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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

| | | |
|-----------------------------|---|------------------------------|
| ANTHONY MORENO, |) | No. CV-F-10-503 OWW/SKO |
| |) | |
| |) | MEMORANDUM DECISION GRANTING |
| Plaintiff, |) | PLAINTIFF'S MOTION TO REMAND |
| |) | AND DENYING PLAINTIFF'S |
| vs. |) | REQUEST FOR ATTORNEY'S FEES |
| |) | (Doc. 22) |
| |) | |
| SELECT PORTFOLIO SERVICING, |) | |
| INC., et al., |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |

Before the Court is Plaintiff Anthony Moreno's motion to remand this action to the Tulare County Superior Court.¹

Plaintiff filed a Verified Complaint for: (1) Fraud, (2) Deceit, (3) Unfair Business Practices under California Business and Professions Code § 17200, (4) Breach of Contract, (5) Declaratory Relief, (6) Specific Performance, and (7) Injunction.

¹Plaintiff's counsel did not appear at the hearing set for 10:00 a.m. on June 21, 2010. Plaintiff's counsel called the Court after the hearing and explained that he mistakenly believed the hearing was set for 1:30 p.m.

1 Defendants are Select Portfolio Servicing, Inc. ("SPS"), and Does

2 1-25. The Complaint alleges:

3 1. This is a '*trial plan fraud*' case which
4 involves a homeowner who was promised a loan
5 modification, and a Defendant (the Loan
6 Servicing Company), SELECT PORTFOLIO
7 SERVICING, INC. ... that fraudulently,
8 deceptively, maliciously, and oppressively
9 offered a loan modification and then refused
10 to honor the agreement after SIX LOAN
11 PAYMENTS were made under a string of THREE
12 Deceptive Contracts.

13 Plaintiff is alleged to be a citizen of California and the owner
14 of property at 31866 Road 138 #B, Visalia, California, and SPS is
15 alleged to be a citizen of Utah. As the "Statement of Facts,"
16 the Complaint alleges:

17 9. Plaintiff fell behind on his loan
18 payments and sought out a loan modification
19 from his loan servicer, SPS.

20 10. On or around July 2009, Plaintiff spoke
21 with a representative of Defendant Loan
22 Servicer, (Mr. Tony Rasmussen - Phone # 801-
23 313-2161), and others in the loss mitigation
24 department, who took Plaintiff's financial
25 information over the phone, including
26 Plaintiff's gross monthly income and monthly
expenses, and then explained to Plaintiff
that Plaintiff qualified for loan
modification given his income, expenses, and
hardship, and that all Plaintiff had to do
was submit their [sic] financial
documentation to SPS to confirm the data
given over the phone and a loan modification
would be thereafter and in due course
provided.

11. Following this conversation, and based
upon reliance of the statements made by Mr.
Rasmussen, (who on information and belief is
an employee acting within the course and
scope of his employment, and who is
authorized by Defendant to make such
statements and assertions, which ultimately

1 proved to be false, deceptive, manipulative,
2 and misleading) Plaintiff did thereby submit
3 his financial documentation to Defendant as
4 requested, including income and expenses and
5 hardship information and all other
6 information requested.

7 12. In response to this financial
8 submission, Defendant thereafter, on or
9 around August 6, 2009, did deliver to
10 Plaintiff a 'HOME AFFORDABLE MODIFICATION
11 TRIAL PERIOD PLAN' (for Investor Loan
12 #412444593). Again, the true
13 beneficiary/investor has never been
14 identified, but once identified will be added
15 as a defendant to this complaint.

16 13. The Modification agreement stated that
17 it had 'an effective date of 9/01/2009).'
18 (See Attached Exhibit 'A' for a true and
19 correct copy of the loan modification
20 agreement which is incorporated herein by
21 reference.

22 14. The first paragraph of the contract
23 stated: 'If I am in compliance with this
24 trial period plan ('the Plan') and my
25 representations in Section 1 continue to be
26 true in all material respects THEN THE LENDER
27 WILL PROVIDE ME WITH A HOME AFFORDABLE
28 MODIFICATION AGREEMENT' [sic] AS SET FORTH IN
29 SECTION 3 ... that would amend and supplement
30 the mortgage ... and note.'

31 15. Section 3 of the agreement stated: 'If I
32 comply with the requirements in Section 2 and
33 my representations in Section 1 continue to
34 be true in all material respects THE LENDER
35 WILL SEND ME A MODIFICATION AGREEMENT FOR MY
36 SIGNATURE WHICH WILL MODIFY MY LOAN DOCUMENTS
37 ... ['].

38 16. It is not clear by this agreement who
39 the 'Lender' is that SPS is referring to, and
40 the true nature of the investor/beneficiary
41 of the loan has been intentionally concealed.

42 17. The Trial Plan agreement also contained
43 Section 1. 'My representations' which
44 contained a list of items Plaintiff certifies
45 in regards to his finances, and his property.
46

1 18. The payment under the trial plan
2 agreement was \$678.74 per month, and the
3 agreement called for three payments beginning
4 in (/1/09) [sic] and ending 11/01/09.

5 19. Plaintiff agreed to the terms and
6 conditions of this loan modification trial
7 plan agreement, and made all three payments
8 in a timely manner as required by the
9 agreement.

10 20. Plaintiff executed the loan modification
11 agreement on 8-10-09.

12 21. Defendant accepted and cashed each and
13 every payment which finalized the contract by
14 full performance and the alleged loan default
15 was thereby cured.

16 22. In making the payments under this
17 agreement, Plaintiff was lead [sic] to
18 believe, informed and intentionally induced
19 to make these three loan payments based on
20 Plaintiff's income and expenses which were
21 submitted to Defendant's representative
22 (which income was approximately \$3,800 per
23 month, and monthly expenses which were
24 approximately \$3,000 per month) which
25 Plaintiff was deceptively lead [sic] to
26 believe were sufficient for the Obama Making
Home Affordable Loan Modification (HAMP).

27 23. However, the under the President's HAMP
28 modification program, a borrower does not
29 qualify for a modification if their 'back-
30 end' debt-to-income ratio exceeds 55%.

31 24. Plaintiff's back-end debt ratio at the
32 time of this trial plan agreement was
33 approximately 79% which exceeds the
34 guidelines outlined in the President's
35 modification program.

36 25. Defendant should have therefore informed
37 Plaintiff that he did not qualify for the
38 HAMP modification program.

39 26. The Trial Plan agreement Cover Page
40 [sic] that was also sent to Plaintiff,
41 referenced the President's making Home
42 Affordable Loan Modification Symbol, which

1 was further used as a false inducement to
2 induce Plaintiff to sign the Loan
Modification Agreement.

3 27. Defendant, by and through their [sic]
4 agents, employees, and contractors, did
5 therefore make false statements of fact,
6 which were made to induce Plaintiff's
7 justifiable reliance that Plaintiff qualified
for a loan modification under HAMP, and that
by sending in three trial plan payments,
Plaintiff would receive an additional
modification agreement.

8 28. Plaintiff relied on these false
9 statements of fact to his detriment, and
10 suffered damages as a result, including out-
of-pocket expenses, pain and suffering,
11 mental distress and other damages to be
proven at trial.

12 29. To make matters worse, Defendant's [sic]
13 refused to honor the above-referenced loan
14 modification, and instead, issued a second
MAKING HOME AFFORDABLE LOAN MODIFICATION
AGREEMENT to Defendant on or around October
7, 2009.

15 30. This Second [sic] agreement was similar
16 to the first agreement, but the 'trial plan'
17 payments were now nearly doubled to \$1,288.98
18 (on information and belief this was done to
19 force a default of the loan since Defendant
realized that Plaintiff could afford a
reasonable monthly payment of \$678.74 (which
is in line with the 31% front-end ratio
contemplated by HAMP as a reasonable housing
ratio).

20 31. The 31% housing ration [sic] must
21 include and cover principal, interest, tax,
22 insurance and association dues ('PITIA').

23 32. The \$1,288.98 payment was for include
24 [sic] principal and interest (but not tax,
25 insurance, and/or association dues) and even
at this figure the payment alone creates a
33.98% housing ratio which exceeds the
guidelines set forth under HAMP.

26 33. Therefore, the Defendant intentionally

1 sought to induce Plaintiff to make loan
2 payments that they thought Plaintiff would be
3 unable to afford, and which would result in
4 his default of the mortgage loan.

4 34. On information and belief, Defendant is
5 incentivized under certain agreements,
6 including a pooling and servicing agreement,
7 to lead homeowners toward foreclosure, rather
8 than to legitimately modify their loans, and
9 Defendant acted intentionally, fraudulently,
10 intentionally [sic], willfully, wantonly,
11 callously, and with a plan and design to
12 induce Plaintiff into making additional
13 'trial plan' loan payments, under the guise
14 that they qualified for President Obama's
15 HAMP program when in fact that was blatantly
16 false.

10 35. The Trial plan agreement (for this
11 second modification agreement) was executed
12 by Plaintiff on 10/26/09 and the contract was
13 completed by full performance - as was the
14 first agreement - after Plaintiff made the
15 three requested payments in a timely manner.

14 36. See Attached 'Exhibit B' for a true and
15 correct copy of the SECOND loan modification
16 agreement which is incorporated herein by
17 reference.

17 37. Defendant accepted and cashed each and
18 every payment under this SECOND AGREEMENT
19 which finalized the contract by full
20 performance and the alleged loan default was
21 thereby cured, for the second time.

20 38. Plaintiff's material representations as
21 set forth in Section 1 of the loan
22 modifications agreement never changed in any
23 material respect, and Plaintiffs [sic] income
24 and expenses did not materially change during
25 this period of 'bait and switch.'

23 39. Instead of honoring either the first or
24 second agreement, which had been fully
25 executed and completed by full performance,
26 Defendant's [sic] once again breached the
second agreement as they had breached the
first agreement, and failed to provide the
agreed-upon modification.

1 40. Defendant has no defense to its failure
2 to perform its end of the bargain.

3 41. Both parties provided valuable
4 consideration for the agreement in that
5 Defendant agreed to forebear from foreclosure
6 efforts, and Plaintiff agreed to pay a
7 reduced loan amount while lead to believe
8 this would provide a reasonable modification
9 and thereby forebear from leaving the house
10 or pursuing a short sale which it [sic] could
11 have done had they [sic] truthfully been
12 informed they did not qualify for HAMP.

13 42. In pouring gasoline on the flame,
14 Defendant then caused to be issued a THIRD
15 TRIAL PLAN MODIFICATION AGREEMENT, (on or
16 around December 29, 2009) which again bears
17 the *Making Home Affordable* symbol which was
18 intended to induce Plaintiff's justifiable
19 reliance that he qualified for a loan
20 modification, and THREE ADDITIONAL loan
21 payments were again requested. See Attached
22 Exhibit 'C' for a true and correct copy of
23 the SECOND [sic] loan modification agreement
24 which is incorporated herein by reference.

25 43. This is false, deceptive, unfair, and
26 acted as an anticipatory repudiation of the
earlier contracts.

44. Defendants [sic] therefore have breached
two agreements and have acted in a manner to
intentionally defraud Plaintiff into parting
with their [sic] money.

45. It must be asked, WHAT IS GOING ON HERE?

46. Defendant [sic] acts, omissions, false
representations, breach of contract, and
other deceptive acts and practices are the
proximate cause of Plaintiff's injuries and
although the alleged breach of the loan
documents have been cured, not once but
twice, Defendant has continued to threaten
foreclosure, which acts Plaintiff seeks to
enjoin.

47. On or about November 11, 2009,
Plaintiff, through its [sic] undersigned
counsel, submitted to Defendant a written

1 Qualified Written Request (Under RESPA
2 Section 6) challenging the application of
3 trial plan payments. Defendant has
4 acknowledged the request within 20 days, but
5 has not otherwise responded except to write
6 on 12/10/09 'if you have an alleged error in
servicing, we will contact you.' This
clearly violates RESPA and is nonresponsive
to Plaintiff's concerns, and Plaintiff
reserves the right to amend the complaint to
add a RESPA violation.

7 48. In addition, this letter of 11/11/09
8 also requested that Defendant identify the
9 holder to the Note pursuant to Federal trust
10 in [sic] Lending law (15 U.S.C. 1641(f)).
11 Likewise, the indifferent loan servicer has
failed to respond to which Plaintiff also
reserves the right to amend the complaint
alleging the breach and violation of this
federal statute.

12 49. This letter also indicated that
13 Plaintiff, by making additional loan payments
14 following Defendants [sic] fraud and breach
15 of the previously mentioned loan agreements,
16 did not waive their [sic] rights to sue
17 Defendant for Fraud [sic], breach of
contract, false and deceptive practices,
etc., and such rights have never been waived
at any time. See attached Exhibit 'D' for a
true and correct copy of the 11/19/2009 [sic]
demand letter

18 50. It is clear from the foregoing that
19 Defendant has absolutely no concern or
20 interest for the Plaintiff, and in addressing
21 their [sic] financial hardship, and refuses
22 to follow various Federal Laws that are
established for the protection of borrowers
across the Country. This has become a
pandemic across the nation which can only be
addressed through a court of law.

23 51. Defendant owes a duty to modify
24 Plaintiff's loan in accordance with
25 California Civil Code Section 2923.6 which
26 states that the loan servicer has a duty to
all borrower's [sic] in a loan pool.
Plaintiff's loan, on information and belief,
is part of a loan pool of which Defendant

1 profits by servicing loans, some of them
2 predatory loans.

3 52. WHEREFORE, given the foregoing,
4 Plaintiff hereby asserts the following causes
5 of action and seeks its [sic] actual,
6 compensatory and punitive damages in an
7 amount to be proven at trial.

8 The First Cause of Action is for fraud and alleges that SPS knew
9 that Plaintiff "did not qualify from [sic] the Obama Making Home
10 Affordable program because it knew Plaintiff's front-end (housing
11 ratio) and back-end (debt-to-income ratio) do not meet the
12 guidelines for Making Home Affordable (HAMP)"; that even though
13 the guidelines for HAMP were not met, SPS stated to Plaintiff in
14 July 2009 that Plaintiff did qualify for the HAMP program and
15 only needed to submit his financial documentation to receive the
16 modification; that on three occasions Defendant represented that
17 Plaintiff qualified for a loan modification, when Defendant knew
18 the representations were false and "were intentionally made to
19 induce Plaintiff's justifiable reliance (that they [sic]
20 qualified for a loan modification," that Plaintiff relied on the
21 representations and suffered "both out-of-pocket, and other
22 pecuniary damages as well as mental anguish," and that Plaintiff
23 is entitled to punitive damages.

24 The Second Cause of Action is for deceit and makes the same
25 allegations as the First Cause of Action.

26 The Third Cause of Action is for unfair competition in
violation of California Business and Professions Code § 17200 and
alleges that Defendant's acts as set forth herein violate

1 California statutes for Fraud and Deceit and therefore violate
2 California statutes which will serve as the underlying offense
3 for an Unfair Competition and Deceptive Acts and Practices
4 statute," that such acts are "unfair," that "[t]he utility of
5 Defendant's conduct is hard to identify and the hard [sic] to
6 Plaintiff (in potentially losing their [sic] family home) is
7 incredible in comparison" and "'shock the conscience'" and serve
8 no worthwhile purpose other than to harass, intimidate,
9 embarrass, mislead, and defraud Plaintiff of his personal and
10 real property," resulting in Plaintiff's damages and entitling
11 Plaintiff to punitive damages.

12 The Fourth Cause of Action is for breach of contract and
13 alleges:

14 68. Defendant offered Plaintiff two separate
15 loan modifications (the first on or around
16 8/6/09 and the second on or around 10/7/09).

17 69. Defendant [sic] accepted each of these
18 offers and fully performed its obligations
19 under each agreement by making full and
20 complete payments as requested in a timely
21 manner.

22 70. Plaintiff's financial condition and
23 representations as set forth in Section 1. Of
24 [sic] each agreement and no time [sic]
25 altered or changed in any material respect.

26 71. Each party provided legally sufficient
consideration as set forth herein and the
contract is not otherwise illegal or subject
to non-enforcement.

72. Defendant breached its agreements, on
both occasions, by failing to provide the
agreed-upon loan modification as set forth in
the respective agreements.

1 73. Defendant has not [sic] defense to such
2 breach, and by submitting each subsequent
3 loan modification offer, Defendant
anticipatorily repudiated the earlier
agreement.

4 74. Such breach of contract has proximately
5 and actually caused Plaintiff's damages
6 (which are foreseeable) and which will be
proven at trial.

7 75. Plaintiff's Subject Property is his
8 primary residence and is unique. Money
9 damages will not adequately remedy the breach
of contract, and Plaintiff therefore seeks
SPECIFIC PERFORMANCE OF THE 8/16/09
agreement.

10 76. In addition, Defendants [sic] acts and
11 material omission (and breach of contract)
12 were willful, wanton, intentional, egregious,
13 reckless and oppressive wherefore Plaintiff
14 seeks actual and compensatory damages, as
well as exemplary (punitive damages),
attorney fees, and costs of suit and other
relief deemed just and proper.

15 The Complaint also seeks declaratory relief "that the
16 original contract of 8/06/09 is fully enforceable, and was breach
17 [sic] by Defendant and that the Court should thereby order
18 Specific Performance of this Agreement to remedy the wrongful and
19 deliberate conduct of Defendant," specific performance of the
20 8/06/09 loan modification agreement, and injunctive relief to
21 enjoin SPS "to market and/or sell or otherwise convey or transfer
22 the Subject Property without Court approval." The prayer for
23 relief seeks, *inter alia*, "monetary damages, including actual,
24 and compensatory in an amount no less than \$25,000 and in an
25 amount to be proven at trial."

26 SPS removed the action, stating as grounds in the Notice of

1 Removal:

2 1. This action is a civil action of which
3 this Court has original jurisdiction under 28
4 U.S.C. Section 1331, and is one which may be
5 removed to this Court by SPS pursuant to the
6 provisions of 28 U.S.C. Section 1441(b) in
7 that it arises under the 'Making Home
8 Affordable Loan Modification Program.'
9 Supplemental jurisdiction exists with respect
10 to any remaining claims pursuant to 28 U.S.C.
11 § 1367.

12 4. Alternatively, this action is a civil
13 action of which this Court has original
14 jurisdiction under 28 U.S.C. Section 1332,
15 and is one which may be removed to this Court
16 by SPS pursuant to the provisions of 28
17 U.S.C. § 1441(b) in that it is a civil action
18 between citizens of different states and the
19 manner [sic] in controversy exceeds the sum
20 of \$75,000.00, exclusive of interests and
21 costs because Plaintiff seeks relief related
22 to a loan of the real property subject to the
23 action.

24 Plaintiff moves to remand this action.

25 A. GOVERNING STANDARDS.

26 The party seeking to invoke removal jurisdiction bears the
burden of supporting its jurisdictional allegations with
competent proof. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th
Cir.1982); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th
Cir.1988). "The propriety of removal thus depends on whether the
case originally could have been filed in federal court." *Chicago*
v. International College of Surgeons, 522 U.S. 156, 163 (1997);
28 U.S.C. § 1441(a). A court's removal jurisdiction must be
analyzed on the basis of the pleadings at the time of removal.
See Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, 159
F.3d 1209, 1213 (9th Cir.1998). District courts must generally

1 construe the removal statutes strictly against removal and
2 resolve any uncertainty in favor of remanding the case to state
3 court. *Takeda v. Northwestern Nat'l. Life Ins. Co.*, 765 F.2d
4 815, 818 (9th Cir.1985).

5 B. ARTICLE III STANDING.

6 Plaintiff asserts that remand is required because Plaintiff
7 "has no 'standing' to invoke federal court jurisdiction and is
8 not a 'real party in interest' to this action," relying on
9 Article III to the United States Constitution. In order to
10 satisfy Article III's standing requirements, a plaintiff must
11 show (1) he has suffered an "injury in fact" that is (a) concrete
12 and particularized and (b) actual or imminent, not conjectural or
13 hypothetical; (2) the injury is fairly traceable to the
14 challenged action of the defendants; and (3) it is likely, as
15 opposed to merely speculative, that the injury will be redressed
16 by a favorable decision. *Lujan v. Defenders of Wildlife*, 504
17 U.S. 555, 560-561 (1992). Plaintiff contends:

18 In this case, SPS has suffered no injury in
19 fact, as it is not the owner of Plaintiff's
20 loan (rather it is acting as a 'loan
21 servicer' on behalf of some unknown lender or
22 a *MERS* loan as referenced in Plaintiff's deed
23 of trust). There is absolutely no proof
24 offered that Defendant is acting on behalf of
25 any 'lender' who has an actual right to
26 enforce Plaintiff's loan, or any lender that
would otherwise have standing to pursue such
claims in a Bankruptcy court as a legitimate
'creditor' of the loan.

Where *MERS* loans are involved (*MERS* acts as
the 'beneficiary' of the loan pursuant to the
Deed of Trust), it is common knowledge that
there is likely NO TRUE LENDER than [sic] can

1 PROVE THEY HAVE THE RIGHT TO ENFORCE the debt
2 alleged to be owed to that particular
3 creditor. Consequently, before this Court
4 can/should hear this case, Plaintiff should
5 be required to identify the 'lender' of this
6 loan (the true 'real party in interest") and
the Court should require this lender, if such
exists, to prove it has an original copy of
Plaintiff's promissory note with proper
endorsements and assignment of the deed of
trust.

7 Plaintiff contends that without proof that SPS is a valid agent
8 of the lender:

9 SPS has absolutely no standing to seek
10 Federal Court jurisdiction, and has no
11 grievance to redress, has suffered no injury
12 in fact, and is not a *real party in interest*
13 to this action (See F.R.C.P. 17 which states
14 that '*an action must be prosecuted in the*
15 *name of the real party in interest*'), but
rather Defendant seeks to advance *third party*
standing on behalf of some unknown and
unidentified lender, which attempt herein to
invoke federal court jurisdiction should be
denied.

16 Plaintiff seriously misunderstands Article III and cites no
17 authority that removal is precluded based on the contention that
18 the removing *Defendant* must have Article III standing.
19 Plaintiff's motion to remand on this ground is DENIED.

20 C. DIVERSITY JURISDICTION - AMOUNT IN CONTROVERSY.

21 Plaintiff moves to remand this action to the extent removal
22 is based on diversity of citizenship, contending that SPS cannot
23 establish that the amount in controversy "exceeds the sum or
24 value of \$75,000, exclusive of interests and costs," the
25 jurisdictional minimum. 28 U.S.C. § 1332(a).

26 "[W]here a plaintiff's state court complaint does not

1 specify a particular amount of damages, the removing defendant
2 bears the burden of establishing, by a preponderance of the
3 evidence, that the amount in controversy exceeds [\$75,000].
4 Under this burden, the defendant must provide evidence
5 establishing that it is 'more likely than not' that the amount in
6 controversy exceeds that amount." *Sanchez v. Monumental Life*
7 *Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). In *Valdez v.*
8 *Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir.2004), the Ninth
9 Circuit remanded for a determination of the amount in controversy
10 where the only discrete sum requested in the complaint was
11 "general damages ... in excess of \$50,000.00:

12 Since 'it [was] not facially evident from the
13 complaint that more than \$75,000 [was] in
14 controversy,' Allstate should have 'prove[n],
15 by a preponderance of the evidence, that the
16 amount in controversy [met] the
17 jurisdictional threshold.' ... Allstate did
18 not. Its only effort was the statement in
19 its 'Petition for Removal' that 'upon
20 information and belief, [it] submit[s] that
21 the amount in controversy ... exceeds
22 \$75,000.00.' '[I]nformation and belief'
23 hardly constitutes proof 'by a preponderance
24 of the evidence.' ... To discharge its
25 burden, Allstate needed to 'provide evidence
26 establishing that it is "more likely than
 not" that the amount in controversy exceeds
 that amount.'

21 ... [W]e reiterate that the amount-in-
22 controversy inquiry in the removal context is
23 not confined to the face of the complaint ...
24 Nor does it present an insurmountable
25 obstacle to quantify the amount at stake when
26 intangible harm is alleged; the parties need
 not predict the trier of fact's eventual
 award with one hundred percent accuracy ...
 Instead, '[a]lthough we have not addressed
 the types of evidence defendants may rely
 upon to satisfy the preponderance of the

1 evidence test for jurisdiction, we have
2 endorsed the Fifth Circuit's practice of
3 considering facts presented in the removal
4 petition as well as any "summary-judgment-
5 type evidence relevant to the amount in
6 controversy at the time of removal." ...

7 See also *Conrad Associates v. Hartford Acc. & Indem. Co.*, 994
8 F.Supp. 1196, 1198-1199 (N.D.Cal. 1998):

9 In cases in which the existence of diversity
10 jurisdiction depends on the amount in
11 controversy, '[t]he district court may
12 consider whether it is "facially apparent"
13 from the complaint that the jurisdictional
14 amount is in controversy.' *Singer v. State
15 Farm Mutual Auto Ins. Co.*, 116 F.3d 373, 377
16 (9th Cir. 1987), citing *Allen v. R & H Oil &
17 Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). If
18 the complaint is silent on the amount of
19 damages claimed, 'the court may consider
20 facts in the removed petition and may
21 "require the parties to submit summary-
22 judgment type evidence relevant to the amount
23 in controversy at the time of removal.'
24 *Singer*, 116 F.3d at 377. A speculative
25 argument regarding the potential value of the
26 award is insufficient. *Id.* at 376; *Gaus v.
Miles*, 980 F.2d 564, 567 (9th Cir. 1992).
The amount in controversy includes claims for
general and special damages (excluding costs
and interests), including attorneys' fees, if
recoverable by statute or contract, and
punitive damages, if recoverable as a matter
of law. See *Richmond v. Allstate Ins. Co.*,
897 F.Supp. 447 (S.D.Cal. 1995)

20 Plaintiff, noting that the Complaint seeks, *inter alia*,
21 "monetary damages, including actual, and compensatory in an
22 amount no less than \$25,000 and in an amount to be proven at
23 trial," and that the Notice of Removal merely states that "the
24 manner [sic] in controversy exceeds the sum of \$75,000.00,
25 exclusive of interests and costs because Plaintiff seeks relief
26 related to a loan of the real property subject to the action,"

1 contends that SPS has not established that the amount in
2 controversy exceeds the statutorily required amount. Plaintiff
3 asserts that the gravamen of his Complaint is that SPS
4 fraudulently induced Plaintiff to enter into loan modification
5 agreements, that SPS breached the agreement it provided to
6 Plaintiff and should be liable for breach of contract and
7 specific performance, and that it should not be entitled to
8 foreclose on Plaintiff's property. Plaintiff argues:

9 [T]he fact that this case is 'related to a
10 loan' (modification agreement) which by its
11 terms was to reduce Plaintiff's monthly
12 payment, this still does not create a
13 situation wherein the \$75,000 amount in
14 controversy requirement can be automatically
15 and certainly satisfied. Even if Plaintiff
16 were to receive its reduced loan payment, it
17 is not clear how loan [sic] Plaintiff would
18 actually maintain such loan as modified (for
19 example the agreement could be specifically
20 enforced, and the loan modification reduced
21 payment be applied, but yet Plaintiff might
22 only retain the property for a year or so, as
23 an example). Such reduced payments for a one
24 year period also fail to reach a \$75,000
25 amount in controversy requirement and any
26 such argument by Defendant in this regard
would be purely speculative and would confer
no subject matter jurisdiction.

SPS argues that the amount in controversy is satisfied
because Plaintiff is seeking relief regarding a loan in the
principal amount of \$448,000.00 by seeking an injunction to
enjoin any foreclosure sale of the property:

An injunction of a foreclosure sale on the
Property would prevent the lien holder from
obtaining a payoff by way of the security.
Here, Plaintiff admits he defaulted on a 2007
loan in 2009. Thus, Plaintiff is seeking to
prevent SPS from pursuing exercising [sic]

1 its right under the deed of trust to collect
2 the entirety of the \$448,000.00 loan through
3 the security.

4 SPS refers to its Request for Judicial Notice filed in support of
5 its motion to dismiss and strike. Exhibit C is a deed of trust
6 recorded on Plaintiff's property on February 26, 2007 securing a
7 loan of \$440,000.00 from New Century Mortgage Company. Exhibit D
8 is a deed of trust and request for notice of default recorded
9 against Plaintiff's property on February 26, 2007 securing a loan
10 of \$56,000.00 from New Century Mortgage Company. SPS notes that
11 the Complaint alleges that Plaintiff "fell behind on his loan
12 payments and sought out a loan modification from his loan
13 servicer, SPS."

14 SPS has not established by a preponderance of the evidence
15 that the amount in controversy exceeds \$75,000.00. Plaintiff's
16 motion to remand on this ground is GRANTED.

17 D. FEDERAL QUESTION JURISDICTION.

18 Plaintiff moves to remand on the ground that his Complaint
19 alleges no federal question over which this Court may exercise
20 subject matter jurisdiction.

21 SPS argues that federal claims are alleged in the Complaint
22 that support federal question jurisdiction. SPS relies on the
23 allegations in Paragraphs 47-48:²

24 47. On or about November 11, 2009,

25 ²SPS does not argue that the Home Affordable Modification
26 Program raises federal question jurisdiction. The HAMP is
 described in *Williams v. Geithner*, 2009 WL 3757380 at *1-3
 (D.Minn., Nov. 9, 2009).

1 Plaintiff, through its [sic] undersigned
2 counsel, submitted to Defendant a written
3 Qualified Written Request (Under RESPA
4 Section 6) challenging the application of
5 trial plan payments. Defendant has
6 acknowledged the request within 20 days, but
7 has not otherwise responded except to write
8 on 12/10/09 'if you have an alleged error in
9 servicing, we will contact you.' This
10 clearly violates RESPA and is nonresponsive
11 to Plaintiff's concerns, and Plaintiff
12 reserves the right to amend the complaint to
13 add a RESPA violation.

14 48. In addition, this letter of 11/11/09
15 also requested that Defendant identify the
16 holder to the Note pursuant to Federal trust
17 in [sic] Lending law (15 U.S.C. 1641(f)).
18 Likewise, the indifferent loan servicer has
19 failed to respond to which Plaintiff also
20 reserves the right to amend the complaint
21 alleging the breach and violation of this
22 federal statute.

23 Plaintiff argues that the Complaint does not allege any
24 claim involving a federal right. Plaintiff cites *Lippett v.*
25 *Raymond James Financial Services, Inc.*, 340 F.3d 1033, 1042 (9th
26 Cir.2003):

27 [T]he artful pleading doctrine allows federal
28 courts to retain jurisdiction over state law
29 claims that implicate a substantial federal
30 question. A state law claim falls within
31 this ... category when: (1) 'a substantial,
32 disputed question of federal law is a
33 necessary element of ... the well-pleaded
34 state claim,' ... or the claim is an
35 'inherently federal claim' articulated in
36 state-law terms.

37 Plaintiff asserts that he has not alleged any federal questions
38 and has not raised any causes of action relying on any federal
39 law. Plaintiff contends that "[a]n important corollary to the
40 well-established well-pleaded complaint rule is that the

1 essential federal element of the plaintiff's complaint must be
2 supported under one construction of federal law and defeated
3 under another." Plaintiff cites *Bauchelle v. AT&T Corp.*, 989
4 F.Supp. 636, 641 (D.N.J.1997):

5 If a disputed question of federal law exists
6 as part of Plaintiff's state law cause of
7 action, federal question jurisdiction might
8 still be found. In such a circumstance, the
9 existence of a 'substantial, disputed
10 question of federal law' is a threshold issue
11 to support federal question jurisdiction ...
12 A federal question is substantial when the
13 federal issue is decisive because vindication
14 of rights depends on construction of federal
15 law ... Jurisdiction exists 'only if that
16 question also "is a necessary element of one
17 of the well-pleaded state claims."' ... A
18 substantial disputed federal question,
19 however, is insufficient by itself to confer
20 jurisdiction. Thus, where Plaintiff's causes
21 of action are created by state law, and no
22 disputed question of federal law is a
23 necessary element of one of those state law
24 claims, there is no federal jurisdiction over
25 the matter.

16 The conditions for federal question jurisdiction were set out by
17 the Supreme Court in *Grable & Sons Metal Prods., Inc. v. Darue*
18 *Eng'g & Mfg.*, 545 U.S. 308 (2005). Those conditions are that the
19 claims "necessarily raise a stated federal issue, actually
20 disputed and substantial, which a federal forum may entertain
21 without disturbing any congressionally approved balance of
22 federal and state responsibilities." *Id.* at 314. Deciding if
23 there is federal jurisdiction is determined by analyzing
24 Plaintiff's complaint. "Whether the complaint states a claim
25 arising under federal law must be ascertained by the legal
26 construction of [the plaintiff's] allegations, and not by the

1 effect attributed to those allegations by the adverse party."

2 *Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412, 1414 (9th

3 Cir.1990).

4 Although the Complaint does not allege any federal causes of
5 action, SPS argues that it could be found to have waived its
6 right to remove this action if it waited until Plaintiff actually
7 amended his complaint to state causes of action for violations of
8 RESPA and TILA.

9 28 U.S.C. § 1446(b) provides:

10 The notice of removal of a civil action...
11 shall be filed within thirty days after the
12 receipt by the defendant, through service or
13 otherwise, of a copy of the initial pleading
14 setting forth the claim for relief upon which
15 such action ... is based, or within thirty
16 days after the service of summons upon the
17 defendant is such initial pleading has then
18 been filed in court and is not required to be
19 served on the defendant, whichever period is
20 shorter.

21 If the case stated by the initial pleading is
22 not removable, a notice of removal may be
23 filed within thirty days after receipt by the
24 defendant, through summons or otherwise, of a
25 copy of an amended pleading, motion, order or
26 other paper from which it may first be
ascertained that the case is one which or has
become removable, except that a case may not
be removed on the basis of jurisdiction
conferred by section 1332 of this title
[diversity of citizenship] more than 1 year
after commencement of the action.

"A party ... may waive the right to remove to federal court
where, after it is apparent that the case is removable, the
defendant takes actions in state court that manifest his or her
intent to have the matter adjudicated there, and to abandon his

1 or her right to a federal forum." *Resolution Trust Corp. v.*
2 *Bayside Developers*, 43 F.3d 1230, 1240 (9th Cir.1994). "However,
3 [for there to be a waiver,] it must [have] be[en] unequivocally
4 apparent that the case [was] removable [before the defendant
5 engaged in the litigation conduct], [] the intent to waive the
6 right to remove to federal court and to submit to state court
7 jurisdiction must [have been] clear and unequivocal, and the
8 defendant's actions must be inconsistent with the right to
9 remove." 16 Moore's Federal Practice § 107.18[3][a].

10 Given these standards, Plaintiff's Complaint does not assert
11 any federal claims. Although the Complaint refers to potential
12 violations of RESPA and TILA, the Complaint does not actually
13 allege that these federal statutes have been violated; rather,
14 the Complaint suggests that they may have been and that Plaintiff
15 might seek leave to amend to assert such claims. Whether or not
16 SPS violated RESPA or TILA is not an essential element of any of
17 Plaintiff's state law causes of action. SPS's concern that its
18 failure to remove the action based on the allegations in
19 Paragraphs 47-48 would result in the waiver of its right to
20 remove is misplaced because it is not unequivocally clear from
21 these allegations that the action is removable on the ground of
22 federal question subject matter jurisdiction. If, following
23 remand of this action, Plaintiff amends his complaint to allege
24 violations of RESPA, TILA, or any other applicable federal law,
25 SPS can file a successive notice of removal based on these
26 federal questions within the time period set forth in Section

1 1446(b). See 16 Moore's Federal Practice, § 107.30[4]; *Mattel,*
2 *Inc. v. Bryant*, 441 F.Supp.2d 1081, 1089 (C.D.Cal.2005), *aff'd*,
3 446 F.3d 1011 (9th Cir.2006).

4 Plaintiff's motion to remand on this ground is GRANTED.

5 E. ATTORNEY'S FEES.

6 Plaintiff couples his motion to remand with a request for
7 its attorneys' fees in connection with the motion to remand.
8 Plaintiff does not assert any specific amount of attorney's fees
9 or provide any documentation supporting this request.

10 28 U.S.C. § 1447(c) provides that "[a]n order remanding the
11 case may require payment of just costs and any actual expenses,
12 including attorney fees, incurred as a result of the removal."
13 The decision to award such fees is within the district court's
14 discretion and does not require a finding of bad faith removal
15 because the purpose of such an award is not punitive, but rather
16 to reimburse a plaintiff for wholly unnecessary litigation costs
17 caused by defendant. *Moore v. Permanente Medical Group, Inc.*,
18 981 F.2d 443, 446-447 (9th Cir. 1992). A court may award
19 attorney's fees when removal is wrong as a matter of law. *Ansley*
20 *v. Ameriquest Mortg. Co.*, 340 F.3d 858, 864 (9th Cir.2003).
21 However, "absent unusual circumstances, attorney's fees should
22 not be awarded when the removing party has an objectively
23 reasonable basis for removal." *Martin v. Franklin Capital Corp.*,
24 546 U.S. 132, 136 (2005).³

25 ³SPS miscited this case as *Martin v. First Franklin Capital*
26 *Corp.*, 536 U.S. 132 (2005).

1 Plaintiff argues that his attorney's fees should be awarded
2 for SPS's "knee-jerk improvident removal which appears designed
3 to consume Plaintiff's time, money, and resources, and delay this
4 case from being heard on its merit in Tulare Superior Court."

5 However, as SPS responds, based on the Notice of Removal and
6 its opposition to the motion to remand, "it is clear that at a
7 minimum, SPS has an objectively reasonable basis for removing
8 this matter in light of Plaintiff's allegations regarding
9 violations of federal laws and relief requesting amounts in
10 excess of \$75,000.00." Plaintiff's request for attorney's fees
11 pursuant to Section 1447(c) is DENIED.

12 CONCLUSION

13 For the reasons stated:

14 1. Plaintiff's motion to remand is GRANTED and Plaintiff's
15 request for attorney's fees is DENIED;

16 2. Counsel for Plaintiff shall prepare and lodge a form of
17 order consistent with this Memorandum Decision within five (5)
18 court days following service of this Memorandum Decision.

19 IT IS SO ORDERED.

20 Dated: June 23, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE