

APPEAL, PROTO, SA

**U.S. District Court
District of Kansas (Kansas City)
CIVIL DOCKET FOR CASE #: 2:07-cv-02146-CM-DJW**

Lipari v. US Bancorp N A et al
Assigned to: District Judge Carlos Murguia
Referred to: Magistrate Judge David J. Waxse
Case in other court: USDC Western District of Missouri,
06-01012

Date Filed: 04/10/2007
Jury Demand: Both
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Other Contract

Plaintiff

Samuel K. Lipari

represented by **Samuel K. Lipari**
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TERMINATED: 01/02/2008

V.

Defendant

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Email All Attorneys
 Email All Attorneys and Additional Recipients

Date Filed	#	Page	Docket Text
04/10/2007			Case transferred in from Western District of Missouri. Case Number 06-1012. Case is an electronic transfer.(mm) (Entered: 04/11/2007)
04/10/2007	<u>1</u>		NOTICE OF REMOVAL from Western District of Missouri, case number 06-1012, filed by Samuel K. Lipari. (Attachments: (1) Exhibit A)(Originally filed in WD/MO on 12/13/06)(mm) (Entered: 04/11/2007)
04/10/2007	<u>7</u>		ANSWER to Complaint <u>1</u> by US Bancorp N A, US Bank NA. (Originally filed in WD/MO on 12/21/06)(mm) (Entered: 04/11/2007)
04/10/2007	<u>12</u>		REPLY to 2 Answer to Complaint by Plaintiff Samuel K. Lipari. (Attachments: (1) Exhibit A)(Originally filed in WD/MO on 1/4/07)(mm) (Entered: 04/11/2007)
04/10/2007	<u>20</u>		

		REPORT OF RULE 26 meeting by US Bancorp N A, US Bank NA (Originally filed in WD/MO on 2/9/07) (mm) (Entered: 04/11/2007)
04/10/2007	<u>21</u>	ORDER transferring case from the Western District of Missouri to the District of Kansas. (mm) (Entered: 04/11/2007)
04/25/2007	<u>22</u>	MOTION to Dismiss by Defendants US Bancorp N A, US Bank NA (Olthoff, Mark) (Entered: 04/25/2007)
04/25/2007	<u>23</u>	MEMORANDUM IN SUPPORT of <u>22</u> MOTION to Dismiss by Defendants US Bancorp N A, US Bank NA (Attachments: # <u>1</u> Notice of Exhibit Attachment)(Olthoff, Mark) (Entered: 04/25/2007)
04/27/2007	<u>24</u>	MEMORANDUM IN SUPPORT of <u>22</u> MOTION to Dismiss by Defendants US Bancorp N A, US Bank NA (Attachments: # <u>1</u> Exhibit A-1 Plaintiff's Amended Complaint Part 1# <u>2</u> Exhibit A-2 Plaintiff's Amended Complaint Part 2# <u>3</u> Exhibit B - December 30, 2004 Order# <u>4</u> Exhibit C-1 Complaint Part 1# <u>5</u> Exhibit C-2 Complaint Part 2# <u>6</u> Exhibit C-3 Complaint Part 3# <u>7</u> Exhibit C-4 Complaint Part 4# <u>8</u> Exhibit D# <u>9</u> Exhibit E)(Olthoff, Mark) (Entered: 04/27/2007)
05/03/2007	<u>25</u>	MOTION to Strike <u>22</u> MOTION to Dismiss by Plaintiff Samuel K. Lipari (mm) (Entered: 05/04/2007)
05/03/2007	<u>26</u>	CERTIFICATE OF SERVICE of discovery by Samuel K. Lipari (mm) (Entered: 05/04/2007)
05/04/2007	<u>27</u>	CERTIFICATE OF SERVICE of Rule 26(a) Disclosures by US Bancorp N A, US Bank NA. (Olthoff, Mark) (Entered: 05/04/2007)
05/07/2007	<u>28</u>	MOTION to Stay Entry of Schedule, Stay Discovery and for Protective Order by Defendants US Bancorp N A, US Bank NA. (Olthoff, Mark) (Motion title modified on 5/8/2007. (mg)) (Entered: 05/07/2007)
05/10/2007	<u>29</u>	ENTRY OF APPEARANCE by Jay E. Heidrick on behalf of US Bancorp N A, US Bank NA. (Heidrick, Jay) (Entered: 05/10/2007)
05/17/2007	<u>30</u>	MEMORANDUM in Opposition by Defendants US Bancorp N A, US Bank NA re <u>25</u> MOTION to Strike <u>22</u> MOTION to Dismiss (Olthoff, Mark) (Entered: 05/17/2007)
05/24/2007	<u>31</u>	ORDER granting <u>28</u> Motion to Stay Discovery. All pretrial and Rule 26 proceedings, including the planning conference, scheduling conference, Rule 26(a)(1) disclosures, and discovery, are hereby stayed until the Court has ruled on Defendants' pending Motion to Dismiss (doc. 22). Signed by Magistrate Judge David J. Waxse on 5/24/2007. (bh) (Entered: 05/24/2007)
05/29/2007	<u>32</u>	REPLY Memorandum in support of <u>25</u> MOTION to Strike <u>22</u> MOTION to Dismiss by Plaintiff Samuel K. Lipari(yh,) (Entered: 05/31/2007)
05/29/2007	<u>33</u>	OBJECTION(S) to Discovery under Rule 72.1.4 by Samuel K. Lipari. (yh,) (Entered: 05/31/2007)
06/08/2007	<u>34</u>	RESPONSE to <u>33</u> Objection(s) by Defendants US Bancorp N A, US Bank NA. (Olthoff, Mark) (Entered: 06/08/2007)
08/20/2007	<u>35</u>	

		ORDER denying <u>25</u> Motion to Strike. Plaintiff has twenty–three days to file a response to <u>22</u> MOTION to Dismiss. Signed by Judge Carlos Murguia on 8/20/2007. (js) (Entered: 08/20/2007)
09/11/2007	<u>36</u>	ENTRY OF APPEARANCE by Ira Dennis Hawver on behalf of Samuel K. Lipari. (Hawver, Ira) (Entered: 09/11/2007)
09/11/2007	<u>37</u>	RESPONSE by Plaintiff Samuel K. Lipari re <u>22</u> MOTION to Dismiss (Hawver, Ira) (Entered: 09/11/2007)
10/03/2007	<u>38</u>	REPLY to Response to Motion by Defendants US Bancorp N A, US Bank NA re: <u>22</u> MOTION to Dismiss (Heidrick, Jay) (Entered: 10/03/2007)
11/16/2007	<u>39</u>	ORDER granting in part and denying in part <u>22</u> Motion to Dismiss. Signed by Judge Carlos Murguia on 11/16/07. (js) (Entered: 11/16/2007)
11/27/2007	<u>40</u>	RESPONSE by Plaintiff Samuel K. Lipari re <u>39</u> Order on Motion to Dismiss (Hawver, Ira) (Entered: 11/27/2007)
11/30/2007	<u>41</u>	ORDER SETTING SCHEDULING CONFERENCE: Telephone Scheduling Conference set for 1/11/2008 at 03:00 PM before Magistrate Judge David J. Waxse. Report of Parties Planning Meeting deadline 1/4/2008. Signed by Magistrate Judge David J. Waxse on 11/30/07. (ll) (Entered: 11/30/2007)
12/06/2007	<u>42</u>	RESPONSE to <u>40</u> Response to Order by Defendants US Bancorp N A, US Bank NA. (Heidrick, Jay) (Entered: 12/06/2007)
12/19/2007	<u>43</u>	MOTION to Dismiss Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure by Defendants US Bancorp N A, US Bank NA. (Heidrick, Jay) (Entered: 12/19/2007)
12/19/2007	<u>44</u>	MEMORANDUM IN SUPPORT of <u>43</u> MOTION to Dismiss Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure by Defendants US Bancorp N A, US Bank NA. (Attachments: # <u>1</u> Index of Exhibits, # <u>2</u> Exhibit A, # <u>3</u> Exhibit B)(Heidrick, Jay) (Entered: 12/19/2007)
12/27/2007	<u>45</u>	MOTION to Withdraw as Attorney by Plaintiff Samuel K. Lipari. (Attachments: # <u>1</u> Exhibit Proposed Order, # <u>2</u> Exhibit Acknowledgement of Plaintiff)(Hawver, Ira) (Entered: 12/27/2007)
12/28/2007	<u>46</u>	MOTION for Extension of Time to File Response as to <u>43</u> MOTION to Dismiss <i>Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure</i> , <u>44</u> Memorandum in Support of Motion, by Plaintiff Samuel K. Lipari(Hawver, Ira) (Entered: 12/28/2007)
12/31/2007	<u>47</u>	RESPONSE by Defendants US Bancorp N A, US Bank NA re <u>45</u> MOTION to Withdraw as Attorney <i>Defendants' Response to the Motion for Leave to Withdraw as Counsel Filed by Dennis Hawver</i> (Olthoff, Mark) (Entered: 12/31/2007)
12/31/2007	<u>48</u>	RESPONSE by Defendants US Bancorp N A, US Bank NA re <u>46</u> MOTION for Extension of Time to File Response as to <u>43</u> MOTION to Dismiss <i>Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure</i> , <u>44</u> Memorandum in Support of Motion, (Heidrick, Jay) (Entered: 12/31/2007)
01/02/2008	<u>49</u>	ORDER granting <u>45</u> Motion to Withdraw as Attorney. Attorney Ira Dennis

		Hawver terminated as attorney for plaintiff Samuel K. Lipari. Signed by Magistrate Judge David J. Waxse on 1/2/08. (mh) (Entered: 01/02/2008)
01/11/2008		MINUTE ENTRY for Telephone Scheduling Conference held before Magistrate Judge David J. Waxse on 1/11/2008. Written Scheduling Order to follow. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (ll) (Entered: 01/11/2008)
01/14/2008	<u>50</u>	SCHEDULING ORDER: Estimated trial time 15–20 days. Jury Trial set for 3/2/2009 at 01:30 PM before District Judge Carlos Murguia. Discovery deadline 7/1/2008. Dispositive motion deadline 8/15/2008. Final Pretrial Conference set for 7/30/2008 at 10:00 AM before District Magistrate Judge David J. Waxse. Proposed Pretrial Order due by 7/23/2008. SEE ORDER FOR FURTHER DEADLINES. Signed by Magistrate Judge David J. Waxse on 1/14/08. (mh) (Entered: 01/14/2008)
01/24/2008	51	ORDER granting in part and denying in part <u>46</u> Motion for Extension of Time to File Response/Reply re <u>43</u> MOTION to Dismiss <i>Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure</i> . Response deadline 2/1/2008. Signed by District Judge Carlos Murguia on 1/24/08.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (js) (Entered: 01/24/2008)
01/31/2008	<u>52</u>	RESPONSE by Plaintiff Samuel K. Lipari re <u>43</u> MOTION to Dismiss <i>Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure</i> (yh) (Entered: 02/01/2008)
02/13/2008	<u>53</u>	NOTICE OF SERVICE by Samuel K. Lipari of discovery document and production request (yh) (Entered: 02/14/2008)
02/21/2008	<u>54</u>	REPLY to Response to Motion by Defendants US Bancorp N A, US Bank NA re: <u>43</u> MOTION to Dismiss <i>Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure</i> REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS (Olthoff, Mark) (Entered: 02/21/2008)
03/03/2008	<u>55</u>	MOTION for extension of time to file supplemental Rule 26 disclosures by Plaintiff Samuel K. Lipari(yh) (Entered: 03/03/2008)
03/05/2008	<u>56</u>	RESPONSE by Defendants US Bancorp N A, US Bank NA re <u>55</u> MOTION for extension of time (Attachments: # <u>1</u> Exhibit A)(Heidrick, Jay) (Entered: 03/05/2008)
03/11/2008	<u>57</u>	NOTICE OF SERVICE by US Bancorp N A, US Bank NA of Defendants' First Interrogatories and First Request for Production (Heidrick, Jay) (Entered: 03/11/2008)
03/17/2008	58	ORDER finding as moot <u>55</u> Motion for Extension of Time to File. Plaintiff's request for an extension of time to serve his supplemental disclosures until 4/15/2008 is unnecessary as Para. 2.h of the Scheduling Order provides that supplemental disclosures are to be served 40 days before the deadline for completion of discovery. The deadline for completion of discovery is 7/1/2008; therefore, the deadline for serving supplemental disclosures is 5/21/2008. Entered by Magistrate Judge James P. O'Hara on 3/17/08. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mh) (Entered: 03/17/2008)

03/17/2008	<u>59</u>	MOTION for Protective Order <i>relating to Plaintiff's First Requests for Production</i> by Defendants US Bancorp N A, US Bank NA(Heidrick, Jay) (Entered: 03/17/2008)
03/17/2008	<u>60</u>	MEMORANDUM IN SUPPORT of <u>59</u> MOTION for Protective Order <i>relating to Plaintiff's First Requests for Production</i> by Defendants US Bancorp N A, US Bank NA(Heidrick, Jay) (Entered: 03/17/2008)
03/17/2008	<u>61</u>	INDEX OF EXHIBITS by Defendants US Bancorp N A, US Bank NA re <u>59</u> MOTION for Protective Order <i>relating to Plaintiff's First Requests for Production</i> (Attachments: # <u>1</u> Exhibit A– Plaintiff's Requests for Production, # <u>2</u> Exhibit B– Good faith efforts to resolve dispute)(Heidrick, Jay) (Entered: 03/17/2008)
03/17/2008	<u>62</u>	NOTICE OF SERVICE by US Bancorp N A, US Bank NA of Discovery (Heidrick, Jay) (Entered: 03/17/2008)
03/26/2008	<u>63</u>	MOTION for Leave to Amend Complaint (Petition) re <u>1</u> Notice of Removal by Plaintiff Samuel K. Lipari(yh) (Entered: 03/27/2008)
03/27/2008	<u>64</u>	NOTICE of Supplemental Authority by Samuel K. Lipari (yh) (Entered: 03/27/2008)
03/27/2008	<u>65</u>	RESPONSE by Plaintiff Samuel K. Lipari re <u>59</u> MOTION for Protective Order <i>relating to Plaintiff's First Requests for Production</i> (Attachments: # <u>1</u> Exhibit 1–Letter, # <u>2</u> Exhibit 2–Settlement Brief)(yh) (Entered: 03/27/2008)
04/04/2008	<u>66</u>	ORDER denying without prejudice <u>63</u> Motion for Leave to Amend Complaint. Signed by Magistrate Judge David J. Waxse on 4/4/2008.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (bh) (Entered: 04/04/2008)
04/10/2008	<u>67</u>	REPLY to Response to Motion by Defendants US Bancorp N A, US Bank NA re: <u>59</u> MOTION for Protective Order <i>relating to Plaintiff's First Requests for Production</i> (Heidrick, Jay) (Entered: 04/10/2008)
04/22/2008	<u>68</u>	MOTION to Compel <i>Plaintiff's Compliance with Rule 26(a)</i> by Defendants US Bancorp N A, US Bank NA(Heidrick, Jay) (Entered: 04/22/2008)
04/22/2008	<u>69</u>	INDEX OF EXHIBITS by Defendants US Bancorp N A, US Bank NA re <u>68</u> MOTION to Compel <i>Plaintiff's Compliance with Rule 26(a)</i> (Attachments: # <u>1</u> Exhibit 1 to Motion)(Heidrick, Jay) (Entered: 04/22/2008)
04/22/2008	<u>70</u>	MEMORANDUM IN SUPPORT of <u>68</u> MOTION to Compel <i>Plaintiff's Compliance with Rule 26(a)</i> by Defendants US Bancorp N A, US Bank NA (Attachments: # <u>1</u> Exhibit Index to Memorandum of Law, # <u>2</u> Exhibit A to Memorandum, # <u>3</u> Exhibit B to Memorandum)(Heidrick, Jay) (Entered: 04/22/2008)
04/30/2008	<u>71</u>	NOTICE OF SERVICE by Samuel K. Lipari of Deposition and Duces Tecum Request (yh) (Entered: 05/01/2008)
04/30/2008	<u>72</u>	NOTICE OF SERVICE by Samuel K. Lipari of Rule 26 Supplemental Disclosures (yh) (Entered: 05/01/2008)
04/30/2008	<u>73</u>	NOTICE OF SERVICE by Samuel K. Lipari of Answers to defendant's First

		Set of Interrogatories (yh) (Entered: 05/01/2008)
04/30/2008	<u>74</u>	MOTION for time to extend discovery by Plaintiff Samuel K. Lipari.(yh) (Entered: 05/01/2008)
04/30/2008	<u>75</u>	MEMORANDUM in Opposition by Plaintiff Samuel K. Lipari re <u>68</u> MOTION to Compel <i>Plaintiff's Compliance with Rule 26(a)</i> (Attachments: # <u>1</u> Exhibit 1 MSC Amended Complaint, # <u>2</u> Exhibit 2 Motion for Hearing, # <u>3</u> Exhibit 3 Response to Hearing Motion, # <u>4</u> Exhibit 4 Appellant Brief, # <u>5</u> Exhibit 5 MSC v Neoforma, # <u>6</u> Exhibit 6 MSC Motion to Consolidate)(yh) (Entered: 05/01/2008)
05/09/2008	<u>76</u>	NOTICE by Defendants US Bancorp N A, US Bank NA of taking deposition of Samuel Lipari on May 28, 2008 (Heidrick, Jay) (Entered: 05/09/2008)
05/14/2008	<u>77</u>	SECOND NOTICE of Supplemental Authority by Samuel K. Lipari (yh) (Entered: 05/14/2008)
05/15/2008	<u>78</u>	RESPONSE by Defendants US Bancorp N A, US Bank NA re <u>74</u> MOTION for extension of time (Heidrick, Jay) (Entered: 05/15/2008)
05/15/2008	<u>79</u>	REPLY to Response to Motion by Defendants US Bancorp N A, US Bank NA re: <u>68</u> MOTION to Compel <i>Plaintiff's Compliance with Rule 26(a)</i> (Attachments: # <u>1</u> Exhibit A– Supplemental Disclosures)(Heidrick, Jay) (Entered: 05/15/2008)
05/16/2008	<u>80</u>	MOTION for Protective Order against deposition by Plaintiff Samuel K. Lipari(yh) (Entered: 05/16/2008)
05/16/2008	<u>81</u>	Initial Witness & Exhibit List by US Bancorp N A, US Bank NA.(Heidrick, Jay) (Entered: 05/16/2008)
05/19/2008	<u>82</u>	MOTION for Protective Order <i>for Plaintiff's Notice of Deposition Duces Tecum</i> by Defendants US Bancorp N A, US Bank NA(Heidrick, Jay) (Entered: 05/19/2008)
05/19/2008	<u>83</u>	MEMORANDUM IN SUPPORT of <u>82</u> MOTION for Protective Order <i>for Plaintiff's Notice of Deposition Duces Tecum</i> by Defendants US Bancorp N A, US Bank NA (Attachments: # <u>1</u> Exhibit A– Letter to Lipari)(Heidrick, Jay) (Entered: 05/19/2008)
05/20/2008	<u>84</u>	AMENDED DOCUMENT by US Bancorp N A, US Bank NA. Amendment to <u>83</u> Memorandum in Support of Motion, <u>82</u> MOTION for Protective Order <i>for Plaintiff's Notice of Deposition Duces Tecum</i> . (Heidrick, Jay) (Entered: 05/20/2008)
05/22/2008	<u>85</u>	MOTION to Compel <i>Discovery Responses</i> by Defendants US Bancorp N A, US Bank NA(Heidrick, Jay) (Entered: 05/22/2008)
05/22/2008	<u>86</u>	MEMORANDUM IN SUPPORT of <u>85</u> MOTION to Compel <i>Discovery Responses</i> by Defendants US Bancorp N A, US Bank NA(Heidrick, Jay) (Entered: 05/22/2008)
05/22/2008	<u>87</u>	INDEX OF EXHIBITS by Defendants US Bancorp N A, US Bank NA re <u>85</u> MOTION to Compel <i>Discovery Responses and Memorandum in Support</i> (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit

		D)(Heidrick, Jay) (Entered: 05/22/2008)
05/30/2008	<u>88</u>	RESPONSE by Defendants US Bancorp N A, US Bank NA re <u>80</u> MOTION for Protective Order <i>against Deposition</i> (Heidrick, Jay) (Entered: 05/30/2008)
05/30/2008	<u>89</u>	Opposition by Plaintiff Samuel K. Lipari re <u>82</u> MOTION for Protective Order <i>for Plaintiff's Notice of Deposition Duces Tecum</i> (yh) (Entered: 06/02/2008)
06/03/2008	90	ORDER denying <u>74</u> Motion for Extension of Time. Plaintiff's motion to extend discovery until 10/1/08 is denied for failure to show the requisite good cause for amending the scheduling order. Entered by Magistrate Judge David J. Waxse on 6/3/08. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mh) (Entered: 06/03/2008)
06/05/2008	<u>91</u>	NOTICE OF SERVICE by Samuel K. Lipari of Second Rule 26 Supplemental Disclosures (yh) (Entered: 06/06/2008)
06/12/2008	<u>93</u>	NOTICE of unavailability by Samuel K. Lipari (mm) (Entered: 06/13/2008)
06/12/2008	<u>94</u>	Objection to Order of Magistrate Judge re 90 Order on Motion for Extension of Time by Plaintiff Samuel K. Lipari(mm) (Entered: 06/13/2008)
06/13/2008	<u>92</u>	REPLY to Response to Motion by Defendants US Bancorp N A, US Bank NA re: <u>82</u> MOTION for Protective Order <i>for Plaintiff's Notice of Deposition Duces Tecum</i> (Heidrick, Jay) (Entered: 06/13/2008)
06/19/2008	<u>95</u>	RESPONSE by Defendants US Bancorp N A, US Bank NA re <u>94</u> Objection to Order of Magistrate Judge re 90 Order on Motion for Extension of Time, by Plaintiff Samuel K. Lipari (Heidrick, Jay) (Entered: 06/19/2008)
07/08/2008	<u>96</u>	MEMORANDUM AND ORDER granting <u>85</u> Motion to Compel. Plaintiff shall, within fourteen days of the date of this Order, produce all documents responsive to Defendants' First Set of Requests for Production and serve supplemental responses to Defendants' First Interrogatories No. 1, 3, 5-14, 16-17, and 21. 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 Defendants have incurred in making their Motion to Compel. Signed by Magistrate Judge David J. Waxse on 7/8/2008. (bh) (Entered: 07/08/2008)
07/10/2008	<u>97</u>	Objection to Order of Magistrate Judge re <u>96</u> Order on Motion to Compel., by Plaintiff Samuel K. Lipari (Attachments: # <u>1</u> Exhibit Vol. I)(yh). (Entered: 07/11/2008)
07/10/2008	<u>98</u>	FURTHER EXHIBIT(S) IN SUPPORT of <u>96</u> Order on Motion to Compel., <u>97</u> Objection to Order of Magistrate Judge re <u>96</u> Order on Motion to Compel., by Plaintiff Samuel K. Lipari. (Attachments: # <u>1</u> Exhibit Vol. II part 2, # <u>2</u> Exhibit Vol. III, # <u>3</u> Exhibit Settlement Brief)(yh) (Entered: 07/11/2008)
07/11/2008	<u>99</u>	MEMORANDUM AND ORDER overruling <u>94</u> plaintiff's Objection to the Magistrate's Order Denying Extension of Discovery. Signed by District Judge Carlos Murguia on 7/11/2008. (jw) (Entered: 07/11/2008)
07/18/2008	<u>100</u>	MOTION to Alter OR Amend Judgment re <u>99</u> Memorandum and Order on Objection to Order of Magistrate Judge and MOTION to Stay Further Pretrial Proceedings (Response deadline 8/1/2008) by Plaintiff Samuel K. Lipari

		(Attachments: # <u>1</u> Exhibit 1; # <u>2</u> Exhibit 2)(ck) (Entered: 07/18/2008)
07/18/2008	<u>101</u>	MOTION to Amend Petition re <u>1</u> Notice of Removal by Plaintiff Samuel K. Lipari. (Attachments: # <u>1</u> Exhibit 1; # <u>2</u> Exhibit 2)(ck) (Entered: 07/18/2008)
07/18/2008	<u>102</u>	RESPONSE by Defendants US Bancorp N A, US Bank NA re <u>97</u> Objection to Order of Magistrate Judge re <u>96</u> Order on Motion to Compel by Plaintiff Samuel K. Lipari (Heidrick, Jay) (Entered: 07/18/2008)
07/18/2008	<u>107</u>	MOTION to Stay Discovery (This was originally filed with document <u>100</u> MOTION to Alter Judgment & MOTION to Stay Discovery but should have been entered as two separate motions) by Plaintiff Samuel K. Lipari.(mm) (Entered: 07/30/2008)
07/22/2008	<u>103</u>	MEMORANDUM AND ORDER granting in part and denying in part <u>68</u> Motion to Compel. On or before 7/30/2008, Plaintiff shall serve an amended Rule 26(a)(1)(A)(i) witness disclosure statement in compliance with this Memorandum and Order. On or before 7/30/2008, Plaintiff shall serve a supplemental Rule 26(a)(1)(A)(ii) document disclosure statement or serve amended Rule 26(a)(1)(A)(ii) document disclosures in compliance with this Memorandum and Order. On or before 8/13/2008, Plaintiff shall show cause why he should not be required to pay a portion of the reasonable fees and expenses that Defendants incurred in making their Motion to Compel. Signed by Magistrate Judge David J. Waxse on 7/22/2008. (bh) (Entered: 07/22/2008)
07/23/2008	104	Order Converting Pretrial Conference to Status Conference. On the Court's own motion, the Pretrial Conference scheduled for 7/30/2008 at 10:00 a.m. is converted to a telephone status conference, at which time the Court will take up Plaintiff's Motion to Stay (doc. 100). Entered by Magistrate Judge David J. Waxse on 7/23/08. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mh) (Entered: 07/23/2008)
07/28/2008	<u>105</u>	MEMORANDUM AND ORDER denying <u>101</u> Motion to Amend Complaint. Signed by Magistrate Judge David J. Waxse on 7/28/2008. (bh) (Entered: 07/28/2008)
07/28/2008	<u>106</u>	MEMORANDUM in Opposition by Defendants US Bancorp N A, US Bank NA re <u>100</u> MOTION to Alter Judgment MOTION to Stay Discovery re <u>99</u> Order on Objection to Order of Magistrate Judge MOTION to Stay Discovery re <u>99</u> Order on Objection to Order of Magistrate Judge (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E)(Olthoff, Mark) (Entered: 07/28/2008)
07/31/2008	108	MINUTE ENTRY for proceedings held before Magistrate Judge David J. Waxse: Denying <u>107</u> Motion to Stay Discovery; Status Conference and Motion Hearing held on 7/30/2008 re <u>107</u> MOTION to Stay Discovery. Plaintiff appeared pro se. Defendants appeared through counsel Mark A. Olthoff. Plaintiff's Motion is denied for failure to establish good cause for staying the proceedings. The pretrial conference is rescheduled for 8/14/2008 at 2:30 p.m. The parties shall prepare a proposed joint pretrial order. Defendants shall submit the proposed pretrial order to the Magistrate Judge on or before 8/11/2008. The deadline for filing dispositive motions is continued to 8/22/2008. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (bh) (Entered: 07/31/2008)

08/07/2008	109	ORDER: The Telephone Pretrial Conference set for 8/14/2008 is hereby rescheduled for 8/28/2008 at 02:00 PM before Magistrate Judge David J. Waxse. Proposed Pretrial Order due by 8/21/2008. Dispositive motion deadline continued to 9/5/2008. Jury Trial continued to 4/6/2009 at 01:30 PM in Courtroom 463 (CM) before District Judge Carlos Murguia. Entered by Magistrate Judge David J. Waxse on 8/7/08. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (ll) (Entered: 08/07/2008)
08/11/2008	<u>110</u>	RESPONSE by Defendants US Bancorp N A, US Bank NA re <u>107</u> MOTION to Stay Discovery re <u>100</u> MOTION to Alter Judgment MOTION to Stay Discovery re <u>99</u> Order on Objection to Order of Magistrate Judge MOTION to Stay Discovery re <u>99</u> Order on Objection to Order of Magistrate Judge (Heidrick, Jay) (Entered: 08/11/2008)
08/18/2008	<u>111</u>	RESPONSE by Defendants US Bancorp N A, US Bank NA re <u>103</u> Order on Motion to Compel., <i>Order to Plaintiff to Show Cause</i> (Heidrick, Jay) (Entered: 08/18/2008)
08/18/2008	<u>112</u>	ANSWER to defendant's Rule 59 <u>110</u> Response to Motion by Plaintiff Samuel K. Lipari. (yh) (Entered: 08/18/2008)
08/18/2008	<u>113</u>	RESPONSE to defendant's assertion re: <u>111</u> Response to Order by Plaintiff Samuel K. Lipari. (yh) (Entered: 08/18/2008)
08/18/2008	<u>114</u>	NOTICE AND ORDER TO SHOW CAUSE. Signed by Magistrate Judge David J. Waxse on 8/18/08. (mh) (Entered: 08/18/2008)
08/18/2008		DOCKET ANNOTATION: Notice and Order to Show Cause <u>114</u> mailed to Samuel Lipari, 297 NE Bayview, Lee's Summit, MO 64064 by regular United States Mail and by certified mail, return receipt requested (receipt # 70022030000122080760) on 8/18/08. (mh) (Entered: 08/18/2008)
08/18/2008	<u>115</u>	ORDER directing plaintiff to pay fees in connection with defendants' motion to compel <u>68</u> and pursuant to the court's direction in doc. 103. Signed by Magistrate Judge David J. Waxse on 8/18/08. (mh) (Entered: 08/18/2008)
08/18/2008		DOCKET ANNOTATION: Doc. 115 mailed to Samuel Lipari, 297 NE Bayview, Lee's Summit, MO 64064, by regular United States mail and by certified mail, return receipt requested (receipt # 70022030000122080777), on 8/18/08. (mh) (Entered: 08/18/2008)
08/18/2008	<u>116</u>	AFFIDAVIT of prejudice by Samuel K. Lipari. (yh) (Entered: 08/19/2008)
08/20/2008	117	ORDER regarding <u>114</u> Notice and Order to Show Cause. The Court has reviewed Plaintiff's reply (doc. 113) to Defendants' response (doc. 111) regarding Plaintiff's asserted noncompliance with the Court's 7/22/08 Order (doc. 103). Plaintiff's filing of the reply does not relieve Plaintiff of the obligation to respond to the Order to Show Cause. Plaintiff shall file his response to the Order to Show Cause on or before 8/27/08. Entered by Magistrate Judge David J. Waxse on 8/20/08. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mh) (Entered: 08/20/2008)
08/20/2008	<u>118</u>	MOTION for Order to Show Cause by Defendants US Bancorp N A, US Bank NA (Attachments: # <u>1</u> Exhibit A)(Heidrick, Jay) (Entered: 08/20/2008)

08/22/2008	<u>119</u>	CERTIFIED MAIL RECEIPT returned regarding <u>114</u> Order, and <u>115</u> Order, addressed to Samuel Lipari. (mg) (Entered: 08/25/2008)
08/22/2008	<u>122</u>	OBJECTION to Order of Magistrate Judge re Order <u>115</u> by Plaintiff Samuel K. Lipari. (mm) (Entered: 08/25/2008)
08/22/2008	<u>123</u>	Objection to Order of Magistrate Judge re Order 117 by Plaintiff Samuel K. Lipari (Attachments: #(1) Exhibit 1, (2) Exhibit 1A, (3) Exhibit 1B, (4) Exhibit 1C-1, (5) Exhibit 1C-2, (6) Exhibit 1D, (7) Exhibit 2-1, (8) Exhibit 2-2, (9) Exhibit 2 Letter, (10) Exhibit 3, (11) Exhibit 4, (12) Exhibit 5, # <u>13</u> Exhibit 6, (14) Exhibit 7, (15) Exhibit 8, (16) Exhibit 9)(mm) (Entered: 08/25/2008)
08/25/2008	<u>120</u>	SECOND NOTICE AND ORDER TO SHOW CAUSE. Defendants' Motion for Order to Show Cause <u>118</u> is granted. Plaintiff Samuel K. Lipari is required to show cause to United States District Judge Carlos Murguia, in a pleading filed by 9/8/08, why this case should not be dismissed with prejudice, or other sanctions imposed, pursuant to Federal Rule of Civil Procedure 37(b)(2)(A) for failure to comply with the Courts 7/8/08 Order (doc. 96), and/or pursuant to Federal Rules of Civil Procedure 16(f) and 37(b)(2)(A) for failure to participate in the preparation of a joint proposed pretrial order. Signed by Magistrate Judge David J. Waxse on 8/25/08. (mh) (Entered: 08/25/2008)
08/25/2008	121	ORDER continuing pretrial conference. In light of the Court's recent show cause orders, the Court, on its own motion, continues the 8/28/08 telephone pretrial conference to 10/28/08 at 11:00 a.m. before Magistrate Judge David J. Waxse. Defendants shall submit the parties' joint proposed pretrial order to the Magistrate Judge by 10/21/08. Entered by Magistrate Judge David J. Waxse on 8/25/08. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mh) (Entered: 08/25/2008)
08/25/2008		DOCKET ANNOTATION: Doc. 120 mailed to plaintiff Samuel K. Lipari, 297 NE Bayview, Lee's Summit, MO 64064, by regular United States mail and by certified mail, return receipt requested (certified receipt # 70022030000122080647). (mh) (Entered: 08/25/2008)
08/25/2008	<u>124</u>	NOTICE of filing motion to remand appeal by Samuel K. Lipari (mm) (Entered: 08/25/2008)
08/27/2008	<u>125</u>	NOTICE of Filing Order Denying Motion to Remand Appeal by US Bancorp N A, US Bank NA (Attachments: # <u>1</u> Exhibit Order)(Olthoff, Mark) (Entered: 08/27/2008)
08/27/2008	<u>126</u>	SEALED MOTION for Leave to File Under Seal by Defendants US Bancorp N A, US Bank NA (Attachments: # <u>1</u> Exhibit A- Redacted Billings)(Heidrick, Jay) (Entered: 08/27/2008)
08/27/2008	<u>127</u>	AFFIDAVIT of Attorney Fees re <u>115</u> Order by US Bancorp N A, US Bank NA. (Heidrick, Jay) (Entered: 08/27/2008)
08/27/2008	<u>128</u>	AFFIDAVIT regarding attorney fees by Defendants US Bancorp N A, US Bank NA(Heidrick, Jay) Modified on 9/2/2008 to correct title of pleading (yh). (Entered: 08/27/2008)
08/28/2008	129	ORDER REFERRING MOTION to Magistrate Judge David J. Waxse re <u>128</u> MOTION for Attorney Fees <i>in Support of Affidavit of Attorney Fees, Doc. No.</i>

		<i>127</i> filed by US Bancorp N A, US Bank NA. Signed by District Judge Carlos Murguia on 8/28/2008. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (jw) (Entered: 08/28/2008)
08/28/2008	<u>130</u>	CERTIFIED MAIL RECEIPT returned regarding <u>120</u> Order addressed to Samuel K. Lipari. (mg) (Entered: 08/29/2008)
09/02/2008	131	ORDER REFERRING MOTION to Magistrate Judge David J. Waxse re <u>126</u> SEALED MOTION for Leave to File Under Seal filed by US Bancorp N A, US Bank NA. Signed by District Judge Carlos Murguia on 9/2/2008. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (jw) (Entered: 09/02/2008)
09/02/2008	132	ORDER granting <u>126</u> Motion for Leave to File Under Seal. Defendants are directed to file forthwith the requested document(s) with an event from the SEALED DOCUMENTS category. In addition, Defendants shall serve a copy of the sealed document(s) on Plaintiff. The Clerk shall grant electronic access to sealed document(s) to counsel of record. Pro hac vice attorneys must obtain sealed document(s) from local counsel. Signed by Magistrate Judge David J. Waxse on 9/2/2008.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (bh) (Entered: 09/02/2008)
09/02/2008	133	ORDER setting new dispositive motion deadline. In light of the Court's recent Show Cause Orders and the continuance of the Pretrial Conference, the Court, on its own motion, extends the deadline for filing dispositive motions to 11/17/2008. Entered by Magistrate Judge David J. Waxse on 9/2/08.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mh) (Entered: 09/02/2008)
09/02/2008	<u>134</u>	RESPONSE to <u>120</u> Order on Motion for Order to Show Cause,, by Plaintiff Samuel K. Lipari. (Attachments: # <u>1</u> Exhibit Answer to Order to Show Cause, # <u>2</u> Exhibit 1 Notice of Appeal, # <u>3</u> Exhibit 2 Notice of Removal, # <u>4</u> Exhibit 3 Motion to remand, # <u>5</u> Exhibit 4 Reply, # <u>6</u> Exhibit Affidavit of prejudice, # <u>7</u> Exhibit 6 Objection to Magistrate Order, # <u>8</u> Exhibit 7 Tenth Circuit Notice, # <u>9</u> Exhibit 7 Plaintiff's response, # <u>10</u> Exhibit 8 Unrelated Pretrial Order, # <u>11</u> Exhibit 9 Combined pretrial order, # <u>12</u> Exhibit 10 Plaintiff's production request, # <u>13</u> Exhibit 11 Plaintiff's response to OSC, # <u>14</u> Exhibit 12 Reply to demand, # <u>15</u> Exhibit 13 Reply to demand, # <u>16</u> Exhibit 14 Objection, # <u>17</u> Exhibit 15 Letter to clerk, # <u>18</u> Exhibit 16 Order on motion to stay discovery, # <u>19</u> Exhibit 17 Report of parties' and planning, # <u>20</u> Exhibit 18 Response to Second Motion to Dismiss, # <u>21</u> Exhibit 19 Affidavit of Samuel K. Lipari)(yh) (Entered: 09/03/2008)
09/02/2008	<u>136</u>	AFFIDAVIT of Samuel K. Lipari in support of re <u>134</u> Response to Show Cause Order. Defendant has submitted exhibits in support of affidavit to the court that are to voluminous and will be maintained coventionally in the clerk's office. (3 boxes of exhibits).(mm) (Entered: 09/04/2008)
09/03/2008	<u>135</u>	RESPONSE to <u>123</u> Objection to Order of Magistrate Judge re 117 Order,, by Plaintiff Samuel K. LipariObjection to Order of Magistrate Judge re 117 Order,, by Plaintiff Samuel K. Lipari, <u>122</u> Objection to Order of Magistrate Judge re <u>115</u> Order by Plaintiff Samuel K. Lipari by Defendants US Bancorp N A, US Bank NA. (Heidrick, Jay) (Entered: 09/03/2008)

09/04/2008	<u>137</u>	15	MEMORANDUM AND ORDER granting in part and denying in part <u>43</u> Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure. All claims except plaintiff's misappropriation of trade secrets claim pursuant to Mo. Rev. Stat. section 417.450 are hereby dismissed. Signed by District Judge Carlos Murguia on 9/4/2008. (jw) (Entered: 09/04/2008)
09/04/2008	138		DOCKET ANNOTATION: <u>137</u> Memorandum and Order on Motion to Dismiss, sent certified mail 7002 2030 0000 9349 8359 to Samuel K. Lipari, 297 NE Bayview, Lee's Summit, MO 64064. (jw) (Entered: 09/04/2008)
09/05/2008	<u>139</u>		MOTION for Leave to Amend Complaint (Petition) re <u>1</u> Notice of Removal by Plaintiff Samuel K. Lipari (Attachments: (1) Exhibit 1 (State Court Petition), (2) Exhibit Proposed Amended Petition)(mm) (Entered: 09/05/2008)
09/08/2008	<u>140</u>		SEALED EXHIBIT(S) of <i>billing records</i> re <u>127</u> Affidavit (Heidrick, Jay) (Entered: 09/08/2008)
09/09/2008	<u>141</u>		CERTIFIED MAIL RECEIPT returned re <u>137</u> Order on Motion to Dismiss, addressed to Samuel Lipari. (jw) (Entered: 09/09/2008)
09/13/2008	<u>142</u>		RESPONSE by Defendants US Bancorp N A, US Bank NA re <u>139</u> MOTION for Leave to Amend Complaint re <u>1</u> Notice of Removal (Heidrick, Jay) (Entered: 09/13/2008)
09/22/2008	<u>143</u>		RESPONSE to <u>134</u> Response,, to <i>Order to Show Cause (Doc. No. 120)</i> by Defendants US Bancorp N A, US Bank NA. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E)(Heidrick, Jay) (Entered: 09/22/2008)
10/10/2008	<u>144</u>	29	MEMORANDUM AND ORDER overruling <u>97</u> Objection to Order of Magistrate Judge; denying <u>100</u> Motion to Alter or Amend Judgment and to Stay Further Pretrial Proceedings; overruling <u>122</u> Objection to Order of Magistrate Judge and overruling <u>123</u> Objection to Order of Magistrate Judge. IT IS FURTHER ORDERED that plaintiff's <u>116</u> 28 U.S.C. section 144 Affidavit of Prejudice does not require recusal under 28 U.S.C. section 144. Signed by District Judge Carlos Murguia on 10/10/2008. (jw) (Entered: 10/10/2008)
10/15/2008	<u>146</u>		NOTICE of Change of Address by Samuel K. Lipari (mm) (Entered: 10/17/2008)
10/15/2008	<u>147</u>		STIPULATION for order of dismissal of remaining claims by Samuel K. Lipari. (mm) (Entered: 10/17/2008)
10/16/2008	<u>145</u>	34	ORDER granting <u>59</u> Defendants' First Motion for Protective Order; denying <u>80</u> Plaintiff's Motion for Protective Order; granting <u>82</u> Motion for Protective Order as to Defendant U.S. Bancorp N.A and denying <u>82</u> Motion for Protective Order as to Defendant U.S. Bank N.A. Plaintiff shall, within 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. 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. incurred in making its Motion for Protective Order (doc. 59) and opposing Plaintiff's Motion for Protective Order (doc. 80). Signed by Magistrate Judge David J.

			Waxse on 10/16/2008. (bh) (Entered: 10/16/2008)
10/16/2008	<u>148</u>	51	NOTICE OF APPEAL as to <u>144</u> Order on Objection to Order of Magistrate Judge, Order on Motion to Alter Judgment, Order on Motion to Stay Discovery, <u>145</u> Order on Motion for Protective Order, <u>137</u> Order on Motion to Dismiss by Plaintiff Samuel K. Lipari. (kao) (Entered: 10/17/2008)
10/17/2008			APPEAL FEE STATUS: Filing fee NOT PAID re: Notice of Appeal – Final Judgment, <u>148</u> . (THIS IS A TEXT ONLY ENTRY–NO DOCUMENT IS ASSOCIATED WITH THIS TRANSACTION) (kao) (Entered: 10/17/2008)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SAMUEL K. LIPARI,)
)
Plaintiff,)
)
v.)
)
US BANCORP NA and)
US BANK NA,)
)
Defendants.)
_____)

CIVIL ACTION

No. 07-2146-CM

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. 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). This matter is before the court on Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure (Doc. 43).

I. Background

As assignee of Medical Supply Chain, Inc. (“Medical Supply” or “MSCI”), plaintiff brings the following five state-law claims against defendants, each under Missouri law: (1) breach of contract; (2) fraud; (3) trade secret misappropriation; (4) breach of fiduciary duty; and (5) prima facie tort. Defendants originally moved to dismiss plaintiff’s claims in April 2007, arguing plaintiff lacked standing and the claims were barred by res judicata. The court denied the dismissal of the

claims that had been brought in prior lawsuits because the prior lawsuits dismissed the state-law claims without prejudice, and thus, there had been no final judgment on the merits. At the time of the court's order, the record did not clearly delineate which of plaintiff's current claims had been raised in the previous lawsuits and dismissed without adjudication on the merits. Accordingly, the court denied defendants' motion to dismiss without prejudice and required the parties to set forth which claims had been raised in the prior lawsuits. In their supplemental briefing, the parties agreed that all of the current claims were brought in the prior lawsuits—in other words, the claims had not been adjudicated on the merits and were not barred by res judicata.

On December 19, 2007, defendants filed their second motion to dismiss. This motion was filed after defendants filed their answer, but while discovery was ongoing.

II. Timeliness of Motion

Plaintiff argues that defendants' second motion to dismiss is prohibited under Federal Rule of Civil Procedure 12(g). Under Rule 12(g), any defense that is available at the time of the original motion that is not included in the original motion may not be the basis of a second pre-answer motion. Rule 12(h)(2), however, specifically preserves a party's right to file a motion to dismiss for failure to state a claim and provides for a post-answer motion for failure to state a claim under Rule 12(c). Fed. R. Civ. P. 12(h)(2)(B). "The distinction between [a Rule 12(b)(6) motion and a Rule 12(c) motion] is purely formal, because the court must review a Rule 12(c) motion under the same standard that governs a Rule 12(b)(6) motion." *Res. Ctr. for Indep. Living, Inc. v. Ability Res., Inc.*, 534 F. Supp. 2d 1204, 1207 (D. Kan. 2008) (citing *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003)); *see also Fisher v. Lynch*, No. 07-2154-KHV, 2008 WL 2152053, at *1 (D. Kan. May 21, 2008) ("A motion for judgment on the pleadings under Rule 12(c) is governed by the same standards

as a motion to dismiss under Rule 12(b)(6).”). The court may treat a Rule 12(b)(6) motion as if it had been submitted under Rule 12(c). *Res. Ctr. for Indep. Living, Inc.*, 534 F. Supp. 2d at 1207 (treating the defendants’ post-answer motion to dismiss as if it had been styled a Rule 12(c) motion for judgment on the pleadings); *Faulk v. Tiffany*, No. 99-2354-GTV, 2000 WL 714336, at *1 (D. Kan. May 23, 2000) (citing *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990)); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980)). Because the same standard governs both motions, the court will consider defendants’ Rule 12(b)(6) motion to dismiss as if it had been styled a Rule 12(c) motion for judgment on the pleadings. *Res. Ctr. for Indep. Living, Inc.*, 534 F. Supp. 2d at 1207.

III. Legal Standards

This court will grant a Rule 12(b)(6) motion to dismiss only when the factual allegations fail to “state a claim to relief that is plausible on its face . . . or when an issue of law is dispositive.” *Meyer v. Christie*, No. 07-2230-JWL, 2007 WL 3120695, at *4 (D. Kan. Oct. 24, 2007) (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007); *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)). While the factual allegations need not be detailed, the claims must set forth entitlement to relief “through more than labels, conclusions, and a formulaic recitation of the elements of a cause of action.” *In re Motor Fuel Temperature Sales Practices Litig.*, 534 F. Supp. 2d 1214, 1216 (D. Kan. 2008). The allegations must contain facts sufficient to state a claim that is plausible, rather than merely conceivable. *Id.*

“All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true.” *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008). The court construes any reasonable inferences from these facts in favor of the plaintiff. *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006);

Dudnikov, 514 F.3d at 1070. The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Where, as here, a plaintiff is proceeding pro se,¹ “[d]ismissal . . . for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend.” *Jenkins v. Currier*, 514 F.3d 1030, 1032 (10th Cir. 2008) (quotation omitted). But plaintiff’s “pro se status does not relieve him from complying with the court’s procedural requirements.” *Barnes v. U.S.*, 173 F. App’x 695, 697 (10th Cir. 2006) (citations omitted); *see also Santistevan v. Colo. Sch. of Mines*, 150 F. App’x 927, 931 (10th Cir. 2005) (holding that a pro se litigant must follow the same rules of procedure as other litigants). He still “has the burden of alleging sufficient facts on which a recognizable legal claim could be based.” *Jenkins*, 514 F.3d at 1033 (internal quotations omitted).

IV. Analysis

A. Choice of Law

In a diversity matter, the court must apply the substantive law of the forum state, including its choice of law provisions. *Otis Elevator Co. v. Midland Red Oak Realty, Inc.*, 483 F.3d 1095, 1101 (10th Cir. 2007). Although this matter was transferred from the Western District of Missouri, “[t]he transfer of a case to another district does not alter the applicable law. The transferee court must apply the same law applicable in the transferor court.” *Hill’s Pet Prods., a Div. of Colgate-Palmolive Co. v. A.S.U., Inc.*, 808 F. Supp. 774, 776 n.3 (D. Kan. 1992); *see also Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1219 (10th Cir. 1997) (applying choice of law rules of state in which

¹ On January 2, 2008, plaintiff’s counsel withdrew at plaintiff’s request.

the transferor state sits). Thus, the court must apply Missouri's choice of law provisions.² When determining choice of law issues, Missouri applies the law of the state with the most significant relationship to the action. *Superior Equip. Co., v. Maryland Cas. Co.*, 986 S.W.2d 477, 480 (Mo. Ct. App. E.D. 1998) (discussing choice of law in contract actions); *Goede v. Aerojet Gen. Corp.*, 143 S.W.3d 14, 24–25 (Mo. Ct. App. E.D. 2004) (discussing choice of law in tort actions). This requires a balancing of several factors, including the following factors: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Superior Equip. Co., Inc.*, 986 S.W.2d at 480.

The complaint alleges the causes of action occurred in Jackson County, Missouri; the alleged contract was negotiated in Missouri; the alleged tortious conduct occurred in Missouri; plaintiff resides in Missouri; and the dissolved entity—Medical Supply—was incorporated and had its principal business location in Missouri. Based on the allegations in the complaint, the court finds that Missouri has the most significant relationship with this case, and thus, Missouri law applies to plaintiff's claims.

B. Breach of Contract

Defendants argue that plaintiff has failed to allege a cognizable breach of contract claim because he failed to allege an agreement and consideration. To state a cause of action for breach of contract under Missouri law, plaintiff must allege (1) an agreement between parties capable of contracting; (2) mutual obligations arising thereunder with respect to a definite subject matter; (3) a

² The result is the same under Kansas's choice of law provisions. Kansas law applies the law of the state where the contract was formed or the tortious conduct occurred. *Found. Prop. Invs., LLC v. CTP, LLC*, 159 P.3d 1042, 1046 (Kan. Ct. App. 2007); *Ling v. Jan's Liquors*, 703 P.2d 731, 735 (Kan. 1985).

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. Ct. App. E.D. 1992). To have an enforceable contract, there must be an agreement of the parties—or meeting of the minds—upon the terms of the contract. *Smith v. Hammons*, 63 S.W.3d 320, 325 (Mo. Ct. App. S.D. 2002). “The nature and extent of the contract’s essential terms must be certain or capable of being certain.” *Id.* The agreement is invalid when the parties have reserved the essential terms of the contract for future determination. *Id.* “Negotiations or preliminary steps towards a contract do not constitute a contract.” *Gateway Exteriors, Inc. v. Suntime Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. Ct. App. E.D. 1994) (citations omitted).

The basis for plaintiff’s breach of contract claim is that plaintiff and Brian Kabbes of defendant U.S. Bank exchanged email negotiations regarding escrow services for Medical Supply and had agreed upon some or all of the terms, including the following factors: the fees for the escrow agent services; defendant U.S. Bank’s compensation; the investment of long and short term held funds; the name of the escrow agent; and the payment schedule. (Complaint at ¶ 201.)³ Plaintiff further alleges that defendants performed diligence to determine whether to contract with Medical Supply (*id.* at ¶ 202); and that Mr. Kabbes also requested corporate good standing documentation from Medical Supply, which was provided (*id.* at ¶ 203).

Plaintiff’s allegations do not support a plausible “meeting of the minds.” By plaintiff’s own admission, the parties agreed to “some or all” of the terms. He alleges certain terms were supposedly agreed to, but fails to set forth the terms of the alleged contract or the substance of the email communications. Plaintiff has not pleaded a contract with any measure of definiteness and

³ Plaintiff misnumbered paragraphs in the complaint. After paragraph 225 on page 45, he begins numbering the paragraphs with number 194. He misnumbers the paragraphs through the complaint.

certainty. There is nothing in the pleading to show whether the alleged contract was oral or written,⁴ the terms of the contract, the amounts involved, the obligations of the respective parties, the measure of damages determined by the contract, or the time period of the terms. “In short, the pleading is so indefinite and uncertain that no cause of action for breach of contract is stated.” *Yoest v. Farm Credit Bank of St. Louis*, 832 S.W.2d 325, 329 (Mo. Ct. App. W.D. 1992) (upholding dismissal of breach of contract claim for failure to state a claim because the plaintiffs did not plead a contract with any measure of definiteness and certainty).

Plaintiff’s allegations merely support a finding that Medical Supply and defendant U.S. Bank were negotiating or discussing the possibility of an escrow contract—which does not constitute a contract. *Gateway Exteriors, Inc.*, 882 S.W.2d 275, 279. The allegations do not support a breach of contract claim. It is, therefore, not necessary to address the applicability of the statute of frauds, Mo. Rev. Stat. § 432.045. For the above mentioned reasons, plaintiff’s breach of contract claim is dismissed.

C. Fraud⁵

In order to make a submissible case of fraudulent misrepresentation, plaintiff must allege the following: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) the speaker’s intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer’s ignorance of the falsity of the representation; (7) the hearer’s reliance on the representation being true; (8) the hearer’s right to rely

⁴ Under Count I, breach of contract, plaintiff alleges the contract was written, but he alleges it was oral in Count II, fraud.

⁵ Plaintiff improperly alleges new fraud claims in his response to defendants’ motion. The allegations relate to defendants’ and defendants’ counsel’s actions in this litigation. These claims are not properly before the court, and the court will not consider them.

thereon; and (9) the hearer's consequent and proximately-caused injury. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 765 (Mo. 2007). Allegations of fraud must be stated with particularity. Fed. R. Civ. P. 9(b); *Bohac v. Walsh*, 223 S.W.3d 858, 863 (Mo. Ct. App. E.D. 2007).

Defendants argue that plaintiff fails to state a claim for relief because (1) he failed to plead that defendants made a false representation; (2) he failed to plead justifiable reliance or causation; and (3) a party cannot maintain a cause of action in tort when the breach of duty is purely contractual. As alleged in the complaint, the false misrepresentation is that an agent of defendant US Bank "represented to MSCI that US BANK and the commercial trust department would not perform as escrow agent or host MSCI's escrow accounts because of the 'know your customer provisions' diligence requirements of the USA PATRIOT Act and made it impossible for the bank to perform this service for MSCI." (Complaint at ¶ 210.) Because it is dispositive of the issue, the court will first address plaintiff's alleged reliance.

Plaintiff alleges Medical Supply "justifiably relied upon this fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of US BANK's Commercial Trust department and instead contacted US BANCORP NA's Andrew Cesere, to try and resolve the problem." (Complaint at ¶ 216.) But the other allegations in his complaint indicate that he (1) was not ignorant of the falsity of the representation⁶ and (2) did not rely on the representation being true. After hearing the representation that the Patriot Act prevented defendants from setting up plaintiff's escrow, plaintiff and his attorney discussed the issue, at length, with defendant US Bancorp's employees—Brian Kabbes and Lares Anderson. (Complaint at ¶ 215.) The complaint also alleges that he discussed the issue with Ed Higgins, the head of personal trust in defendant US Bancorp's St.

⁶ The court is not opining on the truthfulness of the alleged misrepresentation, but assumes all facts in favor of plaintiff at this stage of the proceeding.

Louis office. (*Id.*) Based on the allegations in the complaint, it is clear that plaintiff did not believe the alleged misrepresentation to be true, and in fact disputed its truth with defendant US Bancorp. The court finds that plaintiff has not alleged reliance.

Because plaintiff has failed to plead all the elements of fraud, the court finds that he has not submitted a valid fraud claim and dismisses the claim. The court need not address defendants' other arguments regarding plaintiff's fraud claim.

D. Misappropriation of Trade Secrets

In the complaint, plaintiff alleges that Medical Supply gave its trade secrets to defendant US Bank to apply for a line of credit and that defendants have misappropriated Medical Supply's trade secrets under Mo. Rev. Stat. § 417.450 by copying and transmitting the trade secrets to (1) defendant US Bancorp; (2) three of defendant US Bancorp's officers; and (3) defendant US Bancorp's subsidiary, US Bancorp Piper Jaffray.

Misappropriation occurs in two ways (1) "when one acquires a trade secret through 'improper means,' that is, through such means as theft, bribery or inducing one to breach a duty of secrecy"; or (2) when one disclosing a trade secret without consent, inter alia, knew or had reason to know that the secret was '[a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.'" *H & R Block E. Tax Servs., Inc. v. Enchura*, 122 F. Supp. 2d 1067, 1074 (W.D. Mo. 2000) (citing and quoting Mo. Rev. Stat. § 417.453(2)(a) and (4)). Relying on Connecticut law, defendants argue that a corporation is not liable for disclosure of trade secrets when the alleged disclosure is to others within the corporation. But the complaint alleges that defendant US Bank exceeded its authorized use and disclosed the alleged trade secrets to other entities—defendant US Bancorp and its subsidiary US Bancorp Piper Jaffray. The complaint does not define the relationship between defendant US Bank, defendant US Bancorp, and US Bancorp Piper Jaffray.

Nor does it explain the terms of Medical Supply's disclosure to defendant US Bank. Defendants also contend that plaintiff has failed to state a claim for relief because Medical Supply had already provided the alleged trade secrets to US Bancorp Piper Jaffray. It is not clear from the complaint whether the information Medical Supply provided to US Bancorp Piper Jaffray is the same information as the alleged trade secrets. Based on the allegations in the complaint, the court finds that it is not "obvious that the plaintiff cannot prevail on the facts he has alleged." *Jenkins*, 514 F.3d at 1032. Defendants' motion regarding this claim is therefore denied.

E. Breach of Fiduciary Duty

"In order to adequately plead a claim for breach of fiduciary relationship, the plaintiff must plead (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. W.D. 2000) (citing *Preferred Physicians Mut. Mgmt. Group v. Preferred Physicians Mut. Risk Retention*, 918 S.W.2d 805, 811 (Mo. Ct. App.1996)).

The complaint alleges that defendants owed plaintiff a fiduciary duty because (1) defendants were escrow service providers to Medical Supply and (2) defendants were the custodians of Medical Supply's confidential information. As the court explained above, the complaint does not allege a contract for escrow services, and thus, the only possible fiduciary relationship would arise from the parties' business dealings. "It has long been the rule in [Missouri] that the existence of a business relationship does not give rise to a fiduciary relationship, nor a presumption of such a relationship." *Chmielecki v. City Prods. Corp.*, 660 S.W.2d 275, 294 (Mo. Ct. App. W.D. 1983). And, ordinarily, there is no fiduciary relationship between a debtor and creditor. *Yoest*, 832 S.W.2d at 328.

Moreover, to allege a fiduciary relationship, plaintiff must alleged the elements of a fiduciary relationship, which including the following:

(1) one party must be subservient to the dominant mind and will of the other party as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value, which are the property of the subservient party, must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic and habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party.

Roth v. Equitable Life Assur. Soc. of U.S., 210 S.W.3d 253, 260 (Mo. Ct. App. E.D. 2006);

Chmielecki, 660 S.W.2d at 294–95 (“[A] confidential relationship is synonymous with a fiduciary relationship, and extends to instances in which a special confidence is reposed on one side and there is resulting *domination and influence* on the other.”). Plaintiff’s complaint does not allege a valid fiduciary relationship. Plaintiff does not allege he was subservient to defendants, surrendered his independence to defendants, or even placed trust and confidence in defendants. He was represented by counsel; he personally participated in the negotiations, negotiating lower fees and other terms; and he and his counsel disputed the denial of the escrow accounts—they contacted various individuals at the bank to fight the denial and threaten legal action.

In addition to failing to allege a fiduciary relationship, plaintiff’s claim that defendants breached a fiduciary duty because they disseminated Medical Supply’s alleged trade secrets is displaced by Mo. Rev. Stat. § 417.463.1. Section 417.463.1 provides that, with limited exceptions, “sections 417.450 to 417.467 displace conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret.” Mo. Rev. Stat. § 417.463.1. The limited exceptions are not applicable here. Mo. Rev. Stat. § 417.463.2. For these reasons, plaintiff has failed to state a cause of action for breach of fiduciary duty. Defendants’ motion regarding this claim is granted.

F. Prima Facie Tort

In order to plead a *prima facie* tort, the plaintiff must plead (1) an intentional lawful act by the defendant; (2) intent to cause injury to the plaintiff; (3) injury to the plaintiff; (4) an absence of any justification or an insufficient justification for the defendant's act. *Cridlebaugh v. Putnam County State Bank of Milan*, 192 S.W.3d 540 (Mo. Ct. App. W.D. 2006). "[T]he burden is on the plaintiff to affirmatively plead and prove an absence of justification on the part of the defendant." *Wilt v. Kansas City Area Transp. Auth.*, 629 S.W.2d 669, 673 (Mo. Ct. App. W.D. 1982). Missouri courts do not look upon *prima facie* tort claims with favor and have consistently limited their application. *Hertz Corp. v. Raks Hospitality, Inc.*, 196 S.W.3d 536, 549 (Mo. Ct. App. E.D. 2006). "The doctrine of *prima facie* tort is a tort of last resort, and it is difficult to find reported cases where a plaintiff actually has recovered on this theory." *Cridlebaugh*, 192 S.W.3d at 545.

Plaintiff alleges defendants are liable for the following intentional lawful acts: (1) refusing to provide escrow account services; (2) circulating derogatory financial information about Medical Supply; (3) placing warning notes against Medical Supply's officers on defendant US Bank's computer system; (4) disparaging Medical Supply's legal claims against defendants; (5) causing a disciplinary complaint to be filed against Medical Supply's counsel; and (6) preventing Medical Supply from obtaining a loan secured with escrow account funds as they were released to Medical Supply. (Complaint at ¶ 249.) Plaintiff has not properly alleged an "absence of any justification or an insufficient justification" for defendants' refusal to provide escrow account services. Plaintiff makes a conclusory allegation that "[t]here is an absence of justification and in the alternative insufficient justification for US BANK and US BANKCORP's acts," but the factual allegations in the complaint do not support this conclusion. As alleged in the complaint, the recorded phone message of US Bancorp's Becky Hainje explained that the escrow services were denied because (1) Medical Supply was an unknown start-up business; (2) the principals involved were unknown to the

bank; and (3) the “know your customer” provision of the Patriot Act. (Complaint at ¶ 214.)

Although the complaint may, if read liberally, allege that the latter reason was unjustified, it does not allege that the first two reasons were unjustified. The court finds that plaintiff has failed to state a claim regarding this allegation. Plaintiff’s remaining allegations regarding defendants’ lawful intentional acts are conclusory and fail to set forth factual allegations to support the conclusions. Thus, these allegations do not set forth claims for *prima facie* tort. *In re Motor Fuel Temperature Sales Practices Litig.*, 534 F. Supp. 2d at 1216 (holding claims must set forth entitlement to relief “through more than labels, conclusions, and a formulaic recitation of the elements of a cause of action.”). Based on the allegations in the complaint, the court finds that plaintiff has failed to state a claim for *prima facie* tort.

G. Rule 8

Defendants request the court dismiss plaintiff’s complaint because it violates Federal Rules of Civil Procedure 8. Rule 8(a) states: “A pleading . . . must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(d)(1) elaborates on the short and plain requirement in requiring each averment to be “simple, concise, and direct.” Plaintiff’s complaint is 71 pages and anything but “simple, concise, and direct.” But the court declines to dismiss on this ground. Plaintiff’s complaint asserts non-relevant information, but sets forth allegations for his claims. As discussed above, only one claim remains—misappropriation of Medical Supply’s alleged trade secrets. The court will consider the claim on its merits. The court also denies defendants’ request that it strike paragraphs 24–32 and 249(e) of the complaint.

IT IS THEREFORE ORDERED that Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure (Doc. 43) is granted in part and denied in part. All claims except plaintiff’s misappropriation of trade secrets claim pursuant to Mo. Rev.

Stat. § 417.450 are hereby dismissed.

Dated this 4th day of September 2008, at Kansas City, Kansas.

s/ Carlos Murguia _____
CARLOS MURGUIA
United States District Judge

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 brings this action for misappropriation of trade secrets against defendants US Bancorp NA and US Bank NA. This matter is before the court on plaintiff’s 28 U.S.C. § 144 Affidavit of Prejudice (Doc. 116); Objection to the Magistrate’s Order Compelling Discovery and Sanctioning the Plaintiff (Doc. 97); Motion Under Fed. R Civ. P. 59(e), To Alter or Amend Judgment and to Stay Further Pretrial Proceedings (Doc. 100); Objection to Magistrate Orders of 8/18/08 (Doc. 122); and Objection to Magistrate’s Order of 8/20/08 (Doc. 123).

Affidavit of Prejudice

Plaintiff filed a 28 U.S.C. § 144 Affidavit of Prejudice (Doc. 116), arguing that Magistrate Judge Waxse and the undersigned judge are prejudiced and biased against him. When reviewing an affidavit under 28 U.S.C. § 144, the court cannot consider the truth of the facts alleged. *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir. 1976) (citing *Berger v. United States*, 255 U.S. 22, 31 (1921)). But the court must determine the legal sufficiency of the affidavit. *Id.*; *see also Winslow v. Lehr*, 641 F. Supp. 1237, 1238 (D. Colo. 1986) (“[T]he filing of an affidavit of prejudice does not operate automatically to disqualify a judge. The judge must examine the affidavit to determine

whether it is sufficient as a matter of law.”). The following must occur for the affidavit to be deemed sufficient to require disqualification: “1) the facts must be material and stated with particularity; 2) the facts must be such that, if true[,] they would convince a reasonable man that bias exists; [and] 3) the facts must show the bias is personal, as opposed to judicial, in nature.” *Winslow*, 641 F. Supp. at 1240 (citing *United States v. Thompson*, 483 F.2d 527 (3d Cir. 1973)). A 28 U.S.C. § 144 affidavit cannot be based on the rulings in the case. *Id.*; see also *Berger*, 255 U.S. at 31 (reviewing an affidavit of prejudice under Section 21 of the Judicial Code and holding that “the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case.”).

After reviewing the affidavit, the court finds that it is insufficient. Plaintiff’s allegations of bias and prejudice are based upon rulings made in this action. The affidavit lacks facts showing personal bias and prejudice. It contains only insufficient conclusions. See *Winslow*, 641 F. Supp at 1241 (“An affidavit is deemed insufficient when it lacks facts showing a personal bias or prejudice, and contains only insufficient conclusions.”). The facts alleged in the affidavit would not convince a reasonable person that bias exists. The court therefore finds that the affidavit does not require recusal under 28 U.S.C. § 144.

Objections to Magistrate Judge’s Orders

A district court reviews a magistrate judge’s decision on nondispositive motions under a “clearly erroneous or contrary to law standard.” *First Union Mortgage Corp. v. Smith*, 229 F.3d 992, 995 (10th Cir. 2000) (citing 28 U.S.C. § 636(b)(1)(A)). This standard requires the district court to affirm the magistrate judge’s decision unless it is “left with the definite and firm conviction that a mistake has been committed.” *Burton v. R.J. Reynolds Tobacco Co.*, 200 F.R.D. 661, 667 (D. Kan.

2001) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The court will first consider plaintiff's Objection to the Magistrate's Order Compelling Discovery and Sanctioning the Plaintiff (Doc. 97), in which he objects to Judge Waxse's July 8, 2008 Memorandum and Order (Doc. 96). After reviewing the record, the court finds that Judge Waxse applied the appropriate standard when granting defendants' motion to compel. Furthermore, Judge Waxse's order requiring plaintiff to show cause why the court should not impose discovery sanctions is supported by the record. Plaintiff's objection is overruled.

Next, the court will consider plaintiff's Objection to Magistrate Orders of 8/18/08 (Doc. 122). On August 18, 2008, Judge Waxse issued two orders; one ordered plaintiff to pay a portion of the reasonable attorney fees and expenses that defendants incurred in connection with their motion to compel (Doc. 115) and the other ordered plaintiff to show cause why this case should not be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 37(b)(2)(A), for failing to comply with the court's July 22, 2008 Order (Doc. 114). Before granting defendants their attorney fees, Judge Waxse ordered plaintiff to show cause why plaintiff should not have to pay defendants' attorney fees, but plaintiff failed to respond to the court's show cause order. The court finds that Judge Waxse's order requiring plaintiff to pay defendants' attorney fees was not contrary to law. Similarly, Judge Waxse issued the August 18, 2008 order to show cause because plaintiff had failed to comply with the court's July 22, 2008 order granting in part defendants' motion to compel. Under Federal Rule of Civil Procedure 37(b)(2)(A) an action may be dismissed for failure to comply with a discovery order. Thus, Judge Waxse's August 18, 2008 order to show cause was in accordance with the law. Plaintiff had numerous opportunities to comply with the court's orders and follow the court's rules before Judge Waxse imposed sanctions on plaintiff and ordered him to show cause why the case should not be dismissed. Plaintiff's objections are overruled.

Finally, the court will consider plaintiff's Objection to Magistrate's Order of 8/20/08 (Doc. 123). On August 20, 2008, Judge Waxse issued an order informing plaintiff that the filing of his reply to defendants' response to the court's August 18, 2008 show cause order did not relieve plaintiff of the obligation to respond to the show cause order (Doc. 117). In the order, Judge Waxse granted plaintiff additional time in which to respond to the show cause order. After reviewing Judge Waxse's order, the court finds that the order was not clearly erroneous or contrary to law. Accordingly, plaintiff's objection is overruled.

Plaintiff also argues that as of July 11, 2008, this court lacks jurisdiction over this case because plaintiff filed an appeal in *Medical Supply Chain v. Neoforma*, Case No. 05-2299-CM. But plaintiff's appeal of another case or controversy does not divest this court of jurisdiction in this case.

Motion to Reconsider and Stay Further Pretrial Proceedings

Plaintiff requests that the court reconsider its July 11, 2008 Memorandum and Order (Doc. 99) in which it upheld Judge Waxse's order denying plaintiff's motion for time to extend discovery. Because plaintiff is seeking reconsideration of a nondispositive motion, his request is governed by D. Kan. Local Rule 7.3, not Federal Rule of Civil Procedure 59(e). The court has recognized the following grounds for granting a motion to reconsider: "(1) an intervening change in controlling law, (2) availability of new evidence, and (3) the need to correct clear error or prevent manifest injustice." D. Kan. Rule 7.3. Plaintiff argues that the court should reconsider its July 11, 2008 order to correct clear error or prevent manifest injustice. The court has reviewed its July 11, 2008 order and finds that it is not manifestly unjust, clearly erroneous, or contrary to law.

On July 18, 2008, plaintiff refiled his request to stay further pretrial proceedings as its own motion (Doc. 107). Judge Waxse properly denied the motion on July 31, 2008 (Doc. 108). As

explained above, plaintiff's appeal of another case or controversy does not divest this court of jurisdiction in this case. Accordingly, plaintiff's Motion Under Fed. R Civ. P. 59(e), To Alter or Amend Judgment and to Stay Further Pretrial Proceedings (Doc. 100) is denied.

IT IS THEREFORE ORDERED that plaintiff's 28 U.S.C. § 144 Affidavit of Prejudice (Doc. 116) does not require recusal under 28 U.S.C. § 144.

IT IS FURTHER ORDERED that plaintiff's Objection to the Magistrate's Order Compelling Discovery and Sanctioning the Plaintiff (Doc. 97) is overruled.

IT IS FURTHER ORDERED that plaintiff's Objection to Magistrate Orders of 8/18/08 (Doc. 122) is overruled.

IT IS FURTHER ORDERED that plaintiff's Objection to Magistrate's Order of 8/20/08 (Doc. 123) is overruled.

IT IS FURTHER ORDERED that plaintiff's Motion Under Fed. R Civ. P. 59(e), To Alter or Amend Judgment and to Stay Further Pretrial Proceedings (Doc. 100) is denied.

Dated this 10th day of October 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

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

¹Fed. 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).

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

⁸Req. 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

⁹See, 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).

¹⁰See, 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

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*

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

¹⁷Fed. 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 are 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

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

¹⁹Pl.'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

²¹Any 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 his response.²⁶ Rather, Plaintiff states that Defendants have failed to disclose documents pursuant to Rule 26(a)(1) and failed to provide

²³See Depo. Notice (doc. 71) at p. 1.

²⁴*Id.*

²⁵*Id.*

²⁶See 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

²⁷*Id.* at p. 1.

²⁸Fed. R. Civ. P. 30(b)(6).

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

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

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

C. Analysis

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

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

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).

³⁵Fed. 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

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

³⁷168 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 topics 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.

³⁹*Id.*

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

⁴¹*Id.*, at *3-4.

⁴²No. 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 reasonable 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

⁴⁴Fed. 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

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

⁴⁶Defendants 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.

⁴⁷Fed. 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.

⁴⁸Fed. 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

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
OCT 16 PM 3:59
BY: [Signature] SECURITY

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.)

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 orders including the following:

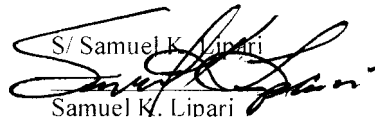
1. Asserting jurisdiction while this same matter or controversy was on appeal and in violation of the first to file rule;
2. The subsequent granting of the defendants more than one motion to dismiss in violation of the Federal Rules Of Civil Procedure;
3. The court's dismissal of the plaintiff's contract, fiduciary duty and fraud based claims contradicting the Western District Court of Missouri and Missouri state court rulings that the alleged facts stated a claim and were plausible;
4. The court's Memorandum and Order of 10/10/08 upholding rulings made by this court during an open affidavit of prejudice and in the absence of jurisdiction;
5. The denial of discovery by the plaintiff permitted by the Federal Rules Of Civil Procedure by refusing to rule on the plaintiff's objections to defendants' frivolous assertions of blanket protective orders until after discovery was closed and after the plaintiff has stipulated to dismissal of his remaining claims;
6. The continued assertion of jurisdiction over discovery demonstrated by the court's order of October 16th, 2008 when the question of protective orders will be resolved in the Missouri 16th Circuit Court at Independence, Missouri.

The plaintiff stipulated to dismissal with prejudice of his remaining claim for violation of Missouri State Trade Secret Act on October 15, 2008.

The plaintiff was not able to appeal the transfer at law until the transferee court relinquished jurisdiction. The plaintiff has given simultaneous notice of appeal in this the transferee court and the transferor court.

The plaintiff now timely appeals.

Respectfully submitted,


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

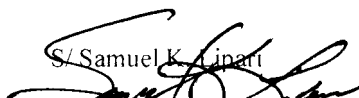
Certificate of Service

I certify that on October 16th, 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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ATTORNEY FOR DEFENDANTS


S/ Samuel K. Lipari
Samuel K. Lipari