

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

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,

Case No. 8:08CV01662

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.

**OCWEN LOAN SERVICING, LLC'S MEMORANDUM OF LAW IN RESPONSE
TO DEFENDANT/THIRD-PARTY PLAINTIFF'S MOTION TO REMAND**

INTRODUCTION

Third-party defendant Ocwen Loan Servicing, LLC (hereinafter "Ocwen") respectfully submits this memorandum of law in response to Defendant/Third-party plaintiff's motion to remand. Defendant/Third-party plaintiff (hereinafter "Defendant") has failed to demonstrate any basis under the law of the Eleventh Circuit and the District Courts of Florida to remand this case to state court. Pursuant to 28 U.S.C. § 1441(c),

Defendant's third-party complaint asserts a separate and independent cause of action against Ocwen which, standing alone, would provide federal question jurisdiction pursuant to 28 U.S.C. § 1331. Under the rule first established by the Fifth Circuit in *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133 (1980) and still followed by the Eleventh Circuit and the District Courts of Florida, a third-party defendant such as Ocwen is permitted to remove a case to federal court when a third-party complaint "states a separate and independent claim which if sued upon alone could have been brought properly in federal court." *Id.* at 136. Because Ocwen has demonstrated the existence of a separate and independent claim that would appropriately provide a basis for jurisdiction under 28 U.S.C. § 1331, removal of this case was proper and Defendant's motion should be denied.

BACKGROUND

Plaintiff 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 filed its original complaint in mortgage foreclosure against Defendant on or about January 14, 2008. (*See generally* Compl.). On July 22, 2008, Defendant filed her answer, affirmative defenses, counterclaims, third-party complaint, and demand for a jury trial. (*See generally* Third-Party Compl.). Defendant's third-party complaint states claims against three parties: Ocwen, Ace Mortgage Funding, LLC aka Ace Mortgage Funding, Inc. (hereinafter "Ace Mortgage"), and Jason Varela. (*Id.*).

The claims alleged against Ocwen in Defendant's third-party complaint are claims arising under the Federal Truth-in-Lending Act ("TILA") for rescission, termination of

any security interest held by Ocwen, return of any money or property given by Defendant, statutory damages, forfeiture of loan proceeds, actual damages, and attorney's fees. (*See* Third-Party Compl., ¶¶ 219-236 and Wherefore paragraph). Defendant has alleged that Ocwen, as assignee of the original note and mortgage, is subject to rescission under 15 U.S.C. § 1641(c). (*Id.* at ¶ 225). Defendant has further alleged that as a result of the original mortgage broker/lender's violations of TILA, she has a right of rescission. (*Id.* at ¶¶ 227-28). The gravamen of Defendant's third-party complaint against Ocwen, therefore, is that because Defendant had a right of rescission operable against Ocwen and Ocwen failed to properly respond to Defendant's rescission notice, Ocwen is liable to Defendant for rescission of the transaction, termination of Ocwen's security interest (if any), return of Defendant's money or property, statutory damages, forfeiture of loan proceeds, actual damages, and attorney's fees. (*Id.* at ¶¶ 229-36). Defendant has therefore alleged distinct claims under TILA against Ocwen, including a claim for rescission pursuant to 15 U.S.C. § 1635(f) and a claim for statutory damages for Ocwen's alleged failure to properly respond to Defendant's rescission notice under 15 U.S.C. § 1640. (*See* Third-Party Compl. at ¶¶ 228, 236).

Defendant's motion to remand admits that the third-party claims asserted against Ocwen are limited to Defendant's claims for TILA rescission under 15 U.S.C. § 1635(f) and statutory damages for Ocwen's failure to respond to a rescission notice under 15 U.S.C. § 1640. Defendant further admits that she made claims against both Ocwen and the original Plaintiff for TILA rescission only to the extent that either has a security interest in Defendant's home. (Defendant's Brief at ¶ 13). Defendant attempts to use the fact that TILA claims are asserted against both Ocwen and the original plaintiff to

demonstrate that the TILA claims against Ocwen are “inextricably linked” to factual determinations regarding ownership of the note and the actions of third-party defendants Ace Mortgage and Jason Varela. (See Third-Party Compl. at ¶¶ 14, 15, 20). Defendant’s arguments in this regard are flawed, however, as the relevant inquiry is not whether Defendant’s third-party claims against Ocwen are separate and independent from the other third-party claims and counterclaims asserted by Defendant against Ace Mortgage, Jason Varela, and the original plaintiff, but whether the third-party claim asserted against Ocwen is separate and independent from the original plaintiff’s claims against Defendant. See *North Star Capital Acquisitions, LLC v. Krig*, 2007 WL 3522425 at * 3 (M.D. Fla. Nov. 15, 2007); *Texas v. Walker*, 142 F.3d 813, 817 (5th Cir. 1998).

ARGUMENTS AND AUTHORITIES

I. The *Carl Heck* Exception is Still Controlling Law in the Eleventh Circuit and Middle District of Florida

A. The Cases Cited by Defendant are Not Persuasive Authority

Defendant argues that *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980) has been superseded by the 1990 amendment to 28 U.S.C. § 1441(c). (Defendant’s Brief, at 6). In support of her argument, Defendant cites only one case: *Cross Country Bank v. McGraw*, 321 F. Supp. 2d 816 (S.D. W.VA. 2004), a West Virginia case decided three years prior to this Court’s decision in *North Star Capital Acquisitions, LLC v. Krig*, 2007 WL 3522425 at *1 (M.D. Fla. Nov. 15, 2007) (attached to the Notice of Removal as Ex. C) where this Court stated

[m]ost federal courts have determined that third party defendants do not have a right to remove a case under § 1441(c) [t]his Court, however, is bound by the former Fifth Circuit’s decision in *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, which permits removal by third party

defendants where a separate and independent controversy invoking federal jurisdiction exists.

(emphasis added). Defendant cites no case to support her position that the rule in *Carl Heck* is not still controlling law in the Middle District of Florida; in fact, *North Star* is a recent case from the Middle District directly contrary to Defendant's position.

National American Ins. Co. v. Advantage Contract Servs., Inc., 200 F. Supp. 2d 620 (E.D. La. 2002), cited by Defendant in support of her argument that *Carl Heck* was superseded by the 1990 amendment to section 1441(c), is, in fact, also directly contrary to Defendant's position. That case considered the propriety of the removal of a third-party contract claim under section 1441(c) pursuant to the *Carl Heck* exception allowing third-party defendants to remove. The court noted that the 1990 amendment to section 1441(c) added the language "within the jurisdiction conferred by section 1331 of this title," an addition that essentially limited the type of claim that could be removed to only federal question claims (i.e., not claims basing federal jurisdiction on diversity). *Id.* at 621. The court specifically noted that the 1990 amendment, however, did not affect the right of a third-party defendant to remove a separate and independent claim pursuant to section 1441(c):

Since the enactment of the Judicial Improvement Act of 1990, the essential holding of *Carl Heck Engineers, Inc.* has not changed, and a third-party defendant may still avail itself of the right to remove an action under Section 1441(c).

Id. (emphasis added).

Finally, Defendant does not and cannot address the fact that courts in the Districts of Florida have repeatedly followed the *Carl Heck* exception allowing removal by third-

party defendants under section 1441(c) even after the 1990 amendments to section 1441(c). *See, e.g., Hayduk v. United Parcel Service, Inc.*, 930 F. Supp. 584, 593 (S.D. Fla. 1996) (stating “This Court, however, is bound by the Fifth Circuit’s opinion in *Carl Heck*, which makes specific provision for third-party removal where separate and independent federal causes of action exist.”); *Persoff v. Aran*, 792 F. Supp. 803, 804 (S.D. Fla. 1992) (stating “this Court remains bound by the position of the former Fifth Circuit in *Carl Heck Engineers. . .*”).

II. All of the Elements of the *Carl Heck* Exception are Satisfied: Ocwen Has Thus Demonstrated Removal is Proper Under These Circumstances

The rule established in the *Carl Heck* case states “If the third party complaint states a separate and independent claim which if sued upon alone could have been brought properly in federal court, there should be no bar to removal.” 622 F.2d at 136. As discussed above, the 1990 amendment to 28 U.S.C. §1441(c) added the limitation that any claims removed pursuant to that subsection must confer federal question jurisdiction. Because the third-party claim asserted against Ocwen here is separate and independent from the claim asserted against Defendant by the original plaintiff, because that separate and independent claim confers “arising-under” jurisdiction pursuant to 28 U.S.C. § 1331, and because not all defendants are required to consent to removal under section 1441(c), removal of this case was proper and Defendant’s motion should be denied.

A. Defendant’s Third-Party Complaint States a Separate and Independent Claim That Provides Federal Question Jurisdiction

Defendant argues that because her TILA claims against Ocwen are dependent upon whether Ocwen is the owner of the note and whether the other third-party defendants violated TILA, and because Defendant has also asserted a counterclaim

against the original plaintiff for TILA violations, that her TILA claims against Ocwen are “inextricably linked” to Defendant’s affirmative defenses, counterclaims, and other third-party claims. (See Defendant’s brief, at 9-11; 13-15). To quote the Fifth Circuit, the Defendant’s arguments in this regard are “barking up the wrong tree.” *Texas v. Walker*, 142 F.3d 813, 817 (5th Cir. 1998). In *Walker*, a case cited with approval by the Middle District of Florida in *North Star Capital Acquisitions, Inc.*, 2007 WL 3522425 at * 1n.3 (noting that although *Walker* was not persuasive authority like *Carl Heck*, that it was a natural extension of *Carl Heck* and would be applied as such) the Fifth Circuit stated that the separate and independent rule, when applied to third-party defendants removing under section 1441(c) “requires that the plaintiff’s claims against the original defendant be ‘separate and independent’ from the defendant’s federal claims against the removing third-party defendant.” *Walker*, 142 F.3d at 817 (internal citations omitted). Thus, the relevant inquiry is not, as Defendant contends, whether her third-party claims against Ocwen are inextricably linked with her other third-party claims, her counterclaims, or her affirmative defenses. Rather, the “proper comparison” is between the original plaintiff’s claims against Defendant and Defendant’s federal claims against Ocwen. *See id.*

When viewed in this light, it becomes abundantly clear that Defendant’s TILA claims against Ocwen are separate and independent from the original state law claims for mortgage foreclosure and re-establishment of a lost note asserted by the original plaintiff against Defendant. Defendant admits as much, conceding that the original plaintiff made only two claims, neither of which would confer federal question jurisdiction. (Defendant’s brief, at 8). The resolution of the original claims against Defendant depends on consideration of whether Defendant defaulted on her mortgage obligations,

entitling the original plaintiff to foreclosure. In contrast, the resolution of Defendant's TILA claims against Ocwen depends on an entirely different set of facts and circumstances and the existence of an entirely different legal duty. The Fifth Circuit has recognized that "a plaintiff is not enforcing a TILA liability when he or she is defending against a state law debt claim." *Lacy v. Gen. Finance Corp.*, 651 F.2d 1026, 1029 (5th Cir. 1981). Further, "[a] borrower may properly and successfully pursue a TILA claim even though he has defaulted on the underlying debt." *Id.*

In particular, Defendant has alleged two different claims under TILA against Ocwen: a claim for rescission under 15 U.S.C. § 1635(f), and a claim for statutory damages under 15 U.S.C. § 1640. (See Third-Party Compl. at ¶¶ 228, 236). While Defendant's claim for rescission under section 1635(f) might rely, in part, on factual determinations regarding the conduct of the original mortgage broker/lender and its agent, Defendant's claim for statutory damages under section 1640 is determined solely on the basis of Ocwen's actions and Ocwen's legal duty to Defendant. Not only is Defendant's claim for statutory damages under section 1640 separate and independent from the original mortgage foreclosure claims asserted against Defendant, it is entirely separate and independent from Defendant's claim for rescission. While Defendant's claim for rescission relies, in part, on factual determinations regarding the disclosures made to Defendant at the time of the mortgage, Defendant's claim for statutory damages against Ocwen relies solely on the conduct and legal duty of Ocwen alone in responding to Defendant's rescission notice.

As Defendant's claim for statutory damages under 15 U.S.C. § 1640 relies on the conduct and scope of the legal duty of Ocwen alone, it is clearly separate and

independent of the remainder of Defendant's claims as well as the original complaint in mortgage foreclosure. Defendant has argued, however, that because her claim against Ocwen for TILA rescission under 15 U.S.C. § 1635(f) depends on the acts of third-party defendants Ace Mortgage and Jason Varela, that it is not a separate independent claim. The fact that some of the events or actors are the same does not render two claims "inextricably linked" such that a third-party defendant would not have the right to remove based upon section 1441(c). *Hayduk v. United Parcel Service*, 930 F. Supp. 584, 595 (S.D. Fla. 1996). Where federal claims involve distinct legal wrongs and distinct sets of legal duties, those claims are deemed separate and independent from otherwise nonremovable claims. *North Star*, 2007 WL 3522425 at * 4. "A federal claim is separate and independent if it involves an obligation distinct from the nonremovable claims in the case. . . . When applied to a counterclaim defendant, this rule requires that the plaintiff's claims against the original defendant be 'separate and independent' from the federal counterclaim against the removing counterclaim defendant." *Id.* at * 3. Here, plaintiff's original complaint in mortgage foreclosure involves entirely different legal wrongs and entirely different legal duties than Defendant's third-party complaint against Ocwen for TILA rescission and statutory damages pursuant to 15 U.S.C. § 1640. The relevant claims are separate and independent, therefore satisfying the first prong of the *Carl Heck* exception.

Under the *Carl Heck* exception, and especially in light of the 1990 amendment to section 1441(c), a third party defendant must demonstrate two elements to remove a federal claim asserted in a third-party complaint. The first, as discussed above, is that the third-party complaint states a separate and independent claim from that asserted by the

original plaintiff. The second is that the separate and independent action of the third-party complaint must confer federal question subject matter jurisdiction under 28 U.S.C. § 1331. *Hayduk*, 930 F. Supp. at 595. There is no dispute that Defendant has asserted third-party claims against Ocwen for violations of TILA, a federal law. 28 U.S.C. § 1331 states “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Therefore, Defendant’s TILA claims provide a proper basis for jurisdiction under section 1331, and are subject to removal under section 1441(c).

B. Removal Under Section 1441(c) Does Not Require Consent of All Defendants

Ocwen has demonstrated that removal is appropriate pursuant to section 1441(c) because the Eleventh Circuit and the Districts of Florida still follow the *Carl Heck* exception, and the third-party federal claims asserted by Defendant satisfy both elements of the *Carl Heck* rule. Where removal is based on section 1441(c), consent of all defendants is not required to effect the removal. *Hayduk v. United Parcel Service*, 930 F. Supp. at 594; *see also Bradwell v. Silk Greenhouse, Inc.*, 828 F. Supp. 940, 943 n.2 (M.D. Fla. 1993); *Alexander by Alexander v. Goldome Credit Corp.*, 772 F. Supp. 1217, 1223 (M.D. Ala. 1991); *Courtney v. Benedetto*, 627 F. Supp. 523, 526 (M.D. La. 1986). It is therefore immaterial that Defendant herself does not consent to this removal; because the removal is pursuant to section 1441(c), Defendant’s consent is not required.

III. The Well-Pleaded Complaint Rule Does Not Operate to Prevent Removal of a Separate and Independent Third-Party Claim

Defendant’s arguments regarding the well-pleaded complaint rule are a red herring that should not distract this Court from the simplicity of the issues at hand.

Defendant argues that the well-pleaded complaint rule, as incorporated into section 1441(c) by section 1331, applies only to claims raised by original plaintiffs and, therefore, federal claims asserted in third-party complaints cannot form a basis for federal question subject matter jurisdiction. (Defendant's brief, at 6-7). Defendant offers only one case in support of this proposition: *Cross Country Bank v. McGraw*, 321 F. Supp. 2d 816 (S.D. W.Va. 2004). As discussed previously, this case has absolutely no precedential value, and is directly contrary to decisions rendered by the Districts of Florida following the *Carl Heck* exception. Specifically, after the 1990 amendment to section 1441(c), the *Hayduk* court recognized that "a cause of action can only be said to arise under the laws of the United States if a federal question appears on the face of, in this case, the third party complaint." 930 F. Supp. at 596 (emphasis added).

Defendant relies on the decision in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002) for the proposition that the well-pleaded complaint rule would bar removal in this case, and argues that the *Holmes* case supersedes the result reached in *Hayduk*. (Defendant's brief, at 11). *Holmes*, however, considered the well-pleaded complaint rule only as it related to the ability of a counterclaim to provide the basis for federal "arising under" jurisdiction. 535 U.S. at 830. In determining that a counterclaim asserting a claim under federal patent law could not give rise to federal question jurisdiction under the well-pleaded complaint rule, the Court noted that whether a case arose under federal patent law could not depend on the defendant's answer, and "[i]t follows that a counterclaim – which appears as part of the defendant's answer, not as part of the plaintiff's complaint – cannot serve as the basis for 'arising under' jurisdiction." *Id.* at 831.

In contrast, the issue at hand is not whether the federal claim asserted by Defendant in her counterclaim can provide federal question jurisdiction, but whether the federal claim asserted by Defendant in her third-party complaint provides federal question jurisdiction. The *Holmes* court did not address that question, but the Middle District of Florida addressed a similar question in the context of the *Holmes* decision in the *North Star* case. In that case, the Middle District specifically decided “the *Holmes Group* rational does not appear to apply to a counterclaim defendant who was not a party to the original action.” 2007 WL 3522425 at *2. The Court in *Holmes* was concerned about allowing a defendant to avoid the plaintiff’s choice of forum by asserting a federal counterclaim and then removing; yet where the counterclaim in question was not asserted by the original defendant against the original plaintiff, but instead by the original defendants against counterclaim defendants who were not parties to the original lawsuit, the concern expressed by the Court in *Holmes* was not applicable. *Id.* at *3. The instant case presents similar circumstances – the federal claims in question here, Defendant’s TILA claims, were asserted by Defendant against Ocwen, who was not a party to the original lawsuit. The rational of the *Holmes* decision is simply not applicable.

Further, the Middle District has specifically recognized that “*Holmes Group* does not appear to eviscerate *Carl Heck* and *Walker*; the holding in *Holmes Group* is limited to the facts of that case and the policy concerns addressed by the Supreme Court do not apply when the removing party is a counterclaim defendant who was not an original party.” *Id.* The Fifth Circuit in *Texas v. Walker*, 142 F.3d at 816, elaborated on that theory, noting that where a removing third-party defendant was not a party to the case prior to being sued by the original defendant, the rationale of *Carl Heck* would protect the

removing third-party defendant from the operation of the well-pleaded complaint rule. Similarly, Ocwen was not a party to this case prior to being sued by Defendant. Because the rationale of the *Carl Heck* case allows Ocwen to remove pursuant to section 1441(c), Ocwen is also protected from the operation of the well-pleaded complaint rule. See *Walker*, 142 F.3d at 816.

CONCLUSION

The Fifth Circuit decision in *Carl Heck Engineers, Inc. v. Lafourche Parish Policy Jury*, 622 F.2d 133 (5th Cir. 1980) is binding precedent on the Eleventh Circuit and the District Courts of Florida. *Carl Heck* provides that a third-party defendant may remove under section 1441(c) on the basis of a third-party complaint if the third-party complaint asserts a separate and independent cause of action which if sued upon alone could have been brought properly in federal court. Combined with the operative language of the 1990 amendment to section 1441(c), the *Carl Heck* rule has two elements: (a) a separate and independent claim, which (b) provides federal question jurisdiction under section 1331.

Ocwen has demonstrated that Defendant's third-party TILA claims satisfy both prongs of the test. Defendant's TILA claims are clearly separate and independent from the state law mortgage foreclosure claims asserted by the original plaintiff, as both involve distinct wrongs and distinct legal duties. Defendant's TILA claims are asserted pursuant to a United States statute, and therefore arise under federal law and grant federal jurisdiction under section 1331. Because both elements of the *Carl Heck* exception are satisfied and *Carl Heck* remains controlling law in this jurisdiction, Defendant's motion must be denied.

Dated: September 30, 2008

Respectfully submitted,

S/ Elizabeth R. Wellborn

Elizabeth R. Wellborn

Florida Bar No. 155047

Elizabeth R. Wellborn, PA

1701 West Hillsboro Blvd., Suite 307

Deerfield Beach, FL 33442

Tel: 954-354-3544 Ext. 215

Fax: 954-354-3545

ewellborn@erwlaw.com

*Attorneys for Ocwen Loan Servicing,
LLC*

FORECLOSUREPROSE.COM

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will notify the following electronically:

Michael P. Roland, Esq.
Consumer Law Center, P.A.
537 10th Street West
Bradenton, Florida 34205
Attorneys for Defendant Donna M. Pinkston

I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

Unknown Tenant #1 in Possession
Of Subject Property
5907 Second Street West
Bradenton, Florida 34207

Mortgage Electronic Registration Systems, Inc.
c/o C.T. Corporation as R.A.
1200 South Pine Island Road
Plantation, Florida 33324

Derek DiPasquale
Blalock Walters Held & Johnson PA
802 11th St. W.
Bradenton, Florida 34205
Attorneys for Third-Party Defendants Ace Mortgage and Jason Varela

Mark C. Elia
Van Ness Law Firm P.A.
1239 E. Newport Center Drive, Suite 110
Deerfield Beach, Florida 33442
Attorneys for HSBC Bank USA, N.A., as Trustee

S/ Elizabeth R. Wellborn
Elizabeth R. Wellborn
Florida Bar No. 155047
Elizabeth R. Wellborn, PA
1701 West Hillsboro Blvd., Suite 307
Deerfield Beach, FL 33442
Tel: 954-354-3544 Ext. 215
Fax: 954-354-3545
ewellborn@erwlaw.com