motion for Protective Order despite the fact that the deposition notice is directed only to Defendant U.S. Bancorp and not to Defendant U.S. Bank N.A. Rule 26(c) allows only a party or person "from whom discovery is sought" to move for a protective order.[35] As U.S. Bank N.A. is not a party "from whom discovery is sought," it is not entitled to join in the instant Motion for Protective Order. The motion is therefore denied as to U.S. Bank N.A.

Turning to the merits of the dispute, the Court agrees with U.S. Bancorp that the deposition notice is overly broad and does not define the topics of inquiry with "reasonable particularity" as

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[31]*Lee v. Nucor-Yamato Steel Co. LLP*, No. 3:07CV00098 BSM, 2008 WL 4014141, at *3 (E. D. Ark. Aug. 25, 2008) (citing *Dwelly v. Yamaha Motor Corp*., 214 F.R.D. 537, *539-40 (D. Minn. 2003); *Prokosch v. Catalina Lighting, Inc*., 193 F.R.D. 633, *638 (D. Minn. 2000)).

[32]*Lee*, 2008 WL 4014141, at *3.

[33]*McBride*, 250 F.R.D. at 584 ; *Steil v. Humana Kan. City, Inc.,* 197 F.R.D. 442, 444 (D. Kan. 2000); *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000).

[34]*McBride,* 250 F.R.D. at 584 (citing *Reed,* 193 F.R.D. at 692).

[35]Fed. R. Civ. P. 26(c)(1).

required by Rule 30(b)(6). Plaintiff's Petition consists of 263 paragraphs, which span more than seventy pages. Plaintiff's Rule 30(b)(6) deposition notice asks U.S. Bancorp to produce a witness who can testify regarding the conduct of its employees and agents and its subsidiaries' employees, which conduct is described in all of the 263 paragraphs of the Petition. The notice also requests that U.S. Bancorp produce a corporate representative who is "familiar with all documents in its possession or control or the possession of its agents related to the conduct of its agents" described in those same 263 paragraphs. In other words, Plaintiff is asking U.S. Bancorp to produce a representative to testify about every single allegation of conduct by U.S. Bancorp in the entire Petition and all documents relating to the conduct of its agents. This hardly meets the requirement that Plaintiff "designate, with painstaking specificity, the particular subject areas" to be covered in the deposition."[36]

In similar circumstances, courts have not hesitated to issue protective orders when corporations are asked to respond to overly broad or unfocused Rule 30(b)(6) deposition notices. For example, in *In re Independent Service Organizations Antitrust Litigation*,[37] Judge Earl E. O'Connor entered a protective order where one of the plaintiffs served a Rule 30(b)(6) deposition notice on defendant Xerox Corporation, requesting that Xerox produce a corporate witness "to testify about facts supporting numerous paragraphs of Xerox's denials and affirmative defenses in its Answer and Counterclaims."[38] Judge O'Connor held that while the plaintiff had "a right to discover the facts upon which Xerox will rely for its defense and counterclaims," its attempt to do

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[36]*See McBride*, 250 F.R.D. at 584 (citing *Thorman*, 243 F.R.D. at 426; *Sprint,* 236 F.R.D. at 528).

[37]168 F.R.D. 651, 654 (D. Kan. 1996).

[38]*Id.*

so through its Rule 30(b)(6) deposition was "overbroad, burdensome, and a highly inefficient method through which to obtain otherwise discoverable information."[39]

Also, in *Sheehy v. Ridge Tool Co.*,[40] a protective order was entered where the court found that the Rule 30(b)(6) deposition notice was overly broad. In that case, the Court held that a Rule 30(b)(6) notice requesting a corporate representative who is "most knowledgeable as to the subject Complaint" did not describe the issues to be addressed with the required "reasonable particularity" and ordered the plaintiff to serve re-notices that described in greater details the issues and topies to be covered.[41]

In a similar vein, the Court in *Smithkline Beecham Corp. v. Apotex Corp.,*[42] concluded that a Rule 30(b)(6) notice served by the defendant on the plaintiff requesting designation of a witness to testify regarding the plaintiff's responses to defendants' interrogatories and requests for production was "[i]n its present form . . . overbroad, unduly burdensome, and an inefficient means through which to obtain otherwise discoverable information."[43]

In the present case, the Court agrees with U.S. Bancorp that the deposition notice is overly broad and does not define the topics of inquiry with "reasonable particularity" as required by Rule 30(b)(6). Thus, the deposition notice places an undue burden on U.S. Bancorp. This is particularly true under the particular circumstances of this case, where a significant portion of the Petition has been dismissed, and only one claim — misappropriation of trade secrets — remains in the lawsuit.

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[39]*Id.*

[40]No. 3:05 CV 1614 (CFD) (TPS), 2007 WL 1548976 (D. Conn. May 24, 2007).

[41]*Id.*, at *3-4.

[42]No. 98 C 3952, 2000 WL 116082 (N.D. Ill., Jan. 24, 2000).

[43]*Id.*, at *9-10.

In addition, the Court holds that the deposition notice's request that U.S. Bancorp provide at the deposition "all documents in its possession or control or the possession of its agents related to the conduct of its agents described with details in ¶¶ 1-263 of the plaintiff's complaint" is overly broad and unduly burdensome. While Rule 30(b)(2) allows a deposition notice to "be accompanied by a request under Rule 34 to produce documents . . . at the deposition," the document request must comply with Rule 34. As discussed above in Part III, Rule 34(b)(1)(A) requires that the request "describe with reasonable particularity each item or category of items" to be produced.[44] A request for all documents related to the conduct of U.S. Bancorp's agents as set forth in every paragraph of Plaintiff's lengthy Petition does not describe the documents with reasonable particularity and is overly broad on its face.

In light of the above, the Court grants the Motion for Protective Order with respect to U.S. Bancorp. Plaintiff may re-notice the deposition; however when he does so, he should take care to describe in greater detail the issues and topics that will be covered during the deposition, and should limit it to issues concerning his one remaining claim, i.e., misappropriation of trade secrets. In the event Plaintiff includes a document request in the deposition notice, Plaintiff must take care to insure that the request describes with reasonably particularity each item or category of items to be produced. In addition, he should refrain from using omnibus terms to describe general categories of documents. With respect to the location of the deposition, Plaintiff should confer with the attorneys for U.S. Bancorp to determine a mutually convenient location for the deposition.

**VI. Attorney's Fees and Expenses Incurred in Connection with the Motions**

The Court will now address the issues of attorney's fees and expenses. Federal Rule of Civil Procedure 26(c) expressly provides that Rule 37(a)(5) applies to the award of expenses incurred in

[44]Fed. R. Civ. P. 34(b)(1)(A).

relation to a motion for protective order.[45] Thus, the Court must look to Rule 37(a)(5) to determine whether an award of expenses is appropriate here.

The Court has granted Defendants' First Motion for Protective Order. It has also granted Defendants' Second Motion for Protective Order as to Defendant U.S. Bancorp. Although Defendants do not request an award of expenses or fees in connection with their motions,[46] the Court must nevertheless address this issue, as Federal Rule of Civil Procedure 37(a)(5)(A) provides for the payment of the moving party's expenses where a motion for protective order is granted. Under Rule 37(a)(5)(A), the Court *must*, after giving an opportunity to be heard, require the party whose conduct necessitated the motion for protective order to pay the movant's reasonable attorney's fees and expenses incurred in making the motion, unless (1) the movant filed the motion before attempting in good faith to obtain the relief requested without court action, (2) the opposing party's response was substantially justified, or (3) other circumstances make an award of expenses unjust.[47]

The Court has also denied Plaintiff's Motion for Protective Order. Neither Plaintiff nor Defendants requested expenses or fees in connection with that motion. The Court must nevertheless address the issue because Rule 37(a)(5)(B) provides for the payment of the opposing party's expenses where a motion for protective order is denied. It states that the Court, after giving an opportunity to be heard, *must* require the party filing the motion for protective order to pay the party who opposed the motion for protective order the reasonable fees and expenses that it incurred in

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[45]Fed. R. Civ. P. 26(c)(3) states that "Rule 37(a)(5) applies to the award of expenses."

[46]Defendants merely ask the Court for protective orders and to grant them "all other relief" to which they are "justly entitled." Defs.' First Mot. for Protective Order (doc. 59) at p. 2; Defs.' Second Mot. for Protective Order (doc. 82) at p.2.

[47]Fed. R. Civ. P. 37(a)(5)(A) (Rule renumbered by Dec. 1, 2007 amendments).

opposing the motion for protective order, unless (1) the motion for protective order was substantially justified, or (2) other circumstances make an award of fees and expenses unjust.[48]

As subsections (A) and (C) of Rule 37(a)(5) expressly provide, a court may award expenses and fees only after it has given the parties an "opportunity to be heard."[49] To satisfy this requirement, the Court, in this case, directs Plaintiff to show cause, in a pleading filed within **twenty-one (21) days** of the date of this Order, why he should not be required to pay the reasonable expenses and attorney's fees that (1) both Defendants incurred in filing the First Motion for Protective Order (doc. 59); (2) Defendant U.S. Bancorp incurred in filing the Second Motion for Protective Order (doc. 82); and (3) both Defendants incurred in opposing Plaintiff's Motion for Protective Order (doc. 80). Defendants shall each have **eleven (11) days** thereafter to file a response thereto, if they so choose. The Court will issue an order regarding whether fees and expenses should be awarded after it has reviewed the parties' briefing.

**IT IS THEREFORE ORDERED** that Defendants' Motion for Protective Order (doc. 59) is granted.

**IT IS FURTHER ORDERED** that Plaintiff's Motion for Protective order (doc. 80) is denied, and Plaintiff shall make himself available for his deposition.

**IT IS FURTHER ORDERED** that Defendants' Motion for Protective Order (doc. 82) is granted with respect to Defendant U.S. Bancorp N.A., and denied with respect to Defendant U.S. Bank N.A.

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[48] Fed. R. Civ. 37(a)(5)(B).

[49] *McCoo v. Denny's, Inc.*, 192 F.R.D. 675, 697 (D. Kan. 2000) (citing Fed. R. Civ. P. 37(a)(4) (now numbered Fed. R. Civ P. 37(a)(5)).

**IT IS FURTHER ORDERED** that Plaintiff shall, within **twenty-one (21) days** of the date of this Order, show cause in a pleading filed with the Court, why he should not be required to pay the reasonable fees and expenses that Defendant U.S. Bancorp N.A. has incurred in making its Motions for Protective Order (doc. 59 and 82) and opposing Plaintiff's Motion for Protective Order (doc. 80), in addition to the reasonable fees and expenses that Defendant U.S. Bank N.A. has incurred in making its Motion for Protective Order (doc. 59) and opposing Plaintiff's Motion for Protective Order (doc. 80). Defendants shall have **eleven (11) days** thereafter to file a response thereto.

**IT IS SO ORDERED**.

Dated in Kansas City, Kansas on this 15th day of October 2008.

s/ David J. Waxse
David J. Waxse
U.S. Magistrate Judge

cc: All counsel and *pro se* parties

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**
**OFFICE OF THE CLERK**
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Douglas E. Cressler
Chief Deputy Clerk

October 17, 2008

Samuel K. Lipari
3520 Ne Akin Boulevard
Suite 918
Lee's Summit, MO 64064

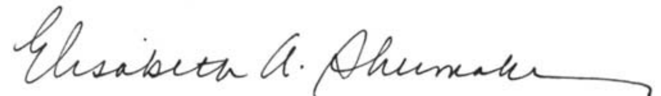
**RE: 08-3287, Lipari v. US Bancorp NA, et al**
Dist/Ag docket: 2:07-CV-02146-CM-DJW

Dear Mr. Lipari:

Enclosed please find an order issued today by the court.

Please contact this office if you have questions.

Sincerely,



Elisabeth A. Shumaker
Clerk of the Court

cc: Andrew M. DeMarea
Mark A. Olthoff

EAS/na

**Exhibit 2**

**F I L E D**
**United States Court of Appeals**
**Tenth Circuit**

**October 17, 2008**

**Elisabeth A. Shumaker**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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SAMUEL K. LIPARI,

Plaintiff - Appellant,

v.

US BANCORP NA; US BANK NA,

Defendants - Appellees.

No. 08-3287

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ORDER

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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

**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. | ) | |

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

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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.



**Exhibit 3**

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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**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:

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