

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

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Elisabeth A. Shumaker
Clerk of Court

December 18, 2008

Douglas E. Cressler
Chief Deputy Clerk

Samuel K. Lipari
3520 NE Akin Blvd., Suite 918
Lee Summit, MO 64064

RE: 08-3345, Lipari v. US Bancorp NA, et al
Dist/Ag docket: 2:07-CV-02146-CM-DJW

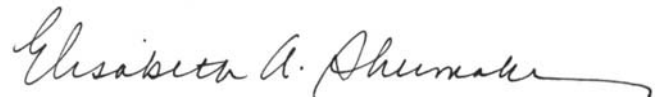
Dear Appellant:

This appeal was docketed today.

Attorneys for parties must complete and file an entry of appearance form within 10 days from the date of this letter. Pro se parties must complete and file the form within 30 days from the date of this letter. *See* 10th Cir. R. 46.1. Appellant's failure to enter an appearance may cause the appeal to be dismissed. An appellee who fails to enter an appearance may not receive notice or service of orders.

The \$5.00 filing fee and \$450.00 docket fee were not paid to the district clerk when the notice of appeal was filed as required by Fed. R. App. P. 3(e). Unless the fees are paid to the district clerk or an application for leave to proceed without prepayment of fees is made to the district court, within 30 days of the date of this letter, this appeal may be dismissed without further notice. *See* 10th Cir. R. 3.3(B). Please contact this office if you have questions.

Sincerely,



Elisabeth A. Shumaker
Clerk of the Court

cc: Andrew M. DeMarea
Jay E. Heidrick
Mark A. Olthoff

EAS/lab

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
DEC 17 PM 4:07
T. DEBBY H. GARDNER
CLERK
BY *[Signature]* DEPUTY
AT KANSAS CITY, KS

SAMUEL K. LIPARI)
(Assignee of Dissolved)
Medical Supply Chain, Inc.)
Plaintiff) Case No. 07-02146
)
vs.)
)
US BANCORP, NA)
US BANK, NA)
Defendants)

SECOND AMENDED 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 second amended notice of appeal to include this court's December 12, 2008 order which does not change or alter this court's November 26, 2008 order announcing judgment on all remaining claims.

The plaintiff however includes as attachment the defendants' filed status report (exb. 1) intentionally and falsely contradicting the November 26, 2008 order of this court and materially misrepresenting the November 26, 2008 order to the Tenth Circuit Court of Appeals for the purpose of further delaying the plaintiff's entry into the nationwide market for hospital supplies to compete with the Novation LLC hospital supply cartel of which US BANCORP, INC and US BANK NA are members of. US BANCORP, INC and US BANK NA continue to commit sham petitioning in violation of the Sherman Antitrust Acts to prevent the plaintiff from enjoying the benefits of his bargain and for the purpose of depriving the plaintiff of critical inputs required to enter that market.

The plaintiff now timely appeals.

Respectfully submitted,

[Handwritten Signature]

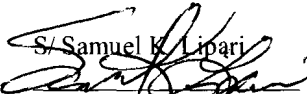
S/ Samuel K. Lipari
Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

Certificate of Service

I certify that on December 17th, 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
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION


S/ Samuel K. Lipari
Samuel K. Lipari

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SAMUEL K. LIPARI,)	
)	
)	Plaintiff,
)	
vs.)	Case No. 08-3287
)	(Appeal from Kansas District
)	Case No. 07-CV-02146)
U.S. BANCORP, and)	
)	
U.S. BANK NATIONAL ASSOCIATION,)	
)	
Defendants.)	

STATUS UPDATE CONCERNING APPELLATE COURT JURISDICTION

Appellees/Defendants U.S. Bancorp and U.S. Bank NA, through counsel Shughart Thomson & Kilroy, P.C., file this status update concerning appellate jurisdiction. This Court still lacks appellate jurisdiction because no final Order or Judgment has been entered by the Kansas District Court.

On November 26, 2008, the District Court found that appellant/plaintiff's voluntary stipulation was ineffective because such dismissal under such circumstances would not be "without prejudice" to the defendants. *See* Doc. No. 159. The District Court ordered Mr. Lipari to withdraw the stipulation by December 1 or the Court would dismiss the action and order Mr. Lipari to pay fees awarded by Magistrate Waxse. *See id.*

Mr. Lipari did not withdraw his stipulation and on December 5, 2008 the District Court ordered Mr. Lipari to show cause as to why his case should not be dismissed. *See* Doc. No. 164. Mr. Lipari filed his response to the show cause order on December 10, 2008. *See* Doc. No. 169. No further order has been issued and there has been no final order dismissing this case. Therefore, this Court still does not possess appellate jurisdiction.

Exh 1

Respectfully submitted,

s/ Mark A. Olthoff

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ATTORNEYS FOR APPELLEES/DEFENDANTS
U.S. BANCORP and
U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served via electronic mail this 11th day of December, 2008, to:

Mr. Samuel K. Lipari
3520 NE Akin Boulevard
Suite 918
Lee Summit, MO 64064

s/ Mark A. Olthoff

Attorney for Appellees/Defendants

**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 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). On September 4, 2008, the court dismissed all of plaintiff's claims except plaintiff's misappropriation of trade secrets claim (Doc. 137). On October 15, 2008, plaintiff filed a Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2) (Doc. 147), which is currently pending before this court.

In plaintiff's stipulation, he sought to withdraw his Motion for Leave to Amend Complaint, which had not been ruled on, and stipulate to the dismissal of his misappropriation of trade secrets claim with prejudice. In defendants' response to plaintiff's stipulation, defendants agreed to join the stipulation but only on the condition that the order of dismissal "reflect that plaintiff has been ordered to

pay defendants' attorneys' fees for his non-compliance as ordered in Doc. No. 115,¹ as well as all applicable costs of the action" (Doc. 153). In his reply, plaintiff disputed the fees and would not agree to dismiss the claims with defendants' conditions (Doc. 155).

After filing his stipulation for dismissal and before defendants could respond to the stipulation, plaintiff appealed this lawsuit to the Tenth Circuit Court of Appeals. On November 14, 2008, the Tenth Circuit Court of Appeals abated the appeal pending this court's resolution of plaintiff's stipulation for dismissal. On November 26, 2008, Magistrate Judge Waxse ordered plaintiff to pay defendant's reasonable attorneys' fees and expenses in the amount of \$700 (Doc. 158). That same day, because plaintiff was unaware of the amount of fees he would be required to pay when he filed his stipulation for an order of dismissal, the undersigned judge issued an order giving defendant until December 10, 2008 to withdraw his stipulation for order of dismissal (Doc. 159).² In that order, the court explained that if plaintiff failed to withdraw his stipulation, the court would dismiss plaintiff's misappropriation of trade secrets claim—the only claim remaining in this action—and order plaintiff to pay the reasonable attorneys' fees and expenses as ordered in Judge Waxse's November 26, 2008 order. On December 8, 2008, plaintiff filed a second appeal with the Tenth Circuit. On December 9, 2008, plaintiff filed a response to the court's orders regarding the withdrawal of his stipulation for dismissal.

¹ On August 18, 2008, Magistrate Judge Waxse ordered plaintiff to pay reasonable attorneys' fees and expenses related to defendants' Motion To Compel Compliance with Rule 26(a)(1). Judge Waxse ordered the parties to file pleadings regarding the appropriate amount of the fees and expenses.

² The docket sheet incorrectly stated that had defendant until December 1, 2008, and, on December 5, 2008, the court issued a show cause order adjusting the date for plaintiff to withdraw his motion for stipulation to December 12, 2008. The December 5, 2008, show cause order was not to prejudice plaintiff, but to ensure that he had adequate time to withdraw his stipulation for dismissal if he chose to do so.

Although plaintiff's response makes many allegations of bias and prejudice, he does not withdraw his stipulation for dismissal.³ Pursuant to Federal Rule of Civil Procedure 41(a)(2), the court may allow a plaintiff to voluntarily dismiss an action "upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). "The rule is designed primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Brown v. Baeke*, 413 F.3d 1121, 1123 (10th Cir. 2005) (quotation omitted). The court should grant a motion for voluntary dismissal "[a]bsent 'legal prejudice' to the defendant." *Id.* (quotation omitted). When determining "legal prejudice" the court is obligated to consider the novelty of the circumstances of the case. *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997). The court should consider the relevant factors, including: "the opposing party's effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the present stage of litigation." *Id.* (citing *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.*, 77 F.3d 354, 358 (10th Cir. 1996)).

Under Rule 41(a)(2), the court may impose terms upon the dismissal of a plaintiff's claim, such as payment of attorneys' fees or a limitation on the refiling of certain claims. *See Gonzales v. City of Topeka Kan.*, 206 F.R.D. 280, 283 (D. Kan. 2001) (citing 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2366, at 305–314 (1995)). *Id.* (quoting *Am.Nat. Bank and Trust Co. v. Bic Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991)). "Conditions are designed to alleviate any prejudice a defendant might otherwise suffer upon refiling of an action."

After reviewing the record and the parties' briefs, this court finds that dismissing this case with the condition that plaintiff pay defendants' attorneys' fees pursuant to Judge Waxse's November 26,

³ Plaintiff also alleges that his appeal divests this court of jurisdiction; however, the Tenth Circuit Court of Appeals abated the appeal pending this court's resolution of plaintiff's Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2).

2008 order will not legally prejudice defendants. Accordingly, plaintiff's stipulation for dismissal is granted and this case is dismissed.

IT IS THEREFORE ORDERED that plaintiff's Stipulation For Order Of Dismissal Of Remaining Claims Pursuant To Federal Rule Of Civil Procedure 41(A)(2) is granted.

IT IS FURTHER ORDERED that plaintiff shall pay defendants' reasonable attorneys' fees and expenses as ordered in Judge Waxse's November 26, 2008 order.

Dated this 12th day of December 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge