

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CASE NO.: 8:08-cv-1662

HSBC BANK USA, N.A., AS TRUSTEE
ON BEHALF OF ACE SECURITIES CORP.
HOME EQUITY LOAN TRUST AND FOR
THE REGISTERED HOLDERS OF ACE
SECURITIES CORP. HOME EQUITY LOAN
TRUST, SERIES 2005-HE6, ASSET BACKED
PASS-THROUGH CERTIFICATES,

Plaintiff,

vs.

DONNA M. PINKSTON,

Defendant and Third-Party Plaintiff,

vs

OCWEN LOAN SERVICING, LLC, ACE
MORTGAGE FUNDING, LLC aka ACE
MORTGAGE FUNDING, INC. and JASON
VARELA, an individual,

Third-Party Defendants. /

**DEFENDANT/THIRD-PARTY PLAINTIFF'S MOTION TO REMAND AND
MEMORANDUM IN SUPPORT OF MOTION**

Defendant/Third-Party Plaintiff, DONNA M. PINKSTON (hereinafter "Defendant"), by and through her undersigned attorney, pursuant to Federal Rule of Civil Procedure 7(b) and 28 U. S. C. § 1447(c), asks this court to remand the instant case back to the state court from which it was removed and as grounds therefor states:

1. The Plaintiff filed its complaint in the circuit court of the twelfth judicial circuit in and for Manatee county, Florida on or about January 16, 2008.

2. The Defendant was served with the complaint on or about July 2, 2008.

3. Defendant filed her Verified Answer, Affirmative Defenses, Motion to Dismiss Count I, Counterclaims, Third Party Complaint, and Demand for a Jury Trial (hereinafter "Defendant's Answer") on or about July 22, 2008.

4. Defendant's Answer includes an affirmative defense that the mortgage and note subject to the action have been rescinded and therefore the mortgage(s) and note(s) are void (*See* Affirmative Defenses, ¶ 21.)

5. Defendant's Answer includes an affirmative defense that Plaintiff has unclean hands based on ownership interest in the note at issue (*See* Affirmative Defenses, ¶ 22.)

6. Defendant's Answer includes an affirmative defense that the court lacks jurisdiction over the subject matter. (*See* Affirmative Defenses, ¶ 23.)

7. Defendant's Answer contains a counterclaim against Plaintiff for Truth in Lending Rescission to void Plaintiff's security interest, "to the extent it exists" (*See* Counterclaims, ¶¶ 187-204.), as well as other counterclaims.

8. Defendant's Answer contained counterclaims against Plaintiff for fraud, breach of duty of good faith and fair dealing, and unjust enrichment based on ownership interest in the note at issue. (*See* Counterclaims.)

9. Defendant's Answer contained a third-party complaint against third-party defendant OCWEN LOAN SERVICING, LLC (hereinafter, "OCWEN") for truth in lending rescission to void Plaintiff's security interest, "to the extent it exists" (*See* Third-Party Complaint, ¶¶ 219-236.), as well as claims against other third-party defendants.

10. OCWEN filed its Notice of Removal on or about August, 25, 2008. Thus, Defendant has no issue with the timeliness of the filing of the Notice of Removal.

11. OCWEN argues in its Notice of Removal, removing the case to this Court, that removal is based on grounds that Defendant's third-party complaint raises a separate and independent cause of action that, in itself, presents substantial questions of federal law and provides federal-question jurisdiction under the 28 U.S.C. § 1331. (*See* Notice of Removal, p. 1-2.)

12. However, there is no independent cause of action, as OCWEN asserts. The third-party claim against OCWEN for truth in lending rescission, is inextricably linked to the affirmative defenses against Plaintiff, third-party claims against other third-party defendants, counterclaims against Plaintiff, and the ultimate resolution of Plaintiff's complaint, seeking foreclosure of Defendant's home.

13. The Defendant makes claims for truth in lending rescission against both OCWEN and against Plaintiff, only to the extent that either holds a security interest in Defendant's home.

14. The Truth in Lending claims are separated within the pleading only for the convenience of grouping counterclaims separate from third-party claims.

15. Because the determination of ownership of the security interest also contributes to whether each party is liable for counterclaims or third party claims against it, as well as the validity of actual allegations in Plaintiff's claims against Defendant, and Defendant's affirmative defenses to those claims, the claims against all parties are linked.

16. OCWEN's argument for removal is that Defendant's third party claim against OCWEN is a "separate and independent claim which if sued upon alone could have been brought properly in federal court." (*See* Notice of Removal, p. 5.)

17. OCWEN supports this argument by claiming that it "is entirely possible that Defendant could lose her case against the mortgage foreclosure based upon the default of her

note and win her case for TILA rescission and statutory damages against OCWEN.

18. OCWEN's argument is flawed. If Defendant wins her case for TILA rescission against OCWEN, then OCWEN must be the owner of the note at issue, and therefore Plaintiff's claim for re-establishment of the note and claim of ownership, necessary to bring a foreclosure action, would fail.

19. OCWEN also argues that it is entirely possible that Defendant could win on her counterclaims against the original plaintiff yet fail to establish that OCWEN committed any violations of TILA that would justify rescission or statutory damages." (See Notice of Removal, p. 9.)

20. Although it is possible for Defendant to succeed in her counterclaims against Plaintiff and not, succeed on TILA claims against OCWEN, it is also possible for her to succeed against both Plaintiff AND OCWEN based on the same set of facts involving the actions of third-party defendants ACE Mortgage and Jason Varela. OCWEN's argument implies that only its actions are at issue as relates to the TILA rescission claim against it. In fact, it is the Actions of the other third-party defendants, and OCWEN's ownership of the note are key to its liability. Those same actions and same ownership are key to Plaintiff's liability for counterclaims, and Defendant's affirmative defenses.

21. Furthermore, this Court lacks jurisdiction because all defendant's have not agreed to this removal.

Defendant, Donna M. Pinkston, therefore respectfully requests this court remand these proceedings back to the state court from which they came.

MEMORANDUM OF LAW

The party asserting federal jurisdiction bears the burden of proving that the case is

properly in federal court. Thus, a removing Defendant bears the burden of proving the existence of federal jurisdiction. *Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269, 273-74 (2d Cir. 1994); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

Courts interpret the removal statute narrowly resolving any doubts against removability and resolving uncertainties in favor of remand. *Lupo*, at 274; *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109, 61 S. Ct. 868, 872, 85 L. Ed. 1214 (1941). Where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand. *University of South Alabama v. The American Tobacco Company*, 168 F.3d 405, 411-12 (11th Cir. 1999); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

**CONSENT OF ALL DEFENDANTS REQUIRED FOR REMOVAL BECAUSE THE
“WELL PLEADED COMPLAINT RULE” PROHIBITS REMOVAL**

In cases involving multiple defendants all defendants must consent to the removal of a case to federal court. *Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040, 1049 (11th Cir. 2001). All defendants in this case have not consented to removal. OCWEN argues that, pursuant to *Bradwell v. Silk Greenhouse, Inc.*, 828 F.Supp. 940, 943 n.2 (M.D.Fla.1993), removal is proper without consent of all defendants as an exception when removal is based upon 28 U.S.C. § 1441(c).¹ (See Notice of Removal, p. 3.)

Here, OCWEN argues that removal is appropriate in this case since Defendant's sole claim against OCWEN is for rescission pursuant to the Truth in Lending Act (“TILA”) and Federal Courts have jurisdiction over TILA as a Federal Question under 28 U.S.C. § 1331.² (See

¹ “Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.” 28 U.S.C. § 1441(c).

² “The district courts shall have original jurisdiction of all civil actions arising under the

Notice of Removal, p. 4.) However, OCWEN concedes that third-party defendants are generally not permitted to remove an action from state to federal court. (*See* Notice of Removal, p. 4.)

OCWEN argues that an exception to this prohibition exists if “the third party complaint states a separate and independent claim which if sued upon alone could have been brought properly in federal court.” (*See* Notice of Removal, p. 5.) OCWEN sites *Persoff v. Aran*, 792 F. Supp. 803, 804 (S.D. Fla. 1992)(Quoting *Carl Heck Engineers, inc. v. LaFource Parish Police Jury*, 622 F.2d 133, 136 (5th Cir. 1980)).

However, *Carl Heck Engineers* has been superseded by the 1990 amendment to § 1441(c). *See Cross Country Bank v. McGraw*, 321 F. Supp. 2d 816, 822 (S.D.W.Va., 2004) (citing *Nat'l Am. Ins. Co. v. Advantage Contract Servs.*, 200 F. Supp.2d 620, 621 (E.D.La., 2002). At the time *Carl Heck Engineers* was decided, the language of § 1441(c) stated, “Whenever a separate and independent claim or cause of action, *which would be removable if sued upon alone*, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.” *Id.* (citing *Nat'l Am. Ins. Co.*, 200 F. Supp.2d at 621). In 1990, the statute was amended and the italicized words were replaced with “within the jurisdiction conferred by section 1331 of this title.” *Id.* Thus § 1331 has been incorporated into § 1441(c), and with it the the jurisdictional limitations under § 1331, including the “well-pleaded complaint rule”.

The “well-pleaded complaint rule” was incorporated into § 1331 by the Supreme Court in *Louisville & Nashville R.R. Co. v. Mottley*, where the court stated, “[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of

Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." *McGraw* at 211 (quoting *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908)).

Since *Mottley*, the well-pleaded complaint rule has been interpreted by the Supreme Court as dependent on the nature of the claim raised by the original plaintiff, not third party plaintiffs. See *McGraw* at 819. See also *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672, 70 S.Ct. 876, 94 L.Ed. 1194 (1950) ("The plaintiff's claim itself must present a federal question unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose."); *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.* 535 U.S. 826, 122 S.Ct. 1889, 153 L.Ed.2d 13 (2002)(finding, first, the well-pleaded-complaint rule allows plaintiff to be "master of complaint" by enabling plaintiff to have case heard in state court by avoiding federal claims; second, finding that conferring this power upon the defendant would radically expand the class of removable cases, contrary to the "due regard for the rightful independence of state governments" that our cases addressing removal require; finally, that allowing responsive pleadings by the defendant to establish "arising under" jurisdiction would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a "quick rule of thumb" for resolving jurisdictional conflicts).

The well-pleaded complaint rule has been found to apply to third party complaints as well as counterclaims. See *Cross Country Bank v. McGraw*, 321 F. Supp.2d 816, 822 (S.D.W.Va.,

2004)(“[T]his Court fails to find a distinction between a counterclaim and a third-party complaint that would enable a cause of action contained in the latter to create federal question jurisdiction.”) See also *Id.* (citing 6 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 1444) (“When there is no subject matter jurisdiction over the original action between plaintiff and defendant, it cannot be created by adding a third-party claim over which there is jurisdiction.”).

Thus only when the plaintiff and NOT a third-party plaintiff, makes a well pleaded claim in the original complaint alleging federal jurisdiction, does federal subject matter jurisdiction apply. Plaintiff made two claims. First, Plaintiff's count I states, “This is an action for re-establishment of a promissory note under Section 673.3091 of the Florida Statutes.” Second, Plaintiff's count II is an action for foreclosure. Further, Plaintiff prays for the following relief: “That this Court will take jurisdiction of this cause, of the subject matter and the parties hereto.” Therefore, there is no federal question pleaded in plaintiff's complaint such that this Court has jurisdiction over the subject matter.

EVEN IF THE WELL-PLEADED COMPLAINT RULE DID NOT APPLY, THERE IS NO SEPARATE AND INDEPENDANT CLAIM, SO CONSENT OF ALL DEFENDANTS IS REQUIRED OR REMAND IS REQUIRED.

OCWEN argues in its Notice of Removal, that an exception exists, to the requirement that third-party defendants are not permitted to remove an action from state to federal court, when an separate and independent cause of action exists, and where recovery is not dependent upon establishing the liability of another party. (*See* Notice of Removal, p. 6-7.). OCWEN further states that the standard for separate and independent cause of action is that “where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of

transactions, there is no separate and independent claim or cause of action under Section 1441(c).” (See Notice of Removal at p. 6-7 (citing *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951).)

American Fire, however, supports remand in this matter, stating, “Liability lay among three parties, but it was uncertain which one was responsible. Therefore, all were joined as defendants in one petition. . . . The facts in each portion of the complaint involve Reiss, the damage comes from a single incident. The allegations in which Reiss is a defendant involve substantially the same facts and transactions as do the allegations in the first portion of the complaint against the foreign insurance companies. It cannot be said that there are separate and independent claims for relief as 1441(c) requires. Therefore, we conclude there was no right to removal.” *American Fire* at 14-16. Thus when one defendant among more than one accused is liable, and uncertainty exists as to who is responsible when liability rises from a single series of events, there is no separate and independent status to the claims.

Here, the allegations of truth in lending violations providing liability for rescission are NOT wholly dependent upon the existence, scope, and breach of OCWEN's duty, as OCWEN claims. (See Notice of Removal, p. 5.) Instead, the allegations are dependent on first, whether OCWEN is the holder and owner of the note, and second, on whether there were violations of federal law by other third party defendants, Jason Varela, and Ace Mortgage Funding. The Truth-in-Lending Act, 15 U.S.C. 1641 (c) states, “Any consumer who has the right to rescind a transaction under section 125 may rescind the transaction as against any assignee of the obligation.”

To determine OCWEN's liability, it is necessary to determine if OCWEN is an assignee, AND that the actions of Jason Varela, and Ace Mortgage Funding constitute violations giving

rise consumer's, that is Defendant's, right to rescind. There is a factual dispute as to whether OCWEN or Plaintiff is the holder and owner of the note at issue. The TILA rescission complaint against OCWEN was specifically alleged only to the extent that OCWEN's security interest exists. (See Third Party Complaint, ¶¶ 219-220.). Plaintiff claims to own the note and mortgage. (See Complaint, ¶10.). A Rescission complaint was similarly filed as a counterclaim against Plaintiff. (See Counterclaims, ¶¶ 187-204.) As in *American Fire*, here liability lay in one of more than one accused based on assignee status, and a factual determination of both whether statutory violations by third-party defendants exist, as well as assignee status among parties is necessary to determine liability, and thus there cannot be a “separate and independent cause of action” as OCWEN asserts.

OCWEN cites, *Alexander v. Goldome Credit Corp.*, in its attempt to tie the Truth in Lending Act to its “separate and independent cause of action argument.” (See Notice of Removal, p. 5.) The mere fact that a truth in lending claim is brought, does not support removal. *Alexander* is distinguished from the present case in two ways. First, it is the Plaintiff who brings the Federal claim, and thus the “well-pleaded complaint rule” is satisfied, and second, the Federal claim is brought against only one party. *Alexander v. Goldome Credit Corp.*, 772 F.Supp. 1217, 1223, (M.D. Ala. 1991)(“Plaintiffs' Truth in Lending Act claim, alleged only against defendant Goldome, is not contingent on the outcome of the fraud and breach of contract claims.” (emphasis added))

Here, Plaintiff makes no federal claim, and Defendant's truth in lending rescission brought against two parties relies upon factual determinations of TILA violations by two OTHER parties and ownership of the note by either OCWEN or Plaintiff. Defendant incorporates factual allegations against Mr. Varela and Ace Mortgage into its counterclaim for

rescission against Plaintiff. (*See* Counterclaims, ¶ 187.) Defendant incorporates the same factual allegations against Mr. Varela and Ace Mortgage in its third-party claim for rescission against OCWEN. (*See* Third Party Complaint, ¶ 219.) Further, Defendant asserts an affirmative defense that the mortgage note has been rescinded as an affirmative defense against Plaintiff. Thus the claim for rescission against OCWEN is inextricably linked to the counterclaim against Plaintiff and affirmative defenses against Plaintiff and the separate and independent cause of action argument fails.

OCWEN states that where the claims are such that “the original plaintiff could be unsuccessful on her claims against the original defendant, but the original defendant could still be successful on her claims against the third-party defendant, that is 'the essence of an independent claim, and the mere fact that some of the actors are the same, or that the events are somehow interconnected, cannot defeat [the third-party defendant's] right to remove an otherwise separate and independent claim.” (*See* Notice of Removal at p. 7 (citing *Hayduk v. United Parcel Service*, 930 F. Supp. 584, 595 (S.D. Fla. 1996)).)

OCWEN's reliance upon *Hayduk* is flawed in that the allegations in *Hayduk* are factually distinguishable from the present case, (even without consideration of the more recent Supreme Court decision since *Hayduk*, in *Holmes Group, Inc. v. Vornado Air Circulation Systems*, as discussed above, that re-affirmed the well-pleaded complaint rule) and it is upon those factual allegations that a determination of a separate and independent federal claim are determined.

In *Hayduk*, UPS reported its property stolen and Plaintiff Hayduk was arrested when he failed to return a UPS truck because doing so would require crossing picket lines of the Teamsters. *Hayduk v. United Parcel Service*, 930 F. Supp. 584, 588 (S.D. Fla. 1996). Plaintiff Hayduk sued UPS for malicious prosecution, false imprisonment, defamation, intentional

infliction of emotional distress and negligence. *Id.* at 589. UPS counterclaimed and added a third-party complaint against the Teamsters. *Id.* The counterclaims by UPS included civil conspiracy, and breach of duty of loyalty. *Id.* The third-party complaint by UPS against the Teamsters alleged intentional interference of business relationships, contribution, legal subrogation, and civil conspiracy (with Hayduk). *Id.* The Teamsters removed and Hayduk filed a motion for remand. The court considered whether removal might be appropriate under § 1441(c), should the Teamsters amend. *Id.* at 589, 592.

The *Hayduk* court conceded that most courts do not follow the *Carl Heck* line of cases, and that § 1441(c) is generally not available to third-party defendants such that they may never remove. *Id.* at 593. Nevertheless, the *Hayduk* court applied the minority rule in *Carl Heck* in its 1996 decision allowing removal where separate and independent federal causes of action exist. *Id.*

The only third-party claim the *Hayduk* court address was intentional interference with business relationships. *Id.* at 593. The Plaintiff alleged that this claim was interconnected with the facts alleged in his complaint and thus arose from an interlocked series of transactions, and was not separate and independent as required under the *Carl Heck* analysis. *Id.* at 593. The court ruled that the interference claim was separate and independent because UPS' claim alleged that the Teamsters directed "numerous individuals employed with UPS nationwide" to strike in violation of a temporary restraining order, and that this nationwide strike interfered with UPS' business relationships. *Id.* at 593.

Thus it was not the actions of Plaintiff Hayduk that provided the allegations that substantiate the claim for intentional interference with business relationships, but the Teamsters' violation of the temporary restraining order, and therefore they "do not necessarily touch upon

the facts or circumstances of Hayduk's claim. *Id.* at 594-5.

In contrast to the allegations at issue in *Hayduk*, it is not possible for Defendant's third-party claim against OCWEN to be separated such that it does not touch upon the facts or circumstances of either Plaintiff's claim or Defendant's counterclaims and affirmative defenses. The essence of OCWEN's liability lies in whether 1) third-party defendants Ace Mortgage Funding, LLC and its agent, third-party defendant, Jason Varela violated the Truth in Lending Act, and 2) whether OCWEN owns the note at issue, or whether the note is owned by Plaintiff, HSBC as Plaintiff alleges, (*See* Complaint at ¶10.) and 3) whether OCWEN failed to respond appropriately to a demand for rescission.

If OCWEN does not own the note because the note is owned by HSBC, as it alleges, then OCWEN is not liable for that actions of Jason Varela and Ace Mortgage for the third-party claim alleged against it. If OCWEN does own the note, as it implied in its response to the rescission demand, then it still remains to be determined based on the allegations of the transactions between Jason Varela, Ace Mortgage, and Defendant, whether the Truth in Lending Act has been violated, and then finally whether OCWEN failed to respond to the rescission demand as required under the Act. Those same allegations will also contribute to the determination of HSBC's liability for the other counterclaims, as well as Ace Mortgage's and Jason Varela's liability for third-party claims.

For instance, Defendant brings a third-party claim against Ace Mortgage for violation of the Truth in Lending Act, Unfair and Deceptive Trade Practices, Fraud in the Inducement, and Violation of Florida's Deceptive and Unfair Trade Practices Act. The factual allegations related to these claims are many of the factual allegations that determine OCWEN's liability. (*See generally* Third-Party Complaint and Counterclaims.) Similar claims against Jason Varela rely

upon the same facts as those determining OCWEN's liability.

Further, Defendant filed an affirmative defense of rescission and lack of subject matter jurisdiction against Plaintiff. Defendant can succeed against OCWEN only if OCWEN is the holder and owner of the note at issue. Therefore if Defendant prevails against OCWEN, then Defendant will also succeed against Plaintiff on its affirmative defense of lack of subject matter jurisdiction, since Plaintiff is not able to bring a claim regarding a note owned by OCWEN. Further, if Defendant succeeds against OCWEN, Plaintiff's entire case would fail, but Defendant would also fail in its affirmative defense of rescission against Plaintiff, because no rescission would apply to a party without ownership that can be rescinded. In addition to its claim against OCWEN, Defendant has a filed a counterclaim for truth in lending rescission against Plaintiff, based on entirely the same violations by Jason Varela and Ace Mortgage. The only reason this claim is brought against two parties is because each claims ownership of the note.

Even if this court continues to follow the minority view under *Carl Heck Engineers*, and does not apply the well-pleaded complaint rule, as affirmed by the Supreme Court in 2002 in *Holmes Group*, then the factual allegations necessary for liability against OCWEN, including ownership of the note and violations of the Truth in Lending Act by third-party defendants Ace Mortgage and Jason Varela, are inextricably linked to the affirmative defenses against Plaintiff, counterclaims against Plaintiff, claims against other third-party defendants, and the ultimate resolution of Plaintiff's complaint, seeking foreclosure of Defendant's home. Therefore, there is no separate and independent claim and as such consent of all parties is required for removal. Since Defendant does not consent to removal, this case should be remanded. Further, should this Court apply the well-pleaded complaint rule, as affirmed by the Supreme Court in *Holmes Group*, this case should be remanded because this court lacks jurisdiction.

WHEREFORE, the Defendant asks this Court to remand the instant case back to the original state court forum from which it was removed.

RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g) undersigned counsel personally spoke with: Elizabeth Wellborn, Esq., counsel for the Plaintiff, and third-party defendant, OCWEN, who *objects* to the relief sought in the motion to remand; and Derek DiPasquale, Esq., counsel for third-party defendant's ACE Mortgage and Jason Varela, who *objects* to the relief sought in the motion to remand.

/S/Michael P. Roland

Michael P. Roland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been filed with the Clerk of this Court by using CM/ECF system. I further certify that a true and correct copy is being electronically served by the Notice of Electronic Filing automatically generated by the ECF system on Elizabeth R. Wellborn, Esquire, 1701 West Hillsboro Blvd., Suite 307, Deerfield Beach, FL 33442 and by U.S. Mail to Mark C. Elia, Esq, Van Ness Law Firm, P.A. 1239 E. Newport Center Drive, Suite #110, Deerfield Beach, FL 33442, and Derek DiPasquale, Blalock Walters Held & Johnson P A, 802 11th St W., Bradenton, FL 34205, this 16th day of September, 2008.

/S/Michael P. Roland

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