

**UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

SAMUEL K. LIPARI,	)
	)
<i>Plaintiff,</i>	) Case Nos. 08-3287, 8-3338, and
	) 08-3345
v.	)
	)
U.S. BANCORP and	) Appeal from KS Dist. Court
U.S. BANK NATIONAL ASSOCIATION,	) Case No. 2:07-cv-02146-CM
	)
<i>Defendants.</i>	)

**APPELLANT’S REPLY MEMORANDUM  
ON THE MOTION TO TRANSFER APPEAL UNDER 28 U.S.C. § 1631**

Comes now the plaintiff/appellant Samuel K. Lipari and makes the following reply memorandum to the defendant/appellees’ answer to the motion to transfer this appeal to the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. Sec. 1631.

The defendant/appellees’ answer did not provide a legal basis for the jurisdiction of this court and none exists. The defendant/appellees did not dispute that this is not the same matter in controversy as *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05- 2299 which was on appeal as *Medical Supply Chain, Inc. v. Neoforma et al.* 10<sup>th</sup> Cir. Case No. 06-3331 at the time *Lipari v. US Bancorp et al* was transferred to Kansas District Court and is on appeal in the Tenth Circuit as *Medical Supply Chain, Inc. v. Neoforma et al.* 10<sup>th</sup> Cir. Case No. 08-3187 during the time the trial court made orders dismissing

claims in *Lipari v. US Bancorp et al*, KS Case No. 2:07-cv-02146-CM and granting final judgment.

**I. THE CASE WAS TRANSFERRED TO KANSAS WHILE THIS COURT HAD EXCLUSIVE JURISDICTION**

The US Supreme Court has determined that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982). The trial court erroneously exerted jurisdiction over Case No. 2:07-cv-02146-CM while *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05- 2299 containing the same state law claims ( as argued by the defendant/appellees for *res judicata* in the trial court action the present appeal was taken from) and concerning the same issues was before the Tenth Circuit US Court of Appeals as *Medical Supply Chain, Inc. v. Neoforma et al* Case No. 06- 3331.

The controlling law of this circuit is that a notice of appeal in *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05- 2299 divests the trial court of jurisdiction. See *McCauley v. Halliburton Energy Services, Inc.*, 413 F.3d 1158 at 1162 (Fed. 10th Cir., 2005).

## **II. THE TRIAL COURT'S ORDERS OF DISMISSAL AND JUDGMENT WERE WHILE THIS COURT HAD EXCLUSIVE JURISDICTION**

Since diversity jurisdiction does not exist due to common state of residency of a co-defendant in *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05- 2299, the removal jurisdiction was invalid and the Western District Court of Missouri's denial of remand was in error.

The Kansas District Court trial court in Case No. 2:07-cv-02146-CM did not meet federal jurisdiction requirements at the time it entered judgment, an absolute requirement for validity under the controlling precedent of the US Supreme Court and of this circuit:

“In light of the Supreme Court's decision *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996), we need not address the Hollanders' specific arguments. In *Caterpillar*, the Court held that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Id.* at 64, 117 S.Ct. 467; see also *Feichko v. Denver & Rio Grande W. R.R. Co.*, 213 F.3d 586, 590-91 (10th Cir.2000) (discussing *Caterpillar*).”

*Hollander v. Sandoz Pharmaceuticals Corp.*, 289 F.3d 1193 at 1203 (10th Cir., 2002).

### **CONCLUSION**

The appeal if it goes forward will have this circuit reversing the Eighth Circuit trial court in the Western District of Missouri for failing to remand the action. After the final judgment unlike the attempt to seek review of an interim order of transfer in *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d

1509, 1516-17 (10th Cir. 1991) , an appeals court has jurisdiction over all orders including the order of transfer and denying remand made by a trial court in another circuit. See *Technosteel v. Beers Construction Co.*, 271 F.3d 151 at 154 (4th Cir., 2001). However, this court need not put itself in that position when jurisdiction was never accomplished in the trial court below.

The defendant/appellees' arguments that the Eighth Circuit orders denying jurisdiction as premature or yielding to this circuit do not remedy this circuits first and foremost duty to recognize its own lack of jurisdiction.

Whereas for the above stated reasons the plaintiff/appellant respectfully requests this court reverse the decisions in below as being void for lack of jurisdiction and transfer the appeal to the US Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on February 6, 2009 I have served the opposing counsel with a copy of the foregoing notice using email to the following:

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