No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TIM SUNDY,

Petitioner

v.

FRIENDSHIP PAVILION ACQUISITION COMPANY, LLC, ARSENAL REAL ESTATE II-IDF, LP, THOMAS LING, GARY PICONE, MICHAEL WEINSTEIN, MARTHA C. CHRISTIAN, C. ANDREW FULLER, CHARLES BAKER, GEORGIA DEPARTMENT OF TRANSPORTATION

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

TIM SUNDY
227 Sandy Springs Place, Ste. D-465
Sandy Springs, GA 30328
email: dstshall@earthlink.net
Pro se Petitioner

QUESTION PRESENTED

In this case, proceedings were removed from a State court to the Federal court. While pending in the Federal court, the Petitioner was granted intervenor status as a defendant under Fed. R. Civ. P. 24(a)(2) with neither restrictions nor stipulations, nor any objection or issue raised by the other parties. Subsequently, the case was remanded to State court where Petitioner proceeded, *inter alia,* as Third-party Plaintiff for more than two years. The original plaintiff nor any of the third-party defendants ever filed a Petition or Motion in protest of Petitioner's Third-party Plaintiff status. After proceeding for more than two years, the State trial court judge, on a given day, randomly decided that there are neither Third-party plaintiffs nor Third-party defendants in the case and issued an injunctive order to that effect. The Petitioner, lacking the opportunity to be heard and placed in double jeopardy, filed an application for appeal of the injunctive order with the Court of Appeals of Georgia. The Court of Appeals held Petitioner to the strictness of its Rule 31(e) [1] in its dismissal despite the conditions of the trial court's arbitrary decision whereby there is no Petition or Motion which led directly to the arbitrary order neither are there responses to the non-existent petition or motion.

The question is whether the State court trial judge, in an ***in rem*** proceeding, can strip Petitioner of his rights and benefits of equal protection to proceed as intervenor and third-party plaintiff in light of *Woodward v. Lawson*, 225 Ga.261,262 (167 SE2d 660)(1969).

[1] Georgia Court of Appeals RULE 31(e). Required Attachments. The applicant shall include with the application a copy of any petition or motion that led directly to the order or judgment being appealed and a copy of any responses to the petition or motion.

PARTIES TO THE PROCEEDING BELOW

All parties are as listed in the caption of the case on the cover page. The Petitioner is not a corporation.

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Petitioner Tim Sundy respectfully petitions for a writ of certiorari to review the dismissal by the Court of Appeals of Georgia of his Application for Appeal and the decision of the Supreme Court of Georgia denying review.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is unpublished and is in the Appendix at **A0001-A0003**. The order of the Supreme Court of Georgia denying Mr. Sundy's petition for writ of certiorari is unpublished and is in the Appendix at **A0004.**

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S. Code § 1257(a). The Supreme Court of Georgia denied Mr. Sundy's petition for writ of certiorari on May 7, 2018 and this Petition to this court is therefore timely under this Court's Rule 13.1 and Rule 30.1.

The Petitioner is attempting to invoke the equity jurisdiction of this Court. Fraud upon the court confers equitable jurisdiction on a court to set aside a judgment where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or without authority assumes to represent a party and connives at his defeat; or where the

attorney corruptly sells out his client's interest to the other side. *Luttrell v. U.S.*, 644 F. 2d 1274, 1276 (9th Cir. 1980).

RELEVANT CONSTITUTIONAL PROVISIONS

The purview of the well-known Fourteenth Amendment to the United States Constitituion is in agreement with the constitution of the State of Georgia Art. 1 § 1¶ 2: Protection to person and property; equal protection. Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

STATEMENT OF THE CASE

On or about 1 May 2015, the Petitioner, Tim Sundy, as one of the guarantors of a lease executed on 27 September 2011 between MEDITERRANEAN DINING GROUP INC dba MYKONOS and FRIENDSHIP PAVILION ACQUISITION COMPANY, LLC, ("FPAC"), discovered that on 14 November 2011, Respondent FPAC Vice President Thomas Ling, along with joint tortfeasors ARSENAL REAL ESTATE FUND II-IDF, LP ("Arsenal") and Gary Picone, executed a PROPERTY OWNER'S AFFIDAVIT ("Affidavit") in the state of New Jersey, county of Morris, falsely attesting that there were no leases. **APPENDIX A0005-A0009** The said Affidavit was transported to Georgia by use of the US mail and delivered to state government entity GEORGIA DEPARTMENT OF TRANSPORTATION ("GDOT") to complete the sale and transfer of a portion of the Premises at Land Lot 157, 4949 Friendship Road, Buford, Georgia for GDOT FEDERAL AID PROJECT STP-2688(4), Project PI No. 170735. The Petitioner

also discovered that FPAC *et al.* had been in undisclosed and undiscoverable negotiations with GDOT for the property since 2010.

The Respondents FPAC, Ling, Arsenal and Picone (hereinafter as "Owners" for the sake of understanding Petitioner's petition and to mirror what is used as description in the PROPERTY OWNER'S AFFIDAVIT), acted with the intent to make profit and gain from Federal funds as a direct result of said Affidavit filed by the Owners to complete the acquisition and purchase by GDOT, however in the affidavit the Owners falsely attested:

> "Further, that there are no leases, either recorded of record, unrecorded, or otherwise, currently in effect or terminated in contemplation of the acquisition or purchase by the Georgia Department of Transportation (hereinafter as "Department") of the **real estate** shown on Exhibit "A" and "B" attached hereto, except as may be set out below;"

with no exceptions set out. **APPENDIX A0005**

This attestation in the affidavit was false on 14 November 2011 because Tim Sundy and his brother, co-guarantor David Sundy, were bound by lease with the Owners as of 27 September 2011 for the purpose of operating a full service restaurant on the real estate **"As-Is"** described as the Premises at Land Lot 157 by the description in Exhibit "A" and "B" of the Lease; the portion of **real estate** shown in the Affidavit is on the Premises which the Sundys were leasing. The conditions in the lease clearly state:

> **TERM: clause 3; ¶3**
> Except as otherwise provided in this Lease, Lessee hereby accepts the **Premises "AS-IS"** in the condition existing as of the Commencement Date or the date of this Lease, whichever is earlier, subject to all applicable zoning municipal, county, state and federal laws, ordinances and regulations governing and regulating the use of the **Premises**,

and any covenants, or restrictions now of record with respect to the **Premises** of which Lessee is notified. Lessee shall, at Lessee's sole expense, comply with all zoning, municipal county, state, and federal laws, ordinances, regulations, rules, orders, directions and requirements now in force or which may hereinafter be in force, which shall impose any duty upon Lessor or Lessee with respect to the use, occupation or alteration of the **Premises**, or as a result of the contents stored in the **Premises** or distributed therefrom.

A provision in the lease agreement addresses condemnation and permits suit against the condemnor.:

CONDEMNATION. clause 12
If the whole of the Premises, or such substantial portion thereof as will make the Premises unusable for the purposes herein leased, be condemned by any legally constituted authority for any public use or purpose, then in either of said events the term hereby granted shall cease from the time when possession thereof is taken by the condemning authority, and rental shall be accounted for as between Lessor and Lessee as of that date. In the event the portion condemned is such that the remaining portion can, after restoration and repair, be made usable for Lessee's purposes, then this Lease shall not terminate; however, the rent shall be reduced equitably to the amount of the Premises taken. In such an event, Lessor shall make such repairs as may be necessary as soon as the same can be reasonably accomplished. Such termination, however, shall be without prejudice to the rights of either Lessor or Lessee, or both, to recover compensation and damage caused by condemnation from the condemnor. It is further understood and agreed that neither the Lessee nor Lessor shall have any rights in any award made to the other by any condemnation authority.

It appears that the Owners had devised a collusive scheme whereby they would seek and secure a tenant and guarantors for property that was under imminent domain and condemnation but not disclose the true condition of the property and then attest to GDOT that there were no leases.

Nevertheless, *inter alia*, in furtherance of their scheme of prevention of performance, Owners are denying that the affidavit is false but FPAC sued the

Petitioner(s) upon an *in rem* proceeding in June 2015 for damages and breach of contract. The Petitioner, as intervenor defendant, filed a third-party complaint naming the Owners as third-party defendants and alleging claims involving the same subject matter as FPAC's original action, i.e., breach of contract.

The effect of the false Affidavit was to deprive the Petitioner of the Premises, of private property without compensation, and of compensation for losses caused by the inverse condemnation of the substantial portion of the Premises leased by Petitioner under conditions of almost three-years of road construction which necessitated the closing of the side/lane(s) of the road adjacent to the Premises and other impediments, and made the Premises unusable for the purpose of operating a restaurant under the terms of the Lease. But Owners are accusing Petitioner of breach of contract.

The Petitioner Tim Sundy, with his brother David Sundy, having fully executed a Lease with Owners on 27 September 2011, with language of **"Real Estate"** shown on **Exhibit "A" and "B"** as used in the Affidavit compared with the language of **"Premises"** used in the lease/contract are the same and under **CONDEMNATION:** clause 12; ¶ 1 of the lease, it relates to the Premises and not just the building.

> **PREMISES, clause 1:**
> Lessor, for and in consideration of the rents, covenants, agreements and stipulations hereinafter mentioned, reserved and contained, to be kept, paid, and performed by Lessee, has leased and rented, and by these presents does lease and rent unto Lessee, and Lessee hereby agrees to lease and take upon the terms and conditions hereinafter set forth, approximately 3,150 square feet of floor space in a multi-tenant building containing approximately 19,250 square feet of leasable floor space, shown on **Exhibit" A"** attached hereto and made a part hereof, **(hereinafter referred to as the "Building")** located on the **real property** of Lessor known as 4949 Friendship Road, Suites 111 and 112, Buford, Hall County, Georgia, 30518 (hereinafter referred to as the **"Premises")** and more

particularly described on Exhibit "B" and "B-1" attached hereto and made a part hereof. The **Premises include** the Common Areas (herein below defined) designated for the general non-exclusive use and convenience of Lessee, Lessor, Lessor's other tenants and their respective employees, agents, invitees and licensees. The Premises, the Building and the Common Areas are hereinafter collectively referred to as the "Center". At Lessor's sole discretion, Lessor shall have the option to relocate Lessee's location within the Building upon written notification to Lessee prior to commencement of construction of the Premises at no cost to Lessor.

Even if the false attestation in the PROPERTY OWNER'S AFFIDAVIT was made mistakenly, the Owners, which includes the entity FPAC, went on in the Affidavit to make special obligations to GDOT regarding any claim against GDOT arising as a result of GDOT's acquisition of the portion of real estate or the Premises at Land Lot 157. The Owners agreed that they would "indemnify and hold harmless" GDOT from any and all claims arising from the transaction. The Owners indemnified GDOT, making the Owners liable for the claim of any interested claimant (Mediterranean Dining, the Sundys, etc.) against GDOT attendant to the sale and condemnation of a portion of the Premises, breaching clause 12:CONDEMNATION of the Petitioner's lease as cited above.

Under Georgia law, a claim of "indemnity" involves "the obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit." *Cash v. St. & Trail, Inc.*, 221 S.E.2d 640, 642 (Ga. Ct. App. 1975) (quoting *Copeland v. Beville*, 92 S.E.2d 54 (Ga. Ct. App. 1956)). Parties to a contract may validly agree that one party (the indemnitor) will indemnify or "save harmless" the other party (the indemnitee) from claims of third

parties, even where the third-party claim is based on the indemnitee's own fault or negligence. Id. (citing *Martin v. Am. Optical Co.*, 184 F.2d 528, 529 (5th Cir. 1950)).

As bizarre as it sounds, the contract between FPAC and the Sundys as guarantors, in light of FPAC's Affidavit to GDOT with special obligations, transfers the liability to FPAC in this web of deception, which the Owners clearly stated in the Affidavit to GDOT:

> "The owner or owners named above for (his/her/its) part acknowledges that this Affidavit is made and given to the Department in connection with and for purposes of inducing te Department in its acquisition or purchase of the real estate shown on Exhibit "A" and "B" attached thereto and, further, agrees to indemnify and hold harmless the Department from any and all claims for compensation or benefits made by any party or individual claiming through or under any interest in the property or businesses now or formerly situated or operating on said property, against the Department other than as may be set herein below." **APPENDIX A0006**

Through this Property Owner's Affidavit, the Owners agreed to deprive Petitioner Tim. Sundy as well as other existing tenants/guarantors at 4949 Friendship Road of a right of recovery for inverse condemnation from GDOT, while securing for the Owners both a sum of money 170% greater than the fair market appraisal and privacy of action, i.e. the surety that Petitioner Tim Sundy was deprived of all notification from GDOT of GDOT Federal Aid Project No. STP00-2688-00(004). Clause 12 of the Lease containing a right of recovery from the condemnor was specifically abrograted by the Property Owner's Affidavit. Likewise, the federal government was cheated out of tax payer money in Friendship Road for GDOT FEDERAL AID PROJECT STP-2688(4), Project PI No. 170735.

The Owners spun a wicked web of deception in the falsehoods of the PROPERTY OWNER'S AFFIDAVIT with no intent to honor Petitioner's contract neither the false Affidavit file with GDOT. And if the special obligations clause is true in the Affidavit, technically the Petitioner cannot "**recover compensation and damage caused by condemnation from the condemnor**" GDOT as a Third-party which is contrary to the lease CONDEMNATION: clause **12; ¶ 1**, and the breach of clause **12** by the special obligation would make the Owner FPAC subject to a counter-claim as well as FPAC substituting for GDOT as a Third-party. The only guilt of GDOT and the Attorney General, having knowledge of the actual commission of a felony via mail fraud cognizable by a court , is that they have concealed the facts from the United States..

Respondents FPAC, Weinstein, Ling, Picone, and Arsenal, having complete foreknowledge of the road construction and knowing that their negotiations with GDOT were not part of the public record and that Petitioner could not discover Respondents dealings nor the special obligation Owners were negotiating with GDOT, knowingly and intentionally conspired to have their cake and eat it too -- securing tenant and guarantors by fraud and deceit, then selling a portion of the property to GDOT for 170% of its appraised value with a fraudulent affidavit, and then indemnifying GDOT, all for the purpose of creating illicit personal gains on two fronts.

In this case, proceedings were removed from a State court to the Federal court. While pending in the Federal court, the Petitioner was granted intervenor status as a defendant under Fed. R. Civ. P. 24(a)(2) with neither restrictions nor

stipulations, nor any objection or issue raised by the other parties. Subsequently, the case was remanded to State court where Petitioner proceeded, *inter alia,* as Third-party Plaintiff for more than two years. The original plaintiff nor any of the third-party defendants ever filed a Petition or Motion in protest of Petitioner's Third-party Plaintiff status.

Petitioner Tim Sundy, in his third-party complaint in 2015CV1366, seeks to hold the Owners, including FPAC, jointly, severally, or individually liable for any judgment entered in favor of Plaintiff FPAC against defendants Tim Sundy, David Sundy and Mediterranean Dining Group Inc., and also demonstrates that the claims against the third-party defendants, as joint tortfeasors, are the product of FPAC's indemnifying GDOT in the Property Owner's Affidavit. With FPAC substituted for GDOT, all of the liability asserted by FPAC against the Petitioner in its complaint is passed onto FPAC and Respondents Ling, Picone, Arsenal and Weinstein in Petitioner's third-party complaint.

On 30 October 2017, after more than two years of proceedings, the State trial court judge randomly decided that there are neither Third-party plaintiffs nor Third-party defendants in the case and issued a mandatory injunctive order to that effect, ignoring the indemnification provision between FPAC/Owners and GDOT. The Petitioner, lacking the opportunity to be heard and placed in double jeopardy, filed an application for appeal of the injunctive order with the Court of Appeals of Georgia. While disregarding the fact that the trial court has ignored every request for certificate of immediate review by Petitioner, the trial court issuing no rulings

on said requests, the Court held the Petitioner to the strictness of its Rule 31(e) [1] in its dismissal despite the conditions of the trial court's arbitrary decision whereby there is no Petition or Motion which led directly to the arbitrary order nor any responses to the non-existent petition or motion.

REASONS FOR GRANTING THE PETITION

. The Petitioner met the requirements in the court below under Rule 14 of the Fed. R. of Civ. P., whereby a defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it, as a matter of right and without leave of Court, if the defending party files the third-party complaint less than 14 days after serving its original answer. Likewise, Official Code of Georgia Annotated ("O.C.G.A.) § 9-11-14 states that at any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him, as a matter of right and without leave of Court, not later than ten days after he serves his original answer.

Hall County Superior Court case 2015CV001366 was removed to United States District Court North Georgia – Gainesville Division ("USDC") establishing civil case 2:15-CV-00149-RWS on 10 July 2015. Although, at that point, the dispossessory portion of the action concerned the property of interest, the case then was governed by the Federal Rules of Civil Procedure ("FRCP") to bring in Third-party Defendants. Also on 10 July 2015 a Motion for Intervention with a timely

Third-party Complaint was filed by the Petitioner satisfying both the time limitations of FRCP Rule 14 and State statute OCGA § 9-11-14.

Petitioner's Motion for Intervention was GRANTED in Federal Court on 6 August 2015 without qualification and unopposed by Third-party Defendants. **A0010-A0012** All parties were proper before the Federal Court, and the dispossessory in Federal Court was proceeding ***In Rem***, as provided by Rule 9(h) FRCP, therefore Third-party Plaintiffs were entitled to implead against Third-party Defendants for remedy over, or contribution, or otherwise as provided by Rule 14(c)(1) FRCP.**[5]**

As stated by the Georgia Court of Appeals in *International Maintenance Corp. v. Inland Paper Board Packaging, Inc.*, 256 Ga. App. 752, 755, 569 S.E.2d 865, 868 (2002), "Case law in Georgia allows an intervenor to file "any pleading in the case that original parties could have filed." (Citation omitted.) *Woodward v. Lawson*, 225 Ga. 261, 262(1) (167 S.E.2d 660) (1969)., cert. denied. 396 U.S. 889 (90 S.Ct. 175, 24 L.Ed.2d 163) (1969)."

It is unclear, under Georgia law, whether the trial court is required to look behind (or beyond) the pleadings (in particular, the third-party complaint) of an underlying tort action to take into account the application of an indemnification provision between an indemnitor and indemnitee, in this case FPAC and GDOT. This lack of clarity, combined with *pro se* Petitioner's proper intervention and timely and proper addition of third parties as a matter of law, should compel this Court to take the opportunity to address the question of whether a biased judge can assist FPAC's own misconduct and action in FPAC's own favor while denying

FPAC's liability to itself by virtue of its indemnifying GDOT. See *Gobble v. Bradford*, 226 Ala. 517, 147 So. 619 (1933).

ARGUMENT

It would appear that the reason for granting a writ for the subject matter in this petition is necessary when a jury trial was due in the trial court more than two years ago and this case should long ago have been settled. At issue is the trial court's *sua sponte* dismissal of Petitioner's third-party complaint after more than two years of proceedings.

If this court could take Judicial notice of case 2:18-CV-0112-SWJ pending in the US District Court for the Northern District of Georgia **A0067** , it seems that Petitioner, to his detriment, has attempted to blow the whistle on GDOT and businessmen from New Jersey defrauding the federal government and Georgia out of tax payer dollars while using affirmative RICO activity to consummate the fraud, among other violations.

> Whoever, ... to defraud.... for obtaining money or property by means of false or fraudulent pretenses, representations, or promises....places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, ... 18 U.S.C. § 1341

The Petitioner has supporting documentary evidence but the State Attorney General has turned his head the other way. The Attorney General now becomes a joint tortfeasor in the violations by failing to perform his paramount duties.

> Georgia Constitution Art. 1 § 1¶ 2: Protection to person and property. Protection to person and property is the paramount duty of government and shall be impartial and complete, No person shall be denied equal protection of the laws.

The affirmative predicated RICO activity, mail fraud/O.C.G.A. § 16-14-3

(9)(A)(xxix) and violations of O.C.G.A. § 16-10-20 were brought to the attention of the Attorney General as early as July 2015, but the Attorney General has hidden the facts from authorities of the United States in violation of **18 U.S. Code § 4:**

Petitioner in Georgia has also sought to hold court officers to the same letter of the law to which *pro se* Petitioner is held, yet is overwhelmed under oppressive circumstances of having been deprived of liberty to defend himself against civil liability as well as deprived of access to the court.

On 30 October 2017, the trial court below in Hall County Superior Court case 2015CV1366 issued a written Order to Petitioner, mandatory and injunctive in nature, ordering that all parties in the case adopt a case heading/caption which omits Petitioner as intervenor and Third-party Plaintiff, and omits all Third-party defendants.

> "The fact that the district court, and not the superior court, granted leave to add parties, does not nullify this permission....*Rodgers* does not suggest that a state court may simply ignore the rulings of district courts made in the same case before remand to superior court...**The district court's order was valid until set aside.** See generally *Howell Mill/Collier Assoc. v. Gonzales*, 186 Ga. App. 909, 910 (1) (368 S.E.2d 831) (1988). **It was never set aside, and the superior court was therefore bound by it**... Accordingly, we conclude that the superior court erred..." (emphasis added) *El Chico Restaurants, Inc. v. Trans. Ins. Co.*, 235 Ga. App. 427 (509 S.E.2d 681)(1998).

> "As has been explained, following an order of remand, a defendant is not required to replead in superior court the pleadings it made in federal court... Since a defendant is not required to replead in superior court following remand, then the defendant is not required to reserve the pleadings on the plaintiff following remand....Here, it is undisputed that the superior court received notice of remand and that the superior court properly proceeded with the case following remand. Because repleading and reserving the pleadings after remand was not necessary, the Court need not reach the question of whether Iguana was properly served with

> the counterclaim following remand." Iguana, LLC v. Patriot Performance Materials, Inc., Civil Action No. 7:08-CV-141 (M.D.Ga. 9-15-2010).

The trial court's injunctive Order further states that all documents submitted not using the new heading/caption will be stricken from the record and the offenders sanctioned. As noted in Petitioner's 29 November 2017 Objection **A0054-A0063,** the trial court did not overtly dismiss the Petitioner as a Third-party Plaintiff or the Third-party complaint itself, rather the trial court chose the covert route of changing the caption of the case with the intent that Petitioner acquiesce to the court's Order and voluntarily "dismiss" his third-party complaint. On 5 May 2018, the trial court rejected Petitioner's objection to its Order. At a hearing on 30 July 2018, the trial court noted that FPAC attorney had not used the ordered caption and gave fair warning of sanction.

The Georgia Court of Appeals failed to acknowledge the fact, yet the Petitioner believes, whatever the hidden personal interest the trial court has in the *in rem* proceedings **A0064-A0066** and for defying a Federal court order **A0010-A0012,** the trial court judge is using extreme force and threats to overthrow Petitioner's access to the court and cause/force Petitioner to waive his intervenor and Third-party Plaintiff status, as well as to remove FPAC as Third-party Defendant substituting for GODT. Therefore, the Court of Appeals has stated they lack jurisdiction **A0001.** The trial court's history of violating Georgia's statutory laws, refusal to acknowledge orders of the U.S. District Court, and now threat of sanctions and use of force raises the specter of 18 U.S.C. § 2383:

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned

not more than ten years, or both; and shall be incapable of holding any office under the United States.

Since July 2015, including a hearing on 8 December 2016 **see A0013-A0053**, Respondent FPAC has never questioned nor protested the Petitioner's status; it is only some hidden interest by trial court Judge Martha Christian, et al., (In taking judicial notice of pending action USDC 2:18-CV-0112 **A0067** hereinafter referred to as "STATE" officials) that has created an issue. Petitioner cites from the transcript of the 8 December 2016 hearing as follows:

> MR. WEINSTEIN: I'm representing Friendship Pavilion, Arsenal Real Estate, Gary Picone, Thomas Ling, and myself. P. 6:14-15 **A0018**
>
> Mr. Tim Sundy: And that was actually raised in 982 but was also raised in 1366, so I intend to address the issue of intervention this morning. P. 8:1-3 **A0020**
>
> THE COURT: Which orders, Mr. Sundy?
> MR. SUNDY: The orders which granted us – the Honorable O'Kelley and Story granted us intervenor status.
> THE COURT: That was in 1366? P. 13:20-23 **A0025**
>
> MS. BERANEK: Your Honor, there is an order on the record in the federal case, the first case that I believe Mr. Sundy's referring to. And that order is part of the written record of the case. It's on the docket. It's --it's -- it's available to the public.P. 14:7-11 **A0026**
>
> MS. BERANEK: Yes. And in that, I believe Judge Story stated that there was no opposition to the motion to intervene. But as to what it says is only -- yeah, I only know what's in the written order itself. And yes, your Honor, it is part of the record in the case. So... P. 14:19-23 **A0026**
>
> THE COURT: Well, let me ask Mr. Weinstein. Do you --are you objecting to the order itself, the authenticity of the

order that's in the record, the copy that's in the record, Mr. Weinstein?

MR. WEINSTEIN: No, I'm not, your Honor.

P. 14:24-25 and P. 15:1-3 **A0026-A0027**

THE COURT: Okay. What I want to address first is the issue of intervenor status of David Sundy and Tim Sundy. And I have gone over all the pleadings in both cases, and here's where I see we are on this particular issue. The case was remanded to federal court, and when it was remanded to federal court Mr. Tim Sundy and David Sundy asked to be allowed to intervene. And what I'm talking about is 1366. They were allowed to intervene in the federal court, and there was a federal court order allowing them to intervene that stated that there was no objection. And then the case -- because I believe the D.O.T. was dismissed in the federal court, the case was then remanded back to the Hall County Superior Court. And the issue -- the question I'll ask Mr. Weinstein is, does Friendship Pavilion in 1366 object to the intervention?

P. 17:8-23 **A0027**

MR. WEINSTEIN: And your Honor, I think we might have been able to short circuit this whole thing. We don't have an objection. They did intervene into the federal case. We didn't raise an objection. And when the case was remanded back to this court, we didn't really object one way or the other as to whether or not they should be --whether the Sundays should be granted intervenor status. So if they want to intervene into 1366 now that it's back in the Superior Court of Hall County, we don't have an objection to them intervening into the case.

P. 17:24-25 and P. 18:1-8 **A0027- A0028**

THE COURT: .....I don't hear your objection, and so I'm going to allow David Sundy and Tim Sundy and find they are proper intervenors in the Friendship Pavilion case. So that's really not an issue. P. 18:14-17 **A0028**

For unknown reasons, the **STATE** officials have demonstrated an actual interest in the outcome of the *in rem* case and even adopted FPAC's Motion to Lift Lis Pendens. **A0064-A0066** For almost three years, the Hall County Superior Court ("HCSC") has created collateral issues by court officers violating Georgia statutory laws, while systemically depriving Petitioner of Constitutional due process and equal protection and liberty interests, as Petitioner defends himself from being subjected to RICO affirmative predicated activity and seeks counter means for damages.

Petitioner(s) Sundy, defrauded of more than $400,000 in actual out-of-pocket costs and still paying creditors as direct injury from FPAC *et al.*'s scheme of prevention of performance for Petitioners' restaurant, cannot afford to hire private lawyers for themselves and are forced to proceed *pro se.* Petitioner(s) Sundy have intelligently, rationally, professionally and respectfully exercised their right to defend themselves against civil liability and against STATE officials' violations of Georgia law in the three cases filed against Petitioner(s) by STATE officials (FPAC, Baker and Fuller, see **A0067**). STATE officials have retaliated against Petitioner Sundy for opposing acts and/or practices of judges and clerks made unlawful by the Official Code of Georgia. STATE officials (Martha Christian, Jack Partain, and Jay Cook) have threatened Petitioner(s) Sundy with sanctions for engaging in First Amendment rights to petition for redress, defend themselves from civil liability and against the statutory violations by court officers, with Judge Jack Partain expressing that "[he] can hardly wait to receive [Jay Cook's] motion for sanctions."

There exists an actual controversy which necessitates a declaration by the court of the parties' respective rights: the STATE officials clearly have adverse legal interests. For instance, the Petitioner contends that the STATE officials have acted illegally to deprive the Petitioner of equal protection and full access to the court.

The STATE officials, on the other hand, have stated both that they are above the law, and that they are "simply protecting themselves." The STATE officials appear to be set on using the subtle forms for destructive means documented by Michael L. Kathrein, a common citizen of the State of Illinois who was exposed to and victimized by judicial legal abuse syndrome. Mr. Kathrein described corruption by dishonest judges as taking many "subtle" but equally destructive forms ("Subtle Forms').

> "You must appreciate however, that corruption takes many subtle but equally destructive forms. A dishonest judge can ignore evidence, twist procedure, obstruct the record, retaliate, manufacture facts and ignore others, dismiss valid claims, suborn perjury, mischaracterize pleadings, engage in *ex parte* communication and misapply the law. When he does these things intentionally, he commits a crime. Petty or grand, the acts are still crimes. It takes surprisingly little to "throw" a case."

The trial court, by depriving Petitioner of his third-party complaint, continues the trial court's pattern of systemically denying *pro se* Petitioner due process, retaliating against Petitioner for Petitioner's hubris in holding court officers to statutory standards and Petitioner's refusal to acquiesce to STATE officials' systematic pattern of bias and tyrannical partiality and other violations of the Petitioner's rights of equal protection and full access to the court.

STATE officials have removed and/or altered Petitioner's documents and unlawfully voided/modified valid federal court orders **A0010-A0012** filed in State

Superior court case records by Petitioner, depriving Petitioner of procedural due process and equal protection. STATE officials have conspired to block Petitioner from filing documents in existing case(s), depriving Petitioner of equal protection, full access to the courts and due process, while ensuring the Petitioner's record in the case is defective, with STATE officials appearing to have actual intent to do something wrongful or illegal to cause injury to the Petitioner.

A vital element of the subtle forms used by STATE officials, in addition to using their official capacity to exonerate each other from violations of State of Georgia statutes, is their employment of the trial court Clerk of Court and deputy clerks to aid in corrupting and/or destroying the complete record necessary for appeal.

STATE official Clerk Baker, as a "subtle form employee" of State Officers and/or on his own initiative, has empowered himself to manipulate the outcome of any case in Hall County Superior Court by the removal of a litigant's documents, having the approval and/or deliberate indifference of the Attorney General, (Christopher Carr), in violation of Petitioner's **Fourth amendment rights** to be secure in one's papers. There is a pattern in the records of *pro se* civil cases in Hall County Superior Court of "scrivener errors" and other procedural anomalies.

In a denial of equal access and constitutional rights, Hall County Superior Court has created a discriminatory process of unauthorized and *ex parte* removal of original pleadings from the court record, whereby the Clerk/Deputy Clerk(s) of Court intercepts Petitioner's responses, pleadings, defenses, etc. when the papers are handed to the clerk's officer(s) to be filed, before they are stamped "filed," and physically takes papers to

disqualified Judge C. Andrew Fuller who then personally selects papers which he intends to hear at a hearing of a "New Case," while disqualified Judge Fuller also orally orders the Clerk/Deputy Clerk(s) to refuse to allow other pleadings to be stamp-filed at all, ensuring that the New Case will also contain an incomplete record in the event the Sundys may seek to appeal. **A0068-A0069**

STATE officials have issued oral orders which court officers have unlawfully adopted to justify the unlawful deprivation of Petitioner's constitutional rights and immunities under the First, Fourth, Fifth, Ninth and Fourteenth Amendments and as STATE officials' defense for not performing their administrative and non-discretionary duties, despite STATE officials full knowledge of O.C.G.A. § 15-6-21(b)(c), O.C.G.A. § 5–6–31 and "what the judge orally declares is no judgment until the same has been reduced to writing and entered as such.

STATE officials have used their oral orders, the removal of documents, and the voiding of valid federal orders to frustrate and impede and hinder Petitioner's efforts to pursue valid legal claims, to deny Petitioner access to the courts and to perpetrate fraud upon the court, with fraud upon the court defined as:

> "fraud directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents .... It is thus fraud where ....the impartial functions of the court have been directly corrupted." See *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995).
>
> The Eleventh Circuit, citing *Robinson v. Audi,* has said that "[W]hatever else it embodies, [fraud on the court] is ...an intent to deceive or defraud the court." See *Sec. & Exch. Comm'n v. Lauer*, No. 13-13110 (11th Cir. Apr. 21, 2015)

STATE officials are actively violating Georgia statutes and just as actively exonerating each other from culpability while purposing to create a defective record for Petitioners, manipulating the State appellate courts to render an adverse ruling as a result of Petitioners' defective record on appeal. STATE officials' impairment of Petitioner's' appeal(s) have denied Petitioner the right to appeal in a state court upon a full and complete record and rendered Petitioner(s) procedurally disadvantaged in the prosecution of their cause of action, causing Petitioner to be violated in the state courts of the full right of access to the court and/or equal protection.

There is no known instance in Hall County Superior Court involving an attorney-represented litigant where the Court has created a **NEW CASE** using the attorney's "Affirmative Defenses" and required the attorney to expend money and time to show up for a hearing before allowing the attorney's "Affirmative Defenses" to be filed in their originally-designated case **A0068-A0069.** Hall County Superior Court has established an endeavor to deprive *pro se* litigants of rights and immunities secured by the Constitution, in violation of the equal protection clause of the **Fourteenth Amendment.**

The public has an interest in ensuring that STATE officials comply with regulations and statutes, as well as constitutional protections. The public has an interest in ensuring that a conspiracy of elected judges and clerks cannot override the constitutional rights, protections and immunities of the citizens. The public has an interest in ensuring that billion-dollar corporations are not given procedural advantages

over *pro se* litigants by biased judges with retirement fund investment interests involved in a denial of equal access and due process.

Despite the fact that Georgia's Attorney General is on NOTICE pursuant to O.C.G.A. § 9-10-2, some of the NOTICES have been removed from their respective record by the Clerk and Judges collectively and the Attorney General has the power and could have prevented criminal behavior and practices, yet exercising deliberate indifference..

SUMMARY OF ARGUMENT

In Georgia, the third-party defendant's secondary liability to the original defendant for his liability on the main claim is required if a third-party complaint is to meet the statutory requirements. See *Wolski v. Hayes,* 144 Ga. App. 180 (240 S.E.2d 720) (1977); *Smith, Kline French Labs. v. Just,* 126 Ga. App. 643 (191 S.E.2d 632) (1972).. FPAC's indemnity of GDOT made FPAC, as third-party defendant, liable to itself on the main claim of breach of contract in the *in rem* proceeding and properly named as such by Petitioner.

"It is immaterial that the liability of the third-party rests on *a different theory* from that underlying plaintiff's claim." (Cit.)' (Emphasis supplied.) *Smith, Kline French Labs. v. Just,* [126 Ga. App. 643, 646, supra]

"Only one who is secondarily liable to the original defendant may be brought in as a third-party defendant, as in cases of indemnity, subrogation, contribution, warranty and the like. [Cits.]" *Burroughs Corp. v. Outside Carpets,* 127 Ga. App. 622, 623 (2) (194 S.E.2d 487.

Owners FPAC, Ling, Picone, and Arsenal, with the collaboration of Respondent Weinstein, substituted for GDOT via the indemnification contained in the Property Owner's Affidavit, breaching clause 12 of Petitioner's lease. The Owners, in secret and undiscoverable negotiations with GDOT, knew that the Premises were not "AS IS" and would not be "AS IS" when condemnation acquisition was completed by GDOT, breaching clause 3 of Petitioner's lease. The Owners falsely attested that Petitoner's lease did not exist on 14 November 2011 when it completed the transfer of property to GDOT in a predicate act of RICO..

Meanwhile, no third-party defendant has ever attacked the granting of intervenor status to the Petitioner nor third-party status. "A judgment not attacked, especially where third parties are involved, should not be set aside." *First Fidelity Insurance Corporation v. Busbia,* 128 Ga. App. 485, (197 SE2d 396)(1973). This is echoed in O.C.G.A. § 9-11-60(h) which states that "generally judgments and orders shall not be set aside or modified without just cause and, in setting aside or otherwise modifying judgments and orders, the court shall consider whether rights have vested thereunder and whether or not innocent parties would be injured thereby." Since federal courts have "jurisdiction to determine jurisdiction," that is, "power to interpret the language of the jurisdictional instrument and its application to an issue by the court," *Stoll v. Gottlieb,* 305 U.S. at 171, 59 S.Ct. at 137, error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction. Such an erroneous interpretation does not render the judgment

a nullity. *See Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 376-77, (1940)

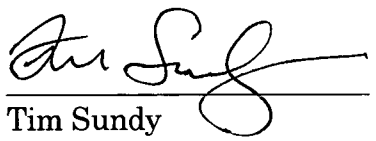
The trial court has refused to recognize the validity of a federal court order, regular on its face. The trial court has refused to follow Georgia statutes and Georgia case law, including case law recognizing the validity of federal court orders. The Georgia Court of Appeals did not rule on the mandatory injunctive nature of the trial court's dismissal of Petitioner's third-party and intervenor status based upon the trial court's repeated pattern of refusing to acknowledge Petitioner's proper and timely request for certificate of immediate review. The trial court's pattern, an aspect of Kathrein's subtle form, deprives Petitioner of meaningful review and constitutionally protected liberty or property interest without constitutionally adequate process.

CONCLUSION

It is unclear, under Georgia law, whether the trial court is required to look behind (or beyond) the pleadings (in particular, the third-party complaint) of an underlying tort action to take into account the application of an indemnification provision between an indemnitor and indemnitee, in this case FPAC and GDOT. In light of the STATE's unknown interest in the *in rem* proceedings in 2015CV1366, the STATE having adopted FPAC's motion to dismiss Petitioner's Notice of *Lis Pendens,* as well as the STATE's placement of the Petitioner in the unconstitutional position of relinquishing rights in order to be granted the "privilege" of continuing in the law suit under conditions of relinquishing claims against FPAC, *et al.,* and the STATE's threats

of sanctions against Petitioner for defending himself against civil liability, Petitioner respectfully requests that this Court grant this petition for writ of certiorari .

Respectfully submitted 6 August 2018.



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