UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff*	))))	**Case No. 09-3203**
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. This case has been repeatedly appealed to the Eighth Circuit to seek review of the Western District's denial of a timely motion to remand to Missouri state for absence of federal diversity jurisdiction and the violation of the federal first to file doctrine and the Western District's order to transfer the action to the Kansas District Court only to be dismissed without prejudice.

2. 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" June 30, 2000 in a fact pattern 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.

3. The last basis for yielding to the concurrent exercise of jurisdiction by the Kansas District Court has been removed when the Kansas District court terminated the transferred case and the appellant filed a timely notice of appeal specifying the issues sought to be appealed as the Western District of Missouri Court's failure to remand the action to state court for lack of diversity jurisdiction and violation of the "first to file doctrine."

4. The defendants have not addressed the case law repeatedly served on their counsel in response to earlier motions to dismiss the appeal that both the denial of the plaintiff/appellant's timely motion to remand for lack of jurisdiction and the order to transfer could not be appealed until the Kansas District Court had finally concluded jurisdiction over the transferred matter.

5. The Tenth Circuit did not address the appellant's Kansas District Court lack of jurisdiction arguments raised as an issue in each appeal and did not exercise review over the Western District of Missouri's orders.

6. The appellant will have to seek a review in the US Supreme Court through a petition for certiorari from the Eighth Circuit Court of Appeals if the appellee's motion is granted. See exb. 1 Appellant's Petition for Certiorari.

7. The appellant hereby incorporates the record from the previous appeals from this action that is already in possession of the Eighth Circuit which document the appellees' repeated frauds on this court through their defense counsel and to which this court has yet to refer to disciplinary action or criminal prosecution.

Memorandum of Law

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 order 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 Tenth Circuit did not address the absence of its jurisdiction and that of the Kansas District court under clearly established controlling authority related to absence of diversity jurisdiction and the violation of the "First to File" doctrine.

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 terminated the case, thus removing both the interlocutory review and now the

concurrent jurisdiction bar. The test for finality 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).

> "As pointed out *Albert v. Kevex Corp*., 729 F.2d at 765, 221 USPQ at 209, the normal rule is that "federal jurisdiction is measured at the outset of the suit." (Davis, J., dissenting from the majority's view that existence of interfering patents must be shown before jurisdiction exists to determine priority in an "interfering patents" suit under 35 U.S.C. Sec. 291). The reference there was to district court jurisdiction, yet it is that jurisdiction that defines our own." [Emphasis added]

Atari, Inc. v. JS&A Group, Inc., 747 F.2d 1422 at1431 (C.A.Fed., 1984).

The United States Court of Appeals for the Eighth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. Sec. 1631:

> "§ 1631. Transfer to cure want of jurisdiction Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred."

28 U.S.C. Sec. 1631

The transfer decision is reviewable for clear error over jurisdiction. The Fourth Circuit in *Technosteel v. Beers* has observed that this court *McGeorge v. Continental Airlines, Inc.*, 871 F.2d 952, 954 (10th Cir. 1989) that "reviewable decisions" under S 1294(1) "applies to all `reviewable' decisions of

the district courts, not just to those which are immediately appealable."

Technosteel v. Beers Construction Co., 271 F.3d 151 at 155 (4th Cir., 2001). The Fourth Circuit stated:

> "The Tenth Circuit seemingly understood "reviewable decisions" to encompass every ruling of a district court that might in due course ultimately pass under the scrutiny of an appellate court. But the term is susceptible to a narrower reading: decisions subject to review at the time they are entered, namely, (a) final decisions, (b) non-final decisions embraced by S 1292's provision for review of certain types of interlocutory orders, (c) decisions treated as final under the "collateral order" doctrine of Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), and (d) (perhaps) non-final decisions subject to immediate mandamus. *Id*. at 675 (second emphasis added)"

Technosteel v. Beers Construction Co., 271 F.3d 151 at 156 (4th Cir., 2001).

In *F.D.I.C. v. McGlamery* this court reasserted the reviewability over erroneous decisions even when they are made in the transferor court.

> "The RTC argues that such review would be ineffective because those courts would be constrained by the "law of the case" doctrine on a motion to retransfer. (Citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988) (Transferee court should consider as "law of the case" transferor court's determination that it lacked jurisdiction.)). Christianson makes clear, however, that the "law of the case" does not deprive a court of the power to correct erroneous decisions. Christianson, 486 U.S. at 816-17, 108 S.Ct. at 2177-78. We thus cannot agree that the district court's order is effectively unreviewable by virtue of the law of the case doctrine. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376, 101 S.Ct. 669, 674-75, 66 L.Ed.2d 571 (1981) (an order is effectively unreviewable on appeal after final judgment only "where denial of immediate review would render impossible any review whatsoever.")."

F.D.I.C. v. McGlamery, 74 F.3d 218 at 221 (C.A.10 (N.M.), 1996).

The Fourth Circuit distinguished between earlier precedents resolving the issue of a circuit court reviewing a district court's interim order of transfer and the

circumstances of the plaintiff/appellant where the appeal is after entry of judgment in the trial court and denied the dismissal of the appeal:

> "In its motion to dismiss, however, Beers draws no distinction between the reviewability of interlocutory decisions which are immediately appealable and those which are not. Relying on precedent, which holds that a transferor circuit court loses jurisdiction to review interlocutory decisions of its district courts that are not immediately appealable once the file is physically transferred under S 1404(a), see, e.g., *Wilson-Cook Med., Inc. v. Wilson*, 942 F.2d 247, 250 (4th Cir. 1991); *Chrysler Credit Corp. v. Country Chrysler, Inc.,* 928 F.2d 1509, 1516-17 (10th Cir. 1991), Beers asserts that we are likewise divested of jurisdiction to review immediately appealable decisions of our district courts if the district court file is physically transferred to a district court embraced within another circuit before a notice of appeal is filed here. We find the proposed application of the general S 1404(a) transfer principles applicable to interlocutory decisions that are not immediately appealable to be unsuitable in the quite different context of timely filed appeals from immediately appealable decisions of our district courts. We therefore deny Beers' motion to dismiss."

Technosteel v. Beers Construction Co., 271 F.3d 151 at 154 (4th Cir., 2001).

The Kansas District Court lacked jurisdiction to over the transferred action. Jurisdiction over the same matter or controversy was exclusively in federal court under *Medical Supply Chain, Inc. v. Neoforma, et al*. Tenth Circuit case no. 06-3331. The Western District Court was in clear error and lacked diversity jurisdiction and was required to remand the concurrent state law based claims to the State of Missouri Court at Independence. *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 (the appellees' defense counsel committing the frauds on this court as a defendant).

The constitutionally required 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 (being appealed) still had 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. Case No. 07-CV-2146, the Tenth Circuit court's jurisdiction on appeal was 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).

The transferor court, the Western District of Missouri retained jurisdiction over this action removed from the State of Missouri Court at Independence because the removal was fraudulent and there was an absence of complete diversity. Furthermore, the Western District out of comity was required to yield to the exclusive jurisdiction of this court over the same matter in controversy *Medical Supply Chain, Inc. v. Neoforma, et al*. Tenth Circuit case no. 06-3331.

When the transferring court's authority to order the transfer is challenged, the Eighth Circuit Court retains jurisdiction to review the transfer even after its completion. *Farrell v. Wyatt*, 408 F.2d 662, 664 (2d Cir.1969).

CONCLUSION

Whereas for the above stated reasons the plaintiff/appellant respectfully requests this court deny dismiss the current appeal.

Respectfully submitted,

S/Samuel K. Lipari
_____
Samuel K. Lipari
803 Lake Drive
Independence, MO 64053
816-254-6771
saml@medicalsupplychain.com
Pro se

Certificate of Service

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

Mark A. Olthoff
MARK A. OLTHOFF MO lic. #38572
POLSINELLI SHUGHART PC
1700 Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
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

No. 09-_____

In the Supreme Court of the United States

SAMUEL K. LIPARI, *Pro Se*-PETITIONER

v.

US BANCORP NA.
US BANK NA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR SAMUEL K. LIPARI IN SUPPORT

Samuel K. Lipari,
P*ro Se.*
803 S Lake Drive
Independence, MO 64053
1-816-254-6771

Exb. 1