The In-House Legal Professional's Guide to

Removing Cases to Federal Court

A Checklist

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REMOVING CASES TO FEDERAL COURT – A CHECKLIST

Defendants in consumer finance cases regularly "remove" cases filed against them in state court to federal court. This booklet discusses the process of removal, including the factors defendants should consider before deciding to remove a case to federal court. It sets forth a step by step "checklist" for defendants who decide they would prefer federal court to state court.

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What is removal?

Removal is the process of transferring a case from state court to federal court. It is provided for by federal statute. 28 U.S.C. §§ 1441-1453; Fed. R. Civ. Pro. 81(c). State courts have no role to play in determining whether a case is removed or not – a defendant can remove a case if it elects to do so and the case could have been filed in federal court in the first place (with some exceptions).

Once a case has been removed from state to federal court, the state court no longer has jurisdiction over the matter, though a federal court can remand a case to state court. A federal judge can remand a case without any request by the plaintiff if the judge does not believe federal jurisdiction has been properly established by the defendant. A plaintiff can also move to have the case remanded to state court if the plaintiff does not believe federal jurisdiction exists. In some cases, where the basis for removal is "federal question" jurisdiction (where a claim is based on federal law) and that claim is later dismissed, leaving only state law claims, a judge may decline to exercise jurisdiction over the remaining state law claims, and they can be re-filed in state court. However, in general once case has been removed to federal court it stays there until fully resolved.

Note that only a defendant can remove a case to federal court. The theory is that if a plaintiff files a case in state court, he, she, or it selected that forum and cannot change to federal court. In the context of mortgage servicing litigation, this can prevent removal of a borrower's claims raised as counterclaims in a foreclosure initiated by the servicer in state court.

Why remove cases to federal court?

There are a number of reasons mortgage servicers frequently remove cases to federal court.

- Federal judges are generally more experienced with the types of cases servicers typically face (i.e., consumer finance-related matters)
- Better developed case law (a federal district court is bound by the decisions of the circuit court of appeals in which the district court is located, and the opinions of other district court judges are published – state court judges are not bound by federal court decisions and state trial court opinions are generally not published)
- More consistent – and thus predictable – treatment in federal court
- Generally better judges in federal court. This is highly variable, however. There are many, many very fine judges in state court, and there are some terrible judges in federal court. Every situation must be evaluated based on the particular judge assigned to the case in state court and the possible judge assignments in federal court.
- Usually cases move faster in federal court than in state court. The amount of time that passes between the initiation of a case and its resolution is one of the biggest factors in the overall cost of litigation – both in terms of the direct expenses of litigation and the cost of business interruption - so resolving cases quicker will generally result in lower overall litigation cost.
- Familiarity with the Federal Rules of Civil Procedure and certainty regarding expectations and obligations, which can vary in state court
- In cases that may go to trial, the jury pool may be more favorable in federal court than in state court. Usually a federal district is broader and covers a wider demographic than a state court jury pool. This can be beneficial or detrimental depending on the particular circumstances.
- In class action litigation, the availability of interlocutory review of class certification orders.

Step 1:

Do you really want to remove?

Although we typically advise clients to remove cases from state to federal court whenever possible, the particular circumstances of each case must be considered before making a final decision. There are situations in which a defendant will be better off in state court than federal court.

For example, your case may be assigned to a particularly favorable state court judge. If you or your counsel know that judge to be fair or to have rendered favorable decisions on key issues in the past, you will likely want to remain in that forum rather than taking your chances with an unknown federal judge. If you do not have prior experience with the judge to whom the case has been assigned in state court, obtain input from attorneys who have experience with that judge. You or your counsel should also research the state court judge's track record. Are there published appellate opinions related to that judge's decisions? Does that judge have any experience with the type of case you have assigned to the judge, and if so, how has he or she handled those kinds of cases in the past?

You should always get basic biographical information for the state court judge to whom you have been assigned before making a decision to remove a case from that judge's courtroom. There are many sources for such information, including bar association surveys, local legal newspaper guides (for example, the California Daily Journal volume of "Judicial Profiles" is an excellent resource for information about California judges) and third-party websites such as "The Robing Room" (www.therobingroom.com).

When a case is removed to federal court, it is randomly assigned to a federal district court judge and/or magistrate judge. There is no way to know in advance what judge the case will be assigned to upon removal. Therefore, a removing defendant is always taking a risk that the federal judge assigned to the case will be *less* favorable than the state court judge it was assigned to. However, the risk can be calculated to a degree. Certain federal judicial districts have judges with better reputations than others. If you are in a district that only has a couple of judges and they have poor reputations in the kind of case you are facing, you are less likely to remove. If you are in a jurisdiction with more judges, or a very high ratio of favorable to unfavorable federal judges, you are more likely to remove. There are no jurisdictions, however, in which the federal judges are all excellent nor are there any where the judges are all poor. Every jurisdiction has some judges that are very good and every jurisdiction has judges that are not so good. Ultimately, whether you should remove the case to federal court requires the exercise of judgment and a balancing of the risks, but ultimately whether you get a "better" judge in federal court than state court will come down to a certain degree of luck.

If the case you are considering removing arguably relates to another case or cases pending in the same jurisdiction you are removing to, you may be able to seek to have the case

you are removing transferred to that judge or consolidated with those cases. Similarly, if the case is a re-filed action (or an action that is related in some way to an earlier case), you may be able to have the case assigned to the judge who heard the earlier case. Forum or "judge" shopping is frowned upon, but if there are efficiencies to be gained by having a particular case assigned to a particular judge, judges are amenable to such transfers.

Finally, you need to take into account the published decisions involving the issues you are facing in the case. If the federal court has a number of negative opinions, or there is negative authority from the U.S. Court of Appeals that includes the district court you would remove your case to, you will probably prefer to stay in state court. Conversely, if the state court authority is negative (or non-existent) and the federal court authority is more positive, you will likely want to get your case into the federal court if you can.

Step 2:

Determine whether there is federal jurisdiction.

In order to remove a case to federal court, the federal court must have subject matter jurisdiction over the matter. If there is no federal jurisdiction, the case cannot be removed.

Generally speaking, a case can be removed to federal court if it could have been filed in federal court by the plaintiff. In many cases both state and federal courts may have subject matter jurisdiction over a particular matter, and the plaintiff has his or her choice of which court to present the claim to. Plaintiffs generally prefer state courts for all the same reasons defendants generally prefer federal courts. They believe the state court forum offers them leverage in settlement discussions and a more favorable forum for resolution of their claims.

Federal subject matter jurisdiction generally comes in two different varieties: Federal Question Jurisdiction and Diversity Jurisdiction. Diversity jurisdiction is now broken into two subsets – "standard" diversity jurisdiction and "CAFA" jurisdiction in putative class action cases.

Federal Question Jurisdiction

Federal question jurisdiction exists when a claim arises pursuant to a federal law. For example, if a plaintiff alleges a claim pursuant to the Truth in Lending Act, the Real Estate Settlement Procedures Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, etc., the case presents a "federal question" and can be removed to federal court. In addition, certain state claims that present a "substantial federal question" can also be removed on the basis of federal question jurisdiction. For example, a state consumer fraud claim that contends that a defendant violated the state statute by acting "unlawfully," where the "unlawful" conduct is alleged to be a violation of a federal statute, may present a federal question even though the claim is actually brought pursuant to state law. Also, certain state court claims are pre-empted by federal law, and thus present federal questions.

28 U.S.C. § 1331

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Supplemental Jurisdiction

When a case containing claims that present federal questions and claims that do not present federal questions, the federal court has what is called "supplemental jurisdiction" to hear the non-federal claims. However, if the court dismisses the federal claims, it has discretion to either retain the state claims or remand them to state court. You should beware that in some courts, judges regularly refuse to exercise supplemental jurisdiction over state claims if the federal claims are dismissed. This results in the state claims being dismissed without prejudice – i.e., the plaintiff can simply re-file them in state court. Thus, in cases where there is a significant likelihood that the claims presenting federal questions will be dismissed but it is less certain whether the state claims will be dismissed, you should anticipate that the state claims may wind up back in state court notwithstanding the removal. Your overall goals for the litigation should be considered when deciding whether to remove if there are both federal and non-federal claims presented. If you believe the case will be settled quickly or your goal is to resolve the litigation by way of a motion as quickly as possible, you may elect *not* to remove a case if there is a chance that the federal court will refuse to consider the state claims.

This is also a good reason to raise both federal question and diversity jurisdiction as the basis for removal if there is a good faith basis to assert both in the notice of removal. While a federal court has discretion to decline to exercise supplemental jurisdiction to consider the state claims if it dismisses the federal claims, the same is not true if diversity jurisdiction exists. For this reason, you should always include diversity jurisdiction as a basis for removal if possible.

28 U.S.C. § 1367

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
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> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal

Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States

The Two Flavors of Diversity Jurisdiction

In order to avoid bias in state courts against a state's own citizens and against citizens of other states, Congress enacted a statute that provides for federal court jurisdiction over disputes between citizens of different states. However, the rule is subject to certain conditions and limitations. Recently Congress passed the Class Action Fairness Act, or "CAFA", which makes it easier for defendants in class action cases to remove such cases to federal court on the basis of diversity jurisdiction.

As pointed out in the previous section, diversity jurisdiction offers a defendant more certainty that the case will be fully adjudicated in federal court, as a court has discretion to refuse to exercise supplemental jurisdiction over state law claims if it dismisses claims presenting federal questions. However, if diversity jurisdiction exists, it will cover all of the claims.

"Standard" Diversity Jurisdiction

Diversity jurisdiction exists when there is complete diversity of citizenship among the parties and the amount in controversy exceeds $75,000.00 exclusive of interest and costs.

For "complete diversity" to exist, no plaintiff can be a citizen of the same state of any defendant. So if there are five plaintiffs, only one of whom is a citizen of California, and there are five defendants, and one of them is also a citizen of California, complete diversity is lacking and the case cannot be removed on the basis of diversity jurisdiction (though it still might be removed if a federal question is presented in one or more claim). If all five plaintiffs are citizens of California but none of the defendants are California citizens, then complete diversity exists.

Individual Citizenship

An individual is typically a citizen of the state in which he or she resides.

Corporate Citizenship

Corporations are citizens of the state where it was incorporated as well as the state in which it maintains its principal place of business. Often this will be the same state, but a corporation may also often be a citizen of two states. A corporation organized pursuant to the laws of the State of Delaware whose principal place of business is located in New York is a citizen of both Delaware and New York. Determining where a corporation's principal place of business is located can be tricky. Different courts apply different tests, so it is possible that in some courts a corporation is considered a citizen of state A and state B where another court will consider it to be a citizen of state A and state C.

National Bank Citizenship

National banks – banks organized pursuant to the laws of the United States rather than the laws of any particular state – are citizens of the state of their "main office" as specified in their articles of association. There are some wrongly decided district court opinions that hold that a national bank is a citizen of both the state specified as the location of its main office in its articles of association *and* the state of its principal place of business. The majority of decisions, however, hold that a national bank is a citizen of only one state – the state specified in its articles of association as the location of its main office.

LLC/Partnership Citizenship

Limited liability companies and partnerships are problematic because they are considered citizens of the states in which their members or partners are citizens. In larger LLCs or partnerships, this can be a large number of states, which often precludes removal on the basis of diversity jurisdiction. Fortunately, few mortgage servicers are organized as LLCs or partnerships.

Trust/Trustee Citizenship

Unfortunately, trusts and trustees are frequently defendants in mortgage servicing litigation, and the analysis of the citizenship of a trust is problematic. If a trustee is a "real party in interest," then only the trustee's citizenship is considered for purposes of diversity jurisdiction. However, it would be a rare case in which the servicer would want to take the position that the trustee of the typical RMBS trust is the "real party in interest." In most cases, the plaintiff is seeking relief against the trust, not the trustee individually. The trustee will want to avoid individual liability and limit liability to the trust for which the trustee serves as trustee. For example, if the plaintiff is suing for consumer fraud and includes "XYZ Mortgage Servicing, Inc., a Delaware corporation and ABC Bank, N.A., as Trustee for the 2006-1 Series 6 Certificates" as defendants, ABC Bank, N.A. will want to avoid individual liability – in other words, if plaintiff successfully obtains a $1,000,000 judgment, the ABC Bank will want satisfaction of that judgment to come exclusively from the Trust, not from the Bank's assets. Note that state law can vary on the ability of a trustee to avoid individual liability in this way – a topic beyond the scope of this pamphlet. For purposes of citizenship, the salient point is that if the servicer plans to take the position that the trustee is not the "real party in interest" and that the trust itself is the "real party in interest," then the citizenship of the beneficiaries of the trust must be considered. That is, the servicer will need to know who all the investors in the trust are (as well as their citizenship) in order to use diversity as a basis for removal.

Beware of cutting corners here. If the servicer takes the position that only the citizenship of the trustee matters, the trustee could be estopped from later contending that it is *not* the real party in interest. Since it is very unlikely that a servicer would ever take the position that the trustee *is* the real party in interest, if you are removing a case in which a trust or trustee is a defendant, you will need to determine who the beneficiaries are and their citizenship, and lay those facts out in the notice of removal.

Nominal or "Fraudulently Joined" Defendants

In determining whether diversity of citizenship exists, you do not consider the citizenship of "nominal" or "fraudulently joined" defendants. "Nominal" or "fraudulently joined" defendants are defendants who do not have any real interest in the outcome of the litigation and are added simply to avoid diversity jurisdiction. For example, a mortgage servicing company organized in Delaware with its principal place of business in California may have an office and operations in Texas. If it is sued in Texas state court by a Texas citizen, diversity of citizenship would exist unless the plaintiff names a co-defendant that is a Texas citizen. If the plaintiff adds one of the mortgage servicing company's employees who happens to live in Texas, the presence of that individual defendant would break the diversity unless the employee is a "nominal" or "fraudulently joined" defendant. In other words, if the claim is for rescission pursuant to TILA, there is no way the individual defendant could possibly have liability and thus the individual defendant's citizenship would not be considered by the court in determining whether diversity jurisdiction exists.

You should also beware of improperly joined claims. Often a plaintiff's lawyer will join dozens of individual claims against dozens of unrelated mortgage servicers in a single action. The loans have no relationship to each other, and other than a common issue of law, the claims are completely unrelated. Sometimes these claims are joined by a common argument that MERS is the beneficiary of the mortgages involved, and that MERS is somehow unlawful or mortgages for which MERS serves as beneficiary are unenforceable. These cases can result in loss of diversity if one of the unrelated defendants is a citizen of the same state as one of the plaintiffs. In this case, you should seek to sever the claims and remove. In order to avoid the removal deadline, this may need to be done on an expedited basis, or you may need to remove first and seek severance in the federal court. Which course to take in a case like this is highly dependent upon the particular circumstances presented.

Amount in Controversy

When asserting "standard" diversity as the basis for federal jurisdiction, the removing party must allege and be prepared to support an argument that the "amount in controversy" is in excess of $75,000 exclusive of interest and costs. Note that "amount in controversy" is not necessarily the same thing as "damages." Consequential expenses – such as the expenses incurred as a result of complying with an injunction – can be considered when determining whether more than $75,000 is "in controversy." Also, in any case where the borrower is contending that the loan is null and void or unenforceable, so long as the principal balance due exceeds $75,000 the amount in controversy standard will be satisfied.

Cases where the amount in controversy standard is hard to satisfy typically involve challenges to various fees or charges imposed by a mortgage servicer. Typically these cases are pled as class actions and may be removable pursuant to CAFA (see discussion *infra*). However, if a number of plaintiffs join together to seek recovery of relatively small amounts, it can be

difficult or impossible to meet the amount in controversy threshold. Defendants cannot "aggregate" damages of multiple plaintiffs to meet the amount in controversy standard.

28 U.S.C. § 1332(a)

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

CAFA Jurisdiction

In 2005, Congress enacted the Class Action Fairness Act, which, among other things, made it easier for defendants to remove putative class action cases to federal court. CAFA can be a complicated statute to apply, but for purposes of this discussion, you need to be aware of two key differences between "standard" diversity jurisdiction and removal pursuant to CAFA.

First, only "minimal" diversity is required (not "complete" diversity). That is, only one plaintiff and one defendant need be citizens of different states – the presence of a defendant who is a citizen of the same state as one of the plaintiffs will not necessarily destroy diversity.

Second, the amount in controversy standard is raised to $5,000,000, but the claims of prospective class members can be aggregated (unlike "standard" diversity). Thus, if there are over 1,000,000 people in the class, the "amount in controversy" standard is satisfied even if each of them suffered damages of only $5.

There are several exceptions to these rules. For example, if more than 2/3 of the prospective class are citizens of the state in which the case was filed and at least one defendant is also a citizen of that state, the court will not take the case pursuant to CAFA. In other situations the court may have discretion to exercise jurisdiction depending on how many prospective class members are citizens of the forum state.

28 U.S.C. § 1332(d)

(d)

(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)

(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) [1] of the Securities Act of 1933 (15 U.S.C. 78p (f)(3) [2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb (f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b (a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)

(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)

(i) As used in subparagraph (A), the term “mass action” means any civil action (except a civil action within the scope of section 1711 (2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term “mass action” shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)

(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

Step 3:

Is removal timely?
Watch the deadline carefully!

A defendant must remove within 30 days of receiving summons and complaint. There is a split of authority regarding the impact of an "earlier served" defendant on a "later served" defendant's ability to remove. In jurisdictions known as "first served" jurisdictions, the deadline runs from the date of service on the first defendant served. It is important to know whether you are in such a jurisdiction. If a co-defendant was served 29 days ago and you were just served today, your removal may be due tomorrow! Other jurisdictions follow a "last served" defendant rule, meaning each defendant gets a full 30 days to decide whether to remove the case. While an earlier served defendant may be time-barred from removing a case, a later served defendant could still remove in such a jurisdiction.

If a case cannot be removed immediately but becomes removable later, the defendant has 30 days from the receipt of the amended complaint or pleading that makes the case removable. For example, a complaint may be amended and add a federal claim or a claim that increases the amount in controversy, or a plaintiff may settle with a non-diverse defendant, removing that party from the case. In no event can a case be removed more than one year after filing, however, unless it is a class action removable pursuant to CAFA.

Deadlines for removal cannot be extended by agreement of the parties or even by order of court. The deadlines are jurisdictional. That is, if they are not satisfied, the court does not have jurisdiction to hear the case.

Step 4:

Obtain Consent of Co-Defendants

All co-defendants who have been served with summons and complaint must consent to removal of a case before it can be removed. This can impose a significant hurdle, particularly if you are under significant time pressure to get a case removed. For one thing, you may not know for sure whether the co-defendants have been served or not. If there is no evidence of service of process on the docket and you have no reason to believe the co-defendants have been served, we typically allege in our notice of removal that "on information and belief" no other co-defendants have been served, and that on further "information and belief" any other co-defendants would consent to removal. However, the best practice is to contact the co-defendants and obtain their consent. If a co-defendant is a frequent defendant in litigation, it may be possible to identify its usual outside counsel and contact that attorney to obtain the consent. Otherwise, a call to a General Counsel or a law department might yield results. However, if you know that a co-defendant has been served (for example, there is a proof of service on the docket indicating service) you must have consent from that co-defendant before you can remove the case. Consenting co-defendants should file written consents with the court to ensure that the court does not remand the case to state court on a sua sponte basis due to lack of proof of consent.

We generally counsel clients to remove cases within 30 days of the date they are filed even if they have not yet been served. This avoids any issues over timeliness of the removal (a case removed within 30 days of filing is *per se* timely). It also helps avoid the need to obtain consent of co-defendants since there is not likely going to be any evidence of service of process on the docket this early in a case.

If a co-defendant has already removed a case, you should file a written consent to that removal (assuming you consent) and you should also file your own notice of removal if there are any additional grounds that support federal jurisdiction and/or the removal that were not stated in the co-defendant's notice of removal. You need to do this within the same 30 day deadline for filing the notice of removal itself.

Step 5:

Prepare & File Documents in Federal Court

Several documents need to be prepared and filed in both federal and state court in order to effectuate the removal, including a notice of removal, a certificate of interested parties, a civil cover sheet, appearance forms and a notice of filing of notice of removal.

Document No. 1:

Notice of Removal

The key document is the notice of removal itself. This document should be prepared as if it were a motion seeking to establish federal jurisdiction. It consists of numbered paragraphs in which the removing defendant alleges all of the facts pertinent to a determination that federal jurisdiction exists. The notice of removal should be supported by evidence. Some federal judges review cases that have been removed from state court and assigned to them even without any motion to remand being filed. These judges will *sua sponte* remand a case to state court if they are not convinced that federal jurisdiction exists. Because you don't know how active the judge assigned to your case will be, best practices call for the submission of the evidence necessary to support your allegations with the notice of removal. This can include an affidavit or affidavits of knowledgeable witnesses about those facts, and will likely include documents supporting the factual allegations. The notice of removal should cite the complaint to the extent the complaint contains allegations that bear on federal jurisdiction. All of the pleadings filed in the state court must be attached to the notice of removal.

This is another place where you may be tempted to cut corners – particularly given the time pressure you may be under to get the removal accomplished. Resist that temptation. A remand will mean that you have wasted your time and incurred expenses with nothing to show for them.

Document No. 2:

Certificate of Related Parties

Another document that must be filed when you remove a case is a certificate of related parties. The specific requirements vary from court to court, but most if not all federal courts require a statement to be filed identifying any affiliates of a corporate defendant. The certificate may not need to be filed when the removal is filed, but it is a good practice to file it together with the other removal papers so that it has been taken care of and does not get overlooked later. The requirements are usually set forth in the court's local rules and typically require disclosure of the

identity of any entity or person owning more than 5% of a corporation, the identities of the members of an LLC, the identities of the partners of a partnership, etc. as well as the affiliates of each of those (i.e., tracing ownership up the "corporate family tree"). As mentioned elsewhere, you need to be careful of how you treat trustees of trusts who may be named defendants, and consider whether you need to disclose the identity of the beneficiaries of the trusts in order to avoid an argument later that the bank or entity serving as trustee has individual liability.

Document No. 3:

Civil Cover Sheet

This is a form most district courts require to be completed and filed when the notice of removal is filed. Although it is perfunctory, it contains information the court looks at in determining whether diversity or federal question jurisdiction has been properly invoked. An error here can result in greater scrutiny of the allegations of the notice of removal.

Document No. 4:

Appearance Forms

Many, but not all, district courts will also require the attorneys appearing for the removing defendant to file separate appearance forms.

28 U.S.C. § 1446

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial

pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

* * * * *

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded

Step 6:

Prepare & File Documents for State Court

Once the notice of removal has been filed in federal court, you must apprise the state court of the fact that the case has been transferred. This is accomplished by filing a "Notice of Filing of Notice of Removal" in state court.

It is the filing of this document that officially divests the state court of jurisdiction. For this reason, timing can be important. Generally speaking orders entered in state court prior to removal remain in effect after the case has been removed unless vacated or modified by the federal court. Temporary restraining orders entered in the state court will remain in effect until they expire by their terms or applicable federal rules. Preliminary injunctions, however, will continue until they have been vacated, modified or expire by their own terms. Thus, if the Plaintiff is seeking a temporary restraining order or other relief in the state court and you would prefer not to have the state court consider the issues raised in such a proceeding, you will want to not only file the notice of removal in the federal court prior to the hearing on any such matter, but also the notice of filing of notice of removal in the state court prior to that hearing. Once the notice of filing of notice of removal is filed, the state court is deprived of jurisdiction to act unless and until the federal court remands the case to state court.

Copies of all of these documents must be promptly served upon the plaintiff's counsel.

Step 7:

Defend Against Motion to Remand

A motion to remand is a plaintiff's request that the federal court return the case to state court. A motion to remand can be based upon an argument that the federal court lacks jurisdiction (e.g., the amount in controversy is less than $75,000, the citizenship allegations are incorrect in the notice of removal and the parties are not diverse, the complaint does not state a federal claim, etc.) or an argument that the removal procedure was flawed in some way (e.g., a served defendant does not consent, removal was untimely, etc.).

The plaintiff has 30 days to file a motion to remand based on a defect in the removal procedure.

A claim based on lack of subject matter jurisdiction can be raised at any time! One of the dangers of removal is a faulty assertion of subject matter jurisdiction. A plaintiff who does not believe that federal jurisdiction exists can "lie in the weeds" on that issue and see if he or she can settle the case or obtain a favorable result without seeking remand or arguing a lack of jurisdiction. If the case does not go as the plaintiff hoped, he or she can claim that the court lacked subject matter jurisdiction and that he or she gets to start all over in state court. For this reason, you must be absolutely certain that subject matter jurisdiction exists before removing a case.

Federal courts are said to "jealously guard" their jurisdiction. This means they strictly construe the removal statute in favor of remand and against removal.

Beware that the statute contains a fee shifting provision. If the court finds that there was no "objectively reasonable basis" for the removal, it can award the plaintiff its fees and costs in seeking remand.

28 U.S.C. § 1447(c)

> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446 (a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a

result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Step 8:

Consider Options if Remand is Ordered

Consider your options if remand is ordered, but in point of fact they are limited. An order remanding a case to state court is generally not reviewable on appeal. There are exceptions to this rule, but they are so rare and unlikely to apply in the typical case against a mortgage loan servicer that they are not worth discussing here. Under certain circumstances you can seek a writ of mandamus from a court of appeals if remand is ordered, but this is also very rare and there is a high standard that must be satisfied to obtain it.

There is an exception for cases removed pursuant to CAFA. An order remanding a case removed pursuant to CAFA can be appealed. *See* 28 U.S.C. § 1453(c)(1) (notwithstanding 28 U.S.C. § 1447(d), court of appeals may review remand order where case was removed under CAFA).

Basically, if remand is ordered, you are going back to state court and will litigate there. Most state court judges will not hold your attempt to take the case away from them against you, but it is something to keep in mind.

28 U.S.C. § 1447(d)

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Step 9:

Impact of Removal on Deadline to Respond

Once the case is removed, you have the longer of:

i. 21 days from the date you receive the summons and complaint; or

ii. 5 days from the date of removal

to respond to the complaint with a motion to dismiss, answer and affirmative defenses, or some other pleading. Typically we take a conservative approach and contact the plaintiff's counsel immediately upon removal to agree to a stipulated deadline for a response to the complaint. Normally 5 days is insufficient, but in some cases if a motion to dismiss is ready to go there is no reason to delay further.

If the case is remanded to state court, the state court rules of procedure will apply. These can vary. The best practice is once again to seek a stipulation with the plaintiff's lawyer for a deadline for the response in state court following remand

Federal Rule of Civil Procedure 81(c)

(c) Removed Actions.

(1) Applicability.

These rules apply to a civil action after it is removed from a state court.

(2) Further Pleading.

After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 21 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief;

(B) 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 7 days after the notice of removal is filed.

(3) Demand for a Jury Trial.

(A) As Affected by State Law. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) Under Rule 38. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

Conclusion

In most cases you will prefer to have your cases proceed in federal court rather than state court. On the surface, removing a case from state court to federal court is not difficult. However, there are many contours to federal jurisdiction, and various issues that may not be apparent at first glance that can significantly impact the litigation that must all be accounted for. Removal should not be taken lightly – it should be carefully considered, planned for and implemented.

APPENDIX A

REMOVAL CHECKLIST

STEP	ACTION	RULE	DEADLINE
1	Decide whether you want to remove		Approx. 21 days from service of summons & complaint (to allow time to prepare removal papers by deadline to remove)
2	Determine whether federal jurisdiction exists	28 U.S.C. § 1331 28 U.S.C. § 1332 28 U.S.C. § 1453	See Step 1
3	Determine whether removal is timely	28 U.S.C § 1446	30 days from service of summons & complaint
4	Obtain consent from other defendants		Obtain consent prior to removal; Co-defendants must file consents within 30 days of Step 6
5	Prepare and file notice of removal in federal court	28 U.S.C. § 1446	30 days from service of summons & complaint
6	Prepare and file Notice of Filing of Notice of Removal in state court	28 U.S.C. § 1446	Promptly after Step 5
7	Motion to Remand	28 U.S.C. § 1447	30 days from Step 5
8	Consider options if case is remanded		
9	Respond to Complaint	FRCP 81(c)(2)	Time remaining to respond under state law or 5 days after removal, whichever is later Governed by state law if remand is ordered

APPENDIX B

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)

(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)

(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or

similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) [1] of the Securities Act of 1933 (15 U.S.C. 78p (f)(3) [2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb (f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b (a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)

(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)

(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711 (2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)

(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) 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.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603 (a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446 (b) of this chapter may be enlarged at any time for cause shown.

(e)

> (1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—
>
> > (A) the action could have been brought in a United States district court under section 1369 of this title; or
> >
> > (B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407 (j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)

(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446 (a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

APPENDIX C
Form Notice of Removal

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(BALTIMORE DIVISION)

[redacted], **on their own behalf and on behalf of all others similarly situated,** **Plaintiffs,** **vs.** [redacted], **Defendant.**	**Case No. _____** **[formerly Circuit Court for Baltimore City, Maryland – Case No. [redacted]]**

NOTICE OF REMOVAL

Defendant [redacted] hereby removes Case No. [redacted] from the Circuit Court for Baltimore City, Maryland, to the United States District Court for the District of Maryland pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, and as grounds for its removal states as follows:

STATEMENT OF THE CASE

1. On September 3, 2010, Plaintiffs [redacted] filed a Complaint in the Circuit Court for Baltimore City, Maryland styled [redacted] *v.* [redacted], Case No. [redacted] (the "State Court Action"). A copy of the Complaint, with exhibits, is attached as **Exhibit A** hereto.

2. [redacted] was served with the summons and Complaint on October 4, 2010. The exhibits to the Complaint were not provided to [redacted] until October 5, 2010.

3. The Complaint purports to assert four causes of action including: (a) violation of Maryland's Consumer Protection Act; (b) violation of Maryland's Consumer Debt Collection Act; (c) violation of Maryland's Mortgage Fraud Protection Act; and (d) declaratory and injunctive

relief.[1] Each of Plaintiffs' claims is based on their contention that [redacted] failed to provide a satisfactory "Notice of Intent to Foreclose" in purported violation of Maryland Annotated Code, Real Property Article § 7-105.1.

4. Plaintiffs purport to bring each of their claims on behalf of themselves, as well as a putative class.

5. The relief Plaintiffs seek on behalf of themselves and the putative class includes, *inter alia*: (a) compensatory damages for themselves in an unspecified amount; (b) compensatory damages for the putative class of "not more than $4,999,000, subject to amendment"; (c) "reasonable attorney's fees and costs" for themselves and the putative class; (d) an order "vacat[ing] any foreclosure sales in which [redacted] proceeded through its agents and affiliates with a foreclosure when a proper NOITF was never provided to the homeowner"; (e) "appropriate injunctive relief," including a "permanent injunction on any foreclosure actions currently pending or to be instituted against the [sic] [redacted] of [sic] any members of the class"; and (f) "such other and further relief as the Court deems just and proper."

DIVERSITY JURISDICTION UNDER 28 U.S.C. § 1332(a)

6. This Court has jurisdiction over this matter under 28 U.S.C. § 1332(a), because there is complete diversity of citizenship between Plaintiffs and [redacted] and more than $75,000, exclusive of interest and costs, is at stake.

7. Plaintiffs allege that they are residents of the State of Maryland and that their primary residence is [redacted], Maryland.

8. [redacted] is not a citizen of Maryland because it is a limited liability company without any owner or member that is a citizen of Maryland. [redacted]'s sole member is [redacted]

[1] Plaintiffs label their claims as "Count I," "Count II," "Count III," and "Count V." No "Count IV" appears in the Complaint.

[redacted], LLC. [redacted], LLC's sole member is [redacted], LLC. [redacted], LLC has two members: [redacted], LLC and [redacted], LLC. [redacted], LLC's sole member is [redacted], LLC. [redacted], LLC's sole member is [redacted], Inc., a [redacted] corporation with its principal place of business in [redacted]. (Affidavit of [redacted] ("[redacted] Aff."), attached hereto as **Exhibit B**, at ¶ 7). Therefore, there is complete diversity between Plaintiffs and [redacted] in this action.

9. Plaintiffs in this action request unspecified compensatory damages for themselves, as well as attorneys' fees and costs. However, Plaintiffs also request a permanent injunction preventing [redacted] from ***ever*** foreclosing on the property securing their loan. (Compl. at p. 25 ("Order appropriate injunctive relief … [including] permanent injunction on any foreclosure actions currently pending or to be instituted against the [sic] [redacted]")). The unpaid balance of Plaintiffs' loan is currently $[redacted] and the injunctive relief requested would effectively preclude [redacted] from ever foreclosing its lien on the collateral and recovering these amounts. ([redacted] Aff. at ¶ 8). Thus, well over $75,000 is in controversy and the jurisdictional threshold under 28 U.S.C. § 1332(a) is satisfied.

JURISDICTION UNDER THE CLASS ACTION FAIRNESS ACTION (CAFA)

10. Jurisdiction also exists under 28 U.S.C. § 1332(d) because: (1) minimum diversity is satisfied; (2) the number of putative class members is greater than 100; and (3) the amount in controversy exceeds $5 million. 28 U.S.C. §§ 1332(d)(2), (d)(5)(B).

11. For purposes of establishing minimum diversity necessary for jurisdiction under CAFA, a limited liability company such as [redacted] is "deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." 28 U.S.C. §

1332(d)(10); *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 968, 705 (4th Cir. 2010) ("Thus, a limited liability company, such as Express Check, is an "unincorporated association" within the meaning of § 1332(d)(10)."). [redacted] is organized under the laws of [redacted] and has its principal place of business in [redacted]. ([redacted] Aff. at ¶ 6). Because Plaintiffs are citizens of Maryland and [redacted] is a citizen of [redacted] and [redacted], at least one member of the putative class is diverse from at least one defendant and minimum diversity is satisfied.

12. Plaintiffs define the putative class as:

> All Maryland homeowners who were the subject of a foreclosure proceeding initiated at the request and direction of [redacted] after April 4, 2008 and the NOITF provided to the homeowner identified [redacted] or some other entity as the secured party where [redacted] actually knew another party was the true secured party.

(Compl. ¶ 53).[2] Plaintiffs allege in the Complaint that "[t]he class size is estimated to be in excess of 50 ***and may include thousands of Maryland homeowners***," and explains that "upwards to 130,000 or more Maryland homeowners have received NOITFs during the class period" and that [redacted] "owns a substantial percentage of all mortgage loans." (*Id.* ¶ 54) (emphasis added). Thus, Plaintiffs allege that, more likely than not, the putative class has in excess of 100 members. *See Martin v. State Farm Mutual Auto. Ins. Co.*, No. 10-0144, 2010 WL 3259418, *3 (S.D.W.Va. Aug. 18, 2010) (stating that a "removing party must prove the jurisdictional amount by a preponderance of the evidence) (citing *Bartnikowski v. NVR, Inc.*, 307 Fed. Appx. 730 (4th Cir. 2009)).

---

[2] Plaintiffs' putative class definition is defective on its face because it proposes an improper "failsafe" class, *i.e.*, class membership is defined by the alleged wrongful conduct and cannot be objectively assessed. *See* MANUAL OF COMPLEX LITIGATION § 21.222 (4th ed. 2004); JEROLD S. SOLOVY ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.21[3][c] (Supp. 2008). Such a class could never be certified as a matter of law. *See Levitt v. Fax.com*, No. 05-949, 2007 WL 3169078, *5 n.5 (D. Md. May 25, 2007) ("Deciding the merits of individuals' claims in order to determine the members of the class is not appropriate."); *see also Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 404-06 (Tex. 2000) (collecting cases). In any event, for purposes of CAFA jurisdiction, [redacted] may assume that the putative class includes all Maryland borrowers whom [redacted] has foreclosed upon since April 4, 2008. *See, e.g., Helm v. Alderwoods Group, Inc.*, No. 08-01184, 2008 WL 2002511, *4 (N.D. Cal. May 7, 2008).

13. Indeed, [redacted]'s books and records indicate that, as of October 29, 2010, it has initiated or caused to be initiated no less than 2,407 foreclosure actions in the State of Maryland since April 4, 2008. ([redacted] Aff. at ¶ 9). Accordingly, the number of putative class members is well in excess of 100.

14. Likewise, the amount in controversy in this matter exceeds $5 million, as required by 28 U.S.C. § 13323(d)(2). The relief Plaintiffs seek on behalf of themselves and the putative class includes, *inter alia*: (a) compensatory damages for themselves in an unspecified amount; (b) "a sum of no more than $4,999,000, subject to amendment, which represents the compensatory damages of the class"; (c) "reasonable attorney's fees and costs"; (d) an order "vacat[ing] any foreclosure sales in which [redacted] proceeded through its agents and affiliates with a foreclosure when a proper NOITF was never provided to the homeowner"; (e) "appropriate injunctive relief," including a "***permanent*** injunction on any foreclosure actions currently pending or to be instituted against the [sic] [redacted] of [sic] any members of the class" (emphasis added); and (f) "such other and further relief as the Court deems just and proper."

15. The $5 million jurisdictional threshold is plainly satisfied by Plaintiffs' demand for $4,999,000 in compensatory damages "for the class," ***plus*** compensatory damages for themselves ***and*** attorneys fees and costs. It is certainly reasonable to conclude that Plaintiffs, more likely than not, seek more than $999 in compensatory damages. *See Martin*, 2010 WL 3259418 at *3. Attorneys' fees are also properly included in the calculation of the amount in controversy in class actions where they are permitted by the statutes under which plaintiffs assert their claims. *See Bartnikowski*, 307 Fed. Appx. at 734-36; *Lowdermilk v. U.S. Bank Nat'l Assoc.*, 479 F.3d 994, 1000 (9th Cir. 2007); *Lewis v. Ford Motor Co.*, 610 F. Supp. 2d 476, 484-86 (W.D. Pa. 2009) (noting that "attorneys fees are commonly in the range of 27% to 30% of the direct damages"). Here, attorneys'

fees are authorized by the Maryland Consumer Protection Act (Count I), and the Maryland Mortgage Fraud Protection Act (Count III). MD. CODE COM. LAW § 13-408(b); MD. CODE REAL PROP. § 7-406(b). If each of the attorneys listed on the Complaint sought fees for even a few hours of time to this case, the addition of attorneys' fees to the $4,999,000 in damages Plaintiffs specifically demand would push the amount in controversy over $5 million.[3]

16. Moreover, the Maryland Mortgage Fraud Protection Act provides for ***treble*** damages. MD. CODE REAL PROP. § 7-406(c). And although Plaintiffs do not specifically request punitive damages, they do allege that [redacted]'s conduct was intentional and "deliberate" and ask for "further relief as the Court deems just and proper." (Compl. ¶¶ 83, 85). The Fourth Circuit has included punitive damages in the calculation of the amount in controversy under similar circumstances. *See Bartnikowski*, 307 Fed. Appx. at 734-35.

17. Most significantly, Plaintiffs at least purport to seek a ***permanent*** injunction prohibiting [redacted] from foreclosing on properties securing the loans of ***all*** putative class members. (Compl. at p. 25). For the named Plaintiffs alone this puts more than $340,000 in controversy. (*See* ¶ 9, *supra*). The unpaid principal balances of the loans to the approximately 2,407 putative class members (taken as of the completion of each foreclosure) total $571,799,068.85. ([redacted] Aff. at ¶ 10). Thus, it is evident that amounts well in excess of $5 million are at stake in this litigation and that the amount-in-controversy requirement for removal under Section 1332(d)(2) is more than satisfied.

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[3] Appendix B to the Local Rules for the U.S. District Court for the District of Maryland provides guidelines for hourly rates to be used in determining attorneys' fees. For attorneys such as [redacted] and [redacted] whom have been licensed more than 15 years, the guidelines recommend a fee in the range of $275 to $400 an hour.

18. Because minimum diversity exists, the number of putative class members is greater than 100, and the amount in controversy exceeds $5 million, this Court has jurisdiction under CAFA. 28 U.S.C. §§ 1332(d)(2), (d)(5)(B).

ALL PROCEDURAL REQUIREMENTS FOR REMOVAL HAVE BEEN SATISFIED

19. Pursuant to 28 U.S.C. § 1446(a) and Local Rule 103.5.a, a true and correct copy of all of the process, pleadings, orders, and documents from the State Court Action which have been served upon [redacted] are being filed with this Notice of Removal. [redacted] will file true and legible copies of all other documents on file in the State Court Action, as well as a certification pursuant to Local Rule 103.5, within 30 days of the filing of this Notice of Removal.

20. This Notice of Removal has been filed within 30 days of the date that [redacted] was served with the summons or the Complaint in this matter. Removal is therefore timely in accordance with 28 U.S.C. § 1446(b).

21. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1441(a) and 1446(a) because the U.S. District Court for the District of Maryland is the federal judicial district embracing the Circuit Court for Baltimore City, Maryland where the State Court Action was originally filed.

CONCLUSION

By this Notice of Removal, [redacted] does not waive any objections it may have as to service, jurisdiction or venue, or any other defenses or objections it may have to this action. [redacted] intends no admission of fact, law or liability by this Notice, and expressly reserves all defenses, motions and/or pleas.

Dated: November 1, 2010

[redacted]

Thomas J. Cunningham (*Pro Hac Vice* motion forthcoming)
J. Matthew Goodin (*Pro Hac Vice* motion forthcoming)
Julie Webb (*Pro Hac Vice* motion forthcoming)
LOCKE LORD BISSELL & LIDDELL LLP
111 South Wacker Drive
Chicago, Illinois 60606
Phone: (312) 443-0700
Fax: (312) 896-6472
tcunningham@lockelord.com
jmgoodin@lockelord.com
jwebb@lockelord.com

Attorneys for Defendant
[redacted]

CERTIFICATE OF SERVICE

This is to certify that the foregoing NOTICE OF REMOVAL, with exhibits, was sent via United States mail on the 1st day of November, 2010, postage prepaid thereon to:

[redacted]

Attorney for Plaintiffs

[redacted]

[redacted]

APPENDIX D
Form Certificate of Related Parties

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(BALTIMORE DIVISION)

[redacted], on their own behalf and on behalf of all others similarly situated,	
Plaintiffs,	**Case No. [redacted]**
vs.	
[redacted], LLC,	
Defendant.	

DEFENDANT [redacted], LLC'S LOCAL RULE 103.3 DISCLOSURE

Defendant [redacted], LLC ("[redacted]"), by its undersigned counsel, and pursuant to Local Rule 103.3, files this Statement of Corporate Interest and says:

1. [redacted] is a subsidiary of [redacted], LLC, which is a subsidiary of [redacted], LLC, which is a subsidiary of [redacted], LLC, which is a subsidiary of [redacted], Inc. Other entities which are affiliated with [redacted] by virtue of their being direct or indirect subsidiaries of [redacted], Inc. are:

[redacted], LLC
[redacted], Inc.
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], Inc.

[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted] Corporation
[redacted], LLC
[redacted], LLC
[redacted]
[redacted], Inc.
[redacted], LLC
[redacted], Inc.
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted]
[redacted], LLC
[redacted] Corp.

[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
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[redacted], LLC
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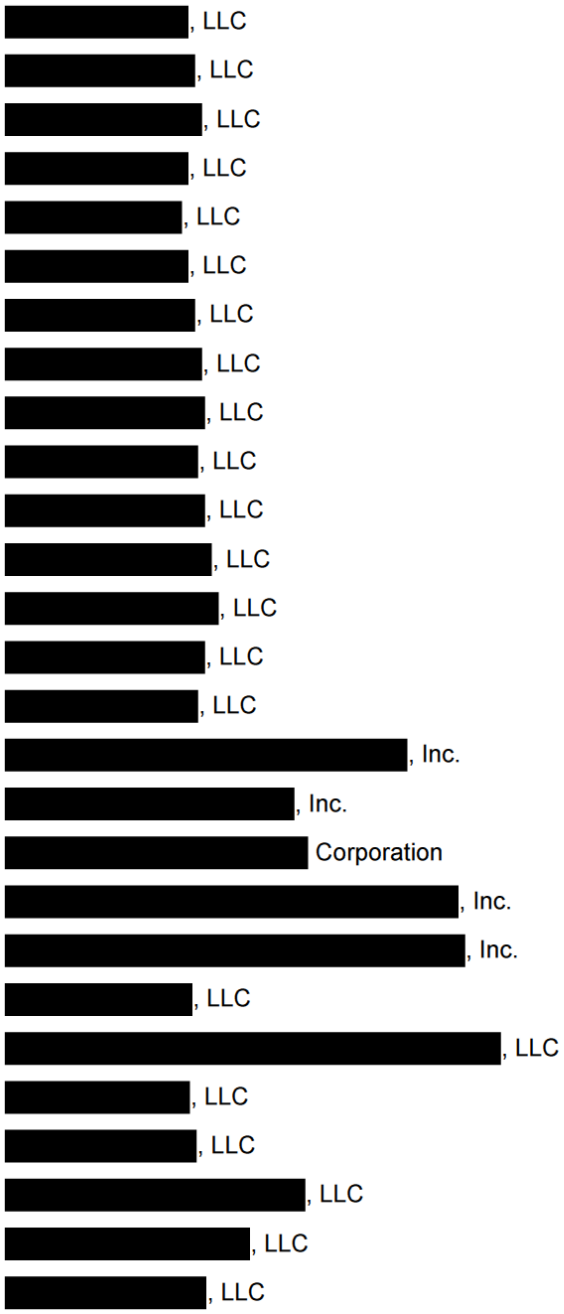
[redacted], LLC
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[redacted], Inc.
[redacted], Inc.
[redacted] Corporation
[redacted], Inc.
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[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC
[redacted], LLC

2. [redacted], Inc. is indirectly owned in part by [redacted].

3. [redacted] is unaware of any other business entity that may have a financial interest in the outcome of this litigation.

[redacted]

Thomas J. Cunningham (*Pro Hac Vice* motion pending)
J. Matthew Goodin (*Pro Hac Vice* motion pending)
Julie Webb (*Pro Hac Vice* motion pending)
LOCKE LORD BISSELL & LIDDELL LLP
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tcunningham@lockelord.com
jmgoodin@lockelord.com
jwebb@lockelord.com

Attorneys for Defendant
[redacted]

APPENDIX E
Form Civil Cover Sheet

COPY

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

I (a) PLAINTIFFS (Check box if you are representing yourself ☐)
[redacted]

DEFENDANTS
[redacted]

(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)
(PRO SE)
[redacted]

Attorneys (If Known)
THOMAS J. CUNNINGHAM, ESQ. / DANIEL A. SOLITRO, ESQ.
LOCKE LORD BISSELL & LIDDELL LLP
300 SOUTH GRAND AVENUE, 26TH FLOOR
Tel: (213) 485-1500 Fax: (213) 485-1550

II. BASIS OF JURISDICTION (Place an X in one box only.)

☐ 1 U.S. Government Plaintiff
☑ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☑ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES – For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.)

	PTF	DEF		PTF	DEF
Citizen of This State	☑ 1	☐ 1	Incorporated or Principal Place of Business in this State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☑ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☑ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. ORIGIN (Place an X in one box only.)

☐ 1 Original Proceeding ☑ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify): ☐ 6 Multi-District Litigation ☐ 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: ☑ Yes ☐ No (Check 'Yes' only if demanded in complaint.)
CLASS ACTION under F.R.C.P. 23: ☐ Yes ☑ No
☑ MONEY DEMANDED IN COMPLAINT: $ (amount not specified)

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
28 U.S.C. sections 1331, 1337, and 1441

VII. NATURE OF SUIT (Place an X in one box only.)

☐ 400 State Reapportionment	☐ 110 Insurance	☐ 240 Torts to Land	☐ 370 Other Fraud	☐ 510 Motions to Vacate Sentence	☐ 710 Fair Labor Standards Act
☐ 410 Antitrust	☐ 120 Marine	☐ 245 Tort Product Liability	☐ 371 Truth in Lending	Habeas Corpus	☐ 720 Labor/Mgmt. Relations
☐ 430 Banks and Banking	☐ 130 Miller Act	☐ 290 All Other Real Property	☐ 380 Other Personal Property Damage	☐ 530 General	☐ 730 Labor/Mgmt. Reporting & Disclosure Act
☐ 450 Commerce/ICC Rates/etc.	☐ 140 Negotiable Instrument		☐ 385 Property Damage Product Liability	☐ 535 Death Penalty	☐ 740 Railway Labor Act
☐ 460 Deportation	☐ 150 Recovery of Overpayment & Enforcement of Judgment			☐ 540 Mandamus/ Other	☐ 790 Other Labor Litigation
☐ 470 Racketeer Influenced and Corrupt Organizations	☐ 151 Medicare Act			☐ 550 Civil Rights	☐ 791 Empl. Ret. Inc. Security Act
☑ 480 Consumer Credit	☐ 152 Recovery of Defaulted Student Loan (Excl. Veterans)			☐ 555 Prison Condition	
☐ 490 Cable/Sat TV					
☐ 810 Selective Service					
☐ 850 Securities/Commodities/ Exchange	☐ 153 Recovery of Overpayment of Veteran's Benefits			☐ 610 Agriculture	☐ 820 Copyrights
☐ 875 Customer Challenge 12 USC 3410	☐ 160 Stockholders' Suits			☐ 620 Other Food & Drug	☐ 830 Patent
☐ 890 Other Statutory Actions	☐ 190 Other Contract			☐ 625 Drug Related Seizure of Property 21 USC 881	☐ 840 Trademark
☐ 891 Agricultural Act	☐ 195 Contract Product Liability				
☐ 892 Economic Stabilization Act	☐ 196 Franchise				☐ 861 HIA (1395ff)
☐ 893 Environmental Matters					☐ 862 Black Lung (923)
☐ 894 Energy Allocation Act	☐ 210 Land Condemnation			☐ 630 Liquor Laws	☐ 863 DIWC/DIWW (405(g))
☐ 895 Freedom of Info. Act	☐ 220 Foreclosure			☐ 640 R.R. & Truck	☐ 864 SSID Title XVI
☐ 900 Appeal of Fee Determination Under Equal Access to Justice	☐ 230 Rent Lease & Ejectment			☐ 650 Airline Regs	☐ 865 RSI (405(g))
	☐ 240 Torts to Land			☐ 660 Occupational Safety /Health	
☐ 950 Constitutionality of State Statutes	☐ 245 Tort Product Liability			☐ 690 Other	☐ 870 Taxes (U.S. Plaintiff or Defendant)
	☐ 290 All Other Real Property				☐ 871 IRS-Third Party 26 USC 7609

ED CV [redacted]

FOR OFFICE USE ONLY: Case Number: _____

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

[redacted]

CV-71 (11/08) CIVIL COVER SHEET

DEC 15 2009

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? ☑ No ☐ Yes
If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? ☑ No ☐ Yes
If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:
(Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or
☐ B. Call for determination of the same or substantially related or similar questions of law and fact; or
☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or
☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.
☐ Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
[redacted]	

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.
☐ Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	[redacted]

(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose.
Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
San Bernardino, California	

*** Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties**
Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER): _____ Date December 15, 2009

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))

APPENDIX F
Form Appearance

U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
ATTORNEY APPEARANCE FORM

NOTE: In order to appear before this Court an attorney must either be a member in good standing of this Court's general bar or be granted leave to appear *pro hac vice* as provided for by Local Rules 83.12 through 83.14.

In the Matter of Case Number: [redacted]

[redacted], Plaintiffs

vs.

[redacted],

Defendants

AN APPEARANCE IS HEREBY FILED BY THE UNDERSIGNED AS ATTORNEY FOR:

[redacted]

NAME (Type or print) Thomas J. Cunningham	
SIGNATURE (Use electronic signature if the appearance form is filed electronically) s/ Thomas J. Cunningham	
FIRM Locke Lord Bissell & Liddell LLP	
STREET ADDRESS 111 South Wacker Drive	
CITY/STATE/ZIP Chicago, IL 60606	
ID NUMBER (SEE ITEM 3 IN INSTRUCTIONS) 6215928	TELEPHONE NUMBER (312) 443-1731

ARE YOU ACTING AS LEAD COUNSEL IN THIS CASE?	YES ☑	NO ☐
ARE YOU ACTING AS LOCAL COUNSEL IN THIS CASE?	YES ☐	NO ☑
ARE YOU A MEMBER OF THIS COURT'S TRIAL BAR?	YES ☑	NO ☐
IF THIS CASE REACHES TRIAL, WILL YOU ACT AS THE TRIAL ATTORNEY?	YES ☑	NO ☐

IF THIS IS A CRIMINAL CASE, CHECK THE BOX BELOW THAT DESCRIBES YOUR STATUS.

RETAINED COUNSEL ☐ APPOINTED COUNSEL ☐

APPENDIX G
Form Notice of Filing of Notice of Removal

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

[redacted] and [redacted], Plaintiffs, v. [redacted], Defendant.	* * * * * * * *	**Case No.** [redacted] **NOTICE OF FILING NOTICE OF REMOVAL IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND**

* * * * * * * * * * * * * *

DEFENDANT'S NOTICE OF FILING OF NOTICE OF REMOVAL

PLEASE TAKE NOTICE THAT, on November 1, 2010, Defendant [redacted], LLC, filed a Notice of Removal, pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, removing the above-captioned action from the Circuit Court for Baltimore City, Maryland to the United States District Court for the District of Maryland. A true and correct copy of the Notice of Removal is attached hereto as **Exhibit 1.**

PLEASE TAKE FURTHER NOTICE that, upon the filing of the Notice of Removal with the Clerk of the United States District Court for the District of Maryland, and filing copies thereof with the Clerk of the Circuit Court for Baltimore City, Maryland, the Defendant has effected removal and the Circuit Court shall proceed no further in this action unless and until the case is remanded pursuant to 28 U.S.C. § 1446(d).

[redacted]

Dated: November 1, 2010

[redacted]

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APPENDIX H
Sample Response to Motion to Remand

[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[redacted], et al,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. [redacted]
	)	
[redacted], et al,	)	Judge Arthur J. Tarnow
	)	Mag. Judge Mona K. Majzoub
Defendants.	)	

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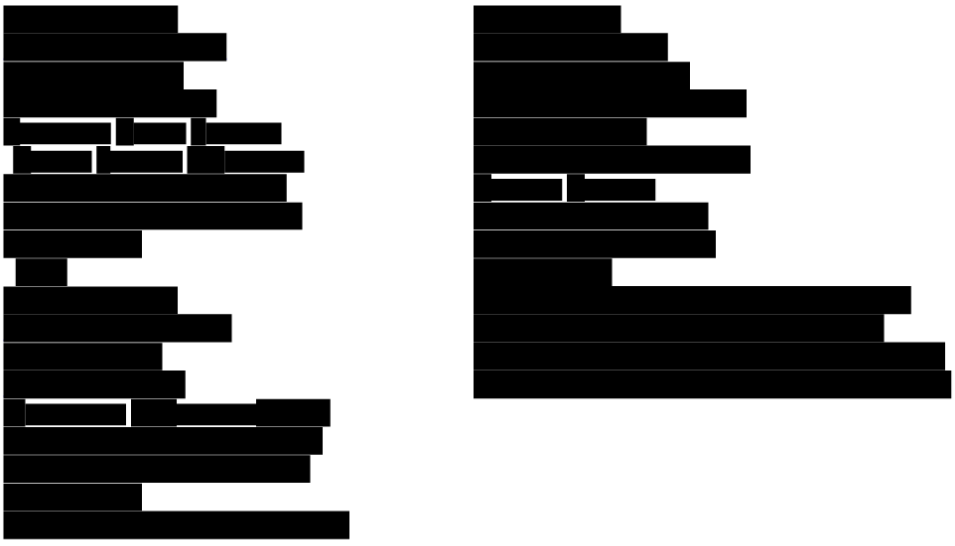

DEFENDANT [redacted]'S RESPONSE AND
BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

Defendant [redacted] hereby responds to Plaintiffs' Motion to Remand [Dkt. No. 21]. [redacted] also incorporates as part of its response the arguments, evidence, and authorities set forth in its Notice of Removal [Dkt. No. 1 ("Notice")] and in its pending Motion to Sever [Dkt. No. 7], which involves overlapping issues of improper joinder and misjoinder.[1]

INTRODUCTION

The question *actually* presented in plaintiffs' Motion to Remand is: may plaintiffs deprive a diverse defendant like [redacted] of its right to litigate in federal court by aggregating

[1] Plaintiffs initially filed an "Objection to Removal and Motion to Remand" on June 16, 2010 [Dkt. No. 13]. That pleading was stricken by the clerk on June 21, 2010 [Dkt. No. 14]. The present Motion to Remand was then filed on June 23, 2010.

dozens of unrelated claims, by and against unrelated parties, based on distinct and unrelated transactions and occurrences, into a single "mass action"? The answer is: they may not.

Over the past several months, plaintiffs' counsel has filed at least a dozen nearly identical foreclosure-delay lawsuits in state court, each on behalf of a *single* borrower (or joint borrowers), and each based on a *single* loan transaction involving a *single* property. Those lawsuits have each been removed to federal court, and at least two of them are currently pending before this Court.[2] Apparently preferring a state forum and wishing to avoid further removals, plaintiffs' counsel identified a few of his clients whose mortgage lenders or servicers appear to be Michigan citizens and joined their claims together with the unrelated claims of several dozen of his other clients in this "mass action," thereby, in his estimation, destroying diversity and precluding removal. Plaintiffs' counsel's estimation is unsound. Diversity exists between [redacted] and the only plaintiff *or* defendant with any connection to [redacted]. Thus, this case has been properly removed by [redacted] on the basis of diversity jurisdiction. Plaintiffs' counsel cannot evade federal jurisdiction by fraudulent joinder and misjoinder of claims and parties. This case presents a textbook illustration of why these doctrines exist.

Plaintiffs' *post hoc* invocation of the ever-popular—yet equally-frivolous—"MERS conspiracy" theory does nothing to deprive this Court of jurisdiction. The existence of federal jurisdiction is determined by what is alleged in the Second Amended Complaint ("SAC") and

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[2] *See, e.g.*, *Nabbud v. Mortgage Electronic Registration Systems, et al.*, No. 2:10-cv-10887-GCS-DAS, Dkt. No. 1 (E.D. Mich., removed Mar. 5, 2010); *Mekani v. Homecomings Financial, LLC*, No. 2:10-cv-10992-PDB-DAS, Dkt. Nos. 1-3 (E.D. Mich., removed Mar. 11, 2010); *Yaldo v. Deutsche Bank National Trust Co., as Trustee of the Indymac Index Mortgage Loan Trust 2005-AR6, Mortgage Loan Trust 2005-AR6, et al.*, 2:10-cv-11185-SJM-DAS, Dkt. Nos. 1-2 (E.D. Mich., removed Mar. 24, 2010); *Yousif v. Wells Fargo Home Mortgage*, No. 2:10-cv-11669-LPZ-MKM, Dkt. No. 1 (E.D. Mich., removed Apr. 23, 2010); *Faris v. BAC Home Loans Servicing , L.P., et al.*, No. 2:10-cv-11764-GCS-MJH, Dkt. No. 1 (E.D. Mich., removed Apr. 30, 2010); *Abro v. Chase Bank*, No. 2:10-cv-11949-SJM-RSW, Dkt. No. 1 (E.D. Mich., removed May 13, 2010).

any additional evidence offered by the removing party. While it is far from clear what plaintiffs are actually accusing defendants of, what *is* clear is that plaintiffs have not pled any facts from which this Court could infer the existence of some industry-wide conspiracy that ties together claims by more than 40 borrowers against scores of unrelated mortgage lenders, servicers, and others. Indeed, plaintiffs themselves characterize their claims as being about "defective information in the loan application process, defective charges, overinflated appraisals, failure to respond to requests for investigations based on mortgage application and billing errors and false promises made in the loan modification process" (SAC at p. 1, Introduction), not MERS. And even if MERS *is* a proper party to the dispute between [redacted] and [redacted], diversity is *still* present because MERS is not a Michigan citizen either.

As [redacted] explained in its Notice and Motion to Sever, plaintiffs' SAC violates both Michigan and federal joinder rules because it misjoins unrelated claims by and against divergent parties arising out of separate and distinct mortgage loan transactions. As plaintiffs' counsel as much as admitted in statements to the press, he has joined these claims without pretext or compunction in an effort to avoid removal. This Court should not condone plaintiffs' attempted manipulation of its jurisdiction and should deny their Motion to Remand.

ARGUMENT

1. Complete diversity exists between [redacted] and the only parties and claims that can be properly joined.

Plaintiffs argue that complete diversity is not present because they are each Michigan citizens, and defendants [redacted], [redacted] and [redacted] [redacted] are as well. (Plaintiffs' Brief in Support, Dkt. No. 13, at p. 2). But this argument ignores the fact that the claims of whatever plaintiffs who are suing these defendants cannot be properly joined with the claims of the only plaintiff who has a connection

to [redacted]. As [redacted] explained in its Notice, there is no common transaction or occurrence that links [redacted] to any plaintiff other than [redacted] or to any other defendant, including the purported Michigan defendants plaintiffs identify in their Motion to Remand. (*See* Dkt. No. 1 at ¶ 3 and Ex. 2). Thus, there is no basis to join claims by plaintiffs other than [redacted] against defendants other than [redacted], with the claims that [redacted] is asserting against [redacted]. These other claims by *other* plaintiffs against *other* defendants are improperly joined and misjoined under MCR § 2.206(A)(1) and Federal Rule of Civil Procedure 20(a). Therefore, the citizenship of those defendants is irrelevant to whether this Court has jurisdiction over [redacted]'s claims against [redacted].

Numerous federal district and appellate courts have acknowledged that "[a] defendant's 'right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy.'" *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (quoting *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S. Ct 35, 37 (1921)), *abrogated on other grounds*. Similarly, courts have made clear that a group of unrelated plaintiffs may not aggregate their claims against various defendants—some diverse and some not—into a single mass action to deprive the diverse defendants access to a federal forum. *See In re: Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002); *In re Diet Drugs*, No. 90-20478, 1999 WL 554584, at *3 (E.D. Pa. July, 1999) (explaining that plaintiffs' egregious misjoinder "wrongfully deprives Defendants of their right of removal."); *Reed v. American Medical Sec. Group, Inc.*, 324 F.Supp.2d. 798, 805 (S.D. Miss. 2004) (adopting the fraudulent misjoinder doctrine because "diverse defendants ought not be deprived of their right to a federal forum"). A "court may … find diversity jurisdiction where diversity is destroyed only through misjoinder of parties." *Asher, et al., v. Minnesota Mining and Manufacturing Co., et al.*, No. 04-

522, 2005 WL 1593941, at *7 (E.D. Ky. June 30, 2005). Plaintiffs have attempted exactly what these courts have prohibited.

Plaintiffs have aggregated their unrelated claims against unrelated defendants in an effort to avoid federal jurisdiction and deprive diverse defendants like [redacted] of their right to remove. Though plaintiffs' intent is transparent, regardless of their intent, their unrelated claims are improperly joined and misjoined under state and federal rules and should be disregarded for purposes of assessing subject matter jurisdiction over the claims involving [redacted] and [redacted]. *See Asher*, 2005 WL 1593941 at *7. Because [redacted]'s claims against [redacted] have been properly removed under the doctrines of fraudulent joinder and misjoinder, plaintiffs' Motion to Remand should be denied.

2. Plaintiffs' invocation of the "MERS conspiracy" theory does nothing to deprive this Court of jurisdiction.

Plaintiffs also argue that all plaintiffs, defendants and claims are *not* improperly joined or misjoined because "MERS is the common thread that links all of these mortgages, plaintiffs, and defendants." (Dkt. No. 13 at p. 3). More specifically, plaintiffs contend that "[t]his case involves **thirty-eight mortgages** listing [MERS] **as mortgagee**" and [redacted] is an alleged member of MERS. (*Id.*) (emphasis in original). Plaintiffs somehow conclude that "[o]bviously, there is some problem with MERS …." (*Id.*).

Ignoring for present purposes that plaintiffs' newly-adopted "MERS conspiracy" theory has been soundly rejected by courts around the country, *see*, *e.g.*, *Cervantes v. Countrywide Home Loans, Inc.*, No. CV 09-517-PHX-JAT, 2009 WL 3157160, at *10-11 (D. Ariz. Sept. 24, 2009) (rejecting similar claims in lead case in MDL styled *In re: Mortgage Electronic Registration Systems (MERS) Litigation*, MDL No. 23119 (D. Ariz.)), the more crucial detail plaintiffs ignore is that none of these "facts" are pled anywhere in the SAC. *See Gentek Bldg*

Products, Inc. v. Steel Peel Litigation Trust, 491 F.3d 320, 330 (6th Cir. 2007) ("When ruling on a motion to remand, a court generally looks to the plaintiff's complaint, as it is stated at the time of removal, and the defendant's notice of removal."). To the contrary, plaintiffs' SAC characterizes their claims as relating to "defective information in the loan application process, defective charges, overinflated appraisals, failure to respond to requests for investigations based on mortgage application and billing errors and false promises made in the loan modification process", not some conspiracy involving MERS. (SAC at p. 1, Introduction). Indeed, in the Count specifically titled "Civil Conspiracy," plaintiffs make no mention whatsoever of MERS. (*See* SAC at ¶¶ 37-42). Much like the fraudulent joinder and misjoinder of parties and claims in this case, the so-called "MERS conspiracy" is a concoction formulated to circumvent federal jurisdiction. Plaintiffs' entire discussion of MERS is a red-herring and should be ignored in assessing the Court's jurisdiction over claims by [redacted] against [redacted].

And even if the Court were to accept that [redacted] has some claim against MERS that could properly be joined with his claims against [redacted], diversity jurisdiction would *still* exist because MERS is also a foreign citizen—a Delaware corporation with its principal place of business in Reston, Virginia—not a citizen of Michigan. Plaintiffs acknowledge this in their SAC. (*See* SAC at ¶ 2). MERS consented to [redacted]'s removal through its counsel on June 8, 2010.

3. Federal question jurisdiction is also present.

[redacted] also joins in and adopts the bases for federal jurisdiction raised in defendant [redacted]'s Joinder in [redacted]'s Notice of Removal and Statement of Additional Bases of this Court's Subject Matter Jurisdiction Supporting Removal [Dkt. No. 16] and the arguments raised in [redacted]'s Response and Brief in Opposition to Plaintiffs' Motion to Remand [Dkt. No. 22]. As [redacted] explains in its papers, jurisdiction over this matter also exists under 28 U.S.C. § 1331.

CONCLUSION

For the foregoing reasons, Defendant [redacted] respectfully requests that the Court deny plaintiffs' Motion to Remand and sever claims asserted by plaintiff [redacted] against [redacted] into a separate action pursuant to Federal Rules of Civil Procedure 20(a) and 21.

Dated: June 28, 2010

By: /s/ J. Matthew Goodin

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, I electronically filed the foregoing document with the Clerk of the Court using the ECF system.

/s/ J. Matthew Goodin