

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

| | | |
|-----------------------------------|---|-------------------------|
| SAMUEL K. LIPARI, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Case No. 09-3203 |
| |) | |
| U.S. BANCORP and U.S. BANK |) | |
| NATIONAL ASSOCIATION, |) | |
| |) | |
| Appellees. |) | |

REPLY IN SUPPORT OF APPELLEES’ MOTION TO DISMISS

Appellees file this Reply in support of their Motion to Dismiss. Mr. Lipari’s *ad hominum* attacks and false accusations aside, his opposition does not change the fact that this Court lacks jurisdiction over his purported appeal.

It is well settled that, after a district court grants a motion to transfer under 28 U.S.C. § 1404(a), “the physical receipt of the file in the transferee court is the event that signals the end of jurisdiction in the transferor court.” *Integrated Health Services of Cliff Manor, Inc. v. THCI Co., LLC*, 417 F.3d 953, 957 (8th Cir. 2005). The Clerk of the Court for the District of Kansas received the physical transfer of this file in April 2007. The case was litigated to finality there and appealed to the Tenth Circuit which rendered its decision on July 16, 2009. Mr. Lipari did not file this appeal until September 16, 2009. This Court plainly lacks appellate jurisdiction.

To support his jurisdictional argument, Mr. Lipari primarily relies upon this Court's opinion in *Meat Price Investigators v. Spencer Foods, Inc.*, 572 F.2d 163 (8th Cir. 1978). But Mr. Lipari's reliance on this case is misplaced. In *Meat Price Investigators*, the matter had been transferred under the multi-district litigation statute, 28 U.S.C. § 1407. This Court found that, because transfer was based under 28 U.S.C. § 1407, it had jurisdiction to review a subsequent order entered by the district court after transfer. *Id.* at 167.

Mr. Lipari's argument is misplaced in that the present matter is not part of any multi-district litigation. The case was transferred under 28 U.S.C. § 1404(a). (*See* Ex. A to Motion.) Therefore, the *Meat Price Investigators* decision is not applicable. In fact, the *Meat Price Investigators* court acknowledged the general rule (cited above and quoted by Mr. Lipari in his Answer) that physical transfer of the file pursuant to 28 U.S.C. § 1404(a) deprived the transferor circuit of jurisdiction. *Meat Price Investigators*, 572 F.2d at 167; *see also FMC Corp. v. Gloucester Eng'g Co.*, 830 F.2d 770, 771 (7th Cir. 1987).

Mr. Lipari's reliance on 28 U.S.C. § 1631 is also unavailing. Under this statute, a court may transfer a matter only if the transferor court finds it lacks jurisdiction. 28 U.S.C. § 1631; *see also Hempstead County and Nevada County Project v. U.S. E.P.A.*, 700 F.2d 459, 462 (8th Cir. 1983). Here, the Western District found it did possess subject matter jurisdiction over the matter and then

transferred venue under 28 U.S.C. § 1404(a). (*See* Ex. A to Motion.)¹ Moreover, Mr. Lipari's appeal to the Tenth Circuit challenged the Court's subject matter jurisdiction and that Court specifically found jurisdiction existed. *See Lipari v. U.S. Bancorp*, 2009 WL 2055125 *1 (10th Cir., July 16, 2009).² The Tenth Circuit likewise concluded there was no basis for transfer under 28 U.S.C. § 1631. *Id.*

Mr. Lipari's personal attacks and false accusations do not help him in attempting to create appellate jurisdiction here.³ This Circuit lost appellate jurisdiction in April 2007 when the Clerk of the Court for the District of Kansas physically received the case file. He failed to seek permission to file an interlocutory appeal or to apply for an extraordinary writ prior to the physical transfer. Mr. Lipari also did not ask the Kansas District Court to re-transfer the case to Missouri. By whatever stratagem, Mr. Lipari did not seek review of transfer here in 2007 or in the Tenth Circuit in 2009. He should not be allowed to seek an appeal to this Court now. The case is over and these appellees should not be made to continually respond to Mr. Lipari's specious arguments.

¹ The only parties to the case were plaintiff Lipari (a citizen of Missouri) and defendants U.S. Bancorp and U.S. Bank (both non-Missouri citizens). Ex. A to Motion at p. 5.

² Mr. Lipari's response erroneously asserts otherwise. (Aplt's. Answer to Motion to Dismiss Appeal at p. 5.)

³ Mr. Lipari accuses counsel of "misleading" the District Clerk by not referencing in the removal his prior case. That is wrong. The Form JS-44 Civil Cover Sheet that accompanied the 2006 removal plainly identified the earlier case as a "related case." Ex. G attached hereto. In any event, the matter was certainly "briefed" by Mr. Lipari and his contention was rejected by the Missouri District Court. (*See* Ex. A to Motion at pp. 2, 4-5.)

For these reasons, appellees U.S. Bancorp and U.S. Bank National Association request that this Court dismiss appellant's appeal, award attorney fees as a sanction of the appellant, and for such other relief as the Court deems just and proper.

/s/ Mark A. Olthoff

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ATTORNEYS FOR APPELLEES
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the above and foregoing was delivered via United States mail, postage prepaid, this 13th day of October, 2009, to:

Mr. Samuel K. Lipari
803 S. Lake Drive
Independence, MO 64053

Appellant

/s/ Mark A. Olthoff

Attorney for Appellees U.S. Bancorp and
U.S. Bank National Association

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Civil Cover Sheet

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the Western District of Missouri.

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Plaintiff
(s): **Samuel K. Lipari**

County of Residence: Jackson

Plaintiff's Atty(s):

**Pro Se (Samuel K. Lipari)
Missouri**

Defendant
(s): **US Bancorp, NA ; US Bank, NA**

County of Residence: Outside State of Missouri

Defendant's Atty(s):

**Mark A. Olthoff (US Bancorp, NA ; US Bank, NA)
Shughart Thomson & Kilroy, P.C.
120 W. 12th St., Suite 1700
Kansas City, Missouri 64105
816-421-3355**

REMOVAL FROM JACKSON COUNTY, CASE #0616-CV32307

II. Basis of Jurisdiction: **4. Diversity (complete item III)**

III. Citizenship of Principal Parties
(Diversity Cases Only)

Plaintiff:-1 Citizen of This State
Defendant:-5 Non MO corp and Principal place of Business outside MO

IV. Origin : **2. Removed From State Court**

V. Nature of Suit: **190 Other Contract**

VI.Cause of Action: **This case is being removed pursuant to 28 U.S.C. Section 1332. Plaintiff asserts claims for, among other things, breach of contract, fraud, breach of fiduciary duty, and prima facie tort.**

VII. Requested in Complaint
Class Action:

Dollar Demand:

Jury Demand: Yes

VIII. This case **IS RELATED** to Case Number **05-0210-CV-W-ODS** assigned to Judge **Ortrrie D. Smith**

Signature: /s/ Mark A. Olthoff

Date: 12/13/06

If any of this information is incorrect, please go back to the Civil Cover Sheet Input form using the *Back* button in your browser and change it. Once correct, print this form, sign and date it and submit it with your new civil action. **Note: You may need to adjust the font size in your browser display to make the form print properly.**

Revised: 05/09/06