United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06- .

In Re Samuel K. Lipari,	*
	* On Petition for Writ of Mandamus
	* to the United States District Court
	* for the Western District
Petitioner,	* of Missouri

PETITION FOR WRIT OF MANDAMUS
PURSUANT TO 28 U.S.C. § 1361

Comes now the plaintiff Samuel Lipari appearing pro se and makes this Petition for Writ of Mandamus to the United States District Court for the Western District of Missouri requiring the court to remand *Lipari v. General Electric et al*, W.D. of Mo. Case No. 06-0573-CV-W-FJG to Missouri State court where the plaintiff's well pleaded complaint was originally filed.

PRELIMINARY STATEMENT

The petitioner has been unable to have his timely motion to remand and motion for emergency hearing to remand for state law based contract claims heard by the Western District of Missouri despite the removal's facial failure to comply with the thirty day time limit of 28 U.S.C. § 1446(b). The District court has issued other orders, giving cause, along with other legal

actions involving the defendants for the petitioner to fear the District court may become vulnerable to a corrupt or malign influence enjoyed by the defendants and unchecked in federal courts.

I. STATEMENT OF THE ISSUE

Whether a federal court can retain jurisdiction over an action removed from state court later than thirty days from service of summons and outside of thirty days from any voluntary act, admission, pleading of the plaintiff or order of the state court informing the defendants of the existence of federal jurisdiction.

II. STATEMENT OF THE FACTS

A. Court's Failure Of Duty To Remand

1. The petitioner Samuel Lipari filed a timely motion for remand within 30 days after the filing of the notice of removal under section 1446 (a) as required under 28 U.S.C. § 1447(c), preparing the motion on the day he received notice of removal.

2. The petitioner Samuel Lipari has filed no motion or voluntarily availed himself of the jurisdiction of the Western District of Missouri other than to seek remand and has not waived or forfeited his right to remand.

3. The Western District Court has not remanded the action as required under 28 U.S.C. § 1447(c).

4. The Western District of Missouri has continued to make rulings and issue orders despite the lack of jurisdiction on the face of the removal filing and after service of notice and evidence of the lack of jurisdiction by the petitioner in violation of the court's clearly established duty " If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall be remanded*" (emphasis added) under 28 U.S.C. § 1447(c).

B. Statutory Absence of Jurisdiction Under 28 U.S.C. § 1441 *et seq*.

5. The petitioner Samuel Lipari's state petition was a well-pleaded complaint for claims arising solely under state law.

6. The petitioner Samuel Lipari's state petition contained no federal question.

7. The defendants General Electric Company ("GE"), General Electric Capital Business Asset Funding Corporation ("GE Capital"), and GE Transportation Systems Global Signaling, LLC ("GE Transportation") (collectively the "GE defendants") 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.

8. The GE defendants allowed the 30 day time limit under Section 1446(b) to expire from the failure to serve a summons on a Missouri domiciled

company which expired under Missouri State Rule 54.21 thirty days after the issuance of the summons to the Jackson County Sheriffs Deputies for service and was not renewed.

9. The defendants 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.

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

11. The Missouri State Court made findings of law and fact, making 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).

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

13. The full trial appearance docket, not the selectively edited or altered one filed by the GE Defendants reveals 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** Docketing Statement**)**

C. Strong Missouri State Interest In Controversy

14. The GE Defendants availed themselves of state court jurisdiction by vigorously defending against the petitioner's claims filing a combined motion to dismiss with evidence outside of the pleadings rendering the pleading a summary judgment motion (See **Exb. 3** GE Motion to Dismiss) which was overruled by the state court and denied. (See **Exb. 4** State Court Docket Order Entry).

15. The GE Defendants unsuccessfully argued that Missouri's complex regulation of corporations statutory scheme did not permit a dissolved Missouri corporation's sole assignee in interest a personal property right which could be asserted in court despite the clear language of the Missouri legislature and Missouri state court rulings affirming that right. (See **Exb. 5** Lipari's Suggestion in Opposition to GE's Motion to Dismiss).

16. Despite the time honored principles of *res judicata*, comity and the *Rooker-Feldman* Doctrine the GE Defendants' counsel John Power has persuaded the sister federal court sited in Kansas City, Kansas hearing an action against the GE defendants' alleged coconspirators who share in privity a common and coordinated defense with the GE defendants, to ignore the State of Missouri court ruling on the petitioner's right to represent the assigned interest of his dissolved Missouri corporation as provided for by the

Missouri corporation acts and Rule 17 of the Federal Rules of Civil Procedure. (See **Exb**. **6** Judge Carlos Murguia's Memorandum & Order denying Lipari's reconsideration).

17. The petitioner's complaint alleges that GE broke its contract in Blue Springs, Missouri knowing the petitioner relied upon the bargain to capitalize its entry into the market for hospital supplies where the petitioner's business was the last independent web based electronic marketplace in order for GE and its hospital supply cartel members to continue to artificially inflate hospital supplies without competition. (See **Exb. 7** Lipari Complaint).

18. A July 2nd, 2005 Los Angeles Times article stated 1/3 of the Missourians losing insurance coverage are children: "An estimated 24,000 children are expected to lose their benefits, dental coverage is being cut for adults, and disabled people are losing coverage for crutches and other aids." (See **Exb. 8** Missouri's Sharp Cuts to Medicaid) Called Severe-More than 68,000, a third of them children, may lose benefits in the move to avoid tax hikes. LA Times, July 1, 2005. (Attachment 4 to Plaintiff's Motion Opposing GE Extension of Time).

19. On June 29, 2005, Doctor David Moskowitz, was invited to testify before the Missouri Medicaid Reform Commission and in his released pre-

testimony stated for the 65,000 patients losing coverage; “Since oxygen tanks are among the items no longer covered, *many patients will soon die*” [emphasis added]. These patients are the consumers in the market for hospital supplies that was the primary relevant market of Medical Supply Chain, Inc. Doctor Moskowitz also stated;

> "The Missouri Legislature is wrestling with the most critical domestic issue of our time. It is literally a life and death issue for tens of millions of Americans. It seems to me profoundly un-American, on the eve of our nation's birthday, to have people die simply because Medicaid is still paying retail for drugs.”

(See **Exb. 8** David Moskowitz, MD Testimony Attachment 4 to Plaintiff’s Motion Opposing GE Extension of Time).

20. The current loss of coverage for Missourians is reported to effect 90,000 Missouri state citizens and has become the central issue in the U.S. Senate election campaign for the seat held by Hon. Senator Jim Talent, Missouri’s junior senator. (See **Exb 9** KC Star Buzz Blog Sept 29, 2006 CAMPAIGN AD BUZZ | McCaskill criticizes Talent on Medicaid)

D. Missouri Popular Backlash Misdirected At Senator Jim Talent

21. Hon. Senator Jim Talent’s seat is one of four or five identified by the New York Times as one where a Republican incumbent is behind or even with a Democrat challenger. (See **Exb 10** New Hope For Democrats in Bid for Senate)

22. Hon. Senator Jim Talent is losing his senate re-election campaign despite the evidence repeatedly proffered by the petitioner in federal courts that the Congress adequately funded Medicare and Medicaid and that the administration of President George Bush disbursed the funds but that the hospital supply cartel including Novation LLC and participated in by the GE defendants have artificially inflated healthcare costs through the exercise of illegal monopoly power, leaving Governor Matt Blunt and the State of Missouri no choice but to cut benefits to its most needy and vulnerable citizens.

23. The petitioner has been repeatedly barred by federal courts from presenting his evidence against the GE defendants and their cartel members that have violated the Sherman Antitrust Acts to artificially inflate hospital costs, despite stating colorable claims according to the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure.

24. Hon. Senator Jim Talent is not a member of the US Senate Judiciary Committee and is unable to represent the interests of Missouri citizens in protecting their rights to redress in federal courts.

25. Hon. Senator Jim Talent bears no responsibility for the experiences the petitioner and his now dissolved Missouri Corporation Medical Supply Chain, Inc. suffered in federal courts.

26. Hon. Senator Sam Brownback of the neighboring state of Kansas who is a member of the US Senate Judiciary Committee supported Novation LLC and the cartel's interest in opposing increased regulation of the extraordinary market power hospital supplier controlled Group Purchasing Organizations have. (See **Exb. 11** MSCI's Answer Memorandum In Support Of Reconsideration Of Transfer, Pg. 2-3) and Jeffrey Hill "Healthcare Providers Look To Dodge New Mandates", The Hill, July 11th, 2005 and with the loss of regional Ford and GM plants to artificially inflated healthcare costs has had his presidential aspirations significantly weakened. (See **Exb. 12** Ford will cut 25,000 to 30,000 jobs, close 14 plants.**)**

E. Weakness of Federal Government in Enforcing Law In Healthcare

27. On August 21, 2004 the New York Times reported that the companies to be served with subpoenas are the drug makers Merck, Bristol-Myers Squibb and Genentech; **the G.E. Healthcare medical equipment unit of General Electric**, and Cardinal Health, a large manufacturer and distributor of drugs and medical supplies. [Emphasis added]

28. The NY Times article stated that "Based on the federal codes cited in a copy of one of the subpoenas, investigators are seeking evidence of health care fraud, conspiracy to defraud the United States, theft or bribery involving programs receiving federal funds, obstruction of investigations

and other possible violations. The subpoena was signed by Shannon Ross, criminal chief of the United States attorney's office in Dallas."

29. Ms. Shannon Ross, originally from Kansas was later found dead in her home the day before the third US Senate Judiciary Subcommittee on Antitrust hearing on Novation, LLC.

30. The Dallas Morning News described the US Attorney's office as already reeling from the unexpected death of False Claims Act litigator Thelma Louise Quince Colbert who accidentally drowned a month earlier in July. (See **Exb. 13** U.S. attorneys office loses 3 'go-to guy's.)

31. The Ft. Worth US Attorney's office then had three more experienced corporate crimes litigators cut from its staff. (See **Exb. 13** U.S. attorneys office loses 3 'go-to guy's.)

32. This court overturned The Western District of Missouri Chief Judge Whipple's ruling in *Lankford v. Sherman* No. 05-4285-CV-C-DW (WD Mo. Nov. 22, 2005) Case No. 05-3587 (8th Cir. 2006) finding unreasonable the withholding of medical and hospital supplies and overcoming what is otherwise a strong tendency in the federal judicial system to not act on systemic problems in our nation's healthcare delivery system.

33. The Western District of Missouri Chief Judge Dean Whipple presided over a panel that reciprocally disbarred the petitioner's counsel without a

required hearing and after *ex parte* communication with the Kansas Supreme Court Clerk's office, leaving the petitioner without representation despite this circuit's requirement of an evidentiary hearing, enforcing the Kansas Court's disbarment for taking an African American's Civil Rights case to federal court, a case *Bolden v. City of Topeka* that the petitioner's former attorney won in the Tenth Circuit and has now been cited by the Sixth Circuit. (See **Exb. 14** Show Cause Answer of Petitioner's Counsel.)

34. The federal district and appellate courts for Kansas had however previously sanctioned the petitioner's counsel over $23,000.00 for asserting the existence of liability for the threatened bad faith use of USA PATRIOT Act suspicious activity reporting as a means to obstruct Medical Supply Chain, Inc.'s entry into the hospital supply chain market in *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 03-3342.

35. The Tenth Circuit upheld the trial court's dismissal without findings of law or fact and made a show cause order why Medical Supply and its counsel should not be sanctioned for a frivolous appeal.

36. Medical Supply answered the show cause order asserting the trial court had applied the incorrect legal standard and had misstated the USA PATRIOT Act. The Tenth Circuit found that Medical Supply had pled a conspiracy that included a separate legal entity, contradicting the trial court's

ruling and the Tenth Circuit panel found that Medical Supply was correct in the existence of private rights of action under the USA PATRIOT Act. However, instead of correcting its ruling and ordering that Medical Supply was entitled to injunctive and declaratory relief, the Tenth Circuit panel ordered that Medical Supply's counsel receive its most serious sanction for a frivolous appeal.

37. The federal court law clerks writing the opinion militantly used the power of their sitting Tenth Circuit judge employers to retaliate against a party for making the same reasoned argument the much more competent, experienced Arkansas Supreme Court Justices and actual peers of the Eight Circuit court did when they later found liability exists with malicious use of USA PATRIOT Act reporting in the decision *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003).

38. In *Bank of Eureka Springs*, the court found the bank had filed a suspicious activity report ("S.A.R.") in an attempt to have its client criminally prosecuted without cause so that it might take his property. The court found the bad faith conduct deprived the bank of immunity for the SAR under the USA PATRIOT Act.

39. Medical Supply alleged that US Bank sought to file a malicious suspicious activity report to restrain competition in the market for hospital

supplies where US Bancorp NA and Piper Jaffray were actively participating in agreements to exclude internet marketplaces like Medical Supply from undercutting Novation, LLC and Neoforma, Inc.'s maintenance of artificially inflated hospital supply prices.

40. The Kansas federal courts then directed that the petitioner or his counsel be sanctioned for bringing the action to enforce federal antitrust laws against the GE defendants in *Medical Supply Chain, Inc. v. General Electric Company, et al*., case number 03-2324-CM.

41. Because the Tenth Circuit law clerks had messed up the first retaliation against the petitioner for protected speech, the Tenth Circuit ordered the Kansas District Court Judge Carlos Murguia to sanction the petitioner or his counsel for surprisingly being correct at law; specifically conforming to the Tenth Circuit's expanded second prong of the *Farnell* test in *Reibert v. Atlantic Richfield Co*., 471 F.2d 727 (10th Cir.), Cert. denied, 411 U.S. 938, 93 S.Ct. 1900, 36 L.Ed.2d 399 (1973) and satisfying the Tenth Circuit's requirement that the aggrieved party must satisfy the "by reason of" and/or "by" requirements found in (the antitrust statutes). This prerequisite boils down to the complainant proving that the antitrust violations are the proximate cause of his injury, which the petitioner had cleary offered evidence to prove.

42. The decision authored by Tenth Circuit Judge Carlos F. Lucero to reverse the trial court and remand Medical Supply's action against the General Electric defendants for sanctioning was made because the complaint *properly* alleged that GE's CEO Jeffrey Immelt committed felonies under the Sherman Antitrust Act in personally restraining trade in the market for hospital supplies.

43. The complaint's averments were based on published articles that Jeffrey Immelt conspired to keep Web based hospital supply distributors modeled on Medical Supply Chain, Inc. from entering the market and this conduct is unlawful and actionable under the Sherman Antitrust Act.

44. Judge Carlos F. Lucero knew the complaint pled that Jeffrey Immelt was the president of GE Medical, then the CEO of the parent company GE and the founder of the legally separate entity GHX, LLC that memorialized the agreement between competitors including Neoforma, Inc. to restrain trade, allocate business, artificially inflate prices and exclude Medical Supply Chain, Inc. in violation of Article I of the Sherman Antitrust Act.

45. On Wednesday, August 24th, Jonathan L. Glecken lead counsel for the defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. , through extortion threatened Medical Supply's

counsel with the loss of his home if he did not withdraw Medical Supply's claims including the petitioner's valid state law contract claims.

46. The GE defendants' counsel Jonathan L. Glecken was unaware that the defendants' cartel had already injured Medical Supply's counsel by causing him to lose his house as part of numerous informal sanctions in retaliation for representing Medical Supply in seeking redress from the cartel's repeated refusals to deal and other antitrust prohibited acts in the hospital supply market.

47. The Western District of Missouri Judge Ortrie D. Smith on June 15, 2005 ordered the petitioner's action *Medical Supply Chain, Inc. v. Neoforma et a*l Case No. 05-0210 transferred to Kansas District court where obvious fraud on the court had been repeatedly propagated to injure Medical Supply Chain "in the interests of justice" while there was still time to prevent the need to make drastic cuts in the State of Missouri's Medicaid coverage.

48. The Western District of Missouri Judge Ortrie D. Smith caused Medical Supply's case to be transferred to Kansas District Court Judge Kathryn H. Vratil who made no rulings delaying the opportunity to obtain discovery on the defendants' participation in the wrongful disbarment of Medical Supply's counsel until Kansas District Court Judge Kathryn H. Vratil participated in an ex parte discussion with personnel and justices of the

Kansas Supreme Court, disparaging Medical Supply's counsel without his knowledge or opportunity to question Kansas District Court Judge Kathryn H. Vratil's testimony in conduct designed to cause Medical Supply's counsel to be disbarred without due process.

49. Kansas District Court Judge Kathryn H. Vratil then removed herself from this case on October 20, 2005 minutes before the Kansas Supreme Court justices heard Medical Supply's counsel's oral argument. A transcript of the hearing which was resultantly delayed gives light to these unusual events.

50. The petitioner's case was then transferred to Kansas District Court Judge Carlos Murguia where he took no action for the many months until immediately after Medical Supply's counsel was reciprocally disbarred by the Kansas District Court without disclosing to Medical Supply's counsel that Kansas District Court Judge Kathryn H. Vratil had participated in ex parte testimony over Medical Supply's counsel's "incompetence".

51. The Kansas District Court refused to postpone its decision on reciprocally disbarring Medical Supply's counsel until the Tenth Circuit ruled on the appeal of *Bolden v. City of Topeka* where Medical Supply's counsel representing James Bolden challenged Kathryn H. Vratil's findings of law in that case.

52. The Kansas District court also interfered and obstructed providing records to the Tenth Circuit court for the appeal in *Bolden v. City of Topeka* during and after the state proceedings to disbar Medical Supply's attorney causing the Tenth Circuit to have to postpone the briefing schedule of James Bolden's appeal.

53. The Kansas District Court Judge Kathryn H. Vratil was ultimately overruled on two issues appealed by the petitioner and James Bolden's now disbarred counsel and the decision has been favorably cited by the Sixth Circuit.

54. No further court action occurred in the Medical Supply action until the petitioner's counsel had been disbarred, then Kansas District Court Judge Carlos Murguia began in earnest making rulings with the visible purpose of dismissing the action for the lack of counsel and completing the removal of representation participated in by the Kansas District court and to further its adversarial interest in the petitioner's proceeding.

55. The Kansas District Court Judge Carlos Murguia dismissed the federal claims in their entirety for failure to state a claim despite the fact that the compliant was identical in elements of pleading for its claims to the complaint filed in *Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al*, 8th Cir. 03-1441and 03-1554 and

Judge Murguia expressly declined to exert jurisdiction over the state law based claims the petitioner subsequently filed in Missouri State Court and are the subject of this petition for mandamus.

56. The *Craftsman Limousine* case known as "*Limo*" concerned the group boycott/refusal to deal by dominant motor vehicle manufacturers seeking to control a downstream market for limousine conversion by causing the with holding of a critical input-trade journal advertising a fact scenario common to the Medical Supply cases.

57. The Western District of Missouri ruled on antitrust and state claims pled in exactly the same manner that the Medical Supply complaint pled them and stated:

> "Thus, a motion to dismiss is likely to be granted "only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. " *Fusco v. Xerox Corn*., 676 F.2d 332, 334 (8th Cir. 1982)."

Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al, No. 98-3454 Order on Dismissal (W.D. Mo. July 7, 1999). Judge Russell G. Clark, Senior Judge United States District Court for the Western District of Missouri went on to state:

> "The Federal Rules of Civil Procedure require only notice pleading. Plaintiff must only set forth a short and plain statement showing that it is entitled to relief, not all the facts which establish that it is entitled to relief. FED. R. CIV. P. 8(a). Plaintiffs have sustained this low burden in the complaint against General Motors, as has Ford Motor Company

> in its allegations against plaintiff. The Court will, therefore, deny those motions to dismiss." [emphasis added]

Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al, No. 98-3454 Order on Dismissal (W.D. Mo. July 7, 1999).

58. The Tenth Circuit appears to have fired or relieved its Chief Clerk Patrick J. Fisher for the overt bias in favor of the hospital supply cartel that led to the petitioner's injuries at the hands of the federal courts responsible for Kansas. (See **Exb. 15** Letter to Clerk Fisher.)

59. Tenth Circuit Chief Judge Deanell Reece Tacha did not take action on the problems with the appearance of a malign and corrupt influence over Kansas District court cases and their review in the Tenth Circuit, including the conduct of Magistrate James P. O'Hara influencing a Kansas District court case he was not assigned to but where he was a managing partner for 18 years in the defense firm was defending [and for testifying falsely under oath before a Kansas state tribunal about its denial of discovery in litigation against the GE defendants. (See **Exb. 16** Judicial Complaint of Petitioner.)

60. Kansas US District Court Magistrate James P. O'Hara altered his testimony on the stand on January 21, 2005 revealing for the first time the Novation defendants' (also represented by the GE defense counsel John K. Power MO Lic # 70448) continuing pattern and practice of racketeering to

Medical Supply's President and counsel. (See **Exb. 17** Novation Complaint, See also **Exb. 18** Magistrate O'Hara Testimony Sup 1 Atch 9 pg.s 609-669 (Partial Summary Judgment Exhibits)

61. Tenth Circuit Chief Judge Deanell Reece Tacha did not act on the disparate treatment the appeals court gave Medical Supply Chain, Inc. and counsel for the hospital supply cartel or the mere clerk pool outcomes contradicting the Tenth Circuit's own published precedents and Chief Judge Deanell Reece Tacha herself declined to vote for en banc reconsideration, even of the retaliatory sanctioning in trespass of judicial authority. (See **Exb. 19** Second Motion for En Banc Hearing *Medical Supply Chain, Inc. v US Bancorp NA et al*)

62. Tenth Circuit Chief Judge Deanell Reece Tacha did not act on the hospital supply cartel counsel Susan C. Hascall, also from Magistrate James P. O'Hara's firm added as on the Tenth Circuit Court of Appeals brief in opposition to Medical Supply, despite having just left employment as a law clerk in the Tenth Circuit Court of Appeals. (See **Exb. 16** Judicial Complaint of Petitioner.)

63. Tenth Circuit Chief Judge Deanell Reece Tacha only acted to clean up the appearance of impartiality Chief Clerk Patrick J. Fischer was giving her circuit in September of 2005 after the death of Chief Justice William H.

Rehnquist on September 4th reopened speculation building upon a July 6, 2005 Slate Magazine article entitled "A Different Shortlist How about an old-style conservative Supreme Court nominee?" By Emily Bazelon and David Newman.

64. The article had suggested Chief Judge Deanell Reece Tacha as an appropriate nominee to replace US Supreme Court Justice Sandra Day O'Connor.

F. Fear of GE Corrupt or Malign Influence Over Federal Forum

65. 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 plaintiff. (See **Exb. 1** Denial of GE Dismissal).

66. The full trial court 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).

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

68. The GE Defendants fraudulently misrepresented to the federal court 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.

69. The GE Defendants' false statement to the federal court 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.

70. The GE Defendants fraudulently misrepresented that the plaintiff made apparent intentions to dismiss or to proceed in the absence of the remaining local defendant 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

71. In fact the summons was returned unserved to Carpets N' More on 5/02/2006. (See **Exb. 2** page 2 of Complete State docket).

72. The GE Defendants fraudulently misrepresented that the July Case Management Order is an "other paper" that determined the status of jurisdiction over the defendant parties in their answer to the petitioner's Remand Motion. (See **Exb. 20** page 3 of GE Defendants' Brief In Opposition To Motion To Remand The Matter To State Court (WD Mo Doc. 9)

73. 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"

(See **Exb. 2** page 4 of Complete State docket)

G. Defendants' Efforts To Corruptly Influence The Present Litigation

74. The defendants removed this action against the GE Defendants including GE Capital a defendant in the sealed case in the Western District of Missouri 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 the Western Missouri Bradley J. Schlozman declined to intervene and without knowledge that the US Attorney Bradley J. Schlozman would be countermanded by the US Department of Justice in Washington D.C.

75. The U.S. Justice Department reestablished its intervention after the GE Defendants filed their Notice of Removal.

76. The Western District order acknowledging the countermanding of Bradley J. Schlozman's improvident withdraw was attached to the plaintiff's motion or hearing on remand and served on the clerk of the court and counsel for the defendants but does not appear on the Western District of

Missouri Appearance Docket. (See **Exb. 21** CM-ECF Western District of Missouri - Docket Report).

77. Alarmingly, the Western District of Missouri Court then later issued an unusual "Show Cause Order" directed against the US Department of Justice to challenge the agency's intervention in *United States ex rel Michael W. Lynch v Seyfarth Shaw et al.* Case no. 06-0316-CV-W- SOW, fully giving the appearance that the Western District Court is seeking to deprive the relator Michael W. Lynch from having the assistance of counsel in enforcing Congressional Policy in the form of a civil action based on the laws of the United States as the Western District of Missouri deprived the petitioner of counsel for doing the same. (See **Exb. 22** Lynch Show Cause Order)

78. The Western District of Missouri Court and the US Attorney for the Western District, Bradley J. Schlozman are acting in a way that impedes the interests of justice in light of the September 2006 revelations by the Chief Bankruptcy Judge for the Northern District of Illinois, Hon. Judge Eugene R. Wedoff to the Federal Bureau of Investigation on the widespread use of offshore funds in the continuation of a "*Greylord*" racketeering enterprise effecting the outcomes of federal court cases in several states.

79. The relator Michael W. Lynch provided evidence to Western District US Attorney Bradley J. Schlozman discovered in April 2006 that a

$39,000,000.00 bribery fund was being used to secure outcomes in court cases including the shift of unfunded pension obligations of McCook Metals, Inc. to the Pension Benefit Guaranty Board (PBGC) at the expense of US taxpayers despite the obligation of Alcoa Aluminum financed by General Electric, pursuant to Alcoa's acquisition of Reynolds Metals, under ERISA law.

80. The relator Michael W. Lynch provided evidence to Western District US Attorney Bradley J. Schlozman of a conspiracy by Alcoa and the financing entity of General Electric, GE Capital to defraud the US taxpayer by raising the prices for the US military's acquisition of aluminum for military jets.

81. The relator Michael W. Lynch provided pre-bankruptcy evidence to Western District US Attorney Bradley J. Schlozman indicating that Alcoa and General Electric conspired with Judge Wedoff to force McCook Metals into bankruptcy in August 2001 and wrest control of the company from Lynch.

82. The US Attorney for the Western District, Bradley J. Schlozman was served documents by the relator including the admission under oath by General Electric's agents Jenner & Block and General Electric's law firm Seyfarth Shaw in their capacity as legal counsel for General Electric Commercial Finance had knowledge of the breaking and entering of the

relator's home to obstruct justice. (See **Exb 23** Transcript of Seyfarth Shaw Attorney deposition.)

83. The US Attorney for the Western District, Bradley J. Schlozman was served documents by the relator revealing the General Electric Company at the direction of its then CEO Jack Welch and later under the direction of its CEO Jeffrey Immelt had targeted the relator personally for his testimony over Alcoa's monopolization of aerospace aluminum products with the aid of the General Electric Company's subsidiary GE Capital in the General Electric/Honeywell merger litigation.

84. The US Attorney for the Western District, Bradley J. Schlozman was served documentation revealing the relator's personal assets and those of his family members were being taken and seizure of Michael W. Lynch's house was being threatened to accomplish this retaliation through the GE defendants' extra legal influence over the federal courts. (See **Exb 24** Order to seize Michael W. Lynch's property.)

85. The GE defendants' continuing misconduct against the relator Michael W. Lynch, including predicate racketeering acts to injure Michael W. Lynch's business prevented the petitioner Samuel Lipari from completing his third attempt to capitalize Medical Supply Chain's entry into the market for hospital supplies.

86. The US Attorney for the Western District also failed to act on the petitioner's citizen's criminal complaint against Kansas US District Court Magistrate James P. O'Hara for his obstruction of justice, but did participate in warrantless surveillance, home searches and eavesdropping done by federal authorities working in Independence, Missouri and Kansas City, Missouri with the assistance of local law enforcement personnel and at the request of the GE defendants' hospital supply cartel members including Novation, LLC on the pretext of USA PATRIOT Act Suspicious Activity information maliciously created by US Bancorp NA to injure the petitioner and prevent him from entering the market for hospital supplies.

87. The US Attorney for the Western District also failed to act to uphold the laws of the United States despite knowledge of the injuries to the petitioner, his family, his business and associates at the hands of the defendants' scheme to obstruct justice that included an attempt to cause the petitioner to travel to Chicago, Illinois and meet two attorneys from two undisclosed law firms. (See **Exb. 25** Affidavit of Samuel Lipari Opposing Transfer).

88. 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 but the GE Defendants fraudulently stated that they had obtained two dismissals. (See

Exb. 26 Response To Plaintiff's Motion For Emergency Hearing On Plaintiff's Remand Motion (WD Mo 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."

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

90. The complete and accurate procedural history is contained in paragraphs 5-11 on page 2-3 of the petitioner's complaint.

91. The GE Defendants disparaged the petitioner'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.

92. The GE Defendants in Document 9-1 filed 08/21/2003 of *Medical Supply v. GE et al.* (See **Exb. 27** [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."

93. The GE Defendants represented the law 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.

94. Judge Laughrey also found as the petitioner's counsel had argued that 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

95. 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. (See **Exb. 28** Memorandum and Order *Medical Supply Chain, Inc. v. GE et al*.)

H. Western District's Appearance of Participation In The Fraud

96. The Western District court docketed the removal and exerted jurisdiction over the plaintiff by ordering mediation and that the defendant prepare a case management plan, seemingly accepting the *ex parte* misrepresentations of the defense counsel that this court had jurisdiction from a timely removal. (See **Exb. 29** CM-ECF Western District of Missouri - Docket Report as of July 24, 2006).

97. The petitioner delivered a letter to Western District Chief Judge Dean Whipple and carbon copied it to trial court Judge Fernando J. Gaitan and opposing counsel John K. Power MO Lic # 70448 alerting the court to the misconduct in the fraudulently filed removal and the injuries the petitioner, his family, business and associates have suffered while seeking redress in federal court and detailing the petitioner's fears over the forum's lack of impartiality (See **Exb. 30** Letter to Chief Judge)

98. No response has been forthcoming and no action has been taken on the petitioner's submitted formal pleadings and evidence in support of remand.

99. The court has also not acted on the obvious conflicting representation of GE Defendants' counsel John K. Power MO Lic # 70448 who 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 likely resulted in Novation losing a $7.62 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.

100. 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.

101. 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 petitioner's witness about the artificial inflation of hospital supply prices leading to the overcharging of Medicare and Medicaid by $26 Billion Dollars. (See **Exb. 31** Channel 4 Special Report).

102. This broadcast was followed by the BBC nationwide broadcast mentioning Novation's controversy (See **Exb 32)**.

103. The televised report led 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. 33)**.

104. 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. 34)**.

105. The BBC on August 9, 2006 reported that 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.

106. At all times, GE Defendants' counsel John K. Power MO Lic # 70448 misrepresesented to the Missouri state court, the Kansas District Court and repeatedly to the Western District of Missouri that the petitioner'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 on the injury to the nationwide hospital supply markets from the monopolized distribution chain controlled by the defendants. (See **Exb. 35** Medical Supply News).

III. RELIEF SOUGHT

98. The Court of Appeals is respectfully requested to issue a Writ of Mandamus directing the US District Court for the Western District of Missouri to remand the petitioner's action captioned *Lipari v. General Electric et al.* W.D. Court Case No. 06-0573-CV-W-FJG to state court and to declare the GE defendants' notice of removal untimely.

99. The Court of Appeals is respectfully requested to make findings of fact and law that after the May 4, 2006 state court 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. That the GE defendants did not file their Notice of Removal until July 17, 2006, 63 days later and 33 days beyond the thirty day time limit of 28 U.S.C. §1446(b) and that no other paper voluntarily filed by the petitioner or order issued by the state court contained in the case record reopened a window for removal in the thirty days preceding the GE Defendants' Notice of Removal.

100. The Court of Appeals is respectfully requested to make findings of fact and law that the federal jurisdiction of the US District Court for the Western District of Missouri over the petitioner's action depends on compliance with the thirty day time limit of 28 U.S.C. §1446(b) and that the failure of the GE defendants to comply with the thirty day time limit for the Notice of Removal, notwithstanding the defendants counsel's signed representation

that the removal was timely deprived the US District Court for the Western District of Missouri of jurisdiction over the petitioner's matter.

101. The Court of Appeals is respectfully requested to make findings of fact and law that the petitioner's Writ of Mandamus furthered the interests of justice and that all costs for this collateral and original action be tolled upon the GE defendants in *Lipari v. General Electric et al.* W.D. Court Case No. 06-0573-CV-W-FJG by the trial court judge.

102. The petitioner respectfully requests that the Court of Appeals issue an Order of Mandamus requiring the United States District Court for the Western District of Missouri remand the petitioner's action against the GE Defendants back to the State of Missouri Jackson County District Court at Independence, Missouri.

IV. REASONS WHY THE WRIT SHOULD ISSUE

103. The petitioner seeks the issuance of a Writ of Mandamus directing the US District Court for the Western District of Missouri to remand his state law based contract claims to Missouri state court.

> "The writ of mandamus is an extraordinary remedy that should be utilized only in those `exceptional circumstances . . . amounting to a judicial usurpation of power.' A federal court may issue a writ of mandamus only when the appellant has established a `clear and indisputable right' to the relief sought, the court has a nondiscretionary duty to honor that right, and appellant has no other adequate remedy."

Perkins v. General Motors Corp., 965 F.2d 597, 598-99 (8th Cir.) (quoting *In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986)) (alteration in original) cert. denied, 113 S. Ct. 654 (1992).

104. Mandamus is a "drastic" remedy to be invoked only in "extraordinary situations." *In re Life Ins. Co. of North America*, 857 F.2d 1190, 1192 (8th Cir. 1988). The facts recited by the petitioner demonstrate the extraordinary circumstances that have caused his contract claims to removed to federal court. The petitioner has been repeatedly injured by actors who are officials in the federal court system who overtly used their power to protect the GE defendants' misconduct and to retaliate against the petitioner for seeking to enforce the express public policies of the United States Congress as provided for by US Statute and the common law property rights guaranteed by the Constitution and statutes of the State of Missouri.

105. Accordingly, the continued exercise of federal jurisdiction in the absence of compliance with 28 USC § 1446 over the petitioner's contract based claims is a clear abuse of discretion or usurpation of judicial power contrary to the express language of 28 USC § 1447(c) and the petitioner has no other adequate means to obtain relief when the trial court does not grant a hearing on the petitioner's timely motion to remand and the federal courts have repeatedly threatened and sanctioned the petitioner and his associates

for correctly stating the law of our nation and fully justifies the issuance of the requested Writ. *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994) (per curiam).

A. The District Court Has Not ruled on An Emergency Hearing

106. The District court's continuing exercise of jurisdiction over the petitioner obstructs a just, impartial and swift resolution of the contract controversy in state court. Despite the petitioner's demonstrated haste in responding with a timely motion to demand begun on the same day he received notice of removal, the prompt replies to all pleadings and a motion for an emergency hearing to remand, the District court has not ruled on the issue and has made rulings or orders when jurisdiction itself is reasonably questioned. The First Circuit determined that a District court can not indefinitely postpone ruling on an Emergency Motion to Remand:

> "We note at the outset that we have given the District Court ample opportunity to decide whether removal of the Suárez action was proper, and despite the time-sensitive nature of this case, and three weeks of hearings on the merits of the Rosselló action which has been consolidated with this case for appeal, we are now faced with the extreme decision of whether we should compel remand through a Writ of Mandamus."

Rosselló-González v. The Puerto Rico Electoral Commission Case No. 04-2611 (1st Cir. 2005). The First Circuit also observed: "Because the District Court plainly erred, and because every additional day spent

adjudicating this issue before the District Court or on appeal before this court increases the risk of irreparable harm, our intervention by Writ of Mandamus would be appropriate." *Id*.

B. An Indisputable And Clear Right To Remand Exists

107. This court's determination of whether an "indisputable and clear right" exists must take into consideration the discretion entrusted in the district court in deciding issues related to the duty. *In re Drexel Burnham Lambert, Inc*., 861 F.2d 1307, 1312 (2d Cir. 1988).

108. Appeals courts have recognized that discretion is extremely limited in exerting removal jurisdiction: "Removal jurisdiction is therefore completely statutory, and we cannot construe jurisdictional statutes any broader than their language will bear." *In re County Collector*, 96 F.3d 890, 895 (7th Cir. 1996); accord *Williams v. Rogers*, 449 F.2d 513, 518 (8th Cir. 1971). "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1 of the Constitution." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

1. Thirty Day Time Period Mandatory

109. 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."

110. 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).

111. 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)."

Somlyo v. J. Lu-Rob Enterprises, Inc., 932 F.2d 1043, 1046 (2d Cir. 1991).

2. Remand is Compulsory When Removal Was Untimely

112. 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.")

113. Presented with an absence of subject matter jurisdiction, the district court should have remanded the case to state court. Such action is directly countenanced by the language of § 1447(c), which mandates a remand anytime that the district court concludes that subject matter jurisdiction is nonexistent.

114. This court has recognized that once jurisdiction of the trial court is determined to be improper, the trial court has a clearly established duty to remand the petitioner's action to state court:

> "The appropriate course of action, however, was not dismissal, but remand to the state court. See 28 U.S.C. § 1446(c)(4) ("If it clearly

> appears . . . that removal should not be permitted, the court shall make an order for summary remand."); 28 U.S.C. § 1446(c)(3) ("judgment of conviction [in the state criminal proceedings] shall not be entered unless the prosecution is first remanded"); *Continental Cablevision of St. Paul, Inc. v. United States Postal Serv*., 945 F.2d 1434, 1441 n.3 (8th Cir. 1991). We thus vacate the district court's dismissal order and remand to the district court for remand to the state court."

City of Kansas City v. James Frederick Newport, Case No. 95-3837WM at pg. 1-2 (8th Cir. 1996) (Unpublished).

C. No Waiver

115. The petitioner has not waived his right to remand by affirmative conduct in the Western District of Missouri federal court. See *Nolan v. Prime Tanning Co*., 871 F.2d 76, 78 (8th Cir. 1989). Federal courts consider a number of factors in determining whether a party has waived its right to seek remand. See *Midwestern Distrib., Inc. v. Paris Motor Freight Lines, Inc.*, 563 F. Supp. 489, 493-95 (E.D. Ark. 1983). A party that engages in affirmative activity in federal court typically waives the right to seek a remand, see *Financial Timing Pubs., Inc. v. Compugraphic Corp.*, 893 F.2d 936, 940 (8th Cir. 1990).

116. The GE Defendants' counsel has made numerous intentional misrepresentations designed to defraud the court. And, while the petitioner has been injured in the past in two other actions by the same counsel's

deliberate misconduct, the petitioner has sought no sanction or other relief save for remand.

D. No Valid Challenge to the Duty to Remand Has Been Made

117. The standard the GE 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).

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

118. The GE defendants caught in fraudulently asserting federal jurisdiction through an untimely 28 U.S.C. §1446(b) removal tried to argue that the Missouri State court case management order apprised them of the absence of the remaining local defendants, reopening the window for removal.

119. Unlike this court's finding in *In re Curtis Bruce Willis*, Case No. 00-3134 (8th cir. 2000), no later paper or document appeared in discovery or as

a pleading or order revealing a new window of federal jurisdiction within the thirty day limit:

> "(FN)1 Section 1446(b) provides that if the case as stated in the initial pleadings is not removable, the notice of removal may be filed within thirty days of when the defendant)first discovers the case is removable. See 28 U.S.C. § 1446(b)."

In re Curtis Bruce Willis, at fn 1.

120. The Missouri state case management order unlike the California District case *Bertha v. Beach Aircraft Corp.*, 674 F. Supp. 24 (CD Ca. 1987) misleadingly cited by the GE defense counsel did not become a later document restarting the clock for removal. 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 failed 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

121. The GE Defendants failed 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 argued:

> "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 (W.D. Court Doc. 9) at page 2.

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

122. 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.

2. Plaintiff Didn't Voluntarily Create Federal Jurisdiction With a Paper

123. 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 petitioner. As noted by the Fifth Circuit in *S.W.S. Erectors, Inc*., this new window of 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.

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

124. As the record shows, not only did the petitioner not file any paper or exhibit at the Case Management Conference fraudulently used by the GE Defendants to unlawfully remove jurisdiction of the contract claims matter from the Missouri state court, the petitioner did not call for or schedule the Case Management Conference. In fact the conference was ordered *sua sponte* by the Missouri state court but was then fraudulently misrepresented by the GE Defendants as set by the petitioner: "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 W.D. 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. (See **Exb. 2** Complete State Docket)

E. Failure of An Unrelated Court Order to Confer Federal Jurisdiction

125. 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).

126. 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).

127. 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*.

F. Carpets N' More Summonses Expired More Than 30 Days Before Removal

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

1. Missouri Statute Sets Deadlines For Valid Process

129. 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]

130. 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]

131. 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.

132. 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).

2. Missouri Requires Strict Compliance For Valid Service of Process

133. 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 RMSo 54.01 results in quashing of service.

134. 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 RMSo 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.

3. Defense Counsel's Personal Experience Is Not Definitive

135. While it may be true that the GE defendants' 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.

136. 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).

G. Absent Defendants Cannot Waive Sufficiency of Process

137. 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]

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

H. Eighth Circuit Recognizes The Time Marker Is "Official Process"

138. The Eight Circuit has resolved the issue of whether service of a summons initiating an action must be by official process complying with the express language of statutes governing valid service. The Eight Circuit has definitively ruled that Missouri state law determines the status of parties for removal and the service of summons must conform to state law requirements for valid service.

1. State law determines the status of parties for removal

139. The Eastern District of Missouri considered a similar issue over whether diversity was created by and voluntary stipulated dismissal of a party in a slightly different fact scenario in *Carney v. BIC Corp*., No. 4:95CV417-DJS (E.D. Mo. July 14, 1993). The Eastern District remanded the action to state court. As the petitioner has argued the Western District is required to follow Missouri state law on whether the summonses expired, the Eastern District court properly determined that Missouri state service

statutes defined the status of the parties for diversity purposes. This court found it could not review the order remanding the action back to state court:

> "The remand order in the present case does not come within the Thermtron exception, because it was based on a ground specified in 28 U.S.C. § 1447(c) -- the district court's determination that it lacked subject matter jurisdiction to hear the action. After noting that the stipulated dismissal provided that, in accordance with Mo. Rev. Stat. § 537.762(6), Massie would remain a party in the action for purposes of venue and jurisdiction, the district court concluded that the dismissal of Massie did not create removal jurisdiction based upon diversity of citizenship and remanded the present case to Missouri state court. Thus, the remand order was based solely upon the district court's conclusion that removal jurisdiction did not exist. Although the district court applied Mo. Rev. Stat. § 537.762(6) in reaching this conclusion, its consideration of § 537.762(6) was in no way separate from the jurisdictional determination. Therefore, the present case is distinguishable from Karl Koch, in which the remand order at issue was based upon a matter affecting the merits of the case. By contrast, the district court in the present case made no determinations concerning the substantive rights of the parties. Thus, the remand order falls squarely within 28 U.S.C. § 1447(d) and is foreclosed from appellate review."

Carney v. BIC Corporation Case No. 95-3163 (8th Cir. 1996).

2. Formal Service of Process Rules Define Timeliness

140. This court has looked to the US Supreme Court decision *Murphy Bros. v. Michetti Pipe Stringing, Inc*., 526 U.S. 344 (1999) to resolve issues over the thirty day rule. This court excerpted the portion of *Murphy Bros* that emphasizes strict adherence to the thirty-day time limit and the use of formal service of process rules or "officially summoned" to mark the timeliness:

> "The Court held that **formal process is required**, noting the difference between mere notice to a defendant and official service of process:

"An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." *Id*. **Thus, a defendant is "required to take action" as a defendant—that is, bound by the thirty-day limit on removal—"only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend**." *Id*. at 350. The Court essentially acknowledged the significance of formal service to the judicial process, most notably **the importance of service in the context of the time limits on removal** (notwithstanding an earlier admonition by the Court in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941), for strict construction of the removal statute). **We conclude that, if faced with the issue before us today, the Court would allow each defendant thirty days after receiving service within which to file a notice of removal, regardless of when—or if—previously served defendants had filed such notices**. See 16 James Wm. Moore et al., Moore's Federal Practice § 107.30[3][a][i], at 107-163 (3d ed. 2000)" [emphasis added]

Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P, Case No. 00-3361 at pg. 5-6 (8th Cir. 2001).

141. On the basis of *Marano Enterprises*, the Eight Circuit rule is that receiving service is the timeliness marker for the thirty day window to remove the case to federal court under 28 U.S.C. § 1446(b). When the summons was returned unserved on the remaining non diverse defendant and expired without renewal, there was no longer an "official summons" to reopen the window. The GE defendants' removal was untimely and the Western District of Missouri court lacks jurisdiction and must remand the action to state court.

I. Nominal Party's Absence Cannot Open Federal Jurisdiction

142. The additional non-diverse party Carpets-N-More had no duty to the petitioner under the allegations of the complaint and therefore was a nominal party whose presence or absence in the action do to service of process could not have opened a window for federal jurisdiction.

143. Removal is authorized by 28 U.S.C. § 1441 and governed by § 1446. Where there are multiple defendants, all must join in a petition to remove within thirty days of service. See *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 754 & n.2 (8th Cir. 2001). However, nominal defendants, those "against whom no real relief is sought," need not join in the petition. *Pecherski v. General Motors Corp.*, 636 F.2d 1156, 1161 (8th Cir. 1981).

144. This court in *Thorn v Amalgamated Transit Union*, Case No. 01-3085 (8th Cir. 2002) observed a local union was a nominal party because it had no contractual duty as Carpets N More would have no duty in the petitioner's contract action against the GE defendants:

> "However, all of the affirmative acts that Thorn alleges were discriminatory were committed by Local 1005 and its officers and members. ATU is not liable for those acts because Local 1005 was not acting as an agent of the international. See *Laughon v. Int'l Alliance of Theatrical & Stage Employees*, 248 F.3d 931, 935 (9th Cir. 2001). As for ATU's alleged failure to discipline its local chapter, we have already noted that Local 1005 has no affirmative duty to remedy discrimination by the employer. Likewise, an international union has no affirmative duty to discipline a local for failing to remedy employer

discrimination. Accordingly, we agree with the district court that ATU was a nominal party for purposes of Thorn's motion to remand."

Thorn v Amalgamated Transit Union, Case No. 01-3085 at pg. 10.

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

145. 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).

1. Named but Unserved Defendants Cannot Defeat Diversity

146. 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).

147. 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).

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

148. 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).

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

149. 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.

1. The Fraud was Intentional

150. 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).

2. The Court Was Deceived

151. 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.

152. 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.

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

153. 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 35.** From the plaintiff's motion to remand.

154. 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.

4. The Fraud Was By An Officer of The Court

155. 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).

5. The Fraud Has Harmed The Court and The State

156. 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.'"

L. Public Policy is served By Hearing the Controversy In State Court Under The *Burford* Abstention Doctrine

157. As recounted in the statement of facts, the complex regulatory scheme created in the Missouri Corporation code must define the status and standing of parties under Rule 17. However, the GE defendants' counsel has succeeded in persuading federal courts to ignore the earlier final decision of the Missouri state court in granting the petitioner standing as the assignee of rights from the dissolved Missouri Corporation Medical Supply Chain, Inc. Despite the strong comity and *res judicata* principles violated and in reversible error violating the Rooker-Feldman doctrine.

158. This court recognized in *I n re Otter Tail Power Company* Case No. 96-3618 (8thcir. 1997) the *Burford* doctrine from *Burford v. Sun Oil Co*.,

319 U.S. 315 (1943) (federal court may abstain in deference to complex state administrative procedure) as a justification for remand to state court:

> "("*Burford* abstention applies when a state has established a complex regulatory scheme supervised by state courts and serving important state interests, and when resolution of the case demands specialized knowledge and the application of complicated state laws." (quotations and citations omitted)), is also inapplicable. The premise of *Burford* abstention is that "a federal court should abstain when the action before it involves matters of state law best left to the state alone." *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985); see also *Quackenbush*, 116 S. Ct. at 1726 ("Ultimately, what is at stake is a federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the independence of state action, that the State's interests are paramount and that a dispute would best be adjudicated in a state forum." (quotations and citation omitted))."

In re Otter Tail Power Company at pg. 30

M. The GE Defendants Participated in State Court

159. 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).

160. 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 cross claim in state court).

161. 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).

CONCLUSION

The delay the petitioner is currently experiencing in obtaining a remand of his action to state court from Western District of Missouri Fernando J. Gaitan is not unfamiliar. It resembles the inaction of the Kansas District court, specifically the delay of Kansas District Court Judge Kathryn H.

Vratil and Kansas District Court Judge Carlos Murguia to cause the disbarment of the petitioner's counsel and then to dismiss the petitioner's claims for lack of representation. The Western District of Missouri Fernando J. Gaitan is in danger of appearing under the malign if not corrupt influence of the GE defendants when clearly there is no federal jurisdiction to be exercised. In the absence of any statutory basis for federal jurisdiction Western District of Missouri Fernando J. Gaitan gives the appearance of violating the petitioner's rights to state court redress by delaying a decision until the petitioner disadvantaged by lack of counsel mistakenly tries to assert a discovery right or some other act in furtherance of his claims that would lead him unwittingly into waiver of his right to demand.

The petitioner respectfully requests that the Court of Appeals grant his petition for a writ of mandamus and provide the much needed relief from the irreparable harm of invalid federal jurisdiction in violation of 28 U.S.C. §§ 144(b) and1447(c).

Respectfully Submitted

_____

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VERIFICATION

State of Missouri)
) SS
County of Jackson)

I Samuel K. Lipari being of lawful age and being first duly sworn upon my oath, state that I have read the above and foregoing petition and find the statements therein to be true and correct to the best of my information, knowledge and belief.

_____
Samuel K. Lipari

Subscribed and sworn to before me on this _____ day of October, 2006

_____
Notary

Commission expires:

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 Petition for Writ of Mandamus, this 3rd day of October 2006, to the following:

Hon. Judge Fernando J. Gaitan, Jr., Room 7552, United States District Court for the Western District of Missouri Charles Evans Whittaker Courthouse 400 East Ninth Street, Kansas City, Missouri 64106

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

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