Barbara J. Forde, #013220
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Plaintiff in Propria Persona

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

BARBARA J. FORDE, a married woman dealing with her sole and separate property,

Plaintiff,

v.

FIRST HORIZON HOME LOAN CORPORATION, a Kansas Corporation; METLIFE HOME LOANS, a division of METLIFE BANK, NA; THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, as Trustee for the HOLDERS OF THE CERTIFICATES, FIRST HORIZON MORTGAGE PASS-THROUGH CERTIFICATES SERIES FH05-FA8; FIRST HORIZON HOME LOANS, a division of FIRST TENNESSEE BANK NATIONAL ASSOCIATION; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; QUALITY LOAN SERVICE, CORPORATION, a California Corporation; JOHN AND JANE DOES 1-15, XYZ CORPORATIONS 1-15; ABC LIMITED LIABILITY COMPANIES 1-15; and 123 BANKING ASSOCIATIONS 1-15,

Defendants.

No. CV 10-01922-PHX-MEA

PLAINTIFF'S MOTION TO REMAND

I. INTRODUCTION.

Pursuant to 28 U.S.C. § 1447(c) and other applicable law, Plaintiff Barbara J. Forde hereby files her Motion to Remand this case to the Maricopa County Superior Court. Because Defendant Quality Loan Service Corporation failed to properly join in the Notice of Removal in a timely manner, and because Plaintiff's case involves important legal issues of substantial public importance, presenting issues of first impression pertaining to interpretation of State laws, this matter should be remanded to State Court, the forum of Plaintiff's choosing.

II. MEMORANDUM OF POINTS AND AUTHORITIES.

A. Procedural Backround.

On August 3, 2010, Plaintiff filed her lawsuit against the Defendants in her chosen forum of Maricopa County Superior Court. On August 5, 2010, Defendant Quality Loan Service, Corporation ("QLS"), First Horizon Home Loans, a division of First Tennessee Bank National Association, First Horizon Home Loan Corporation, and MetLife Home Loans, a division of MetLife Bank, N.A., were all served. Defendant Mortgage Electronic Systems, Inc. ("MERS") was served on August 6, 2010. On August 10, 2010, Defendant The Bank of New York Mellon was served.

On August 25, 2010, Christopher McNichol of Gust Rosenfeld filed a Notice of Representation of Certain Defendants in Superior Court. The Notice listed his clients as all Defendants except QLS and First Horizon Home Loans, a division of First Tennessee Bank National Association.

That same day, QLS filed a Motion to Dismiss in State Court.

On September 7, 2010, marking the 30-day deadline for the Defendants served on August 5 or 6, Mr. McNichol filed a Notice of Removal of the action to Federal Court, in the District Court of Arizona. In the Notice of Removal, Mr. McNichol lists his clients as all Defendants except QLS and First Horizon Home Loan Corporation.

The Notice of Removal is signed by Mr. McNichol, but not by counsel for QLS, Paul Levine. The Notice states that QLS "is separately represented and has consented to this removal." *See* Notice of Removal, p. 2, ll. 23-24. Mr. Levine has never filed any pleading with this Court indicating agreement with, or joinder in, the Notice of Removal filed by Mr. McNichol.

B. Quality Loan Service, Corporation's Failure To Independently And Unambiguously Consent to Removal Is A Defect In Removal Procedure Requiring Remand.

One of the grounds for remand, under 28 U.S.C. § 1447(c), is a defect in the removal procedure. *See, e.g., Henderson v. Holmes*, 920 F.Supp. 1184, 1186 (D. Kan. 1996). As a creature of statute, removal comes with procedures and requirements that are mandatory in nature. *Id.* (citing *Lewis v. Rego Co.,* 757 F.2d 66, 68 (3rd Cir. 1985)). The Ninth Circuit strictly construes the removal statute *against* removal jurisdiction, and "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.,* 980 F.2d 564, 565 (9th Cir. 1992). Removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand. *Id*; *Creekmore v. Food Lion, Inc.*, 797 F.Supp. 505, 507 (E.D. Va. 1992)("Removal of civil cases to federal court infringes state sovereignty. Consequently, courts strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court."). "Courts should interpret the removal statute narrowly, and presume that the plaintiff may choose his or her forum." *Id.* (quoting *Doe v. Allied-Signal, Inc.,* 985 F.2d 908, 911 (7th cir. 1993)).

The removing party has the burden of proving that removal was properly accomplished. *Id.* (citing *Christian v. College Blvd Nat. Bank*, 795 F.Supp. 370, 371 (D. Kan. 1992)). A Notice of Removal fails unless all defendants join it. *Blum v. Indymac Mortgage Servs.,* 2010 WL 476725 at 1 (N.D. Cal. 2010); *Henderson*, 920 F.Supp at 1186. The failure to join all proper defendants renders a notice of removal procedurally defective. *Id.*; *Ford v. New United Motors Mfg, Inc.,* 857 F.Supp. 707, 708 (N.D. Cal. 1994).

In order to properly join in or agree to a Notice of Removal, each defendant must support it in writing. *Henderson*, 920 F.Supp. at 1186. "[S]ection 1446 requires that each defendant file a notice of removal, either independently or by unambiguously joining in or consenting to another defendant's notice, within the thirty-day period following service of process." *Creekmore*, 797 F.Supp. at 508. It is **not enough** for a removing party in its notice of removal to represent that the other defendants consent, or do not object to, removal. *Henderson*, 920 F.Supp. at 1187 (emphasis supplied). "The statute [28 U.S.C. § 1446] requires all defendants, individually, or through their counsel, to voice their consent before the court, not through another party's attorney." *Creekmore*, 797 F.Supp. at 509.

The requirement that each party through their attorney file a document concurring with the Notice of Removal is based on subsection (a) of the statute, which specifically refers to Rule 11, Fed.R.Civ.P. "Rule 11 does not authorize one party to make representations or file pleadings on behalf of another. Rather, Rule 11 requires that each pleading, motion, or other paper submitted to the court be signed by the party or its attorney of record, if represented." *Creekmore*, 797 F.Supp. at 508. *See also, Ford*, 857 F.Supp. at 708 n. 3 ("In removals involving multiple defendants, not all defendants must actually file a Notice of Removal. All that is required is that each defendant file a document in which the defendant formally concurs with the removal.") Although a defendant does not object to removal, proper removal does not depend on the absence of such objection. *Creekmore*, 797 F.Supp. at 509. "Rather, all defendants must *affirmatively and unambiguously* assert their desire to remove the case to federal court." *Id.* (emphasis in original). To allow one party, through counsel, to bind the position of other parties without their express consent, would have serious adverse repercussions, not only in removal situations but in any incident of litigation. *Id.*

The attorney for QLS, Paul Levine, has not signed any pleading filed with the District Court in this matter, much less a document indicated joinder in, or agreement with, the Notice of Removal. This failure to act, under the case law, can mean nothing but a **lack of consent** to

removal. More than 30 days has elapsed since QLS was served; more than 30 days has elapsed since each and every defendant has been served. Accordingly, the time for filing a joinder in the Notice of Removal has expired. The Notice of Removal is procedurally defective for failure of all defendants to join. Following the guidance of the Ninth Circuit and numerous District Courts deciding the matter, the removal statute must be strictly construed *against* removal. Plaintiff should be allowed to proceed in her chosen forum; this matter should be remanded back to the Maricopa County Superior Court.

C. **This Matter Should Be Remanded to Superior Court; Foreclosures In Arizona Are a Policy Problem of Substantial Public Importance; Retention of Jurisdiction Would Be Disruptive of Arizona's Need to Rule on Issues of First Impression.**

Under federal common law, there are many different reasons why federal courts abstain from deciding cases removed to their courts. Federal courts may abstain from the exercise of diversity jurisdiction "where there is an important countervailing interest served by having the issue decided by a state court." *State v. Mushroom King, Inc.*, 77. B.R. 813, 818 (D. Or. 1987).

The United States Supreme Court enunciated this type of abstention back in 1943, and courts have been exercising it ever since:

> Although a federal equity court does have jurisdiction of a particular proceeding, it may, in it sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest," for it "is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."

Burford v. Sun Oil Co., 319 U.S. 315, 316-7, 63 S.Ct. 1098, 1099 (1943)(quoting *United States v. Dern*, 289 U.S. 352, 360, 53 S.Ct. 614, 617 (1934); *Pennsylvania v. Williams*, 294 U.S. 176, 185, 55 S.Ct. 380, 385 (1935)). "There must be reluctance even greater when the rights are strictly local, jurisdiction having no other basis than the accidents of residence." *Hawks v. Hamill*, 288 U.S. 52, 61, 53 S.Ct. 240, 243 (1933).

When no constitutional issue is raised, abstention is appropriate if the case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Mushroom King*, 77 B.R. at 818 (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976)). "It is enough that the exercise of federal review of the question would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Mushroom King,* 77 B.R. at 819. If an issue in the litigation is one of first impression for the state, which significantly affects the state's statutory scheme, the state court should decide the matter. *See id.* ("I conclude that this issue is one of first impression significantly affecting the state's statutory scheme .... It is a matter of substantial public concern and important state policy. ... For these reasons, and as a matter of comity between the federal and state systems, I grant the state's motion to abstain and remand."). *See also, Kirkbride v. Continental Cas. Co.,* 696 F.Supp. 496, 499 (N.D. Cal. 1988)(a question of first impression is a matter of substantial state interest in abstention analysis).

One cannot argue with the statement that home foreclosures in the State of Arizona are governed by state law, bearing on policy problems of substantial public importance. The issues presented in this case transcend the results of this particular piece of litigation. Arizona court dockets are filled with lawsuits by homeowners against their lenders, servicers, trustees, and investors. Lenders and other named defendants routinely remove the cases to federal court, in spite of the plaintiff's choice of forum and in spite of the issues of state, not federal, concern. Continued federal court determination of these cases is disruptive of this State's need to establish a coherent policy in resolving the homeowner lawsuits filed here.

Many of the issues presented in Plaintiff's Complaint are issues of first impression, and without doubt significantly affect Arizona's statutory scheme. A prime example of an issue of first impression, not yet decided by a state court, is Plaintiff's argument that any entity attempting to foreclose should be required to provide conclusive proof that this entity, rather than any other,

is entitled to payment under the note, *and* is entitled to foreclose on the deed of trust. *See* Complaint ¶¶ 104, 105, 106, and Count One (¶¶ 112-134) and Count Two (¶¶ 135-153). In the aftermath of the housing frenzy, the massive multi-billion dollar deals consisting of the packaging, then selling, and reselling, and reselling of securitized loans, the insurance coverage pertaining to those loans, and the bailouts, a real controversy exists regarding entitlement to payment and entitlement to foreclosure.

That this issue is one of first impression in Arizona, undecided by any state court, was succinctly and purposefully pointed out by the Arizona District Court in March of this year. *Garcia v. ReconTrust Co.*, No. CV-08-8113-PHX-MHM.[1] Garcia sued her lender and MERS, arguing, among other things, that the trustee's sale should be enjoined, and that the original promissory note must be presented before foreclosure can be initiated. In responding to these arguments, the Honorable Mary H. Murguia of the Arizona District Court stated:

> The only courts that have addressed this issue are federal courts within the District of Arizona; **neither the Arizona Court of Appeals, nor the Arizona Supreme Court have weighed in on the issue**. ... [C]ourts within the District of Arizona "have routinely held that [a plaintiff's] 'show me the note' argument lacks merit."
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> **Given the absence of instruction from the Arizona Supreme Court or Court of Appeals**, the most reasonable course of action is for this Court to follow the rulings of its sister courts within the District of Arizona and hold that production of the original promissory note is not required before commencing a foreclosure/trustee's sale. To the extent Garcia intends to argue that these non-judicial proceedings are indeed contemplated by the U.C.C., **that argument would be better suited for the Arizona Supreme Court, which is the body that is charged with interpreting the laws of the State of Arizona.**

Garcia v. ReconTrust Co., No. CV-08-8113-PHX-MHM (emphasis supplied).[2] In effect, Judge Murguia made the strongest argument possible for federal abstention in Arizona foreclosure

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[1] Pursuant to L.R.Civ. 7.1(d)(3), a copy of this opinion has not been attached to this original Motion, but copies of this opinion have been attached to the copies sent directly to Magistrate Judge Aspey and the parties in this matter.

[2] *See also, Diessner v. Mortgage Electronic Registration Systems,* 618 F.Supp.2d 1184, 1187 (D. Ariz. 2009)("Diessner does not cite, nor is the court aware of, any controlling authority providing that the cited UCC section applies in non-judicial foreclosure proceedings in Arizona."); *Mansour v. Cal-Western Reconveyance Corp.,* 618 F.Supp.2d 1178, 1181 (D. Ariz. 2009)("no reported cases address the applicability of A.R.S. § 47-3301 in a factually analogous situation.")

cases. Foreclosures in this State are a critical matter of statewide importance to its citizens and to its economy. Plaintiff homeowners are seeking the assistance of their local courts, while their lenders and related defendants remove these cases to federal court as a matter of course. The Arizona Court of Appeals, and the Arizona Supreme Court, have not addressed these matters of substantial statewide importance because the lenders prevent these cases from ever achieving that level, each time they remove the matter to federal court. The "accidents of residence" should not stand in the way of this State's interpretation and construction of its own statutes, a matter of strictly local concern.

When a federal court has no guidance from the state in terms of rules of decision, the matter should be remanded to state court. The goal of a federal court, sitting in diversity, is to resolve a lawsuit in substantially the same manner as the state court would. *See, e.g., Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428, 116 S.Ct. 2211, 2220 (1996)(a federal court sitting in diversity should have "substantially the same" outcome as a state court would have, deciding the same matter). When the state courts have not decided a matter, it is of course impossible for the federal court to divine how the state court would have ruled. This is precisely the situation now before this Court. Remand is necessary because the State Courts have not spoken on the issue.

The Arizona State Courts have never had an opportunity to speak on many of the issues brought to court by this Plaintiff. Her claims are *all* state law claims, some of which are claims of first impression regarding the proof required of a party before that party may be paid pursuant to, or foreclose due to an alleged default on, a promissory note which has been sold, insured, resold, and resold. Federal court determinations of these issues, to date, have prevented the state courts from confronting and deciding these difficult first impression issues of state law and policy. The "accident of residence" of the parties should not operate to deprive the State Court of its need to rule on the state law issues presented here, and develop a coherent body of case law to deal with

this burgeoning area of litigation. Remand will allow the Arizona State Courts to rule on these critical issues.

D. Plaintiff is Entitled to Her Attorney's Fees for Having to Bring This Motion.

The Removal statute, 28 U.S.C. § 1446, and the case law interpreting it, leave no room for confusion regarding the requirement that **all** Defendants must sign a consent to, or join in the, Notice of Removal for it to be effective. In spite of this fact, the Notice of Removal filed in this case simply states that Paul Levine, counsel for QLS, "has consented to this removal." Because of this procedurally defective removal, Plaintiff has incurred significant attorney's fees and other costs. Plaintiff hereby makes a request, pursuant to 28 U.S.C. § 1447(c), for her just costs and actual expenses, including attorney fees, for having to file this Motion.

III. CONCLUSION.

Based on the foregoing, Plaintiff respectfully requests that this Court remand her lawsuit to Maricopa County Superior Court. Defendant QLS failed to join in, or consent to, the Notice of Removal in any manner recognized by the Federal Rules and federal statutes applicable to removal. This matter should be remanded, for that reason alone.

Should this Court not remand based on QLS' failure to consent to removal, Plaintiff respectfully requests that this Court abstain from deciding her lawsuit, and instead remand it to Superior Court. The State Courts of Arizona have not had the opportunity to rule on a number of claims being asserted by Plaintiff here, and other homeowners in lawsuits pertaining to foreclosures, in this State. Such issues of first impression are without doubt matters of the utmost statewide significance, and should initially be decided by the state courts, interpreting state law. The District Courts in Arizona, deciding homeowner diversity cases before them, have voiced a desire for guidance from the state courts on these issues. Remand to state court will provide that guidance.

Plaintiff further requests an award of her attorney's fees.

RESPECTFULLY SUBMITTED this 24th day of September, 2010.

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I hereby certify that on September 24th, 2010, I electronically transmitted this document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

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s/ Barbara J. Forde, Esq.