

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS  
(Kansas City)

FILED  
U.S. DISTRICT COURT  
DISTRICT OF KANSAS  
07 MAY-3 PH ~: 53

RALPH L. GEUJACH  
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At KANSAS r.ITY KS .1

SAMUEL K. LIPARI )  
(Assignee of Dissolved )  
Medical Supply Chain, Inc.)  
*Plaintiff,* )  
)  
v. )  
)  
US BAN CORP and )  
US BANK NATIONAL ASSOCTA nON )  
*Defendants,* )

) Case No. 07-CV-02146-CM"DJW

MOTION TO STRIKE DEFENDANTS' MOTION TO DISMISS

Comes now the plaintiff Samuel K. Lipari and makes the following motion to strike the defendants' second or fifth motion to dismiss this case or controversy as being prohibited under the rules. Samuel K. Lipari respectfully reserves his right to answer the motion to dismiss should the court not strike the motion.

STATEMENT OF FACTS

1. The defendants lost their motion to dismiss the plaintiffs complaint on identical grounds on April 4, 2007 in the order of the Western District of Missouri Court Case No. 06-1012-CV-W-FJG transferring this controversy to this court instead of granting dismissal,

2. The defendants did not seek reconsideration or otherwise appeal the Western District of Missouri order in Case No. 06-1012-CV- W-FJG failing to grant their dismissal.

3. The defendants in this same case or controversy variously styled *Medical Supply Chain v. US Bancorp N A, et al, Medical Supply Chain v. Novation, et al* KS Case No. 02-cv-02539-CM, W. Dist, Mo. Case No. 05-0210-CV-W-ODS and *Medical Supply Chain v. Novation, et al* 05-cv-02299-KHV-GLR made more than three separate motions for dismissal (Docs. 6,7, 13 and 32). which did not result in the plaintiff s state claims being dismissed with prejudice.

4. The defendants did not seek reconsideration or appeal this court's denial of a dismissal with prejudice of the plaintiffs state law claims in *Medical Supply Chain v. Novation, et al* 05-cv-02299-CM-GLR, Document 78, filed 03/07/2006.

5. The Tenth Circuit Court of Appeals in *Medical Supply Chain v. Novation, et al* Case No. 06-3331 (10th Cir.) has sole exclusive federal jurisdiction over this case or controversy including the state law claims in the complaint currently before this court.

#### MOTION IN SUPPORT

The defendants' current dismissal is a prohibited second Rule 12 motion to dismiss. Palermo, *Federal Pretrial Practice: Basic Procedure & Strategy* 2001 states at page 21; "Rules 12(g) and 12(h), read together, provide in general, there shall not be more than one Rule 12 motion to dismiss .... All defenses and grounds "then available" shall be asserted in the one motion; certain defenses shall be asserted in the Rule 12 motion, or in the initial responsive pleading (or amendment thereof) under threat of waiver."

After the order by Judge Carlos Murguia permitting the plaintiff to file his contract and fiduciary claims in state court ( Case 05-cv-02299-CM-GLR Doc.78 Filed 03/07/2006 at page 19 ), the defendants were required to appeal the decision to retain the state claims in federal court:

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

*Amazon Inc. v. Dirt Camp Inc.*, 273 F.3d 1271 at 1276 (10th Cir., 2001).

The necessity of appeal to thwart a follow on state court action has been established in the Tenth Circuit since 1992:

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

*BUI v. IBP Inc.* at fn 1 (2002).

The Tenth Circuit in which this action currently has its federal existence has exclusive jurisdiction over the current state law based claims. A district court loses all jurisdiction over matters brought to the court of appeals upon the filing of a notice of appeal .... Once 'an appeal is taken, the district court is divested of jurisdiction except to take action in aid of the appeal until the case is remanded to it by the appellate court, or to correct clerical errors under Rule 60(a)." *Travelers Ins. Co. v. Lileberg Enters., Inc.*, 38 F.3d 1404, 1407 n.3 (5th Cir. 1994).

The defendants prohibited second motion for dismissal seeks relief violating the plaintiffs clearly established constitutional guaranteed right to redress and to property rights from the assigned contract action when it is settled law that this court cannot change the dismissal without prejudice into one with prejudice during the pendency of appellate jurisdiction:

"On May 17, 2000, one day after Logan filed its notice of appeal to this Court, the district court attempted, in an order, to correct its earlier statement that Logan could pursue his patent infringement claims by stating that its dismissal of those claims had been with prejudice. However, because Logan had already filed his notice of appeal, the district court was without jurisdiction to issue the May 17th order. *Rutherford v. Harris County, Tex.*, 197 F.3d 173,189-90 (5th Cir. 1999)."

*Logan v. Burgers Ozark Country Cured Hams Inc.*, 263 F.3d 447 at 454 (5th Cir., 2001). See also Graham by *Graham v. Wyeth Laboratories, Div. of American Home Products Corp.*, 906 F.2d 1399 at fn 23 (C.A.10 (Kan.), 1990).

### CONCLUSION

The defendants second or fifth motion to dismiss is prohibited under the rules of civil procedure. The defendants' motion seeks for this court to trespass upon the plaintiffs clearly established constitutional rights and to do so when this court is clearly without jurisdiction to do so. Therefore the plaintiff respectfully requests that this court strike the defendants' motion for dismissal. Should the court decide otherwise, the plaintiff respectfully requests the court give him notice and the opportunity to respond.

Respectly submitted,



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Pro se

**CERTIFICATE OF SERVICE**

I certify I have served a copy of this FRCP 26(a)(1), disclosure to the opposing counsel listed below via U.S. Mail on May 3<sup>rd</sup>, 2007.

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SAMUEL K. LIPARI

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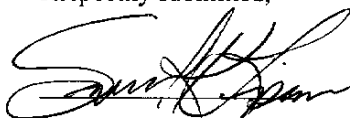
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Pro se

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I certify I have served a copy of this FRCP 26(a)(1), disclosure to the opposing counsel listed below via U.S. Mail on May 3<sup>rd</sup>, 2007.

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SAMUEL K. LIPARI,