IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff*	)	
vs.	)	
GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORP., GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING, L.L.C. CARPET & MORE STEWART FOSTER HEARTLAND FINNCIAL *Defendants*	)	**Case No. 0616-cv07421**

SUGGESTION IN OPPOSITION TO THE
GENERAL ELECTRIC DEFENDANTS MOTION FOR DISMISSAL

Comes now the petitioner, SAMUEL K. LIPARI appearing *pro se* and makes the following suggestions in opposition to the defendants GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORPORATION and GE TRANSPORTATION SYSTEM GLOBAL SIGNALING, L.L.C.'s (collectively the "GE defendants") motion to dismiss. The petitioner respectfully requests that the court deny the motion for the following reasons:

1. GE DEFENDANTS HAVE NOT MET DISMISSAL STANDARD

The standard to obtain a dismissal is high:

> "we must view the petition liberally and favorably to the plaintiff, giving him the benefit of all inferences fairly deducible from the facts stated, and assume that

> all the facts alleged are true. Further, the petition is to be liberally construed so as to obtain substantial justice. If the alleged facts and inferences, viewed most favorable to the plaintiff, show any grounds for relief, the petition is not to be dismissed. *Sharp Bros. v. American Hoist & Derrick Co.*, supra, 714 S.W.2d at 921; *Burckhardt v. General Am. Life Ins. Co.*, 534 S.W.2d 57, 63 (Mo.App.1976); Lowrey v. Horvath, 689 S.W.2d 625, 626 (Mo. banc 1985); *Shapiro v. Columbia Union National Bank and Trust Co.*, 576 S.W.2d 310, 312 (Mo. banc 1978)."

Grus v. Patton, 790 S.W.2d 936 at 939 (Mo. App. E.D., 1990).

> "When reviewing the dismissal of a petition, the pleading is granted its broadest intendment, all facts alleged are treated as true, and it is construed favorably to the plaintiff to determine whether the averments invoke substantive principles of law which entitle the plaintiff to relief." *Farm Bureau Town & Country Ins. Co. v. Angoff*, 909 S.W.2d 348, 351 (Mo. banc 1995). "A petition is not to be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Accident and Indem. Co. v. M.J. Smith Sawmill, Inc.*, 883 S.W.2d 91, 93 (Mo.App.1994)(quoting *American Drilling v. City of Springfield*, 614 S.W.2d 266, 271 (Mo.App.1981)). "The ruling [on a motion to dismiss] is ordinarily confined to the face of the petition which is construed in a light favorable to plaintiff." *Id.* "

Lowery v. Air Support Intern., Inc., 982 S.W.2d 326 at 328 (Mo. App. S.D., 1998. However, the standard applicable to the GE defendants' motion is even higher. Below it will be demonstrated that the defense has converted their motion to an inadequate motion for summary judgment by including material facts outside of the petition.

2.GE DEFENDANTS INTRODUCED EVIDENCE OUTSIDE OF THE PETITION

In their suggestion supporting dismissal the GE defendants introduce facts outside of the petition before this court and contradict facts about the petitioner's concurrent federal antitrust and racketeering actions against the GE defendants described in the petition. The petitioner denies these mischaracterizations of material facts being used by the GE defendants to argue for this court's dismissal of the petitioner's untested state claims.

3. THE DISMISSAL'S CONVERSION INTO SUMMARY JUDGMENT MOTION

The defense counsel has converted his motion for dismissal's conversion into one for summary judgment:

> "Here, as in the first litigation, the parties introduced evidence beyond the pleadings. The trial court received evidence from both sides. "When the parties introduce evidence beyond the pleadings, a motion to dismiss is converted to a motion for summary judgment." *Xavier*, 923 S.W.2d at 430; *Smithville v. St. Luke's Northland Hosp. Corp.*, 972 S.W.2d 416, 419 (Mo.App. 1998); see also *King Gen. Contractors, Inc.*, 821 S.W.2d at 499 ("The acceptance and consideration of this evidence by the court effectively `transformed' the proceeding to one under Rule 74.04."). This is the case "even though the trial court did not give notice of the conversion under Rule 55.27." *Jeffrey*, 104 S.W.3d at 428.

Deatherage v. Cleghorn at pg. 5 (Mo. App., 2003).

The defense council has however failed to meet the burden of Rule 74.04, having provided no pleadings, depositions, admissions on file, or any affidavits showing

that there is no genuine issue of material fact. In fact, the defense counsel has controverted material facts related to the ongoing dispute between the parties as they were set out in the petition. Therefore the matter must now be presented to the jury:

> "We note that under Rule 55.27, when matters outside the pleadings are presented to and not excluded by the court, a motion to dismiss is to be treated as one for summary judgment. Under Rule 74.04, summary judgment is to be rendered only when it is clear from the pleadings, depositions, admissions on file, and any affidavits that there is no genuine issue of material fact."

Black Leaf Products Co. v. Chemsico, Inc., 678 S.W.2d 827 at 829 (Mo. App. E.D., 1984).

4. THE LEGAL CAPACITY ARGUMENT IS NOW MOOT

The GE defendants' argument "Lipari Does Not Have The Legal Capacity To Sue" is now moot. The petitioner has addressed the misnomer in pleading as a trustee when he is an assignee. Missouri law provides for assignment of interest from a dissolved corporation to its founding chief executive officer:

> "The assignment by Deer Wood to Smith of its rights, title and interest under the purchase contract is within the bounds of "winding up" its business and affairs after the corporation was dissolved. § 351.476.1(5). We find assignment of contract rights of a dissolved corporation to be allowable under Missouri law.
> ***
> Section 351.525 mandated every statutory trustee to be named in a suit after dissolution of a corporation.

> However, § 351.525 was repealed on May 29, 1991. Because of this statute's repeal, with no provision under current Missouri law replacing it, we find that Deer Wood's assignment of its rights, title and interest under the contract is valid."

Smith v. Taylor-Morley, Inc., 929 S.W.2d 918 (Mo. App. E.D., 1996).SAMUEL K. LIPARI is the proper party with standing to be the plaintiff in this action:

> "Mere misnomer of a corporate defendant in words and syllables is immaterial, provided there is no substantial mistake so as to indicate a different entity, it is duly served with process, and the corporation could not have been, or was not, misled." *Martin v. Signal Dodge, Inc.*, 444 S.W.2d 29, 31 (Mo.App.E.D.1969). This logic is wholly applicable to the instant situation even though it is the corporate plaintiff that was misnamed rather than the corporate defendant. **Appellants' initial pleading explained their identity as "statutory trustees for Revesco, Inc., an administratively dissolved Missouri corporation."** Respondents do not even suggest that they were in any way prejudiced, misled or confused by appellants' nominal mistake. The trial court erroneously applied the law in granting judgment for respondents on this basis.

Gunter v. Bono, 914 S.W.2d 437 at 440 (Mo. App. E.D., 1996). See petitioner's notice of misnomer and its attached evidentiary document assignee the rights of Medical Supply Chain, Inc. to Samuel Lipari.

5. GE DEFENDANTS MISREPRESENTATIONS OF CONDITIONS PRECEDENT

The GE defendants allege no contract exists because "Two Conditions Precedent" are not satisfied. The financing term of the contract in fact and at law is neither a condition nor a condition precedent. The financing term is

also clearly a duty of the GE defendants and if it was a condition it is waived by the petitioner in bringing this action.

The petition alleges MSCI took steps to gain the approval of Blue Springs for occupying the building. The contract does not make this a duty of MSCI therefore its non-performance is no defense. As a condition protecting only MSCI, failure of approval could not be used as a defense if it had been required of MSCI. Finally, if obtaining approval had been required of MSCI under the contract, MSCI would be excused because as the petition states, the GE defendants were giving signs of repudiation.

6. A VALID CONTRACT TO PURCHASE REAL ESTATE EXISTS

Conditions precedent indicate the existence of a contract:

> "MECO's basic premise that the presence of the condition precedent in the Addendum meant "there was either no agreement at all, or no enforceable agreement until [the financing contingency] was satisfied" is flawed. First, such argument runs counter to the general principle that a condition precedent presupposes the existence of a contract and not the converse, as MECO argues. *Career Aviation Sales, Inc. v. Cohen*, 952 S.W.2d 324, 326 (Mo.App. 1997); *Highland Inns Corp. v. American Landmark Corp.*, 650 S.W.2d 667 (Mo.App. 1983). *Morgan v. City of Rolla*, 947 S.W.2d 837, 840 (Mo. App. 1997) (holding a condition precedent is an act or event that must be performed or occur, after the contract has been formed, before the contract becomes effective)."

Meco Systems v. Dancing Bear Entertainment, 42 S.W.3d 794 (Mo. App. S.D., 2001).

7. THE PROVISION OF A MORTGAGE IS A PROMISE NOT A CONDITION

The financing from GE Capital was not a condition precedent to the validity of the contract. Instead it is a promise Medical Supply's sought prior to the formation of the contract. The contract was formed when the GE defendants accepted the bargain. The GE defendants did not qualify their exchange of promises by making them contingent on the provision of a mortgage like Medical Supply Chain, Inc. conditioned its acceptance of the bargain upon. Similarly, no language qualifying or conditioning the duty involving MSCI providing the mortgage precedes it. Instead GE CAPITAL or its underwriter (GENERAL ELECTRIC COMPANY see Exb. GE Statement of Cash Flows) must provide the mortgage as the GENERAL ELECTRIC COMPANY PROPERTY manger Fricke unequivocally committed the GE defendants to.

MSCI's duty under the contract was conditioned upon the GE defendants' promise to act: "and is contingent upon GE Capital securing a twenty year mortgage on the building and the property with a first year moratorium." See Exb. Contract to Purchase Real Estate

The GE defendants cannot avoid their own duty by claiming this condition upon formation of a contract is now a condition precedent after GE accepted this duty:

> "Contract provisions are construed as conditions precedent, however, "only if unambiguous language so requires or they arise by necessary implication." *Juengel Const. Co. v. Mt. Etna, Inc.*, 622 S.W.2d 510, 513 (Mo.App.1981)."

Hood-Rich, Inc. v. County of Phelps, 872 S.W.2d 584 at 588 (Mo. App. S.D., 1994).

Conditions precedent are disfavored:

> "Conditions precedent are disfavored and contract provisions are construed as such only if unambiguous language so requires or they arise by necessary implication. *Morgan v. City of Rolla*, 947 S.W.2d 837, 840 (Mo.App.1997)."

Lowery v. Air Support Intern., Inc., 982 S.W.2d 326 at 329 (Mo. App. S.D., 1998).

8. PROMISES SOUGHT BY MSCI TO FORM THE CONTRACT ARE NOT CONDITIONS PRECEDENT TO THE GE DEFENDANTS' PERFORMANCE UNDER THE CONTRACT

The GE defendants allege that the promises sought by MSCI from GE in exchange for MSCI's promise to release GE TRANSPORTATION from the remainder of the ten year lease commitment and forego the 5.4 million dollars in lease income were conditions precedent to MSCI's ability to enforce obligations for performance under the contract. However these requirements made by MSCI are clearly conditions to the formation of the contract. Once Fricke

promised the performance of these terms on behalf of the GE defendants, they were no longer bars to the validity of the contract and the obligations created by the agreement:

> "Generally, a condition precedent is an event occurring subsequently to the formation of a valid contract, an event that must occur before there is a right to an immediate performance, before there is a breach of a contractual duty, and before the usual judicial remedies are available. Whether conditions precedent are considered prerequisites to formation of a contract or prerequisites to an obligation to perform under an existing agreement is controlled by the intent of the parties."

K.L. Conwell Corp. v. City of Albuquerque, 802 P.2d 634 at 638, 111 N.M. 125 (N.M., 1990).

The defense misrepresents the conditions to the formation of the contract with conditions precedent to the obligation to perform under the contract:

> "A condition precedent to the formation of a contract prevents the formation of a contract except upon realization of the condition. *Hohenberg Brothers Co. v. George E. Gibbons & Co*., 537 S.W.2d 1, 3 (Tex.1976). A condition precedent to an obligation to perform, on the other hand, does not prevent contract formation, but does prevent a duty to perform from arising except upon realization of the condition. Id."

Crest Ridge Const. Group, Inc. v. Newcourt Inc., 78 F.3d 146 at 150 (C.A.5 (Tex.), 1996.

9. GE CLEARLY COMMITTED TO FINANCING THE PURCHASE

In the clear and express language of the contract, Medical Supply Chain, Inc. negotiated for and obtained GENERAL ELECTRIC COMPANY's commitment to finance the

purchase through GE Capital or directly as GE Capital's underwriter as part of the bargain MSCI sought.

> "**GE Capital or its underwriter** would need to **provide Medical Supply Chain, Inc. a twenty-year mortgage** at 5.4% on the full purchase price of 6.4 million dollars, with a moratorium on the first full year of mortgage payments. The City of Blue Springs would be paid the balance of lease payments for the land ($800,000.00) or in the alternative, the mortgage will include an escrow account to complete the lease and purchase of the land on its original terms. **GE Capital** can provide or designate the closing agent and **would be required to provide 5.4 million dollars to Cherokee South, L.L.C. and your division's check for the remainder of the lease payable to Medical Supply Chain, Inc.** along with a bill of sale for the buildings furniture and equipment. This closing would need to be completed by June 15th, 2003."

GE's corporate real estate manager George Fricke as quoted in the petition clearly accepted this bargain on behalf of the GE defendants:

> "I spoke to the business leaders and we will accept that transaction ah... let's start the paper work ah... if you want to do some drafting of lease termination or if you would like us to do that, give me a holler 203-431-4452."

In return for GE's commitment to fund the purchase with a mortgage and to pay $800,000.00 to the City of Blue Springs, Medical Supply Chain, Inc. promised to release GE Transportation from a ten year lease commitment of 5.4 million dollars, a deep discount that would otherwise have no rational explanation.

The duty to provide the mortgage financing was clearly General Electric's duty under the terms of the contract, not MSCI's. "[n]on-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur." *Highland Inns Corp. v. American Landmark Corp.*, 650 S.W.2d 667 at 673 (Mo.App.1983).

10. IF FINANCING IS A CONDITION IT'S A CONDITION *SUBSEQUENT*

If conditional language regarding financing had been contained in the contracts' imposition of a duty to provide the mortgage on the GE defendants, it could only make the term a condition subsequent and not a defense to be raised by GENERAL ELECTRIC:

> "A financing contingency in a real estate contract is a **condition *subsequent***, not a condition precedent, which may be raised, if not fulfilled, to void the contract. *Century 21 A1 Burack Rltrs. v. Zigler*, 628 S.W.2d 915, 916 (Mo.App.1982)." [emphasis added]

Flores v. Baker, 678 S.W.2d 884 at 886-887 (Mo. App. S.D., 1984).

The petiton clearly alleges that the GE defendants were able to make a deal with the defendant HEARTLAND FINANCIAL and to finance the buyout of MSCI's hospital supply competitor for over $600 million dollars.

While some cases do not recognize financing as a condition subsequent it is not a duty that the GE defendants can avoid:

> Nevertheless, other precedents, never overruled, hold unequivocally that "subject to financing" clauses are conditions precedent to the purchaser's duty to perform; *Doerflinger Realty Company v. Maserang*, 311 S.W.2d 123, 128 [4, 5] (Mo.App.1958); others indirectly hold as much. *Highland Inns Corp. v. American Landmark Corporation*, 650 S.W.2d 667, 672-674 [6-9] (Mo.App.1983).

Richard's Original Long Creek Lodge v. Seymour Inn, Inc., 791 S.W.2d 944 at 946 (Mo. App. S.D., 1990)

11. SOLE CONDITION IS IN THE PETITIONER'S FAVOR AND WAIVED

The condition precedent of approval by the City of Blue Springs is clearly in favor of Medical Supply Chain, Inc. and for the protection of Medical Supply Chain, Inc. from purchasing a building for the intended use as a corporate headquarters for its hospital supply business. No protection is afforded the GE Defendants by the condition precedent. Therefore, the GE defendants cannot be excused from their duties under the contract by the failure of a party to obtain approval:

> "A condition precedent is an act or event that must be performed or occur, after the contract has been entered into, before the contract becomes effective. In Missouri, it is well-settled law that a party to a real estate contract may waive any condition in that party's favor. *Fleischer v. McCarver*, 691 S.W.2d 930, 933 (Mo.App.E.D. 1985). A party to a real estate contract may waive the occurrence of a condition precedent and enforce the other party's duty to perform if the condition was included in the contract for the sole benefit and protection of the party waiving it. *Id.* (emphasis added). Whether a condition precedent is for the benefit of the buyer, or the seller, or both, must be determined under the facts and circumstances of each

> case and by the language of the contract entered into between the parties. Id. The test is whether the condition was intended by both parties to be included in the contract for the benefit of both parties, not whether the condition was in fact of a benefit to both parties. Id. If a condition is waived the parties are subsequently bound to perform their duties under the contract. *Howard v. Youngman*, 81 S.W.3d 101, 111 (Mo.App.E.D. 2002)."

Pelligreen v. Wood, 111 S.W.3d 446 at pg. 30 of decision (Mo. App., 2003). As shown in *Pelligren* above, had the favored party been disputed, it would be an issue to be resolved by the finder of fact and ineligible for dismissal.

As a condition protecting MSCI with no effect on the GE defendant sellers, MSCI and now its successor the petitoner is entitled to waive this condition and enforce the contract against the GE defendants:

> "Since this provision of the contract favoring the Buyers did not waive or affect the rights of Sellers, it was within Buyers' rights to waive. *Campbell v. Richards*, supra, at 505, *Koedding v. Slaughter*, 634 F.2d 1095, 1097 (8th Cir.1980)."

McDermott v. Burpo, 663 S.W.2d 256 at 261 (Mo. App.W.D., 1983).

12. MSCI'S DUTIES WERE RELEASED BY DEFENDANT'S REPUDIATIONS

The petition clearly describes the conduct of the GE defendants that communicated GE's repudiation of the contract with MSCI. As such it fulfills the petitioner's requirement to plead the performance of any conditions

precedent clearly imposing a duty on MSCI, because if any such duties were MSCI's they were waived by the repudiation conduct of the GE defendants:

> "The Buyers would have accomplished nothing and the law does not require a useless tender in order to obtain specific performance--in this case going to Medallion's office on September 5th with the balance of the purchase price. **By repudiating the contract and denying any obligation under it the Sellers placed themselves in a position that acceptance after a tender would be refused.** *Blankenship v. Porter*, 479 S.W.2d 409, 413 (Mo.1972). As stated *Cooper v. Mayer*, 312 S.W.2d 127, 130 (Mo.1958):
>
> "[**W]here failure of a party to perform a condition is induced by a manifestation to him by the other party that he will not substantially perform his own promise, performance of such condition is waived and, therefore, excused.**"
> * * *
> * * *
> "[**W]hen the vendor of land claims to have rescinded, and repudiates and denies the obligation of the contract, placing himself in such a position that it appears that if tender were made its acceptance would be refused, then no tender need be made by the vendee.** In such case it is enough if the latter, in a suit for specific performance, offer by his bill to bring in the money when the amount is liquidated."
>
> **A futile tender by the Buyers was excused**, and they did offer to make tender at trial if specific performance was granted. Lancaster v. Simmons, 570 S.W.2d 742 (Mo.App.1978)."

McDermott v. Burpo, 663 S.W.2d 256 at 262 (Mo. App.W.D., 1983).

CONCLUSION

Whereas for the above reasons suggesting that the GE defendants are not entitled to a judgment or dismissal at

law and have not shown that material fact contradictions do not exist the petitioner Samuel Lipari respectfully requests that the court deny the GE defendants motion for dismissal and summary judgment.

Respectfully Submitted,

_____
Samuel K. Lipari
297 NE Bayview
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Pro se

Exhibit list

Exb. 1 GE Statement of Cash Flows
Exb. 2 Contract to Purchase Real Estate

In the County of_____)
) SS:
State of _____)

AFFIDAVIT

I attest the above facts and attached documents are truthful to the best of my knowledge.

_____ Date_____
Samuel K. Lipari

I certify I have witnessed the above signature:

_____ Notary Public Commission Exp:_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 17th day of May, 2006, by first class mail postage prepaid to:

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

_____

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