

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

PAUL SQUITERI SIFONTES; EMMA GOMEZ  
DE PEREZ; NELSON RAMOS IRIZARRY;  
MARILYNE NEGRON GOMEZ; MARITZA  
GOMEZ ALAYON; RAUL NIEVES ZENO;  
DOLORES TRIAS GOMEZ; PEDRO GOMEZ;  
VICTOR GOMEZ, HIS WIFE, SOCORRO  
GOMEZ, AND THEIR CONJUGAL  
PARTNERSHIP; MADELINE GOMEZ HORTA;  
INVERSIONES VM GOMEZ; GUILLERMO  
PUIG, HIS WIFE MARGARITA FERNANDEZ  
ARDOIS AND THEIR CONJUGAL  
PARTNERSHIP; CARLOS E. PLA, AND HIS  
WIFE MARIA FERNANDEZ,

Plaintiffs,

v.

UBS FINANCIAL SERVICES  
INCORPORATED OF PUERTO RICO; UBS  
FINANCIAL SERVICES, INC.; UBS BANK  
USA; JOSE G. RAMIREZ; CARLOS FREIRE  
BORGES; CARLOS UBIÑAS; DOEL GARCIA;  
JOHN DOE; RICHARD ROE,

Defendants.

CIVIL NO. \_\_\_\_\_

**NOTICE OF REMOVAL**

TO THE HONORABLE COURT:

COMES NOW UBS Bank USA ("UBS Bank"), by and through its undersigned  
counsel, without submitting to the *in personam* jurisdiction or venue of this Honorable  
Court or waiving any other applicable defenses or objections,<sup>1</sup> and as authorized by

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<sup>1</sup> "A party who removes an action from a state to a federal court does not thereby waive any of his or her Federal Rule 12(b) defenses or objections." 5C Wright & Miller, FED. PRAC. & PROC. § 1395 (3d ed.) (Supp. 2013); Lambert v. Kysar, 983 F.2d 1110 (1st Cir. 1993) (right to object to venue not waived by removal petition or by assertion in removal petition that venue was proper); Nationwide Eng. & Control Sys., Inc. v. Thomas, 837 F.2d 345, 347-48 (8th Cir. 1988) ("Removal, in itself, does not constitute a waiver of any right to object to lack of personal jurisdiction, ... but after removal, the federal court takes up the case where the state court left off. ... Upon removal, a defendant may assert any defense that would have been available to him in state court and which has not been lost through the operation of either Fed.R.Civ.P. 12(g) or 12(h) (*citing* Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 436 (1974)); *see also* Fed.R.Civ.P. 4(d)(5), 81(c) & 28 U.S.C. § 1441(e)(6)).

28 U.S.C. § 1441 and 1446 (removal), and 28 U.S.C. § 1331 and 1332(a) (federal question and diversity jurisdiction), and remove the above-captioned case from the Puerto Rico Court of First Instance for the Commonwealth of Puerto Rico, San Juan Superior Part, to this Court.

## I. INTRODUCTION

1. On October 16, 2013, Plaintiffs filed a complaint before the Puerto Rico Court of First Instance, San Juan Superior Part, under the caption Paul Squitieri Sifontes et al. v. UBS Financial Services Incorporated of Puerto Rico, UBS Financial Services, Inc., UBS Bank USA, José G. Ramírez, Carlos Freire Borges, Carlos Ubñas and Doel García, Civil Case No. KPE 2013-4988 (904) (“the State Action”). See Complaint, Exhibit A hereto.

2. UBS Bank has received a summons addressed to it and a copy of the complaint (see Exhibits A and B hereto). It reserves any and all rights, defenses and objections with respect to the summons and complaint and the service thereof.

3. In the Complaint, Plaintiffs purport to assert three substantive claims: (1) to compel UBS Bank, UBS Financial Services, Inc. (“UBS-Del”), and UBS Financial Services Incorporated of Puerto Rico (“UBS-PR”) to arbitrate before the Financial Industry Regulatory Authority (“FINRA”) all claims that UBS Bank may have for collection of monies due under loan agreements between Plaintiffs and UBS Bank; (2) to enjoin UBS Bank from doing business in Puerto Rico allegedly in violation of P.R. Act No. 55 of May 12, 1933, 7 P.R. Laws Ann. § 181; and (3) to enjoin UBS-PR, UBS-Del and the individual defendants from acting as financial intermediaries allegedly in violation of P.R. Act No. 214 of October 14, 1995, 7 P.R. Laws Ann. § 1073.

4. All Plaintiffs are residents of Puerto Rico. See Complaint ¶ 1. UBS Bank is a federally regulated Utah industrial bank with its principal place of business in Utah. In fact, it does not have any offices or employees in Puerto Rico. UBS-Del is a Delaware corporation with its principal place of business in New Jersey. UBS-

PR is a Puerto Rico corporation with its principal place of business in Puerto Rico. Messrs. José G. Ramírez, Carlos Freire-Borges, Carlos Ubñas and Doel Gardá (the “Individual Defendants”) are residents of Puerto Rico.

5. As set forth below, UBS Bank is the only proper defendant in this action. Thus, under 28 U.S.C. § 1332, diversity jurisdiction is present. The fraudulent or improper joinder of UBS-PR and the Individual Defendants, and the assertion against those defendants of causes of action that fail to state a plausible claim under Puerto Rico law, seek only to destroy diversity, thereby depriving this Honorable Court of subject matter jurisdiction.

6. Moreover, the Complaint involves a federal question, which provides an additional and independent basis for removal.

## **II. DIVERSITY JURISDICTION**

7. Under 28 U.S.C. § 1441, “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 . . . to the district court of the United States for the district and division embracing the place where such action is pending.”

8. Under 28 U.S.C. § 1332(a), this Court has jurisdiction over all civil actions between citizens of different States where the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

9. This District Court has original jurisdiction over the State Action under 28 U.S.C. § 1332(a), as the case is between citizens of different States and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

### **A. Fraudulent or Improper Joinder of Non-Diverse Defendants**

10. Plaintiffs fraudulently or improperly joined UBS-PR and the Individual Defendants solely to defeat diversity jurisdiction. Thus, said defendants are not “properly joined” under 28 U.S.C. § 1441(b), and their citizenship is disregarded for purposes of removal jurisdiction.

11. As the U.S. Supreme Court stated in Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921), “[the] right of removal cannot be defeated by a fraudulent joinder.” Therefore, “[d]istrict courts ‘will not allow removal jurisdiction to be defeated by the plaintiff’s destruction of complete diversity of citizenship by the collusive or improper joinder of parties or the assignment of claims.’” Renaissance Marketing, Inc. v. Monitronics International, Inc., 606 F.Supp.2d 201 (D.P.R. 2009) (quoting Pastrana v. Solstar, 46 F. Supp.2d 101, 103 (D.P.R.1999)). “A party fraudulently joined to defeat removal need not join in a removal petition, and is disregarded in determining diversity of citizenship.” Polyplastics, Inc. v. Transconex Inc., 713 F.2d 875, 877 (1st Cir.1983).

12. “The First Circuit has held that ‘a finding of fraudulent joinder bears an implicit finding that the plaintiff has failed to state a cause of action against the fraudulently joined defendant.’” Renaissance Marketing, 606 F.Supp.2d at 208 (quoting Polyplastics, 713 F.2d at 877). Thus, in order to prove a fraudulent joinder, the movant must show that: (1) there was actual fraud in the pleading of jurisdictional facts or (2) that the plaintiff is unable to establish a cause of action against the non-diverse party in state court. Gasch v. Hartford Accident and Indem. Co., 491 F.3d 278, 281 (5th Cir. 2007). “When defendants rely on the second prong of this test, the Court must determine if there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.” Id. at 281. “While some courts in this district have suggested that a defendant alleging fraudulent joinder bears a particularly heavy burden, it seems simplest to treat the inquiry as a modified version of a motion to dismiss, asking whether the state court complaint states a plausible claim under Rule 8(a)(2).” Alpha Biomed. & Diagnostic v. Philips Medical Sys., 828 F.Supp.2d 425, 433 (D.P.R. 2011).

13. Here, the only proper defendant is UBS Bank. See Larroquette v. Cardinal Health 200, Inc., 466 F.3d 373, 376 (5th Cir.2006) (“we ordinarily conduct a

Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether, under state law, the complaint states a claim against the in-state defendant"). The causes of action against the non-diverse defendants (and UBS-Del) fail to state a plausible claim under Puerto Rico law.

**1. The Cause of Action to Compel UBS Bank to Arbitrate**

14. Plaintiffs' first cause of action essentially seeks an order to compel UBS Bank to arbitrate before FINRA all claims it may have against Plaintiffs for collection of monies due under loan agreements between UBS Bank and Plaintiffs. See Complaint ¶¶ 43-47. Although Plaintiffs mention UBS-Del and UBS-PR in their allegations under this cause of action, the relief requested clearly is solely against UBS Bank. The Complaint itself alleges that only UBS Bank is sending collection letters to Plaintiffs advising them of potential judicial claims in the courts of Utah pursuant to the forum selection clause in the loan agreements signed by Plaintiffs. See id. ¶¶ 44. UBS-Del, UBS-PR and the Individual Defendants are not parties to the loan agreements signed by Plaintiffs, have not sent any such letters to Plaintiffs and have not alleged that claims against them must be litigated in Utah.

15. Further, while UBS Bank is not (and, as a bank, cannot be) a member of FINRA, UBS-Del, UBS-PR and the Individual Defendants are all FINRA members and have not challenged FINRA's jurisdiction to hear purported claims covered by the arbitration clause in the customer account agreements entered with UBS-Del and/or UBS-PR.

16. Thus, it is only as to UBS Bank that Plaintiffs seek an order compelling arbitration before FINRA. All other defendants are improperly joined.

**2. The Cause of Action to Enjoin UBS Bank from Doing Business in Puerto Rico**

17. The second cause of action requests an injunction to enjoin UBS Bank from doing business in Puerto Rico allegedly for not complying with Act No. 55. See Complaint ¶¶ 48-54. Act No. 55 imposes on foreign banking institutions

certain requirements for doing business in Puerto Rico. This claim is directed only against UBS Bank. Id., ¶¶ 51-54.

**3. The Cause of Action to Enjoin UBS-Del, UBS-PR and the Individual Defendants from Acting as Financial Intermediaries**

18. The third cause of action does not include UBS Bank. Rather, it seeks an injunction to enjoin the other defendants – UBS-Del, UBS-PR and the Individual Defendants – from acting as financial intermediaries in alleged violation of Act No. 214. See Complaint ¶¶ 55-59. This claim is based entirely on the premise that Act No. 214 applies to said defendants. For at least three reasons, it does not. Because this purported claim fails to establish a cause of action against the non-diverse defendants, it should be disregarded for purposes of determining diversity jurisdiction. See Gasch, 491 F.3d at 281.

19. First, UBS-Del, UBS-PR and the Individual Defendants are duly registered with the Puerto Rico Office of the Commissioner of Financial Institutions ("OCFI") under the Puerto Rico Uniform Securities Act, 10 P.R. Laws Ann. § 851 et seq., as broker-dealers (in the case of UBS-Del and UBS-PR) or agents (in the case of the individuals). Art. 3(b) of Act No. 214 expressly excludes agents, brokers-dealers, investment and security advisors or consultants covered by the Puerto Rico Uniform Securities Act ("Registered Securities Persons").

20. The exclusion of Registered Securities Persons from the application of Act No. 214 was recognized in Piovanetti v. Touma, 178 D.P.R. 745, 764-765 (2010). In that case, the Puerto Rico Supreme Court stated:

The professionals that comprise the first group—the agents, brokers-dealers, consultants or investment and securities advisors, who are covered by the preceding statutes—are exempted from complying with the provisions of Act No. 214, supra. The foregoing finds support in the fact that the duties of these professionals are similar to those of financial intermediaries, and are subject to state regulation through the securities and financing companies laws. Thus, we believe that the clear legislative purpose was for those professionals—who are covered by the Uniform Securities

and Financial Company Law-to be totally exempt from the application of Act. No. 214, supra.

Id. (translation ours).

21. Shortly after Piovanetti, Act No. 248 of Dec. 330, 2010 amended Act No. 214. In pertinent part, the exclusion of Registered Securities Persons was moved from the definition of "financial intermediary" in Article 2(j) to Article 3(b), which contained a list of other entities, such as banks and other financial institutions, also excluded from the application of Act No. 214. The relevant provision in Article 3(b), as amended by Act 248-2010, reads as follows:

Exclusions- This law shall not apply to any person who acts in his/her capacity as owner, partner, director, officer, agent or employee of any business authorized by law such as: banks, savings and loans associations and banks, financing companies, finance companies, mortgage companies, and other similar entities whose principal business activity is to provide loans or financing, and who are duly licensed for such endeavor.

It will also not apply to any person who as owner, partner, director, officer, agent or employee engages in any business activity where providing loans or financing to clients is inherent, incidental or necessary to the business, such as a business for the sale or lease of goods and services, **agents, brokers-dealers, consultants or securities and investment advisors covered by Act. No. 80-1963, as amended, and Act No. 6-1954, as amended, known respectively as "Puerto Rico Uniform Securities Act" and "Puerto Rico Investment Company Act,"** nor to any lawyer, accountant, economist, engineer or teacher who provides these services incidentally in the course of the exercise of his/her profession.

(Emphasis added; translation ours).

22. Thus, Act No. 214 excludes Registered Securities Persons from its requirements.

23. This exclusion is recognized by OCFI. In fact, the certificates submitted by Plaintiffs as Exhibits C and D to the Complaint state that brokers, investment advisors and others who are covered by the Puerto Rico Uniform

Securities Act and the Puerto Rico Investment Company Act need not register as financial intermediaries. The OCFI inserted the following footnote in said certificates:

Art. 3(b) of Law No. 214 enacted on October 14, 1995, as amended, makes said law inapplicable to the agents, brokers-dealers, investment and security advisors or consultants covered by Law No. 60 enacted on June 18, 1963, as amended, and Law No. 6 enacted on October 19, 1954, as amended, respectively known as the "Puerto Rico Uniform Securities Act" and the "Puerto Rico Investment Company Act".

24. Therefore, Plaintiffs have no claim under Act No. 214 against UBS-PR, UBS-Del and the Individual Defendants.

25. The second reason why Act No. 214 does not apply here is that Plaintiffs have not alleged, and indeed cannot allege, that UBS-PR, UBS-Del or the Individual Defendants required or demanded a service charge or commission from Plaintiffs for procuring a loan from UBS Bank on their behalf. Said requirement is a necessary element of a violation of Act No. 214. See Act No. 214, Art. 2(a).

26. The third reason is that Act No. 214 does not contain a private right of action to enforce licensing requirements or for other relief. Rather, the statute indicates that only OCFI may enforce its licensing provisions. See id., Art. 13. Plaintiffs lack standing to seek the requested injunctive relief under Act No. 214.

#### **4. The Cause of Action for Document Retention Order**

27. The fourth cause of action seeks to enjoin defendants from "destroying or failing to preserve evidence related to the transactions hereby described." See Complaint ¶¶ 60-61. This is not a legally valid cause of action. This is simply a superfluous recitation of the standard that governs preservation of evidence pending litigation. Plaintiffs do not need an injunction to require defendant to preserve evidence because (1) no allegation of spoliation is made and cannot be seriously made in the Complaint, and (2) the duty to preserve exists regardless of court order. See Pérez-García v. Puerto Rico Ports Authority, 871 F. Supp. 2d 66, 69 (D.P.R. 2012).



28. In short, the Complaint fails to state any claim against UBS-Del, UBS-PR or the Individual Defendants. Therefore, Plaintiffs improperly joined non-diverse defendants in an attempt to preclude this Court from assuming removal jurisdiction.

**B. Complete Diversity**

29. Based on the above, it is clear that there is complete diversity for purposes of removal jurisdiction under 28 U.S.C. § 1441(b). Plaintiffs and the only properly joined defendant, UBS Bank, are citizens of different States under 28 U.S.C. § 1332(a). Plaintiffs are all citizens of Puerto Rico and UBS Bank is a federally regulated, Utah industrial bank with its principal place of business in Utah.

30. Plaintiffs also include fictitiously named defendants, John Doe and Richard Roe. See Complaint ¶ 9. Pursuant to 28 U.S.C. § 1441(b)(1), the citizenship of fictitious defendants is disregarded for purposes of removal. See Universal Commun. Sys. v. Lycos, Inc., 478 F. 3d 413, 426 n.10 (1st Cir. 2007).

**C. Amount in Controversy**

31. The amount in controversy requirement of 28 U.S.C. § 1332 is also satisfied. Under 28 U.S.C. § 1332(a), the amount in controversy in a case where federal jurisdiction is based on diversity of citizenship must exceed \$75,000, exclusive of interest and costs. For injunctions and declaratory relief, the jurisdictional amount “is measured by the value of the object of the litigation.” Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 347 (1977). The amount in controversy is met if either the plaintiff’s harms or the defendant’s costs of compliance will exceed \$75,000. E. Chemerinsky, Federal Jurisdiction, §5.3 at 307 (4th ed. 2003).

32. Here, Plaintiffs allege that the amount in controversy totals \$66,764,841.14. See Complaint, Exhibit A. In addition, UBS Bank’s costs of compliance will exceed \$75,000.

### III. FEDERAL QUESTION JURISDICTION

33. As noted above, under 28 U.S.C. § 1441, “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 . . . to the district court of the United States for the district and division embracing the place where such action is pending.” Under 28 U.S.C. § 1331, this Court has jurisdiction over all actions arising under the Constitution, the laws or treaties of the United States.

34. This Court has original jurisdiction over the State Action, as it involves a federal question.

35. Through the first cause of action, Plaintiffs seek an order to compel UBS Bank to arbitrate certain claims. The Federal Arbitration Act (the “FAA”) provides for petitions to compel arbitration, 9 U.S.C. § 4, if the arbitration agreement is contained in a contract that involves interstate commerce, *id.* § 1-2; see also *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (the FAA “makes contracts to arbitrate ‘valid, irrevocable, and enforceable,’ so long as their subject involves ‘commerce’”). While UBS Bank disputes the arbitrability of Plaintiffs’ claims (as there is no arbitration agreement between Plaintiffs and UBS Bank), there is no question that the loan transactions alleged by Plaintiffs involve interstate commerce. See Complaint ¶ 43.

30. It is well settled that a federal court has jurisdiction over a suit to compel arbitration under the FAA, “when the court would have jurisdiction over a suit on the underlying dispute.” *Moses H. Cone Memorial Hospital*, 460 U.S. at 25 n.32. That is the case of a petition to compel arbitration of claims arising under federal law.<sup>2</sup> See *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009); see, e.g., *Dean Witter Reynolds, Inc. v. Sanchez Espada*, 959 F. Supp. 73, 76 (D.P.R. 1997) (court had

<sup>2</sup> Federal courts also have jurisdiction if the underlying claim involves diverse parties under 28 U.S.C. § 1332. See, e.g., *Northport Health Servs. of Arkansas, LLC v. Rutherford*, 605 F.3d 483 (8th Cir. 2010); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1106 (9th Cir. 2002). See supra Section II.A.1.

jurisdiction because the dispute underlying the petition to compel arbitration involved claims arising under federal securities law); De Jesus-Santos v. Morgan Stanley Dean Witter, Inc., 2006 WL 752997, at \*3 (D.P.R. Mar. 22, 2006) (court had authority to decide petition to compel arbitration because the underlying dispute involved the U.S. Securities and Exchange Act).

31. Here, the Plaintiffs' own allegations show that the underlying claims against UBS Bank involve the purported violation of federal law. Complaint ¶¶ 39-40. Paragraph 39 alleges that UBS Bank violated federal and state laws and regulations, including those promulgated by the Federal Deposit Insurance Corporation, by providing loans without verifying the credit history of the clients and their ability to repay. Paragraph 40 alleges violations of federal and state law for allegedly failing to adequately advise clients of the true nature of the loans they were obtaining, including their personal liability for the repayment of the loans.

32. Therefore, federal questions are present. Since the first cause of action involves a federal question, the remaining claims, which arise from the same nucleus of operative fact as the claim to compel arbitration, can be entertained by this Court under its supplemental jurisdiction. 28 U.S.C. § 1367; United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); see also De Jesus-Santos, 2006 WL 752997, at \*3.

33. In sum, removal also is permissible here based on federal question jurisdiction.

#### **IV. OTHER REQUIREMENTS FOR REMOVAL**

34. Pursuant to 28 U.S.C. § 1441(a), the U.S. District Court for the District of Puerto Rico is the appropriate federal court to which this action should be removed. UBS Bank reserves any and all rights, defenses and arguments regarding the appropriate venue.

35. Pursuant to 28 U.S.C. § 1446(b)(1), this removal is timely because 30 days have not elapsed since "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.”

36. Pursuant to 28 U.S.C. § 1446(b)(2), “all defendants who have been properly joined and served must join in or consent to the removal of the action.” Accordingly, the non-diverse defendants, who have been fraudulently or improperly joined in this case, need not join in or consent to the removal. The undersigned certifies that, without waiving any rights, defenses or arguments, UBS-Del consents to the removal to this Court.

37. Pursuant to 28 U.S.C. §1446(a), UBS Bank submits herewith the following documents:

- a. the Complaint and Exhibits thereto (Exhibit A hereto),
- b. process received (Exhibit B hereto),
- c. State Court order dated October 16, 2013 (Exhibit C hereto),
- d. Motion to Intervene as Amicus Curiae filed by OCIF (Exhibit D hereto), and
- e. Subpoena (Exhibit E hereto).

WHEREFORE, notice is hereby given that, pursuant to 28 U.S.C. §1441 and 1446, the State Action is removed from the Puerto Rico Court of First Instance for the Commonwealth of Puerto Rico, San Juan Superior Part, to the U.S. District Court for the District of Puerto Rico.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that on this date I electronically filed the foregoing document and its exhibits with the Clerk of Court using the CM/ECF system; a copy of this notice and the exhibits hereto are being served by messenger upon: Harold D. Vicente, José A. Andú Fuentès and Francisco Pujol Meneses (counsel of record for Plaintiffs in the Puerto Rico Court of First Instance, San Juan Superior Part) at their addresses of record, and by e-mail at [hvicente@vc-law.net](mailto:hvicente@vc-law.net); [ja@andreu-sagardia.com](mailto:ja@andreu-sagardia.com); and [pujol@donegroup.net](mailto:pujol@donegroup.net); and Francisco J. Villarrubia (counsel for

OCIF), at his address of record and by e-mail at fvillarrubia@lvvlaw.com. Furthermore, copy of this Notice of Removal will be filed as an attachment to an Informative Motion before the Puerto Rico Court of First Instance, San Juan Superior Part, in compliance with 28 U.S.C. § 1446 (d).

In San Juan, Puerto Rico, this 21st day of October, 2013.

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