UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMUEL K. LIPARI	)	
(Assignee of Dissolved	)	
Medical Supply Chain, Inc.)	)	
Plaintiff	)	**Case No. 08-3984**
	)	
vs.	)	
	)	
US BANCORP, INC.	)	
US BANK, NA	)	
Defendants	)	

ANSWER TO MOTION TO DISMISS APPEAL

Comes now the plaintiff Samuel K. Lipari, plaintiff/appellant as an individual and as assignee of all claims of dissolved Missouri corporation Medical Supply Chain, Inc. ("MSC") appearing *pro se* and makes the following answer to US Bancorp, Inc. and US Bank NA's motion to dismiss the appeal.

STATEMENT OF FACTS

1. The defendant/appellees fraudulently concealed the lack of jurisdiction of the Western District of Missouri trial court to unlawfully remove the plaintiff's claims in the concurrent Missouri State Court Case No. 0616-CV32307.

2. Defendant/appellees' counsel Mark A. Olthoff (Mo. Lic. # 38572) omitted notice to Ms. Patricia L. Brune the U.S. District Court for the Western District of Missouri in his Notice of Removal dated 12/13/2006 that the plaintiff's claims were already under federal jurisdiction in the first filed in *MSC v. Neoforma, Inc. et al* Kansas District Court case no. 05-CV-2299-CM whose trial judge Hon. Judge Carrlos Murguia had dismissed without prejudice. See **exb. 1**.

3. At the time of removal of the present action to the Western District of Missouri, the same claims in the same case or controversy Kansas District Court case no. 05-CV-2299-CM were in an appeal in Tenth Circuit Case No. 06-3331 initiated on September 8, 2006 which had exclusive federal jurisdiction. See **exb. 2**. Tenth Circuit 06-3331 Appearance Docket.

4. The plaintiff/appellant notified the Clerk of the Court of her error resulting from Mark A. Olthoff's facial misrepresentation of the existence of federal jurisdiction but no action was taken by the Western District Court Clerk. See **exb. 3** Lipari's Letter to Clerk of the Court

5. At the time of removal there was no federal diversity jurisdiction over the concurrent Missouri State Court Case No. 0616-CV32307 because the same case or controversy Kansas District Court case no. 05-CV-2299-CM which was on appeal as Tenth Circuit Case No. 06-3331 and (currently) again as Tenth Circuit Case No. 08-3187 both contained the defendant Shughart Thomson & Kilroy Watkins Boulware P.C. domiciled in Missouri, the same state of residence as the plaintiff. See **exb. 2**. Tenth Circuit Appearance Docket and **exb. 4**. Tenth Circuit 08-3187 Appearance Docket.

5. The plaintiff/appellant made a timely objection to removal and motion to remand (See **exb. 5** plaintiff's 12/18/2006 Motion to Remand) raising the lack of federal diversity jurisdiction (See **exb. 5** pg. 3 ¶¶ 9,7, 10-11), the exclusive federal jurisdiction in *MSC v. Neoforma, Inc. et al,* Tenth Circuit Case No. 06-3331(See **exb. 5** pg. 2-3, 4,6 ¶¶ 2, 12-13) and the violation of the federal "First to File

Doctrine" against Kansas District Court case no. 05-CV-2299-CM see **exb. 5** pg. 6-8 ; and Hon. Judge Fernando J. Gaitan, Jr.'s position on the board of directors of a defendant in the same case or controversy and open motion for recusal see **exb. 5** pg. 2 ¶¶ 4-8.

6. Defendant/appellees' counsel Mark A. Olthoff (Mo. Lic. # 38572) did not brief Hon. Judge Fernando J. Gaitan, Jr. on the applicability of these prohibitions to federal jurisdiction in the present underlying action W.D. of MO. Case No. 06-1012-W-FJG stating merely:

> "Defendants, while denying that plaintiff has any viable claims, admit that subject matter jurisdiction exists in this Court as alleged in their Notice of Removal. Otherwise, defendants deny the allegations in Paragraphs 1-5 of plaintiff's Complaint."

Exb. 6 Answer of US Bank and US Bancorp to Motion for Remand page 2 in ¶ 1.

7. On February 9, 2005 the Hon. Judge Nanette K. Laughrey of US District Court for the Western District of Missouri ruled an electronic signature and emails form an enforceable contract satisfying the Statute of Frauds under Missouri State law and 15 USC §7001, the federal Electronic Signatures in Global and National Commerce Act, widely known as "E-SIGN"[1] June 30, 2000 in a fact pattern

[1] Section 101(a) of E-SIGN states that "(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

materially the same as the plaintiff/appellant had pled his contract based claims against US Bank and US Bancorp since the plaintiff first initiated a litigation in 2002.

8. On August 8, 2006, the Missouri State Court of Appeals opinion of Hon. Robert G. Ulrich, Hon. Joseph M. Ellis, and Hon. Ronald R. Holliger in *Crestwood Shops, L.L.C. v. Hilkene*, No. WD 65694 (Mo. App. 8/8/2006) confirmed the US District court's resolution in *Intern. Casings Group* of the Missouri Statute of Fraud's application to contracts formed or modified through e-mail.

9. On January 19, 2007 Mark A. Olthoff (Mo. Lic. # 38572) Andrew M. DeMarea (Mo. Lic. #45217); and Jay E. Heidrick (Mo. Lic. # 54699) sought to escape a law based outcome on the plaintiff/appellant's contract based claims and filed a motion to transfer the action to Kansas District court while federal jurisdiction was exclusively in *MSC v. Neoforma, Inc. et al,* Tenth Circuit Case No. 06-3331 and again without addressing or briefing Hon. Judge Fernando J. Gaitan, Jr. on the lack of federal jurisdiction in his court. See **exb**. **7** US Bank and US Bancorp Motion to Dismiss Strike or Transfer at pgs. 16-17.

10. On April 4, 2007 Hon. Judge Fernando J. Gaitan, Jr. declined to grant Olthoff, DeMarea, and Heidrick's motions to dismiss or strike the plaintiff/appellant's claims but granted their motion to transfer them to Kansas District Court (see **exb.** 8 Order) where the new action was styled *Lipari vs. US Bancorp, Inc. et al*. KS Dist. Court Case No.07-02146.

11. On December 10, 2007 The Tenth Circuit issued its mandate in *MSC v. Neoforma, Inc. et al,* Case No. 06-3331, returning federal jurisdiction over the underlying state contract claims of the plaintiff/appellant to Kansas District Court case no. 05-CV-2299-CM. See **exb. 9** Mandate of Tenth Circuit.

12. At no time from 2007 Mark A. Olthoff's (Mo. Lic. # 38572) Notice of Removal dated 12/13/2006 which deceived Ms. Patricia L. Brune U.S. District Court for the Western District of Missouri over the existence of federal jurisdiction through omission of notice of the Kansas District Court and Tenth Circuit ongoing litigation in the same case or controversy until the order transferring the underlying action to the Kansas District Court on April 4, 2007 did did Hon. Judge Fernando J. Gaitan, Jr. ever have lawful jurisdiction over the plaintiff/appellant's concurrent Missouri state contract based claims which lacked diversity and were exclusively under the jurisdiction of the Tenth Circuit Court of Appeals in *MSC v. Neoforma, Inc. et al,* Case No. 06-3331 having been appealed from Kansas District Court case no. 05-CV-2299-CM on September 8, 2006.

13. The plaintiff/appellant learned that US Bank and US Bancorp were continuing with a scheme to defraud the Kansas District Court Magistrate Judge Hon. through a false and bad faith motion to compel production of discoverable documents signed by Jay E. Heidrick (Mo. Lic. # 54699) even though the documents had been repeatedly produced (the copying cost to reproduce them to defend against Heidrick's motion to compel was over $5000.00) and the scheme included no rulings on the defendants' "automatic" blanket protective orders under local Kansas District Court Rules and dismissal of the plaintiff's claims as a

sanction.

14. When the plaintiff/appellant successfully proved the fraud on the court (see Appendix Vol. XVI, XVII pgs. 6202-6566 available online at http://www.medicalsupplychain.com/MSC%20v%20Novation%20Appeal%20(08-3187).htm containing the record of the Kansas District Court transferee case which the defendants did not object to being supplemented into the *MSC v. Neoforma, Inc. et al,* Tenth Circuit Case No. 06-3331 record on appeal) the Kansas District Court instead partially granted a second dismissal including all Missouri state law based contract claims in violation of the federal rules of civil procedure as a prohibited second Rule 12 motion to dismiss. See Palermo, Federal Pretrial Practice: Basic Procedure & Strategy 2001 states at page 21; "Rules12(g) and 12(h), read together, provide in general, there shall not be more than one Rule 12 motion to dismiss....All defenses and grounds "then available" shall be asserted in the one motion; certain defenses shall be asserted in the Rule 12 motion, or in the initial responsive pleading (or amendment thereof) under threat of waiver."

15. Instead of accomplishing dismissal through the defendants' fraud scheme The Kansas District Court impugned the e-mail based contract decisions of Hon. Judge Nanette K. Laughrey of the US District Court for the Western District of Missouri and the Missouri State Court of Appeals opinion of Justices Hon. Robert G. Ulrich, Hon. Joseph M. Ellis, and Hon. Ronald R. Holliger as violating the " plausibility " standard of *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) and failing to state a claim for contract under Missouri state law.

16. The plaintiff appealed from Hon. Judge Fernando J. Gaitan, Jr.'s denial of

the timely motion to remand the action to Missouri State court and from the order transferring the action to Kansas District Court in the absence of federal Diversity Jurisdiction over the matter or controversy which included a Missouri domiciled defendant corporation, in violation of the exclusive federal jurisdiction of a US Court of Appeals over the same matter in controversy, and in violation of the federal "First to File Doctrine" in a timely notice of appeal dated September 5th, 2008 (see **exb. 10** Notice of Appeal) from the date the transferee court (the District of Kansas) first dismissed some of the plaintiff's Missouri State law based claims expressly with prejudice on September 4, 2008.

17. The plaintiff/appellant feared the time to appeal the transferor court's (W.D. of Missouri) transfer would begin to run on a state based claim under Missouri State law was expressly dismissed with prejudice and was a complete "judicial unit" under Missouri Rule 74.01(b) as recognized in *Penn-Am. Ins. Co. v. The Bar, Inc*., 201 S.W.3d 91, 95 (Mo. App. 2006) and B*ell Scott, LLC v. Wood, Wood, & Wood Invs., Inc*., 169 S.W.3d 552, 554 (Mo. App. 2005).

18. On September 16, 2008, Mark A. Olthoff (Mo. Lic. # 38572) Andrew M. DeMarea (Mo. Lic. #45217); and Jay E. Heidrick (Mo. Lic. # 54699) sought to have the plaintiff/appellant's appeal 08-3087 dismissed as frivolous for being untimely "some 17 months after the case had been transferred." See **exb. 11** Motion to Dismiss Appeal.

19. The plaintiff/appellant answered the Motion to Dismiss the Appeal giving Mark A. Olthoff (Mo. Lic. # 38572) Andrew M. DeMarea (Mo. Lic. #45217); and

Jay E. Heidrick (Mo. Lic. # 54699) notice that the controlling authorities prevented the plaintiff/appellant from appealing the transfer or denial of remand until after the transferee court (the Kansas District Court) had dismissed the claim with prejudice. See **exb. 12** Appellant Reply to Motion to Dismiss Appeal at pgs. 4-6 addressing the need to wait until after the transferee court dismisses and denial of remand at pg. 3

20. When this court denied jurisdiction over the plaintiff's 08-3087 appeal of transferor court's failure to remand and order transferring the action to Kansas in the absence of jurisdiction during the exclusive jurisdiction of *MSC v. Neoforma, Inc. et al,* Tenth Circuit Case No. 06-3331 over the same matter or controversy, the transferee court renewed its sanctioning of the plaintiff/appellant based on filings by Jay E. Heidrick (Mo. Lic. # 54699).

21. The filings by Jay E. Heidrick (Mo. Lic. # 54699) induced the plaintiff/appellant to abandon his meritorious Missouri Trade Secret Claims, voluntarily dismissing all of his remaining claims and ending trial court jurisdiction over the matter or controversy with prejudice under Rule 41(a)(2). See **exb. 13** Notice of Voluntary Dismissal.

22. The defendants and the Kansas District Court having been given notice of controlling law contradicting the lawfulness of the dismissal of all Missouri state law contract based claims under the Federal Rules of Civil Procedure, the express language of E-Sign Act, resulting interpretations of the act as it applies to materially identical fact situations in Missouri courts and the resulting inappropriateness of the "plausibility" based dismissal sought to keep a matter or controversy alive in the Kansas District Court solely for the bad faith purpose of

avoiding review.

23. The plaintiff/appellant then filed in the US District Court for the Western District of Missouri a timely second amended Notice of Appeal (See **exb. 14**) designating the voluntary dismissal with prejudice of the remaining Kansas District Court claims.

24. The Western District court did not file the Second Amended Notice of Appeal or forward it to the Eighth Circuit. See Docket Notation of Assistant Western District Clerk Lori Carr stating "chambers" had instructed her to send it to Kansas District Court:

> "***Remark: Plaintiff's Second Amended Notice of Appeal was received by this court and then
> forwarded this date to the District of Kansas for processing at the instruction of chambers. (Carr, Lori) (Entered: 12/05/2008)"

Exb. 15 Appearance Docket of W.D. of Missouri Case No. 4:06-cv-01012-FJG

25. On December 9, 2008 the Chief Clerk of the Eighth Circuit wrote a letter to Ms. Patricia L. Brune instructing her to file the Second Amended Notice of Appeal in her court, the U.S. District Court for the Western District of Missouri See **Exb. 16** Letter of Chief Clerk for the Eighth Circuit.

26. Ms. Patricia L. Brune never complied with the order.

27. In Kansas District Court to manufacture a basis for continuing trial jurisdiction, Jay E. Heidrick (Mo. Lic. # 54699) filed a conditional stipulation to dismissal with prejudice providing attorney's fees were awarded despite the contrary controlling authorities applying to dismissals with prejudice. See **exb. 17**

Reply To Defendants' Conditional Stipulation of Dismissal.

28. When the Kansas trial Court granted the plaintiff's voluntary dismissal, the court awarded attorneys fees but (or to manufacture a lawful reason for awarding attorneys' fees) the court changed the stipulation of dismissal with prejudice into a dismissal without prejudice. See **exb. 18** Order of Dismissal and Attorneys' Fees.

29. When the Kansas District Court received the extrajudicial communication from Western District Clerk Lori Carr (**exb. 15** *supra*), the court ordered the plaintiff/appellant to show cause why sanctions should not be ordered against the plaintiff for appealing the dismissal:

> "ORDER TO SHOW CAUSE. Plaintiff did not respond to the court's order 159 requiring Plaintiff to withdraw the plaintiff's 147 stipulation of dismissal by December 1, 2008. Plaintiff instead filed 163 amended notice of appeal with the 10th Circuit. Plaintiff is hereby ordered to show cause to this court by 12/12/2008 why this case should not be dismissed for failure to withdraw the 147 stipulation of dismissal. Show Cause Response due by 12/12/2008.Signed by District Judge Carlos Murguia on 12/5/2008.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (jw) (Entered: 12/05/2008)"

Kansas District Court December 5, 2008 Order to Show Cause.

30. The parties were under a November 14, 2008 order by the Tenth Circuit Court of Appeals to give status reports on the proceedings in Kansas District Court after the plaintiff's Kansas District Court Notice of Appeal filed simultaneously with his Second Amended Notice of appeal in Western District of Missouri. See **exb. 19** Abeyance Order of Chief Deputy Clerk Douglas E. Cressler of The Tenth Circuit Case No. 08-3287.

31. The plaintiff complied with the order filing a timely status report on December 10 2008 that included the November 26th, 2008 order by the Kansas District Court that on pg. 4 expressly gave the Plaintiff until "December 10, 2008 to withdraw his stipulation for dismissal" . See **exb. 20** Plaintiff/Appellant's Status

Report

31. To continue the manufactured Kansas District Court jurisdiction following the plaintiff's voluntary dismissal of all remaining claims with prejudice and to discredit the plaintiff/appellant, Mark A. Olthoff (Mo. Lic. # 38572) signed and filed a fraudulent status report contradicting the plaintiff/appellant and the November 26 court order the plaintiff attached in evidence by falsely stating that the plaintiff had been ordered to withdraw his stipulation of dismissal by December first. See **exb. 21** False status report by Olthoff at pg. 1.

32. On December 18th , 2008 Jay E. Heidrick (Mo. Lic. # 54699) filed a fraudulent status report for the purpose of misrepresenting the court order on the stipulated dismissal as an order with prejudice, an order the Kansas District court appeared it cot recognized it lacked jurisdiction to award defendants' attorneys fees for, the whole device employed in bad faith by Jay E. Heidrick to postpone or defeat appellate review of the inappropriate dismissal of the plaintiff's Missouri State law based contract claims.

33. Jay E. Heidrick (Mo. Lic. # 54699) falsely stated in his December 18th , 2008 Status Report to the Tenth Circuit that "…the United States District Court, District of Kansas entered a final Order dismissing plaintiff's suit with prejudice. See, Doc. #171." See **exb. 22** False Status Report by Heidrick at pg.1.

34. The plaintiff/appellant was forced to enter subsequent amended notices of appeal when the Kansas District Court continued to exercise substantive jurisdiction over issues subject to appeal in the Tent Circuit.

35. On December 12, 2008 the trial court entered a final judgment declining to sanction the plaintiff and clarifying that the deadline to withdraw the stipulation of dismissal had been December 10, 2008.

36. On December 19, 2008 Chief Deputy Clerk Douglas E. Cressler of The Tenth Circuit issued an order consolidating the appellate case numbers the clerk had earlier assigned: 08-3287, 08-3338, and 08-3345, all arising out of the same proceeding before the U.S. District Court of Kansas in *Lipari v. US Bancorp NA*, No. 2:07-CV-02146-CM-DJW. See **exb. 23** Tenth Circuit Consolidation Order.

37. The plaintiff appellant had been originally ordered by the Tenth Circuit to (see **exb 24** containing the court's "Order to File Memoranda") brief the court on its appellate jurisdiction after the plaintiff had filed his notice of appeal on October 16, 2008 following the plaintiff's October 15, 2008 stipulation of dismissal with prejudice of all remaining claims. (**exb 13** *supra*).

40. The plaintiff/appellant briefed the Tenth Circuit Court of Appeals that their jurisdiction was merely the jurisdiction to review the appellate court's jurisdiction or lack thereof and that the Kansas District Court never obtained jurisdiction from the April 4, 2007 transfer order of Hon. Judge Fernando J. Gaitan, Jr. transferring the concurrent state claims case to Kansas District Court (see **exb.** 8 Order) while the Tenth Circuit still had exclusive jurisdiction in in *MSC v. Neoforma, Inc. et al,* Case No. 06-3331 over the same matter or controversy. See **exb. 25** Memorandum of the Plaintiff/Appellant.

41. Neither **exb. 19** the Abeyance Order of Chief Deputy Clerk Douglas E.

Cressler of The Tenth Circuit Case No. 08-3287 or **exb. 23** the Tenth Circuit Consolidation Order resolve or make a finding of law on the presence or absence of Tenth Circuit Appellate Court jurisdiction over the plaintiff/appellant's concurrent state law claims.

42. The present Motion to Dismiss the Appeal before this court filed by Mark A. Olthoff (Mo. Lic. # 38572); Andrew M. DeMarea (Mo. Lic. #45217); and Jay E. Heidrick (Mo. Lic. # 54699)

SUGGESTION OF LAW IN SUPPORT OF JURISDICTION OVER APPEAL

In *Wilkinson v. Shackelford*, 478 F.3d 957 (8th Cir., 2007), Wilkinson like the plaintiff/appellant voluntarily dismissed her remaining claims pursuant to Federal Rule of Civil Procedure 41(a). She then filed a timely notice of appeal challenging the district court's denial of her motion to remand. The Eighth Circuit exercised jurisdiction over the earlier denial of remand stating "The district court was 'required to resolve all doubts about federal jurisdiction in favor of remand.' *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir.1997). The Eighth Circuit ordered return of the case to the district court with instructions to remand it to state court even though "Wilkinson could have requested an interlocutory appeal immediately following the denial of her motion to remand, but did not." *Wilkinson* 478 F.3d at fn 4.

In *Meat Price Investigators Ass'n v. Spencer Foods, Inc*., 572 F.2d 163 (C.A.8 (Iowa), 1978) the Eighth Circuit found that a transfer oorder could be

appealed from a transferor court when there were allegations of unethical conduct like the frauds in the present appeal where Mark A. Olthoff (Mo. Lic. # 38572) omitted notice to Ms. Patricia L. Brune the U.S. District Court for the Western District of Missouri in his Notice of Removal dated 12/13/2006 that the plaintiff's claims were already under federal jurisdiction in the first filed in *MSC v. Neoforma, Inc. et al* Kansas District Court case no. 05-CV-2299-CM and federal jurisdiction was facially lacking in the defendants' fraudulent notice of removal:

> "We held that physical transfer of the original papers to a permissible transferee forum in another circuit did not deprive this court of jurisdiction to review an order entered subsequent to the transfer. Assuming that an appeal could properly be brought in either circuit, this court decided to assert jurisdiction, first because the order appealed from involves allegedly unethical conduct of attorneys in this circuit a matter of considerable concern to this court; and also because it was determined that the ultimate decision would not materially impede the progress of pretrial proceedings in Texas. The parties were directed to brief the issue of the "finality" of the order denying severance and disqualification along with the merits of the appeal, and those issues are presently before this court."

Meat Price Investigators Ass'n v. Spencer Foods, Inc., 572 F.2d 163 (C.A.8 (Iowa), 1978)

This court in *Meat Price Investigators* determined that "Although the state bar association has the primary responsibility of adjudicating matters of professional ethics, the district court "bears the responsibility for supervision of the members of its bar." *Hull v. Celanese Corp*., 513 F.2d 568, 571 (2d Cir. 1975)." *Meat Price Investigators* 572 F.2d at 165.

This court in *Meat Price Investigators* however recognized that normally transferee forum in another circuit deprives the transferor circuit of jurisdiction to

review the transfer:

> "Prior to discussing the pending motions, we face a threshold question about our jurisdiction to hear any appeal from the district court regarding this case. Some cases have held that the physical transfer of the original papers in a case to a permissible transferee forum in another circuit deprives the transferor circuit of jurisdiction to review the transfer. See, e.g., *Starnes v. McGuire*, 168 U.S.App.D.C. 4, 512 F.2d 918 (1974); *Drabik v. Murphy*, 246 F.2d 408 (2d Cir. 1957). These cases are not controlling here, because they deal with review of a transfer order itself under 28 U.S.C. § 1404(a), rather than review of an order entered subsequent to a transfer under 28 U.S.C. § 1407. In addition, the rationale behind this rule is based largely on the appealing party's failure to seek a stay of the transfer order prior to physical transmission of the files. See, e.g., Drabik v. Murphy, supra, 246 F.2d at 409. This rationale loses its force when the order sought to be appealed from was entered subsequent to the physical transfer of the files. We hold that the district court's transfer of the files does not ipso facto deprive us of jurisdiction to hear this appeal."

Meat Price Investigators 572 F.2d at 166-167.

The plaintiff/appellant recognized that he could not appeal the transfer order by Hon. Judge Fernando J. Gaitan, Jr. once the case had been physically transferred to Kansas District Court under the controlling authority of this circuit in *Nine Mile Limited, In re*, 673 F.2d 242 (C.A.8 (Iowa), 1982): "Because the case file has been physically transferred to the clerk for the District of South Carolina, we lack jurisdiction to the transfer order." *Nine Mile, id.* at 244. See also *In re Asemani*, 455 F.3d 296 at 300 (D.C. Cir., 2006): "*Starnes* [*Starnes v. McGuire*, 512 F.2d 918 (C.A.D.C., 1974)], 512 F.2d at 924 ('[P]hysical transfer of the original papers in a case to a permissible transferee forum deprives the transferor circuit of jurisdiction to review the transfer.')."[Emphasis added].

Transfer orders, including ones transferring a case for the convenience of the

parties and witnesses, 28 U.S.C. § 1404(a), are not appealable final decisions. E.g., *Murphy v. Reid*, 332 F.3d 82 (2d Cir.2003) (per curiam); *In re Carefirst of Maryland, Inc.*, 305 F.3d 253, 256 (4th Cir.2002); *Ukiah Adventist Hospital v. FTC*, 981 F.2d 543, 546 (D.C.Cir.1992); *Kotlicky v. U.S. Fidelity & Guaranty Co.*, 817 F.2d 6, 7 n. 1 (2d Cir.1987). See also 15 Charles Alan Wright et al., Federal Practice & Procedure § 3827 (2d ed. 1986) ("An order of transfer under Section 1406(a) is interlocutory and not appealable...."); id. § 3855 ("It is entirely settled that an order granting or denying a motion to transfer under 28 U.S.C.A. § 1404(a) is interlocutory and not immediately appealable....").

The plaintiff/appellant has now timely appealed the transfer order and denial of remand by Hon. Judge Fernando J. Gaitan, Jr. after the Kansas District Court has made its final order, thus removing the interlocutory review bar. The test for finality is not whether the suit is dismissed with prejudice or without prejudice, on the merits or on a jurisdictional ground or on a procedural ground such as failure to exhaust administrative remedies when exhaustion is not a jurisdictional requirement. The test is whether the district court has finished with the case. *Shah v. Inter-Continental Hotel Chicago Operating Corp.*, 314 F.3d 278, 281 (7th Cir.2002); *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 707 (7th Cir.1999); *Hunt v. Hopkins*, 266 F.3d 934, 936 (8th Cir.2001).

The plaintiff/appellant was induced by the defendants' continuing fraud over the Kansas District Court into voluntarily dismissing his remaining claims with prejudice. See Rebecca A. Cochran, "Gaining Appellate Review by

`Manufacturing' a Final Judgment Through Voluntary Dismissal of Peripheral Claims," 48 Mercer L.Rev. 979 (1997). However jurisdiction over the appeal is not in the Tenth Circuit where neither the appellate court or the transferee Kansas District Court could obtain jurisdiction from Hon. Judge Fernando J. Gaitan, Jr.'s order of transfer. The plaintiff/appellant had filed a notice of appeal in the same matter or controversy *MSC v. Neoforma, Inc. et al* Kansas District Court case no. 05-CV-2299-CM and the Tenth Circuit had docketed the appeal as Tenth Circuit Case No. 06-3331.

The defendant/appellees US Bank and US Bancorp previously argued to the Western District of Missouri Court (see **exb. 7** Motion to Dismiss, Strike or Transfer pgs. 4-15 where the defendants refer to MSC v. Neoforma et al, first filed in W.D. of Missouri and later transferred to Kansas as "*Medical Supply II*", and attach the complaint as Exhibit C) and later to the Kansas District court that the claims were the same matter or controversy by asserting the court should dismiss the Missouri State contract law based claims as precluded by *Res Judicata* in *MSC v. Neoforma, Inc. et al* Kansas District Court case no. 05-CV-2299-CM and therefore are now judicially estopped from denying the identity of claims. *Wyldes v. Hundley*, 69 F.3d 247, 251 (8th Cir.1995) ("The principle of judicial estoppel `bars a party from taking inconsistent positions in the same litigation.'") (quoting *Morris v. California*, 966 F.2d 448, 452 (9th Cir.1991)). This Court has not articulated clearly the elements of judicial estoppel but has held that judicial estoppel applies only when a party takes a position that is "clearly inconsistent

with its earlier position." *Hossaini v. W. Mo. Med. Ctr.,* 140 F.3d 1140, 1143 (8th Cir.1998).

At the docketing of the notice of appeal on September 2006, all US District Courts lost jurisdiction over the plaintiff/appellant's concurrent state claims: "The filing of the notice of appeal was an event of jurisdictional significance, which divested the district court from granting further relief concerning the issues on appeal. See *Griggs v. Provident Consumer Discount C*o., 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)". *Walker v. City of Orem*, 451 F.3d 1139 at 1146 (10th Cir., 2006).

The US District Court for the Western District of Missouri was in error to assert federal diversity jurisdiction when the same matter or controversy originally filed in *MSC v. Neoforma, Inc. et al* Kansas District Court case no. 05-CV-2299-CM had a defendant domiciled in the state of Missouri:

> "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 or first filed federal question jurisdiction over all supplemental claims under 28 U.S.C. § 1367(a).

If the trial court of Hon. Judge Fernando J. Gaitan, Jr. lacked subject-matter jurisdiction over appellant's action, 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).

CONCLUSION

Whereas for the above stated reasons the plaintiff/appellant respectfully requests this court deny the appellee's Motion to Dismiss the Appeal and furthermore to return the action to trial court with instructions to remand the action to Missouri State Court.

Respectfully submitted,

S/Samuel K. Lipari

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Certificate of Service

I certify that on January 7, 2009 I have served the opposing counsel with a copy of the foregoing via e-mail and US Mail:

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S/Samuel K. Lipari
_____
Samuel K. Lipari

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	**State Court No. 0616-CV32307**
US BANCORP, NA	)	
AND US BANK, NA,	)	**JURY TRIAL DEMANDED**
	)	
Defendants.	)	

NOTICE OF REMOVAL OF CIVIL ACTION

To: The Judges of the United States District Court
for the Western District of Missouri
Western Division

Defendants U.S. Bancorp (misnamed as US Bancorp, NA) and U.S. Bank National Association (misnamed as US Bank, NA) (collectively, the "Defendants") submit this Notice of Removal of this action from the Circuit Court of Jackson County, Missouri at Independence, Missouri – where this case is currently pending under the case style of *Lipari v. US Bancorp, NA*, Case No. 0616-CV32307 – to the United States District Court for the Western District of Missouri. In support of this Notice of Removal, Defendants state as follows:

I. INTRODUCTION

1. Defendants desire to exercise their right under the provisions of 28 U.S.C. §§ 1441 *et seq*., to remove this case from the Circuit Court of Jackson County, Missouri, at Independence, Missouri. 28 U.S.C. § 1441(a) provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

EXHIBIT 1

2. This civil action has not been tried. Plaintiff filed his Petition for Damages on November 28, 2006. Defendants first received a copy of Plaintiff's Petition on December 8, 2006 via certified mail. Rather than challenge service of process, Defendants voluntarily appear in this action, but hereby reserve all objections, arguments, and defenses to Plaintiff's Petition. A responsive pleading will be filed in accordance with Rule 81 of the Federal Rules of Civil Procedure.

II. NOTICE OF REMOVAL IS TIMELY

3. The time in which Defendants are required by the laws of the State of Missouri, by the Missouri Rules of Civil Procedure, or by the Rules of the Circuit Court of Jackson County, to move, answer or otherwise plead in response to Plaintiff's Petition has not elapsed.

4. In accordance with the requirements of 28 U.S.C. § 1446(b), this Notice of Removal is filed within thirty (30) days after the receipt by any defendant, through service, of a copy of the initial pleading setting forth the claim for relief on which Plaintiff's action is based.

III. DIVERSITY JURISDICTION EXISTS

5. This Court has original jurisdiction over this civil action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states.

6. Plaintiff Samuel K. Lipari is a citizen and resident of the State of Missouri. Defendant U.S. Bancorp is a Delaware corporation with its principal place of business at 800 Nicollet Mall, Minneapolis, Minnesota 55402. Defendant U.S. Bank National Association is a national banking association with its main office located at 800 Nicollet Mall, Minneapolis, Minnesota 55402. Complete diversity of citizenship therefore exists. *See* 28 U.S.C. §§ 1332, 1348; *Wachovia Bank, National Association v. Schmidt*, ___ U.S. ___, 126 S.Ct. 941, 945 (2006).

7. The $75,000 amount-in-controversy requirement found in 28 U.S.C. § 1332 is satisfied because Plaintiff's Petition seeks damages in the amount of four hundred fifty million dollars ($450,000,000.00). *See* Pl.'s Pet. at ¶ 263.

IV. REMOVAL TO THIS DISTRICT IS PROPER

8. Pursuant to 28 U.S.C. §§ 1441 *et seq*., the right exists to remove this case from the Circuit Court of Jackson County, Missouri at Independence, Missouri, to the United States District Court for the Western District of Missouri, which embraces the place where the action is pending.

V. MISCELLANEOUS

9. Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings, and orders served on Defendants – including a copy of the Petition bearing Case No. 0616-CV32307 – is attached to this Notice of Removal as Exhibit A.

10. All Defendants join in this Notice of Removal.

11. Written notice of the filing of this Notice of Removal will be promptly served on counsel for all adverse parties as required by law or, as is the case here, on the alleged "*pro se*" Plaintiff.

12. A true and correct copy of this Notice of Removal will be promptly filed with the Clerk of the Circuit Court of Jackson County, Missouri at Independence, Missouri, as required by law, and served on Plaintiff.

13. Defendants reserve the right to amend or supplement this Notice of Removal, and Defendants reserve all defenses.

14. Defendants request a trial by jury on all issues triable by right to a jury trial.

WHEREFORE, Defendants U.S. Bancorp and U.S. Bank National Association pray that this case be removed from the Circuit Court of Jackson County, Missouri at Independence,

Missouri, where it is now pending, to this Court, that this Court accept jurisdiction of this action, and that this action be placed on the docket of this Court for further proceedings, same as though this case had originally been instituted in this Court.

Dated: December 13, 2006

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

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

CERTIFICATE OF SERVICE

I hereby certified that the above and foregoing document was filed electronically with the above-captioned court, and a copy was sent by overnight mail on this 13th day of December, 2006 to:

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

/s/ Mark A. Olthoff
Attorney for Defendants

United States Court of Appeals for the Tenth Circuit

If you view the full docket, you will be charged for 7 Pages $ 0.56

United States Court of Appeals for the 10th Circuit
Case Summary

Court of Appeals Docket #: 06-3331 Filed: 9/15/06
Nsuit: 3410
Medical Supply Chain v. Neoforma, Inc., et al
Appeal from: United States District Court for the District of Kansas

Lower court information:
District: 1083-2 : 05-CV-2299-CM
Ordering Judge: Carlos Murguia, District Judge

10/4/06	[1961739] Notice of appearance filed by Mark A. Olthoff, Andrew M. DeMarea as attorneys for US Bancorp NA, US Bank NA, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray, Andrew S. Duff. CERT. OF INTERESTED PARTIES (y/n): n. (na)
10/6/06	[1962677] Fee paid. Date paid in District Court on 10/3/06. (lab)
10/6/06	[1962731] Notice of appearance filed by Robert A. Henderson and Kathleen A. Hardee as attorney for Shugart Thomson. CERT. OF INTERESTED PARTIES (y/n): n. (kf)
10/6/06	[1962734] Appellees' Rule 26.1 Disclosure Statement filed by Appellee Shugart Thomson. Original and 3 copies. c/s: y. (kf)
10/10/06	[1962951] Order filed by Clerk - Docketing statement and transcript order form due 10/24/06 for counsel for appellants Samuel K. Lipari and Medical Supply Chain. Parties served by mail. (kf)
10/16/06	[1965283] Notice of appearance filed by Ira Dennis Hawver as attorney for Medical Supply Chain and Samuel K. Lipari. CERT. OF INTERESTED PARTIES (y/n): y. (at)
10/16/06	[1965290] Docketing statement filed by Medical Supply Chain and Samuel K. Lipari. Original and 4 copies c/s: y. (at)
10/16/06	[1965297] Notice received from Appellants Medical Supply Chain and Samuel K. Lipari that a transcript is not necessary for this appeal. Notice due that record is complete 10/27/06 for Ralph L. DeLoach. (at)
10/25/06	[1968198] Filed notice record is complete 10/23/06.

EXHIBIT 2

Appellant's brief and appendix due 12/4/06 for Samuel K. Lipari and Medical Supply Chain. (lab)

11/21/06  [1977110] E-Motion Appellees' motion to dismiss untimely appeal received from appellees Neoforma, Inc., et al. Submission type: email (kf)

11/22/06 [1977513] "Appellees' Motion to Dismiss Untimely Appeal" [06-3331] filed by Neoforma, Inc., Robert J. Zollars, Volunteer Hospital, Curt Nonomaque, University Health, Robert J. Baker, US Bancorp NA, US Bank NA, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray, Andrew S. Duff, Shugart Thomson, Watkins Boulware, PC and Novation LLC. Original and 7 copies. c/s: y. (kf)

11/28/06  [1979292] Other E-document received from Medical Supply Chain, Samuel K. Lipari. Pleading type: Response to Appellees' motion to dismiss for timeliness of Appellant's notice of appeal. Submission type: email (kf)

12/5/06  [1981838] Other E-document received from Neoforma, Inc., Robert J. Zollars, Volunteer Hospital, Curt Nonomaque, University Health, Robert J. Baker, US Bancorp NA, US Bank NA, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray, Andrew S. Duff, Shugart Thomson, Watkins Boulware, PC, and Novation LLC. Pleading type: Appellees' Reply to Appellant's Response to Appellees' Motion to Dismiss Untimely Appeal. Submission type: email (kf)

12/6/06 [1982068] Reply to Response to Motion to Dismiss filed by Neoforma, Inc., et al (appellees), Original and 3 copies. c/s: y (na)

12/7/06 [1982579] Response to Appellee's Motion to Dismiss for Timeliness of Appellants' Notice of Appeal filed by Medical Supply Chain and Samuel K. Lipari. Original and 7 copies. c/s: y. (at)

Clerk of the Court
Western Division at Kansas City
Charles Evans Whittaker Courthouse
400 E. 9th Street
Kansas City, Missouri 64106

RE: Error in Re-docketing *Medical Supply Chain, Inc. v Neoforma et al,* Case No. 05-0210-CV-W-ODS as *Samuel K. Lipari v US Bank NA, et al* Case No. 06-1012-CV-W-FJG

Dear Clerk of the Court

Your office has erroneously docketed *Medical Supply Chain, Inc. v Neoforma et al*, Case No. 05-0210-CV-W-ODS, now transferred to the District of Kansas where it is captioned *Medical Supply Chain, Inc. v Neoforma et al*, Case No. 05-2299-CM and is and is appealed to the Tenth Circuit US Court of Appeals as *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al*., Case No. 06-3331.

The supplemental state law claims (¶¶252-329 including Trade Secret Relief at ¶¶325,325, ¶448, ¶454, ¶¶479-482, ¶¶488-494, Count XI , Damages For Breach Of Contract ¶¶538-543, Count XII Damages For Breach Of Fiduciary Duty ¶¶544-553) in Case No. 05-2299-CM complaint that Kansas District Judge Carlos Murguia declined federal jurisdiction over on 03/07/2006 subsequently became the concurrent state jurisdiction case captioned *Samuel K. Lipari v US Bank NA, et al* Missouri 16th Cir. State Court Case No. 0616-CV32307 within the savings clause of 28 U.S.C. § 1367(d). The plaintiff is identified as the successor in interest to Medical Supply Chain, Inc. and the defendants are two defendants of the non-diverse federal action where the federal defendant Shughart Thomson & Kilroy shares Missouri domicility with the plaintiff. Both US Bank NA and US Bancorp NA declined to appeal Judge Murguia's order. If later events such as the plaintiff's successful appeal or US Bank NA and US Bancorp NA are granted relief from their counsel Mark A. Olthoff's (MO #38572) inadvertence, the claims can be returned to federal court where Judge Murguia retains continuing jurisdiction under 28 U.S.C. § 1367(a). The Eight Circuit has specifically observed:

> "While the 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 1287-88 (C.A.8 (S.D.), 1998).

Consequently, the plaintiff respectfully calls attention to the Clerk of the Court that it has no jurisdiction to overturn Judge Murguia's order on 03/07/2006 over the claims captioned *Samuel K. Lipari v US Bank NA, et al* Missouri 16th Cir. State Court Case No. 0616-CV32307 which are concurrent and the same case or controversy as the federal court case *Medical Supply Chain, Inc. v Neoforma et al*, Case No. 05-2299-CM under 28 U.S.C. § 1367(a). Diversity jurisdiction removal under 28 U.S.C. § 1441 *et seq* is inapplicable where a US District Court in the District of Kansas is already exercising original jurisdiction over the parties' federal questions.

Respectfully submitted,

_____
Samuel K. Lipari/ Pro se
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306

cc: Mark A. Olthoff's (MO #38572), 12 Wyandotte Plaza,120 W. 12th Street, Ste 1700, KCMO 64105

EXHIBIT 3

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF MISSOURI

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, STRIKE OR TRANSFER

EXHIBIT 4

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MISCELLANEOUS

I. INTRODUCTION

The procedural history surrounding this suit is lengthy. On or about November 12, 2002, Medical Supply Chain, Inc. ("Medical Supply") first filed this case in the United States District Court for the District of Kansas bringing claims under federal and state law. *See* Complaint in *Medical Supply I*, attached as **Exhibit A** ("*Medical Supply I*"). On June 16, 2003, Judge Murguia dismissed the federal claims with prejudice and dismissed the state claims without prejudice. 2003 WL 21479192 (D. Kan., June 16, 2003). Medical Supply appealed the decision to the Tenth Circuit Court of Appeals where it was affirmed. 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished). The Tenth Circuit further found that Medical Supply's appeal was frivolous and that Medical Supply's then counsel should show cause why he should not be sanctioned. *See* 112 Fed. Appx. at 731-32. On or about December 30, 2004, the Tenth Circuit issued another Order wherein it found that Medical Supply's counsel had filed a frivolous appeal. The Tenth Circuit remanded the matter to the District Court for a determination of sanctions. *See* Order, attached as **Exhibit B**.

While the District Court determined the sanctions issue in *Medical Supply I*, *see* 2005 WL 2122675 (D. Kan., May 13, 2005), Medical Supply filed an identical action in the Western District of Missouri on March 4, 2005. *See* Complaint in *Medical Supply II*, attached as **Exhibit C** ("*Medical Supply II*"). In *Medical Supply II*, U.S. Bancorp and U.S. Bank National Association (U.S. Bank) were named again as defendants in the Complaint again which included claims based in federal and state law. *See* **Exhibit C**. The defendants sought transfer of *Medical Supply II* to the District of Kansas, citing that the District of Kansas maintained jurisdiction over the matter pending resolution of the sanctions proceedings in *Medical Supply I.* Judge Smith granted defendants' motion and transferred *Medical Supply II* to the District of Kansas. *See* Order, attached as **Exhibit D**. The defendants then renewed their motions to dismiss in the District of Kansas. On or about March 7, 2006, Judge Murguia granted defendants' motion to dismiss and issued further

sanctions against both Medical Supply's former counsel and Medical Supply. 419 F. Supp.2d 1316 (D. Kan. 2006). Medical Supply has appealed the *Medical Supply II* to the Tenth Circuit where it remains pending. *See* Docket of Tenth Circuit (Case No. 06-3331).

This lawsuit should be dismissed. The plaintiff does not have standing to make these claims; the plaintiff's claims are barred by *res judicata*; the Complaint fails to comply with the pleading requirements of Fed. R. Civ. P. 8; and plaintiff's allegations fail to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). Finally, plaintiff's allegations regarding or referencing District Judge Kathryn Vratil; District Judge Carlos Murguia; Magistrate Judge James P. O'Hara and the law firm of Shughart Thomson & Kilroy should be stricken under Fed. R. Civ. P. 12(f) as immaterial, impertinent and scandalous.

In the alternative, due to its extensive familiarity with this matter and the pending appeal of *Medical Supply II*, this case should be transferred to the District of Kansas pursuant to 28 U.S.C. § 1404. Despite the fact both Medical Supply and its former attorney have been sanctioned by both the Tenth Circuit and the District of Kansas, Samuel Lipari has now filed this third action asserting the same claims on the same set of facts against U.S. Bancorp and U.S. Bank. Mr. Lipari, as principal of Medical Supply, chose the Kansas District Court in originally bringing *Medical Supply I* in 2002. Yet he now attempts to avoid the numerous and negative rulings from that Court and the Tenth Circuit. Such actions amount to nothing short of forum shopping.

II. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED

The plaintiff's Complaint should be dismissed with prejudice for any of the following reasons: (1) plaintiff does not have standing to maintain this action; (2) plaintiff's claims against the defendants are barred by *res judicata*; (3) plaintiff's Complaint fails to comply with Fed. R. Civ. P. 8; or (4) plaintiff's Complaint fails to state a claim for which relief can be granted. For any or all of these reasons, this Court must dismiss plaintiff's Complaint with prejudice.

A. Plaintiff Does Not Have Standing To Maintain This Action

The plaintiff brings this action "as the sole assignee of rights for the dissolved Missouri Corporation Medical Supply Chain, Inc. where he was the founder and Chief Executive Officer. . . ." *See* Complaint at p. 1. The plaintiff does not explain in the Complaint how Medical Supply was dissolved, though he previously advised the Kansas District Court that he voluntarily dissolved it. (*See* **Exhibit E**.) Regardless of whether it was voluntarily dissolved or dissolved by the State, the plaintiff may not maintain this action in his personal capacity.

Missouri statutes governing both voluntary dissolution and administrative dissolution state that a dissolved corporation may continue business in the name of the corporation to wind up its business and affairs. *See* R.S.Mo. §§ 351.476, 351.486. Missouri law prohibits a sole shareholder from bringing a cause of action that was held by the dissolved corporation. In *Hutchings v. Manchester Life and Cas. Management Corp.*, 896 F. Supp. 946 (E.D. Mo. 1995), the *pro se* plaintiff filed a cause of action against several defendants for causes of action belonging to a dissolved corporation where the plaintiff was the sole shareholder. The court noted the law of Missouri that a shareholder cannot maintain suit on behalf of a corporation because a shareholder does not have legal ownership of corporation property. *Id*. at 947. The court further noted that, when a corporation is dissolved, only the statutory trustees of the corporation may wind up the corporation's business. *Id.* at 948. The court found that the Complaint sought relief based on the plaintiff's personal capacity rather than as a trustee acting on behalf of the dissolved corporation. Therefore, the court dismissed the plaintiff's Complaint in its entirety. *Id.*; *see also Gunter v. Bono*, 914 S.W.2d 437, 440-41 (Mo. App. E.D. 1996); *Mabin Constr. Co. v. Historic Constr., Inc.*, 851 S.W.2d 98, 103 (Mo. App. W.D. 1993).

The same holds true in this matter. The plaintiff is making claims that were held by the dissolved corporation, Medical Supply Chain, Inc.[1] Even if he was the sole shareholder, founder and CEO of Medical Supply, he cannot maintain this action in his personal capacity. Thus, this action should be dismissed with prejudice.

B. Plaintiff's Claims and Causes of Action are Barred by the Doctrine of *Res Judicata.*

Even if plaintiff may file suit in his personal capacity, his causes of action are barred by the doctrine of *res judicata*. Medical Supply's earlier lawsuits in *Medical Supply I* and *II* (**Exhibits A & C**)[2] were based upon the same conduct, transaction, set of operative facts and claims alleged here. These lawsuits have been dismissed twice by the District of Kansas. *See* 2003 WL 21479192; 419 F. Supp.2d 1316. Thus, plaintiff's instant causes of action against U.S. Bancorp and U.S. Bank are barred by *res judicata*.

In this matter, Mr. Lipari alleges that he is the purported assignee "of all interests and rights held previously by the Missouri Corporation Medical Supply Chain, Inc. . . ." Complaint, ¶ 37. Under Missouri law, "[A]n assignee acquires no greater rights than the assignor had at the time of the assignment." *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556-557(Mo. App. S.D. 2004) (quoting, *Carlund Corp. v. Crown Center Redevelopment,* 849 S.W.2d 647, 650 (Mo. App. 1993)); *see also Centennial State Bank v. S.E.K. Constr. Co., Inc.,* 518 S.W.2d 143, 147 (Mo. App. 1974). As a result, Mr. Lipari stands in Medical Supply's shoes and can occupy no better

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[1] Judicial estoppel also prevents plaintiff's attempt to assert these claims. *See Autos, Inc. v. Gowin*, 2005 WL 2459153 *4 (D. Kan. 2005). In his first two lawsuits, plaintiff maintained that the causes of action belonged to Medical Supply. That must be his continuing contention in the Tenth Circuit or else the current appeal must be dismissed. Clearly, the assertion that plaintiff *pro se* may assert these claims on behalf of Medical Supply is inconsistent with the prior allegations in *Medical Supply I* and *II*. *See Johnson v. Linden City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005); *Gebert v. Transport. Admin. Servs.*, 260 F.3d 909, 917 (8th Cir. 2001). Notably, Judge Murguia denied plaintiff's motion to substitute a new party plaintiff in *Medical Supply II*. *See* 19 F. Supp.2d at 1336.

[2] Plaintiff also filed another suit in Kansas District Court, *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM which was also dismissed. Many of the same allegations are included in this Complaint.

position than Medical Supply would have if it sued defendants directly. *Id.* Thus, "common law principles compel the conclusion that any defense valid against [Medical Supply] is valid against its assignee, [Samuel Lipari]." *Id.*

The preclusion principle of *res judicata* prevents "the relitigation of a claim on grounds that were raised or **could have been raised** in the prior suit." *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990) (emphasis added), *cert. denied*, 498 U.S. 823 (1990). The doctrine of *res judicata* bars relitigation of a claim if: "(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases." *Id.*; *see also Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043 (8th Cir. 1997), *cert denied*, 522 U.S. 1090 (1998); *Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987).[3] The Eighth Circuit has held that when a "cause of action" or "claim" "arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same claim or cause of action for purposes of *res judicata*." *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997).

This suit is barred by the doctrine of *res judicata* due to Judge Murguia's March 7, 2006 Order dismissing *Medical Supply II.* Among the many reasons for dismissal, Judge Murguia found that Medical Supply's Complaint violated Rule 8 of the Federal Rules of Civil Procedure and was "so exceptionally verbose and cryptic that dismissal is appropriate." 419 F. Supp.2d at 1331. Judge Murguia denied Medical Supply's request to amend the Complaint and dismissed the Complaint in its entirety. *Id*. at 1332.

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[3] Section 24 of the Restatement (Second) of Judgments also provides that : When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar[,] . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Thus, "a claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim." *Lane v. Peterson*, *supra*, 899 F.2d at 742.

While the Court declined to retain supplemental jurisdiction over the state law claims, by dismissing *Medical Supply II* under Rule 8, and denying Medical Supply's request to amend, Judge Murguia's Order constituted a final adjudication of the suit on the merits of the claims sufficient to trigger *res judicata*. *See Micklus v. Greer*, 705 F.2d 314, 317 n.3 (8th Cir. 1983) (holding that dismissal under Rule 8 without leave to amend is deemed dismissal on the merits sufficient to trigger *res judicata*); *see also Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997) (holding, "It is well settled that denial of leave to amend constitutes *res judicata* on the merits of the claims which were the subject of the proposed amendment.")

As in this matter, both U.S. Bancorp and U.S. Bank were defendants in *Medical Supply II.* *Medical Supply II* was premised on the same facts and causes of action sought by the plaintiff in this matter and it was dismissed by a court of competent jurisdiction. Thus, any action by Medical Supply is barred by the doctrine of *res judicata*.[4]

While Medical Supply is not identified as a party to this suit, Mr. Lipari brings suit as a purported assignee of the Medical Supply's interest. As stated, Mr. Lipari can have no greater right than that possessed by Medical Supply. *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556-57 (Mo. App. S.D. 2004). Because Medical Supply's cause of action against both U.S. Bancorp and U.S. Bank is barred by *res judicata*, Mr. Lipari has no right to maintain this action as an assignee and this matter should be dismissed in its entirety with prejudice.

C. Even if Not Barred by *Res Judicata*, Plaintiff's Claims Should be Dismissed Under Rule 8 of the Federal Rules of Civil Procedure

Plaintiff's Complaint may also be dismissed for failing to comply with Fed. R. Civ. P. 8. Rule 8(e)(1) states that "Each averment of a pleading shall be simple, concise, and direct." Here,

[4] Plaintiff's claim for violation of trade secrets under R.S.Mo. § 417.450 specifically was included in *Medical Supply I* (Exhibit A Count VII). This is a claim which **was or could have been raised** in *Medical Supply II* (and was raised in allegations, Exhibit C at ¶¶ 316-332, and the dismissed RICO Count XV, at ¶¶ 587-88) and therefore does not defeat dismissal under the doctrine of *res judicata*. *See Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990).

plaintiff's Complaint is 75 pages and consists of 264 paragraphs, many of which are simple ramblings of the plaintiff. For example, paragraphs 61 through 67 contain statements that a venture capital firm visited Medical Supply; that Medical Supply believed much of the assets in venture funds were from overvalued equities in telecom technology; that the collapse of WorldCom would depress these venture markets; that Medical Supply's technology is superior to that of several other companies, including Cerner; and that Medical Supply would not compromise itself by being aligned with an existing healthcare supplier. Paragraphs 252-57 contain citations to newspaper articles; testimony before the Missouri Legislature; statistics on the cost of health care; and the number Missouri residents without access to Medicaid. Plaintiff's Complaint is full of baseless conspiracy theories and hollow allegations that have no relation to the causes of action set forth by Mr. Lipari in this action.

In *Medical Supply II*, Judge Murguia addressed this same issue and dismissed Medical Supply's Complaint for failing to comply with Rule 8. In *Medical Supply II*, Judge Murguia held that the Complaint "falls miles from Rule 8's boundaries. . . . In sum, plaintiff's complaint is so exceptionally verbose and cryptic that dismissal is appropriate." 419 F. Supp.2d at 1331.

In *Medical Supply II*, Judge Murguia also denied Medical Supply's request to amend its Complaint. Judge Murguia found that, given the long history of plaintiff's pleadings in both *Medical Supply I* and *II*, "amendment would be futile." *Id.* at 1332. Judge Murguia also noted that the defendants had sought sanctions under Rule 11 and had given Medical Supply's attorneys the required 21 days to amend the complaint pursuant to Rule 11(c)(1)(A), yet Medical Supply had failed to do so. Finally, Judge Murguia found that Medical Supply had recently changed attorneys and the new attorney had chosen not to amend the complaint and thus adopted it has his own. *Id.* Therefore, Judge Murguia dismissed the action in its entirety.

This Court should also dismiss plaintiff's Complaint in its entirety. Like *Medical Supply II*, plaintiff's Complaint in this matter does not contain a short, concise statement of facts and "falls miles from Rule 8's boundaries." 419 F. Supp.2d at 1331. Mr. Lipari, as principal of Medical Supply, has had numerous opportunities to file a pleading that complies with Rule 8 but refuses to do so. Therefore, this Court should deny any request to amend, and dismiss this Complaint in its entirety, with prejudice, under Rule 8 of the Federal Rules of Civil Procedure.

D. Even if Not Barred by *Res Judicata* or Rule 8, Plaintiff's Claims Should Be Dismissed For Failure to State a Claim under Rule 12(b)(6).

Plaintiff's claims fail to state a claim upon which relief can be granted. In deciding a motion to dismiss, this Court must accept the well-pled factual allegations in the Complaint as true and grant the plaintiff the benefit of any inferences that are reasonably supported by those factual allegations. However, the "court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). Stated differently, this Court need not "blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Plaintiff's allegations are conclusory, invite unwarranted inferences and the various tort and statutory claims asserted are meritless on their face, even when viewed in the light most favorable to plaintiff. Accordingly, dismissal is appropriate in this case.

1. Count I: Damages for Breach of Contract

Plaintiff's breach of contract claim is without merit. The elements of a breach of contract claim are: (1) an agreement between parties capable of contracting; (2) mutual obligations arising thereunder with respect to a definite subject matter; (3) a valid consideration; (4) part performance by one party and prevention of further performance by the other; and (5) damages measured by the contract and resulting from its breach. *Scher v. Sindel*, 837 S.W.2d 350, 354 (Mo. App. E.D. 1992).

The basis for plaintiff's breach of contract claim is that plaintiff, Samuel Lipari ("Lipari") and Brian Kabbes of U.S. Bank exchanged email negotiations regarding plaintiff's desire for escrow services including that Kabbes e-mailed Lipari a contract; that Lipari and Kabbes agreed to lower the normal fees for escrow agent services; U.S. Bank compensation; the investment of long and short term held funds; the name of the escrow agent; and payment schedule (Complaint at ¶ 201). Plaintiff further alleges that defendants performed diligence to determine whether to contract with Medical Supply (*id.* at ¶ 202); and that Kabbes also requested corporate good standing documentation from Medical Supply which was provided (*id.* at ¶ 203).[5]

It is hornbook law that the existence of a valid and enforceable contract is dependent upon agreement of the parties, or meeting of the minds, upon the terms of that contract. *Smith v. Hammons*, 63 S.W.3d 320, 325 (Mo. App. S.D. 2002). As the *Hammons* court stated:

> "*Negotiations or preliminary steps towards a contract do not constitute a contract*. The existence of a contract necessitates a 'meeting of the minds' which the court determines by looking at the intention of the parties as expressed in their words or acts. Whether a contract is made and, if so, what the terms of that contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties."

Id. (*quoting Gateway Exteriors, Inc. v. Suntide Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. App. E.D. 1994) (emphasis supplied). Plaintiff and U.S. Bank were *negotiating* a potential written contract which never came to fruition. Obviously, had there been a meeting of the minds between the parties, a written contract memorializing all of these terms would have been executed. Plaintiff's supposition that an oral contract was formed based on the negotiation of the terms of a potential written agreement is insufficient to support its claim. *Hammons*, 63 S.W.3d at 325.

No reasonable person reviewing the facts as set forth in plaintiff's Complaint could conclude that a contract was formed between Medical Supply and U.S. Bank. Nowhere in the Complaint does

[5] Defendants note that plaintiff nowhere pleads the existence of a purported contract with U.S. Bancorp.

plaintiff allege that any U.S. Bank representative, including Kabbes, stated or even implied that the escrow accounts had been approved by U.S. Bank. It is clear that the changes allegedly suggested by Kabbes and agreed to by Medical Supply were indicative of parties negotiating a potential contract. Therefore, plaintiff's cause of action for breach of contract fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6).

2. Count II: Damages for Fraud and Deceit

Count II of the Complaint purports to claim damages for fraud and deceit. Plaintiff alleges that Brian Kabbes falsely represented that U.S. Bank would not perform escrow services to Medical Supply because of the "know your customer" provisions of the Patriot Act. (Complaint ¶ 210.) As support for this claim, plaintiff includes approximately ten single spaced pages of what he claims was a call between representatives of Medical Supply and the defendants. (Complaint ¶¶ 214, 215.) Plaintiff then alleges the following in paragraph 216:

> MSCI and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation to not enforce U.S. BANK'S promise with the defendants' officer Brian Kabbes upon learning that U.S. BANK was not going to provide the escrow services. MSCI and and (*sic*) SAMUEL LIPARI justifiably relied upon the fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of U.S. BANK's Commercial Trust department and instead contacted U.S. BANCORP NA's Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan Paine.

Plaintiff further alleges that the defendants made the fraudulent misrepresentation with knowledge of its falsity or with reckless disregard as to "whether it was true or false to the point of not checking and realizing that the increased duties of the 'know your customer' for new account holders had not been enacted." (Complaint ¶ 217.)

The elements of fraudulent misrepresentation are: (1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the

falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and (6) proximate injury. *Premium Financing Specialists, Inc. v. Hullin*, 90 S.W.3d 110, 115 (Mo. App. W.D. 2002). There must be more than mere suspicion, surmise and speculation. *Blanke v. Hendrickson*, 944 S.W.2d 943, 944 (Mo. Ct. App. 1997).

Plaintiff's fraud claim delineated in Count II is legally insufficient. Assuming all facts as true, even if the defendants stated the "know your customers" provision of the Patriot Act was the reason for not providing escrow accounts, there is no allegation that this statement was made with the intent for Medical Supply to act upon it. Thus, regardless if the statement is false and justifiably relied upon by Medical Supply (which defendants strongly deny), no reasonable person could interpret that the statement was made by the defendants with the intent for Medical Supply to act or refrain from acting in a particular manner.

Further, plaintiff's claim that it relied upon this statement is nonsensical. Plaintiff asserts that because Medical Supply relied on the statement, Mr. Lipari did not call the St. Louis branch of U.S. Bank, but instead called U.S. Bancorp, which angered Lars Anderson and Susan Paine. This nonsensical allegation does not show the plaintiff justifiably relied on the statement or that any action it took in reliance on the statement was detrimental to the plaintiff. For these reasons, plaintiff's fraud claim in Count II should be dismissed with prejudice pursuant to Rule 12(b)(6).

3. Count III: Misappropriation of Trade Secrets under R.S.Mo. § 417.450.

Under Missouri law, the misappropriation of trade secrets occurs when one acquires a trade secret through improper means such as theft or bribery; or when one discloses a trade secret without consent or knew or had reason to know that the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy. *See H&R Block Eastern Tax Services, Inc. v. Enchura*, 122 F. Supp.2d 1067, 1074 (W.D. Mo. 2000).

The following is a summary of the allegations plaintiff makes to support his misappropriation claim:

- On or about October 10, 2002 plaintiff gave a copy of the Medical Supply business plan and associate program booklets to U.S. Bank employee Douglas Lewis to apply for the escrow accounts Medical Supply was seeking. (Complaint ¶ 108);

- The business plan and associate booklets "had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained therein." (Complaint ¶ 109);

- The letter of introduction also addressed the confidential nature of the documents (Complaint ¶ 110);

- After delivery, Mr. Lipari was given a loan application and agreed to return the next day (Complaint ¶ 114);

- On or about November 6, 2002, Mr. Lipari sought to retrieve the documents given to Mr. Lewis on October 10, 2002 (Complaint ¶ 189);

- Upon retrieving the booklets, he noticed that the binders had been separated and copies or faxes had been made of the associate program and business plans as shown by "tractor marks" from a copy or fax machine (Complaint ¶¶ 192, 193);

- That the defendants instructed Mr. Lewis to disassemble the documents and make copies in violation of the notice of limitations and disclosure (Complaint ¶ 229);

- U.S. Bank exceeded its authorized use and copied and/or transmitted the documents to three U.S. Bancorp employees (Complaint ¶ 230);

- That U.S. Bancorp, its officers, and its subsidiary "U.S. BANCORP PIPER JAFFRAY acquired unconsented knowledge of MSCI's trade secrets and made use thereof (Complaint ¶ 232).

Plaintiff's claim for misappropriation of trade secrets fails to state a claim. Plaintiff alleges that U.S. Bancorp obtained "unconsented knowledge of MSCI's trade secrets and made use thereof." However, it was Medical Supply and Mr. Lipari who selected U.S. Bank and for the purposes of providing escrow services. *See* Complaint ¶¶ 45, 47. Further, the plaintiff admits in his Complaint that before seeking escrow services from the defendants, plaintiff voluntarily contacted Piper Jaffray

and submitted his idea and business plan for consideration of Medical Supply as a venture capital candidate. *See* Complaint, ¶¶ 55-60.

These facts show that plaintiff's claim for misappropriation of trade secrets cannot stand. It was the plaintiff who sought out U.S. Bank; the plaintiff who submitted the alleged trade secrets to U.S. Bank; and the alleged trade secrets had already been divulged (by the plaintiff) to Piper Jaffray (U.S. Bancorp's subsidiary at the time). Moreover, the plaintiff fails to allege how any of the defendants misused the materials or how he was damaged by the misuse. For these reasons, this Court must dismiss Count III of plaintiff's Complaint with prejudice pursuant to Rule 12(b)(6).

4. Count IV: Damages for Breach of Fiduciary Duty

Plaintiff generally alleges that defendants owed it a "fiduciary duty" but fails to provide any factual basis for this particular allegation. A claim for breach of fiduciary duty has four elements: (1) the existence of a fiduciary relationship between the parties, (2) a breach of that fiduciary duty, (3) causation, and (4) harm. *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. Ct. App. 2000). A fiduciary is a person having a duty to "act primarily for the benefit of another in matters connected with his undertaking." *See* Restatement (Second) Agency 13 cmt. a (1957); Restatement (Second) of Trusts § 2 (1958). While Missouri has not adopted a precise common-law definition, a "fiduciary relationship" may exist when "a special confidence [is] reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the interests of the one reposing the confidence." *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 751 (Mo. Ct. App. 1990). Plaintiff cannot, however, unilaterally foist a fiduciary duty upon a defendant in the absence of some agreement or conduct by the defendants to accept such a responsibility. *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. Ct. App. 1996). Nor does a business relationship give rise to a fiduciary relationship. *Kratky v. Musil*, 969 S.W.2d 371, 377 (Mo. Ct. App. 1998).

No fiduciary relationship between plaintiff and defendants ever existed. Accordingly, Count IV should be dismissed.

5. Count V: Damages for *Prima Facie* Tort

Count V of the plaintiff's complaint should be dismissed for failure to plead the required elements of a *prima facie* tort. *Lohse v. St. Louis Children's Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. Ct. App. 1983). The Missouri Supreme Court has held that *prima facie* tort is not "a duplicative remedy for claims that can be sounded in other traditionally recognized tort theories, or a catchall remedy of last resort. . . ." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993). The specific elements of a *prima facie* tort claim are: (1) an intentional lawful act by the defendant; (2) an intent to cause injury to the plaintiff; (3) injury to the plaintiff; and (4) an absence of any justification or an insufficient justification for the defendant's act. *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc).

The thrust of a *prima facie* tort claim is the intentional undertaking of an otherwise lawful act, which is done with the intent to cause injury to the plaintiff, and which is without any recognized justification. Here plaintiff failed to allege action by the defendants which is lawful. Plaintiff does not make his claim for *prima facie* tort in the alternative and at no point in the Complaint does plaintiff allege that any of the defendants' actions were lawful or truthful. Further, plaintiff alleges no facts to support the element that there was an intent to cause injury. Rather, plaintiff simply alleges that "U.S. BANK and U.S. BANCORP's (*sic*) committed these lawful acts with intent to injure MSCI." (Complaint ¶ 249(2).) While the requirements of Rule 12(b)(6) state that all allegations in the complaint must be accepted as true, the "court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). For these reasons, Count V should be dismissed with prejudice pursuant to Rule 12(b)(6).

III. PLAINTIFF'S CLAIMS REFERENCING DISTRICT JUDGE KATHRYN VRATIL; DISTRICT JUDGE CARLOS MURGUIA; MAGISTRATE JUDGE JAMES P. O'HARA; AND THE LAW FIRM OF SHUGHART THOMSON & KILROY SHOULD BE STRICKEN

Throughout the Complaint, plaintiff makes numerous comments and allegations directed at Judge Kathryn Vratil; Judge Carlos Murguia; Magistrate James P. O'Hara and the defendants' law firm of Shughart Thomson & Kilroy. These allegations concern the disbarment of Medical Supply's former attorney and are immaterial, impertinent and scandalous within the meaning of Rule 12(f). Plaintiff makes these allegations solely in an attempt to embarrass and vilify these Judges and the law firm engaged to represent these defendants. Fed. R. Civ. P. 12(f) provides "[u]pon motion made by a party before responding to a pleading . . . or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The court is afforded broad discretion in ruling on a motion to strike. *See Nationwide Ins. Co. v. Cent. Mo. Elec. Co-op.*, 278 F.3d 742, 748 (8th Cir. 2001) ("[A] district court enjoys liberal discretion under Rule 12(f).").

This Court should exercise its discretion and specifically strike paragraphs 24-28, 224, 225, and 249(e) of plaintiff's Complaint as these allegations are immaterial to the claims, add nothing to the Complaint and were included solely for a malevolent purpose. Each of these allegations is immaterial, impertinent and scandalous under Rule 12(f) and should therefore be stricken by this Court. *Young v. Dunlap*, 223 F.R.D. 520, 521-22 (E.D. Mo. 2004); *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp.2d 1255, 1258 (W.D. Mo. 2001).[6]

[6] It is apparent from even a cursory review of the Complaint that the law firm and Magistrate O'Hara had no involvement with anything touching upon plaintiff's claim until the law firm was engaged to provide representation of certain defendants in the Kansas District Court case. Magistrate O'Hara's first involvement with plaintiff apparently was with a subsequent suit that plaintiff filed. *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM.

IV. IN THE ALTERNATIVE, PLAINTIFF'S CLAIMS SHOULD BE TRANSFERRED TO THE DISTRICT OF KANSAS FOR FURTHER ADJUDICATION

In the alternative, defendants request this case be transferred to the United States District Court for the District of Kansas. 28 U.S.C. § 1404(a).[7] This is the third lawsuit stemming from the same operative facts where Medical Supply or Mr. Lipari has named U.S. Bancorp and U.S. Bank as defendants. As shown above, both of the previous actions have an extensive procedural history in the District of Kansas where this matter should be transferred.

Federal courts have consistently and uniformly ordered section 1404(a) transfers to other federal district courts when related lawsuits are pending in the transferring court, and have used quite strong language in so doing. For example, in *Prudential Insurance Co. of America v. Rodano*, 493 F. Supp. 954 (E.D. Pa. 1980), the court ordered transfer, stating:

> "The most compelling reason for transfer is that it would best serve the interests of justice. The presence of two related cases in the transferee forum is a substantial reason to grant a change of venue. The interests of justice and the convenience of the parties and witnesses are ill-served when federal cases arising out of the same issues are allowed to proceed separately."

Id. at 955; *see also Islamic Republic of Iran v. Boeing Co.*, 477 F. Supp. 142, 144 (D. D.C. 1979) ("Most importantly, litigation of liability issues closely similar to issues pending for over two years in another federal court would be a grossly inefficient use of judicial resources. Litigation of such related claims in the same forum is strongly favored.").

As in *Republic of Islam*, this lawsuit is virtually identical to both *Medical Supply I* and *Medical Supply II* which were adjudicated in Kansas. Should the Tenth Circuit remand *Medical Supply II* for further proceedings, the District of Kansas would retain jurisdiction. If this matter was

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[7] Title 28 U.S.C. Sec. 1404(a), states in its entirety:

> (a) For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

not transferred, U.S. Bancorp and U.S. Bank would be forced to defend *Medical Supply II* in the District of Kansas as well as this current matter in the Western District of Missouri. Both suits arise out of the same set of operative facts. Despite being patently unfair to these defendants to defend identical suits in different Districts, this would be an extreme waste of judicial resources and creates the possibility of conflicting rulings from different courts. These factors strongly favor transferring this lawsuit to the District of Kansas.

Several federal courts have recognized that avoiding multiplicity of litigation is given great, even decisive, weight in deciding whether to transfer a case under § 1404(a). *See Monsanto Technology, Inc. v. Syngenta Crop Protection, Inc.,* 212 F. Supp.2d 1101, 1103 (E.D. Mo. 2002) (In cases where issues substantially overlap, transfer is necessary if there is a serious danger of District Courts making inconsistent determinations on material issues); *Cali v. East Coast Aviation Services, Ltd.*, 178 F. Supp.2d 276, 295 (E.D. N.Y. 2001) (". . . courts have given great weight to the need to avoid multiplicity of litigation . . . litigation of related claims in the same tribunal is strongly favored. . . ."); *Dahl v. Hem Pharmaceuticals Corp.*, 867 F. Supp. 194, 197 (S.D. N.Y. 1994) ("It would be a patent misuse of judicial resources to require another Federal District Court (and perhaps another Court of Appeals) to review and become familiar with facts and circumstances already extensively excavated by another Federal Court") (emphasis added); *see also* Wright & Miller, *Federal Practice and Procedure*, Sec. 3854, pp. 441-42 and numerous cases cited therein.

When Judge Smith transferred *Medical Supply II* to the District of Kansas, he specifically rejected plaintiff's attempt at forum shopping and cited the case's extensive procedural history in the District of Kansas. Judge Smith wrote:

> Mere disappointment with the result of a case does not give a party the right to file an almost identical cause of action and, moreover, does not entitle a party to forum shop. Based on the District of Kansas' extensive experience with the almost

identical previous lawsuit and in the interest of justice, the above-captioned matter is transferred to the District of Kansas.

Exhibit D, p. 2.

Plaintiff originally chose the Kansas District Court as the forum for its lawsuit. Now, plaintiff engages in the most egregious form of "forum-shopping" in a baseless attempt to avoid further negative rulings from that Court and the Tenth Circuit. Such disregard for the courts, the judicial system, the interests of justice and the rights of these defendants should not be rewarded. Therefore, this Court should transfer this matter to the District of Kansas if it is not dismissed.

V. CONCLUSION

Defendants request that the Court enter its Order transferring this matter to Judge Carlos Murguia in the District of Kansas or in the alternative, dismiss plaintiff's Petition and strike plaintiff's allegations concerning District Judge Kathryn Vratil; District Judge Carlos Murguia; Magistrate Judge James P. O'Hara and the law firm of Shughart Thomson & Kilroy; and grant defendants whatever other relief they are justly entitled.

Respectfully submitted,

/s/ Mark A. Olthoff
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ATTORNEYS FOR DEFENDANTS
U.S. BANCORP, 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 19th day of January, 2007, to:

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

/s/ Mark A. Olthoff
Attorney for Defendants

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff*	)))) Case No. 06-1012-CV-W-FJG) State Court No. 0616-CV32307)
vs.	) (Properly Case No. 05-0210-) CV-W-ODS)
US BANCORP, NA US BANK, NA *Defendants*	)))

REPLY TO NOTICE OF REMOVAL AND MOTION
TO REMAND THE MATTER TO STATE COURT ON GROUNDS THAT
THE REMOVAL LACKED JURISDICTION UNDER SECTION 1441 et seq

Comes now the plaintiff Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and makes the following reply to the defendants US Bancorp NA and US Bank, NA's notice of removal in a timely motion for remand under 28 U.S.C. Sec. 1447(c).

SUMMARY OF REASON FOR REMAND

The plaintiff respectively calls attention to the court that the plaintiff's claims removed from Missouri State Court by defendants US Bancorp, NA and US Bank, NA are supplemental state law based claims originally filed in this court as *Medical Supply Chain, Inc. v. Neoforma, et al*., Case No. 05-0210-CV-W-ODS, now Kansas District Court Case No. 05-2299-CM. The Kansas District Court has continuing supplemental jurisdiction under 28 U.S.C. § 1367(a) and the court's current order (Doc 78 Filed 03/07/2006) declining federal jurisdiction was not objected to or appealed by the defendants.

STATEMENT OF FACTS

1. The state law claims that comprise the current state action were the supplemental state law claims (¶¶252-329 including Trade Secret Relief at ¶¶325,325, ¶448, ¶454, ¶¶479-482, ¶¶488-494, Count XI , Damages For Breach Of Contract ¶¶538-543, Count XII Damages For Breach Of Fiduciary Duty ¶¶544-553) in the complaint filed as *Medical Supply Chain, Inc. v. Neoforma, et al*., Case No. 05-0210-CV-W-ODS. The controversy was transferred to Kansas District court upon the contested motion of the defendants and currently exists as *Medical Supply Chain, Inc. v. Neoforma, et al*., Kansas District Court Case No. 05-2299-CM.

EXHIBIT 5

2. The order of the Kansas District court dismissing the plaintiff's federal claims and request to amend is currently on appeal to the Tenth Circuit US Court of Appeals as *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al*., Case No. 06-3331. See **Exb. 1.** Tenth Circuit Docket

3. The defendants in *Medical Supply Chain, Inc. v. Neoforma, et al*., KS Dist. Case No. 05-2299-CM include the Voluntary Hospital Association ("VHA") and Novation, LLC. See **Exb. 2.** Original Complaint cover page.

4. The appellees in *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al*., Case No. 06-3331 include VHA and Novation, LLC, *id.*

5. The state contract and fiduciary duty complaint removed from state court describes VHA and Novation LLC as coconspirators of US Bank NA and US Bancorp NA in ¶¶12, 13, 34, 43, 44, 222, 223, 236, 237, 257.

6. The plaintiff brought to the court's attention in the related action *Lipari v. General Electric Company, et al* Case No. 06-0573-CV-W-FJG that Hon. Judge Feranado J. Gaitan has a fiduciary interest in VHA and Novation, LLC (See **Exb. 3** Motion for Recusal)by virtue of his declared position as a Director of St. Luke's Health System, an owning member of Novation LLC's parent company VHA. See **Exb. 4.** St. Luke's Baldrige Award Application at pg. 7.

7. The plaintiff in the related case *General Electric* asserted that in the year 2002 alone, St. Luke's Health System (SLHS) did ninety seven million dollars of hospital supply business with Novation LLC and received a 2% rebate for every dollar spent.[1]

8. The plaintiff alleges in his state complaint that the defendants US Bancorp and US Bank broke a contract to provide escrow accounts to keep the plaintiff out of the national market for hospital supplies once US Bancorp and US Bank discovered the plaintiff was a threat to their interests in Novation LLC through their investment banking subsidiary US Bancorp Piper Jaffray.

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[1] "SLHS is a shareholder and owner of VHA/Novation, the largest Group Purchasing Organization (GPO) in the nation. SLHS accessed 885 VHA/Novation contracts with a total spending of $97 million in 2002. VHA/Novation validates the quality, market share, and availability of the various vendors, and provides SLHS as much as a 6% increase in discounts plus an average 2% rebate for every contract dollar spent, thereby supporting the achievement of SLH objectives. Most key suppliers are accessed through VHA/Novation."

http://baldrige.nist.gov/PDF_files/Saint_Lukes_Application_Summary.pdf at page 7

9. The defendants US Bank and US Bancorp's exercise of removal for diversity jurisdiction from state court contradicts the Kansas trial court's decision in *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM to dismiss the supplemental claims from federal jurisdiction, continuing the action in federal court:

> "f. **State Law Claims**
> Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only the supplemental state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (quotation marks, alterations, and citation omitted). Having dismissed each of plaintiff's federal claims, this court finds no compelling reason to retain jurisdiction over the state law claims and dismisses them without prejudice."

Exb. 5 Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19.

10. The defendants did not object to or appeal Judge Carlos Murguia's decision dismissing the plaintiff's state claims.

11. Diversity Jurisdiction does not exist in the federal action having original jurisdiction over the present supplemental state law claims because the defendant Shughart Thomson & Kilroy Watkins Boulware, P.C is incorporated in and has its principal place of business in Missouri, the state where Samuel Lipari resides and where his predecessor in interest (the now dissolved Medical Supply Chain, Inc.) was incorporated.

12. The defendants' counsel Mark A. Olthoff's (Mo. Lic #38572) Notice of Removal does not disclose that the plaintiff's complaint is comprised of the claims in *Medical Supply Chain, Inc. v. Neoforma, et al*., Case No. 05-0210-CV-W-ODS now under the jurisdiction of Hon. Judge Carlos Murguia in *Medical Supply Chain, Inc. v. Neoforma, et al*., KS Dist. Case No. 05-2299-CM.

13. The defendants' counsel Mark A. Olthoff (Mo. Lic #38572) omitted from its *ex parte* removal the court order of Hon. Judge Carlos Murguia dismissing the supplemental state claims from federal jurisdiction, which neither Mark A. Olthoff (Mo. Lic #38572) or the defendants objected to and which was not appealed by the defendants.

SUGGESTION IN SUPPORT

The removal is improper for lack of jurisdiction in this US District Court and case, federal Diversity does not exist, and removal violates federal comity and the "first to file" rule as recognized by the Eight Circuit. The plaintiff has made a timely motion for remand. Section 1447(c) provides in relevant part

that "[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under [28 U.S.C.] Sec. 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1441 does not prescribe separate rules of subject matter jurisdiction. Rather, § 1441 merely provides a procedural mechanism for a party to remove a qualifying case to federal court. *Baris v. Sulpicio Lines, Inc*., 932 F.2d 1540, 1543-46 (5th Cir.1991) (distinguishing improper removal from lack of subject matter jurisdiction).

I. Kansas District Court Still Has Federal Jurisdiction Over the State Claims

Here the defendants' removal suffers from a jurisdictional defect. This is 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 these 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).

The Eight Circuit has acknowledged that there are circumstances in which a District court could continue to assert jurisdiction over supplemental claims after the federal claims are dismissed:

> "At any rate, KPERS cannot prevail even if we limit our analysis to supplemental jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218 (1966), and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349, 108 S.Ct. 614, 618, 98 L.Ed.2d 720 (1988), the Supreme Court distinguished between the power to exercise jurisdiction over pendent (or supplemental) claims and the advisability of exercising such jurisdiction. Under the familiar test, "**a federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.**' " *Cohill,* 484 U.S. at 349, 108 S.Ct. at 618 (quoting *Gibbs,* 383 U.S. at 725, 86 S.Ct. at 1138). The existence of this jurisdiction is determined at the time of removal, even though subsequent events may remove from the case the facts on which jurisdiction was predicated. *Bank One Texas Nat'l Ass'n v. Morrison*, 26 F.3d 544, 547 (5th Cir.1994); see KPERS I, 4 F.3d at 622.

On the other hand, **the decision of whether to exercise supplemental jurisdiction after dismissal of the federal claim is discretionary**. *Cohil*l, 484 U.S. at 349, 108 S.Ct. at 618 ("*Gibbs* drew a distinction between the power of a federal court to hear state-law claims and the discretionary exercise of that power.") It is the district court's decision to retain jurisdiction, not the existence of jurisdiction in the first place, which KPERS contends was improper. In fact, we decided the first question, the existence of jurisdiction, in KPERS I, 4 F.3d at 622. Even if the district court abused its discretion in retaining the case, the court would not be without jurisdiction. *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir.1990), **we held that "it would have been more appropriate for the federal district court, once rejecting the federal claims, to have exercised its discretion and not passed on the pendent claim.**" *Id*. at 220. However, the district court had in fact retained and decided the pendent claim. Despite our conclusion that the district court should not have decided the pendent claim, on appeal we proceeded to review the state claim on the merits. Id. at 220-21. **We could not have done so if the district court had lacked subject-matter jurisdiction.** Therefore, we need not review the propriety of the district court's decision to retain supplemental jurisdiction in order to decide this appeal." [Emphasis added]

Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc., 77 F.3d 1063 at 1067-68 (C.A.8 (Mo.), 1996).

The Eight Circuit has also recognized that under controlling US Supreme Court precedent the decision of the trial court to retain jurisdiction over supplemental claims is open throughout the litigation and subject to change:

"While the 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 litigatio**n." *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).

Assuming the defendants' state law indemnification counterclaims were sufficiently related to the plaintiffs' jurisdictionally sufficient claims such that all claims could fairly be characterized as part of the "same case or controversy" pursuant to 28 U.S.C. § 1367(a), the district court had the discretion to decline to retain jurisdiction under section 1367(c)(3) (dismissal of all claims over which it had original jurisdiction) and 1367(c)(1) (complex issue of state law) at any time in the litigation. Further, because the timely filing of the Rule 59(e) motion tolled the appeal time in order to provide the district court with jurisdiction to resolve the motion, the district court's decision to relinquish supplemental jurisdiction was made before the case was "final" for appeal purposes.

Defendants Kirsch and Redden contend the district court's reversal of its decision to retain supplemental jurisdiction violates the law-of-the-case doctrine. However, none of the cases on which Kirsch and Redden rely involve a district court's decision to relinquish supplemental jurisdiction pursuant to 28 U.S.C. § 1367 in the context of resolving a Fed.R.Civ.P. 59(e) motion. *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C.Cir.1996); *Starks v. Rent-A-Center*, 58 F.3d 358 (8th Cir.1995); *Lovett v. General Motors Corp*., 975 F.2d 518 (8th Cir.1992), cert. denied, 510 U.S. 1113, 114 S.Ct. 1058, 127 L.Ed.2d 378 (1994). In any event, a court has the power to revisit its prior decisions when "the initial decision was 'clearly erroneous and would work a manifest injustice.' " *Starks*, 58 F.3d at 364 (quoting *Christianson v. Colt Indus.Operating Corp*., 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988)). As determined above, this is such a case." [Emphasis added]

Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284 at 1287-88 (C.A.8 (S.D.), 1998).

II. US Bank NA and US Bancorp NA Failed to Appeal the Dismissal

In the Tenth Circuit where the defendants US Bank NA and US Bancorp NA represented there as here by Mark A. Olthoff (MO #38572) were presented with the order by Judge Carlos Murguia permitting the plaintiff to file his contract and fiduciary claims in state court (See Exb. 1 Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19). The defendants were required to appeal the decision to retain the state claims in federal court:

> "Here, Cannondale sought final disposition on the merits as to all claims, but the district court granted summary judgment only on the federal claim. The court dismissed without prejudice the state law claims. As a result, Cannondale received only a part of what it sought. This disposition left Cannondale open to precisely what happened in this case, a second litigation. Cannondale was sufficiently aggrieved by this result, and consequently has standing to appeal. See *Jarvis*, 985 F.2d at 1425 ("In this case, a successful appeal by Nobel would eliminate any possible re-filing . . . in state court[, and because] avoiding a state court suit would substantially reduce Nobel's future litigation costs, we find that Nobel has the requisite stake in this appeal."); *Disher v. Information Res., Inc*., 873 F.2d 136, 138-39 (7th Cir. 1989) (defendant prevailing on summary judgment on all but two claims may appeal dismissal without prejudice because the decision is not entirely in the defendant's favor by exposing the defendant to further litigation). Accordingly, we have jurisdiction over this appeal under 28 U.S.C. § 1291."

Amazon Inc. v. Dirt Camp Inc., 273 F.3d 1271at 1276 (10th Cir., 2001), The necessity of appeal to thwart a follow on state court action has been established in the Tenth Circuit since 1992:

> "(FN1). Although dismissals without prejudice are not usually considered final decisions, and therefore not appealable, "where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable." *Amazon, Inc. v. Dirt Camp, Inc*., 273 F.3d 1271, 1275 (10th Cir. 2001). Where, as here, the district court dismissed a state claim without prejudice after granting summary judgment on the federal claims, and where the dismissal without prejudice was not sought by plaintiff for purposes of manufacturing finality, we may exercise appellate jurisdiction. See id. & n.4 (citing *Jarvis v. Nobel/Sysco Food Servs. Co*., 985 F.2d 1419, 1424 (10th Cir. 1993) and *Cook v. Rocky Mountain Bank Note Co*., 974 F.2d 147, 148 (10th Cir. 1992))."

BUI v. IBP Inc. at fn 1 (2002). The plaintiff appealed, suspending the effect of Judge Murguia's dismissal of federal claims, which the defendants contest and the Tenth Circuit action is captioned *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al*., Case No. 06-3331. Only upon the success of the plaintiff's appeal can the defendants return these state claims to federal court. Possibly, the defendants can obtain relief from neglect or inadvertence from Judge Murguia and be permitted to file an untimely Rule 59(e) motion if they can demonstrate good cause.

III. Diversity Does Not Exist

The plaintiff concedes that the US Supreme Court has just determined that national associations are to be treated as residents of the state in which they have a principal place of business but that does not

save the defendants' removal from being frivolous. Diversity jurisdiction still does not exist, despite the movement of pendant (supplemental) claims 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."

Disher v. Information Resources, Inc., 691 F.Supp. 75 at 81. (N.D. Ill., 1988). Here, the claims were filed with the Missouri domiciled defendant Shughart, Thomson & Kilroy as a defendant. Diversity did not exist. Nor does it exist at the time of removal of the concurrent state case because the US District Court still has original federal question jurisdiction over all supplemental claims under 28 U.S.C. § 1367(a). Alternatively the Missouri domiciled defendant Shughart, Thomson & Kilroy is in Privity with the state law claim defendants and by virtue of Mark A. Olthoff's (Mo. Lic #38572) entry of appearance, directly represented in state court.

IV. Comity

The defendants are attempting to have the "Judges of the Western District of Missouri" violate the time honored principal of Federal Comity in usurping the Kansas District Court's original federal question jurisdiction and continuing supplemental jurisdiction over all claims arising from the same controversy under 28 U.S.C. § 1367(a):

"Principles of comity come into play when separate courts are presented with the same lawsuit. When faced with such a dilemma, one court must yield its jurisdiction to the other, unless one court has exclusive jurisdiction over a portion of the subject matter in dispute. Principles of comity suggest that a court having jurisdiction over all matters in dispute should have jurisdiction of the case. Otherwise, the fractioned dispute would have to be resolved in two courts."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169 at 1173 (C.A.11 (Fla.), 1982). The Tenth Circuit in which this action currently has its federal existence and this court's Eight Circuit both adhere to the "first to file" rule giving jurisdiction to *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS, now Kansas District Court Case No. 05-2299-CM:

"As detailed above, nearly two years have gone by while this case has proceeded on identical complaints in two jurisdictions. Generally, the doctrine of federal comity permits a court to decline jurisdiction over an action when a complaint involving the same parties and issues has

already been filed in another district. *Pacesetter Systems, Inc. v. Medtronic, Inc*., 678 F.2d 93, 94-5 (9th Cir.1982). Hence, courts follow a "first to file" rule that where two courts have concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case. *Hospah Coal Co. v. Chaco Energy Co*., 673 F.2d 1161, 1163 (10th Cir.), cert. denied, 456 U.S. 1007, 102 S.Ct. 2299, 73 L.Ed.2d 1302 (1982). The Eleventh Circuit has similarly stated that "[i]n the absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case." *Merrill Lynch, Pierce, Fenner & Smith v. Haydu*, 675 F.2d 1169, 1174 (11th Cir.1982). The purpose of this rule is to promote efficient use of judicial resources. The rule is not intended to be rigid, mechanical, or inflexible, but should be applied in a manner serving sound judicial administration. *Pacesetter Systems, Inc*., 678 F.2d at 95.

We conclude that the federal comity doctrine is best served in this case by dismissing Orthmann's action in Minnesota district court. Although he filed his action first in Minnesota, the decision by the Seventh Circuit means that the controversy is now further developed in the Wisconsin district court."

Orthmann v. Apple River Campground, Inc., 765 F.2d 119 at 121 (C.A.8 (Minn.), 1985).

And as the *Orthmann* court shows, the exception proves the rule. The Kansas District court now being appealed in the Tenth Circuit has developed the case further than the Western District of Missouri.

In a possible future contest between state court and the District of Kansas, the state court would likely then lose:

"In absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case. *Mann Mfg., Inc. v. Hortex, Inc*., 439 F.2d 403 (5th Cir. 1971). It should make no difference whether the competing courts are both federal courts or a state and federal court with undisputed concurrent jurisdiction. There are no reasons compelling the federal court, last into this case, which remanded after removal proceedings, to decide the case."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169 at 1174 (C.A.11 (Fla.), 1982).

CONCLUSION

This court is required to remand this case to state court. The Western District of Missouri has no jurisdiction to overturn Judge Murguia's order on 03/07/2006 over the claims now captioned *Samuel K. Lipari v US Bank NA, et al* Missouri 16th Cir. State Court Case No. 0616-CV32307 which are concurrent in jurisdiction with and part of the same case or controversy as the federal court case *Medical Supply Chain, Inc. v Neoforma et al*, Case No. 05-2299-CM under 28 U.S.C. § 1367(a). Diversity jurisdiction removal under 28 U.S.C. § 1441 *et seq* is inapplicable where a US District Court in the District of Kansas is already exercising original federal question jurisdiction over the parties and diversity did not exist at the time the action was filed originally as *Medical Supply Chain, Inc. v. Neoforma, et al*., Case No. 05-0210-CV-W-ODS.

The plaintiff respectfully requests that this action be remanded to Missouri state court from whence it was removed.

Respectfully submitted,

_____

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

Certificate of Service

I certify that on December 18th, 2006 I have served the opposing counsel with a copy of the foregoing notice using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff
MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

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

Exhibits

Exb. 1. Tenth Circuit Docket
Exb. 2. Original Complaint cover page.
Exb. 3 Motion for Recusal
Exb. 4. St. Luke's Baldrige Award Application at pg. 7.
Exb. 5 Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	
U.S. BANCORP, et al.,	)	
	)	
Defendants.	)	

ANSWER AND AFFIRMATIVE DEFENSES OF
DEFENDANTS U.S. BANCORP AND U.S. BANK NATIONAL ASSOCIATION

Defendants U.S. Bancorp and U.S. Bank National Association ("U.S. Bank"), by and through their attorneys and for their answer and affirmative defenses in this case, state and allege as follows:

Defendants have answered and responded to the Complaint to the best of their abilities with respect to those allegations that are reasonably capable of an answer consisting of a simple admit, deny or denied because defendants are without sufficient knowledge or information to form a belief whether to admit or deny the allegations in the paragraph. However, rather than a short and plain statement of the case as required by Fed. R. Civ. P. 8(a)(2) and 8(e)(1), this Complaint is confusing, argumentative and prolix. To that extent and because of it, defendants have denied certain especially lengthy, complex and confusing paragraphs *in toto*. In addition, all of the claims of plaintiff are deficient by reason of the strict pleading required by Fed. R. Civ. P. 9(b) or the causes of action fail to state claims upon which relief may be granted as a matter of law and fact under Fed. R. Civ. P. 12(b)(6).

EXHIBIT 6

I. JURISDICTION

1. Defendants, while denying that plaintiff has any viable claims, admit that subject matter jurisdiction exists in this Court as alleged in their Notice of Removal. Otherwise, defendants deny the allegations in Paragraphs 1-5 of plaintiff's Complaint.

II. VENUE

2. Defendants deny the conclusions of law and averments in paragraphs 6-7 of plaintiff's Complaint.

III. PROCEDURAL HISTORY

3. In answer to paragraphs 8-34, defendants admit that Medical Supply Chain, Inc. previously filed identical claims in prior lawsuits in federal courts in Kansas and Missouri asserting both federal and state law claims; that Medical Supply Chain, Inc. sought to appeal the district court dismissals of those cases; that the Tenth Circuit Court of Appeals had previously affirmed the dismissal of federal claims in the first filed case; and that both the Tenth Circuit Court of Appeals and Kansas District Court have sanctioned Medical Supply Chain, Inc.'s prior counsel; but defendants lack sufficient knowledge or information to permit them to form a belief whether to admit or deny the remaining allegations in paragraphs 8-34 of the plaintiff's Complaint and, therefore, deny the same.

IV. PARTIES

4. Defendants lack sufficient knowledge or information to permit them to form a belief whether to admit or deny the allegations in paragraphs 35-37 of plaintiff's Complaint and, therefore, deny the same.

5. Defendants admit the allegations in paragraph 38 of plaintiff's Complaint.

6. In answer to paragraph 39 of plaintiff's Complaint, defendants admit that U.S. Bank National Association is a national bank subject to the National Bank Act with its headquarters located in Minneapolis, Minnesota, but denies all other allegations in paragraph 39 of the Complaint.

V. INTRODUCTION

7. In answer to paragraphs 40-44, defendants lack sufficient knowledge or information to permit them to form a belief whether to admit or deny the allegations in paragraphs 40-44 of the Complaint and, therefore, deny the same.

VI. STATEMENT OF FACTS

8. In answer to paragraphs 49-54 of the plaintiff's Complaint, defendants lack sufficient knowledge or information to permit them to form a belief whether to admit or deny the allegations in paragraphs 49-54 of the Complaint and, therefore, deny the same.

9. In answer to paragraphs 55-70 of the plaintiff's Complaint, defendants lack sufficient knowledge or information to permit them to form a belief whether to admit or deny the allegations in paragraphs 55-70 of the Complaint and, therefore, deny the same.

10. In answer to paragraphs 71-82 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 71-82 of plaintiff's Complaint and, therefore, deny the same.

11. Defendants admit that someone purporting to act on behalf of Medical Supply Chain, Inc. contacted U.S. Bank, but lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the remaining allegations in paragraph 83 of plaintiff's Complaint and, therefore, deny the same.

12. In answer to paragraphs 84-88 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 84-88 of plaintiff's Complaint and, therefore, deny the same.

13. In answer to paragraphs 89-91 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 89-91 of plaintiff's Complaint and, therefore, deny the same.

14. In answer to paragraphs 92-94 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 92-94 of plaintiff's Complaint and, therefore, deny the same.

15. In answer to paragraphs 95-107 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 95-107 of plaintiff's Complaint and, therefore, deny the same.

16. In answer to paragraphs 108-114 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 108-114 of plaintiff's Complaint and, therefore, deny the same.

17. In answer to paragraphs 115-140 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 115-140 of plaintiff's Complaint and, therefore, deny the same.

18. In answer to paragraphs 141-150 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or

deny the allegations in paragraphs 141-150 of plaintiff's Complaint and, therefore, deny the same.

19. In answer to paragraphs 151-178 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 151-178 and, therefore, deny the same.

20. In answer to paragraphs 179-187 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 179-187 of plaintiff's Complaint and, therefore, deny the same.

21. In answer to paragraphs 188-200 of plaintiff's Complaint, defendants lack sufficient knowledge of information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 188-200 of plaintiff's Complaint and, therefore, deny the same.

22. In answer to paragraphs 201-207 of plaintiff's Complaint, defendants admit that plaintiff sought preliminary injunctive relief which was denied, that plaintiff filed a notice of interlocutory appeal which was denied, that the Kansas District Court dismissed plaintiff's prior action, that plaintiff's "motion for new trial" was denied and that the Tenth Circuit Court of Appeals dismissed the interlocutory appeal as moot, but defendants deny all other legal conclusions and averments in paragraphs 201-207 of plaintiff's Complaint.

23. In answer to paragraphs 208-225 of plaintiff's Complaint, defendants lack sufficient knowledge or information in order to permit them to form a belief whether to admit or deny the allegations in paragraphs 208-225 of plaintiff's Complaint and, therefore, deny the same.

VII. CLAIMS

24. Defendants deny the allegations in paragraph 194 of plaintiff's Complaint.[1]

COUNT I – BREACH OF CONTRACT

25. In answer to paragraph 195 of plaintiff's Complaint, defendants incorporate their responses to all preceding paragraphs of plaintiff's Complaint as if fully stated herein.

26. Defendants deny the allegations in paragraphs 196-207 of plaintiff's Complaint.

COUNT II - FRAUD

27. In answer to paragraph 208 of plaintiff's Complaint, defendants incorporate their responses to all preceding paragraphs of plaintiff's Complaint as if fully stated herein.

28. Defendants deny the allegations in paragraphs 209-224 of plaintiff's Complaint.

COUNT III – TRADE SECRETS

29. In answer to paragraph 225 of plaintiff's Complaint, defendants incorporate their responses to all preceding paragraphs of plaintiff's Complaint as if fully stated herein.

30. Defendants deny the allegations in paragraphs 226-233 of plaintiff's Complaint.

COUNT IV – BREACH OF FIDUCIARY DUTY

31. In answer to paragraph 234 of plaintiff's Complaint, defendants incorporate their responses to all preceding paragraphs of plaintiff's Complaint as if fully stated herein.

32. Defendants deny the allegations in paragraphs 235-246 of plaintiff's Complaint.

COUNT V – PRIMA FACIE TORT

33. In answer to paragraph 247 of plaintiff's Complaint, defendants incorporate their responses to all preceding paragraphs of plaintiff's Complaint as if fully stated herein.

34. Defendants deny the allegations in paragraphs 248-257 of plaintiff's Complaint.

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[1] Plaintiff's Complaint begins renumbering all subsequent paragraphs beginning with 194.

VIII. PRAYER FOR RELIEF

35. Defendants deny the allegations in paragraphs 258-264 of plaintiff's Complaint.

36. Defendants deny all other allegations, claims, conclusions and causes of action asserted in plaintiff's Complaint not otherwise admitted herein.

WHEREFORE, having fully answered plaintiff's Complaint, defendants U.S. Bancorp and U.S. Bank pray for judgment in their favor and against plaintiff, for their costs and attorneys' fees incurred herein and for such other and further relief as the Court deems just and proper.

AFFIRMATIVE DEFENSES

1. Plaintiff's claims are barred by reason of the failure to state a claim upon which relief may be granted.

2. Plaintiff's claims are barred and/or should be transferred from this Court to the United States District Court for the District of Kansas, as venue is appropriate and proper in the District of Kansas.

3. This Court is not the appropriate venue for the claims in light of the prior actions in the District of Kansas.

4. Plaintiff's claims are barred by reason of prior orders and judgments of the Kansas District Court which have been affirmed by the Tenth Circuit Court of Appeals and, thus, constitute res judicata and/or collateral estoppel.

5. Plaintiff's claims are barred by the applicable statutes of limitation, statutes of repose, and/or claims periods.

6. Plaintiff's claims are barred in whole or in part by reason of lack of standing and the plaintiff's lack of capacity. Notwithstanding Lipari's contentions, he is not the real party in interest to the alleged claims, if any.

7. Plaintiff's claims are barred by reason of the failure or lacks of consideration.

8. It is denied there was any contract between plaintiff and any defendant in relation to the allegations in the Complaint. In the alternative, however, any such alleged contract would be unenforceable to the extent it is barred by the statute of frauds.

9. It is denied there was any contract between plaintiff and any defendant in relation to the allegations in the Complaint. In the alternative, however, plaintiff's recovery for any alleged breach of contract would be barred or reduced by virtue of the failure of a condition precedent, lacks or failure of consideration, and/or indefinite terms of the alleged agreement.

10. Defendants assert their right to recover attorneys' fees from plaintiff pursuant to applicable Court Rules, federal statutes and Orders, including but not limited to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927.

11. Plaintiff's claims for fraud are deficient and barred by reason of the failure to comply with Fed. R. Civ. P. 9(b).

12. The valid business decision not to provide the alleged escrow account(s) to plaintiff was reasonable and is thereby protected from plaintiff's claims.

13. Plaintiff's claims are barred in whole or in part by reason of the lack of damages. Alternatively, plaintiff's claims for damages are speculative and conjectural.

14. Plaintiff's claims are barred for the reason defendants' actions were factually and legally justified and/or privileged.

15. Plaintiff's claims are barred in whole or in part by plaintiff's failure to mitigate damages.

16. Plaintiff's claims are barred by the equitable doctrines of waiver, estoppel and/or ratification.

17. To the extent plaintiff's claims may, might or could arise under the National Bank Act, then these claims are barred by federal preemption principles.

18. To the extent applicable, plaintiff's claims are barred in whole or part by reason of the plaintiff's own conduct, negligence or failure to prevent consequences over which it had or has control.

19. Plaintiff's claims are barred in whole or part for the reason that plaintiff Lipari is not the proper party in interest. These claims, if any, are property of Medical Supply Chain, Inc.

20. Plaintiff's claims are barred in whole or in part because plaintiff may not represent the corporate entity Medical Supply Chain, Inc. whether or not plaintiff had voluntarily and intentionally caused is dissolution.

21. Defendant reserve the right to assert additional defenses as may be revealed in discovery or as justice may require.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF #38572
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
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(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

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 21st day of December, 2006, to:

Samuel K. Lipari
297 N.E. Bayview
Lee's Summit, MO 64064

/s/ Mark A. Olthoff
Attorney for Defendant

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF MISSOURI

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, STRIKE OR TRANSFER

EXHIBIT 7

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES, RULES, REGULATIONS

MISCELLANEOUS

I. INTRODUCTION

The procedural history surrounding this suit is lengthy. On or about November 12, 2002, Medical Supply Chain, Inc. ("Medical Supply") first filed this case in the United States District Court for the District of Kansas bringing claims under federal and state law. *See* Complaint in *Medical Supply I*, attached as **Exhibit A** ("*Medical Supply I*"). On June 16, 2003, Judge Murguia dismissed the federal claims with prejudice and dismissed the state claims without prejudice. 2003 WL 21479192 (D. Kan., June 16, 2003). Medical Supply appealed the decision to the Tenth Circuit Court of Appeals where it was affirmed. 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished). The Tenth Circuit further found that Medical Supply's appeal was frivolous and that Medical Supply's then counsel should show cause why he should not be sanctioned. *See* 112 Fed. Appx. at 731-32. On or about December 30, 2004, the Tenth Circuit issued another Order wherein it found that Medical Supply's counsel had filed a frivolous appeal. The Tenth Circuit remanded the matter to the District Court for a determination of sanctions. *See* Order, attached as **Exhibit B**.

While the District Court determined the sanctions issue in *Medical Supply I*, *see* 2005 WL 2122675 (D. Kan., May 13, 2005), Medical Supply filed an identical action in the Western District of Missouri on March 4, 2005. *See* Complaint in *Medical Supply II*, attached as **Exhibit C** ("*Medical Supply II*"). In *Medical Supply II*, U.S. Bancorp and U.S. Bank National Association (U.S. Bank) were named again as defendants in the Complaint again which included claims based in federal and state law. *See* **Exhibit C**. The defendants sought transfer of *Medical Supply II* to the District of Kansas, citing that the District of Kansas maintained jurisdiction over the matter pending resolution of the sanctions proceedings in *Medical Supply I.* Judge Smith granted defendants' motion and transferred *Medical Supply II* to the District of Kansas. *See* Order, attached as **Exhibit D**. The defendants then renewed their motions to dismiss in the District of Kansas. On or about March 7, 2006, Judge Murguia granted defendants' motion to dismiss and issued further

sanctions against both Medical Supply's former counsel and Medical Supply. 419 F. Supp.2d 1316 (D. Kan. 2006). Medical Supply has appealed the *Medical Supply II* to the Tenth Circuit where it remains pending. *See* Docket of Tenth Circuit (Case No. 06-3331).

This lawsuit should be dismissed. The plaintiff does not have standing to make these claims; the plaintiff's claims are barred by *res judicata*; the Complaint fails to comply with the pleading requirements of Fed. R. Civ. P. 8; and plaintiff's allegations fail to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). Finally, plaintiff's allegations regarding or referencing District Judge Kathryn Vratil; District Judge Carlos Murguia; Magistrate Judge James P. O'Hara and the law firm of Shughart Thomson & Kilroy should be stricken under Fed. R. Civ. P. 12(f) as immaterial, impertinent and scandalous.

In the alternative, due to its extensive familiarity with this matter and the pending appeal of *Medical Supply II*, this case should be transferred to the District of Kansas pursuant to 28 U.S.C. § 1404. Despite the fact both Medical Supply and its former attorney have been sanctioned by both the Tenth Circuit and the District of Kansas, Samuel Lipari has now filed this third action asserting the same claims on the same set of facts against U.S. Bancorp and U.S. Bank. Mr. Lipari, as principal of Medical Supply, chose the Kansas District Court in originally bringing *Medical Supply I* in 2002. Yet he now attempts to avoid the numerous and negative rulings from that Court and the Tenth Circuit. Such actions amount to nothing short of forum shopping.

II. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED

The plaintiff's Complaint should be dismissed with prejudice for any of the following reasons: (1) plaintiff does not have standing to maintain this action; (2) plaintiff's claims against the defendants are barred by *res judicata*; (3) plaintiff's Complaint fails to comply with Fed. R. Civ. P. 8; or (4) plaintiff's Complaint fails to state a claim for which relief can be granted. For any or all of these reasons, this Court must dismiss plaintiff's Complaint with prejudice.

A. Plaintiff Does Not Have Standing To Maintain This Action

The plaintiff brings this action "as the sole assignee of rights for the dissolved Missouri Corporation Medical Supply Chain, Inc. where he was the founder and Chief Executive Officer. . . ." *See* Complaint at p. 1. The plaintiff does not explain in the Complaint how Medical Supply was dissolved, though he previously advised the Kansas District Court that he voluntarily dissolved it. (*See* **Exhibit E**.) Regardless of whether it was voluntarily dissolved or dissolved by the State, the plaintiff may not maintain this action in his personal capacity.

Missouri statutes governing both voluntary dissolution and administrative dissolution state that a dissolved corporation may continue business in the name of the corporation to wind up its business and affairs. *See* R.S.Mo. §§ 351.476, 351.486. Missouri law prohibits a sole shareholder from bringing a cause of action that was held by the dissolved corporation. In *Hutchings v. Manchester Life and Cas. Management Corp.*, 896 F. Supp. 946 (E.D. Mo. 1995), the *pro se* plaintiff filed a cause of action against several defendants for causes of action belonging to a dissolved corporation where the plaintiff was the sole shareholder. The court noted the law of Missouri that a shareholder cannot maintain suit on behalf of a corporation because a shareholder does not have legal ownership of corporation property. *Id*. at 947. The court further noted that, when a corporation is dissolved, only the statutory trustees of the corporation may wind up the corporation's business. *Id.* at 948. The court found that the Complaint sought relief based on the plaintiff's personal capacity rather than as a trustee acting on behalf of the dissolved corporation. Therefore, the court dismissed the plaintiff's Complaint in its entirety. *Id.*; *see also Gunter v. Bono*, 914 S.W.2d 437, 440-41 (Mo. App. E.D. 1996); *Mabin Constr. Co. v. Historic Constr., Inc.*, 851 S.W.2d 98, 103 (Mo. App. W.D. 1993).

The same holds true in this matter. The plaintiff is making claims that were held by the dissolved corporation, Medical Supply Chain, Inc.[1] Even if he was the sole shareholder, founder and CEO of Medical Supply, he cannot maintain this action in his personal capacity. Thus, this action should be dismissed with prejudice.

B. Plaintiff's Claims and Causes of Action are Barred by the Doctrine of *Res Judicata.*

Even if plaintiff may file suit in his personal capacity, his causes of action are barred by the doctrine of *res judicata*. Medical Supply's earlier lawsuits in *Medical Supply I* and *II* (**Exhibits A & C**)[2] were based upon the same conduct, transaction, set of operative facts and claims alleged here. These lawsuits have been dismissed twice by the District of Kansas. *See* 2003 WL 21479192; 419 F. Supp.2d 1316. Thus, plaintiff's instant causes of action against U.S. Bancorp and U.S. Bank are barred by *res judicata*.

In this matter, Mr. Lipari alleges that he is the purported assignee "of all interests and rights held previously by the Missouri Corporation Medical Supply Chain, Inc. . . ." Complaint, ¶ 37. Under Missouri law, "[A]n assignee acquires no greater rights than the assignor had at the time of the assignment." *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556-557(Mo. App. S.D. 2004) (quoting, *Carlund Corp. v. Crown Center Redevelopment,* 849 S.W.2d 647, 650 (Mo. App. 1993)); *see also Centennial State Bank v. S.E.K. Constr. Co., Inc.,* 518 S.W.2d 143, 147 (Mo. App. 1974). As a result, Mr. Lipari stands in Medical Supply's shoes and can occupy no better

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[1] Judicial estoppel also prevents plaintiff's attempt to assert these claims. *See Autos, Inc. v. Gowin*, 2005 WL 2459153 *4 (D. Kan. 2005). In his first two lawsuits, plaintiff maintained that the causes of action belonged to Medical Supply. That must be his continuing contention in the Tenth Circuit or else the current appeal must be dismissed. Clearly, the assertion that plaintiff *pro se* may assert these claims on behalf of Medical Supply is inconsistent with the prior allegations in *Medical Supply I* and *II*. *See Johnson v. Linden City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005); *Gebert v. Transport. Admin. Servs.*, 260 F.3d 909, 917 (8th Cir. 2001). Notably, Judge Murguia denied plaintiff's motion to substitute a new party plaintiff in *Medical Supply II*. *See* 19 F. Supp.2d at 1336.

[2] Plaintiff also filed another suit in Kansas District Court, *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM which was also dismissed. Many of the same allegations are included in this Complaint.

position than Medical Supply would have if it sued defendants directly. *Id.* Thus, "common law principles compel the conclusion that any defense valid against [Medical Supply] is valid against its assignee, [Samuel Lipari]." *Id.*

The preclusion principle of *res judicata* prevents "the relitigation of a claim on grounds that were raised or **could have been raised** in the prior suit." *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990) (emphasis added), *cert. denied*, 498 U.S. 823 (1990). The doctrine of *res judicata* bars relitigation of a claim if: "(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases." *Id.*; *see also Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043 (8th Cir. 1997), *cert denied*, 522 U.S. 1090 (1998); *Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987).[3] The Eighth Circuit has held that when a "cause of action" or "claim" "arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same claim or cause of action for purposes of *res judicata*." *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997).

This suit is barred by the doctrine of *res judicata* due to Judge Murguia's March 7, 2006 Order dismissing *Medical Supply II.* Among the many reasons for dismissal, Judge Murguia found that Medical Supply's Complaint violated Rule 8 of the Federal Rules of Civil Procedure and was "so exceptionally verbose and cryptic that dismissal is appropriate." 419 F. Supp.2d at 1331. Judge Murguia denied Medical Supply's request to amend the Complaint and dismissed the Complaint in its entirety. *Id*. at 1332.

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[3] Section 24 of the Restatement (Second) of Judgments also provides that : When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar[,] . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Thus, "a claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim." *Lane v. Peterson*, *supra*, 899 F.2d at 742.

While the Court declined to retain supplemental jurisdiction over the state law claims, by dismissing *Medical Supply II* under Rule 8, and denying Medical Supply's request to amend, Judge Murguia's Order constituted a final adjudication of the suit on the merits of the claims sufficient to trigger *res judicata*. *See Micklus v. Greer*, 705 F.2d 314, 317 n.3 (8th Cir. 1983) (holding that dismissal under Rule 8 without leave to amend is deemed dismissal on the merits sufficient to trigger *res judicata*); *see also Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997) (holding, "It is well settled that denial of leave to amend constitutes *res judicata* on the merits of the claims which were the subject of the proposed amendment.")

As in this matter, both U.S. Bancorp and U.S. Bank were defendants in *Medical Supply II.* *Medical Supply II* was premised on the same facts and causes of action sought by the plaintiff in this matter and it was dismissed by a court of competent jurisdiction. Thus, any action by Medical Supply is barred by the doctrine of *res judicata*.[4]

While Medical Supply is not identified as a party to this suit, Mr. Lipari brings suit as a purported assignee of the Medical Supply's interest. As stated, Mr. Lipari can have no greater right than that possessed by Medical Supply. *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556-57 (Mo. App. S.D. 2004). Because Medical Supply's cause of action against both U.S. Bancorp and U.S. Bank is barred by *res judicata*, Mr. Lipari has no right to maintain this action as an assignee and this matter should be dismissed in its entirety with prejudice.

C. Even if Not Barred by *Res Judicata*, Plaintiff's Claims Should be Dismissed Under Rule 8 of the Federal Rules of Civil Procedure

Plaintiff's Complaint may also be dismissed for failing to comply with Fed. R. Civ. P. 8. Rule 8(e)(1) states that "Each averment of a pleading shall be simple, concise, and direct." Here,

[4] Plaintiff's claim for violation of trade secrets under R.S.Mo. § 417.450 specifically was included in *Medical Supply I* (Exhibit A Count VII). This is a claim which **was or could have been raised** in *Medical Supply II* (and was raised in allegations, Exhibit C at ¶¶ 316-332, and the dismissed RICO Count XV, at ¶¶ 587-88) and therefore does not defeat dismissal under the doctrine of *res judicata*. *See Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990).

plaintiff's Complaint is 75 pages and consists of 264 paragraphs, many of which are simple ramblings of the plaintiff. For example, paragraphs 61 through 67 contain statements that a venture capital firm visited Medical Supply; that Medical Supply believed much of the assets in venture funds were from overvalued equities in telecom technology; that the collapse of WorldCom would depress these venture markets; that Medical Supply's technology is superior to that of several other companies, including Cerner; and that Medical Supply would not compromise itself by being aligned with an existing healthcare supplier. Paragraphs 252-57 contain citations to newspaper articles; testimony before the Missouri Legislature; statistics on the cost of health care; and the number Missouri residents without access to Medicaid. Plaintiff's Complaint is full of baseless conspiracy theories and hollow allegations that have no relation to the causes of action set forth by Mr. Lipari in this action.

In *Medical Supply II*, Judge Murguia addressed this same issue and dismissed Medical Supply's Complaint for failing to comply with Rule 8. In *Medical Supply II*, Judge Murguia held that the Complaint "falls miles from Rule 8's boundaries. . . . In sum, plaintiff's complaint is so exceptionally verbose and cryptic that dismissal is appropriate." 419 F. Supp.2d at 1331.

In *Medical Supply II*, Judge Murguia also denied Medical Supply's request to amend its Complaint. Judge Murguia found that, given the long history of plaintiff's pleadings in both *Medical Supply I* and *II*, "amendment would be futile." *Id.* at 1332. Judge Murguia also noted that the defendants had sought sanctions under Rule 11 and had given Medical Supply's attorneys the required 21 days to amend the complaint pursuant to Rule 11(c)(1)(A), yet Medical Supply had failed to do so. Finally, Judge Murguia found that Medical Supply had recently changed attorneys and the new attorney had chosen not to amend the complaint and thus adopted it has his own. *Id.* Therefore, Judge Murguia dismissed the action in its entirety.

This Court should also dismiss plaintiff's Complaint in its entirety. Like *Medical Supply II*, plaintiff's Complaint in this matter does not contain a short, concise statement of facts and "falls miles from Rule 8's boundaries." 419 F. Supp.2d at 1331. Mr. Lipari, as principal of Medical Supply, has had numerous opportunities to file a pleading that complies with Rule 8 but refuses to do so. Therefore, this Court should deny any request to amend, and dismiss this Complaint in its entirety, with prejudice, under Rule 8 of the Federal Rules of Civil Procedure.

D. Even if Not Barred by *Res Judicata* or Rule 8, Plaintiff's Claims Should Be Dismissed For Failure to State a Claim under Rule 12(b)(6).

Plaintiff's claims fail to state a claim upon which relief can be granted. In deciding a motion to dismiss, this Court must accept the well-pled factual allegations in the Complaint as true and grant the plaintiff the benefit of any inferences that are reasonably supported by those factual allegations. However, the "court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). Stated differently, this Court need not "blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Plaintiff's allegations are conclusory, invite unwarranted inferences and the various tort and statutory claims asserted are meritless on their face, even when viewed in the light most favorable to plaintiff. Accordingly, dismissal is appropriate in this case.

1. Count I: Damages for Breach of Contract

Plaintiff's breach of contract claim is without merit. The elements of a breach of contract claim are: (1) an agreement between parties capable of contracting; (2) mutual obligations arising thereunder with respect to a definite subject matter; (3) a valid consideration; (4) part performance by one party and prevention of further performance by the other; and (5) damages measured by the contract and resulting from its breach. *Scher v. Sindel*, 837 S.W.2d 350, 354 (Mo. App. E.D. 1992).

The basis for plaintiff's breach of contract claim is that plaintiff, Samuel Lipari ("Lipari") and Brian Kabbes of U.S. Bank exchanged email negotiations regarding plaintiff's desire for escrow services including that Kabbes e-mailed Lipari a contract; that Lipari and Kabbes agreed to lower the normal fees for escrow agent services; U.S. Bank compensation; the investment of long and short term held funds; the name of the escrow agent; and payment schedule (Complaint at ¶ 201). Plaintiff further alleges that defendants performed diligence to determine whether to contract with Medical Supply (*id.* at ¶ 202); and that Kabbes also requested corporate good standing documentation from Medical Supply which was provided (*id.* at ¶ 203).[5]

It is hornbook law that the existence of a valid and enforceable contract is dependent upon agreement of the parties, or meeting of the minds, upon the terms of that contract. *Smith v. Hammons*, 63 S.W.3d 320, 325 (Mo. App. S.D. 2002). As the *Hammons* court stated:

> "*Negotiations or preliminary steps towards a contract do not constitute a contract*. The existence of a contract necessitates a 'meeting of the minds' which the court determines by looking at the intention of the parties as expressed in their words or acts. Whether a contract is made and, if so, what the terms of that contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties."

Id. (*quoting Gateway Exteriors, Inc. v. Suntide Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. App. E.D. 1994) (emphasis supplied). Plaintiff and U.S. Bank were *negotiating* a potential written contract which never came to fruition. Obviously, had there been a meeting of the minds between the parties, a written contract memorializing all of these terms would have been executed. Plaintiff's supposition that an oral contract was formed based on the negotiation of the terms of a potential written agreement is insufficient to support its claim. *Hammons*, 63 S.W.3d at 325.

No reasonable person reviewing the facts as set forth in plaintiff's Complaint could conclude that a contract was formed between Medical Supply and U.S. Bank. Nowhere in the Complaint does

[5] Defendants note that plaintiff nowhere pleads the existence of a purported contract with U.S. Bancorp.

plaintiff allege that any U.S. Bank representative, including Kabbes, stated or even implied that the escrow accounts had been approved by U.S. Bank. It is clear that the changes allegedly suggested by Kabbes and agreed to by Medical Supply were indicative of parties negotiating a potential contract. Therefore, plaintiff's cause of action for breach of contract fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6).

2. Count II: Damages for Fraud and Deceit

Count II of the Complaint purports to claim damages for fraud and deceit. Plaintiff alleges that Brian Kabbes falsely represented that U.S. Bank would not perform escrow services to Medical Supply because of the "know your customer" provisions of the Patriot Act. (Complaint ¶ 210.) As support for this claim, plaintiff includes approximately ten single spaced pages of what he claims was a call between representatives of Medical Supply and the defendants. (Complaint ¶¶ 214, 215.) Plaintiff then alleges the following in paragraph 216:

> MSCI and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation to not enforce U.S. BANK'S promise with the defendants' officer Brian Kabbes upon learning that U.S. BANK was not going to provide the escrow services. MSCI and and (*sic*) SAMUEL LIPARI justifiably relied upon the fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of U.S. BANK's Commercial Trust department and instead contacted U.S. BANCORP NA's Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan Paine.

Plaintiff further alleges that the defendants made the fraudulent misrepresentation with knowledge of its falsity or with reckless disregard as to "whether it was true or false to the point of not checking and realizing that the increased duties of the 'know your customer' for new account holders had not been enacted." (Complaint ¶ 217.)

The elements of fraudulent misrepresentation are: (1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the

falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and (6) proximate injury. *Premium Financing Specialists, Inc. v. Hullin*, 90 S.W.3d 110, 115 (Mo. App. W.D. 2002). There must be more than mere suspicion, surmise and speculation. *Blanke v. Hendrickson*, 944 S.W.2d 943, 944 (Mo. Ct. App. 1997).

Plaintiff's fraud claim delineated in Count II is legally insufficient. Assuming all facts as true, even if the defendants stated the "know your customers" provision of the Patriot Act was the reason for not providing escrow accounts, there is no allegation that this statement was made with the intent for Medical Supply to act upon it. Thus, regardless if the statement is false and justifiably relied upon by Medical Supply (which defendants strongly deny), no reasonable person could interpret that the statement was made by the defendants with the intent for Medical Supply to act or refrain from acting in a particular manner.

Further, plaintiff's claim that it relied upon this statement is nonsensical. Plaintiff asserts that because Medical Supply relied on the statement, Mr. Lipari did not call the St. Louis branch of U.S. Bank, but instead called U.S. Bancorp, which angered Lars Anderson and Susan Paine. This nonsensical allegation does not show the plaintiff justifiably relied on the statement or that any action it took in reliance on the statement was detrimental to the plaintiff. For these reasons, plaintiff's fraud claim in Count II should be dismissed with prejudice pursuant to Rule 12(b)(6).

3. Count III: Misappropriation of Trade Secrets under R.S.Mo. § 417.450.

Under Missouri law, the misappropriation of trade secrets occurs when one acquires a trade secret through improper means such as theft or bribery; or when one discloses a trade secret without consent or knew or had reason to know that the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy. *See H&R Block Eastern Tax Services, Inc. v. Enchura*, 122 F. Supp.2d 1067, 1074 (W.D. Mo. 2000).

The following is a summary of the allegations plaintiff makes to support his misappropriation claim:

- On or about October 10, 2002 plaintiff gave a copy of the Medical Supply business plan and associate program booklets to U.S. Bank employee Douglas Lewis to apply for the escrow accounts Medical Supply was seeking. (Complaint ¶ 108);

- The business plan and associate booklets "had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained therein." (Complaint ¶ 109);

- The letter of introduction also addressed the confidential nature of the documents (Complaint ¶ 110);

- After delivery, Mr. Lipari was given a loan application and agreed to return the next day (Complaint ¶ 114);

- On or about November 6, 2002, Mr. Lipari sought to retrieve the documents given to Mr. Lewis on October 10, 2002 (Complaint ¶ 189);

- Upon retrieving the booklets, he noticed that the binders had been separated and copies or faxes had been made of the associate program and business plans as shown by "tractor marks" from a copy or fax machine (Complaint ¶¶ 192, 193);

- That the defendants instructed Mr. Lewis to disassemble the documents and make copies in violation of the notice of limitations and disclosure (Complaint ¶ 229);

- U.S. Bank exceeded its authorized use and copied and/or transmitted the documents to three U.S. Bancorp employees (Complaint ¶ 230);

- That U.S. Bancorp, its officers, and its subsidiary "U.S. BANCORP PIPER JAFFRAY acquired unconsented knowledge of MSCI's trade secrets and made use thereof (Complaint ¶ 232).

Plaintiff's claim for misappropriation of trade secrets fails to state a claim. Plaintiff alleges that U.S. Bancorp obtained "unconsented knowledge of MSCI's trade secrets and made use thereof." However, it was Medical Supply and Mr. Lipari who selected U.S. Bank and for the purposes of providing escrow services. *See* Complaint ¶¶ 45, 47. Further, the plaintiff admits in his Complaint that before seeking escrow services from the defendants, plaintiff voluntarily contacted Piper Jaffray

and submitted his idea and business plan for consideration of Medical Supply as a venture capital candidate. *See* Complaint, ¶¶ 55-60.

These facts show that plaintiff's claim for misappropriation of trade secrets cannot stand. It was the plaintiff who sought out U.S. Bank; the plaintiff who submitted the alleged trade secrets to U.S. Bank; and the alleged trade secrets had already been divulged (by the plaintiff) to Piper Jaffray (U.S. Bancorp's subsidiary at the time). Moreover, the plaintiff fails to allege how any of the defendants misused the materials or how he was damaged by the misuse. For these reasons, this Court must dismiss Count III of plaintiff's Complaint with prejudice pursuant to Rule 12(b)(6).

4. Count IV: Damages for Breach of Fiduciary Duty

Plaintiff generally alleges that defendants owed it a "fiduciary duty" but fails to provide any factual basis for this particular allegation. A claim for breach of fiduciary duty has four elements: (1) the existence of a fiduciary relationship between the parties, (2) a breach of that fiduciary duty, (3) causation, and (4) harm. *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. Ct. App. 2000). A fiduciary is a person having a duty to "act primarily for the benefit of another in matters connected with his undertaking." *See* Restatement (Second) Agency 13 cmt. a (1957); Restatement (Second) of Trusts § 2 (1958). While Missouri has not adopted a precise common-law definition, a "fiduciary relationship" may exist when "a special confidence [is] reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the interests of the one reposing the confidence." *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 751 (Mo. Ct. App. 1990). Plaintiff cannot, however, unilaterally foist a fiduciary duty upon a defendant in the absence of some agreement or conduct by the defendants to accept such a responsibility. *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. Ct. App. 1996). Nor does a business relationship give rise to a fiduciary relationship. *Kratky v. Musil*, 969 S.W.2d 371, 377 (Mo. Ct. App. 1998).

No fiduciary relationship between plaintiff and defendants ever existed. Accordingly, Count IV should be dismissed.

5. Count V: Damages for *Prima Facie* Tort

Count V of the plaintiff's complaint should be dismissed for failure to plead the required elements of a *prima facie* tort. *Lohse v. St. Louis Children's Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. Ct. App. 1983). The Missouri Supreme Court has held that *prima facie* tort is not "a duplicative remedy for claims that can be sounded in other traditionally recognized tort theories, or a catchall remedy of last resort. . . ." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993). The specific elements of a *prima facie* tort claim are: (1) an intentional lawful act by the defendant; (2) an intent to cause injury to the plaintiff; (3) injury to the plaintiff; and (4) an absence of any justification or an insufficient justification for the defendant's act. *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc).

The thrust of a *prima facie* tort claim is the intentional undertaking of an otherwise lawful act, which is done with the intent to cause injury to the plaintiff, and which is without any recognized justification. Here plaintiff failed to allege action by the defendants which is lawful. Plaintiff does not make his claim for *prima facie* tort in the alternative and at no point in the Complaint does plaintiff allege that any of the defendants' actions were lawful or truthful. Further, plaintiff alleges no facts to support the element that there was an intent to cause injury. Rather, plaintiff simply alleges that "U.S. BANK and U.S. BANCORP's (*sic*) committed these lawful acts with intent to injure MSCI." (Complaint ¶ 249(2).) While the requirements of Rule 12(b)(6) state that all allegations in the complaint must be accepted as true, the "court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). For these reasons, Count V should be dismissed with prejudice pursuant to Rule 12(b)(6).

III. PLAINTIFF'S CLAIMS REFERENCING DISTRICT JUDGE KATHRYN VRATIL; DISTRICT JUDGE CARLOS MURGUIA; MAGISTRATE JUDGE JAMES P. O'HARA; AND THE LAW FIRM OF SHUGHART THOMSON & KILROY SHOULD BE STRICKEN

Throughout the Complaint, plaintiff makes numerous comments and allegations directed at Judge Kathryn Vratil; Judge Carlos Murguia; Magistrate James P. O'Hara and the defendants' law firm of Shughart Thomson & Kilroy. These allegations concern the disbarment of Medical Supply's former attorney and are immaterial, impertinent and scandalous within the meaning of Rule 12(f). Plaintiff makes these allegations solely in an attempt to embarrass and vilify these Judges and the law firm engaged to represent these defendants. Fed. R. Civ. P. 12(f) provides "[u]pon motion made by a party before responding to a pleading . . . or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The court is afforded broad discretion in ruling on a motion to strike. *See Nationwide Ins. Co. v. Cent. Mo. Elec. Co-op.*, 278 F.3d 742, 748 (8th Cir. 2001) ("[A] district court enjoys liberal discretion under Rule 12(f).").

This Court should exercise its discretion and specifically strike paragraphs 24-28, 224, 225, and 249(e) of plaintiff's Complaint as these allegations are immaterial to the claims, add nothing to the Complaint and were included solely for a malevolent purpose. Each of these allegations is immaterial, impertinent and scandalous under Rule 12(f) and should therefore be stricken by this Court. *Young v. Dunlap*, 223 F.R.D. 520, 521-22 (E.D. Mo. 2004); *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp.2d 1255, 1258 (W.D. Mo. 2001).[6]

[6] It is apparent from even a cursory review of the Complaint that the law firm and Magistrate O'Hara had no involvement with anything touching upon plaintiff's claim until the law firm was engaged to provide representation of certain defendants in the Kansas District Court case. Magistrate O'Hara's first involvement with plaintiff apparently was with a subsequent suit that plaintiff filed. *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM.

IV. IN THE ALTERNATIVE, PLAINTIFF'S CLAIMS SHOULD BE TRANSFERRED TO THE DISTRICT OF KANSAS FOR FURTHER ADJUDICATION

In the alternative, defendants request this case be transferred to the United States District Court for the District of Kansas. 28 U.S.C. § 1404(a).[7] This is the third lawsuit stemming from the same operative facts where Medical Supply or Mr. Lipari has named U.S. Bancorp and U.S. Bank as defendants. As shown above, both of the previous actions have an extensive procedural history in the District of Kansas where this matter should be transferred.

Federal courts have consistently and uniformly ordered section 1404(a) transfers to other federal district courts when related lawsuits are pending in the transferring court, and have used quite strong language in so doing. For example, in *Prudential Insurance Co. of America v. Rodano*, 493 F. Supp. 954 (E.D. Pa. 1980), the court ordered transfer, stating:

> "The most compelling reason for transfer is that it would best serve the interests of justice. The presence of two related cases in the transferee forum is a substantial reason to grant a change of venue. The interests of justice and the convenience of the parties and witnesses are ill-served when federal cases arising out of the same issues are allowed to proceed separately."

Id. at 955; *see also Islamic Republic of Iran v. Boeing Co.*, 477 F. Supp. 142, 144 (D. D.C. 1979) ("Most importantly, litigation of liability issues closely similar to issues pending for over two years in another federal court would be a grossly inefficient use of judicial resources. Litigation of such related claims in the same forum is strongly favored.").

As in *Republic of Islam*, this lawsuit is virtually identical to both *Medical Supply I* and *Medical Supply II* which were adjudicated in Kansas. Should the Tenth Circuit remand *Medical Supply II* for further proceedings, the District of Kansas would retain jurisdiction. If this matter was

---

[7] Title 28 U.S.C. Sec. 1404(a), states in its entirety:

> (a) For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

not transferred, U.S. Bancorp and U.S. Bank would be forced to defend *Medical Supply II* in the District of Kansas as well as this current matter in the Western District of Missouri. Both suits arise out of the same set of operative facts. Despite being patently unfair to these defendants to defend identical suits in different Districts, this would be an extreme waste of judicial resources and creates the possibility of conflicting rulings from different courts. These factors strongly favor transferring this lawsuit to the District of Kansas.

Several federal courts have recognized that avoiding multiplicity of litigation is given great, even decisive, weight in deciding whether to transfer a case under § 1404(a). *See Monsanto Technology, Inc. v. Syngenta Crop Protection, Inc.,* 212 F. Supp.2d 1101, 1103 (E.D. Mo. 2002) (In cases where issues substantially overlap, transfer is necessary if there is a serious danger of District Courts making inconsistent determinations on material issues); *Cali v. East Coast Aviation Services, Ltd.*, 178 F. Supp.2d 276, 295 (E.D. N.Y. 2001) (". . . courts have given great weight to the need to avoid multiplicity of litigation . . . litigation of related claims in the same tribunal is strongly favored. . . ."); *Dahl v. Hem Pharmaceuticals Corp.*, 867 F. Supp. 194, 197 (S.D. N.Y. 1994) ("It would be a patent misuse of judicial resources to require another Federal District Court (and perhaps another Court of Appeals) to review and become familiar with facts and circumstances already extensively excavated by another Federal Court") (emphasis added); *see also* Wright & Miller, *Federal Practice and Procedure*, Sec. 3854, pp. 441-42 and numerous cases cited therein.

When Judge Smith transferred *Medical Supply II* to the District of Kansas, he specifically rejected plaintiff's attempt at forum shopping and cited the case's extensive procedural history in the District of Kansas. Judge Smith wrote:

> Mere disappointment with the result of a case does not give a party the right to file an almost identical cause of action and, moreover, does not entitle a party to forum shop. Based on the District of Kansas' extensive experience with the almost

identical previous lawsuit and in the interest of justice, the above-captioned matter is transferred to the District of Kansas.

Exhibit D, p. 2.

Plaintiff originally chose the Kansas District Court as the forum for its lawsuit. Now, plaintiff engages in the most egregious form of "forum-shopping" in a baseless attempt to avoid further negative rulings from that Court and the Tenth Circuit. Such disregard for the courts, the judicial system, the interests of justice and the rights of these defendants should not be rewarded. Therefore, this Court should transfer this matter to the District of Kansas if it is not dismissed.

V. CONCLUSION

Defendants request that the Court enter its Order transferring this matter to Judge Carlos Murguia in the District of Kansas or in the alternative, dismiss plaintiff's Petition and strike plaintiff's allegations concerning District Judge Kathryn Vratil; District Judge Carlos Murguia; Magistrate Judge James P. O'Hara and the law firm of Shughart Thomson & Kilroy; and grant defendants whatever other relief they are justly entitled.

Respectfully submitted,

/s/ Mark A. Olthoff
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ATTORNEYS FOR DEFENDANTS
U.S. BANCORP, 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 19th day of January, 2007, to:

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

/s/ Mark A. Olthoff
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 06-1012-CV-W-FJG
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

ORDER

Currently pending before the Court is plaintiff's Motion to Remand (Doc. # 6); plaintiff's Motion for a More Definite Statement (Doc. # 10); plaintiff's Motion to Vacate Case Management Order (Doc. # 11); defendants' Motion for Leave to File Excess Pages (Doc. # 15); defendant's Motion to Dismiss or in the Alternative to Transfer (Doc. # 16) and plaintiff's Motion to Stay Further Proceedings Pending Appeal (Doc. # 18).

I. BACKGROUND

On October 22, 2002, Medical Supply Chain, Inc. ("Medical Supply") filed an action in the United States District Court for the District of Kansas alleging both state and federal claims Medical Supply Chain, Inc. V. U.S. Bancorp, N.A. et al., Case 02-2539, ("Medical Supply I"). On June 16, 2003, Judge Murguia dismissed the federal claims with prejudice and dismissed the state claims without prejudice. This decision was affirmed by the Tenth Circuit. The second case brought by plaintiff was Medical Supply Chain Inc. v. General Electric Company et al., Case No. 03-2324 which was filed on June 18, 2003 ("Medical Supply II"). On January 29, 2004, the Court granted

EXHIBIT 8

defendants' Motions to Dismiss. The Tenth Circuit affirmed the dismissal of these claims on July 26, 2005. Medical Supply then filed an identical action in the Western District of Missouri on March 9, 2005 captioned Medical Supply Chain, Inc. v. Neoforma, Inc. (05-210-CV-W-ODS) ("Medical Supply III"). In that case, U.S. Bancorp and U.S. Bank National Association were named again as defendants in the Complaint which also alleged violations of state and federal law. On June 15, 2005, Judge Ortrie Smith transferred Medical Supply III to the District of Kansas. On March 7, 2006, Judge Murguia granted defendants' motion to dismiss. Medical Supply appealed this order to the Tenth Circuit where it remains pending. On November 28, 2006, Samuel Lipari filed the instant action in Jackson County Circuit Court against U.S. Bancorp, NA and U.S. Bank NA (Jackson County Case No. 0616-CV-32307). On December 13, 2006, the defendants removed the action to this Court on the basis of diversity. Defendants now move to dismiss plaintiff's case or alternatively to transfer it to the District of Kansas pursuant to 28 U.S.C. § 1404 (a). Plaintiff did not respond to the Motion to Dismiss or Alternatively to the Motion to Transfer.

II. STANDARD

28 U.S.C. § 1404(a) provides, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The Court in Houk v. Kimberly-Clark Corp., 613 F.Supp. 923, 927 (W.D.Mo. 1985), stated that "[i]n any determination of a motion to transfer under § 1404(a), the plaintiff's choice of a proper forum is entitled to great weight, and will not be lightly disturbed." The Court also observed:

It is incumbent upon the party seeking transfer to make a clear showing

> that the balance of interests weighs in favor of the proposed transfer, and unless that balance is strongly in favor of the moving party, the plaintiff's choice of forum should not be disturbed. . . . Where the balance of relevant factors is equal or only slightly in favor of the movant, the motion to transfer should be denied.

Id. at 927 (internal citations omitted).

In Enterprise Rent-A-Car Co. v. U-Haul International, Inc., 327 F.Supp.2d 1032 (E.D.Mo. 2004) the Court stated:

> In determining whether or not to transfer venue, the Court must consider the three general categories of factors stated in §1404(a): (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) whether the transfer would be in the interest of justice.

Id. at 1045 citing Terra Int'l, Inc. v. Mississippi Chem. Corp., 119 F.3d 688, 691 (8th Cir.), cert. denied, 522 U.S. 1029, 118 S.Ct. 629, 139 L.Ed.2d 609 (1997).

III. DISCUSSION

A. Motion to Transfer

Defendants state that this is the third lawsuit stemming from the same operative facts where Medical Supply Chain or Mr. Lipari have named U.S. Bancorp and U.S.Bank as the defendants.[1] Defendants state that federal courts have consistently and uniformly ordered section 1404(a) transfers to other federal district courts when related lawsuits are pending in the transferring court. In Prudential Insurance Co. of America v. Rodano, 493 F.Supp. 954 (E.D.Pa. 1980), the Court stated:

> The most compelling reason for transfer is that it would best serve the interests of justice. The presence of two related cases in the transferee forum is a substantial reason to grant a change of venue. The interests of justice and the convenience of the parties and witnesses are ill-served

[1]Neither U.S. Bancorp nor U.S. Bank Association were named as defendants in Case 03-2323.

> when federal cases arising out of the same circumstances and dealing with the same issues are allowed to proceed separately. The substantial likelihood that this case will be consolidated with the two related cases pending in the United States District Court of Maryland, sitting at Baltimore, weighs heavily in favor of transfer.

Id. at 955.

Defendants do not discuss whether it would be more convenient for the witnesses and parties if this case were transferred to the District of Kansas. However, because the locations of the two courthouses are relatively close, the Court does not find that transferring this case would play a major factor for either the parties or the witnesses. Additionally, the Court finds that the interests of justice would be better served if this case were transferred to the District of Kansas. That district has become extensively familiar with the plaintiff and his various lawsuits over the years. Transfer of this case would conserve judicial resources and avoid the risk of potentially conflicting rulings from different courts.

As mentioned previously, the plaintiff's choice of forum is entitled to great deference. However, the Court finds that the balance of interests in this case weighs strongly in favor of transferring this case due to the extensive previous history that plaintiff has had with his various cases in the District of Kansas. Therefore, because the District of Kansas is a proper alternative forum, this Court hereby **GRANTS** defendants' Motion to Transfer this case to the District Court of Kansas (Doc. # 16).

B. Motion to Remand

Plaintiff moves to remand this case because he states that the Kansas District

Court still has jurisdiction over his state law claims[2]. Plaintiff also states that diversity jurisdiction does not exist. Plaintiff does concede that the Supreme Court has determined that national bank associations are to be treated as residents of the state in which they have their main office, but he argues that this does not save the defendants' removal from being frivolous. He states that diversity jurisdiction still does not exist, despite the movement of the pendant claims to state court. Plaintiff states that claims were filed against the Missouri domiciled defendant Shugart, Thompson & Kilroy as a defendant. Thus, he argues that the presence of this defendant destroys diversity jurisdiction.

Defendants state in opposition that the Motion to Remand should be denied because diversity jurisdiction exists between the parties and the removal was proper. Defendants note that there is no Missouri defendant who was named in plaintiff's state court petition. In his state court petition filed on November 28, 2006, plaintiff named only U.S. Bancorp and U.S. Bank, both of whom are considered Minnesota residents. Additionally, defendants note that the District Court in Kansas did not retain jurisdiction over plaintiff's state law claims, but rather dismissed these claims without prejudice.

The Court agrees with defendants and finds that the removal was proper and diversity jurisdiction exists between the parties. Accordingly, the Court finds no basis for remanding this action and therefore **DENIES** plaintiff's Motion to Remand (Doc. # 6).

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[2] It is unclear how this argument would support remanding this case to the Jackson County court.

III. CONCLUSION

The Court **GRANTS** defendants' Motion for Leave to File Excess Pages (Doc. # 15); **DENIES** as **MOOT** plaintiff's Motion to Reconsider the Court's Case Management Order (Doc. # 11); **DENIES** as **MOOT** plaintiff's Motion to Stay (Doc. # 18); **DENIES** plaintiff's Motion for a More Definite Statement (Doc. # 10); **DENIES** plaintiff's Motion to Remand (Doc. # 6) and **GRANTS** defendants' Motion to Transfer this Case to the District Court of Kansas (Doc. # 16).

Date: 4/4/07
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

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

December 10, 2007

Ingrid (KSkc) Campbell
United States District Court for the District of Kansas
Office of the Clerk
500 State Avenue
Robert J. Dole U.S. Courthouse
Room 259
Kansas City, KS 66101-0000

RE: 06-3331, Medical Supply Chain v. Neoforma, Inc., et al
Dist/Ag docket: 05-CV-2299-CM

Dear Clerk:

Please be advised that the mandate for this case has issued today. Please file accordingly in the records of your court or agency.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk of the Court

cc: Andrew M. DeMarea
Sophie N. Froelich
Jonathan H. Gregor
Kathleen A. Hardee
Ira Dennis Hawver
Robert A. Henderson
Janice Vaughn Mock
Mark A. Olthoff

EXHIBIT 9

John K. Power
William E. Quirk
Stephen N. Roberts
Kathleen Bone Spangler

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff*	)))) Case No. 06-1012-CV-W-FJG) State Court No. 0616-CV32307
vs.	)) (Properly Case No. 05-0210-) CV-W-ODS)
US BANCORP, NA US BANK, NA *Defendants*	)))

NOTICE OF APPEAL

Comes now the plaintiff Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and makes the following notice of appeal from this court's order to transfer the concurrent jurisdiction state claims to the Kansas District Court when the removal from state court was obtained through fraud on this court and federal jurisdiction was exclusively in the US Tenth Circuit Court of Appeals where there was a lack of complete diversity at the time of transfer. The plaintiff also appeals this court's refusal to abstain under the "first to file" rule.

The plaintiff was not able to appeal the transfer at law until the transferee court relinquished jurisdiction. On September 4, 2008 the transferee court granted a Rule 12(b)(6) dismissal of one or more judicial units or claims based on Missouri State law over conduct of the defendants in Misouri.

The plaintiff now timely appeals.

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

EXHIBIT 10

I certify that on September 5th, 2008 I have served the opposing counsel with a copy of the foregoing notice using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff
MARK A. OLTHOFF MO #38572
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Facsimile: (816) 374-0509

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

S/ Samuel K. Lipari
_____
Samuel K. Lipari

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMUEL K. LIPARI,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. 08-3087**
	)	
U.S. BANCORP and U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
	)	
Appellees.	)	

APPELLEES' MOTION TO DISMISS

Appellees U.S. Bancorp and U.S. Bank National Association, pursuant to Fed. R. App. P. 27 and Eight Circuit Local Rule 47(A), hereby move to dismiss the appellant's appeal. As grounds for this motion, appellees state:

1. On September 5, 2008, appellant filed his notice of appeal from the Western District of Missouri. Specifically, appellant appeals from the District Court's April 4, 2007 interim order denying appellant's motion for remand and transferring this case to the District of Kansas. (Exhibit A hereto.)

2. This Court is without jurisdiction to decide this appeal in that this matter has been pending in the United States District Court for the District of Kansas since its transfer from the Western District of Missouri on April 9, 2007 and receipt in the District of Kansas April 10, 2007. (Exhibit B (Missouri docket sheet) and Exhibit C (Kansas docket sheet) hereto reflecting physical transfer of files.) As a result, this case has not been pending within the district courts of the Eighth Circuit for more than 17 months.

3. The District Court for the Western District of Missouri did not certify any order for immediate interlocutory appeal under 28 U.S.C. § 1292(b). Appellant did not file a writ request in this Court asking that the District Court be prohibited form accomplishing the transfer

EXHIBIT 11

set forth in its April 4, 2007 order. Nor is the order one of the types that is immediately appealable under 28 U.S.C. § 1292(a).

4. This Court is without jurisdiction to decide the appeal in that there is not a final judgment disposing of all claims against all parties. On September 4, 2008, the United States District Court for the District of Kansas entered its Memorandum and Order dismissing all but one of the plaintiff's claims. (Exhibit D hereto.) Count IV, purporting to assert a claim for misappropriation of trade secrets, remains pending in the Kansas federal court.

5. Accordingly, because the Court lacks jurisdiction to hear this appeal, it should be dismissed.

BACKGROUND

The appellant's litigation with these defendants has consumed nearly six years and is reflected in several orders and decisions. *See Medical Supply Chain, Inc. v. US Bancorp. et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished) (Exhibit E); *Medical Supply Chain, Inc. v. Novation, et al.*, 419 F. Supp.2d 1316 (D. Kan. 2006), *appeal dismissed* 508 F.3d 572 (10th Cir. 2007). The suit pertinent to this appeal was filed in 2006, removed to federal court and remains pending in the United States District Court for the District of Kansas. (Exhibits A, B, D.)

BASIS FOR DISMISSAL

An appeal should be dismissed when this Court lacks jurisdiction to hear it. This matter is a prime example. Mr. Lipari's claims have been pending (and continue to pend) in the United States District Court for the District of Kansas since April 2007. (Exhibits A-D.) While the notice of appeal purports to challenge interim orders of the United States District Court for the Western District of Missouri, namely its decisions denying remand and ordering transfer, Exhibit A, there is not an appealable order from which the appellant may seek this Court's

review. *See Midwest Motor Express, Inc. v. Central States Southeast and Southwest Pension Fund*, 70 F.3d 1014, 1016 (8th Cir. 1996)(transfer orders generally not immediately reviewable); *Saab v. Home Depot U.S.A.*, 469 F.3d 758, 759 (8th Cir. 2006)(orders denying remand ordinarily not immediately appealable).[1] Even if appellant could have sought review of the Missouri federal court order denying remand and transferring this matter to the District of Kansas, either by interlocutory appeal or extraordinary writ, his notice of appeal to this Court some 17 months after the case has been transferred to and litigated in the Kansas federal court is untimely and without merit. *See Integrated Health Servs. of Cliff Manor, Inc. v. THCI Company, LLC*, 417 F.3d 953, 957 (8th Cir. 2005).

An equally compelling reason to dismiss this appeal is the admitted fact that the matter pending in the United States District Court for the District of Kansas has not been fully terminated. No judgment has been entered. While the Court recently dismissed five of the six counts in plaintiff's complaint, Count IV remains pending. (Exhibit D.) Because there is not a final judgment disposing of all claims against all parties, plaintiff's notice of appeal is premature, *see Action Electric, Inc. v. Local 292, Int'l B'hood of Elec. Workers*, 818 F.2d 15, 16 (8th Cir. 1987), in addition to being filed in the wrong Court.

THIS APPEAL IS FRIVOLOUS

Unquestionably, the instant notice of appeal is futile. More than that, the inexplicable delay in seeking appellate review from orders entered by the Missouri federal court seventeen months ago raises this filing to the level of frivolity. It is plain that the appellant cannot seek relief in this Court where the Missouri federal court had lost its jurisdiction for nearly a year and a half. *See Integrated Health Servs. of Cliff Manor, Inc.*, 417 F.3d at 957; *Midwest Motor*

[1] The district court did not certify the order for appeal under 28 U.S.C. § 1292(b) and the order is not otherwise immediately appealable under 28 U.S.C. § 1292(a).

Express, Inc., 70 F.3d at 1016; *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982). Having no legal or factual basis, the appeal is frivolous within the meaning and intent of Fed. R. App. P. 38.

WHEREFORE, appellees U.S. Bancorp and U.S. Bank National Association request that this Court dismiss appellant's appeal and for such other relief as the Court deems just and proper.

/s/ Mark A. Olthoff
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(913) 451-3361 (FAX)

ATTORNEYS FOR APPELLEES U.S. BANCORP AND U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the above and foregoing was delivered via United States mail, postage prepaid, this 16th day of September, 2008, to:

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

Appellant

/s/ Mark A. Olthoff
Attorney for Appellees U.S. Bancorp and U.S. Bank National Association

FILED
OCT 01 2008
MICHAEL GANS
CLERK OF COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMUEL K. LIPARI	)
(Assignee of Dissolved	)
Medical Supply Chain, Inc.)	) Case No. 08-03087
Plaintiff	) (Appeal from
	) Case No. 06-1012-CV-W-FJG
	) State Court No. 0616-CV32307
vs.	) Originally Case No. 05-0210-
	) CV-W-ODS)
US BANCORP, NA	)
US BANK, NA	)
Defendants	)

REPLY TO DEFENDANTS' MOTION TO DISMISS APPEAL

Comes now the plaintiff Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and makes the following reply to the defendants US Bancorp NA and US Bank, NA's motion to dismiss the appeal. The appellee's motion to dismiss is frivolous for the following grounds:

1. The order transferring the state claims removed from the 16th Circuit State of Missouri Circuit court to the Kansas District Court is or will be appealable upon dismissal in the transferee court.

2. The appellant timely appealed the dismissal of his Missouri state law based contract and tortuous interference claims by filing a notice of appeal within thirty days of their dismissal in Kansas District Court.

RECEIVED
OCT 1 2008
U.S. COURT OF APPEALS
EIGHTH CIRCUIT

EXHIBIT 12

3. The defendants' argument that the plaintiff is 17 months too late is spurious and contrary to clearly established law preventing appeal of a transfer until the conclusion of litigation in the transferee court.

4. Under the Missouri Supreme Court's determination of Missouri state law and the Kansas District Court's dismissal of complete judicial units makes them ripe for review.

SUGGESTION IN SUPPORT OF THE RIPENESS FOR APPEAL

The defendants engaged in forum shopping and changed the choice of law rules by using a 28 U.S.C. § 1404(a) transfer in a way cautioned against by this court in *Kansas Pub. Emp. Retirement Sys. v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608, 611 at 613 (8th Cir.1995). The defendants obtained transfer of the action after the fraudulent removal from the 16th Circuit Missouri State Court to the Kansas District court to avoid the *stare decisis* effect of *Intern. Casings Group v. Premium Standard Farms*, 358 F.Supp.2d 863 (W.D. Mo., 2005) and *Crestwood Shops, L.L.C. v. Hilkene*, No. WD 65694 (Mo. App. 8/8/2006) applying Missouri's statutory compliance with 15 USC §7001, the federal Electronic Signatures in Global and National Commerce Act, "E-SIGN" in the way the plaintiff had advocated based on the November 28, 2000 writings of Patrick A. Randolph. Jr., a UMKC School of Law Professor. In fact Kansas District Court Judge Carlos Murguia has ruled that the Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri's interpretation of Missouri law is "implausible."

I. Reviewability of a transfer order arises after dismissal

Neither the transfer nor the denial of the plaintiff's Motion to Remand can be reviewed until judgment by the transferee court occurs.

A. Denial of Remand

The denial of the plaintiff's motion to remand is an interlocutory order not immediately reviewable. *Chicago, Rock I. & Pac. R. Co. v. Stude*, 346 U.S. 574, 578, 74 S.Ct. 290, 293, 98 L.Ed. 317 (1954) and authorities cited thereat (denial of remand not final or appealable if standing alone); *Brough v. United Steelworkers of America*, 437 F.2d 748, 749 (1st Cir.1971) (denial of remand is nonappealable interlocutory order). Review of a remand denial is available at the end of the case. See *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir.1981) ("Ordinarily, a district court's refusal to remand an action is not in and of itself a final order and cannot be reviewed unless and until a final judgment has been entered."); *Boone v. Citigroup, Inc.*, 416 F.3d 382, 388 (5th Cir.2005) (reviewing denial of remand motion on appeal from final judgment).

As a matter of appellate jurisdiction, § 1291 review is available to the plaintiff raising the remand issue upon entry of a final judgment. See generally 19 James Wm. Moore et al., Moore's Federal Practice ¶ 202.11[5] (3d ed. 1997) ("An order denying a motion to remand a case to the state court from which it was removed . . . may be appealed together with the appeal of the final judgment.") (footnotes omitted).

B. Order Transferring Action to Kansas District Court

A transfer order is an interlocutory order that is not immediately reviewable by appeal. See *D'Ippolito v. American Oil Co.*, 401 F.2d 764, 764-65 (2d Cir. 1968); 17 Moore's Federal Practice 111.60[1] (3d ed. 1999). See also *In re Lieb*, 915 F.2d 180, 184 (5th Cir.1990) (noting that a transfer order is not a final judgment and is not immediately appealable). The plaintiff's decision to not seek mandamus review of an interlocutory ruling does not forfeit the opportunity to obtain review on appeal from a final judgment. See 19 Moore 203.32[3][b]; *Arthur v. Nyquist*, 547 F.2d 7, 9 (2d Cir. 1976) (interlocutory appeal permissive, not mandatory).

The Tenth Circuit does not have jurisdiction to review the Missouri District Court's order transferring the action to Kansas District Court:

"We lack jurisdiction to consider Copley's first argument, which concerns the North Carolina district court's decision to transfer this case to the Missouri district court. *Technitrol, Inc. v. McManus*, 405 F.2d 84, 87 (8th Cir.1968) ("we have grave doubt whether we have any right to review the validity of a transfer order made by a federal District Court outside the circuit"), cert. denied, 394 U.S. 997, 89 S.Ct. 1591, 22 L.Ed.2d 775 (1969); *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1257 (4th Cir.1991); *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 985-86 (11th Cir.1982)."

U.S. v. Copley, 25 F.3d 660 at 662 (C.A.8 (Mo.), 1994). Similarly the Tenth Circuit Court lacks jurisdiction to review the Missouri District Court's order denying remand. See *St. Jude Medical, Inc. v. Lifecare International*, 250 F.3d 587 at 593 (8th Cir., 2000). Review in the Tenth Circuit would be impractical or unlikely:

"Transferee courts have expressed a strong reluctance to review a transfer order indirectly by means of a motion to retransfer. They have the power to do so if the contention is that the transferor court lacked power to order the transfer rather than merely that the transferor court abused its discretion in applying the statute, but even then the doctrine of law of the case ordinarily will suggest the wisdom of not reexamining the decision of a coordinate court.

15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3846 (2d ed.1986)... As noted in dicta by the Supreme Court, "transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988)."

Koehler v. Green, 370 F.Supp.2d 904 at 906 (E.D. Mo., 2005)

II. The Appeal was timely

The plaintiff filed the current notice of appeal on September 5, 2008, one day after the September 4th, 2008 order dismissing the plaintiff's Missouri state law breach of contract and tortuous interference claims. "Generally, a party in a civil case must file a notice of appeal "within 30 days after the judgment or order appealed from is entered." Fed. R.App. P. 4(a)(1)(A)." *Dieser v. Continental Cas. Co.*, 440 F.3d 920 (8th Cir., 2006).

III. The assertion the appeal is 17 months late is spurious

The above cited authorities clearly establish that the plaintiff could not have appealed the interlocutory orders of the Western District of Missouri District court denying the motion to remand or transferring the action to Kansas District Court until dismissal of the plaintiff's claims occurred. The defendants' assertion that the plaintiff is 17 months too late is frivolous and intentionally designed to deceive this court.

IV. Dismissal of Complete Judicial Units

The appeal is from the trial court's dismissal of the plaintiff's Missouri state law contract and interference with contract claims. The plaintiff believes the transfer and failure to remand the claims are both now appealable but if not will be in this circuit upon the judgment of the remainder of the claims.

Under Missouri state law the dismissed claims themselves are now appealable. The Missouri Supreme Court's guidance on making a judgment final stating that "a judgment is final only when it disposes of a `distinct judicial unit.'" See *Lumbermen Mutual Casualty v. Thornton*, 36 S.W.3d 398, 402 (Mo.App. 2000)., citing *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997). The term "distinct judicial unit" means "the final judgment on a claim, and not a ruling on some of several issues arising out of the same transaction or occurrence which does not dispose of the claim." *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997), quoting *State ex rel. State Hwy. Comm'n. v. Smith*, 303 S.W.2d 120, 123 (Mo.1957). "It is `differing,' `separate,' `distinct' transactions or occurrences that permit a separately appealable judgment, not differing legal theories or issues presented for recovery on the same claim." *Id.*

The court's order disposes of distinct "judicial unit[s]," defined as "the final judgment on a claim, and not a ruling on some of several issues arising out of the same transaction or occurrence which does not dispose of the claim." *Penn-Am. Ins. Co. v. The Bar, Inc.*, 201 S.W.3d 91, 95 (Mo. App. 2006); See also *Bell Scott, LLC v. Wood, Wood, & Wood Invs., Inc.*, 169 S.W.3d 552, 554 (Mo. App. 2005).

CONCLUSION

Whereas for the above stated reasons the plaintiff/appellant respectfully requests the court deny the appellee/defendants' motion to dismiss the appeal.

Respectfully submitted,

S/Samuel K. Lipari

Samuel K. Lipari
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816-365-1306
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Pro se

Certificate of Service

I certify that on September 28 2008 I have served the opposing counsel with a copy of the foregoing via US Mail:

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

S/Samuel K. Lipari

Samuel K. Lipari

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

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

STIPULATION FOR ORDER OF DISMISSAL OF REMAINING CLAIMS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(A)(2)

Comes now the plaintiff Samuel K. Lipari appearing pro se and Stipulation for Order of Dismissal of remaining claims pursuant to Federal Rule of Civil Procedure 41(a)(2).

STATEMENT OF FACTS

1. Plaintiff brought claims in good faith in a sworn complaint and with evidence the defendants US Bank NA and US Bancorp, Inc. had disassembled his confidential business plan violating the written contract preventing unauthorized disclosure and dissemination of the proprietary data and algorithm in violation of the Missouri Trade Secrets Act.

2. The plaintiff had no way to know that his claims would be fraudulently removed to federal court then transferred to the District of Kansas for the corrupt purpose of depriving the plaintiff of discovery including the written report of US Bank employee Doug Lewis to the Saint Louis office documenting Lewis's transmission of the plaintiff's trade secrets and other Due Process provided for under the Federal Rules of Civil Procedure.

3. Consumers in the Missouri market for hospital supplies and in the nationwide market for hospital supplies were injured by the conduct of the defendants US Bank NA and US Bancorp, Inc.'s unauthorized disclosure and dissemination acting in conspiracy to restrain competition in the market for hospital supplies with hospital supply cartel members that included US Bancorp Piper Jaffray; Neoforma, Inc.; Novation LL;C and The General Electric Company.

4. The plaintiff voluntarily dismisses his 09/05/2008 Motion for Leave to Amend Complaint, (doc. 139) which has not yet been ruled upon.

EXHIBIT 13

5. The plaintiff stipulates a dismissal of Count III Trade Secret Misappropriation Under Section 417.450 RSMO of The Uniform Trade Secrets Act with prejudice under Rule 41(a)(2) while retaining his objection to the validity of this court's jurisdiction over concurrent state claims dismissed without prejudice from *Medical Supply Chain, Inc. v. Neoforma, Inc. et al* KS Dist. Ct. Case # 05-2299.

MEMORANDUM OF LAW

The defendants have not answered or otherwise sought a Rule 12 dismissal or a summary judgment of the plaintiff's proposed amendments. The plaintiff voluntarily dismisses by stipulation under Rule 41(a)(1)(ii) the proposed amendments to include claims against the defendants under the proposed Count VI cause of action for declaratory and injunctive relief that subtitle b, section 351 of the Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA PATRIOT) Act of 2001 amendment of 31 U.S.C. §5318(g) violates the First and Fifth Amendments of the United States Constitution and monetary damages for fraud on the court by US Bank NA and US Bancorp, Inc. to obtain the sanctioning of the plaintiff by falsely accusing the plaintiff of failing to produce discoverable documents. Those two proposed amended claims are now dismissed without prejudice:

> "A voluntary dismissal by stipulation under Rule 41(a)(1)(ii) is of right, cannot be conditioned by the court, and does not call for the exercise of any discretion on the part of the court. E.g., *In re Wolf*, 842 F.2d 464, 466 (D.C.Cir.1988) (per curiam); *Hinsdale v. Farmers Nat'l Bank & Trust Co*., 823 F.2d 993, 995 & n. 1 (6th Cir.1987); *Gardiner v. A.H. Robins Co*., 747 F.2d 1180, 1189-90 (8th Cir.1984). Once the stipulation is filed, the action on the merits is at an end. *In re Wolf*, 842 F.2d at 466; *McCall-Bey v. Franzen*, 777 F.2d 1178, 1185 (7th Cir.1985); *Gardiner*, 747 F.2d at 1189. We agree with the Seventh Circuit that "[a]n unconditional dismissal terminates federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by [Fed.R.Civ.P.] 60(b)." *McCall-Bey*, 777 F.2d at 1190; see also *Hinsdale*, 823 F.2d at 995-96."
>
> *Smith v. Phillips*, 881 F.2d 902 (C.A.10, 1989).

To the extent this court was not divested of jurisdiction by the plaintiff's filing of a timely notice of appeal in *Medical Supply Chain, Inc. v. Neoforma, Inc. et al* KS Dist. Ct. Case # 05-2299 under *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982). *Smith v. Phillips*, 881 F.2d 902, 904 n. 5 (10th Cir.1989); *Garcia v. Burlington Northern R.R. Co*., 818 F.2d 713, 721 (10th Cir.1987) ("Filing a timely notice of appeal pursuant to Fed.R.App.P. 3 transfers the matter from the district court to the court of appeals) the plaintiff realizes that his claims for damages against the defendants under Count III Trade Secret Misappropriation Under Section 417.450 RSMO of The Uniform

Trade Secrets Act are now dismissed with prejudice under Rule 41(a)(2). However this court's Memorandum and Order of 10/10/08 which avoided resolving the protective order disputes in time for trial has made further work on prosecuting the 417.450 RSMO of The Uniform Trade Secrets Act claim futile for reasons beyond the control of the plaintiff and having nothing to do with the evidence of US Bank NA and US Bancorp, Inc.'s violation or the important public policy of the State of Missouri's legislature.

CONCLUSION

The court must now end its conduct toward the parties in relationship to resolving any claim brought by the plaintiff. Those claims have now been removed from this proceeding.

Respectfully submitted,

S/Samuel K. Lipari
Samuel K. Lipari
Plaintiff
Pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via email, on this 15th day of October, 2008 to:

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ATTORNEYS FOR DEFENDANTS

S/ Samuel K. Lipari
_____
Samuel K. Lipari

IN THE UNITED STATES COURT
WESTERN DISTRICT OF MISSOURI

SAMUEL K. LIPARI,	)
	)
Plaintiff,	)
	)
v.	) Case No. 4:06-cv-01012-FJG
	)
U.S. BANCORP and	)
U.S. BANK NATIONAL ASSOCIATION,	)
	)
Defendants.	)

PLAINTIFF'S SECOND AMENDED NOTICE OF APPEAL

Comes now the plaintiff Samuel K. Lipari appearing pro se and gives an amended notice of appeal to supplement the orders sought to be appealed to include the subsequent orders by the Kansas District Court magistrate upholding the defendants' automatic protective orders and ordering the plaintiff to show cause, awarding $700.00 in attorney fees and the trial judges' memorandum and order.

Respectfully submitted,

S/Samuel K. Lipari
Samuel K. Lipari
Plaintiff
Pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via email, on this 3rd day of December, 2008 to:

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EXHIBIT 14

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ATTORNEYS FOR DEFENDANTS

S/ Samuel K. Lipari

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		(Entered: 12/02/2008)
12/05/2008		***Remark: Plaintiff's Second Amended Notice of Appeal was received by this court and then forwarded this date to the District of Kansas for processing at the instruction of chambers. (Carr, Lori) (Entered: 12/05/2008)

PACER Service Center			
Transaction Receipt			
12/08/2008 08:11:15			
PACER Login:	la1630	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	4:06-cv-01012-FJG
Billable Pages:	3	**Cost:**	0.24

United States Court of Appeals
For the Eighth Circuit
Thomas F. Eagleton Court House
Room 24.329
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St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314)244-2400
FAX (314) 244-2780
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December 9, 2008

Ms. Patricia Brune, Clerk
U.S. District Court
Charles Evans Whittaker Courthouse
400 E. Ninth Street, Room 1510
Kansas City, MO 64106

Re: 4:60-cv-01012-FJG Lipari v. U.S. BANCORP, et al.

Dear Ms. Brune:

Enclosed for filing in your court is a notice of appeal received in this office on December 8, 2008, from Mr. Lipari.

Sincerely,

Michael E. Gans

Michael E. Gans
Clerk of Court

MEG/psa

enclosure

cc: Samuel K. Lipari

EXHIBIT 16

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
08 OCT 28 PM 3:33
CLERK
BY DEPUTY
AT KANSAS CITY, KS

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

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

REPLY TO DEFENDANTS' CONDITIONAL STIPULATION OF DISMISSAL

Comes now the plaintiff Samuel K. Lipari appearing pro se and responds to the defendant's conditional stipulation of dismissal dated October 21st, 2008.

The plaintiff has not stipulated to any attorney's fees. The defendant's motion for such fees as a condition failed

The defendants' repeatedly in bad faith burdened the plaintiff with motions and requests violating the Federal Rules of Civil procedure including a second motion to dismiss. There could not have been two motions for dismissal:

> "We are presented here with a unique situation, however, because the cause of action not incorporated in the second amended complaint had already been subjected to a 12(b)(6) ruling. The opposing party could not therefore direct a further motion at that cause of action."

Davis v. TXO Production Corp., 929 F.2d 1515 at 1517 (C.A.10 (Okl.), 1991).

Because the same matter or controversy is before the court in two case numbers, no fees are warranted for dismissal:

> "Kidde re-filed its complaint the same day it moved to dismiss Kidde I. Thus, the district court had before it two complaints that were the same, except that Kidde II was filed after Kidde had allegedly cured the standing problem that had been raised in Kidde I.6 Nevertheless, USI opposed Kidde's motion to dismiss, arguing that it would be "severely prejudiced if Kidde were allowed to simply dismiss its claim without prejudice and then start over," because it has expended significant resources and effort on Kidde I. The problem with that argument is an unstated and apparently false assumption. The implicit assumption is that USI cannot use the same factual and legal resources in Kidde II that it developed in Kidde I. The record belies that. It appears instead that the effort USI has expended in preparing for the first trial will not be wasted. USI can, and no doubt will, use in the second action the discovery and work product obtained in the first, which is a compelling reason to conclude that the district court did not abuse its discretion in dismissing Kidde I. See Davis, 819 F.2d at 1275 (noting with approval precedent reversing denial of voluntary dismissal when the defendant had shown no prejudice beyond "the annoyance of a second litigation upon the same subject matter" (quoting Durham, 385 F.2d at 369))."

EXHIBIT 17

Walter Kidde Portable Equipment, Inc. v. Universal Security Instruments, Inc., 479 F.3d 1330 at 1337-1338 (Fed. Cir., 2007).

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).

This court's own rule or precedent is that a voluntary dismissal with prejudice does not require an order:

> "The Kansas District court's own precedent is that only a motion under 41(a)(2) seeking dismissal without prejudice requires a court order:
> Under Rule 41(a)(2), "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Thus, a dismissal without prejudice under Rule 41(a)(2) depends on the Court's discretion."

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

CONCLUSION

The plaintiff respectfully reminds the court that the court's conduct toward the parties in relationship to resolving any claims brought by the plaintiff has ended. Those claims have now been removed from this proceeding. The defendants have not brought any counterclaims.

Respectfully submitted,

S/Samuel K. Lipari

Samuel K. Lipari
Plaintiff
Pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via email, on this 28th day of October, 2008 to:

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ATTORNEYS FOR DEFENDANTS

S/ Samuel K. Lipari
Samuel K. Lipari

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 07-2146-CM**
	)	
US BANCORP NA and US BANK NA,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Plaintiff Samuel K. Lipari filed the instant action in Jackson County Circuit Court on November 28, 2006 (Jackson County Case No. 0616-CV-32307) against defendants US Bancorp NA and US Bank NA. This matter is before the court on plaintiff's Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2) (Doc. 147).

I. Factual Background

On December 13, 2006, defendants removed the action to the United States District Court for the Western District of Missouri, Western Division, on the basis of diversity. On April 10, 2007, the United States District Court for the Western District of Missouri transferred the case to this court pursuant to 28 U.S.C. § 1404(a). On September 4, 2008, the court dismissed all of plaintiff's claims except plaintiff's misappropriation of trade secrets claim (Doc. 137). On October 15, 2008, plaintiff filed a Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2). In plaintiff's stipulation, he withdraws his Motion for Leave to Amend Complaint, which had not been ruled on, and stipulates to the dismissal of his misappropriation of trade secrets claim with prejudice. He also states that "the plaintiff realizes that his claims for damages against the defendants under Count

EXHIBIT 18

III Trade Secrets Misappropriation Under Section 417.450 RSMO of The Uniform Trade Secrets Act are now dismissed with prejudice under Rule 41(a)(2)." He further states, "The court must now end its conduct toward the parties in relationship to resolving any claim brought by plaintiff. Those claims have now been removed from this proceeding." In defendants' response to plaintiff's stipulation, defendants agree to join the stipulation but only on the condition that the order of dismissal "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" (Doc. 153). In his reply, plaintiff disputes the fees and does not agree to dismiss the claims with defendants' conditions (Doc. 155).

After filing his stipulation of dismissal and before defendants could respond to the stipulation, plaintiff appealed this lawsuit to the Tenth Circuit Court of Appeals. On November 14, 2008, the Tenth Circuit Court of Appeals abated the appeal pending this court's resolution of plaintiff's Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2) (Doc. 147).

II. Judgment Standard

Pursuant to Federal Rule of Civil Procedure 41(a)(1), a plaintiff can only voluntarily dismiss a case without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Under Rule 41(a)(2), the court may allow a plaintiff to voluntarily dismiss an action "upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). "The rule is designed primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Brown v. Baeke*, 413 F.3d 1121, 1123 (10th Cir. 2005) (quotation omitted). The court should grant a motion for voluntary dismissal "[a]bsent 'legal prejudice' to the defendant." *Id.* (quotation omitted).

When determining "legal prejudice" the court is obligated to consider the novelty of the circumstances of the case. *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997). The court should consider the relevant factors, including: "the opposing party's effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the present stage of litigation." *Id*. (citing *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.*, 77 F.3d 354, 358 (10th Cir. 1996)).

Under Rule 41(a)(2), the court may impose terms upon the dismissal of a plaintiff's claim, such as payment of attorneys' fees or a limitation on the refiling of certain claims. *See Gonzales v. City of Topeka Kan.*, 206 F.R.D. 280, 283 (D. Kan. 2001) (citing 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2366, at 305–314 (1995)). *Id*. (quoting *American Nat. Bank and Trust Co. v. Bic Corp.,* 931 F.2d 1411, 1412 (10th Cir. 1991)). "'Conditions are designed to alleviate any prejudice a defendant might otherwise suffer upon refiling of an action.'" When the court decides to impose such terms, it must give the plaintiff an opportunity to withdraw its request for dismissal. *See id.*

III. Analysis

This matter cannot be voluntarily dismissed under Rule 41(a)(1) because defendants have answered the complaint and the parties have not filed a joint stipulation of dismissal. Thus, the court will consider plaintiff's request to dismiss the lawsuit under Rule 41(a)(2). After reviewing the record, the court cannot say that plaintiff's proposed voluntary dismissal is "[a]bsent 'legal prejudice' to the defendant." On August 18, 2008, the court ordered plaintiff to pay reasonable attorneys' fees and expenses related to defendants' Motion To Compel Compliance with Rule 26(a)(1). The court ordered the parties to file pleadings regarding the appropriate amount of the fees and expenses. On November 26, 2008, Magistrate Judge Waxse ordered plaintiff to pay defendant's reasonable attorneys' fees and expenses in the amount of $700 (Doc. 158).

The court finds that at this stage of the proceedings any voluntary dismissal must recognize the Judge Waxse's November 26, 2008 order regarding attorneys' fees and include an order for plaintiff to pay defendants' attorneys' fees and expenses as set forth in that order. At the time plaintiff filed his stipulation, Judge Waxse had awarded defendants their fees but had not set the amount. Because plaintiff was unaware of the amount of fees he would be required to pay when he filed his stipulation for an order of dismissal, plaintiff should have an opportunity to withdraw his stipulation. Plaintiff shall have up to and including December 10, 2008 to withdraw his stipulation for order of dismissal. If plaintiff fails to withdraw his stipulation, the court will dismiss plaintiff's misappropriation of trade secrets claim—the only claim remaining in this action—and order plaintiff to pay the reasonable attorneys' fees and expenses as ordered in the Judge Waxse's November 26, 2008 order.

IT IS THEREFORE ORDERED that plaintiff shall have up to and including December 10, 2008 to withdraw his stipulation for order of dismissal. If plaintiff fails to withdraw his stipulation, the court will dismiss this action and order plaintiff to pay the reasonable attorneys' fees and expenses as ordered in the Judge Waxse's November 26, 2008 order.

Dated this 26th day of November 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

November 14, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAMUEL K. LIPARI, Plaintiff - Appellant, v. US BANCORP NA; US BANK NA, Defendants - Appellees	No. 08-3287 (D.C. No. 2:07-CV-2146-CM) (D. of Kansas)

ORDER

In response to the court's orders of October 17 and November 13, 2008, the parties have filed "Appellant's Memorandum in Support of Limited Appellate Jurisdiction" and the appellees' "Memorandum Concerning Appellate Jurisdiction." Being duly advised, the court now holds this appeal in abeyance pending the district court's resolution of the pending "Stipulation for Order of Dismissal of Remaining Claims Pursuant to Federal Rule of Civil Procedure 41(a)(2)," the "Defendants' Response to and Conditional Joinder in Plaintiff's Stipulation for Voluntary Dismissal with Prejudice Under FRCP 41(A)," and the appellant's reply to that response.

Once the district court has resolved those pending matters, **the parties shall both notify this court in writing within ten days from the date of entry of the dispositive order.** If there has been no resolution of those pending matters by December 15, 2008,

the parties shall both file written status reports with this court advising of the current status of the pending matters.

Entered for the Court,
ELISABETH A. SHUMAKER
Clerk of Court

by:
Douglas E. Cressler
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAMUEL K. LIPARI	)
(Assignee of Dissolved	)
Medical Supply Chain, Inc.)	) Case No. 08-03287
Plaintiff	) (Appeal from
	) Case No. 06-1012-CV-W-FJG
	) State Court No. 0616-CV32307
vs.	) Originally Case No. 05-0210-
	) CV-W-ODS)
US BANCORP, INC.	)
US BANK, NA	)
Defendants	)

STATUS REPORT ON APPEAL

Comes now the plaintiff Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and makes the following status report on the appeal as ordered by the Clerk of the Court.

STATEMENT OF FACTS

1. On November 26, 2008 the trial court judge Hon. Judge Carlos Murguia made a dispositive Memorandum and Order. See Exhibit 1.

2. The November 26, 2008 order specifies the dismissal of the plaintiff-appellant's remaining claims:

> **"IT IS THEREFORE ORDERED that plaintiff shall have up to and including December 10, 2008 to withdraw his stipulation for order of dismissal. If plaintiff fails to withdraw his stipulation, the court will dismiss this action and order plaintiff to pay the reasonable attorneys' fees and expenses as ordered in the Judge Waxse's November 26, 2008 order**.
> Dated this 26th day of November 2008, at Kansas City, Kansas." [Emphasis in original]

November 26 Memorandum and Order page 4. [Emphasis in original]

EXHIBIT 20

3. On December 3, 2008 the plaintiff filed an amended notice of appeal encompassing this order of the trial judge Hon. Judge Carlos Murguia with the Kansas District Court (exhibit 2) and the Western District of Missouri. Exhibit 3.

4. On December 8 this court treated the amended notice of appeal as a new separate appeal docketing it as a new appeal under Case No. 08-3338.

5. This court ordered the plaintiff-appellant to show cause over what order he was appealing from (the Chief Deputy Clerk of the Court Douglas E. Cressler stating erroneously that the plaintiff was appealing from a magistrate order). See Exhibit 4 at page 2 ¶4.

6. The amended notice of appeal lists the trial court judge's memorandum and order:

> "Comes now the plaintiff Samuel K. Lipari appearing pro se and gives an amended notice of appeal to supplement the orders sought to be appealed to include the subsequent orders by the magistrate upholding the defendants' automatic protective orders and ordering the plaintiff to show cause, awarding $700.00 in attorney fees and the trial judges' memorandum and order."

Exhibit 2 Amended Notice of Appeal.

MEMORANDUM OF LAW

The district court's November 26, 2008 Memorandum and Order "announces" a judgment of dismissal as all district court dispositive orders do prior to entry of judgment: "Fed. R. App. Proc. 4(a)(2) states that "[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." *U.S. v. Scarfo*, 263 F.3d 80 at 87 (3rd Cir., 2001).

The plaintiff's appeal which this court placed in abeyance is now controlled by this court's precedent 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.").

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 that on December 10, 2008 I have served the opposing counsel with a copy of the foregoing notice using email and the US Postal Service having sent the copy with postage prepaid to the following:

Mark A. Olthoff
MARK A. OLTHOFF MO lic. #38572
ANDREW M. DEMAREA MO lic. #45217

SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

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

S/ Samuel K. Lipari
Samuel K. Lipari

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 07-2146-CM**
	)	
US BANCORP NA and US BANK NA,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Plaintiff Samuel K. Lipari filed the instant action in Jackson County Circuit Court on November 28, 2006 (Jackson County Case No. 0616-CV-32307) against defendants US Bancorp NA and US Bank NA. This matter is before the court on plaintiff's Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2) (Doc. 147).

I. Factual Background

On December 13, 2006, defendants removed the action to the United States District Court for the Western District of Missouri, Western Division, on the basis of diversity. On April 10, 2007, the United States District Court for the Western District of Missouri transferred the case to this court pursuant to 28 U.S.C. § 1404(a). On September 4, 2008, the court dismissed all of plaintiff's claims except plaintiff's misappropriation of trade secrets claim (Doc. 137). On October 15, 2008, plaintiff filed a Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2). In plaintiff's stipulation, he withdraws his Motion for Leave to Amend Complaint, which had not been ruled on, and stipulates to the dismissal of his misappropriation of trade secrets claim with prejudice. He also states that "the plaintiff realizes that his claims for damages against the defendants under Count

EXHIBIT 1

III Trade Secrets Misappropriation Under Section 417.450 RSMO of The Uniform Trade Secrets Act ar now dismissed with prejudice under Rule 41(a)(2)." He further states, "The court must now end its conduct toward the parties in relationship to resolving any claim brought by plaintiff. Those claims have now been removed from this proceeding." In defendants' response to plaintiff's stipulation, defendants agree to join the stipulation but only on the condition that the order of dismissal "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" (Doc. 153). In his reply, plaintiff disputes the fee and does not agree to dismiss the claims with defendants' conditions (Doc. 155).

After filing his stipulation of dismissal and before defendants could respond to the stipulation, plaintiff appealed this lawsuit to the Tenth Circuit Court of Appeals. On November 14, 2008, the Tenth Circuit Court of Appeals abated the appeal pending this court's resolution of plaintiff's Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2) (Doc 147).

II. Judgment Standard

Pursuant to Federal Rule of Civil Procedure 41(a)(1), a plaintiff can only voluntarily dismiss a case without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Under Rule 41(a)(2), the court may allow a plaintiff to voluntarily dismiss an action "upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). "The rule is designed primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Brown v. Baeke*, 413 F.3d 1121, 1123 (10th Cir. 2005) (quotation omitted). The court should grant a motion for voluntary dismissal "[a]bsent 'legal prejudice' to the defendant." *Id.* (quotation omitted).

When determining "legal prejudice" the court is obligated to consider the novelty of the circumstances of the case. *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997). The court should consider the relevant factors, including: "the opposing party's effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the present stage of litigation." *Id*. (citing *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.*, 77 F.3d 354, 358 (10th Cir. 1996)).

Under Rule 41(a)(2), the court may impose terms upon the dismissal of a plaintiff's claim, such as payment of attorneys' fees or a limitation on the refiling of certain claims. *See Gonzales v. City of Topeka Kan.*, 206 F.R.D. 280, 283 (D. Kan. 2001) (citing 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2366, at 305–314 (1995)). *Id*. (quoting *American Nat. Bank and Trus Co. v. Bic Corp.,* 931 F.2d 1411, 1412 (10th Cir. 1991)). "'Conditions are designed to alleviate any prejudice a defendant might otherwise suffer upon refiling of an action.'" When the court decides to impose such terms, it must give the plaintiff an opportunity to withdraw its request for dismissal. *See i*

III. Analysis

This matter cannot be voluntarily dismissed under Rule 41(a)(1) because defendants have answered the complaint and the parties have not filed a joint stipulation of dismissal. Thus, the court will consider plaintiff's request to dismiss the lawsuit under Rule 41(a)(2). After reviewing the record, the court cannot say that plaintiff's proposed voluntary dismissal is "[a]bsent 'legal prejudice' to the defendant." On August 18, 2008, the court ordered plaintiff to pay reasonable attorneys' fees and expenses related to defendants' Motion To Compel Compliance with Rule 26(a)(1). The court ordered the parties to file pleadings regarding the appropriate amount of the fees and expenses. On November 26, 2008, Magistrate Judge Waxse ordered plaintiff to pay defendant's reasonable attorneys' fees and expenses in the amount of $700 (Doc. 158).

The court finds that at this stage of the proceedings any voluntary dismissal must recognize the Judge Waxse's November 26, 2008 order regarding attorneys' fees and include an order for plaintiff to pay defendants' attorneys' fees and expenses as set forth in that order. At the time plaintiff filed his stipulation, Judge Waxse had awarded defendants their fees but had not set the amount. Because plaintiff was unaware of the amount of fees he would be required to pay when he filed his stipulation fo an order of dismissal, plaintiff should have an opportunity to withdraw his stipulation. Plaintiff shall have up to and including December 10, 2008 to withdraw his stipulation for order of dismissal. If plaintiff fails to withdraw his stipulation, the court will dismiss plaintiff's misappropriation of trade secrets claim—the only claim remaining in this action—and order plaintiff to pay the reasonable attorneys' fees and expenses as ordered in the Judge Waxse's November 26, 2008 order.

IT IS THEREFORE ORDERED that plaintiff shall have up to and including December 10 2008 to withdraw his stipulation for order of dismissal. If plaintiff fails to withdraw his stipulation, the court will dismiss this action and order plaintiff to pay the reasonable attorneys' fees and expenses as ordered in the Judge Waxse's November 26, 2008 order.

Dated this 26th day of November 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

FILED
2 DEC -3 P 2:53
TIMOTHY
CLERK
BY DEPUTY
AT KANSAS CITY, KS

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

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

PLAINTIFF'S AMENDED NOTICE OF APPEAL

Comes now the plaintiff Samuel K. Lipari appearing pro se and gives an amended notice of appeal to supplement the orders sought to be appealed to include the subsequent orders by the magistrate upholding the defendants' automatic protective orders and ordering the plaintiff to show cause, awarding $700.00 in attorney fees and the trial judges' memorandum and order.

Respectfully submitted,

S/Samuel K. Lipari
Samuel K. Lipari
Plaintiff
Pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via email, on this 3rd day of December, 2008 to:

MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
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ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
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ademarea@stklaw.com
jheidrick@stklaw.com
(913) 451-3355

EXHIBIT 2

(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

S/ Samuel K. Lipari

Samuel K. Lipari
3520 NE Akin Blvd. #918
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com

IN THE UNITED STATES COURT
WESTERN DISTRICT OF MISSOURI

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:06-cv-01012-FJG
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

PLAINTIFF'S SECOND AMENDED NOTICE OF APPEAL

Comes now the plaintiff Samuel K. Lipari appearing pro se and gives an amended notice of appeal to supplement the orders sought to be appealed to include the subsequent orders by the Kansas District Court magistrate upholding the defendants' automatic protective orders and ordering the plaintiff to show cause, awarding $700.00 in attorney fees and the trial judges' memorandum and order.

Respectfully submitted,

S/Samuel K. Lipari
Samuel K. Lipari
Plaintiff
Pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via email, on this 3rd day of December, 2008 to:

MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
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JAY E. HEIDRICK KS #20770
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EXHIBIT 3

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(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

S/ Samuel K. Lipari

_____

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Lee's Summit, MO 64064-7910
USA
816-365-1306
saml@medicalsupplychain.com

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

December 9, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAMUEL K. LIPARI,

Plaintiff - Appellant,

v.

US BANCORP NA; US BANK NA,

Defendants - Appellees.

No. 08-3338
(2:07-CV-02146-CM-DJW)

ORDER

The plaintiff in underlying district court proceeding, Samuel K. Lipari, has filed what he styles as "Plaintiff's Amended Notice of Appeal" following his initiation of a prior attempted appeal, our Case No. 08-3287.

Fed. R. App. P. 3(c)(1)(B) requires an appellant to "designate the judgment, order, or part thereof being appealed." The appellant states only in his amended notice of appeal that he seeks to appeal "subsequent orders by the magistrate upholding the defendants' automatic protective orders and ordering the plaintiff to show cause, awarding $700.00 in attorney fees and the trial judges' memorandum and order." No dates or docket numbers for these orders are provided.

The "amended" notice of appeal was filed on December 3, 2008. It appears that Mr. Lipari is attempting to appeal the order entered November 26, 2008,

Exhibit 4

Docket No. 158. That order awarded the defendants $700.00 in attorneys fees.

An award of attorneys fees is collateral to and separate from a decision on the merits. See White v. New Hampshire Dep't of Emp. Sec., 455 U.S. 445, 451-52 n.13 (1982). We have accordingly opened a new appellate docket for this apparent appeal from the order granting attorneys fees to the defendants. The appellant will be obligated to pay the appellate filing and docketing fees for this appeal, or else be granted leave to proceed *in forma pauperis*.

The order that Mr. Lipari seeks to appeal was entered by a magistrate judge, not the district court judge. It does not appear that the case was being tried to the magistrate judge by consent of the parties. See 28 U.S.C. §§ 636 & 1291.

Within 14 days from the date of this order, Mr. Lipari shall (1) either pay the $455.00 filing fee for this appeal or file in the district court a motion seeking leave to proceed *in forma pauperis* in this appeal; and shall (2) file with this court a memorandum brief explaining what order or orders of the district court he is attempting to appeal and the governing federal laws that would establish any basis for this court's jurisdiction.

Failure to comply with the directives of this order will result in dismissal of the appeal for failure to prosecute, pursuant to Tenth Cir. R. 42.1, without further notice to the parties.

Within 14 days from the date of service of Mr. Lipari's memorandum brief, the defendants shall file their response to his memorandum brief stating their

views on whether appellate jurisdiction exists in this court for this appeal.

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court

by:
Douglas E. Cressler
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 08-3287
	)	(Appeal from Kansas District
	)	Case No. 07-CV-02146)
U.S. BANCORP, and	)	
	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

STATUS UPDATE CONCERNING APPELLATE COURT JURISDICTION

Appellees/Defendants U.S. Bancorp and U.S. Bank NA, through counsel Shughart Thomson & Kilroy, P.C., file this status update concerning appellate jurisdiction. This Court still lacks appellate jurisdiction because no final Order or Judgment has been entered by the Kansas District Court.

On November 26, 2008, the District Court found that appellant/plaintiff's voluntary stipulation was ineffective because such dismissal under such circumstances would not be "without prejudice" to the defendants. *See* Doc. No. 159. The District Court ordered Mr. Lipari to withdraw the stipulation by December 1 or the Court would dismiss the action and order Mr. Lipari to pay fees awarded by Magistrate Waxse. *See id.*

Mr. Lipari did not withdraw his stipulation and on December 5, 2008 the District Court ordered Mr. Lipari to show cause as to why his case should not be dismissed. *See* Doc. No. 164. Mr. Lipari filed his response to the show cause order on December 10, 2008. *See* Doc. No. 169. No further order has been issued and there has been no final order dismissing this case. Therefore, this Court still does not possess appellate jurisdiction.

EXHIBIT 21

Respectfully submitted,

s/ Mark A. Olthoff
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JAY E. HEIDRICK KS #20770
ANDREW M. DeMAREA KS #16141
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 APPELLEES/DEFENDANTS
U.S. BANCORP and
U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served via electronic mail this 11th day of December, 2008, to:

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

s/ Mark A. Olthoff
Attorney for Appellees/Defendants

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 08-3287
	)	(Appeal from Kansas District
	)	Case No. 07-CV-02146)
U.S. BANCORP, and	)	
	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

STATUS REPORT REGARDING APPELLATE COURT JURISDICTION

Appellees/Defendants U.S. Bancorp and U.S. Bank NA, through counsel Shughart Thomson & Kilroy, P.C., hereby notify the Court that on December 12, 2008, the United States District Court, District of Kansas entered a final Order dismissing plaintiff's suit with prejudice. *See*, Doc. #171.

Respectfully submitted,

s/ Jay E. Heidrick
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Facsimile: (913) 451-3361

EXHIBIT 22

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served via electronic mail this 18th day of December, 2008, to:

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

s/ Jay E. Heidrick
Attorney for Appellees/Defendants

FILED
United States Court of Appeals
Tenth Circuit

December 19, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAMUEL K. LIPARI, Plaintiff - Appellant, v. US BANCORP NA; US BANK NA, Defendants - Appellees.	Case Nos. 08-3287, 08-3338, and 08-3345 (D. Kans. No 2:07-CV-02146-CM-DJW)

ORDER

All three of the above-referenced appellate cases, 08-3287, 08-3338, and 08-3345, arise out of the same proceeding before the U.S. District Court for the District of Kansas, Lipari v. US Bancorp NA, No. 2:07-CV-02146-CM-DJW.

Case No. 08-3287 is an appeal by the plaintiff prior to the entry of final judgment of various orders. That case was being held in abeyance pending the entry of a final judgment order.

Case No. 08-3338 is another appeal by the plaintiff initiated prior to the entry of judgment. That case is currently pending responses following the entry of a jurisdictional show cause order.

However, the district court on December 12, 2008 entered a final judgment as to

all claims of the plaintiff, dismissed the case and in the same order, affirmed the magistrate judge's order relating to $700.00 in defendants' attorneys fees that the plaintiff has been ordered to pay. On December 17, 2008, the plaintiff filed a third notice of appeal referencing this final judgment.

Once a final judgment is entered, a prematurely filed notice of appeal ripens. Fed. R. App. P. 4(a)(2); Dodd Ins. Services, Inc. v. Royal Ins. Co., 935 F.2d 1152, 1154 n.1 (10th Cir. 1991). And, as previously noted, the plaintiff has filed another notice of appeal following the entry of final judgment.

The court directs as follows. Case Nos. 08-3287, 08-3338, and 08-3345 are consolidated for purposes of record preparation, briefing, and court consideration. Although other orders issued in these now consolidated appeals remain in effect, the parties are excused from filing any additional responses to jurisdictional show cause orders. Any previously ordered abatements are now lifted.

Because the plaintiff-appellant is proceeding without counsel, the district court shall transmit to this court a single record on appeal for all three appeals pursuant to Tenth Cir. R. 11.2. The record on appeal shall be transmitted on or before January 26, 2009.

All motions and briefs filed in these consolidated appeals will include all three case numbers on the cover in the case caption.

The consolidated opening brief of the plaintiff-appellant addressing all claims of error properly before the court in the three consolidated appeals will be due within 40

days after the record on appeal is filed. Fed. R. App. P. 31(a)(1). The consolidated response brief of the defendants-appellees and any consolidated reply brief of the plaintiff-appellant will then be due as provided in the applicable rules.

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court,

by:
Douglas E. Cressler
Chief Deputy Clerk

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 24

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

SAMUEL K. LIPARI,

Plaintiff - Appellant,

v.

US BANCORP NA; US BANK NA,

Defendants - Appellees.

No. 08-3287

ORDER

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

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

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

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

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

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

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court

by:
Douglas E. Cressler
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

EXHIBIT 25

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,

CIVIL ACTION

v.

No. 07-2146-CM-DJW

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

Defendants.

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.

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

---

[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

[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. Theglobe.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

F I L E D
United States Court of Appe
Tenth Circuit

October 17, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAMUEL K. LIPARI,

Plaintiff - Appellant,

v.

US BANCORP NA; US BANK NA,

Defendants - Appellees.

No. 08-3287

ORDER

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

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

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

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

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

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

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court

by:
Douglas E. Cressler
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

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

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

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

1. On September 4, 2008, the Court dismissed four of the five counts in plaintiff's Complaint.

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

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

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

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

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

Respectfully submitted,

s/ Jay E. Heidrick

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

CERTIFICATE OF SERVICE

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

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

s/ Jay E. Heidrick
Attorney for Defendants