

**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,

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.

**NOTICE OF REMOVAL**

**INTRODUCTION**

Defendant Ocwen Loan Servicing, LLC (hereinafter "Ocwen") respectfully notifies the Court pursuant to 28 U.S.C. § 1441(c) that it has removed this action from the Circuit Court of the Twelfth Judicial Circuit, in and for Manatee County, Florida to this Court. In support of its removal, Ocwen submits this notice. Removal is based on the 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 28 U.S.C. § 1331. The federal question arises under the Truth in Lending Act, 15 U.S.C. § 1601 et seq. and Regulation Z, 12 C.F.R. § 226.

**PROCEDURAL COMPLIANCE**

Copies of all process, pleadings, orders, and other papers or exhibits of every kind on file with the state court are attached as **COMPOSITE EXHIBIT A** in compliance with 28 U.S.C. § 1446(a) and M.D. Fla. Local Rule 4.02(b). Ocwen has paid the appropriate filing fee to the Clerk of this Court upon filing this notice.

Contemporaneous with filing this notice of removal, the undersigned has served a notice of filing of notice of removal upon plaintiffs, defendant, and the remaining third-party defendants as required by 28 U.S.C. § 1446(d). A copy of that notice (without exhibits) is attached as **EXHIBIT B**. The original of the notice, attached as **EXHIBIT B**, with exhibits, is being filed with the Clerk of the Manatee County Circuit Court as required by 28 U.S.C. § 1446(d).

Ocwen's notice of removal is timely. The third-party complaint on which Ocwen's removal is based was filed in Manatee County Circuit Court on July 22, 2008. Ocwen was served with a summons and copy of the third-party complaint on July 25, 2008. Ocwen has thus removed this action to federal court within the thirty-day time limit under 28 U.S.C. § 1446(b).

The grounds for removal are stated below in accordance with 28 U.S.C. § 1446(a).

**CONSENT OF ALL DEFENDANTS IS NOT REQUIRED**

There are three exceptions to the requirement that all defendants consent to removal: (1) the non-consenting defendants have not been served with process at the time of removal; (2) the non-consenting defendants are nominal or formal defendants; and (3) removal is pursuant to 28 U.S.C. § 1441(c). *Bradwell v. Silk Greenhouse, Inc.*, 828 F. Supp. 940, 943 n.2 (M.D. Fla. 1993). Here, the consent of all defendants is not required to remove this action to federal court, as removal is based on 28 U.S.C. § 1441(c). *See Hayduck v. United Parcel Service, Inc.*, 930 F. Supp. 584, 594 (S.D. Fla. 1996) (quoting *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) (stating that where the removed claim is a separate and independent claim under 28 U.S.C. § 1441(c), an exception to the general rule exists and not all defendants are required to join in removal).

**GROUND FOR REMOVAL**

Removal to this district is appropriate under 28 U.S.C. § 1446(a) because this district and division embrace the District Court of the State of Florida for Manatee County, the forum in which the removed action was pending. The case is properly removed to the Tampa Division because it is the "Division encompassing the county of the State in which the action was pending." M.D. Fla. Local Rule 4.02(a).

Defendant's third-party complaint alleges claims against Ocwen for rescission under the Federal Truth-in-Lending Act ("TILA"), termination of any security interest Ocwen has in the property, return of any money or property given by Defendant in connection with the transaction, statutory damages, forfeiture of the loan proceeds, actual damages, and attorneys' fees. These are the only claims alleged against Ocwen. (*See,*

*e.g.*, Third-Party Compl. ¶¶ 219-236 and Wherefore paragraph). This action is removable to federal court pursuant to 28 U.S.C. § 1441(c) because Defendant's third-party complaint raises a separate and independent claim or cause of action that could have been originally filed in this court pursuant to federal question jurisdiction under 28 U.S.C. § 1331. Supplemental jurisdiction exists with respect to any remaining claims pursuant to 28 U.S.C. § 1367.

#### FEDERAL QUESTION JURISDICTION

Federal question jurisdiction exists over this removed action pursuant to 28 U.S.C. § 1331 because Defendant asserts claims in her third-party complaint that arise under the laws of the United States. Defendant alleges that Ocwen as assignee of the original note and mortgage is subject to rescission under 15 U.S.C. § 1641(c). (Third-Party Compl., ¶ 225). Defendant alleges that as a result of the original mortgage broker/lender's material violations of TILA, 15 U.S.C. § 1601 et seq. and Regulation Z § 226 et seq., she has a right of rescission for three years from the date of consummation of the loan. (*Id.* at ¶¶ 227-28). Defendant alleges that on June 12, 2008, she notified Ocwen that the mortgage and notes had been rescinded. (*Id.* at ¶ 229). Defendant further alleges that Ocwen received copies of that notice on June 16 or June 17, 2008. (*Id.* at ¶ 230). Defendant alleges that Ocwen had twenty days after receipt of her notice to terminate its security interest and return all money paid under the loans to Defendant. (*Id.* at ¶ 231), and the twenty day period has passed without Ocwen taking any action to terminate its security interest or return any money paid by Defendant. (*Id.* at ¶¶ 233-35). Defendant thus claims that as a result of violations of TILA and Regulation Z, 15 U.S.C. §§ 1635(a), 1640(a), and 1641(c), Ocwen is liable to Defendant for rescission of the transaction,

termination of Ocwen's security interest, return of any money or property given by Defendant, statutory damages, forfeiture of the loan proceeds, actual damages, and attorneys' fees. (*Id.* at ¶ 236).

The resolution of Defendant's third-party claims against Ocwen, therefore, is wholly dependent upon the existence, scope, and breach of Ocwen's duty, if any, under TILA. TILA claims are subject to removal from state to federal court. *See Alexander by Alexander v. Goldome Credit Corp.*, 772 F. Supp. 1217, 1221 (M.D. Ala. 1991) (stating "Without a doubt, a suit brought under the Truth in Lending Act is subject to removal from state to federal court."). Because resolution of Defendant's third-party claims against Ocwen depends solely on resolution of questions of federal law, Defendant's third-party claims against Ocwen arise under the laws of the United States and provide federal question jurisdiction pursuant to 28 U.S.C. § 1331.

**THIRD-PARTY DEFENDANT REMOVAL IS PROPER UNDER 28 U.S.C. § 1441(C)**

Generally, third-party defendants are not permitted to remove an action from state to federal court. *Persoff v. Aran*, 792 F. Supp. 803, 804 (S.D. Fla. 1992). There are two primary reasons for this rule. First, courts and commentators have typically found that third-party defendants are not "defendants" within the meaning of 28 U.S.C. § 1441(a), and are therefore not allowed to remove. *Id.* Second, it could be considered unfair to the plaintiff, who has a right to choose its forum, to allow a third-party defendant brought into the case by the defendant to defeat the plaintiff's choice. *Id.*

There is an exception to the general rule, however, that allows third-party defendants to remove when "the third party complaint states a separate and independent claim which if sued upon alone could have been brought properly in federal court." *Id.*

(quoting *Carl Heck Engineers, Inc. v. LaFource Parish Police Jury*, 622 F.2d 133, 136 (5th Cir. 1980)). Therefore, if the third-party claim is separate and independent and itself confers federal subject-matter jurisdiction, the third-party defendant must be allowed to remove the case. *Id.* at 805. The exception allowing third-party defendants to remove is based upon the language of 28 U.S.C. § 1441(c), which provides

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.

Although this exception was originally recognized by the Fifth Circuit, the District Courts of Florida as well as other District Courts in the 11th Circuit have found themselves bound by this rule. *See id.*; *see also North Star Capital Acquisitions, LLC v. Krig*, 2007 WL 3522425 at \*1 (M.D. Fla. Nov. 15, 2007) (attached hereto as **EXHIBIT C**); *Hayduck v. United Parcel Service, Inc.*, 930 F. Supp. 584 (S.D. Fla. 1996); *Price v. Alfa Mutual Ins. Co.*, 877 F. Supp. 597 (M.D. Ala. 1995). Decisions of the Fifth Circuit made prior to the close of business on September 30, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

#### **A SEPARATE AND INDEPENDENT CAUSE OF ACTION EXISTS**

There are two requirements under the exception allowing a third-party defendant to remove a cause of action from state court. The first requirement is that a separate and independent cause of action exists. The standard for demonstrating a separate and independent cause of action has been established in part by the Supreme Court, which concluded “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).” *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951).

Courts have also determined that where recovery on a claim is dependent upon establishing the liability of another party, the claim is not separate and independent from the original claims. *Price v. Alfa Mutual Ins. Co.*, 877 F. Supp. at 601. Where, however, the claims asserted by the parties 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.” *Hayduck v. United Parcel Service*, 930 F. Supp. at 595.

In *Alexander by Alexander v. Goldome Credit Corp.*, 772 F. Supp. at 1223 (cited in *Hayduck*, 930 F. Supp. at 595), plaintiffs had asserted various breach of contract claims against Goldome and other defendants, and a claim against Goldome alone for violations of TILA. Goldome attempted to remove the TILA claims under § 1441(c), arguing those claims were separate and independent. *Id.* at 1219, 1223. The court came to the following conclusion regarding the plaintiffs’ TILA claims:

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. It is possible that Goldome may have violated the provisions of the Truth in Lending Act, but that the work on plaintiffs’ residence was performed properly by [other defendants]. Accordingly, the Federal Truth in Lending Act claim provides a basis for removal . . .

*Id.* at 1223 (emphasis added).

The Fifth Circuit has recognized that TILA claims are not contingent upon claims concerning a state law debt, stating “a plaintiff is not enforcing a TILA liability when he or she is defending against a state law debt claim.” *Lacy v. General Finance Corp.*, 651 F.2d 1026, 1029 (5th Cir. 1981) The Fifth Circuit further noted “[t]he TILA claim may be won or lost regardless of the outcome of a claim for the underlying debt; likewise, a claim for the underlying debt may be won or lost regardless of the outcome of the TILA claim.” *Id.* Third-party claims are considered separate and independent from the plaintiff’s original claims when the success of one claim does not depend upon the success of the other claims. *North Star Capital Acquisitions, LLC v. Krig*, 2007 WL 3522425 at \* 4 (attached hereto as **EXHIBIT C**).

Furthermore, where the federal and state law claims in question involve two distinct wrongs with two different sets of duties, the federal claims are considered separate and independent. *Id.* For example, this Court has previously determined that a claim for violations of the federal Fair Debt Collection Practices Act was a separate and independent claim from a non-removable state law claim for collection of a debt. *Id.* The finding that the Fair Debt Collection Practices Act claim was separate and independent was based on two things: not only could the Fair Debt Collection Practices Act claim have been brought alone in federal court, the federal claim and state law contract claims involved two entirely distinct wrongs and were not dependent on each other. *Id.*

Defendant’s TILA claims against Ocwen are not contingent upon the outcome of any other claims involved in the case. Specifically, Defendant has alleged that her TILA claims entitle her to statutory damages for Ocwen’s alleged failure to respond properly to

her rescission notice (*See* Third-Party Compl., ¶ 236), an allegation that is in no way related to or contingent upon the claims regarding to the underlying debt. The original complaint in mortgage foreclosure against the Defendant was based upon default on the underlying mortgage and note. (*See* Compl., ¶¶ 7-20). Defendant's counterclaims against the original plaintiff are for fraud, TILA rescission, breach of duty of good faith and fair dealing, and unjust enrichment. (*See* Answer, ¶¶ 179-216). As in the *Goldome* case, it is entirely possible that Defendant could lose her case against the mortgage foreclosure based upon her default on the note and win her case for TILA rescission and statutory damages against Ocwen, or 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. Defendant's TILA claims against Ocwen are therefore not contingent upon the outcome of the claims surrounding the validity or payment of the underlying note and mortgage.

Likewise, the Defendant's TILA claims against Ocwen are not contingent upon the outcome of any of Defendant's other third-party claims against Ace Mortgage Funding or Jason Varela. Defendant has alleged various causes of action against Ace Mortgage Funding and Jason Varela, including claims for TILA violations, unfair and deceptive trade practices, fraud, breach of duty of good faith and fair dealing, and unjust enrichment. (*See generally* Third-Party Compl., ¶¶ 237-323). Again, Defendant could prevail on her claim against Ocwen for rescission and statutory damages under TILA and lose on her claims against Ace Mortgage and Jason Varela for her fraud and deceptive trade practices claims, or could lose her claim against Ocwen and prevail on her claims against the other third-party defendants. Because Defendant's TILA claims against

Ocwen are not dependent upon the original complaint for mortgage foreclosure, Defendant's counterclaims, or Defendant's other third-party claims, Defendant's claims against Ocwen are separate and independent claims that satisfy the first prong for removal under 28 U.S.C. § 1441(c). See *Alexander by Alexander v. Goldome*, 772 F. Supp. at 1223.

Finally, Defendant's third-party TILA claims against Ocwen involve entirely different wrongs and entirely different sets of duties. The gravamen of the original complaint in mortgage foreclosure and Defendant's counterclaims is the underlying state law debt and its validity. Likewise, Defendant's third-party claims against Ace Mortgage Funding and Jason Varela revolve around the creation of the underlying debt and the alleged duties of those parties with respect to Defendant. Defendant's third-party claims against Ocwen, however, are based solely upon Ocwen's alleged duties to the Defendant under TILA, and whether Ocwen's actions were a breach of those duties. Defendant's claim for statutory damages under TILA for failure to properly respond to a rescission notice, in particular, has no relationship to the remaining claims concerning the validity and enforcement of the underlying debt. Because Defendant has asserted TILA claims against Ocwen that are not contingent upon any other claims and involve two different sets of wrongs and two different sets of duties, Defendant's TILA claims against Ocwen are separate and independent claims that provide a basis for removal under 28 U.S.C. § 1441(c).

**FEDERAL QUESTION JURISDICTION EXISTS UNDER 28 U.S.C. § 1331**

Because the TILA claim asserted against Ocwen in Defendant's third-party complaint is a separate and independent claim properly subject to removal, the remaining

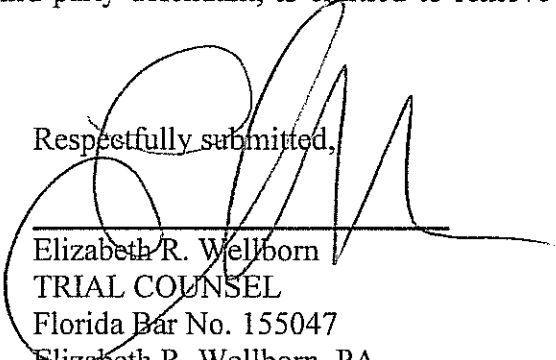
question under the test established by 28 U.S.C. § 1441(c) is whether this claim provides an independent basis for federal question jurisdiction. As demonstrated above, claims asserted under TILA provide a proper basis for removal from state court to federal court. Therefore, both prongs of 28 U.S.C. § 1441(c) are satisfied, and the Fifth Circuit exception for allowing third-party defendants to remove is satisfied.

**CONCLUSION**

The general rule states that third-party defendants are not allowed to remove a case to federal court under 28 U.S.C. § 1441. Nevertheless, a narrow exception to the rule has been created by the Fifth Circuit and followed by the courts in the Districts of Florida allowing third-party defendants to remove a claim pursuant to § 1441(c) when the third-party complaint states a separate and independent cause of action which, if sued on alone, could have been brought in federal court. The third-party complaint in question contains separate and independent claims under TILA. Therefore, both elements of the exception are present and Ocwen, as a third-party defendant, is entitled to remove this case to federal court.

Dated: August 22, 2008

Respectfully submitted,



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LLC*

**CERTIFICATE OF SERVICE**

I certify that on this 25 day of August, 2008, I submitted the foregoing Notice of Removal with the Clerk by providing a paper original and a copy on diskette in PDF format. I further certify that I served a true and correct copy of the foregoing document by United States first class mail to the parties on the attached service list.

S/ Elizabeth R. Wellborn  
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Unknown Tenant #1 in Possession  
Of Subject Property  
5907 Second Street West  
Bradenton, Florida 34207

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c/o C.T. Corporation as R.A.  
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Plantation, Florida 33324

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