In the

United States Court of Appeals

for the

Ninth Circuit

IN RE DUNCAN K. ROBERTSON

DUNCAN K. ROBERTSON,

Plaintiff and Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,

Respondent,

GMAC MORTGAGE, LLC, et al.,

Defendants and Real Parties in Interest.

From a Decision of the United States District Court for the Western District of Washington, No. 12-cv-02017-MJP · Honorable Marsha J. Pechman

PETITION FOR WRIT OF MANDAMUS

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I. PETITION FOR WRIT OF MANDAMUS AND RELIEF SOUGHT

Duncan K. Robertson ("Robertson"), plaintiff below petitions this Court to issue a writ of mandamus commanding the U.S. District Court for Western District of Washington ("district court") to remand his case, No. 12-cv-02017-MJP, to King County Superior Court because of the district court's non-compliance with 28 U.S.C. §§ 1332, 1441, & 1446.

II. INTRODUCTION

"[B]y whatever route a case arrives in federal court, it is the obligation of both district court and counsel to be alert to jurisdictional requirements." Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 593, 124 S.Ct. 1920, 158 L.Ed.2d 866 (2004). Our federal Supreme Court has promised States and their citizens they can rest assured that district courts will comprehend (and not balk at) applying the rules of removal that Congress has prescribed for purposes of ensuring federalism and dual sovereignty. See Caterpillar Inc. v. Lewis, 519 U.S. 61, 77, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

In this case the district court committed clear error by failing to apply Congress's diversity of citizenship requirements under 28 U.S.C. § 1332; ignoring Congress's rules related to "in-forum defendants" under 28 U.S.C. § 1441(b)(2); and deciding "merits" issues before determining the court had subject matter jurisdiction. See e.g., Hunter v. Phillip Morris, 582 F.3d 1039 (9th Cir., 2009).

III. ISSUES

1. Whether the district court committed clear error warranting mandamus relief when it failed to inquire and determine whether defendants had complied with the pleading and proof requirements imposed by 28 U.S.C. §§ 1332, 1441, & 1446?

2. Whether the district court committed clear error warranting mandamus relief when it ruled on the merits of a motion to dismiss prior to determining it had diversity jurisdiction and the case had been properly removed?

3. Whether the issuance of a writ of mandamus directing the federal court to remand this case back to state court is required by the Bauman Factors and constitutional principles of federalism and dual sovereignty?

IV. STATEMENT OF THE CASE

Robertson is a citizen and resident of Oregon. Appendix (hereafter "A") at 3. He brought his causes of action in Washington State Superior Court, and his claims concern, in part, title and interest to a parcel of real property located in King County, Washington. See A at 1-2. Robertson's state court complaint alleged, in pertinent part, that LSI Title Agency, Inc. ("LSI"), a company working with the banks to undertake foreclosures of real property in Washington State, was a fictitious entity masquerading as a Washington company. A at 30-36, see also, A at 5, 15-18, 20-21, 46-47, 50-52. Robertson also alleged LSI purports to be a "Resident Title Insurance Agency in the state of Washington." A at 5. His

allegation was supported by citation to records of the Washington Office of the Insurance Commissioner ("OIC") where LSI had applied for a special title insurance status by declaring its principal place of business to be in Bellevue, WA. See A at 30-33, 150, 181, 196, 250-58.

On November 11, 2012, Defendant JP Morgan Chase, N.A. ("Chase") filed a notice to remove Robertson's case to the federal district court (A at 77-80), which Robertson opposed. See generally, A at 111-121. The removal pleading stated, in part: "suit is between a **citizen of Oregon** and foreign business entities, none of which are Oregon business entities." A at 78. Chase's removal pleading did **not** allege (1) the **citizenship** of any of Defendants (identifying instead "residences"), (2) the **members and their citizenships** for each LLC (partnership), and (3) a **principal place of business** for corporate entities nor **designated main office** for national banking associations. See A at 76-80.

In response, on or about November 30, 2012, Robertson, pro se, filed a Motion to Remand proffering several reasons why the lawsuit should be returned to State Court. See A at 111-116.[1] Robertson attached certain documents in support

[1] Some of those reasons included: that Notice of Removal only made an indirect reference to National Trust Companies. However, the allegation of this defendant's location, Bank of New York Trust Company, N.A. (hereafter "BNY") was false. See A at 79, 107-110, 326-332. For LLC defendants all allegations and declarations were insufficient, alleging no citizenships of members in notice of removal. A at 77-80. Notice alleged Defendant Residential Funding Company,

of remand. See e.g. A at 253-258 (confirming dkt. 17-1 Exhibit (OIC records showing LSI's claimed principal place of business was Washington State.))

Defendant LSI was served on October 19, 2012. A at 152, 154.1, 258.1-.4.[2] LSI filed a Notice of Appearance in Superior Court on Nov. 2, 2012. LSI then joined in Chase's Notice of Removal and moved to dismiss the complaint on the merits on Nov. 15, 2012. A at 83-106. On December 21, 2012, more than two months after LSI was served (and more than a month after LSI joined in Chase's removal), LSI filed its own second Notice of Removal, in which all Defendants joined. A at 122-127. Like Chase's pleading, LSI's removal did not state certain corporate and national association defendant's **principal place of business** or **designated main office**; or the **citizenship of every member of each LLC** defendant; it also stated: "LSI's Motion to Remand <sic> relies on the same jurisdictional basis as JPMorgan Chase's motion[.]" See A at 124. Robertson challenged this second removal in responsive documents and by filing a second Motion to Remand. A at 151, 182-205.

LLC did not exist, an allegation adopted by the Court in its Order Denying Motion to Remand. A at 226 (remand order #1); see also, A at 147-148 (Decl. of Fig).

[2] LSI claimed as a basis for the second Notice of Removal that it was "not properly served" in state court, but set forth no authority for this claim. A at 123 (¶ 1). LSI had filed an additional Notice of Appearance (A at 81-82) in order to set their own date of "acceptance of service", claiming this justified a second removal filing over two months after actual service and over 30 days after it joined in Chase's initial removal pleading. A at 123-24 (¶¶ 1-4). Robertson objected. A at 151-52, see, A at 181-206. The Court never addressed his objections. See A 225-29, 247-48.

Defendants responded to the initial Motion to Remand in their Joint Opp. claiming allegations restated there could be considered as an amendment. A at 128-139. But defendants failed to request leave to file a motion to amend the removal pleading and still failed to affirmatively allege facts showing: 1.) an adequate basis for all defendant's diversity and 2.) precluding a local defendant. A at 134-136; see also, A at 151-52. In response to Mr. Robertson's challenges[3] to the residence basis of removal, Defendants stated: "Plaintiff argues the citizenship of the corporate Defendants may differ from their residences. Plaintiff is mistaken." A at 134. See also, A at 149. Joint Opp. goes on to state: "[t]he Notice of Removal sets forth, for each Defendant, **either** the state it is incorporated (or otherwise organized) or the location of its principal place of business." A at 135.

Defendants also filed four declarations as part of their response (See A at 140-148) and would eventually file two more declarations after the hearing date for the initial remand motion. *See* A at 207-09, 221-224. However, with the exception of the Declaration of Warren A. Robinson (A at 143-44) these declarations proffered no affirmative evidence of citizenship of parties. See A at 140-42, 145-48, 207-09, 221-224. In particular, Decl. of Gary Finnell states: "Principal Place of Business and State of Incorporation. LSI Title Agency, Inc. is incorporated in Illinois. LSI Title Agency, Inc.'s Principal Place of Business (i.e., its "nerve

[3] Alleging Residence rather than citizenship as ground for removal was challenged in Motion to Remand, A at 112:12-15, 114:13-18, 149, 153.

center") is located in neither Oregon nor Washington." A at 146 (filed Dec. 24, 2012); see also, A at 124 (LSI Notice of Removal); A at 134-36 (Joint Opp. To MTR). The Declaration of Matthew Sullivan also contains no mention of citizenships and fails to supplement the insufficient allegations of defendants Chase and BNY citizenships. A at 140-42.[4] The Declaration of William Fig contains information regarding the Notice's defective allegation of the non-existence of defendant Residential Funding Company, LLC, but makes no mention of the citizenship of any of his client LLC's members. A at 147-48, see A at 207-09 (the citizenship of defendant LLCs' members were apparently unknown at this time as the LLCs were in bankruptcy and thus "in a state of flux"). The Feb. 7, 2013, declaration of Kari Krull relates each of LLC defendants to an indirect parent company Ally Financial, Inc., but makes no claims of LLC members' citizenships when the complaint was filed. See, A at 221-224; A at 207-09.

On February 6, 2012, the district court granted LSI's Motion to Dismiss for "failure to state a claim" under Iqbal/Twombley[5] pleading standards

[4] Assertion that defendant BNY has "its principal place of business in Miami, Florida" was challenged by Plaintiff. Compare, A at 78 with, A at 108-110, 114, 149, 152, 328-29, 331-332. BNY never responded to these challenges. Nonetheless, the district court ruled that BNY was a Florida citizen in its Order. A at 226-27.

[5] The heightened pleading standards for actions filed in federal court under Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937; 173 L. Ed. 2d

notwithstanding that Robertson's complaint had been originally filed in state court, and the federal court had not yet determined it had subject matter jurisdiction over the case.[6]

On February 16, 2012, the district court denied Robertson's motion to remand Chase's removal on four grounds, but declined to even discuss Robertson's pleading, proof, and timeliness challenges to the district court's diversity and removal jurisdictions. See generally, A at 225-229. The district court's removal order #1 ruled: "[f]or purposes of diversity under 28 U.S.C. §1332, the notice of removal established the citizenship of each of the Defendants: [***] [i]n response to Plaintiff's motion to remand, Defendants have individually verified their citizenship." A at 226, 227. On February 20, 2012, the district court denied Robertson's second motion to remand LSI's belated removal filed over 60 days after LSI joined in Chase's notice of removal. A at 247-48. This order made no mention of Robertson's objection to LSI's untimely Removal and was based solely on the reasoning of the Court's removal order #1. Id.

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868 (2009) differ from the notice pleading standards utilized in Washington courts. See McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 233 P.3d 861 (2010)

[6] *See* A at 83-106, 155, 170:6-8; 172:22, 174-75, 215; see also, A at 230-246 (motion to Reconsider LSI dismissal); A at 357-360 (denial of motion for reconsideration); A at 259-325 (supplemental authority); A at 335-347 (motion to amend Complaint); A at 348-356 (motion for certification to Wash. Supreme Court).

This matter has not yet gone to trial and Robertson has sought reconsideration, leave to amend his Complaint, and certification pursuant to RCW 2.60.020 as to whether Vawter v. Quality Loan Serv. Corp. of Wash., 707 F.Supp.2d 1115, 1123 (W.D. Wash. 2010) precludes a pre-sale remedy under the Washington Consumer Protection Act, Wash. Rev Code Ch. 19.86 (CPA) for unfair or deceptive nonjudicial foreclosure practices. A at 230-246, 335-356.

V. REASONS WHY THE WRIT SHOULD ISSUE

A. Standard for Issuing Writ of Mandamus

This Circuit considers the presence or absence of the following five "Bauman factors" in evaluating a petition for writ of mandamus:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

Credit Suisse v. United States Dist. Court, 130 F.3d 1342, 1345 (9th Cir. 1997) (quoting, Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977)). "None of these guidelines is determinative and all five guidelines need not be satisfied at once for a writ to issue." Credit Suisse, 130 F.3d at 1345. A petitioner's failure to show clear error may be dispositive of a petition for writ of

mandamus. See McDaniel v. United States Dist. Court, 127 F.3d 886, 888 (9th Cir., 1997)(per curiam).

B. Bauman Factor Three: The district court's removal orders are clearly contrary to law.

A removing party is charged with filing a "short and plain statement of the grounds for removal." 28 U.S.C. § 1446. This has been interpreted as the party seeking to invoke diversity jurisdiction must **affirmatively** allege those facts necessary to establish the actual citizenship of all the parties for both jurisdictional and statutory purposes. See Harris v. Rand, 682 F.3d. 846, 850 (9th Cir., 2012) (emphasis supplied) (citing, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937; 173 L. Ed. 2d 868 (2009)); see e.g., Kanter v. Warner-Lambert Co., 265 F.3d 853, 857-58 (9th Cir., 2001)(defect to allege residence instead of citizenship); cf., Smith v. Sperling, 354 U.S. 91,93, n. 1,77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957)(diversity of citizenship is determined as of the filing of the complaint).[7]

The requirements of the removal statute are "strictly construed against removal jurisdiction." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir., 1992).

[7] In addition to residence defects, this Court in Kanter recognized "merely alleg[ing] that … [corporations] were not citizens of California" constituted a "failure to specify the corporate citizenship of … three co-defendants." Kanter, 265 F.3d at 857.

Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance. Id. (internal citation omitted). The "strong presumption" against removal jurisdiction means the defendant always has the burden of establishing removal is proper. Id. (internal cites omitted).[8]

1. The district court committed clear error because corporate and banking defendants did not adequately allege "citizenship" for each defendant.

A basis for removal of Robertson's case from state court is lacking both generally and for specific types of defendants in both Chase's and LSI's removal pleadings. A broad legal conclusion in a notice of removal or complaint, e.g., that complete diversity exists or, "plaintiff was a citizen of Alaska and defendant of New York" is not adequate. See Barrow Development Co. v. Fulton Ins. Co., 418 F.2d 316, 317-18, FN 1 (9th Cir., 1969). Similarly an allegation which does not provide the facts for determining a party's citizenship is also defective. Kanter, 265 F.3d at 857-858 (party's "residence" instead of "citizenship," e.g., the party "resides in California" is defective).

For the purposes of diversity, "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business [***]." 28 U.S.C. §

[8] "If removal was improper and the federal court lacks jurisdiction, the federal court must remand the case to state court. 28 U.S.C. § 1447(c). The district court must resolve all ambiguity in favor of removal." Dunham v. Lockheed Martin Corp., 445 F.3d 1247, 1252 (9th Cir., 2006).

1332(c)(1). Thus for corporations, this Court has "repeatedly held that a complaint must include allegations of both the state of incorporation and the principal place of business [***]." Harris v. Rand, 682 F.3d 846, 850 (9th Cir., 2012)(internal citations omitted); see also, Hertz Corp. v. Friend, 559 U.S. 77, 92-93, 130 S.Ct. 1181, 175 L. Ed. 2d 1029 (2010).[9] A national banking (or trust) association is a citizen of the State in which its main office, **as set forth in its articles of association**, is located. See Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303, 307, 126 S. Ct. 941; 163 L. Ed. 2d 797 (2006) (emphasis supplied). An LLC, or

[9] In 2010, the U.S. Supreme Court determined that the "principal place of business" refers to "**the place where a corporation's officers direct, control, and coordinate the corporation's activities**." Hertz Corp. v. Friend, 559 U.S. 77, 92-93, 130 S.Ct. 1181, 175 L. Ed. 2d 1029 (2010) (emphasis supplied) (resolving different interpretations of "principal place of business"). In 2012, this court in Harris found that the Hertz decision, did not "impose a heightened pleading requirement" or "dictate a precise manner for pleading subject matter jurisdiction" other than what was already in existence (i.e., plausibility under Iqbal/Twombly). Harris, 682 F.3d at 851 (citing, Iqbal, supra.; Twombly, supra.). The Court concluded that a statement under Federal Civil Practice Form 7(a) would satisfy the initial allegation requirement because it requires "assertion of facts regarding the location of a party's principal place of business," specifically:

> The plaintiff is [a citizen of Michigan] [a corporation incorporated under the laws of Michigan with its principal place of business in Michigan]. The defendant is [a citizen of New York] [a corporation incorporated under the laws of New York with its principal place of business in New York].

Id., 682 F.3d at 850-51 (citing Fed. R. Civ. P. Form 7(a) (2007)(brackets in original)). Defendants repeatedly failed to comply with Form 7(a) or provide facts necessary for compliance with its factual requirements.

partnership, is a citizen of every state of which its owners/members are citizens. Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir., 2006).

There are obvious and fatal defects in Chase's notice of removal (A at 76-80)(first notice), which the district court ignored at the expense of the Washington court system. **First**, the general statement that "[t]he suit is between a citizen of Oregon and foreign business entities, none of which are Oregon business entities" (A at 78)(¶ 3) is fatal because like the statement in Barrow (supra.) such statement does not factually establish citizenship. **Second**, like in Kanter (supra.) the statement that "[c]omplete diversity exists because Plaintiff is a 'citizen' of Oregon and Defendants have the following residences: [***]" (A at 78 (¶ 5) is inadequate because a corporation's residence is not a fact material to its citizenship for diversity purposes. See Kanter, 265 F.3d at 857-58.

Third, Chase's Notice of Removal, does not allege facts sufficient to satisfy the "state of incorporation" and "nerve center" requirements of Hertz (supra). See Harris, 682 F.3d at 850-51. The notice made no affirmative allegation as to the location of each of the following corporations' principal place of business: First American Title Insurance Company, and LSI Title Agency, Inc. A at 78.

Fourth, the national associations: e.g., Chase Bank and BNY, alleged a "principal place of business," but not their main offices designated in their articles

of association. A at 78.[10] Under Wachovia (supra.), it is the designated main office that is the fact which is material to citizenship of the banking association type of entity.[11] So, like a person's citizenship instead of residence, a banking association's "principal place of business" is not factually determinative of its designated main office. Id. Thus both removal notices were defective because neither provided the designated main office.

Fifth, Chase's Notice of Removal does not identify or allege the citizenship of each member in describing the citizenships of LLC defendants. A at 78. Thus the citizenships of GMAC Mortgage, LLC, Residential Funding Real Estate Holdings, LLC, Residential Funding Company LLC, Homecomings Financial, LLC, Executive Trustee Services, LLC, were never sufficiently pled or proved.

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[10] Robertson also notes that paragraph 6 of the removal notice observed Wachovia and the standards it sets; but nowhere in the pleading did the removing party actually attempt to comply with this rule by stating the main office of any of the three national associations or trust companies. See A at 79.

[11] Robertson notes this Circuit has not resolved whether "main office" or "designated main office" is minimally sufficient to allege a national association's "main office, as set forth in its articles of association" under Iqbal/Twombly (Supra.) plausibility standards, and/or whether a factual assertion of principal place of business is required in addition to main office allegations. Compare, Hertz, 559 U.S. at 92-93; and, Harris, 682 F.3d at 851; with, Wachovia, 546 U.S. at 307 & FN 1 (designated main office); see also, Taheny v. Wells Fargo Bank, N.A., 878 F. Supp. 2d 1093, 1094-1095, FN 1 & 2 (E.D. Cal., 2012)(recognizing district courts within the Ninth Circuit have reached conflicting decisions on national association pleading requirements).

There are no valid reasons for loosening the strict compliance standard with regard to removing this case involving regulation title and possession of Washington real property to the federal courts. Gaus, 980 F.2d at 566. LSI had sworn to the Washington Insurance Commissioner that its principal place of business was in Bellevue, Washington. Congress' purposes and federalism principles will not be served by allowing LSI to equivocally rebuke the statements it made to be able to take real property in Washington as a DTA trustee with a principal place of business in Washington. Federal law required judicial inquiry before allowing LSI to escape Washington's judicial reach. See Hertz, 559 U.S. at 96-97. See A at 30-33, 150, 181, 196, 250-52. Robertson has no personal local advantage to having a Washington forum (because he is a citizen of Oregon). Nonetheless defendants were able to get the district court to disregard 28 U.S.C. 1332 and erroneously conclude that complete diversity was alleged in both removal notice pleadings. See A at 225-229 (removal order #1).

2. The district court committed clear error when it found defendants verified their diversity.

When removed by a defendant, the burden lies with the defendant seeking removal; and a defendant has 30 days from service of process to do so. Washington v. Chimei Innolux Corp., 659 F.3d 842, 847 (9th Cir., 2011). Where a plaintiff challenges removal, the defendant may not rest on the allegations of his notice of removal, but must meet his burden by a preponderance of evidence, based on

"competent proof." Gaus, 980 F.2d at 566; Hertz Corp., 559 U.S. at 96-97. Where there is a dispute as to this proof, the court should inquire into the basis of its jurisdiction. See Hertz, 559 U.S. at 96-97. Within certain perimeters (not applicable here), a defendant can move to amend their notice to correct defects in form, but not make new substantive allegations. See ARCO Envtl. Remediation, LLC v. Department of Health and Envtl. Quality of Montana, 213 F.3d 1108, 1117 (9th Cir., 2000). Here, the district court disregarded Robertson's challenges and objections and found that defendants had "verified" removal. A at 225-229. For four reasons, this finding is clearly erroneous.

First, no motion to amend Chase's Notice of Removal had been filed or leave to amend granted. See A at 128-139 (joint opposition); A at 225-229 (first order); A at 247-248 (second order). Because no amendment was sought or granted, the required process of reviewing an amendment was not followed. See ARCO, supra. (process of reviewing the state court record and prohibiting new substantive allegations).

Second, the declarations submitted did not provide facts eliminating all of the defects in the removal pleadings. See A at 140-48; supra. at §V.B.1. For corporate defendants, only one declaration affirmatively stated a principal place of business, i.e., for First American Title. See A at 143-44 (Decl. of William A Robinson). The declaration of Gary Finnell failed to affirmatively state facts

showing where a corporation's officers direct, control, and coordinate the corporation's activities. A at 145-46. Instead it says:

> LSI Title Agency, Inc. is incorporated in Illinois. LSI Title Agency, Inc.'s principal place of business (i.e., "its nerve center") is located in neither Oregon or Washington.

Id. This declaration does not pass muster under the minimum requirements because it lacks averment of where its principal place of business is located. Id. Further there were still defects to cure as to other specific defendants. See supra. at §V.B.1. Taken together the declarations contain no information related to principal place of business for most corporate defendants, citizenship of members of LLC defendants or designated main offices for Chase and BNY and add only that the status of LLC defendants are in flux; creating an issue of fact as to where LLC members were citizens at the time the lawsuit was filed. A at 140-42, 147-48.[12]

Third, LSI's Notice of Removal (second removal) did not remedy all the defects (and furthermore was untimely, i.e., exceeded 30 days from LSI's service). See A at 122-27. Herein, LSI "affirmatively" alleges it is not a citizen of a state, but does not provide required allegations showing where a corporation's officers direct, control, and coordinate the LSI's activities. Id. Nor does the second removal

[12] The February 7, 2013, Declaration of Kari Krull, (a litigation specialist) discusses the LLCs, and states the principal place of business and state of incorporation for the indirect parent company Ally Financial. A at 221-224. However, it makes no claims of LLC or members' citizenship at time of complaint's filing and was filed after the noting dates for the motion to remand to be decided. Id.

notice provide the designated main offices for the national associations or the allegations of the citizenship of each member of each LLC defendant. Id. Further, it should be noted that the district court's decision not to grant Robertson's Second Motion to Remand only adopted removal order #1 (denying Robertson's motion to remand Chase removal pleading so as to "not repeat its rationale.") A at 247-48. Thus, the second order did not address the timeliness of LSI's notice under the removal statute; as if Congress 30 day timeliness limitation was of no concern to the district court. Id.

Fourth, Robertson offered contrary evidence and argument as to the pleadings and declarations of certain defendants, especially LSI and BNY. See e.g., A at 107-109, 111-121, 149-153, 181, 249-258. In instances where allegations are contested and declarations are challenged further inquiry is necessary to determine jurisdiction on the basis of "competent proof". See Hertz, 559 U.S. at 96-97; Gaus, 980 F.2d at 566; see e.g., Sports Shinko, 486 F. Supp. 2d at 1171, 1173-75, 1178-84 (factual analysis). The district court clearly erred by not making an adequate inquiry regarding proof of its jurisdiction as the removal pleadings were inadequate and supporting declarations were also inadequate to prove diversity and removal jurisdiction for most defendants.

3. The district court committed clear error when it failed to determine defendants complied with 28 U.S.C. § 1441(b).

> Congress imposes additional standards for removing state court cases:
>
> The fiction of stamping a corporation a citizen of the State of its incorporation has given rise to an evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another state. [***] It appears neither fair nor proper for such a corporation to avoid trial in the State where it has its principal place of business by resorting to a legal device not available to the individual citizen.

China Basin Properties, Ltd. v. One Pass, Inc., 812 F. Supp. 1038, 1040 & FN 1 (N.D. Cal., 1993) (citing S.Rep. No. 1830, 85th Cong., 2d Sess., reprinted in 1958 U.S. Code Cong. and Admin. News 3099, 3101-02); see also, Sports Shinko Co., Ltd. v. QK Hotel, LLC, 486 F. Supp. at 1173-84 (D. Haw., 2007)(inactive or winding down corporations).

> [***][28 U.S.C.] § 1441(b) imposes a limitation on actions removed pursuant to diversity jurisdiction: "such action[s] shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). This "forum defendant" rule "reflects the belief that [federal] diversity jurisdiction is unnecessary because there is less reason to fear state court prejudice against the defendants if one or more of them is from the forum state." Erwin Chemerinsky, Federal Jurisdiction § 5.5, at 345 (4th ed. 2003).

Spencer v. United States Dist. Court, 393 F.3d 867, 870 (9th Cir., 2004); see Hunter v. Phillip Morris, 582 F.3d 1039, 1044-1046 (9th Cir., 2009). In this case the record establishes the trial court failed to even consider Robertson's challenge

that LSI and other defendants were citizens of Washington. 28 U.S.C. § 1441(b) only allows removal where there is no in state forum defendant. See Hunter, 582 F.3d at 1044-1046. ("[D]iversity jurisdiction is lacking if there is **any possibility that the state law might impose liability on a resident defendant** under the circumstances alleged in the complaint").

Just as the district court committed clear errors by determining without adequately investigating its diversity jurisdiction (supra. §V.B.1-2.), it committed similar clear error by failing to investigate its removal jurisdiction. Indeed, the district court did not even find the limitation imposed by 28 U.S.C. § 1441(b) worth commenting upon at all in both removal orders; apparently finding only "complete diversity" to be necessary See A at 225-229.

4. The district court committed clear error by deciding LSI's motion to dismiss prior to determining it had diversity and removal jurisdiction.

> A federal court cannot assume subject-matter jurisdiction to reach the merits of a case [***] [a]nd the Supreme Court has specifically instructed that a district court **must first** determine whether it has jurisdiction **before** it can decide whether a complaint states a claim.

Moore v. Maricopa County Sheriff's Office, 657 F.3d 890, 895 (9th Cir. 2011) (emphasis supplied) (internal citations omitted); see also, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 1012 (1998) ("When presented with a motion to remand, a federal district court must ascertain whether it has subject matter jurisdiction before considering a defendant's motion to

dismiss"). Here LSI was dismissed before deciding either of the motions to remand. See A at 210-220. Thus, the district court also committed clear error by using its decision on the merits 1.) to eliminate LSI as a jurisdictional problem before determining it had subject matter jurisdiction over the case pursuant to 28 U.S.C. §§ 1332, 1441, & 1446. See Hunter, supra.; cf. Caterpillar Inc., supra; and 2.) by imposing Iqbal/Twombley pleading standards to dismiss Robertson's complaint when there was no basis for assuming authority over the "notice pleading" complaint properly filed in a Washington State court. See, supra, note 5.

C. Bauman Factor 4: The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.

This case well illustrates the extraordinary power a district court can utilize when acting under the guise of "diversity". See supra. at § V.B.1. First, the district court failed to require defendants to plausibly allege diversity jurisdiction, as plaintiffs must do. Harris v. Rand, supra. Second, the district court dismissed a problematic, potentially local defendant, without any consideration 28 U.S.C. § 1441(b). Hunter, supra. Finally, the district court granted LSI's motion to dismiss based on the federal court's restrictive, judge-centric "plausibility" pleading standard which was not then applicable to Robertson's complaint.

The federal rules reflect the Supreme Court's determination pursuant to the Constitution and federal statutes that state law controls in matters of substantive law while federal rules control over matters of procedure. Shady Grove

Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437, 176 L. Ed. 311 (2010); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938); see also, the Rules Enabling Act, 28 U.S.C. § 2702(b); State Law Decision Act, 28 U.S.C. § 1652. Such rules and statutes are designed so that federal courts will respect and not interfere with a state's development of its own substantive law, especially in areas of local concern. See Huddleston v. Dwyer, 322 U.S. 232, 236, 64 S.Ct. 1015; 88 L.Ed. 1246 (1944)("Until such time as a case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.") Respect for State sovereignty requires federal courts to be sensitive to State statutory regimes involving subjects of primarily local concern, such as regulation of **land use and land title**, (Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 29, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959); Burford v. Sun Oil Co., 319 U.S. 315, 332-3, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)), **family**, (United States v Windsor, U.S. No. 12-307 (June 25, 2013)(slip opinion, at 16-19)); and, **elections** (Shelby County v. Holder, U.S. No. 12-96 (June 25, 2013)(slip opinion, at 9-10)).

For most of our nation's history federal courts have not been the primary interpreters of statutes regulating land. Now that they have undertaken to do so, Washington Supreme Court cases suggest federal courts have not been rigorous in applying RCW Ch. 61.24 ("DTA") and CPA as the legislature wrote these statutes.

See Bain v. Metropolitan Mortgage Group, Inc., 175 Wash.2d 83, 105[13] , 109-10, & n. 14[14], 285 P.3d 34 (2012). As a result thousands of Washington land owners may have lost and are continuing to lose their homes because federal courts suck up their cases without satisfying diversity and removal requirements. The federal Courts then fail to follow the Washington Supreme Court's most recent interpretations of the language of Washington's DTA and CPA without ever considering the Washington Due Process and Separation of Powers issues which are being raised to challenge the facial constitutionality of the DTA. See infra, note 15.

An oft repeated error which has led to federal courts improperly removing cases against Washington trustees (notwithstanding trustees in forum status) is the district courts' unwillingness to accept that a DTA trustee's role is very rarely as a "neutral". In actual practice (more often than not) DTA trustees are agents for the banks and do not meet the "neutral judicial substitute" standard for a DTA trustee set forth in Klem v. Wash. Mut. Bank, 176 Wash.2d 771, 295 P. 3d 1179 (2013).[15]

[13] Washington Supreme Court finds Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1042-1043 (9th Cir., 2011) not instructive because Ninth Circuit did not suggest "that the parties could contract around the statutory terms".

[14] The Washington Supreme Court rejects 11 federal district court decisions, including Vawter, supra, as not being helpful because none meaningfully considered applicable DTA provisions or comparable statutory provisions.

[15] In Klem the Washington Supreme Court stated:

Removal is frequently accomplished by district courts either ignoring, as the district court did here, any "in forum" inquiry, (see e.g., Massey v. BAC Home Loans Servicing LP, 2012 U.S. Dist. LEXIS 154256 *4-5 (W.D. Wash. Oct. 26, 2012); Exelby v. Land Title Co., 2013 U.S. Dist. LEXIS 8213 (W.D. Wash. 2013); Hanson v. Mortgage Elec. Registration Sys., 2012 U.S. Dist. LEXIS 176940* note 1, (W.D. Wash. 2013))[16] or by assuming the trustee (who is essential to bringing

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> In a nonjudicial foreclosure, the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected. While the legislature has established a mechanism for nonjudicial sales, **neither due process nor equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure. An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity**, **at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a Washington Consumer Protection Act, …** [Emphasis Supplied]

Klem at 789-90; Although Klem speaks in terms of a due process challenge to the DTA, Id, at n 11, the DTA is also being constitutionally challenged under the Washington Separation of Powers since State v. Posey, 174 Wn.2d 131, 272 P.3d 840 237 (2012) recently held the legislature cannot frustrate superior courts original jurisdiction as set forth in Wash. Cont. Art. 4 § 6. *See also* State ex rel. Roseburg v. Mohar, 169 Wash. 368, 375, 13 P.2d 454 (1932) discussing superior courts original jurisdiction over cases dealing with title and possession of land. Washington homeowners now argue the legislature has no power to *give* "trustees" under the Separation of Powers jurisdiction reserved for superior court.

[16] Robertson would respectfully request this Court take judicial notice Northwest Trustee Services Inc. (NWTS), a defendant in each of these actions is an in-forum

any cause of action based on a DTA nonjudicial sale in Washington) is a "nominal defendant" based on common law trust theories, which are not applicable to a biased substitute judge who acts in violation of state law. See n. 14, supra. See e.g. Prasad v. Wells Fargo Bank, N.A., 2011 U.S. Dist. LEXIS 103122, **8-9 (2012); Townsend v. Quality Loan Serv. Corp., 2012 U.S. Dist. LEXIS 154254, **4-6 (W.D. Wash. Oct. 26, 2012); Gogert v. Reg'l Tr. Servs., 2012 U.S. Dist. LEXIS 11018 (W.D. Wash. Jan. 31, 2012).

In any event the district court's failure to account for the in-forum status and duties of a DTA trustee when considering diversity and/or removal jurisdiction appears evidence of an oft repeated error or persistent disregard of the federal rules and statutes, which: 1.) require federal courts to let state filed cases be tried in state court unless the removal statute is strictly followed; and, 2.) if removal is appropriate, apply the substantive law of the state if it is constitutional. Federal judges have no business attempting to develop state substantive law where the Washington legislature has afforded federal courts direct access to the Washington Supreme Court for help construing state statutes. See RCW 2.60.020.

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defendant, which should have precluded the district court's exercise of removal jurisdiction. See Wash. Sec. State Corporations Search, available at: http://www.sos.wa.gov/corps/ (type "Northwest Trustee Services" into Organization Name and click search, then select "NORTHWEST TRUSTEE SERVICES, INC." and see State of Incorporation is Washington)(last visited June 28, 2013); see also, Exelby v. Land Title Co., 2013 U.S. Dist. LEXIS 8213 (W.D. Wash. 2013); see e.g., Mirozan v Wells Fargo Bank, N.A., 2012 U.S. Dist. Lexis 52484, *3-5 (W.D. Wash. 2013).

D. Bauman Factor 5: The district court's order raises new and important problems, or issues of law of first impression[17].

Robertson, an Oregon resident, filed his case in a Washington state court alleging only state causes of action. He was removed to federal court, objected, and moved for remand. This was refused. He moved to amend. His amendment was denied on the basis of Vawter which the district court construed as precluding any pre-sale remedies. Robertson then asked the district court to certify Vawter's continued viability to the Washington Supreme Court, given the high court's rejection of Vawter in Bain., 175 Wn.2d at 109 ("Vawter mentions RCW 61.24.005(2) once, in a block quote from an unpublished case, without analysis. We do not find [it] helpful."). The district court refused.

Bain is not the only court to reject Vawter's continued viability both outright and in the context of a pre-sale CPA claim. Bain, 175 Wash. 2d at 115-18. Vawter also has been distinguished by Washington's western district bankruptcy court:

> Moreover, this Court has repeatedly distinguished Vawter v. Quality Loan Serv. Corp. of Wash., 707 F.Supp.2d 1115, 1123 (W.D. Wash. 2010), one of the cases relied on by Defendants. See Reinke v. Northwest Trustee Services, Inc. (In re Reinke), Case No. 09-01541 [Dkt. 197]. The remedy afforded a borrower under the WA DOTA is to restrain a foreclosure sale on any "proper legal or equitable ground." RCW 61.24.130(1). When the lender voluntarily stops the foreclosure sale, the borrower need not continue efforts to restrain the sale in order to preserve his or her claim under the WA CPA relating to abuses of the foreclosure process.

[17] See note 11 for discussion of another first impression Circuit issue raised by Robertson's Petition.

Barus v ReCon Trust, 2011 WL 2360206 (W.D.Wash.) Judge Robart (who wrote Vawter) and other judges have held it is plausible that a nonjudicial foreclosure pre- and post- sale can result in a CPA violation. See Bavand v. OneWest Bank FSB, 2013 U.S. Dist. LEXIS 41745, *9-11 (W.D. Wash., Mar. 25, 2013) (relying on the reasoning of Bain to remand case); Burkart v. Mortgage Elec. Registration Sys., 2012 U.S. Dist. LEXIS 140794, at *13 (J. Jones) (finding presale CPA claim plausible under Bain).

Per the fifth Bauman (supra.) factor, this case presents new and important problems with a district court's handling of cases (1) from the State of Washington, which subscribes to "notice pleading" standards (2) after removal to a federal forum subscribing to Iqbal/Twombley "plausibility standards". Should a plaintiff be given at least one chance to amend his pleadings to reflect the different pleading standards after (and if) a federal district court determines it has subject matter jurisdiction? Considerations of fairness, implicit in federalism, dual sovereignty, and the Rules of Civil Procedure suggest so. Fed. R. Civ. P. 15.

The district court denied Robertson's motions to amend. A at 373-4. The district court explained federal courts need not consider "novel" state claims against a trustee for unfairly and deceptively bringing a nonjudicial foreclosure causing Robertson compensable business and financial injury because no sale of

the property occurred. Id. In support of this holding the district Court cited Cervantes v. Countrywide Home Loans, Inc., 656 F.3d at 1042-1043.

The Cervantes (supra.) holding (to the extent it applies equally to cases brought by plaintiffs in federal court and those who have been grudgingly removed there) appears inconsistent with the general requirement that federal courts should determine how a state supreme court would rule on those state substantive law issues which come before it. Huddleston, supra.; see also Gravquick A/S v. Trimble Navigation Intern. Ltd., 323 F.3d 1219, 1222 (9th Cir. 2003); Wolfson v. Watts (In re Watts), 298 F.3d 1077, 1082-1087 (2002); Jones-Hamilton v. Beazer Materials & Services, 973 F.2d 688, 696 & n. 4 (9th Cir., 1992); cf., Emery v. Clark, 604 F.3d 1102, 1119-20. (9th Cir., 2010). Federal courts should not simply decide what they think state law is; the appropriate query is "how would the state Supreme Court rule on this issue?" Id.

Robertson contends there is a fundamental unfairness and affront to federalism in, on one hand, the district court relaxing the Iqbal/Twombley (supra.) standards for bankers and corporations who file removal pleadings, while on the other hand, denying a plaintiff the opportunity to amend a complaint or consider his complaint in the same manner as a State Court would, or (if unsure of state law) refusing to certify an unclear or controversial issue of law to the Washington Supreme Court for resolution. See also, Bros. v Schein, 416 U.S. 386, 390-91, 94

S.Ct. 1741, 40 L. Ed. 215 (1974); Parents Involved Cmty. Schs v. Order Seattle Sch. Dist., 294 F.3d 1085, 1086 (2002). ("[W]e have an obligation to consider whether novel state questions should be certified and we have been admonished in the past for not doing so").

Certainly, there is a problem in allowing one judge to say a legal theory is "implausible" when an opposite position has been adopted by other judges. See Bavand, at *11 citing Klem, supra.; Bain, supra.; Barus v ReCon Trust, supra. Such inconsistency between courts invites forum and judge shopping by banks and servicers in an area of local regulatory interest and control.

E. Bauman Factors 1 and 2: Caterpillar decision creates a situation where proactive efforts by objecting party may constitute waiver of error and deprive of access to an adjudication based on state substantive law.

Grubbs found that where there had not been objection to removal, the existence of removal jurisdiction at time of judgment may not be raised for the first time on appeal. See Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 702, 31 L. Ed. 2d 612, 92 S. Ct. 1344 (1972). Caterpillar, expanded the rule to apply to a litigant who raised an objection to removal, but nonetheless litigated the case. At the time judgment was concluded there was complete diversity. The Court found notwithstanding the initial, timely objection "overwhelming considerations" of trial, overwhelmed the initial diversity defect. Caterpillar, 519 U.S. at 75. While our Supreme Court found that Caterpillar "did not augur a new approach to

deciding whether a jurisdictional defect has been cured" (Grupo Dataflux, 541 U.S. at 592-93) it persists in limiting review of removal errors if not expeditiously acted upon by parties continued objections to the propriety of the court's acquisition of jurisdiction. Robertson has been threatened with sanctions if he persists in challenging the district court any more. A at 229.[18]

Continuation of litigation in the federal forum will precipitate unnecessary costs and use of scarce judicial resources, while generating for defendants a potential Caterpillar defense of "considerations of finality, efficiency." Id. The district court's inclination to not follow decisions of the Washington Supreme Court and/or pay much attention to the plain language of Washington's DTA and CPA suggests that not issuing a writ of mandamus remanding this case back to state court will likely result in a different "federal" substantive version of Washington's CPA, Quiet Title, and DTA being applied to his case than would occur in a Washington State court. Klem at 789-90. See also, supra, note 14. See e.g. Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. Rev. 245, 248-9 (2008) ("The common perception is that state courts and federal courts

[18]Any affirmative action by Robertson in the federal court would provide grounds for defendants to claim he has exhibited a willingness to consent to federal jurisdiction, when he has very clear objections to doing so.

administer very different brands of justice when it comes to civil litigation.") Id., at 251.

VI. REQUEST FOR COSTS AND ATTORNEY FEES

This case lacked an "objectively reasonable basis for removal" as is indicated by defendants failed allegations and declarations. These defendants and their counsel had a duty to know how to adequately plead and prove both diversity and removal jurisdiction. Grupo Dataflux, 541 U.S. at 593. Accordingly Robertson requests this court to award reimbursement of his fees and costs resulting from these wrongful removals, as he requested in both motions to remand. (A at 120-121, 205) Under 28 U.S.C. § 1447(c): "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees incurred as a result of the removal." *Martin v. Franklin CapitalCorp.*,546 U.S. 132,139,126 S.Ct. 704,710 (2005).

VII. CONCLUSION

This Court should issue a writ of mandamus (1) remanding the case to King County Superior Court; (2) vacating all orders and motions issued by the district court; (3) granting reasonable attorney fees and costs incurred by Mr. Robertson resulting from wrongful removal for the reasons set forth herein and in both motions to remand; and (4) clarify defenses against removal of state law cases.

Dated: July 5, 2013

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 30 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point, Times New Roman font.

Dated: July 5, 2013

STAFNE LAW FIRM
Scott E. Stafne

By: *s/Scott E. Stafne*
Scott E. Stafne

Attorney for Petitioner,
Duncan K. Robertson

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Petitioner Roberson states that he is aware of two related cases pending in this Court:

1. *Burkart v. Global Advisory Group, Inc.*,
   Case No. 12-35886 (2012);

2. *Mickelson v. Chase Home Finance LLC, et. al*,
   Case No 13-35008 (2013).

Dated: July 5, 2013

STAFNE LAW FIRM
Scott E. Stafne

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery to the following non-CM/ECF participants:

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