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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Elva E. Damian,

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No. CV-13-0379-TUC-RCC (BGM)

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Plaintiff,

)

11

vs.

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**REPORT AND RECOMMENDATION**

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CitiMortgage, Inc. and its successors  
and assigns; CitiBank N.A., and its  
successors and assigns; Federal National  
Home Mortgage Association (Fannie  
Mae); CSW Financial LLC DBA Titan  
Wholesale, a Nevada Limited Liability  
Company; JOHN DOES 1-10; JANE  
ROES 1-10; ABC CORPORATIONS  
1-10; XYZ LIMITED LIABILITY  
COMPANIES 1-10; and 123  
PARTNERSHIPS 1-10,

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Defendants.

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Pending before this Court is Plaintiff's (Corrected) Motion for Joinder Under Rule 21, F.R.C.P. etc. (or Alternatively Motion to Amend Under Rule 15) and Motion to Remand Case to State Court (Pima Superior Court No. C20130048) (Doc. 10) (hereinafter Motion for Joinder). Plaintiff seeks to join Ms. Stephanie Abcede, the Notary who notarized foreclosure documents authorizing the foreclosure sale of Plaintiff's property, as a Defendant in this matter. Such joinder would destroy diversity jurisdiction of this Court. Pursuant to the Rules of Practice in this Court, the matter was assigned to Magistrate Judge Macdonald for a report and recommendation. The Magistrate recommends the District Court, after its independent

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1 review of the record, grant Plaintiff’s motion for joinder and remand the matter to the state  
2 court.

3 **I. Procedural Background**

4 Plaintiff’s original complaint was filed in Pima County Superior Court on January 4,  
5 2013. *See* Compl. (Doc. 1-2). On May 24, 2013, Defendants properly removed the case to  
6 this Court pursuant to 28 U.S.C. §§ 1441 and 1332. On June 24, 2013, Plaintiff filed a  
7 motion and subsequent corrected Motion for Joinder Under Rule 21, F.R.C.P. etc. (or  
8 Alternatively Motion to Amend Under Rule 15) and Motion to Remand Case to State Court  
9 (Pima Superior Court No. C20130048) (Docs. 9 & 10). Defendants have opposed Plaintiff’s  
10 motion asserting Plaintiff’s failure to comply with Rule 15, Federal Rules of Civil Procedure,  
11 and that Plaintiff cannot meet her burden pursuant to Rule 19(a), Fed. R. Civ. P., regarding  
12 joinder. Plaintiff has replied, directly addressing the standard set forth under Rule 19(a).

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14 **II. Joinder of Stephanie Abcede, Former Notary Public<sup>1</sup>**

15 Section 1447(e), 28 U.S.C., provides: “If after removal the plaintiff seeks to join  
16 additional defendants whose joinder would destroy subject matter jurisdiction, the court may  
17 deny joinder, or permit joinder and remand the action to the State court.” “[T]he decision  
18 regarding joinder of a diversity destroying defendant is left to the discretion of the district  
19 court[.]” *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998). “In deciding  
20 whether to deny joinder of a diversity-destroying party, courts . . . consider[] a variety of  
21 factors including: (1) whether the person sought to be joined is needed for just adjudication  
22 and would be a necessary party under Rule 19(a); (2) the plaintiff’s motive for seeking  
23 joinder and whether plaintiff is seeking to add a defendant solely to destroy diversity of  
24 citizenship; (3) the delay in seeking to add the new defendant; (4) whether, if joinder is

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27 <sup>1</sup>The Court recognizes Plaintiff’s failure to comply with the mandates of LRCiv. 15.1  
28 regarding amended pleadings, and the burden that this places on Defendants and this Court. In its  
discretion, however, the Court will consider Plaintiff’s motion for joinder in order to assess its  
jurisdiction over this cause of action.

1 denied, the statute of limitations would bar an action against the new defendant in state court;  
2 (5) the apparent validity of the claim; and (6) any prejudice to the plaintiff if the amendment  
3 is denied.” *Estate of Harmon ex rel. Patrick v. Avalon Health Care, Inc.*, 2012 WL 6674425,  
4 \*3 (D. Ariz.) (citing *Clinco v. Roberts*, 41 F.Supp.2d 1080, 1082 (C.D.Cal. 2011); *Ansley v.*  
5 *Metro Life Ins. Co.*, 215 F.R.D. 575, 579-80 (D.Ariz. 2003)).

6 **A. Rule 19(a)**

7 A party must be joined if “in that person’s absence, the court cannot accord complete  
8 relief among existing parties” or when a parties’ absence will impede its ability to protect its  
9 interest or subject a party to a substantial risk of incurring inconsistent obligations. Fed. R.  
10 Civ. P. 19(a). A party’s “status as a ‘necessary’ party is not judged by any prescribed  
11 formula, but instead ‘can only be determined in the context of particular litigation.’” *CP*  
12 *Nat’l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911 (9th Cir. 1991) (quoting  
13 *Provident Tradesmen Bank and Trust Co. v. Patterson*, 390 U.S. 102, 118, 88 S.Ct. 733, 742,  
14 19 L.Ed.2d 936 (1968)). “Necessary parties have been described generally, however, as  
15 those ‘[p]ersons having an interest in the controversy, and who ought to be made parties, in  
16 order that the court may act on that rule which requires it to decide on, and finally determine  
17 the entire controversy, and do complete justice, by adjusting all the rights involved in it.’”  
18 *Id.* at 912 (quoting *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139, 15 L.Ed. 158 (1855))  
19 (alterations in original).

20 Defendants argue that Ms. Abcede is not a necessary party to this litigation. Defs.’  
21 Resp. to Pl.’s Mot. for Joinder (Doc. 11) at 4. Defendants rely on district court cases in  
22 which employee-agents of the original defendant were found not to be necessary parties to  
23 the litigation. *Id.* at 4-5. Plaintiff asserts that Ms. Abcede is a necessary party, because as  
24 a notary she can be held personally liable for any false notarization. Pl.’s Reply re: Mot. for  
25 Joinder (Doc. 12) at 4. Plaintiff further argues that “[a]llegations that the Deed of Trust  
26 statutes were violated, including an allegation that a notary falsely certified a signature, are  
27 sufficient to state a claim for relief.” *Id.*

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1           The Arizona Supreme Court recognizes that “[n]otaries public must conform their  
2 conduct to a defined statutory duty of care.” *City Consumer Services, Inc. v. Metcalf*, 161  
3 Ariz. 1, 5, 775 P.2d 1065, 1069 (Ariz. 1989) (upholding jury verdict finding notary public  
4 negligent in executing certificate of acknowledgment). The Court finds that Plaintiff’s  
5 allegations against Ms. Abcede are separate and distinct from those against Defendants, and  
6 that such claims arise from the same transaction or occurrence. As such, this factor weighs  
7 in favor of joinder.

8           ***B. Plaintiff’s Motive***

9           “[A] trial court should look with particular care at [Plaintiff’s] motive” in seeking to  
10 add a diversity-destroying defendant. *Desert Empire Bank v. Insurance Co. of North*  
11 *America*, 623 F.2d 1371, 1376 (9th Cir. 1980) (upholding a district court’s decision to deny  
12 a diversity destroying amendment post removal). Defendants argue that Plaintiff seeking to  
13 “simply add Ms. Abcede’s name to the existing complaint . . . weighs in favor of finding an  
14 improper motive.” Defs.’ Resp. to Pl.’s Mot. for Joinder (Doc. 11) at 5. Defendants also rely  
15 on the fact that the motion for joinder is coupled with a motion for remand, as a clear  
16 indication of Plaintiff’s desire to have this matter heard in the state court. *Id.* Plaintiff  
17 counters that she learned of Ms. Abcede’s license suspension “just hours before the  
18 Complaint was filed[,]” and did not have a “sufficient opportunity to fully investigate the  
19 actions of all potential Defendants[.]” Pl.’s Reply re: Mot. for Joinder (Doc. 12) at 5.

20           Defendants have not provided any convincing evidence to refute Plaintiff’s claims.  
21 Because it is unclear that Plaintiff’s desire to add Ms. Abcede as a defendant is solely to  
22 destroy diversity jurisdiction, this factor weighs in favor of joinder.

23           ***C. Delay***

24           Plaintiff alleges that she discovered Ms. Abcede’s role in this case immediately prior  
25 to filing her Complaint. Pl.’s Reply re: Mot. for Joinder (Doc. 12) at 5. Defendants argue  
26 that the six months between Plaintiff’s filing of her Complaint and seeking to join Ms.  
27 Abcede indicates that her motives are suspect. Defs.’ Resp. to Pl.’s Mot. for Joinder (Doc.  
28 11) at 6. Plaintiff counters that there were issues with service, and that Defendants

1 immediately removed the matter from state court. Pl.'s Reply re: Mot. for Joinder (Doc. 12)  
2 at 8.

3 The timing of Plaintiff's request for joinder may be questionable in light of the delay  
4 between filing her Complaint and seeking the addition of Ms. Abcede. At this point in the  
5 litigation, however, very little has occurred. Defendants filed a motion to dismiss in the state  
6 court action prior to removal; however, this motion is not fully briefed, nor pending before  
7 this Court subject to a decision regarding the Court's jurisdiction. Additionally, a scheduling  
8 conference pursuant to Rule 16, Federal Rules of Civil Procedure, has yet to take place and  
9 no discovery has occurred. Accordingly, the Court finds that Plaintiff's request is not unduly  
10 delayed, thereby supporting joinder.

11 ***D. Statute of Limitations***

12 In Arizona, the statute of limitations for negligence or other tort claims is two years.  
13 A.R.S. § 12-542. Defendants assert that because Plaintiff's claims are barred by the statute  
14 of limitation, joinder should be denied. If Defendants' assertions are correct, however, the  
15 denial of joinder would bar Plaintiff from filing a separate state court action. As such, this  
16 factor supports joinder.

17 ***E. Strength of Claim***

18 Defendants argue that Plaintiff has failed to state a valid claim against Ms. Abcede,  
19 in particular that Arizona does not recognize a tort of wrongful foreclosure. Defs.' Resp. to  
20 Pl.'s Mot. for Joinder (Doc. 11) at 7; *see Jada v. Wells Fargo Bank, N.A.*, 2011 WL 3267330  
21 (D.Ariz.); *Woods v. BAC Home Loans Service, LP*, 2011 WL 2746310 (D.Ariz.). Plaintiff  
22 argues that other courts in this district, however, have recognized that Arizona courts have  
23 neither recognized nor precluded the tort of wrongful foreclosure and considered the same.  
24 Pl.'s Reply re Mot. for Joinder (Doc. 12) at 10; *See Schrock v. Federal Nat'l Mortgage*  
25 *Assoc.*, 2011 WL 3348227; *Herring v. Countrywide Home Loans, Inc.*, 2007 WL 2051394  
26 (D.Ariz.). Plaintiff further argues that Ms. Abcede's liability extends beyond the tort of  
27 wrongful foreclosure.

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1 The Court finds that Arizona courts have not squarely rejected the tort of wrongful  
2 foreclosure. Additionally, there may be tort-based liability arising from Ms. Abcede's duty  
3 as a Notary Public. Therefore, this factor weighs in favor of allowing joinder.

4 ***F. Prejudice to Plaintiff***

5 Defendant argues that Plaintiff would not suffer any prejudice if joinder were denied.  
6 Defendant asserts that if Plaintiff's claims are valid, she will prevail irrespective of whether  
7 Ms. Abcede is joined, that it would be more difficult to collect a judgment against a  
8 suspended Notary Public than the corporate defendants currently before the Court, that Ms.  
9 Abcede's testimony would be helpful to Plaintiff's claims, and that it is unlikely that Plaintiff  
10 would bring a separate claim against Ms. Abcede thereby mitigating any potential  
11 "downside" to having to litigate in two forums. Defs.' Resp. to Pl.'s Mot. for Joinder (Doc.  
12 11) at 8-9. Plaintiff argues only that there is a separate pool of bond money "for the purpose  
13 of remedying injuries caused by Notaries who abuse their authority." Pl.'s Reply re Mot. for  
14 Joinder (Doc. 12) at 10-11.

15 The Court finds that Plaintiff would be prejudiced by denying joinder. It is unlikely  
16 Plaintiff would bring a separate cause of action against Ms. Abcede; however, in light of any  
17 concerns regarding the statute of limitations and Ms. Abcede's separate liability this factor  
18 favors joinder.

19 ***G. Conclusion***

20 Upon consideration of the factors regarding joinder of a diversity-destroying  
21 defendant, the Court finds that these weigh in favor of joining, Ms. Abcede. Furthermore,  
22 "[i]f at any time before final judgment it appears that the district court lacks subject matter  
23 jurisdiction, the case shall be remanded." 28 U.S.C. § 1447. Because joinder of Ms. Abcede  
24 destroys the diversity jurisdiction of this Court, the case should be remanded to the Superior  
25 Court for the State of Arizona, Pima County.

1 **IV. RECOMMENDATION**

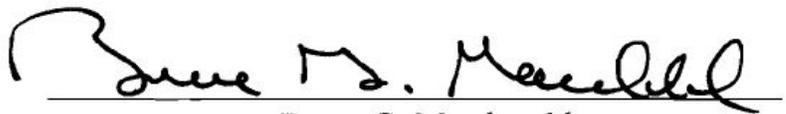
2 For the reasons delineated above, the Magistrate Judge recommends that the District  
3 Judge enter an order:

- 4 (1) GRANTING Plaintiff's (Corrected) Motion for Joinder Under Rule 21,  
5 F.R.C.P. etc. (or Alternatively Motion to Amend Under Rule 15) and Motion  
6 to Remand Case to State Court (Pima Superior Court No. C20130048) (Doc.  
7 10); and  
8 (2) REMANDING this case to Pima County Superior Court (Cause #  
9 C20130048).

10 Pursuant to 28 U.S.C. § 636(b) and Rule 72(b)(2) of the Federal Rules of Civil  
11 Procedure, any party may serve and file written objections within fourteen (14) days after  
12 being served with a copy of this Report and Recommendation. A party may respond to  
13 another party's objections within fourteen (14) days after being served with a copy. Fed. R.  
14 Civ. P. 72(b)(2). No replies shall be filed unless leave is granted from the District Court. If  
15 objections are filed, the parties should use the following case number: **CV-13-379-TUC-**  
16 **RCC.**

17 Failure to file timely objections to any factual or legal determination of the Magistrate  
18 Judge may result in waiver of the right of review.

19 DATED this 19th day of February, 2014.

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22 Bruce G. Macdonald  
23 United States Magistrate Judge  
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