

**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
NOVATION, LLC)	
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>)	

**SUGGESTION IN SUPPORT OF MOTION TO REMAND THE MATTER TO
STATE COURT ON THE GROUND THAT THE REMOVAL ITSELF WAS
UNTIMELY UNDER SECTION 1447(C)**

Comes now the plaintiff Samuel Lipari appearing pro se and makes this expedited suggestion supporting his motion for remand of this action to State court where the plaintiff's well pleaded complaint was originally filed. The plaintiff has created this Suggestion supporting remand on the day notice of removal was received from the defendants so that the Western District of Missouri may meet the thirty day time limit for this court's order of remand under 28 USC Section 1447 and *Korea Exchange Bank, New York Branch v. Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1995).

STATEMENT OF FACTS

1. The plaintiff Samuel Lipari's state petition was a well pleaded complaint for claims under state law.
2. The plaintiff Samuel Lipari's state petition contained no federal question.

3. The defendants have allowed the 30 day time limit under Section 1446(b) to expire from April 4, 2006 when the defendants were served Samuel Lipari's state petition.

4. The defendants have allowed the 30 day time limit under Section 1446(b) to expire from the failure to serve two Missouri domiciled parties which expired under Missouri State Rule 54.21 thirty days after the issuance of summonses to the Jackson County Sheriffs Deputies for service and was not renewed.

5. The defendants have allowed the 30 day time limit under Section 1446(b) to expire from the May 31, 2006 state court order dismissing the two served local defendants.

6. The GE defendants appeared and answered the plaintiff's petition with a motion to dismiss.

7. The Missouri State Court has made findings of law and fact in a May 31, 2006 order denying the GE Defendants dismissal motion that would have preclusive effect over any federal adjudication of the plaintiff's claims. See Exb. 1 Denial of GE Dismissal.

8. The GE Defendants have omitted material evidence in order to mislead the Western District of Missouri in determining jurisdiction by misrepresenting the state court appearance docket by omitting pages with information revealing the date federal jurisdiction could have been discerned.

9. Attached is the full trial appearance docket revealing the GE Defendants failure to appear in a scheduled court hearing or to timely reply to motions despite appearing and filing motions to dismiss. See Exb. 2

ARGUMENTS IN SUPPORT OF MOTION TO REMAND

The plaintiff Samuel Lipari has filed a timely motion for remand. Section 1447(c) was amended by the Judicial Improvements and Access to Justice Act of 1988 to impose a 30-day limit on the time the plaintiff has to file a motion "to remand the case on the basis of any defect in removal procedure."

The GE defendants have allowed their thirty day limit under Section 1446(b) to pass for removal to federal court based on diversity jurisdiction. The complaint on its face was not removable at the time it was filed because it is a state law contract based claim arising from the purchase agreement of an office building located in Jackson County, Missouri and included as defendants four state domiciled parties.

On the face of the GE defendants motion for removal, federal jurisdiction is lacking.

On the face of the GE defendants' motion for dismissal an erroneous interpretation of the removal statute contradicting clearly established federal district and appellate case law is made. If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable" 28 U.S.C. § 1446(b)

A. 30-day Limit on Removal

Section 1446(b) requires removal within 30 days of receipt "by service or otherwise" of the "initial pleading," or of "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become

removable.”

The statute provides two thirty-day windows during which a case may be removed—during the first thirty days after the defendant receives the initial pleading or during the first thirty days after the defendant receives a paper “from which it may first be ascertained that the case is one which is or has become removable” if “the case stated by the initial pleading is not removable.” *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 692 (9th Cir. 2005).

This 30-day time period is “mandatory” but not “jurisdictional.” *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980); *Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F.2d 1043, 1046 (2d Cir. 1991). As the Second Circuit explained in *Somlyo* at page 1046:

Under 28 U.S.C. § 1446(b), the petitioning party must file a notice of removal with the district court within thirty days after receipt of the initial pleading. *See* 28 U.S.C. § 1446(b) (1988). While the statutory time limit is mandatory, it is “merely a formal and modal requirement and is not jurisdictional.” *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir.1980). Nevertheless, absent a finding of waiver or estoppel, federal courts rigorously enforce the statute's thirty-day filing requirement. *See, e.g., Nicola Prods. Corp. v. Showart Kitchens, Inc.*, 682 F. Supp. 171, 173 (E.D. N.Y. 1988); *Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 428 F. Supp. 1035, 1037 (S.D. N.Y. 1977).

B. Remand is Compulsory When Removal Was Untimely

The court must remand when the procedural requirement of filing for removal within thirty days is not met. *See Snapper, Inc. v. Redan*, 171 F.3d 1249, 1253 (11th Cir. 1999) (“The failure to comply with these express statutory requirements for removal can fairly be said to render the removal 'defective' and justify a remand pursuant to § 1447(c).”); *Schmitt v. Ins. Co. of N. Am.*, 845 F.2d 1546, 1551 (9th Cir. 1988)

("[R]emand of the present case became mandatory under section 1447(c) once the district court determined that [defendant's] petition for removal was untimely.")

C. Commencement of the 30-day Limit on Removal

The 30-day time limit set forth in Section 1446(b) commences upon receipt “by service or otherwise” of the “initial pleading.” Formal service of process is not required to trigger commencement of the removal period. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 119 S.Ct. 1322 (1999). The Ge Defendants were served in March, 2006.

D. The “Other Paper” Exception

Under § 1446(b), the removal period does not begin until the defendant is able "to intelligently ascertain removability so that in his petition for removal he can make a simple and short statement of the facts." *DeBry v. Transamerica Corp.*, 601 F.2d 480, 489 (10th Cir. 1979). "If the statute is going to run, the notice ought to be unequivocal. It should not be one which may have a double design." *Id.* Moreover, the circumstances permitting removal must normally come about as a result of a voluntary act on the part of the plaintiff. See *id.* at 486-88.

A defendant cannot forgo one recognized means of obtaining information related to jurisdiction for another and then argue that the manner in which the information was provided, which was in compliance with defendant's request, precludes imputing knowledge of the information to the defendant. Such manipulation would provide a windfall for the defendant which is clearly contravened by the removal statute's emphasis on effecting removal as soon as possible. *Golden Apple Management Co. v. Geac Computers, Inc.*, 990 F. Supp. 1364, 1368 (M.D. Ala. 1998) (citation omitted).

The GE Defendants were not served any orders or other papers by the plaintiff or state court that restarted a timely thirty day window to file for removal. The latest date that can be established is the failure of the plaintiff to join two parties after unsuccessful sheriff's service of summons. Under Missouri state law, this clock started thirty days after the summons were issued by the Jackson County Court Clerk:

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.

(Adopted Jan. 19, 1973, effective Sept. 1, 1973.). The appearance docket Exb 2 shows the plaintiff did not seek to renew the summons.

E. The GE Defendants Participated in State Court

A defendant may file an answer and affirmative defenses in state court without jeopardizing the right to remove the case, but when it takes affirmative actions to submit issues for determination, the defendant thereby evidences the intent to proceed in state court and waives its right of removal. See *Scholz v. RDV Sports, Inc.*, 821 F. Supp. 1469, 1471 (M.D. Fla. 1993) (defendant's filing of motions to dismiss manifested "an intent to proceed in state court"); *Miami Herald Publishing Co. v. Ferre*, 606 F. Supp. 122, 124 (S.D. Fla. 1984).

Filing a motion to dismiss like the GE Defendants did, a counterclaim, a motion to dissolve a temporary injunction, or even engaging in discovery have been held to constitute a waiver. See *In re Weaver*, 610 F.2d 335 (5th Cir. 1980) (motion to dissolve

injunction constituted waiver); *Kam Hon, Inc. v. Cigna Fire Underwriters Ins. Co.*, 933 F. Supp. 1060, 1061–63 (M.D. Fla. 1996) (court could *sua sponte* remand a case where, prior to removal notice, insurance company filed a motion to dismiss/motion to strike in state court); *Paris v. Affleck*, 431 F. Supp. 878, 880 (M.D. Fla. 1977) (filing counterclaim waived defendant’s right of removal); *Briggs v. Miami Window Corp.*, 158 F. Supp. 229 (M.D. Ga. 1956) (removal waived by filing non-compulsory crossclaim in state court).

As Judge Conway of the Middle District of Florida put it, the defendant should not “dilly-dally” in state court while it decides whether it wants to proceed in federal court. *See Kam Hon, Inc. v. Cigna Fire Underwriters Ins. Co.*, 933 F. Supp. 1060, 1063 (1996).

Wherefore the above stated reasons the plaintiff respectfully requests this action be remanded to the court with proper jurisdiction over the plaintiff’s claims. The Jackson County Court of the State of Missouri in Independence.

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 18th day of July, 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.