

**United States Court of Appeals
For the Tenth Circuit**

Consolidated Appeal Case Nos. 08-3287, 08-3338 & 08-3345
Appeal from KS Dist. Court Case No. 2:07-cv-02146-CM
Formerly W.D. MO. Case No. 06-1012-W-FJG
Formerly State of Missouri 16th Cir. Case. No. 0616-CV32307
Currently Docket No. 08-3187 (10th Cir.)
Formerly Docket No. 06-3331 (10th Cir.)
Formerly KS Dist. Court Case No.: 05-2299-CM
Formerly W.D. MO. Case No. 05-0210-ODS

SAMUEL K. LIPARI

v.

US BANCORP INC. and US BANK N.A.

Appeal from
the United States District Court
for the District of Kansas

Hon. Judge Carlos Murguia presiding

Reply Brief Of The Appellant

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

Samuel K. Lipari
Pro se

ORAL ARGUMENT REQUESTED

Table of Contents

Reply Brief	1
Certificate Of Compliance	3
Certification Of Digital Submissions	4
Certificate Of Service	4

Table of Authorities

<i>Sain v. EOG Resources, Inc.</i> , No. 05-2320 (10th Cir. 10/27/2006)	1
<i>Disher v. Information Resources, Inc.</i> , 691 F.Supp. 75 (N.D. Ill.,1988)	1
<i>Hollander v. Sandoz Pharmaceuticals Corp.</i> , 289 F.3d 1193(10th Cir., 2002)	1
<i>Upland Ind. Corp. v. Pacific Gamble Robinson Co.</i> , 684 P.2d 638(Utah 1984)	2
Restatement § 250	2
<i>Becker v. Hsa/Wexford Bancgroup, L.L.C.</i> , 157 F.Supp.2d 1243(D. Utah, 2001)	2
<i>Kay v. Bemis</i> , 500 F.3d 1214 (10th Cir., 2007)	2
<i>Freeman v. Lasky, Haas & Cohler</i> , 410 F.3d 1180 (Fed. 9th Cir., 2005)	3

REPLY BRIEF OF THE APPELLANT

At pages 12-13 of the Appellee Answer Brief, the US Bank appellees argue that the present action is a different case or controversy than the contract claims in the Medical Supply Chain, Inc. litigation, an argument US Bank is judicially estopped from making having argued in doc. 22 Defendants' Motion To Dismiss Plaintiff's Complaint pg. 1 ¶3 and doc. 23 pgs. 6-9 Memorandum In Support Of Defendants' Motion To Dismiss And Strike (both dated April 27, 2007) for dismissal asserting *res judicata*. See appellant's brief at page 10-11 asserting *Sain v. EOG Resources, Inc.*, No. 05-2320 at pg. 6-7 (10th Cir. 10/27/2006) estoppel bars this argument.

The US Bank appellees also do not differentiate the rule in *Disher v. Information Resources, Inc.*, 691 F.Supp. 75 at 81. (N.D. Ill.,1988) that because a non-diverse defendant is in the concurrent federal litigation there is no diversity Jurisdiction over the Missouri state case that was erroneously removed.

The Appellee's Answer Brief has not provided a basis for this court to avoid is lack of jurisdiction under the US Supreme Court case *Hoffman v. Blaski Sullivan v. Behimer*, 363 U.S. 335 at 343, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960) (Aplt. Brief pgs. 13-14) or overcomes the requirement to have jurisdiction at the time judgment is entered under this circuit's own controlling case *Hollander v. Sandoz Pharmaceuticals Corp.*, 289 F.3d 1193 at 1203 (10th Cir., 2002) (Aplt. Brief pg. 14).

The US Bank Appellees' at page 19 of their brief merely resort to misrepresenting the plaintiff/appellant's complaint which charges both written and

oral arguments by citing with the purpose to mislead the court the text of a transcript contained in the body of the appellant's complaint. A recording made before US Bank breached the contract without their attorneys even having the diligence or professional responsibility to realize this recorded conversation is the act of repudiation also referred to as anticipatory breach (which the plaintiff/appellant was vigorously opposing) by US Bank officials that renders the appellees liable under *Upland Ind. Corp. v. Pacific Gamble Robinson Co.*, 684 P.2d 638, 643 (Utah 1984) ;RESTATEMENT § 250; and *Becker v. Hsa/Wexford Bancgroup, L.L.C.*, 157 F.Supp.2d 1243 at 1252-1253 (D. Utah, 2001). See doc. pgs.11-12 of Lipari's Memorandum in Opposition to Defendants' Second Motion for Dismissal. Any exploration in resolution of this issue is evidentiary based and should await Summary Judgment not dismissal, lest the court violate *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007).

This circuit in *Kay v. Bemis*, 500 F.3d 1214 at 1219-1220 (10th Cir., 2007) has determined that the trial court was not free to recast its skepticism and disbelief now prohibited as a basis for dismissal under *Erickson* into premature evidentiary determinations under the guise of "Plausibility".

The plaintiff/appellant has not yet had an opportunity to try his contract claims with discovery and other benefits of Due Process that are necessary for a final judgment on the merits of whether the US Bank Appellees breached a contract with the plaintiff/appellant and whether their subsequent misrepresentations over these claims are actionable as mere Sham Defenses to

keep him out of the market for hospital supplies:

“*Noerr-Pennington* immunity, and the sham exception, **also apply to defensive pleadings**, *In re Burlington N., Inc.*, 822 F.2d 518, 532-33 (5th Cir.1987), because **asking a court to deny one's opponent's petition is also a form of petition**; thus, we may speak of a "sham defense" as well as a "sham lawsuit." [Emphasis added]

Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180 (Fed. 9th Cir., 2005). It is irrefutable that the plaintiff/appellant has business expectancies under Missouri state law that the defendants have continued to interfere with and therefore the appellant must continue to seek antitrust based redress.

Respectfully submitted,

S/Samuel K. Lipari
Samuel K. Lipari

CERTIFICATE OF COMPLIANCE

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced from the beginning of Brief of the Appellant on pg. 1 to the conclusion and contains 620 words.

Complete one of the following:

I relied on my word processor to obtain the count and it is : MS Office 2004 for Mac.

I counted five characters per word, counting all characters including citations and numerals.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

S/Samuel K. Lipari
Samuel K. Lipari

CERTIFICATION OF DIGITAL SUBMISSIONS

I hereby certify the following:

Compliance with digital appellate requirements that copies were provided via email along with written materials to the court and opposing counsel and by electronic mail to the opposing counsel.

Compliance with digital appellate requirements that

(1) all required privacy redactions (below) have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk,

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program Kaspersky Anti-Virus 6.0 and, according to the program, are free of viruses.

S/Samuel K. Lipari
Samuel K. Lipari

CERTIFICATE OF SERVICE

I certify that in addition to the service requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules, identical copies of The Appellant's Reply Brief was submitted to the Clerk in Digital Form and was provided to counsel for all other parties hereto by e-mail on April 6, 2009.

Mark A. Olthoff, Esq.,
Jay E. Heidrick, Esq.
POLSINELLI SHUGHART PC
1700 Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, MO 64105

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