

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI**

SAMUEL K. LIPARI)
(Statutory Trustee of Dissolved)
Medical Supply Chain, Inc.))
<i>Plaintiff,</i>)
v.) Case No. 06-0573-CV-W-FJG
)
GENERAL ELECTRIC COMPANY)
GENERAL ELECTRIC CAPITAL BUSINESS)
ASSET FUNDING CORPORATION,)
GE TRANSPORTATION SYSTEMS GLOBAL)
SIGNALLING, LLC.)
CARPETS n, MORE and)
STEWART FOSTER)
<i>Defendants.</i>)

**PLAINTIFF’S REMAND HEARING TRIAL BRIEF AND REPLY TO
DEFENDANTS’ RESPONSE TO PLAINTIFF’S REMAND
MOTION AND RESPONSE TO PLAINTIFF’S MOTION FOR EMERGENCY
HEARING ON PLAINTIFF’S REMAND MOTION**

Comes Now the plaintiff Samuel K. Lipari appearing *pro se* providing the court a remand hearing trial brief and makes the following reply to the response of the GE Defendants opposing the plaintiff’s motion for remand (Doc. 9) and Response To Plaintiff’s Motion For Emergency Hearing On Plaintiff’s Remand Motion (Doc. 10).

STATEMENT OF CONTROVERTED FACTS

1. The Missouri state court on May 31, 2006 issued an order denying the GE Defendants dismissal motion, foreclosing federal resolution of issues already heard and decided, including the standing of the plaintiff to represent the interests of the dissolved Missouri corporation Medical Supply Chain, Inc. which was assigned to the plaintiff¹ . See Exb. 1 Denial of GE Dismissal.

2. The full trial Missouri state appearance docket reveals the GE Defendants and their sole counsel John K. Power without excuse failed to appear for the Case Management Conference now relied upon by the defendants as justification for removal. The order reads: "Defendant fails to appear by counsel" See Exb. 2 pg. 4 Complete State Docket.

3. On May 31, the remaining Missouri domiciled defendants were dismissed from the case. Two other defendants were unable to be served by Jackson County Sheriff's deputies and the summonses expired on April 28, 2006 under Missouri State Rule 54.21. See Exb. 2 at pg. 1 Complete State Docket (Exb. 6 of Plaintiff's Hearing Motion).

4. The GE Defendants fraudulently misrepresent that the plaintiff called for a case management conference that in fact was ordered *sua sponte* by the Missouri state court: "However, plaintiff has set (sic) a Case Management Scheduling Order without serving Carpets N' More." Defendants' Brief In Opposition To Motion To Remand The Matter To State Court Doc 9 pg. 2. This statement is belied by the Complete state docket which shows no motion or other entry by the plaintiff to schedule or call for a case management conference.

5. The GE Defendants fraudulently misrepresent that the plaintiff made apparent intentions to dismiss or to proceed in the absence of the remaining local defendants for the first time with the Judge created Case Management Order: "Because plaintiff's intentions were not apparent until the July 5 Case Management Order, defendants' motion to remove the case on July 17 is timely". Defendants' Brief In Opposition To Motion To Remand The Matter To State Court Doc 9 pg. 2 When in fact the summonses

were returned unserved to Carpets N' More on 5/02/2006. See Exb. 2 page 2 of Complete State docket.

6. The GE Defendants fraudulently misrepresent that the July Case Management Order is an "other paper" that determined the status of jurisdiction over the defendant parties. Nowhere in the order are the defendants assertions about the new status of the action's defendants delineated:

“CIVIL CASE MANAGEMENT SCHEDULING ORDER Now on JULY 5, 2006 this matter coming on for scheduling conference and pursuant to Local Rule 35.1, the Court hereby enters the following Scheduling Order: Plaintiff appears by counsel, SAMUEL K LIPARI. Defendant fails to appear by counsel. 1. This case is set for trial on March 5, 2007 at 9:30 A.M. 2. The parties are ordered to participate in mediation pursuant to Rule 17. Mediation shall be completed by September 1, 2006. Each party shall personally appear at the mediation and participate in the process. In the event a party does not have the authority to enter into a settlement, then a representative of the entity that does have actual authority to enter into a settlement on behalf of that party shall also personally attend the mediation with the party. 3. Lee Wells is appointed to be the mediator in this case. 4. Each party shall pay their respective pro-rata cost of the mediation directly to the mediator. 5. Parties shall file any designated portion of depositions to be read or shown or played to the jury by videotape ten (10) days before trial. 6. Five (5) days before trial, the parties shall file a list of exhibits to be offered or referred to in the evidence. 7. Five (5) days before trial, the parties shall file a list of witnesses to be called to testify at trial. 8. Five (5) days before trial, the parties shall file any motions in limine, proposed jury instructions, counter designations and objections to proposed deposition excerpts to be read or played to the jury by videotape, and any trial briefs with the Court and the opposite party. 9. Dates in this pretrial order shall be changed only by leave of Court. Dated: JULY 5, 2006 W STEPHEN NIXON Judge”

Exb. 2 page 4 of Complete State docket

7. The defendants removed this action against the GE Defendants including GE Capital a defendant in the sealed case in this court entitled *United States ex rel Michael W. Lynch v Seyfarth Shaw et al.* Case no. 06-0316-CV-W- SOW after the US Attorney for Missouri declined to intervene and without knowledge that the US Attorney for Missouri would be countermanded by the US Department of Justice in Washington D.C. reestablishing intervention after the GE Defendants filed their Notice of Removal. This order was attached to the plaintiff’s motion or hearing on remand.

8. The GE Defendants obtained a dismissal against the plaintiff’s federal claims in only one action *Medical Supply Chain, Inc. v. General Electric Company, et al.*, Kansas Dist. Court case number 03-2324-CM not two as falsely stated by the defense counsel in

Response To Plaintiff's Motion For Emergency Hearing On Plaintiff's Remand Motion

(Doc. 10) at page 2:

“The GE defendants do acknowledge, that Medical Supply Chain has sued the GE defendants in two separate federal court actions. Both actions have been dismissed. In one of those actions, the court has deemed that Medical Supply Chain's conduct was sanctionable.”

9. There has been no finding by a trier of fact that the plaintiff, his former counsel or his dissolved company merited sanctioning for its litigation against the GE Defendants and no such sanctions exist.

10. The complete and accurate procedural history is contained in paragraphs 5-11 On page 2-3 of the plaintiff's complaint.

11. The GE Defendants disparaged the plaintiff's claims in the Kansas District Court for asserting that email established a written contract under Missouri law in June 2003 predating the February 9, 2005 decision Western District of Missouri Judge Nanette K. Laughrey holding similarly in *International Casings Group, Inc., v. Premium Standard Farms, Inc.*, 358 F. Supp. 2d 863; 2005 U.S. Dist. LEXIS 3145, February 9, 2005.

12. The GE Defendants in Document 9-1 filed 08/21/2003 of *Medical Supply v. GE et al.* See Exb 3 [pg. 37, (pg. as numbered) of the filing excerpted] misled the Kansas District Court by refuting the validity of the email writings creating a contract between the parties and misstating the applicability of the Missouri Statute of Frauds:

“Any contract between MSC and GE Capital, GETS, or Mr. Immelt would have to be “in writing and signed by the party to be charged therewith” to be enforceable under Missouri's Statute of Frauds, Mo. Rev. Stat. § 432.010, given that MSC offer was for a contract that was not capable of performance within a year. MSC's allegations as to GE Capital, GETS, and Mr. Immelt must fail because there is no allegation of any agreement between MSC and these three Defendants, let alone a written contract signed by any of these Defendants as required under the Statute of Frauds.”

13. Exactly opposite to Judge Laughrey's finding that under Missouri law separate emails communicating an offer and acceptance are a contract *International Casings* at pg. 15, 17 Judge Laughrey found the email were writings fulfilling the Missouri Statute of Frauds requirement. *Id* at pg.17. And Judge Laughrey found the electronic signatures satisfied the statutes of frauds under both the UCC and Missouri's adoption of the Uniform Electronic Transactions Act ("UETA") Mo. Rev. Stat. §§ 432.200-432.295. *Id* at pg.17-18 Judge Carlos Murguia declined to exercise supplemental jurisdiction over the contract claims and made no findings of law or fact regarding the plaintiff's contract claim.

14. This court docketed the removal and exerted jurisdiction over the plaintiff by ordering mediation and that the defendant prepare a case management plan, deceived by the *ex parte* misrepresentations of the defense counsel that this court had jurisdiction from a timely removal. See (CM-ECF Western District of Missouri - Docket Report) as of July 24, 2006.

15. The conflicting representation of GE Defendants' counsel John K. Power MO Lic # 70448 depended on multiple misrepresentations to the Kansas District Court on behalf of and under the instructions of his clients Novation, LLC, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker has resulted in Novation losing a \$7.62400 billion U.S. dollar a year contract to exclusively supply Britain's National Health Service. Novation LLC is an entity created by these defendants and operating in multiple agreements to restrain trade in hospital supply with the General Electric Company, including the agreement to merge Neoforma, Inc. with GHX LLC as described in the present Missouri state contract claim.

16. Instead of honoring his duty to the court, these hospital supply cartel members and coconspirators of the GE Defendants were led by GE Defendants' counsel John K. Power MO Lic # 70448 to believe the fraudulently obtained rulings in the Kansas District court would make their planned monopolization of Britain's hospital supply purchasing safe. In fact the U.K. domestic news network Channel 4 after examining the case filings ran a nationwide news special report on July 26th 2006, interviewing the plaintiff's witness about the artificial inflation of hospital supply prices leading to the overcharging of Medicare and Medicaid by \$26 Billion Dollars. See Exb.4. Channel 4 Special Report, this broadcast was followed by the BBC nationwide broadcast mentioning Novation's controversy See Exb 5. It led to the large nationally circulated paper the Daily Mail to send investigative reporters to Washington, D.C. where they researched the Sunday article exposing Novation's practice of bribing officials to monopolize American hospital supply sales entitled "US firm given £4bn NHS deal by Labour faces 'bribes' probe" See Exb 6. Then on Monday July 31st 2006, the British paper of record the Times of London also reported that Novation was under investigation by the US justice Department for its anticompetitive practices See Exb. 7. The BBC on August 9, 2006 reported the a nationwide medical services strike will now result to prevent the British government from corruptly awarding the National Health Services hospital supply monopoly contract to Novation.

17. At all times, GE Defendants' counsel John K. Power MO Lic # 70448 has misrepresented to the Missouri state court, the Kansas District Court and repeatedly to the Western District of Missouri that the plaintiff's claims are frivolous, baseless and to

be ignored, despite four US Senate Committee on the Judiciary Antitrust hearings held on Novation's anticompetitive practices, GAO Reports, testimony and numerous articles by the New York Times the injury to the nationwide hospital supply markets from the monopolized distribution chain controlled by the defendants. See Exb. 9 Medical Supply News

REPLY ARGUMENT IN SUPPORT OF REMAND

The standard the defendants were required to meet in order to oppose remand is very high. Any doubts about federal jurisdiction are going to be construed in favor of remanding the action to the state court. *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 76 (1941). The party that sought removal has the burden of proving the grounds necessary to support removal, including compliance with procedural requirements. See *Christian v. College Boulevard Nat. Bank*, 795 F.Supp. 370, 371 (D. Kan. 1992); *Dawson v. Orkin Exterminating Co., Inc.*, 736 F.Supp. 1049, 1050 (D.Colo. 1990); *Laughlin v. Prudential Ins. Co.*, 882 F.2d. 187 (5th Cir. 1989).

I. The Failure of The GE Defendants "Other Paper" Argument

The GE Defendants caught in fraudulently asserting federal jurisdiction through an untimely under 28 U.S.C. §1446(b) removal now try to argue that the case management order apprised them of the absence of the remaining local defendants, reopening the window for removal. The order unlike the California District case *Bertha v. Beach Aircraft Corp.*, 674 F. Supp. 24 (CD Ca. 1987) misleadingly cited by the defense counsel does no such thing. There is no paper from the plaintiff voluntarily or otherwise changing the status of who is a defendant in the action. The GE Defendants attempt fails for two reasons: 1) the expiration of the two summonses thirty days after its issuance

without renewal under RSMo 54.1 and 2) the Missouri state court's order dismissing two local defendants occurred outside of the thirty days preceding the Notice of Removal.

Neither is rescued by the Missouri state court's later Case Management Order.

a. The *Bertha* Court Followed The Voluntary Plaintiff Admission Rule

The GE Defendants fail to understand the careful explanation by the California District court that the chief element conferring jurisdiction is incorporated in that court's pretrial conference-the voluntary submission of a paper by the plaintiff providing evidence that federal jurisdiction has opened.

Without a clue the GE Defendants argue:

“After the Complaint was filed and before all the local defendants were served, **plaintiff filed with the Court an “at-issue memorandum” in which plaintiff represented that all essential parties had been served and that no other parties would be served.** The Court determined that the “at-issue memorandum” constituted the “other paper.” *Id.* at 27.

In so ruling, the Court also noted that in courts which utilized the trial setting conference procedure, the trial setting conference order could also serve as a “other paper.” *Id.* at 26.” [Emphasis Added]

GE Defendant Brief (Doc. 9) at page 2.

b. *Bertha* Was Based On The Plaintiff's Submission

Removability must be discovered from a “paper.” That is, changes in the law, See, e.g., *Phillips v. Allstate Ins. Co.*, 702 F. Supp. 1466 (C.D. Ca. 1989) (new Act of Congress permitting removal not a “paper” triggering thirty-day delay). S.W.S. Erectors, 72 F.3d at 494. See, e.g., *Chapman v. Powermatic, Inc.*, 969 F.2d 160 (5th Cir. 1992) (delay runs only from receipt of a “paper affirmatively revealing on its face” the presence of a removable claim); see also *Leffal v. Dallas Indep. School Dist.*, 28 F.3d 521 (5th Cir. 1994) (same). Compare *Mielke v. Allstate Ins. Co.*, 472 F. Supp. 851 (E.D. Mich. 1979)

(mere knowledge that removable claim exists is sufficient); from opposing counsel and the like do not trigger the removal time delay.

c. Plaintiff Did Not Voluntarily Create Federal Jurisdiction With a Paper

While the Missouri state court's Case Management Order was certainly directed at the GE Defendants, it referenced no new "other paper" created, submitted or otherwise introduced by the plaintiff. As noted by the Fifth Circuit in *S.W.S. Erectors, Inc.*, this new removability must result from a voluntary act of the plaintiff. *S.W.S. Erectors, Inc.*, 72 F.3d at 494; *Self v. General Motors Corp.*, 588 F.2d 655 (9th Cir. 1978). See also *DeBry v. Transamerica Corp.*, 601 F.2d 486-489 489 (10th Cir. 1979). This rule reflects the general rule that the plaintiff is the master of his complaint.

d. The Case Management Hearing Was Ordered *Sua Sponte*

As the record shows, not only did the plaintiff not file any paper or exhibit at the Case Management Conference fraudulently used by the GE Defendants to unlawfully remove jurisdiction of this matter from the Missouri state court, the plaintiff not call for or schedule the Case Management Conference. In fact the conference was ordered *sua sponte* by the Missouri state court but is now fraudulently misrepresented by the GE Defendants as set by the plaintiff: "However, plaintiff has set (sic) a Case Management Scheduling Order without serving Carpets N' More." Defendants' Brief In Opposition To Motion To Remand The Matter To State Court Doc 9 pg. 2. This statement is belied by the Complete state docket which shows no motion or other entry by the plaintiff to schedule or call for a case management conference.

II. The Failure of An Unrelated Court Order to Confer Federal Jurisdiction

In a topically similar controversy, pharmaceutical companies charged with

violating Pennsylvania law by engaging in an unlawful sales and marketing scheme to inflate artificially the average wholesale price of prescription drugs could not prevent a remand of the case to state court, according to a decision by the U.S. District Court for the Eastern District of Pennsylvania (*Pennsylvania v. TAP Pharmaceutical Products, Inc.*, E.D. Pa., No. 2:05-cv-03604, 9/9/05).

Judge Juan R. Sanchez accepted the defendants' view that its federal question jurisdiction to hear the case is governed by the U.S. Supreme Court's recent decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 125 S.Ct. 2363 (2005). However, the court also ruled that the defendants' removal of the case to federal court was untimely under Third Circuit precedent construing 28 U.S.C. §1446(b).

Specifically the defendants argued that the *Grabel* decision was the “order” that revealed the existence of federal jurisdiction, reopening the window for removal. Even though this argument is far stronger than the GE Defendants’ argument a case management order having no bearing or change on diversity jurisdiction, Judge Juan R. Sanchez ruled the *Grable* decision does not constitute an "order" apprising the defendants for the first time that the case was removable. *Grable* was not directed at the defendants, and the factual issues in this case are completely unrelated to those in *Grable*.

III. Carpets N’ More Summonses Expired More Than 30 Days Before Removal

The Missouri state court did not change the status of the unserved defendants in the Case Management Order.

a. Missouri Statute Sets Deadlines For Valid Process

The Missouri State legislature determined the status of named defendants that are the subject of a summons not served within the thirty day limit and not renewed with a request to the court clerk in RMSO 54.21:

“RULE 54.21 TIME FOR SERVICE AND RETURN

The officer or other person receiving a summons or other process shall serve the same and make return of service promptly. **If the process cannot be served it shall be returned to the court within thirty days after the date of issue** with a statement of the reason for the failure to serve the same; provided, however, that **the time for service thereof may be extended up to ninety days from the date of issue by order of the court.** “[Emphasis Added]

Unbelievably the GE Defendants state that this is not the law of the State of Missouri. The statute is however supported in this express requirement *in pari materia* by RMSO 54.01 which states:

“RULE 54.01 CLERK TO ISSUE PROCESS SEPARATE OR ADDITIONAL SUMMONS

Upon the filing of a pleading requiring service of process, the clerk shall forthwith issue the required summons or other process and, unless otherwise provided, deliver it for service to the sheriff or other person specially appointed to serve it. If requested in writing by the party whose pleading requires service of process, the clerk shall deliver the summons or other process to such party who shall then be responsible for promptly serving it with a copy of the pleading. **Upon written request of such party, separate or additional summons and other process shall be issued.** “[Emphasis Added]

The written request is absent from the Missouri state court appearance docket. The necessity for deleting the pages to deceive the Western District of Missouri was their revelation that no attempt or filing by the plaintiff to extend or reissue the summons was made and that the clerk did not issue any separate or additional summons after the Jackson County Sheriff’s Office determined them to be unservable.

Only by service of process authorized by statute or rule (or by appearance) can a court obtain jurisdiction to adjudicate the rights of a defendant. *Roberts v. Johnson*, 836

S.W.2d 522, 524 (Mo. App. 1992). "When the requirements for manner of service are not met, a court lacks power to adjudicate." *State ex rel. Plaster v. Pinnell*, 831 S.W.2d 949, 951 (Mo. App. 1992). Actual notice is insufficient. *Id.* "Satisfying minimum standards of due process . . . does not obviate the necessity of serving process in the manner prescribed in our statutes and rules." *Acapolon Corp. v. Ralston Purina Co.*, 827 S.W.2d 189, 196 (Mo. banc 1992).

b. Missouri Requires Strict Compliance For Valid Service of Process

Despite the misleading brief presented by the GE Defendants making the unsupported argument that plaintiffs have longer than thirty days to serve a defendant and that it is not necessary to comply with these rules including making the written requests required under 54.01, the Missouri Supreme Court has definitively ruled otherwise. In *Worley v. Worley*, 2000 Mo. LEXIS 41 (Mo. *en banc.*, 5-30-00) the court held that failure to strictly follow follow RSMo 54.01 results in quashing of service.

In *Worley*, the husband did not make a written request that the summons be delivered to him and that he would then be responsible for serving it as required by RSMo 54.01. In addition, there was no request to appoint a special process server. The Missouri Supreme Court agreed with the court of appeals and held that because the husband never made a written request as provided by Rule 54.01, the sheriff or other persons specially appointed must make service. Since he was not so appointed, the person who served the process did not have the authority to serve process on the defendant. The case was reversed and remanded with instructions to quash the service of process.

c. Defense Counsel's Personal Experience Is Not Definitive

While it may be true that the defense counsel does not attempt to follow clear and express rules governing Missouri state court proceedings, this does not mean that the rules do not exist or that the defense counsel's experience is actually the frequent desire of parties to waive the requirements of the state's service rules. Something an absent defendant at law cannot waive.

A defendant may waive personal jurisdiction when he or she is before the court and fails to properly raise the issue. *Shapiro v. Brown*, 979 S.W.2d 526, 529 (Mo.App. E.D. 1998); see also Rule 55.27(g).

d. Absent Defendants Cannot Waive Sufficiency of Process

A defending party who wishes to raise defenses of lack of personal jurisdiction, insufficiency of process, or insufficiency of service of process must do so either in a pre-answer motion or in the party's answer. However, the waiver provisions of Rule 55.27(g)(1)(B) are not triggered where a defendant does not appear.

“[A] defendant over whom the trial court could not otherwise constitutionally acquire jurisdiction does not waive the jurisdictional defense merely by . . . nonappearance. Two fundamental precepts must be borne in mind. First, a personal judgment rendered by a court without personal jurisdiction over the defendant is void and may be attacked collaterally. Second, a defendant 'is always free to ignore the judicial proceedings, risk a default judgment and then challenge that judgment on jurisdictional grounds in a collateral proceeding.' . . . Were we to hold that appellant waived the personal jurisdiction defense merely by failing to appear, it would produce the anomalous result that a defendant who has the right to ignore a judicial proceeding waives that right by asserting it. *Nonappearance, therefore, cannot constitute waiver.*” [Emphasis Added]

Crouch v. Crouch, 641 S.W.2d 86, 90 (Mo. banc 1982) (emphasis added) (citations omitted).

IV. Defendants Were Able To Remove the Case For Diversity on April 28, 2006

Once the thirty days allowed by RSMo 54.21 had expired on April 28, 2000

without any filing for extension by the plaintiff, the GE Defendants were responsible for knowing the Carpets N' More no longer defeated diversity jurisdiction. See Exb. 2 After the May 4, 2006 order granting the Heartland defendants' motion for dismissal, the GE Defendants were able to remove the action to federal court on the basis of diversity. See Exb. 2 Which they did not do until filing the Notice of Removal on July 17, 2006, 63 days later and 33 days beyond the thirty day time limit of 28 U.S.C. §1446(b).

a. Named but Unserved Defendants Cannot Defeat Diversity

28 U.S.C. §1441(b) states, "Such action[s] shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought." This statutory language, enacted in 1948, abrogated the Supreme Court's rule in *Pullman Co. v. Jenkins*, 305 U.S. 534, 539-41 (1939) (holding that the presence of a local defendant, whether served or not, defeats removal jurisdiction).

Now, the presence of an unserved Defendant who is a citizen of the forum state does not prevent removal when complete diversity exists *McCall v. Scott*, 239 F.3d 808 n.2 (6thCir. 2001); *Wensil v. E.I. Dupont De Nemours and Co.*, 792 F.Supp. 447, 449 (D.S.C. 1992); *Maple Leaf Bakery v. Raychem Corp.*, No. 99 C 6948, 1999 WL 1101326 (N.D.Ill. Nov. 29, 1999). *Samples v. Conoco, Inc.*, 165 F. Supp.2d 1303, 1308 (N.D. Fla. 2001) (quoting *Gilberg v. Stepan Co.*, 24 F. Supp.2d 325, 330 (D.N.J. 1998): "[A] plaintiff cannot defeat removal merely by naming a nondiverse defendant; that defendant also has to be 'properly joined and served' for removal to be barred."), and *Roberts v. Webster*, 1995 WL 908688 (N.D. Ala. 1995) (because nondiverse resident had not been served, his residency would be disregarded), and *Mask v. Chrysler Corp.*, 825 F. Supp.

285 (N.D. Ala. 1993) (holding, in the alternative, that because nondiverse defendant was not served, it could not defeat diversity jurisdiction), aff'd without opinion, 29 F.3d 641 (11th Cir. 1994), and *Republic Western Ins. Co. v. International Ins. Co.*, 765 F. Supp. 628 (N.D. Cal. 1991) (a resident defendant who has not been served may be ignored in determining appropriateness of removal), and *Duff v. Aetna Casualty and Surety Co.*, 287 F. Supp. 138 (N.D. Okla. 1968) (same).

b. Later Service Would Not Give The Plaintiff The Power to Remand

The Third Circuit Court of Appeals recognized service of local defendants after removal does not defeat diversity in *Lewis v. Rego Co.*, 757 F.2d 66 (3d Cir. 1985):

“[T]he removal statute contemplates that once a case has been properly removed the subsequent service of additional defendants who do not specifically consent to removal does not require or permit remand on a plaintiff’s motion. The statute itself contemplates that after removal process or service may be completed on defendants who had not been served in the state proceeding. The right which the statute gives to such a defendant to move to remand the case confers no rights upon a plaintiff.”

Id. at 69 (citing 28 U.S.C. § 1448). The United States District Court for the Western District of Missouri previously reached the same result: “Any defendant so subsequently served may move to remand the case to the state court, but a plaintiff may not do so if jurisdiction of the United States District Court is established over the action.” *Hutchins v. Priddy*, 103 F. Supp. 601, 607 (W.D. Mo. 1952).

V. Removal Was A Fraud on The Western District of Missouri Court

When the duty of John K. Power MO Lic # 70448 to the Western District of Missouri Court was its highest because of the absence of the opposing party and he was therefore required to apprise the court of information both helpful to his effort and

harmful, Mr. Power misinformed the court and withheld information from the court, obtaining two orders in the facial absence of any federal jurisdiction.

a. The Fraud was Intentional

The GE Defendants misrepresentation through their counsel John K. Power, MO Lic # 70448 that a basis for federal jurisdiction came into existence within 30 days of filing their notice of removal meets the Eight Circuit requirements for a finding of fraud on this court. The standard for proof of fraud upon the court is: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court. A determination of fraud on the court may be justified only by "the most egregious misconduct directed to the court itself," and that it "must be supported by clear, unequivocal and convincing evidence." See *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir.1976) (citations omitted).

b. The Court Was Deceived

By obtaining two court orders through *ex parte* advocacy before the plaintiff knew of the defendants' transfer and before service upon the plaintiff of the Notice of Removal, the Western District of Missouri was deceived into exercising jurisdiction over the plaintiff's state action in the absence of any clear and convincing evidence federal jurisdiction existed.

Fraud on the court is a fraud designed not simply to cheat an opposing litigant, but to 'corrupt the judicial process' or 'subvert the integrity of the court'" itself. It is fraud, including fraud perpetrated by officers of the court, that prevents the court from "perform[ing] in the usual manner its impartial task of adjudicating cases." See 12

Moore's Federal Practice 3d ¶ 60.21[4][a] (2003). See also Blacks Law Dictionary, Sixth Edition id. at 457.

c. The Fraud was Directed At The Western District of Missouri Court

In fact the appearance docket from Independence, Missouri containing entries was edited by the GE Defendants so that pages clearly showing the absence of any event giving rise to federal jurisdiction in the preceding thirty days were omitted. **See exb.** From the plaintiff's motion to remand.

Fraud on the court "is limited to that species of fraud which does or attempts to subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *United States v. Zinner*, No. 95-0048, 1998 WL 57522, *2-*3 (E.D. Pa. Feb. 9, 1998) (citation omitted). John K. Power MO Lic # 70448 in his capacity as an officer of the court committed fraud by omission of the relevant pages of the appearance docket to accomplish the GE Defendants goal of escaping a just resolution of the plaintiff's claims in Missouri State court and to enter the federal system where the case could ultimately be moved to Kansas District court.

d. The Fraud Was By An Officer of The Court

John K. Power's, MO Lic # 70448 involvement as an officer of the court , "to improperly influence" a court so as to give rise to a fraud on the court meets this grave standard. A party must engage in "the most egregious" of conduct such as "bribery of a judge or members of a jury," *Fierro v. Johnson*, 197 F.3d 147, 154 (5th Cir. 1999), or other conduct that "subvert[s] the [court's] integrity," *Zinner*, 1998 WL 57522, *2-*3, and "interfere[s] with the judicial system's ability *impartially* to adjudicate a matter . . ."

Simon v. Navon, 116 F.3d 1, 6 (1st Cir. 1997) (emphasis added). See *Greiner v. City Champlin*, 152 F.3d 787, 789 (8th Cir. 1998), lest the concept of fraud on the court undermine the "deep-rooted federal policy of preserving the finality of judgments." *Travelers Indemnity Co. v. Gore*, 761 F.2d 1549, 1551(11th Cir. 1985). See also *Great Coastal Express, Inc. v. Int'l B'hood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982).

e. The Fraud Has Harmed The Court and The State

In *Hazel-Atlas Glass Co. v. Hartford Empire Co.* 322 U.S. 238 64 S.Ct. 997, 1000, 88 L. Ed 1250, the court addresses the issue of injury caused by Fraud on the Court by stating:

"Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public institutions in which fraud can not complacently be tolerated consistent with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

Id. At 1000. The court observed in *State of Missouri, v. Robert Joe Mason*, 394 S.W.2d 343 "The defendant having resorted to unfair means to defeat the ends of justice, he must suffer the consequences. In *Fulkerson v. Murdock*, 53 Mo. App.l.c. 154, it is said: 'Evidence of the fact of an attempted subornation is admissible as an admission by conduct that the party's cause is an unrighteous one.'"

CONCLUSION

Whereas for the above reasons the plaintiff respectfully requests that the court remand the present action back to the State of Missouri Jackson County District Court at Independence, Missouri. While the basis for remand is self evident from the record now

before the court, the plaintiff will provide separately a proposed order for the remand and in the event a hearing is granted, the plaintiff will have ready witnesses and exhibits showing the fraud over federal jurisdiction and the injuries to the plaintiff from the fraud over federal jurisdiction.

Respectfully Submitted

Samuel K. Lipari *Pro se*

Certificate of Service

This is to certify that a copy of the foregoing notice was mailed postage pre-paid along with a copy of the Proposed Judgment, this 10th day of August, 2004, to the following:

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One
Kansas City Place 1200 Main Street Kansas City, MO
64105-2122

Samuel K. Lipari et, al.