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.

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,

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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:

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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.