

UNITED STATES DISTRICT COURT
TEXAS SOUTHERN DISTRICT
BROWNSVILLE DIVISION

HIGHRISE CONCRETE SYSTEMS, * CIVIL ACTION NO.
INC. *
 *
VERSUS * JUDGE:
 *
 *
ACE AMERICAN INSURANCE *
COMPANY AND DONCO *
INSURANCE AGENCY * MAGISTRATE:

NOTICE OF REMOVAL

NOW INTO COURT, through undersigned counsel, comes ACE AMERICAN INSURANCE COMPANY (“ACE”), defendant in the above-captioned matter, who removes this civil action from the 357th Judicial District Court for the County of Cameron, State of Texas, Cause Number 2012-DCL-4670-E; Highrise Concrete Systems, Inc. vs. ACE American Insurance Company and Donco Insurance Agency to the United States District Court for the Southern District of Texas, pursuant to 28 U.S.C. §1441(a), and avers the following in support thereof:

Parties

1.

Pertinent information regarding the parties in this case, their counsel, and the State court are as follows:

- a. Plaintiff, HIGHRISE CONCRETE SYSTEMS, INC. (“Plaintiff” or “Highrise”), is represented by:

Mitchell C. Chaney
Alison W. Colvin
Colvin, Chaney, Saenz & Rodriguez, LLP
1201 E. Van Buren
Brownsville, TX 78522

Telephone: (956) 542-7441
Facsimile: (956) 541-2170

- b. Defendant, ACE AMERICAN INSURANCE COMPANY (“ACE”), is represented by:

Attorne-in-Charge
Jennifer E. Michel
Preis & Roy
24 Greenway Plaza, Suite 2050
Houston, TX 77046
Telephone: (713) 355-6062
Facsimile: (713) 572-9129

and

Local Counsel
Frank E. Pérez
FRANK E. PÉREZ & ASSOCIATES, P.C.
300 Mexico Boulevard
Brownsville, Texas 78520
Telephone: (956) 504-5403
Facsimile: (956) 504-5991

- c. Defendants, COMMERCIAL METALS COMPANY and CMC STEEL FABRICATORS, INC. d/b/a CMC VALLEY STEEL (collectively “CMC”) are represented by:

Craig H. Vittitoe
Adams & Graham, L.L.P.
P.O. Drawer 1429
Harlingen, TX 78551-1429
Telephone: (956) 428-7495
Facsimile: (956) 428-2954

- d. Defendant, DONCO INSURANCE AGENCY, INC. (“Donco”) is represented by:

Jeffery D. Roerig
Roerig, Oliveira & Fisher, L.L.P.
855 W. Price Road, Suite 9
Brownsville, TX 78520
Telephone: (956) 542-5666
Facsimile: (956) 542-0016

- e. The case is being removed from the 357th Judicial District Court for the County of Cameron, State of Texas, which is located at:

357th Judicial District Court, Cameron County
974 East Harrison
Brownsville, TX 78520

Timeliness

2.

Highrise was Originally sued as a defendant in this matter for wrongful death and survival damages resulting from a construction site fatality. Highrise later requested and was granted leave to realign itself as Plaintiff following settlement of all underlying tort claims. On April 10, 2012, Highrise, as Plaintiff, filed an “Original Petition” against ACE in the 357th Judicial District Court for the County of Cameron, State of Texas, Cause Number 2007-08-4213-E, seeking reimbursement of settlement funds paid out on underlying tort claims, based on assertions that it was entitled to additional assured coverage under an ACE liability insurance policy. Highrise brought settlement reimbursement claims against defendants CMC and Donco as well.

3.

ACE was served with notice of Highrise’s lawsuit dated April 18, 2012. Although proceedings in this case have been ongoing in State court since 2007, this suit became removable as to ACE on June 6, 2012 when the non-diverse CMC parties were dismissed with prejudice from Highrise’s lawsuit. 28 U.S.C. §1446(b); *Sullivan v. Conway*, 157 F.3d 1092, 1094 (7th Cir. 1998). ACE received the trial court’s ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF CMC VALLEY STEEL AND COMMERCIAL METALS COMPANY on June 8,

2012. ACE files this Notice of Removal within 30 days after receiving notice of CMC's dismissal with prejudice.

4.

Highrise was realigned as Plaintiff in this matter on February 1, 2012. It did not sue ACE until after such realignment. As Highrise's realignment changed the diversity status of the parties, and as its claims against ACE amounted to a new and separate lawsuit, all removal deadlines relating to its claims against ACE began to run anew. *Graphic Scanning Corp. v. Yampol*, 677 F.Supp. 256, 258-259 (D. Del. 1988); *Young v. Wells Fargo Bank*, 2009 WL 3255163 (E.D. La. 2009). ACE files this Notice of Removal within one year of Highrise's realignment as Plaintiff and the commencement of its lawsuit against ACE. Therefore, the timing of this Notice of Removal complies with the one-year removal deadline set forth in §1446(c).

5.

On June 28, 2012 the State Court granted Defendant's CMC Valley Steels's and Commercial Metal Company's Amended Motion to Sever Claims. Highrises' claims against Defendants ACE American Insurance Company and Donco Insurance Agency were assigned cause number 2012-DCL-4670-E and Highrises' claims against Defendant's CMC Valley Steels's and Commercial Metal Company remained under the Original cause number 2007-08-4213-E.

Basis for Removal

6.

Removal is proper as there is complete diversity between the remaining true parties in interest to Highrise's claims against ACE. 28 U.S.C. §1332(a); *Johnson v. Columbia Props. Anchorage, L.P.*, 437 F.3d 894, 899-900 (9th Cir. 2006).

7.

Highrise is a citizen of Texas. ACE is a citizen of Pennsylvania. Donco is a Texas insurance agency that allegedly procured the ACE liability policy forming the basis of Highrise's claims. Donco was fraudulently joined in this matter solely to defeat diversity jurisdiction. See *Salazar v. AllState Tex. Lloyd's, Inc.*, 455 F.3d 574 (5th Cir. 2006). As there is no reasonable basis for believing Highrise could recover from Donco in State court, Donco qualifies as a nominal and fraudulently joined defendant whose citizenship must not be taken into account for determining federal removal jurisdiction.

8.

Additionally, the amount in controversy exceeds \$75,000, excluding interest and costs. Highrise seeks from ACE reimbursement of settlement funds paid on underlying tort claims totaling an amount in excess of \$75,000. Therefore, federal diversity jurisdiction is supported. 28 U.S.C. §1332(a).

9.

All defendants who are true parties in interest to Highrise's action against ACE and who have been properly served consent to the removal of this case to federal court. *Cook v. Randolph Cnty., Ga.*, 573 F.3d 1143, 1150-1151 (11th Cir. 2009). Consent of Donco is not necessary

because Donco is a nominal and fraudulently-joined defendant, as set forth above. *Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373, 379 (5th Cir. 2006).

10.

Copies of all necessary pleadings, process, orders, and other filings in the State court suit are attached to this notice as required by 28 U.S.C. §1446(a) and Southern District of Texas Local Rule 81.

11.

Venue is proper in this district under 28 U.S.C. §1441(a) as the State court where the suit has been pending is located in this district.

12.

ACE will promptly file a copy of this Notice of Removal with the clerk of the 357th Judicial District Texas State court, where the suit has been pending.

Jury Demand

13.

Upon information and belief, the initial parties to this case have requested trial by jury in the State court lawsuit.

Rule 11

14.

Pursuant to Rule 11 of the Federal Rules of Civil Procedure, undersigned counsel certifies that he/she has read the foregoing Notice of Removal, that to the best of his/her knowledge, information and belief formed after reasonable inquiry, it is well-grounded in fact

and is warranted by existing law or good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose.

WHEREFORE, for the foregoing reasons, ACE respectfully requests the Court to remove Plaintiff Highrise's lawsuit against ACE to the United States District Court for the Southern District of Texas –Brownsville Division, and that after due proceedings are had, enters judgment in favor of ACE and against Highrise, dismissing Highrise's claims with full prejudice.

Respectfully submitted,

PREIS & ROY
(A Professional Law Corporation)

BY: /s/ Jennifer E. Michel
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and

FRANK E. PÉREZ & ASSOCIATES, P.C.

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**COUNSEL FOR DEFENDANT
ACE AMERICAN INSURANCE
COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that on this the **6th day of July 2012**, a true and correct copy of the foregoing instrument has been served upon counsel of record by the following method:

VIA EMAIL

Ms. Jennifer E. Michel
Ms. Marjorie C. Nicol
Preis & Roy, PLC
24 Greenway Plaza, Suite 2050
Houston, Texas 77046

VIA CMRRR #

7011 2970 0001 9166 5179

Mr. Mitchell Chaney
Ms. Alison Colvin
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VIA REGULAR MAIL

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/s/ Frank E. Pérez
Frank E. Pérez & Associates, P.C