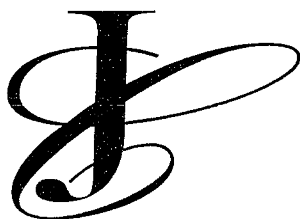


March 21, 2011

Clerk of Appellate Courts
25 Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Re: In re Paul Stepnes, et al v. All State Title et al (Petition for Writ of Prohibition)
Court of Appeals No. ________________
Fourth Judicial District Court No. 27-cv-10-25884

Dear Clerk:

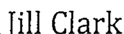
Enclosed for filing please find:

- Petition for Writ of Prohibition;
- Appendix;
- Affidavit of Jill Clark, Esq. in Support of Writ Petition;
- Affidavit of Paul Stepnes in Support of Writ Petition;
- Affidavit of Peggy Katch in Support of Writ Petition;
- Supplemental Affidavit of Jill Clark, Esq.;
- Supplemental Affidavit of Paul Stepnes; and
- Filing fee of $550.

The Orders that Petitioners seek to prohibit are at: A:1 and A:2.

Sincerely,

Jill Clark



JEC/slf
C: The District Court (the Honorable Robert A. Blaeser, Phillip D. Bush, Lloyd B. Zimmerman, and Court Administration); Clients; Opposing counsel (Little *only*).

JILL CLARK, P.A. ATTORNEY AT LAW
2005 AQUILA AVENUE NO. • GOLDEN VALLEY, MINNESOTA 55427 • PHONE: 763-417-9102 • FAX: 763-417-9112 • E-MAIL: JILL@JILLCLARKPA.COM

STATE OF MINNESOTA
IN COURT OF APPEALS

In re Paul Stepnes, Chester Group, LLC,
Chester House, LLC,

Petitioners.

Court of Appeals No. ______________

Paul Stepnes, Chester Group, LLC,
Chester House, LLC,

Fourth Jud. Dist. No. 27-cv-10-25884[1]

Plaintiffs,

PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

v.

All States Title, *et al*,

Defendants.

INTRODUCTION

Petitioners seek to prohibit two district court orders, which were issued, not by the judge assigned to the case, but by a different judge:

1) Order dated February 16, 2011 (See Appendix **A:1**); and

b) Order dated February 24, 2011 (**A:2**).

Petitioners contend that a district court judge convened as the Court of Appeals, refused to honor or consider a notice to removal without cause, and is otherwise about to exceed jurisdiction.

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1 As is further discussed below, it is Plaintiff-petitioners' position that this case was properly dismissed by them pursuant to Minn.R.Civ.P. 41(a)(1). However, Petitioners do not have any other case file number to reference, other than that district court file.

FACTS AND PROCEDURAL HISTORY

1. This civil action was filed on **November 4, 2010** by one individual and two companies. Shortly thereafter, the summons and complaint was served upon Defendant Steven R. Little ("Little"). (Summons and Complaint at **A:37-47**). Mr. Little specifically stated that he would not (or could not) accept service on behalf of his law firm: Coleman, Hull & van Vliet, PLLP ("Coleman"). (Clark Aff. ¶2).

2. Petitioners' then counsel telephoned management at the Coleman firm, and was advised that the firm would be willing to sign an acknowledgement of service if one were faxed over. However, then some things occurred (which remain attorney-client-privileged at this time), and Plaintiffs did not serve any other defendants. (Clark Aff. ¶3).

3. To this day, no other defendants have ever been served. (Clark Aff. ¶4). Even after the "order to show cause" proceeding – counsel for Old Republic admitted that that company had never been served. (**A:30, 31, 34**). **Little was the only defendant properly before the Court.**

4. Little and Coleman apparently retained the same law firm. On **November 24, 2010**, Defendant Little (who had been served), and Coleman (which had not been served), filed a motion to dismiss, citing Minn.R.Civ.P. 12.02(**e**). (**A:19-22**). The motion argued that the Complaint did not state a claim upon which relief

can be granted. (**A:21-22**). The motion did not raise any defense of insufficiency of process, or insufficiency of service of process. (*Id.*).

5. It has never been clear to Petitioners why the Coleman firm filed a motion to dismiss - when it was not a party.

6. Also, for reasons that are unclear, Old Republic National Title Insurance Co. scheduled a motion to dismiss even though it had not been served. (**A:48**). Petitioners did not receive any motion papers from Old Republic. (Clark Aff. ¶5).

7. A number of judges were removed without cause by various plaintiffs and by Little, and several judges self-recused. (See Mn-CIS printouts at **A:13-16** and February 24 Order at **A:3**; see letter of the Honorable Mel I. Dickstein at **A:18**).

8. The Honorable Lloyd B. Zimmerman was assigned by Civil Assignments on **January 27, 2011**. (**A:14**). Little and Coleman filed a motion to dismiss, with a new hearing date, before Judge Zimmerman. (**A:23-25**).

9. On **February 7, 2011**, Plaintiffs amended the complaint to: a) revise the summons to fit the new form; b) add Chester House, LLC as a Plaintiff; and c) remove TFIC, LLC as a defendant. (**A:51** *et seq.*). Plaintiffs had contemplated adding Green Holding, LLC as a plaintiff, but decided to wait. (Stepnes Aff. ¶2).[2] Plaintiffs served the amended summons and complaint upon Little, and they filed it. (Clark Aff. ¶6).

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2 The Summons still contained a typographical error. "Green House, LLC" should have been "Chester House, LLC" as in the Complaint.

10. Later on **February 7, 2011**, Chester House, LLC filed a notice to remove Judge Zimmerman without cause.

11. On or about **February 8, 2011**, Plaintiff counsel talked with Court Administration with purview over assignments, at the counter on the third floor of the Government Center. The Clerk inquired as to the whereabouts of the complaint with Chester House as a Plaintiff, and Attorney Clark indicated that it might still be in processing, that it had been filed the day prior on the second floor. (Clark Aff. ¶7).

12. Thereafter, and presumably consistent with usual processing, Judge Zimmerman was removed without cause and Judge Neville was assigned. There is nothing in the Record showing that Judge Zimmerman declined to be recused, or that that Judicial Officer took issue with the notice to remove.

13. Thereafter, the docket shows that Judge Neville recused, and Judge Abrams was assigned. (**A:14**).

14. On **February 12, 2011**, Plaintiffs met with their attorneys, and a decision was made to dismiss the case without prejudice. The communication is privileged, the decision strategic. But the decision was not based upon which judicial officer had the case at that time, or had had the case prior. (Stepnes Aff. ¶3).

15. On **February 15, 2011**, Plaintiff counsel signed a dismissal without prejudice pursuant to Minn.R.Civ.P. 41(a)(1). Because only <u>one</u> party (Little) had been served, and because Little had not answered (but had filed only a Rule 12

motion), Plaintiff counsel dismissed without prejudice on the basis of her own signature. (**A:51**).

16. On **February 16, 2011**, Plaintiff counsel went first to a court appearance in Ramsey County, and then met her Assistant at the Hennepin County Government Center to prepare for a hearing in a different civil case. While awaiting that hearing, Plaintiff counsel asked the Assistant to go file the Notice of Dismissal, which she had brought with her. This was around 11:30 a.m. (Clark Aff. ¶8).

17. None of the plaintiffs, their attorneys, or any staff had any idea that an Order to Show Cause had been filed earlier on February 16. Plaintiff counsel's office opened the mail containing the February 16 Order on Sunday, **February 20, 2011**. This was the long "President's birthday" weekend. The Office was closed Monday, **February 21, 2011**. (Clark Aff. ¶9; Katch Aff. ¶2).

18. Plaintiff counsel spent significant time researching the issues raised in the Order. Plaintiff counsel estimates that from **February 20-22**, she spent approximately 15 hours researching the issues raised by the February 16 Order. (Clark Aff. ¶10). There did not appear to be any reason why the OSC proceeding was on an expedited schedule.

19. On **February 21, 2011**, Plaintiff counsel met with Paul Stepnes. Plaintiff counsel, who practices both civil and criminal law, was concerned that, as articulated, the OSC was a criminal contempt proceeding. Plaintiff team consulted

with more than one criminal defense attorney, but could not locate one able to appear on such short notice, at the **February 24** hearing. (Clark Aff. ¶11).

20. The February 16 order to show cause did not cite any authority. Plaintiff counsel's research confirmed that even inherent judicial authority has limits. This particular Judicial Officer was not assigned to the file, which further limited the authority. Based on research, it appeared that the proceeding had to be a contempt action. The action did not fit the legal definition of a civil contempt action (there was no "purge" that plaintiffs could perform, no prior judicial order even alleged to have been violated). Therefore, it had to be a criminal contempt proceeding. Further, it could not be a direct contempt action – nothing had occurred in the presence of the issuing Judicial Officer. The remaining option was constructive criminal contempt. (Clark Aff. ¶12).

21. Plaintiff counsel's research confirmed that since 1955, the law has not allowed a judicial officer to act as investigator, jury and judge in a constructive contempt action. A constructive contempt case must be charged out by a prosecutor, and full criminal due process rights are afforded (personal service, neutral judge, trial by jury, etc.). (Clark Aff. ¶13).

22. The February 16 Order heavily suggested that the Judicial Officer had performed research (at a minimum, gone onto the Secretary of State website), and,

apparently intended to question Plaintiffs[3] and then make factual findings and legal conclusions. Indeed, that is what occurred. (*See* February 24 Order). It was Plaintiffs' position that the Fifth Amendment and principles of due process simply do not allow such a proceeding (where the "investigating" judicial officer convenes the action like a prosecutor, then presides as judge and makes a decision as the trier of fact).

23. Plaintiff counsel (who also practices criminal law) was hesitant to allow Mr. Stepnes to personally attend the February 24 hearing *without criminal defense counsel present*. (Clark Aff. ¶14).

24. Further, Plaintiffs and their counsel had numerous issues with the February 16 Order. Neither of the Judges whose names appear on the February 16 Order had ever been assigned to the case. All of the cases that limit the inherent authority of the court *assume* that the judge is properly sitting on the case. Plaintiff counsel was simply not familiar with any authority for one judge to *sua sponte* begin ruling upon another judge's case. (Clark Aff. ¶15).

25. On **February 23, 2011**, Plaintiff counsel Clark drafted and filed the document entitled, "Limited Appearance to Object to Jurisdiction and Removal Without Cause" at **A:8** ("objection to jurisdiction pleading"). In sum, this pleading noted:

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[3] The February 24 Order states that Plaintiff counsel was also ordered to attend the February 24 hearing, but that is not in the February 16 Order. Only "Plaintiffs" were ordered to "appear."

- The court/judicial officer lacked jurisdiction.
- The Order to Show Cause was not served upon Plaintiffs via personal service. It was not served by the Court Administrator on either Plaintiffs or their counsel. (A copy of the order was sent from the Judicial Officer's chambers.)
- A contempt proceeding is a new proceeding.
- Within ten days of notice of the assignment of judicial officer on this new proceeding, Plaintiff Paul Stepnes removed the judicial officer without cause. (This is allowed, of course, under both the civil and criminal procedural rules.)
- The Judicial Canons prohibit a judge from conducting his or her own research.
- A judicial officer may not conduct research, then act as prosecutor, judge and jury.
- The Order is unlawful (and therefore need not be followed); and
- The issue is likely moot (because as shown at **A:12c**, Chester House *was* registered with the Secretary of State).

A:8-12d.

26. The Fourth Judicial District Court Administration was closed that afternoon, so Attorney Clark's Assistant took a copy to Chief Judge Swenson's chambers, to ask how an emergency removal can be processed when the Court Administration is closed. She was advised by a Clerk to return in the morning. She

also hand-delivered copies to the chambers of the two judges whose names appear on the February 16 Order. (Katch Aff. ¶2).

27. The Assistant did return the next morning (2/24), and was told that the pleading had been "filed" as of 2/23, that all of the appropriate people had their copies, and that she could leave and she would be called or receive an email. (Katch ¶3).

28. Unbeknownst to Plaintiffs, the Judicial Officer did convene a hearing that morning. See order at **A:2**. No phone call was made to inform Plaintiffs how the objection to jurisdiction pleading was being dealt with. And when the 2/24 Order was issued, no copy was mailed, emailed, or faxed by that Judicial Officer's chambers. (Clark Aff. ¶16, Stepnes Aff. ¶4, Katch Aff. ¶4). The Assistant went to the Government Center on **February 25, 2011** and obtained a copy of the order at **A:2**. No disclosure had been made to Plaintiffs, their counsel, or the Assistant, concerning phone calls with other attorneys. *Id.* As of Mach 13, 2011 (the date Paul Stepnes signed his first affidavit), Plaintiffs still did not know why this particular Judicial Officer took an interest in this case and take action? Or who said what to whom? (Stepnes Aff. ¶5).

29. The *only* basis for the show cause order – on the face of the order – was the statement that Chester House was not **registered** on the Secretary of State website. (**A:1**). Plaintiffs showed at **A:12c** that it was, indeed, a registered corporation. Plaintiffs thought that would have ended the issue. (Stepnes Aff. ¶6).

30. Upon reviewing the February 24 Order, Plaintiffs could not determine why Judge B – having been apprised that Chester House, LLC *was indeed* an LLC registered on the Secretary of State website – shifted gears and began to question the "inactive status" of Chester House. Had Plaintiffs been on notice that Chester House's active and/or inactive status was at issue, they could have easily explained.

31. Chester House was organized and registered in **2005** (Stepnes Aff. Exh. A). Like many corporations in Minnesota that do not pay the $25 annual filing fee, Chester House was made "inactive" by the State. A terminated LLC is permitted by law to bring or defend a claim on the LLC's behalf "in the name of the limited liability company." Minn. Stat. § 322B.866. Further, payment of the $25 fee is retroactive pursuant to Minn. Stat. § 322B.960, Subd. 5. The corporation is now active, and its "active" status is retroactive to its point of being declared inactive. Because of the way these proceedings progressed, Plaintiffs were not given an opportunity to provide this information to the Court. (Based on what they now know, Plaintiffs believe that providing this information would not have changed the outcome.)

32. Interestingly, the Coleman firm was allowed to participate in this case even though it had not been served, and even though it is listed as "inactive" by the Secretary of State. (**A:64**). The Coleman firm was never ordered to show cause why it scheduled a motion when it is not a party, or why it would conduct business at the court, when it was listed as "inactive."

33. The February 24 Order noted at least one *ex parte* communication at footnote 1. It is true that Attorney Tom Olson has stated that he represents Old Republic. *But Old Republic has never been a party in this case.* It is still unclear to Plaintiffs why a non-party would be consulted with, over the telephone, to garner facts for an upcoming show cause hearing.

34. Petitioners read the February 24 Order to suggest that perhaps Chester House was registered with the SOS between February 16 and February 20 (meaning *after* the OSC had been issued, but before the objection to jurisdiction was filed). There is no factual support for this. February 20 was a Sunday (of the long holiday weekend). And the February 16 Order had not been opened in Plaintiffs' attorney's office until that day. (Clark Aff. ¶17). Further, Chester House was incorporated in **2005**. (Stepnes Aff. Exh. A).

35. The February 24 Order determined, in essence, that Judge A had been wrongfully removed without cause, and "re-assigned" the case to Judge A. Respectfully, Petitioners assert that there was no authority for any of these acts.

36. The February 24 Order also stated that Old Republic had not been served with Plaintiffs' dismissal without prejudice. However, Old Republic was not a party, so there was no reason to serve Old Republic. (Clark Aff. ¶18). Again, with respect, there is a reason why judges should not rule on another judge's case – they would not know who the parties are, let alone the procedural posture.

37. The February 24 Order caused confusion, as it stated that "to the extent" the case as still active the March 23 hearing on the defense motion to dismiss was still on. This put defendants in a jam – because they had not filed their supporting motion papers. Of course, Petitioners had already dismissed the case.

38. On **February 24, 2011**, Chief Judge Swenson, having received Plaintiffs' objection to jurisdiction pleading, wrote a letter confirming, in essence, that he cannot sit as the court of appeals, and that he lacks the authority to intervene in another judge's case. (**A:17**).

37. Plaintiffs are concerned that if they re-file this action (or something similar to it) in the future, that the February 24 Order will impair their rights. The notion in the February 24 order that Plaintiffs could be deemed to be "out of strikes" in some future-filed action (with an indeterminate number of plaintiffs), is, at best, an advisory opinion. Plaintiffs are also concerned that if they wait until that future point to bring a writ action regarding the February 24 Order, that this Court might determine that it was too late. *See* E. J. Magnuson, D. F. Herr, Minnesota Appellate Rules Annotated, Thomsen West 2008 Ed., §120.6.

38. Petitioners were about to file this Petition on Friday, **March 18, 2011.** The Petition was to be filed by their criminal defense counsel. However, on that date, Plaintiff counsel came into possession of an email now added at **A:66-67**. The email is not part of the Record in the case below. The email answered certain "why"

questions. Further, given the content of the email, a decision was made that the undersigned would file this writ action. (Clark Supp.-Aff.).

39. The email is easily viewed as an acknowledgement by Judge A that he lacked jurisdiction (had been removed by that point), and yet apparently wanted to achieve what the February 24 Order eventually did. And, the tentative way in which the email inquiry was made heavily suggests that no one was sure that Judge B had jurisdiction – either. (Petitioners assert that he did not.) The email provides a wealth of information regarding ex parte communications, 'investigations' and motivation. Although some of the issues raised by the email need not be addressed in this venue, Petitioners urge this Court to prohibit the orders below. (Stephes Supp.Aff. ¶1).

ARGUMENT

I. PROHIBITION IS APPROPRIATE HERE.

Prohibition is the appropriate proceeding to contest judicial removal issues. Further, if this Court reverses the district court on removal issues, the appropriate remedy appears to be to "vacate" the order that was issued after the judge should have been disqualified.

A. Writ of Prohibition is Appropriate Way to seek Review of Judicial Removal Issues.

1. Only Court of Appeals can reverse refusals to remove.

Petitioners are not quite sure what proceeding occurred below on February 24. However, based on the February 24 Order, it appears that the District Court

(Judge B) convened itself as the Court of Appeals, in order to reverse the removal of Judge A without cause. Indeed, that was the *effect* of the February 24 Order. That is a function reserves for the Court of Appeals. (See citations in Chief Judge Swenson's letter at **A:17**). Petitioners ask this Court to take judicial notice that Judge B was not a Court of Appeals Judge on February 24.[4]

2. Judge A did not raise removal issue when he had jurisdiction.

Determining whether a notice to remove *without cause* is appropriate is usually performed by the judge who is being removed. *Cf.*, State v. Strom, 1992 WL 182990 (Minn. Ct. App. 1992) ("Disputes about the propriety and timeliness of a notice to remove are usually determined by the judge the party seeks to remove."). At no point did Judge A raise anything *on the record* regarding the 63.03 without-cause removal by Chester House. Further, noting in the Record suggests that any opposing party objected to the removal of Judge A.

State another way, Judge B effectively *denied* the removal of Judge A. Prohibition is the appropriate remedy to pursue when a motion or notice to remove without cause has been denied. State v. Cheng, 623 N.W.2d 252 (Minn. 2001).

Because a timely-filed notice to remove without cause is automatic, usually the only issue is whether the notice was timely. "Determining whether a notice to remove is timely is a question of law for this Court to determine *de novo*. Citizens State Bank v. Wallace, 477 N.W.2d 741, 742 (Minn. Ct. App. 1991).

4 http://www.mncourts.gov/?page=551 accessed March 20, 2011.

No one has ever (in by email) questioned that Chester House's notice to remove Judge A was timely filed. No statute or rule has been cited by the District Court for the proposition that Plaintiffs could not add a plaintiff, and then utilize that plaintiff's removal of right.[5]

Finally, on **February 23, 2011**, Petitioners filed a notice to remove whichever judge was intending to sit at the February 24 hearing (Plaintiffs could not tell, because two judges' names were on the February 16 Order). That removal was *effectively* denied – Judge B did not remove himself. Plaintiffs also requested that if the removal was denied, that they have an opportunity to address the issue to this Court. That was not addressed by the District Court. The hearing was held despite all of Plaintiffs' objections and notice of removal.

Petitioners seek review by this Court of the denial of their removal without cause filed **February 23, 2011**. That issue is properly addressed by writ of prohibition. *See Cheng, supra*.

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5 Of course, Petitioners contend that Judge B should never have taken up this issue. But a reading of the email and the orders of Judge B shows that the crux of the "undoing" of the removal was the unsuccessful allegation that Chester House was "fictitious." No one has ever alleged that simply adding a plaintiff and then utilizing that plaintiff's right to remove, is in any way improper. Of course, adding a plaintiff was only one of the things that Plaintiffs did with their first amended complaint. Now that Petitioners have the email at A66-7, they also note that *even if* the goal of Attorney Clark was to remove Judge A in all cases in which she was counsel, there is *nothing wrong* with that goal. And, indeed, the reason for removals without cause is to allow parties and attorneys to remove those judges that they have had conflict with or believe cannot be fair, without having to go through a "for cause" removal process. Sadly, the email also shows the downside for parties and their lawyers who exercise their due process right to file a motion to remove a judge for cause.

Petitioners advance several arguments in support of their review of Judge B's decision not to honor the notice of removal without cause. First, Plaintiffs noted below that the OSC lacked any citation to authority. As best they could tell, the action had to be a constructive criminal contempt action.

Obviously, if this was a new, criminal proceeding (see jurisdictional discussion, below), Paul Stepnes had an absolute right to remove Judge B from the case pursuant to Minn.R.Crim.P. 26.03, Subd. 13. The OSC was not even filed until February 16, and Paul Stepnes filed his notice to remove on February 23, 2011. The timely notice to remove should have been automatic. It was not even considered by Judge A. Petitioners contend that Judge B was disqualified to rule on February 24 – and that the February 24 Order should therefore be vacated.

Powell v. Anderson, 660 N.W.2d 107, 114 (Minn. Ct. App. 2003) discussed "the remedy available to a party who seeks relief from a decision already made by an allegedly disqualified district court judge." It uses the term "*vacatur*" to describe the voiding of rulings made in cases where the judge should have disqualified. *Vacatur* is appropriate when the judicial officer should have disqualified prior to the ruling, but did not. *Powell* at 114. Based on the above, the February 24 Order of Judge B should be vacated.

B. Judge cannot become Investigator and Remain Judge.

Further, the Rules of Judicial Conduct (effective December 2008) do not allow judicial officers to perform their own investigation (outside the Record), and then

act as judge. Here, it seems undisputed that the 'investigation' took place. First, someone other than the parties investigated Chester House, LLC prior to the February 16 Order.[6] Then, the February 24 Order footnote 1 makes clear that additional "investigation" was performed. Not only was Tom Olson talked to, but he was allowed to "weigh in" on an issue of service *when Old Republic was not even a party in the case.* Once again, this shows why judges who are not assigned to the case should not take actions – they would not even know who the parties are.

These investigations were not on the Record, and the 'evidence' was not proffered by the parties.

Canon 2, Rule 2.9(C) states, "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." Comment [6] makes it clear that the prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic. Here, it would include the Secretary of State website. Not only did the Judge(s) access the website *but it was read incorrectly*. This would be a major reason why judges should not be investigators. They are to decide which party's interpretation is accurate – rather than be wedded to the interpretation that *they* make.

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6 By Judge A, Judge B and/or the two in combination. Petitioners also suggest that if Judge B should not have simply adopted the investigation of Judge A for purposes of issuing an order to show cause.

Comment [1] makes it clear that judges are not to perform their own research, but they are to rely on what the parties submit as the record: [1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge. Obviously, that did not occur here. No party raised these issues. And, when Judge A communicated to Judge B – that was not disclosed to the parties.

Obviously, there are additional Canons/Rules could be considered here.[7]

Because Judge B was/should have disqualified, he lacked jurisdiction to preside over the February 24 hearing. See State v. Dorsey, 701 N.W.2d 238 (Minn. 2005). (The Canons are not merely aspirational. See *Dorsey* and *Powell, supra*, and *Schlienz, infra.*)

Although Plaintiffs below had no opportunity to attempt to remove Judge B for cause after they attempted to remove without cause, this Court could find on the basis of undisputed facts, that the February 24 hearing took place without notice to Plaintiffs, and that there was no need for such urgency – in light of the obvious intent of Plaintiffs to seek removal of Judge B. And that the rapidity of the

[7] CANON 1, Rule 1.1 (Compliance with the Law); Rule 1.2 (Promoting confidence in the Judiciary); Rule 1.2[2] (A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code); Rule 1.3 (Avoiding Abuse of the Prestige of Judicial Office); CANON 2, Rule 2.2 (Impartiality and Fairness); Comment [1] (judge must be objective and open-minded; Rule 2.4 (External Influences on Judicial Conduct); Rule 2.10 (Judicial Statements on Pending and Impending Cases); Rule 2.11 (Disqualification), Part A and (1-2).

proceedings effectively precluded Plaintiffs from bringing their motion to disqualify for cause.

Or, this Court could determine that Plaintiffs gave ample notice to Judge B of the removal issues, and that by failing even to consider removal issues in the February 24 Order, that Judge B made a legal error that is reviewable as a matter of law.

The circumstantial of this case suggest it is appropriate for this Court to consider Judge B's activities, particularly with regard to what relief is appropriate. "Having concluded that the judge's failure to recuse was plain error that affected [Stepnes's] substantial rights, we next consider whether to correct the error to ensure the fairness and integrity of the judicial proceedings. We conclude that we must." State v. Schlienz, 774 N.W.2d 361, *21 (Minn. 2009).

II. EXTRAORDINARY WRIT SHOULD ISSUE.

Alternatively, Petitioners seek extraordinary relief to prohibit the February 16 and February 24 Orders - making them null and void.[8]

Usually, a writ of prohibition is an extraordinary remedy and is only used in extraordinary cases." In re Comm'r of Pub. Safety, 735 N.W.2d 706, 710 (Minn. 2007). A writ of prohibition is the appropriate vehicle when it appears the district court is about to exceed its jurisdiction. Thermorama, Inc. v. Shiller, 271 Minn. 79, 83-84, 135 N.W.2d 43, 46 (1965) (emphasis added). Here, the District Court

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8 Although Petitioners seek a writ of prohibition, this Court has flexibly reviewed such writs, and will issue a writ of mandamus if that is the appropriate remedy.

convened itself as the Court of Appeals or otherwise acted without jurisdiction. Accordingly, a writ of prohibition is appropriate. Petitioners contend that this is an extraordinary case.

In order to obtain a writ of prohibition, a petitioner must show that there is no adequate remedy at law for its alleged injury. Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 208 (Minn. 1986) (addressing requirements for a writ of prohibition). Here, by the time Plaintiffs learned about the Order to Show Cause, they had already dismissed their case without prejudice. They cannot appeal from that. Which means there is no adequate remedy at law.

A. February 24 Order not issued by the assigned judge.

Although there is not much law on the topic, Petitioners contend that it is axiomatic that one judge cannot, *sua sponte*, decide to issue a ruling on another judge's case. And that by issuing the February 16 and February 24 Orders, that the district court is about to exceed its jurisdiction.

B. February 24 Order issued ruling on future-filed case.

The February 24 Order went further than simply putting Judge A back on the file. It ruled that any *future* case filed by these plaintiffs must be before Judge A – and that the future plaintiffs would be "out of strikes." Advisory opinions are discouraged in the court system. This ruling was, at best, an advisory opinion. Yet Plaintiffs are concerned if they do not file this writ now, that if they file a case at a

future time and have trouble in the district court regarding this issue, that it might then be too late to seek this writ. (Stepnes Supp.-Aff.).

C. Court Lacked Personal Jurisdiction Over Plaintiffs.

Whether this was a civil or criminal proceeding, the Court lacked personal jurisdiction over Plaintiffs.

A contempt action is a new proceeding. In re Estate of Anna V. French, 651 N.E.2d 1125, 1131 (Ill. 1995). In the case at bar, the February 24 proceedings were conducted after the case had been dismissed without prejudice.[9]

A new civil case must be personally served. Minn.R.Civ.P. 4. A civil contempt proceeding must comply with certain procedural requirements, including that the court's order "clearly define[] the acts to be performed" and that "the party charged with nonperformance be given an opportunity to show compliance or his reasons for failure." Hopp v. Hopp, 279 Minn. 170, 174, 156 N.W.2d 212, 216 (1968). To the extent that the February OSC did this – Plaintiffs showed that Chester House, LLC was a real (not a "fictitious" company). Therefore, the OSC was moot.

As Plaintiffs analyzed the OSC, it was not a civil proceeding, but a criminal proceeding:

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9 Although the February 25 Order seems to imply that the case was dismissed *because* the Order to Show Cause as dismissed, but the facts do not bear this out. First, the dismissal was signed on February 15, 2011, one day before the February 16 Order. Second, Plaintiff counsel left for Ramsey County court early on February 16, arriving at the Hennepin Courthouse midday and filing the (previously-signed) notice of dismissal. Third, the February 16, 2011 Order was not received and opened by Plaintiff counsel until December 20, 2011.

- The OSC did not threaten a "civil" contempt proceeding because there is no ability to "purge." Further, there was not even the contention that a prior court order had been violated. The OSC dealt with what had occurred *in the past.*
- The OSC does not threaten a direct criminal contempt proceeding, because the conduct complained of did not occur in the courtroom in the presence of the issuing Judge.[10] Indeed, Plaintiffs had never been before this Judge during the case.
- The OSC therefore must have threatened a constructive criminal contempt proceeding, because the conduct is in the past, and occurred outside the presence of the issuing Judge.[11]

Full criminal process applies to constructive criminal contempt proceedings.[12] Plaintiffs therefore had a Fifth Amendment right to remain silent, even if questioned by the Court. They were entitled to a complaint, and a criminal defense attorney, and a trial. *In re Welfare of A.W.*, 399 N.W.2d 223, 225 (Minn. App. 1987) ("Criminal procedural safeguards are applicable in constructive criminal contempt cases.").

Further, since 1955, no single judge is allowed to act as investigator, prosecutor, judge and jury in a criminal contempt proceeding. In re Muchirson, 349

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10 Minn. Stat. §588.01, Subd. 1-2.

11 Minn. Stat. §588.01, Subd. 1 and 3.

12 The Rules of Criminal Procedure are applicable to a constructive criminal contempt proceeding. Knadjek v. West, 153 N.W.2d 846 (Minn. 1967). A new criminal case must be charged by summons and complaint. Minn.R.Crim.P. 3.

U.S. 133 (1955). Here, Judge B was involved in some type of investigation, put the matter on for hearing (prosecuted), presided over the hearing (judged) and decided the issues (jury). Petitioners contend that there was no jurisdiction to take actions as a criminal prosecutor. And under these circumstances, Judge B had no jurisdiction to appear as Judge, or trier of fact.

The Rules of Criminal Procedure are applicable to a constructive criminal contempt proceeding. Knadjek v. West, 153 N.W.2d 846 (Minn. 1967). A new criminal case must be charged by summons and complaint. Minn.R.Crim.P. 3.

The OSC was not personally served upon any of the Plaintiffs. The Order was never even served by the Court Administrator. A copy was mailed to Plaintiff counsel by the Judge's chambers. (**A:65**).

The District Court therefore lacked personal jurisdiction over Plaintiffs.

Further, Plaintiffs *objected* to jurisdiction, in writing, on February 23, but the District Court declined to address this issue. Issues of jurisdiction are usually taken up first – before the merits.

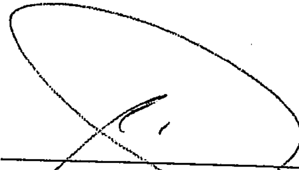
For all of these reasons, the district court is about to exceed its jurisdiction and a writ of prohibition should issue.

CONCLUSION

For all of the above reasons, Petitioners respectfully request that this Court prohibit the orders of February 16 and February 24, 2011, vacate them, and/or otherwise declare them null and void.

Dated: March 21, 2011

ATTORNEYS FOR PETITIONERS



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