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

GREGORY M. MOORE,  
Plaintiff,

No. 2:12-cv-2125-LKK-EFB PS

vs.

WELLS FARGO BANK, N.A.;  
CAL-WESTERN RECONVEYANCE  
CORPORATION; DOES 1-20, inclusive,  
Defendants.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

This case, in which plaintiff is proceeding pro se, is before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21). See 28 U.S.C. § 636(b)(1). On August 14, 2012, defendant Wells Fargo Bank, N.A., successor by merger with Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB (“Wells Fargo”) removed this action from Placer County Superior Court.<sup>1</sup> Dckt. No. 1. Then, on August 21, 2012, Wells Fargo filed a motion to dismiss plaintiff’s complaint, and noticed the motion for hearing on October 3, 2012. Dckt. No. 6. On September 19, 2012, plaintiff filed an opposition to the motion to dismiss and a motion to amend his complaint. Dckt. No. 10.

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<sup>1</sup> Defendant Cal-Western Reconveyance Corporation (“Cal-Western”) also filed a notice of consent to the removal on August 14, 2012. Dckt. No. 2.

1           However, before the court can address the merits of Wells Fargo’s motion to dismiss or  
2 plaintiff’s motion to amend, the court has an independent duty to ascertain its jurisdiction and  
3 may remand sua sponte for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1447(c). “The  
4 burden of establishing federal jurisdiction is on the party seeking removal, and the removal  
5 statute is strictly construed against removal jurisdiction.” *Emrich v. Touche Ross & Co.*, 846  
6 F.2d 1190, 1195 (9th Cir. 1988). “Federal jurisdiction must be rejected if there is any doubt as to  
7 the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).  
8 As explained below, defendant has failed to meet that burden.

9           Here, Wells Fargo’s notice of removal is predicated upon the court’s diversity  
10 jurisdiction. Dckt. No. 1 at 1; *see also* 28 U.S.C. § 1332 (providing that a district court has  
11 diversity jurisdiction over any civil action between citizens of different states as long as the  
12 amount in controversy exceeds \$75,000, excluding interest and costs). The notice of removal  
13 states that there is complete diversity of citizenship between the parties since plaintiff is a citizen  
14 of California, Wells Fargo is a citizen of South Dakota, and Cal-Western’s California citizenship  
15 should be ignored since Cal-Western is a nominal defendant and was fraudulently joined. Dckt.  
16 No. 1 at 2-16.

17           As an initial matter, although Wells Fargo argues at great length in its notice of removal  
18 that, as a national bank, it is only a citizen of South Dakota, “the State in which its main office,  
19 as set forth in its articles of incorporation, is located.” *Id.* at 3 (quoting *Wachovia Bank v.*  
20 *Schmidt*, 546 U.S. 303, 306-07 (2006) (“*Schmidt*”). Wells Fargo contends that, although  
21 *Schmidt* did not decide whether a national bank may also be a citizen of the state that is its  
22 principal place of business, the post-*Schmidt*, published decisions hold that a national bank is  
23 only a citizen of one state. *Id.* at 3-5 (citing *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653  
24 F.3d 702, 710 (8th Cir. 2011) (“*WMR*”). Wells Fargo acknowledges the dissent in *WMR*, and a  
25 number of California district court cases, which have found Wells Fargo to be a California  
26 citizen in reliance upon *American Surety v. Bank of Cal.*, 133 F.2d 160 (9th Cir. 1943), a Ninth

1 Circuit case holding that a national bank’s principal place of business is used to determine  
2 citizenship. However, Wells Fargo argues that the *WMR* dissent and the district court cases were  
3 wrong to rely on *American Surety* since that case is no longer viable. Dckt. No. 1 at 5-12. Wells  
4 Fargo argues that “(I) *Schmidt* has abrogated *American Surety*; (ii) *American Surety*’s premise  
5 that ‘located’ is undefined was superseded by statute in 1994, as pointed out by *Schmidt*; (iii)  
6 importantly, *American Surety*’s application of the principal place of business test, even to  
7 corporations, was wrong according to the Supreme Court in [*The Hertz Corp. v. Friend*, 130 S.  
8 Ct. 1181 (2010)]; and, (iv) *American Surety* is not controlling under Ninth Circuit law because it  
9 merely assumed that the principal place of business test was the correct standard for purposes of  
10 reaching a decision on the merits.” *Id.* at 6.

11 District courts in the Ninth Circuit are divided about whether a national bank is only a  
12 citizen of the state in which its main office, as set forth in its articles of incorporation, is located,  
13 or whether it is also a citizen of the state where it has its principal place of business. *Yong Chull*  
14 *Kim v. Wells Fargo Bank, N.A.*, 2012 WL 3155577, at \*2-3 (N.D. Cal. Aug. 2, 2012) (compiling  
15 cases). However, earlier this year, in *Taheny v. Wells Fargo Bank, N.A.*, 2012 WL 1120140  
16 (E.D. Cal. Apr. 3, 2012), the district judge assigned to this case expressly re-affirmed his earlier  
17 holding in *Guinto v. Wells Fargo Bank, N.A.*, 2011 WL 4738519 (E.D. Cal. Oct. 5, 2011), that  
18 *American Surety* is binding authority and that, therefore, a national bank is also citizen of the  
19 state where it has its principal place of business. 2012 WL 1120140, at \*1; *see also Rodriguez v.*  
20 *Wells Fargo Bank, Nat. Ass’n*, 2012 WL 1940572 (S.D. Cal. May 25, 2012). The court held  
21 that, under the authority of *American Surety*, Wells Fargo is a citizen of California since that is  
22 the state where it has its principal place of business, even though, based on *Schmidt*, it is also a  
23 citizen of South Dakota, the state in which its main office, as set forth in its articles of  
24 incorporation, is located. 2012 WL 1120140, at \*1. For the reasons expressed in the *Taheny*  
25 opinion, this court concludes that Wells Fargo is a citizen of both California *and* South Dakota.  
26 Accordingly, complete diversity among the parties is lacking.

1           Moreover, even if Wells Fargo was not a citizen of California, complete diversity would  
2 still be lacking here since Wells Fargo does not dispute that Cal-Western is a California citizen.  
3 Dckt. No. 1 at 14-15. Although Wells Fargo argues that Cal-Western’s California citizenship  
4 should be disregarded since it is a nominal defendant and was fraudulently joined, Wells Fargo  
5 has not met its burden of establishing either of those facts. *See Boggs v. Wells Fargo Bank NA*,  
6 2012 WL 2357428, at \*2-5 (N.D. Cal. June 14, 2012).

7           Under the “sham” or “fraudulent” joinder doctrine, the citizenship of a non-diverse party  
8 may be disregarded if the district court determines that no possible cause of action has been  
9 stated against that party. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).  
10 There is a “general presumption against fraudulent joinder” and the defendant's burden of  
11 demonstrating that a joinder is fraudulent is a “heavy” one. *Hunter v. Philip Morris USA*, 582  
12 F.3d 1039, 1046 (9th Cir. 2009). In addition, courts ordinarily do not consider a non-diverse  
13 defendant’s defenses on the merits in determining whether that defendant's joinder was  
14 “fraudulent.” *Id.* at 1044.

15           According to Wells Fargo, “as trustee under the deed of trust – a limited agent or  
16 stakeholder for purposes of effectuating non-judicial foreclosure actions,” Cal-Western is merely  
17 a nominal party who was fraudulently joined. Dckt. No. 1 at 14. Wells Fargo points to the  
18 declaration of non-monetary status filed by Cal-Western and argues that “Cal-Western has no  
19 financial interest in the subject property and otherwise does not owe any duty to plaintiff.” *Id.* at  
20 15. Wells Fargo further contends that any act pertaining to Cal-Western’s role as the servicing  
21 trustee is privileged under California law. *Id.*

22           California Civil Code section 2924I permits a trustee to declare “non-monetary status” if  
23 it “maintains a reasonable belief that it has been named in the action or proceeding solely in its  
24 capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the  
25 performance of its duties as trustee.” Cal. Civ. Code § 2924I(a). However, that statute also  
26 provides for a 15-day objection period. *Id.* § 2924I(d). “A party that files a declaration of

1 non-monetary status does not actually become a nominal party until 15 days pass without  
2 objection.” *Sun v. Bank of Am. Corp.*, 2010 WL 454720, at \*2 (C.D. Cal. Feb. 8, 2010). Here,  
3 Cal-Western did not file its declaration of non-monetary status until August 13, 2012, the day  
4 before this action was removed to this court. Dckt. No. 1 at 15, n.3. Therefore, even if the  
5 declaration of non-monetary status could have transmuted Cal-Western into a nominal party,<sup>2</sup>  
6 here it did not do so since the 15 day objection period did not run, and as a result, Cal-Western’s  
7 non-monetary status was not perfected. *Boggs*, 2012 WL 2357428, at \*3; *Hernandez v. First*  
8 *Horizon Loan Corp.*, 2011 WL 2531959, at \*2 (N.D. Cal. Jun. 24, 2011) (granting motion to  
9 remand where defendants removed less than fifteen days after the trustee defendant filed a  
10 declaration for non-monetary status); *Wise v. Suntrust Mortg., Inc.*, 2011 WL 1466153, at \*4  
11 (N.D. Cal. Apr. 18, 2011) (same).

12         Additionally, although Wells Fargo argues that Cal-Western has no financial interest in  
13 the subject property and otherwise does not owe any duty to plaintiff, and that any act pertaining  
14 to Cal-Western’s role as the servicing trustee is privileged under California law, Wells Fargo has  
15 not carried its heavy burden of showing that the joinder of Cal-Western was fraudulent or a  
16 sham. As discussed above, courts ordinarily do not consider a non-diverse defendant’s defenses  
17 on the merits in determining whether that defendant’s joinder was “fraudulent.” *Hunter*, 582  
18 F.3d at 1044; *see also Osorio v. Wells Fargo Bank*, 2012 WL 2054997, at \*2 n. 2 (N.D. Cal.  
19 June 5, 2012) (“a declaration of non-monetary status does not render Cal-Western a nominal  
20 party if it acted improperly as a trustee, if plaintiff has stated a claim for monetary damages  
21 against Cal-Western, or if Cal-Western has a stake in the action against Wells Fargo.”).

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23         <sup>2</sup> Courts disagree regarding the effect of a declaration of non-monetary status for purposes  
24 of diversity jurisdiction. *Compare Hershcu v. Wells Fargo Bank, N.A.*, 2012 WL 439698, at \*2  
25 (S.D. Cal. Feb. 10, 2012) (“The citizenship of Cal–Western may not be ignored for diversity  
26 purposes because it has filed a declaration of non-monetary Status”) *with Cabriaes v. Aurora Loan*  
*Servs.*, 2010 WL 761081, at \*2 (N.D. Cal. Mar. 2, 2010) (filing of declaration by trustee  
“transformed it into a nominal party whose citizenship is disregarded for purposes of assessing  
diversity jurisdiction”).

1 Therefore, Cal-Western's California citizenship will not be disregarded.

2 Because plaintiff and both defendants are citizens of California, this court does not have  
3 diversity jurisdiction over this action. Additionally, a review of the complaint reveals that  
4 plaintiff does not allege any federal claims. Dckt. No. 1-1 at 2-6 (Compl.). Therefore, because  
5 defendants have not adequately established diversity or federal question jurisdiction, the court  
6 lacks subject matter jurisdiction and must remand the case. *See* 28 U.S.C. § 1447(c).

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. The October 3, 2012 hearing on Wells Fargo's motion to dismiss is vacated; and  
9 2. The December 12, 2012 status (pretrial scheduling) conference is vacated.<sup>3</sup>

10 IT IS FURTHER RECOMMENDED that:

- 11 1. The above-captioned case be REMANDED to the Superior Court of the State of  
12 California in and for the County of Placer; and  
13 2. Wells Fargo's motion to dismiss, Dckt. No. 6, and plaintiff's motion to amend, Dckt.  
14 No. 10, be denied as moot.

15 These findings and recommendations are submitted to the United States District Judge  
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
17 after being served with these findings and recommendations, any party may file written  
18 objections with the court and serve a copy on all parties. Such a document should be captioned  
19 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
20 shall be served and filed within fourteen days after service of the objections. Failure to file  
21 objections within the specified time may waive the right to appeal the District Court's order.

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24 <sup>3</sup> As a result, the parties are not required to submit status reports as provided in the August  
25 15, 2012 order. *See* Dckt. No. 4. However, if the recommendation of remand herein is not adopted  
26 by the district judge, the undersigned will reschedule the status conference and require the parties  
to submit status reports.

1 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th  
2 Cir. 1991).

3 DATED: September 24, 2012.

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5 EDMUND F. BRENNAN  
6 UNITED STATES MAGISTRATE JUDGE  
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