

# NO. 08-0961

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IN THE SUPREME COURT OF TEXAS

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ESTATE OF MIGUEL ANGEL LUIS GONZALEZ Y VALLEJO,

*Petitioner/Cross-Respondent,*

v.

MIGUEL ANGEL GONZALEZ GUILBOT, CARLOS A. GONZALES GUILBOT,  
AND MARIA ROSA DEL ARENA DE GONZALEZ,

*Respondents/Cross-Petitioners.*

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PETITIONER VALLEJO'S RESPONSE TO  
DEFENDANTS-RESPONDENTS' PETITION FOR REVIEW

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## STATEMENT OF THE CASE

- Nature of the Case:* The underlying dispute in this case involves ownership of a family business. The only issues on appeal arise from the court of appeals' holdings that, after remand from federal court, the probate court had jurisdiction to try the underlying dispute but that the presiding judge of the probate courts improperly ruled on motions to recuse himself and the trial judge.
- Trial Court:* Hon. Mike Wood, Probate Court No. 2, Harris County, Texas.
- Procedural History:* Fourteen days before trial was to commence, Defendant Carlos A. Gonzalez Guilbot removed the case to federal court. The federal district court judge remanded the case and awarded attorneys' fees to Vallejo for wrongful removal. Carlos appealed that remand order to the Fifth Circuit. At the same time, Defendants moved in probate court to recuse the trial judge, Hon. Mike Wood. Judge Wood declined to recuse himself and referred the motion to the presiding probate judge, Hon. Guy Herman, who referred the recusal motion to Judge Gladys Burwell. At that point, Defendants moved to recuse both Judge Herman and Judge Burwell. Judge Herman reset the hearing on all three motions before himself. When Defendants failed to attend, Judge Herman denied each motion, assessing sanctions against Defendants.
- Disposition:* When Defendants failed to attend the trial, Judge Wood proceeded to a trial before the bench, rendering a final judgment for Vallejo.
- Court of Appeals:* No. 14-07-00047-CV: *Miguel Angel Gonzalez Guilbot et al. v. Estate of Miguel Angel Luis Gonzalez y Vallejo*. Opinion by Justice Yates, joined by Justices Guzman and Brown.
- Disposition:* The court of appeals reversed and remanded, concluding that the trial court had jurisdiction because the remand was complete, but that the judgment and sanctions order were void because they were rendered by judges with recusal motions pending against them.

## **ISSUES PRESENTED**

### **Issue One**

Whether, by giving a certified copy of the remand order to Plaintiffs' counsel for hand delivery to the probate court—rather than having the federal district clerk mail it, as specified by 28 U.S.C. § 1447(c)—the federal judge prevented the probate court from reacquiring jurisdiction over the case, particularly where Defendant Carlos A. Gonzalez Guilbot failed to object to the federal judge's actions and the federal court's order was filed in probate court before that court took any further action in the case?

### **Issue Two**

Whether Defendants Miguel Angel Gonzalez Guilbot and Maria Rosa del Arena de Gonzalez have standing to challenge the probate court's jurisdiction to render final judgment against them after remand when only Defendant Carlos A. Gonzalez Guilbot sought to remove the case? (Not briefed.)

## STATEMENT OF JURISDICTION

Petitioner/Cross-Respondent Estate of Miguel Angel Luis Gonzalez y Vallejo (“Petitioner” or “Vallejo”), Plaintiff and Appellee in the courts below, objects to the assertion by Respondents/Cross-Petitioners Miguel Angel Gonzalez Guilbot, Carlos A. Gonzalez Guilbot, and Maria Rosa del Arena de Gonzalez (“Respondents or “Defendants”), Defendants and Appellants in the courts below, of jurisdiction under TEX. GOV’T CODE § 22.001(a)(2) (Vernon 2004). The court of appeals’ decision does not conflict with this Court’s opinion in *Quaestor Investments, Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999) (per curiam), because *Quaestor* did not address the issue presented here: whether counsel’s hand delivery of a remand order to state court—rather than the federal clerk’s mailing it, as specified in 28 U.S.C. § 1447(c)—prevents jurisdiction from transferring from federal to state court after remand.

The central issue in *Quaestor* was how to calculate the running of the six-month deadline for challenging a default judgment by writ of error where a defendant unsuccessfully attempts to remove the case to federal court after an adverse judgment. 997 S.W.3d at 228. Although the Court analyzed the timing of jurisdictional transfer from federal to state court and concluded “that jurisdiction reverts in the state court when the federal district court executes the remand order and mails a certified copy to the state court,” *id.* at 229, the Court’s analysis and conclusion did not take into account circumstances like those present here: a federal district court judge’s allowing a party to hand deliver the order to state court rather than directing the clerk to mail it; the

defendant's failure to object to this procedure in federal district court; and the filing of the order in state court before the state court took any further action in the case.

Petitioner agrees that this Court does have jurisdiction under TEX. GOV'T CODE § 22.001(a)(6) (Vernon 2004), however, because the issues raised in both petitions are important to the jurisprudence of the state. The hand-delivery issue raised by Defendants' petition is one of first impression in Texas, and addressing it will give the Court an opportunity to clarify or amplify its statements in *Quaestor* about jurisdiction and mailing. *See Quaestor*, 997 S.W.2d at 229. Additionally, the court of appeals' view that TEX. CIV. PRAC. & REM. CODE § 30.016 (Vernon 2008) permits a party to avoid trial indefinitely by filing an endless number of recusal motions, so long as the party does not file more than two against any particular judge, is so contrary to logic and common sense that it should be corrected by this Court. *See Gonzalez Guilbot v. Estate of Gonzalez y Vallejo*, 267 S.W.3d 556, 562 (Tex. App.—Houston [14th Dist.] 2008, pet. filed).

## STATEMENT OF FACTS

The facts of this case are fully set forth in Vallejo's own petition. *See* Vallejo's Pet. at 5-6. Vallejo therefore includes only an abbreviated statement of the facts here to correct misstatements and omissions in Defendants' petition. *See* TEX. R. APP. P. 53.3(b).

### **I. Defendants try to avoid trial by removing the case to federal court.**

On November 14, 2006, Judge Mike Wood set this case for trial on January 8, 2007. *See* Defs.' Pet. at 1. Shortly thereafter, Defendants commenced a series of tactics to avoid trial at all costs.

On November 21, 2006, Defendant Carlos A. Gonzalez Guilbot ("Carlos"), alleging that there was complete diversity of citizenship between the parties, removed the case to the United States District Court for the Southern District of Texas, the Honorable Lee Rosenthal, Judge Presiding. 1st CR 5; 28 CR 6640-41.<sup>1</sup> On December 14, 2006, Judge Rosenthal promptly rejected his diversity arguments as both contrary to established precedent and as untimely raised, ordering him to pay Vallejo's attorneys' fees. 28 CR 6641-42. Additionally, to expedite the case's progress post-remand, Judge Rosenthal gave Vallejo's counsel a certified copy of the remand order to hand deliver to the probate

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<sup>1</sup> The clerk's record in this case consists of one volume marked "Transcript" and 28 volumes marked "Supplemental Transcript." References to the single "Transcript" volume are identified as "1st CR {page}." References to the 28 volumes of the "Supplemental Transcript" are "{volume} CR {page}."

The reporter's record consists of a transcript of the January 8, 2007, recusal hearing marked as "Reporter's Record" and "Volume 1 of 1 Volume(s)" and an additional 26 volumes relating to the January 8, 2007, trial on the merits marked as "Reporter's Record" and "Volume {number} of 26 Volumes." References to the January 8th hearing will be identified as "1 RR {page}." References to the trial on the merits will be "{volume} (of 26) RR {page}."

court. 27 CR 6447. Defendants assert that, in a November 27, 2006 “ex-parte conversation,” Vallejo’s trial counsel and Judge Wood “devised their own procedure for revesting the trial court with jurisdiction” in order to obtain some “tactical advantage” over Defendants. *See* Defs.’ Pet. at 4, 6. This so-called “ex-parte conversation” was, in reality, a hearing properly noticed before the attempted removal that Defendants’ counsel chose not to attend, and at which Vallejo merely gave the trial judge a status report. *See* App. E. to Defs.’ Pet. No relief was sought or given. *See id.*

Carlos then sought review of the remand order in the Fifth Circuit, complaining both about the remand procedure and attorneys’-fees award. 28 CR 6681; *Gonzalez v. Guilbot*, 255 F. App’x 770, 771 (5th Cir. 2007). The Fifth Circuit rejected both complaints, holding (1) that Carlos waived any objection to the remand procedure employed by Judge Rosenthal by not objecting in her court; (2) that the court “lack[ed] jurisdiction to review the particular certification and mailing procedures authorized by the district court” under 28 U.S.C. § 1447; and (3) that Judge Rosenthal did not abuse her discretion in awarding attorneys’ fees to Vallejo because Carlos “had no objectively reasonable basis for removal,” and Judge Rosenthal’s “factual findings with respect to the amount of the fee award were not clearly erroneous.” *Gonzalez*, 255 F. App’x at 772.

## **II. Defendants next attempt to delay trial with an avalanche of recusal motions.**

Litigation of the underlying dispute continued in the probate court while Defendants appealed the remand order to the Fifth Circuit. On December 15, 2006, at 11:56 a.m., Vallejo’s counsel hand delivered a certified copy of Judge Rosenthal’s remand order to the Harris County District Clerk’s office for filing. 28 CR 6774. Earlier

that morning, Defendants' counsel began a second front in the effort to avoid trial by filing a motion to recuse Judge Wood pursuant to Texas Rule of Civil Procedure 18a. 1st CR 7.

Judge Wood declined to recuse himself and, pursuant to Texas Government Code Section 25.00255(f)(2),<sup>2</sup> forwarded the motion to Judge Guy Herman, presiding judge of the state's statutory probate courts. 1st CR 11. Judge Herman appointed Judge Gladys Burwell, Galveston County probate judge, to hear the motion to recuse and set the hearing for December 29, 2006, at 2:00 p.m. 1st CR 44.

Just before that hearing, Defendants' trial counsel, Andres P. Chaumont, simultaneously filed on his own behalf both a second motion to recuse against Judge Burwell, 1st CR 12, and a third motion to recuse against Judge Herman, "in his capacity as administrative presiding judge and from hearing the previous motions to recuse." 1st CR 18. Judge Herman reset all three motions for a January 8, 2007, hearing before himself. 1st CR 43; 1 RR 14. At that hearing, Defendants neither appeared nor offered any evidence in support of their recusal motions. 1 RR 5, 7. Instead, Mr. Chaumont sent a paralegal to observe. 1 RR 6.

Judge Herman first dismissed the motion to recuse Judge Burwell "for a procedural defect," explaining that it "was not filed by Defendants" but rather "by the attorney for the Defendants . . . on his own behalf," and that Texas law requires that

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<sup>2</sup> "Before further proceedings in a case in which a motion for the recusal or disqualification of a judge has been filed, the judge shall: (1) recuse himself; or (2) request that the presiding judge of the statutory probate courts assign a judge to hear the motion." TEX. GOV'T CODE ANN. § 25.00255(f) (Vernon 2004).

motions to recuse be “filed by parties, not by attorneys.” 1 RR 5. Judge Herman next dismissed the motion to recuse against him for the same reason, 1 RR 5-6, further noting that both motions improperly invoked the recusal provisions in Texas Rule of Civil Procedure 18a rather than Government Code Section 22.00255, which governs recusal procedure in statutory probate courts. 1 RR 6. Finally, Judge Herman denied the motion to recuse Judge Wood because Defendants failed to appear and present any evidence or argument to support it. 1 RR 7, 13. After receiving testimony from Vallejo’s counsel, Judge Herman also awarded \$12,000 in sanctions jointly and severally against Defendants and Mr. Chaumont for their “frivolous pleading[s].” 1 RR 10-13; *see* 1st CR 71.

Later that day, Judge Wood held a bench trial, which Defendants likewise failed to attend. 1 (of 26) RR 22-23. Judge Wood signed a final judgment for Vallejo on January 12, 2007. 28 CR 6719-31.

### **III. Defendants appeal Judge Wood’s judgment and Judge Herman’s sanctions order.**

Defendants appealed both Judge Wood’s final judgment and Judge Herman’s sanctions order, alleging that each was void because (1) Judge Rosenthal’s failure to direct the clerk to mail the remand order as directed by the federal removal statute prevented jurisdiction from transferring from federal to state court after remand; and (2) Section 25.00255(f) and Rule 18a(c) prohibited Judge Herman from ruling on the motion to recuse that Defendants filed against him, thereby rendering all subsequent orders void. *See Guilbot*, 267 S.W.3d at 558. On the basis of this second argument

alone, the court of appeals reversed the trial court's judgment and remanded for another trial. *Id.* at 563.

The court first held that “the post-remand jurisdictional transfer to the state court was complete at all relevant times.” *Id.* at 561. The court reasoned that the Fifth Circuit's waiver holding was “the law of the case” because that court had “decided the exact issue [Defendants] raise[d] [in the court of appeals] under identical facts,” the court saw “no clear error” in the Fifth Circuit's holding or any “other reason not to follow the Fifth Circuit's rulings,” and the Fifth Circuit's decision did “not conflict with Texas law.” *Id.* at 560. In support of its last conclusion, the court distinguished this Court's decision in *Quaestor* on the ground that “*Quaestor* did not address the issue” before the court of appeals: “an alternative method of delivery to the state court with full knowledge of all parties and unequivocal, immediate receipt by the state court.” *Guilbot*, 267 S.W.3d at 560.

The court agreed with Defendants, however, that Judge Herman's sanctions order and Judge Wood's subsequent final judgment were void because Judge Herman had ruled on Defendants' motion to recuse him rather than refer that motion to yet another judge. *Id.* at 561. This holding was predicated on the court of appeals' view that the exception to the referral rule for “tertiary recusal motion[s]” in Civil Practice and Remedies Code Section 30.016 applies only to “a third recusal motion . . . filed by the same party against the same judge,” with the result that a litigant can delay trial indefinitely by filing limitless recusal motions, so long as the litigant does not file more than two motions against any particular judge. *See id.* at 562-63; TEX. CIV. PRAC. &

REM. CODE ANN. § 30.016(a) (“In this section, ‘tertiary recusal motion’ means a third or subsequent motion for recusal or disqualification filed against *a* district court or statutory county court judge by *the same party* in a case.” (emphasis added)); *id.* § 30.016(b)(1)-(3) (allowing a “judge who declines recusal after a tertiary recusal motion is filed” to “preside over the case,” “sign orders in the case,” and “move the case to final disposition as though a tertiary recusal motion had not been filed”). The parties then filed cross-petitions for review in this Court.

#### SUMMARY OF THE ARGUMENT

Defendants ask this Court to hold that all orders rendered by the probate court after remand are void merely because Judge Rosenthal’s remand order was hand delivered to probate court by Vallejo’s counsel rather than mailed by the federal district court clerk, even though Carlos failed to object to the hand delivery in federal district court; Defendants initiated further litigation in probate court by filing a recusal motion there immediately after the remand order was signed; and the probate court took no action in the case until the remand order had been hand filed there. But the Fifth Circuit has already determined that Carlos waived his objection to Judge Rosenthal’s remand procedure by not objecting in her court, and Defendants’ hyper-technical, form-over-substance interpretation of the federal removal statute has been rejected on the merits by at least four state courts. Moreover, the only case that Defendants cite to support their position, *Quaestor Investments, Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999) (per curiam), is not on point.

But there are also sound policy reasons for upholding the probate court’s jurisdiction in this case. Hand delivery of remand orders furthers the intent of the removal statutes by preventing delay in the trial of remanded cases. The rule Defendants urge, on the other hand, would waste judicial resources, disregard principles of comity, and give one side a second bite at the apple based on a technicality. The court of appeals correctly rejected Defendants’ effort to overturn the judgment against them on this ground. This Court should reach the same result.

### ARGUMENT

#### **I. Section 1447(c) does not make “mail[ing]” the remand order a jurisdictional requirement.**

Defendants claim that the probate court never regained jurisdiction from the federal district court under the plain terms of 28 U.S.C. § 1447(c), which states that “[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court,” and “[t]he State court may thereupon proceed with [the] case.”<sup>3</sup> But nothing in the language of Section 1447(c) supports Defendants’ argument that the federal clerk’s “mail[ing]” the order to state court is the mandatory, exclusive method to transfer jurisdiction between courts. Indeed, every court to have squarely considered the issue has held otherwise.

As an initial matter, in *Gonzalez*, 255 F. App’x at 771, the Fifth Circuit implicitly held that any right conferred on a defendant by Section 1447(c) to have the remand order mailed instead of transferred by other means is waivable, and explicitly

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<sup>3</sup> The effect of this language is a question of federal law. See, e.g., *United States v. Craft*, 535 U.S. 274, 288 (2002) (“The interpretation of [a federal statute] is a federal question . . .”).

held that Carlos waived any such right here by failing to object to the remand procedure employed by Judge Rosenthal in the federal district court. As the Fifth Circuit explained:

Had [Carlos] Guilbot presented to the district court his argument that the remand procedures were defective, the district court could have easily resolved this issue by instructing the clerk of court to mail a copy of the remand order to the clerk of the state court in addition to providing plaintiffs' counsel with a copy of the order for hand delivery.

*Id.*

Additionally, several state courts have considered the exact argument Defendants make here, and each has flatly rejected it. In *Health for Life Brands, Inc. v. Powley*, 57 P.3d 726, 727-28 (Ariz. Ct. App. 2002), for example, after a federal bankruptcy court granted the plaintiff's motion to remand and the order was entered on the bankruptcy court's docket sheet, the parties continued litigating the underlying dispute in superior court. Yet the bankruptcy clerk apparently never mailed the order. *Id.* at 730. The Arizona Court of Appeals held that, under these circumstances, "the superior court regained the power to proceed with the case upon entry of the remand order in bankruptcy court." *Id.* at 730-31. The court reasoned that

[t]o hold that a state's power to proceed commenced only upon the mailing of a copy of the remand order would arbitrarily give one side a second opportunity to argue its case based on a clerical error, would disregard principles of comity, and would waste judicial resources. Such a conclusion would also exalt form over substance.

*Id.* at 731 (internal citations omitted). By contrast, the court explained, "[a] conclusion that the superior court regain[ed] the power to proceed upon entry of the remand order in federal court [would] prevent[] a case from floundering in some sort of legal limbo while

awaiting the ministerial task of mailing a copy of the remand order” and avoid “[e]xcessive delay in the resolution of disputes,” thereby “further[ing] the intent of Congress that any doubts about the existence of removal jurisdiction in the federal courts . . . be resolved in favor of remand and state court jurisdiction.” *Id.*

Similarly, in *State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 889 P.2d 204, 206 (N.M. Ct. App. 1993), the New Mexico Court of Appeals rejected a plaintiff’s argument that all state court action taken in the two-year interval between the federal court clerk’s entering and mailing the remand order were void, citing the well-settled rule that “all doubts must be resolved in favor of remand.” The court further commented that “[r]ecognizing the validity of the state court action prior to the state court’s official receipt of the federal remand order through the mail is particularly appropriate when a copy of the remand order was provided to the state court by counsel, as [was] true” in that case. *Id.* at 207; *see also Citizens Bank & Trust Co. v. Carr*, 583 So. 2d 864, 866 (La. Ct. App. 1991) (holding that it “was not error for the trial court to base its finding of reinstated jurisdiction on a true copy of the remand order provided by counsel instead of a remand order mailed by the federal court clerk” because while “§ 1447 provides that a certified copy of the order of remand shall be mailed by the federal court clerk, . . . this provision must be strictly construed against removal, with all doubts resolved in favor of remand”); *City of Orange County v. Lot 10*, No. 98-1389, 2002 WL 100674, at \*2 (Iowa Ct. App. Jan. 28, 2002) (“We reject [the defendant’s] contention that the district court lacked jurisdiction when it acted prior to having received a *certified* copy of the remand order from the Federal District Court.”).

The reasoning of these courts is persuasive. This Court should thus hold that Carlos waived his right to complain about Judge Rosenthal’s remand procedure by failing to object to it in federal district court, *Gonzalez*, 255 F. App’x at 771,<sup>4</sup> and, further, that Defendants’ hyper-technical interpretation of Section 1447(c) fails on the merits. *See Olson v. Holmes*, 571 S.W.2d 211, 213 (Tex. Civ. App.—Austin 1979, writ ref’d n.r.e.) (“This appeal involves, of course, rights conferred by federal statute and regulation. Accordingly, our determination of the appeal should be governed by the federal courts’ construction of the statute and regulations.”); *Health for Life Brands, Inc.*,

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<sup>4</sup> The court of appeals did not err, at least in any significant way, in treating the Fifth Circuit’s holding as the law of the case. *See Guilbot*, 267 S.W.3d at 560. Defendants’ only two challenges to this aspect of the court of appeals’ opinion are baseless.

First, Defendants advance the nonsensical argument that the Fifth Circuit was not the court of last resort with respect to the waiver issue because it was “precluded from exercising appellate jurisdiction over any aspect of the remand order.” Defs.’ Pet. at 14. As an initial matter, there is ample authority that the Fifth Circuit was, indeed, the court of last resort with respect to that court’s waiver determination because Defendants did not seek further review in the Supreme Court of the United States. *See, e.g., City of Houston v. Precast Structures*, 60 S.W.3d 331, 338 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (noting that “the City did not request a review by the Texas Supreme Court of this court’s judgment in the first appeal” and that “[w]here a losing party fails to avail itself of an appeal in the court of last resort, but allows the case to be remanded for further proceedings, the points decided by the court of appeals will be regarded as the law of the case and will not be re-examined”). Moreover, the court had appellate jurisdiction to review Carlos’s appeal of the attorneys’-fee award, which necessarily included jurisdiction to determine whether there was any objectively reasonable basis for removal. *See Gonzalez*, 255 F. App’x at 772.

Second, Defendants argue that the Fifth Circuit’s holding was not on an issue of law but rather was a “comment on procedural matters” about a “matter of fact and procedure.” Defs.’ Pet. at 14. But the court was determining the legal effect of Carlos’s undisputed action (or, here, inaction), which is a question of law. *Cf. Landry v. Daigrepoint*, 35 S.W.3d 265, 267 (Tex. App.—Corpus Christi 2000, no pet.) (applying a de novo standard of review to the trial court’s determination regarding waiver of a special appearance because the court “must determine the legal effect of [the defendant’s] undisputed actions” in the trial court). Defendants cite no authority to support their assertion that preservation of error is a question of fact.

In any event, even if this Court declines to regard the Fifth Circuit’s decision as law of the case, the Court can (and should) nonetheless follow the decision to reject Defendants’ jurisdictional arguments because *Gonzalez* appears to be the only federal authority on the federal-law question of whether Section 1447(c)’s “mail[ing]” requirement is jurisdictional.

57 P.2d at 730-31; *Carr*, 583 So. 2d at 866; *Village of Los Ranchos de Albuquerque*, 889 P.2d at 206.

## II. *Quaestor* does not support Defendants' jurisdictional theory.

Arrayed against the logic and authority that supports the court of appeals' ruling on this point, Defendants cite only one case that they claim supports their jurisdictional theory. The source of the authority is peerless, but the substance of the decision simply does not favor their position.

In *Quaestor*, this Court was presented with a single issue—how to calculate the time for appealing a default judgment by writ of error when the six-month period is interrupted by an unsuccessful attempt by the defendant to remove the case to federal court. See *Quaestor*, 997 S.W.2d at 228. There, the defendant State of Chiapas removed a case to federal court 5 months and 16 days after a default judgment was signed. *Id.* at 227. The federal district court signed and mailed the remand order on December 28, 1995, and it was received by the state trial court on January 10, 1996. *Id.* at 228-29. Chiapas then pursued an unsuccessful appeal to the Fifth Circuit, which was dismissed for want of jurisdiction on August 16, 1996. *Id.* at 227. Chiapas finally filed a petition for writ of error on August 29, 1996. *Id.* On September 6, 1996, it mailed a copy of the remand order to the state district clerk. *Id.* at 228.

*Quaestor* moved to dismiss Chiapas's petition as untimely, arguing that the appellate timetable recommenced either on December 28, 1995, when the federal district court entered the remand order, or on January 10, 1996, when the state court acknowledged receipt of it. *Id.* at 228. In response, Chiapas argued that the timetable

recommenced either when the Fifth Circuit dismissed its appeal on August 16, 1996, or when it mailed a copy of the remand order to the state district clerk on September 6, 1996. *Id.* The court of appeals denied Quaestor’s motion to dismiss and held that the appellate timetable does not recommence until the party seeking remand acts affirmatively by giving notice to the other party. *Id.* at 227-28. It later reversed the default judgment and remanded the case to the trial court. *Id.* at 227. Quaestor appealed the denial of its motion to dismiss, and this Court reversed. *Id.* at 229.

The Court first “disagree[d]” with the court of appeals “that [courts] must look any further than” the date of jurisdictional transfer “to determine when the timetable for filing a writ of error appeal beg[ins] to run again,” and then turned to examine the question of when “a jurisdictional transfer occurs between federal and state court.” *Id.* at 228. Initially, the court noted the absence of any “requirement that the state court take action (*e.g.*, entering the order in the state court docket) to reassert jurisdiction,” thereby implying that the state court had regained jurisdiction—and Chiapas’s time for filing a writ of error petition had recommenced—earlier than January 10, 1996, when the state court acknowledged receipt of the remand order. *Id.* (citing *Mathewson v. Aloha Airlines, Inc.*, 919 P.2d 969, 985-86 (Haw. 1996)).

The Court then acknowledged a split in authority over whether jurisdiction transfers when the remand order is executed, entered on the federal docket sheet, or mailed. *See id.* at 228-29. But even though, in the case before it, all of those actions had occurred on the same day, *see id.* at 227-28, the Court nonetheless announced its agreement with “the majority rule” and held “that jurisdiction revests in the state court

when the federal district court executes the remand order and mails a certified copy to the state court.” *Id.* at 229. The Court cited with approval the reasoning of the Third Circuit in *Trans Penn Wax Corp. v. McCandless* that there must be “a determinable jurisdictional event after which the state court can exercise control over the case without further fear of federal interference” and that, ordinarily, “the physical mailing of the certified copy” of the remand order is that event. 50 F.3d 217, 225 (3d Cir. 1995), *cited in Quaestor*, 997 S.W.2d at 229.

Nevertheless, *Quaestor* does not support Defendants’ jurisdictional theory for at least two related reasons. First, as the court of appeals recognized, “[t]hough *Quaestor* has language referring to mailing,” that case “did not address the issue we have here—an alternative method of delivery to the state court with full knowledge of all parties and unequivocal, immediate receipt by the state court.” *Guilbot*, 267 S.W.3d at 560. Rather, the “only issue presented” to the *Quaestor* Court was “when the appellate timetable began to run again” after the case was remanded. *Quaestor*, 997 S.W.2d at 228.

Second, nothing in *Quaestor* or *McCandless* suggests that, regardless of the circumstances, a remand order *must* be mailed in order for a remand to be effective, or that mailing is the only possible “determinable jurisdictional event.” *See id.* at 228-29; *McCandless*, 50 F.3d at 225 (noting the “general rule . . . that a district court loses jurisdiction” upon mailing and explaining the need for “a determinable jurisdictional event after which the state court can exercise control over the case without fear of further federal interference” (emphasis added)); *see also Health for Life Brands, Inc.*, 57 P.3d at

732 (distinguishing *McCandless* because it “did not involve the entry of a remand order followed by litigation of the case in state court without the federal court clerk’s office having sent a copy of the remand order to state court” and characterizing the court’s statements “regarding the significance of the mailing of the remand order” as “dictum”).

Indeed, even Defendants acknowledge that a federal court can lose jurisdiction by some means other than mailing the remand order. *See* Defs.’ Pet. for Rev. at 8 (“The federal court lost jurisdiction on December 14, 2006, when it executed the remand order . . . .”); *id.* at 9 (“[T]he federal court lost jurisdiction when it handed over the remand order to Mr. Longoria on December 14th 2006.”). The “determinable jurisdictional event” in this case was therefore either Judge Rosenthal’s handing the executed remand order to Vallejo’s counsel for delivery to the probate court on December 14, 2006, or the probate court’s receipt and filing of the order on the morning of December 15, 2006. Once the executed order was filed in the probate court, that court was free to “exercise control over the case without further fear of federal interference.” *McCandless*, 50 F.3d at 225.

**III. There is no policy reason to disallow the hand filing of a remand order when appropriate to prevent further delay.**

Unable to cite a single case to support its argument that the federal district clerk’s mailing the remand order is an absolute prerequisite to the transfer of jurisdiction after remand, Defendants urge that hand delivery of the order by a litigant “creates an appearance of impropriety, lack of impartiality and prejudice to opposing litigant(s)” and “destroys any semblance of uniformity in the orderly process of jurisdictional transfer.”

Defs.’ Pet. at 13. Not only do Defendants fail to explain why hand delivery would have these effects, Texas Rule of Civil Procedure 237a expressly provides for it. *See* TEX. R. CIV. P. 237a (“When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties.”). Moreover, where appropriate, hand delivery actually furthers the intent of the removal statute, which is to “prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues.” *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976); *see also Health for Life Brands, Inc.*, 57 P.3d at 731.

The rule Defendants propose, by contrast, “would arbitrarily give one side a second opportunity to argue its case based on a clerical error, . . . disregard principles of comity, . . . waste judicial resources,” and “exalt form over substance.” *Health for Life Brands, Inc.*, 57 P.3d at 730-31.

#### **PRAYER**

For these reasons and those given in its petition for review, Petitioner Vallejo respectfully requests that the Court grant both petitions for review, reverse the court of appeals judgment with respect to its holding that Judge Herman’s ruling on his own motion to recuse voided the sanctions order and final judgment, but affirm the court of appeals’ judgment with respect to its holding that the post-remand jurisdictional transfer to probate court was complete at all relevant times.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on April 20, 2009, a copy of Petitioner Vallejo's Response to Defendants-Respondents' Petition for Review was served on the following by certified mail:

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