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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Elva E. Damian,  
  
Plaintiff,  
  
v.  
  
CitiMortgage Incorporated, et al.,  
  
Defendants.

No. CV-13-00379-TUC-RCC (BGM)

**ORDER**

Before the Court is the February 19, 2014, Report and Recommendation (R&R) from Magistrate Judge Bruce G. Macdonald (Doc. 13) recommending that this Court grant Plaintiffs’ (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).

Defendants filed their objections to the R&R (Doc. 14) on March 10, 2014, and requested oral argument. Plaintiff filed a response to the Defendants’ objections on March 27, 2014 (Doc. 15). The Court finds this matter suitable for decision without oral argument, and declines Defendants’ request

For the following reasons, this Court will adopt the Magistrate Judge’s findings in the R&R.

**I. BACKGROUND**

The factual and procedural background in this case is uncomplicated and is sufficiently detailed in Magistrate Judge Macdonald’s R&R (Doc. 13). This Court fully

1 incorporates by reference the “Procedural Background” section of the R&R into this  
2 Order.

### 3 **II. LEGAL STANDARD**

4 The duties of the district court in connection with a R&R are set forth in Rule 72  
5 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). The district court  
6 may “accept, reject, or modify the recommended disposition; receive further evidence; or  
7 return the matter to the magistrate judge with instructions.” Fed.R.Civ.P. 72(b)(3); 28  
8 U.S.C. § 636(b)(1). The Court will not disturb a Magistrate Judge’s Order unless his  
9 factual findings are clearly erroneous or his legal conclusions are contrary to law. 28  
10 U.S.C. § 636(b)(1)(A). “[T]he magistrate judge’s decision ... is entitled to great deference  
11 by the district court.” *United States v. Abonce-Barrera*, 257 F.3d 959, 969 (9th Cir.  
12 2001). Where the parties object to a R&R, “[a] judge of the [district] court shall make a  
13 de novo determination of those portions of the [R&R] to which objection is made.” 28  
14 U.S.C. § 636(b)(1); see *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985).

### 15 **III. DISCUSSION**

16 Magistrate Judge Macdonald recommended this Court grant Plaintiff’s Motion for  
17 Joinder, and, because joinder would destroy the Court’s diversity jurisdiction, Judge  
18 Macdonald further recommended the Court remand this matter to the state court.

19 When a plaintiff seeks to join a non-diverse defendant to an action removed on the  
20 basis of diversity jurisdiction, joinder is governed by 28 U.S.C. § 1447(e). That section  
21 provides: “If after removal the plaintiff seeks to join additional defendants whose joinder  
22 would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder  
23 and remand the action to the state court.” 28 U.S.C. § 1447(e). As the Ninth Circuit has  
24 observed, the decision to permit joinder of a defendant that destroys diversity jurisdiction  
25 is left to the sound discretion of the Court. *Newcombe v. Adolf Coors Co.*, 157 F.3d 686,  
26 691 (9th Cir.1998).

27 “In deciding whether to deny joinder of a diversity-destroying party, courts . . .  
28 consider[] a variety of factors including: (1) whether the person sought to be joined is

1 needed for just adjudication and would be a necessary party under Rule 19(a); (2) the  
2 plaintiff's motive for seeking joinder and whether plaintiff is seeking to add a defendant  
3 solely to destroy diversity of citizenship; (3) the delay in seeking to add the new  
4 defendant; (4) whether, if joinder is denied, the statute of limitations would bar an action  
5 against the new defendant in state court; (5) the apparent validity of the claim; and (6)  
6 any prejudice to the plaintiff if the amendment is denied." *Estate of Harmon ex rel.*  
7 *Patrick v. Avalon Health Care, Inc.*, 2012 WL 6674425, \*3 (D. Ariz.) (citations omitted).  
8 In the R&R, Judge Macdonald considered each of these factors and determined that the  
9 balance weighed in favor of granting Plaintiff's Motion for Joinder.

10 Because Defendants object to the R&R, the Court will address each of the joinder  
11 factors below.

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

13 Pursuant to Federal Rule of Civil Procedure 19(a), "a party is required to be joined  
14 when that party's absence interferes with the court's ability to accord complete relief  
15 among the existing parties or the parties' absence will impede its ability to protect its  
16 interests or would subject any party to the risk of inconsistent results." *Estate of Harmon*,  
17 2012 WL 6674425 at \*4. "The standard under Rule 19(a) is met when a party has an  
18 interest in the controversy and should be joined so that the court may decide on, and  
19 finally determine the entire controversy." *Id.*

20 Here, Plaintiff seeks to join Stephanie Abcede, a former notary who notarized  
21 foreclosure documents authorizing the sale of Plaintiff's property. Plaintiff seeks to bring  
22 claims against Ms. Abcede for false notarization and breach of the statutory duty of care.

23 Magistrate Judge Macdonald found that Plaintiff's claims against Ms. Abcede are  
24 separate and distinct from the claims against Defendants, and that the claims arise from  
25 the same transaction or occurrence. Judge Macdonald therefore recommended this factor  
26 weighs in favor of joinder.

27 In their objections to the R&R, Defendants argue that "Plaintiff has not claimed  
28 that any distinct harm resulted from [Ms. Abcede's alleged breach of her duties] such that

1 complete relief will be prevented, that Plaintiff’s ability to protect her interest will be  
2 impaired or impeded, or that Plaintiff will be subject to inconsistent obligations if Ms.  
3 Abcede is not joined.” (Doc. 14 at 5). Defendants also state that Ms. Abcede merely  
4 notarized documents and that her absence will not prevent Plaintiff from obtaining  
5 complete relief from the existing Defendants. *Id.* Defendants further allege that  
6 “Plaintiff’s claims involve her relationship with her lender, CitiMortgage, not the alleged  
7 underlying tortious conduct of a notary who notarized a document.” *Id.* at 6. Finally,  
8 Defendants argue that denial of Plaintiff’s motion will not result in duplicate litigation  
9 because Plaintiff’s claims against Ms. Abcede are barred by the statute of limitations. *Id.*

10 The Court rejects Defendants’ arguments on this issue. A party is “necessary” if in  
11 its absence, meaningful relief cannot be afforded to those who are already joined, thus  
12 risking multiple lawsuits on the same issue. *Disabled Rights Action Committee v. Las*  
13 *Vegas Events, Inc.*, 375 F.3d 861 (9th Cir. 2004). Here, Plaintiff seeks to bring claims  
14 against Ms. Abcede based on her statutory duty as a notary. The claims against Ms.  
15 Abcede arise from the same occurrence as Plaintiff’s claims against the current  
16 Defendants (the alleged wrongful foreclosure of Plaintiff’s property), but the claims  
17 against Ms. Abcede are also separate and distinct. Further, if Ms. Abcede is not joined,  
18 Plaintiff would have to file a separate lawsuit regarding the breach of duty and false  
19 notarization claims. Finally, in this circuit, courts permit joinder even when there is no  
20 new or separate cause of action stated against the person to be joined where joinder will  
21 help effect complete relief between the parties. *E.E.O.C. v. Peabody Western Coal Co.*,  
22 400 F.3d 774, 783 (9th Cir. 2005).

23 Defendants also argue that the statute of limitations has already run on Plaintiff’s  
24 claims against Ms. Abcede. The issue currently before the Court is whether Plaintiff’s  
25 Motion for Joinder should be granted, not whether Plaintiff’s claims against Ms. Abcede  
26 are statutorily barred. Plaintiff has not yet filed an amended complaint and it is unclear  
27 what claims Plaintiff will assert against Ms. Abcede, and what the time limits on those  
28 claims will be. The Court therefore declines to make a finding on the statute of

1 limitations issue.

2 Accordingly, the Court finds Ms. Abcede is a necessary party to afford complete  
3 relief of the entire controversy, and this factor weighs in favor of joinder.

4 **B. Plaintiff's Motive**

5 As Judge Macdonald noted in the R&R, "a trial court should look with particular  
6 care at [Plaintiff's] motive" in seeking to add a diversity-destroying defendant. (Doc. 13  
7 at 4; citing *Desert Empire Bank v. Insurance Co. of North America*, 623 F.2d 1371, 1376  
8 (9th Cir. 1980)).

9 In her Motion for Joinder, Plaintiff claimed that she learned of Ms. Abcede's  
10 license suspension hours before filing her complaint, and that she did not have sufficient  
11 opportunity to thoroughly investigate the actions of all potential defendants. Defendants  
12 countered that adding Ms. Abcede's name to the existing complaint shows improper  
13 motive, and that the fact that Plaintiff's motion for joinder is coupled with a motion to  
14 remand shows Plaintiff's desire to keep this matter in the state court. Based on these  
15 arguments, Judge Macdonald found that Defendants failed to provide sufficient evidence  
16 that Plaintiff seeks to join Ms. Abcede solely to destroy this Court's diversity jurisdiction.  
17 Judge Macdonald therefore recommended this factor weighs in favor of joinder.

18 In their objections to the R&R, Defendants claim that they have "demonstrated  
19 that the timing of the request to add Ms. Abcede is highly suspect." (Doc. 14 at 6).  
20 However, while the Court does consider Plaintiff's motive with particular care, and has  
21 taken into account Defendants' arguments on this issue, the Court is not convinced that  
22 Plaintiff filed her Motion for Joinder for the sole purpose of destroying this Court's  
23 diversity jurisdiction. The Court must also consider Plaintiff's statements on this matter,  
24 and Plaintiff avers that she did not file her motion for an improper purpose. "The Court  
25 declines to impute an improper motive to Plaintiff simply because Plaintiff seeks to add a  
26 non-diverse defendant post-removal." *IBC Aviation Servs., Inc. v. Compania Mexicana*  
27 *de Aviacion, S.A. de C.V.*, 125 F. Supp. 2d 1008, 1012 (N.D. Cal. 2000). Accordingly,  
28 this factor weighs in favor of joinder.

1           **C. Delay**

2           Here, Plaintiff filed her Motion for Joinder six months after filing her Complaint.  
3 Magistrate Judge Macdonald noted that although the delay may indicate Plaintiff's  
4 motives are questionable, very little has occurred at this point in the litigation. (Doc. 13 at  
5 5). The Court has not held a scheduling conference in this matter, and no discovery has  
6 occurred. Thus, Judge Macdonald concluded that Plaintiff's motion is not untimely  
7 delayed, and this factor weighs in favor of joinder.

8           In their objections to the R&R, Defendants argue that Plaintiff delayed in seeking  
9 to join Ms. Abcede because she waited to file the motion until after the case was removed  
10 to this Court. It is instructive to look at the timeline of events on this point: Plaintiff filed  
11 her action in state court on January 4, 2013. Defendants were served on April 24, 2013,  
12 and Defendants removed the action to federal court on May 24, 2013. On June 24, 2013,  
13 Plaintiff filed her Motion for Joinder. Considering Plaintiff filed the motion only two  
14 months after Defendants were served and one month after Defendants removed the case  
15 to this Court, the Court does not agree with Defendants' argument that Plaintiff acted  
16 with undue delay. Furthermore, as noted above, the Court has not yet held a scheduling  
17 conference in this matter. At the scheduling conference, the Court typically sets a  
18 deadline several months out for the parties to move to join additional parties or amend the  
19 pleadings. Thus, in light of all these factors, the Court finds Plaintiff's motion was timely  
20 filed.

21           **D. Statute of Limitations**

22           Defendants argue Plaintiff's Motion for Joinder should be denied because her  
23 claims are barred by the statute of limitations. However, Judge Macdonald found that if  
24 Defendants are correct, then Plaintiff will be barred from filing a separate state court  
25 action against Ms. Abcede. Judge Macdonald therefore found this factor weighs in favor  
26 of joinder.

27           In their objections to the R&R, Defendants argue that Plaintiff's claims against  
28 Ms. Abcede would not only be barred in a new action in state court, but that the claims

1 are also barred in this Court. However, the inquiry for the Court to determine in ruling on  
2 Plaintiff's Motion for Joinder is "whether, if joinder is denied, the statute of limitations  
3 would bar an action against the new defendant in state court." *Harmon*, 2012 WL  
4 6674425 at \*3. Thus, the Court is not required to consider whether Plaintiff's claims  
5 against Ms. Abcede would be barred in federal court. The question is whether, if the  
6 Court denies Plaintiff's Motion for Joinder, Plaintiff would be barred from bringing a  
7 new action against Ms. Abcede in state court. Because it appears that the statute of  
8 limitations may prevent Plaintiff from filing a separate action against Ms. Abcede in state  
9 court, this factor weighs in favor of joinder. Furthermore, the sole issue before the Court  
10 is whether to grant or deny Plaintiff's Motion for Joinder. If Defendants believe  
11 Plaintiff's claims are barred based on the statute of limitations, they may properly raise  
12 that argument in a motion before the state court.

### 13 **E. Strength of Claim**

14 Defendants argue Plaintiff has failed to state a valid claim against Ms. Abcede  
15 because Arizona does not recognize a tort of wrongful foreclosure. However, after  
16 examining the relevant case law, Judge Macdonald found that "Arizona courts have not  
17 squarely rejected the tort of wrongful foreclosure." (Doc. 13 at 6). Judge Macdonald  
18 further found that Plaintiff may have additional claims against Ms. Abcede based on her  
19 duty as a notary public. Judge Macdonald therefore concluded this factor weighs in favor  
20 of joinder.

21 In their objections to the R&R, Defendants argue that "district courts have  
22 consistently granted motions to dismiss based on the fact that Arizona does not recognize  
23 a claim for "wrongful foreclosure." (Doc. 14 at 9). While it is true that some district  
24 court opinions have rejected wrongful foreclosure claims, other opinions from this district  
25 have considered such claims. See e.g. *Schrock v. Fed. Nat. Mortgage Ass'n*, 2011 WL  
26 3348227 (D. Ariz. Aug. 3, 2011); *Hughes v. Wells Fargo Bank, NA*, 2009 WL 5174987  
27 (D. Ariz. Dec. 18, 2009); *Contreras v. U.S. Bank as Tr. for CSMC Mortgage Backed*  
28 *Pass-through Certificates, Series 2006-5*, 2009 WL 4827016 (D. Ariz. Dec. 15, 2009);

1 *Herring v. Countrywide Home Loans, Inc.*, 2007 WL 2051394 (D. Ariz. July 13, 2007).  
2 The Court therefore finds that Plaintiff may in fact have a viable claim for wrongful  
3 foreclosure, as there has been no clear decision from the Arizona courts squarely  
4 rejecting such claims.

5 Defendants further argue that “irregular notarization practices have been rejected  
6 as the basis of a wrongful foreclosure action.” (Doc. 14 at 10). However, regardless of the  
7 viability of Plaintiff’s wrongful foreclosure claim, Plaintiff also has claims against Ms.  
8 Abcede related to the statutory duty of care, which are separate and distinct from the  
9 claim for wrongful foreclosure.

10 Accordingly, the Court finds there is some merit to Plaintiff’s claims against Ms.  
11 Abcede and this factor therefore weighs in favor of joinder.

12 **F. Prejudice to Plaintiff**

13 In their response to Plaintiff’s motion, Defendants presented a number of  
14 arguments as to why denying the motion would not prejudice Plaintiff: 1) if Plaintiff’s  
15 claims are valid, she will prevail regardless of whether Ms. Abcede is joined, 2) that it  
16 would be more difficult for Plaintiff to collect her judgment against Ms. Abcede versus  
17 the current corporate defendants, 3) that Ms. Abcede’s testimony would be helpful to  
18 Plaintiff’s claims, and 4) because it is unlikely Plaintiff will file a separate action against  
19 Ms. Abcede, there is no potential downside of Plaintiff having to litigate in two forums.  
20 (Doc. 13 at 6, *citing* Doc. 11 at 8-9). As to Defendant’s argument that it would be more  
21 difficult to collect against Ms. Abcede, Plaintiff countered that there is a separate pool of  
22 bond money available for claims against notaries who abuse their authority. (Doc. 13 at  
23 6, *citing* Doc. 12 at 10-11).

24 Judge Macdonald acknowledged that while it might be unlikely that Plaintiff  
25 would file a separate action against Ms. Abcede in state court, “in light of any concerns  
26 regarding the statute of limitations and Ms. Abcede’s separate liability this factor favors  
27 joinder.” (Doc. 13 at 6).

28 In their objections to the R&R, Defendants reassert the same arguments presented

1 in their Response to the Plaintiff's Motion for Joinder.

2 As noted above, the Court finds Plaintiff's claims against Ms. Abcede are separate  
3 and distinct from the claims against the current Defendants. Joinder of Ms. Abcede is  
4 necessary to remedy Plaintiff's claims based on Ms. Abcede's statutory duty. The Court  
5 will not speculate as to how difficult it may or may not be for Plaintiff to collect  
6 judgment against Ms. Abcede, and this factor alone is not sufficient to deny Plaintiff's  
7 motion for joinder. The Court also declines to make a finding as to whether Plaintiff's  
8 claims against Ms. Abcede are time-barred. However, even if the statute of limitations  
9 has not run and Plaintiff could file a separate suit against Ms. Abcede in state court, it  
10 would result in two significantly similar lawsuits proceeding in two separate forums,  
11 diminishing judicial efficiency and causing significant overlap in discovery. The Court  
12 therefore finds that denying joinder would prejudice Plaintiff and this factor thus weighs  
13 in favor of granting Plaintiff's motion.

#### 14 **G. Conclusion**

15 In the R&R, Judge Macdonald thoroughly discussed the factors regarding joinder  
16 of a diversity destroying defendant. Judge Macdonald also considered the arguments  
17 presented by the parties, and, after analyzing all of the factors, found that the balance  
18 weighs in favor of joinder. "[T]he magistrate judge's decision ... is entitled to great  
19 deference by the district court," *Abonce-Barrera*, 257 F.3d at 969, and the Court will not  
20 disturb a Magistrate Judge's Order unless his factual findings are clearly erroneous or his  
21 legal conclusions are contrary to law. 28 U.S.C. § 636(b)(1)(A).

22 The Court finds that Magistrate Judge Macdonald thoroughly considered all of the  
23 relevant issues and evidence, and that he made a reasoned and well-founded conclusion  
24 that Plaintiff's Motion for Joinder should be granted. The Court has considered  
25 Defendants' objections, and has made "a de novo determination of those portions of the  
26 [R&R] to which objection is made." 28 U.S.C. § 636(b)(1). The Court finds Defendants'  
27 objections unpersuasive and insufficient to overturn the Magistrate Judge's R&R.  
28 Accordingly, the Court will adopt Magistrate Judge Macdonald's recommendation to

1 grant Plaintiff's Motion for Joinder and remand this matter to the state court.

2 **IV. CONCLUSION**

3 **IT IS ORDERED** that Magistrate Judge Macdonald's Report and  
4 Recommendation (Doc. 13) is hereby **ACCEPTED** and **ADOPTED** as the findings of  
5 fact and conclusions of law by this Court.

6 **IT IS FURTHER ORDERED granting** Plaintiff's (Corrected) Motion for  
7 Joinder Under Rule 21, F.R.C.P. etc. (or Alternatively Motion to Amend Under Rule 15)  
8 and Motion to Remand Case to State Court (Pima Superior Court No. C20130048) (Doc.  
9 10).

10 **IT IS FURTHER ORDERED remanding** this case to Pima County Superior  
11 Court (Cause # C20130048).

12 **IT IS FURTHER ORDERED** the Clerk shall close its file on this matter.

13 Dated this 31st day of March, 2014.

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Raner C. Collins  
Chief United States District Judge