

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION**

**IN RE: DELMORE TRULY and
PEARLIE MAE TRULY, DEBTORS**

**3:03-bk-11737E
CHAPTER 13**

STACY BRYANT, et al.

PLAINTIFFS

v.

AP NO. 3:05-ap-1038

ROSSLARE FUNDING, INC., et al.

DEFENDANTS

ORDER

Having found the Removing Defendants'¹ *Response to the Court's Order to Show Cause Why Adversary Proceeding Should Not Be Remanded to State Court* ("Show Cause Order") meritless, the remaining issue before the Court in this adversary proceeding is whether attorney fees and/or costs will be awarded.²

¹As in previous Orders of this Court, the **Removing Trust Defendants** (First Plus Home Loan Owner Trust 1998-4, Wilmington Trust Company, as Owner Trustee for and on behalf of First Plus Home Loan Owner Trust 1998-4, and U.S. Bank National Association, as Co-Owner Trustee and Indenture Trustee for and on behalf of First Plus Home Loan Owner Trust 1998-4) and the **Removing Bank Defendants** (Wells Fargo Bank, N.A. and The Bank of New York) are collectively referred to herein as the "**Removing Defendants.**"

²An award of attorney's fees is a collateral matter over which the court retains jurisdiction even after being divested of jurisdiction on the merits. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). The Court's holding in *Cooter* has been applied in cases in which the district court entered a separate order awarding attorney's fees following an order of remand under 28 U.S.C. § 1447(c).

Plaintiffs' *Motion to Remand* requested that attorney fees be awarded pursuant to 28 U.S.C. § 1447(c).

Section 1447(c) provides that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c). Such an award of attorney fees on remand is within the discretion of the court. *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290 (5th Cir. 2000); *Morgan Guar. Trust Co. Of N.Y. v. Republic of Palau*, 971 F.2d 917 (2nd Cir. 1992); *Sutton Woodworking Machine Co. Inc. v. Mereen-Johnson Machine Co.*, 328 F.Supp.2d 601 (M.D. N.C. 2004); *Shubert v. Roche Holding AG, et al.*, 157 F.Supp.2d 542 (E.D. Penn. 2001); *Calloway v. Union Pacific Railroad Co.*, 929 F.Supp. 1280 (E.D. Mo. 1996). Further, an award of attorney fees under § 1447(c) is not dependent on a finding of bad faith.³ *Valdes*, 199 F.3d at 292; *Morgan*

See Stallworth v. Greater Cleveland Regional Transit Authority, 105 F.3d 252 (6th Cir. 1997) (stating that if the order does not include an award of attorney fees, there is nothing in the statute to suggest that there cannot be a supplemental or amended order); *Mints v. Educational Testing Service*, 99 F.3d 1253 (3rd Cir. 1996) (holding that the language of section 1447(c) does not imply that an order for fees and costs cannot be entered after remand); *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443 (9th Cir. 1992) (relying on *Cooter* and holding that the district court retained jurisdiction to award costs and fees pursuant to section 1447(c) after remand).

³The Eighth Circuit has not rendered an opinion on whether a court must find bad faith before it can award attorneys' fees. District courts within the Eighth Circuit have split when faced with the issue. *Compare Ross v. Thousand*

Guar. Trust Co. Of N.Y., 971 F.2d at 923; *Calloway*, 929 F.Supp at 1283. Instead, the Court should determine whether the defendant had “objectively reasonable” grounds to believe that removal was legally proper. *Valdes*, 199 F.3d at 293. The Fifth Circuit in *Valdes* explained:

The application of § 1447(c) requires consideration of the propriety of the removing party’s actions based on an objective view of the legal and factual elements in each particular case. We evaluate the objective merits of removal at the time of removal, irrespective of the fact that it might ultimately be determined that removal was proper. “[T]he propriety of the defendant’s removal continues to be central in determining whether to impose fees.” In other words, the question we consider in applying § 1447(c) is whether the defendant had objectively reasonable grounds to believe the removal was legally proper.

Id. at 293 (citations omitted).

The Court finds that at the time the Removing Defendants filed their Notice of Removal, they lacked objectively reasonable grounds to believe that the removal was legally proper. A brief review of the uncontested facts existing at the time this

Adventures of Iowa Inc., 178 F.Supp.2d 996, 1003 (S.D. Iowa 2001) (court must determine that the party opposing remand acted in bad faith before awarding fees); *Wells’ Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 157 F.Supp.2d 1018, 104-42 (N.D. Iowa 2001) (same); *Farmers Co-operative Elevator of Buffalo Ctr., IA v. Abels*, 950 F.Supp. 931, 941 (N.D. Iowa 1996) (same), *with Calloway v. Union Pac. R.R. Co.*, 929 F.Supp. 1280, 1283 (E.D. Mo. 1996) (decision to award fees not dependant on finding of bad faith), *and Lytle v. Lytle*, 982 F.Supp. 671, 674 (E.D. Mo. 1997) (noting that while propriety of the removal is a key factor, an award of fees does not rest upon a finding that the state court action was removed in bad faith).

removal was filed solidly supports this conclusion. A review of those facts follows.

In early March 2003, U.S. Bank⁴ filed a Notice of Removal in District Court, Eastern Division (assigned to Judge Howard) removing the lawsuit from Greene County Circuit Court on the basis of federal question jurisdiction and asserting that the claim of alleged usurious interest against it was regulated solely by the National Bank Act, 12 U.S.C. § 85. On March 30, 2004, Judge Howard entered an order remanding the case to Greene County Circuit Court. Judge Howard specifically addressed the issue of complete preemption and found that U.S. Bank was not being sued as the owner of the loans because it violated usury laws, but rather, that the trusts, of which U.S. Bank was a trustee, owned the loans alleged to be usurious, and it was the trusts that received the interest payments.

Pursuant to Judge Howard's order, the case was returned to the Greene County Circuit Court, where it remained for eleven months, until February 11, 2005, when the Removing Defendants filed this 2005 Notice of Removal. Although there were additional Removing Defendants filing this 2005 Notice of Removal, the substantive issues in this Notice of Removal and U.S. Banks' previous 2003 Notice of Removal were virtually the same. The Removing Defendants asserted in their 2005 Notice of

⁴U.S. Bank was the sole Defendant in the 2003 removal; U.S. Bank is also a Removing Defendant in the 2005 removal, which is the subject of this Order.

Removal to this bankruptcy court that there was complete preemption by federal law (specifically the National Bank Act and the Depository Institutions Deregulation and Monetary Control Act) and that the Plaintiffs made allegations against the Removing Defendants in their personal capacities rather than in their capacities as trustees, as if Judge Howard had not entered his March 30, 2004, order addressing these identical issues raised in U.S. Bank's 2003 Notice of Removal. Accordingly, at the time the Removing Defendants filed the 2005 removal, they lacked objectively reasonable grounds to believe that the removal was legally proper. This finding provides a sufficient basis to award costs and any actual expenses, including attorney fees, incurred as a result of the removal.

However, given the specific facts of this case, the analysis of the propriety of the Removing Defendant's actions extends even beyond the time of the filing of the removal. On February 24, 2005, this Court entered a Show Cause Order specifically stating that "both discretionary abstention and equitable remand appeared to be appropriate" in this case. Speculating that it was unlikely that this bankruptcy court was going to provide a favorable forum for the Removing Defendants, the Removing Defendants filed a motion to withdraw the reference from Bankruptcy Court to the District Court, Eastern Division (where it was again assigned to Judge Howard) within

one month of the Court's Show Cause Order.⁵ Although there are additional Removing Defendants in the 2005 removal, which are separate entities from the Removing Defendant (U.S. Bank) in the 2003 removal, the Removing Defendants are nonetheless banking institutions with the same relationship to the respective trusts as U.S. Bank.

While the withdrawal of reference was pending before Judge Howard, this Court held the hearing on this Court's Order to Show Cause. At the hearing, the Removing Defendants did not present any argument on the issues set forth in the Show Cause Order. Rather, they argued that any claim of usury that purported to be brought under state law was entitled to complete preemption and could be brought only in a federal court and that because there were potential bankruptcy issues in this case, that this lawsuit was a core proceeding and must be addressed by the bankruptcy court. Following the Removing Defendants' oral arguments to this Court, Judge Howard issued *another* order on August 4, 2005. In this order, Judge Howard reiterated that his previous ruling rejected similar arguments by U.S. Bank regarding complete preemption and a basis for removal from state court to district court and found, as in the 2003 removal by U.S. Bank, that the Removing Defendants in this

⁵The Removing Defendants filed their responses to the Court's Order to Show Cause on March 24, 2005, the very same day the motion to withdraw the reference was filed.

2005 removal were being sued in their capacities as trustees. Consequently, Judge Howard denied the Removing Defendants' motion to withdraw the reference.

In light of the legal and factual elements in this case, the Removing Defendants had no objectively reasonable grounds to believe that removal in this case was legally proper,⁶ and for these reasons, the Court finds that reasonable attorney fees and costs should be awarded to Plaintiffs in defending the removal to this Court. The Court will determine the amount of attorney fees and costs following the filing of an affidavit by Plaintiffs' attorney in accordance with this Order.

It is hereby

ORDERED that Plaintiffs' Motion to Remand and/or Abstain and for Attorney Fees is **GRANTED**; Plaintiffs' attorney shall have **thirty (30) days** from the entry of this Order to file an affidavit with the Court attesting to the legal fees and costs the Plaintiffs have incurred in contesting the Removing Defendants' Notice of Removal; an itemized statement detailing the legal costs and fees incurred shall be attached to such affidavit; the Removing Defendants shall have **ten (10) days** from the date set for Plaintiffs to file an affidavit to file a response if they deem one appropriate. The Court will review such affidavit and itemized statement and make a determination of

⁶In fact, this Court believes the Removing Defendants' actions constituted forum shopping.

the amount of fees and costs to be entered against the Removing Defendants in favor of Plaintiffs.

IT IS SO ORDERED.



HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATE: October 12, 2005

cc: Mart Vehik, Attorney for Plaintiffs
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