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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

EDUARDO G CARRANZA, et al.,  
Plaintiffs,  
v.  
WELLS FARGO BANK, N.A., et al.,  
Defendants.

Case No. [5:16-cv-06464-EJD](#)

**ORDER GRANTING MOTION TO  
REMAND; DENYING WITHOUT  
PREJUDICE MOTION TO DISMISS**

Re: Dkt. Nos. 13, 20

Eduardo G. Carranza and Helen V. Carranza, as trustees for The Tagart Drive Trust (collectively, “Plaintiffs”), filed this action asserting five causes of action under California law for (1) wrongful foreclosure, (2) quiet title, (3) violation of California Business and Professions Code § 17200 *et seq.*, (4) unjust enrichment, and (5) an accounting against Wells Fargo Bank, N.A. (“Wells Fargo”), Clear Recon Corporation (“Clear Recon”), and The Bank of New York Mellon (“BNYM”) as Trustee for the World Savings Remic Trust, Mortgage Pass-Through Certificates, Series 15 (“WSR 15 Trust”) (collectively, “Defendants”). Plaintiffs initially brought this case in Santa Clara Superior Court, and Defendants removed the action to federal court pursuant to 28 U.S.C, sections 1332 and 1441(b). See Notice of Removal at 2, Dkt. No. 1.

Presently before the court are two motions, a Motion to Remand filed by Plaintiffs and a Motion to Dismiss filed by Defendants. See Dkt Nos. 20 (“Remand Mot.”), 13 (“MTD”). Having carefully reviewed the relevant documents, the court finds this matter suitable for decision without oral argument pursuant to Civil Local Rule 7–1(b). Accordingly, the hearing scheduled for May

1 18, 2017 is hereby VACATED and the court will grant Plaintiffs’ Motion to Remand and deny  
2 Defendants’ Motion to Dismiss without prejudice for the reasons explained below.

3 **I. RELEVANT BACKGROUND**

4 On December 26, 2003, Plaintiffs executed a Deed of Trust and Adjustable Rate Note  
5 “Pick-A-Payment Loan” in the amount of \$420,000.00 in order to purchase certain real property  
6 located at 2706 Tagart Drive, San Jose, California (the “Subject Property”). Compl. ¶¶ 1, 7, Dkt.  
7 No. 1-1. The original lender and loan servicer was World Savings Bank, FSB (“World Savings”)  
8 and the trustee was Golden West Savings Association Service Company (“Golden Service Co.”).  
9 Id. ¶ 7. Plaintiffs’ loan was then sold to the WSR 15 Trust on or before April 7, 2004. Id. ¶ 11.  
10 BNYM serves as trustee for the WSR 15 Trust. Id. ¶ 4.

11 Golden West Financial Corporation (“Golden Financial Corp.”) was the parent company of  
12 World Savings and Golden Service Co. Id. ¶ 8. In May 2007, Wachovia Bank (“Wachovia”)  
13 acquired Golden Financial, including its subsidiary World Savings. Id. The “integration process”  
14 was complete by mid- 2008, and Wachovia Mortgage then became the servicer of Plaintiffs’  
15 mortgage loan. Id. ¶¶ 8-9. Shortly thereafter, Wells Fargo acquired Wachovia, and Wells Fargo  
16 Home Mortgage – a division of Wells Fargo – became the servicer of Plaintiffs’ loan. Id. ¶¶ 8, 10.  
17 Plaintiffs allege that their loan “was not among the assets acquired by Wells Fargo in 2008 when  
18 acquisition of Wachovia was completed.” Id. ¶ 13.

19 Clear Recon is a California corporation that provides default services to mortgage  
20 servicers. Id. ¶ 3. On May 25, 2016, “Wells Fargo recorded a Substitution of Trustee purporting  
21 to substitute Clear Recon as the trustee under Plaintiffs’ deed of trust.” Id. ¶ 22. However,  
22 Plaintiffs contend that Wells Fargo was an “invalid beneficiary without the power to substitute a  
23 trustee under Plaintiff’s Deed of Trust,” and as a result, Defendants violated “Section 2934 of the  
24 non-judicial foreclosure statute” in doing so. Id. Moreover, Plaintiffs allege that on May 23,  
25 2016, before having been substituted as trustee, Clear Recon executed a Notice of Default against  
26 the Plaintiffs on behalf of Wells Fargo, “falsely holding itself out as the beneficiary under  
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1 Plaintiff's Deed of Trust." Id. ¶ 23. The Notice of Default was recorded on May 25, 2016. Id.

2 On October 6, 2016, Plaintiff initiated this action in Santa Clara Superior Court, asserting  
3 claims for wrongful foreclosure, quiet title, violation of the California Business & Professions  
4 Code section 17200 *et seq.*, and unjust enrichment against the Defendants. Plaintiffs also seek "an  
5 accounting" in order to determine the amount of reimbursement owed to them, and request that the  
6 court permanently enjoin all Defendants "from initiating and pursuing foreclosure activity against  
7 the Plaintiffs relating to the Subject Property." Id. at 15 ¶¶ 64-66; at 16 ¶ 1. Wells Fargo removed  
8 the case to federal court on November 4, 2016, claiming diversity jurisdiction pursuant to 28  
9 U.S.C. § 1332.

10 Plaintiffs now seek to remand this case to Superior Court, arguing that the parties are not  
11 actually diverse because both Plaintiff and Clear Recon are citizens of California. Remand Mot. at  
12 2-3, ¶ 5. Also before the court is Defendants' Motion to Dismiss pursuant to Federal Rules of  
13 Civil Procedure 12(b)(6) and (7). MTD at 2.

14 **II. LEGAL STANDARD**

15 Removal jurisdiction is a creation of statute. See Libhart v. Santa Monica Dairy Co., 592  
16 F.2d 1062, 1064 (9th Cir. 1979) ("The removal jurisdiction of the federal courts is derived entirely  
17 from the statutory authorization of Congress."). In general, only those state court actions that  
18 could have been originally filed in federal court may be removed. 28 U.S.C. § 1441(a) ("Except  
19 as otherwise expressly provided by Act of Congress, any civil action brought in a State court of  
20 which the district courts of the United States have original jurisdiction, may be removed by the  
21 defendant."); see also Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) ("Only state-court  
22 actions that originally could have been filed in federal court may be removed to federal court by  
23 defendant."). Accordingly, the removal statute provides two basic ways in which a state court  
24 action may be removed to federal court: (1) the case presents a federal question, or (2) the case is  
25 between citizens of different states and the amount in controversy exceeds \$75,000. 28 U.S.C.  
26 §§ 1441(a), (b).

1           On a motion to remand, it is the removing defendant’s burden to establish federal  
2 jurisdiction, and the court must strictly construe removal statutes against removal jurisdiction.  
3 Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (“The ‘strong presumption’ against removal  
4 jurisdiction means that the defendant always has the burden of establishing that removal is  
5 proper.”). “Where doubt regarding the right to removal exists, a case should be remanded to state  
6 court.” Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003).

7           **III. DISCUSSION**

8           Plaintiffs argue that remand is appropriate because both Plaintiffs and Clear Recon are  
9 citizens of California, and therefore this court lacks jurisdiction. These facts are evident from the  
10 face of the Complaint and are undisputed by Defendants in the Notice of Removal. Since  
11 California parties appear on both sides of the action, this case was not presumptively removable.  
12 See Kuntz v. Lamar Corp., 385 F.3d 1177, 1181 (9th Cir. 2004) (“For a case to qualify for federal  
13 jurisdiction under 28 U.S.C. § 1332(a), there must be complete diversity of citizenship between  
14 the parties opposed in interest.”); see also Miller v. Grgurich, 763 F.2d 372, 373 (9th Cir. 1985)  
15 (“When an action is removed on the basis of diversity, the requisite diversity must exist at the time  
16 the action was removed to federal court ... and should generally be determined from the face of the  
17 complaint.”). However, Defendants argue that Clear Recon “is a fraudulently joined, nominal  
18 party...with absolutely no financial interest in the Property and against which no affirmative relief  
19 is being sought.” Notice of Removal at 5. Consequently, Defendants maintain that Clear Recon’s  
20 citizenship must be disregarded in determining whether the court has subject matter jurisdiction  
21 over this action.

22           **A. Nominal Party**

23           “Defendants who are nominal parties with nothing at stake may be disregarded in  
24 determining diversity, despite the propriety of their technical joinder.” Wise v. Suntrust Mortg.,  
25 Inc., No. 11-CV-01360-LHK, 2011 WL 1466153, at \*4 (N.D. Cal. 2011) (quoting Strotek Corp. v.  
26 Air Transp. Ass’n of Am., 300 F.3d 1129, 1133 (9th Cir. 2002)). “A defendant is a nominal party  
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1 where his role is limited to that of a stakeholder.” Hewitt v. Stanton, 798 F.2d 1230, 1233 (9th  
2 Cir. 1986). A nominal defendant is a person or entity that simply “holds the subject matter of the  
3 litigation in a subordinate or possessory capacity as to which there is no dispute.” S.E.C. v.  
4 Colello, 139 F.3d 674, 676 (9th Cir. 1998). “The paradigmatic nominal defendant is ‘a trustee,  
5 agent, or depository ... [that is] joined purely as a means of facilitating collection.” Id. (citing  
6 S.E.C. v. Cherif, 933 F.2d 403 (7th Cir. 1991)). Because the nominal defendant has no legitimate  
7 claim to the disputed property, it is not a real party in interest. Id.

8 Pursuant to California Civil Code § 2924I, a trustee may declare non-monetary status if it  
9 “maintains a reasonable belief that it has been named in the action or proceeding solely in its  
10 capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the  
11 performance of its duties as trustee.” Cal. Civ.Code § 2929I (a). If there is no objection to the  
12 declaration within 15 days of filing, the trustee gains non-monetary status and may be considered  
13 a nominal defendant whose citizenship does not count for diversity jurisdiction purposes. Id.  
14 § 2929I (d); see Jenkins v. Bank of Am., N.A., 2015 WL 331114, at \*6 (C.D. Cal. 2015) (“District  
15 courts have recognized that defendants who file a declaration of non-monetary status to which  
16 plaintiffs do not object are merely nominal parties whose citizenship does not count for diversity  
17 jurisdiction purposes”) (citing Silva v. Wells Fargo Bank NA, 2011 WL 2437514, at \*4 (C.D. Cal.  
18 2011)). However, “a party filing a declaration of non-monetary status does not become a nominal  
19 party until fifteen days have passed without objection by plaintiffs.” Jenkins, 2015 WL 331114 at  
20 \*7. Moreover, “courts refuse to ignore the nominal party’s citizenship for purposes of diversity  
21 jurisdiction when the case is removed to federal court before the fifteen-day objection period has  
22 expired.” Id.

23 Here, Defendants contend that Clear Recon is a nominal party to this action that merely  
24 replaced Golden Service Co. as the trustee for the Deed of Trust. Notice of Removal at 5.  
25 Defendants assert that Clear Recon “has no financial interest in the Property and its only  
26 involvement was with the foreclosure proceedings, which was strictly within its ministerial role as  
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1 the substituted trustee under the Deed of Trust to effectuate a non-judicial foreclosure action.” Id.  
2 However, Plaintiffs respond that Clear Recon never filed a “Declaration of Non–Monetary Status”  
3 prior to removal, and therefore cannot be considered a nominal party by this court. Plaintiffs  
4 further contend that even if Defendants had filed such a declaration in state court, Plaintiffs would  
5 have objected. Remand Mot. at 5. Finally, because section 2924l is a state procedural rule – not  
6 state substantive law – nonmonetary status may not be granted in federal court.

7 Defendants do not address the failure to file a declaration of non-monetary status on behalf  
8 of Clear Recon in their Opposition to the Remand Motion. See Dkt. No. 23. Accordingly, further  
9 discussion of the effect of such a filing is unnecessary, as the court concludes that Defendants  
10 have failed to satisfy their burden to prove Clear Recon’s nominal party status. Moreover, as  
11 discussed more fully in the following section, the allegations in the Complaint are sufficient to  
12 preclude a finding that Clear Recon should be disregarded from the jurisdictional analysis.

13 **B. Fraudulent Joinder**

14 Under the “fraudulent joinder” doctrine, a defendant may remove a civil action that alleges  
15 claims against a non-diverse defendant when the plaintiff has no basis for suing that defendant.  
16 McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987). “If the plaintiff fails to state a  
17 cause of action against a resident defendant, and the failure is obvious according to the settled  
18 rules of the state, the joinder of the resident defendant is fraudulent.” Id.; Ritchey v. Upjohn Drug  
19 Co., 139 F.3d 1313, 1318 (9th Cir. 1998); see also Good v. Prudential Ins. Co. of Am., 5 F. Supp.  
20 2d 804, 807 (N.D. Cal. 1998) (explaining that for the purposes of proving fraudulent joinder, “the  
21 defendant must demonstrate that there is no possibility that the plaintiff will be able to establish a  
22 cause of action in State court against the alleged sham defendant.”). Under such circumstances,  
23 the “fraudulently-joined” defendant is disregarded for jurisdictional purposes. See Kuntz v. Lamar  
24 Corp., 385 F.3d 1177, 1183 (9th Cir. 2004) (holding that “a federal court must disregard nominal  
25 or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.”)  
26 (quoting Navarro Sav. Ass’n v. Lee, 446 U.S. 458, 461 (1980)).

1           However, “a defendant seeking removal based on an alleged fraudulent joinder must do  
2 more than show that the complaint at the time of removal fails to state a claim against the non-  
3 diverse defendant.” Nasrawi v. Buck Consultants, LLC, 776 F.Supp.2d 1166, 1170 (E.D. Cal.  
4 2011). Fraudulent joinder “must be proven by clear and convincing evidence.” Hamilton  
5 Materials, Inc. v. Dow Chem. Corp., 494 F.3d 1203, 1206 (9th Cir. 2007). “[A]ll disputed  
6 questions of fact and all ambiguities in the controlling state law are [to be] resolved in plaintiff’s  
7 favor.” Calero v. Unisys Corp., 271 F.Supp.2d 1172, 1176 (N.D. Cal. 2003). If after doing so  
8 “there is a non-fanciful possibility that plaintiff can state a claim under [state] law against the non-  
9 diverse defendants the court must remand.” Macey v. Allstate Prop. & Cas. Ins. Co., 220 F. Supp.  
10 2d 1116, 1118 (N.D. Cal. 2002). “Remand must be granted unless the defendant shows that the  
11 plaintiff ‘would not be afforded leave to amend his complaint to cure [the] purported deficiency.’”  
12 Id. (quoting Burris v. AT & T Wireless, Inc., 2006 WL 2038040 (N.D. Cal. Jul. 19, 2006)).

13           Here, Wells Fargo argues that Clear Recon is a “sham” defendant because all of the actions  
14 it allegedly undertook as a with respect to the Subject Property were “related to the foreclosure  
15 filings and trustee’s sale,” and are therefore privileged. Def. Opp. to Remand Mot. (“Opp.”) at 1.  
16 A trustee may be entitled to such a privilege to the extent its conduct arises from California’s non-  
17 judicial foreclosure statutes. See Cal. Code Civ. Proc. 2924(b) (“[T]he trustee shall incur no  
18 liability for any good faith error resulting from reliance on information provided in good faith by  
19 the beneficiary regarding the nature and the amount of the default under the secured obligation,  
20 deed of trust, or mortgage.”); see also Kachlon v. Markowitz, 168 Cal. App. 4th 316, 333 (2008)  
21 (“[S]ection 2924 deems the statutorily required mailing, publication, and delivery of notices in  
22 nonjudicial foreclosure, and the performance of statutory nonjudicial foreclosure procedures, to be  
23 privileged communications under the qualified common interest privilege of section 47,  
24 subdivision (c)(1).”).

25           However, the privilege attributable to foreclosure trustees is qualified, protecting only  
26 those “communications made ‘without malice, to a person interested therein, ... by one who is also  
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1 interested....’ ” Kachlon, 168 Cal. App. 4th at 336 (citing Cal. Civ.Code § 47(c)(1)). In this  
2 context, malice may be established by “a showing that the defendant lacked reasonable grounds  
3 for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff’s  
4 rights.” Id. (quoting Sanborn v. Chronicle Pub. Co., 18 Cal.3d 406, 413 (1976)).

5 Because the burden shifts to the removing party on a motion to remand, Defendants must  
6 show by clear and convincing evidence that Plaintiffs have not, and cannot, allege any claim  
7 against Clear Recon. Defendants have not done so. Plaintiff asserts two causes of action against  
8 Clear Recon specifically, including claim one for wrongful foreclosure, and claim three for  
9 violation of the California Business & Professions Code section 17200 *et seq.* Taken collectively,  
10 Plaintiffs’ factual allegations suggest that Clear Recon may have been an active participant in the  
11 allegedly fraudulent foreclosure proceedings against the Subject Property. For example, with  
12 respect to the wrongful foreclosure claim, Plaintiffs allege that “Defendants BNYM and Wells  
13 Fargo caused Clear Recon, their agent, to breach its duty of care to Plaintiffs by directing Clear  
14 Recon to initiate foreclosure proceedings against Plaintiffs based on the fraudulent and void  
15 foreclosure documents filed by Clear Recon at the behest of its principal ... that also violate the  
16 requirements of California’s non-judicial foreclosure statute.” Compl. ¶ 38. Plaintiffs argue that  
17 “among the most egregious violations of the non-judicial foreclosure statute ... was the Notice of  
18 Default,” which Clear Recon executed on behalf of Wells Fargo despite the fact that Wells Fargo  
19 was not a valid beneficiary. Id. ¶ 39; Remand Mot. at 7. Consequently, Plaintiffs contend that by  
20 “initiating and pursuing illegal and fraudulent foreclosure” Defendants, including Clear Recon,  
21 “acted with willful oppressiveness and malice toward the Plaintiffs.” Id. ¶ 40.

22 In addition to the wrongful foreclosure claim, Plaintiffs allege that Defendants, including  
23 Clear Recon, engaged and are engaging in deceptive business practiced in violation of the  
24 California Business & Professions Code, including: (1) “Executing documents without the legal  
25 authority to do so (Wells Fargo and Clear Recon);” (2) “Acting as beneficiaries and trustees  
26 without the legal authority to do so (Wells Fargo and BNYM (purported beneficiaries) and Clear  
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1 Recon (trustee);” (3) Failing to comply with California Civil Code §§ 1708 and 1709 (Wells Fargo  
2 and Clear Recon);” and (4) “Violating provisions of the non-judicial foreclosure statute set forth at  
3 California Civil Code §§ 2924(a)(1), 2924(a)(1)(C), 2924(a)(6) and 2934a (Wells Fargo and Clear  
4 Recon).” Id. ¶ 52

5 Based on the foregoing, the court concludes that there is “a non-fanciful possibility” that  
6 Plaintiffs could allege Clear Recon acted with malice or reckless disregard for their rights  
7 sufficient to overcome any qualified privilege, and it would therefore be improper to disregard  
8 Clear Recon’s citizenship here. See Macey, 220 F. Supp. 2d at 1118. Because Clear Recon is a  
9 non-diverse defendant, the court must remand this action for lack of subject matter jurisdiction.  
10 See id.

11 **C. Plaintiff’s Request for Attorneys’ Fees**

12 Finally, Plaintiff also requests that the court award attorneys’ fees and costs associated  
13 with the preparation of the Motion to Remand pursuant to 28 U.S.C. section 1447(c) on the  
14 grounds that Defendants’ removal of the action to this court was “clearly improper.” Remand  
15 Mot. at 9.

16 The standard for awarding attorneys’ fees on a motion to remand turns on the  
17 “reasonableness of the removal.” Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005).  
18 The Supreme Court has instructed that attorneys’ fees on a remand motion should be awarded only  
19 in “unusual circumstances.” Id. “[A]bsent unusual circumstances, courts may award attorney’s  
20 fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for  
21 seeking removal.” Id.

22 The court does not find that an award of attorneys’ fees would be appropriate here.  
23 Notwithstanding the court’s decision to remand the case, Wells Fargo’s basis for removal was  
24 grounded in a rational legal theory and was not objectively unreasonable under the circumstances  
25 presented by the case. There is also no evidence of “unusual circumstances” otherwise warranting  
26 such an award. Plaintiffs’ request for attorneys’ fees and costs is therefore DENIED.

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**IV. ORDER**

Based on the foregoing, Plaintiffs' Motion to Remand (Dkt. No. 20) is GRANTED, and Defendants' Motion to Dismiss (Dkt. No. 13) is DENIED WITHOUT PREJUDICE. Plaintiffs' request for attorneys' fees in connection with the remand motion is DENIED.

The Clerk shall remand this action to Superior Court of California for the County of Santa Clara and close this file.

**IT IS SO ORDERED.**

Dated: May 12, 2017

  
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EDWARD J. DAVILA  
United States District Judge