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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DONNA L. HOLLOWAY,

Plaintiff,

v.

WELLS FARGO & COMPANY, a California corporation, f/k/a WELLS FARGO DEALER SERVICES, INC., a California corporation, f/k/a WACHOVIA SHARES RESOURCES, LLC, a California limited liability company, f/k/a WESTCORP, a California corporation; and DOES 1 through 20, inclusive,

Defendant.

Case No.: 8:14-cv-01165-DOC-VBK

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND

Date: September 29, 2014
Time: 8:30 a.m.
Courtroom: 9D
Judge: Hon. David O. Carter

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

STATUTES

RULE

OTHER AUTHORITIES

INTRODUCTION

For obvious reasons, this lawsuit was filed in California state court. The only plaintiff, Donna Holloway ("Plaintiff"), is a citizen of California. The only named defendant, Wells Fargo & Company ("Defendant"), is a citizen of California. And every one of the thirteen causes of action asserted in the complaint is a creature of California statute or common law.

Nonetheless, the lawsuit was removed to this Court. The sole asserted basis for removal is the assertion that "[t]his Court has original subject matter jurisdiction over Plaintiff['s] lawsuit pursuant to 28 U.S.C. § 1332(a) because diversity jurisdiction exists . . . ." That assertion, however, is clearly and demonstrably false. It is beyond dispute that both Defendant and Plaintiff are citizens of California. This Court does *not* have subject matter jurisdiction. As such, remand is required.

In an attempt to manufacture subject matter jurisdiction, Defendant has employed a specious procedural tack—"removal by proxy." The notice of removal in this case *was not filed by Defendant*. It was filed by attorneys purporting only to represent a subsidiary of Defendant that is not a party to the lawsuit. That subsidiary is Wells Fargo Bank, N.A. (the "Non-Party Remover"). According to the removal petition, the Non-Party Remover can be substituted as defendant (and the citizenship of Defendant disregarded) because Plaintiff "erroneously sued" Defendant instead of the Non-Party Remover. For at least two reasons, that position is baseless.

First, there is simply no reason to disregard the citizenship of Defendant. To be sure: the citizenship of a defendant may be ignored if the defendant can show by clear and convincing evidence that it was fraudulently joined. But the removal petition does not make such a showing. Nor could it. There was no joinder in this case at all; there is only one named Defendant. And, even if there were joinder, it is certainly not fraudulent. Plaintiff maintains that Defendant was Plaintiff's

employer for purposes of various state law statutory claims asserted in the complaint. But even if it were not, Defendant would still be a proper defendant to Plaintiff's claims for intentional infliction of emotional distress and violations of California's unfair business practices law.

Second, there would be no subject matter jurisdiction *even if* the citizenship of Defendant were disregarded. The reason is simple: disregarding the citizenship of Defendant would leave *no defendant* for purposes of diversity jurisdiction analysis. Without *some* defendant whose citizenship could be considered, there is no way that the requirements of 28 U.S.C. § 1332(a) could possibly be satisfied. And in any event, 28 U.S.C. § 1441(a) would not authorize the Non Party-Remover's removal of this action because it explicitly limits the right of removal to a *defendant*.

To be clear: the argument being advanced by the Non-Party Remover should have been made *by Defendant in state court* through a properly filed motion to dismiss or an informal conference with Plaintiff's current counsel. Had Defendant done either of those things, Plaintiff could and would have dismissed Defendant, if appropriate, from specific causes of action and replaced Doe 1 with the Non-Party Remover for appropriate causes of action. In no event, however, would the complaint have become removable because the dispute would continue to include a California plaintiff and a California defendant.

If this Court disagrees and concludes that *only* the citizenship of the Non-Party Remover should be considered in assessing the propriety of removal, then Plaintiff respectfully requests that this Court certify for interlocutory appeal the question of whether a national banking association—like the Non-Party Remover (Wells Fargo Bank, N.A.)—is a citizen only of the state in which its main office is located and *not* also a citizen of its principal-place-of-business state (the "*Rouse* Holding"). The *Rouse* Holding is the subject of an intra-circuit split in the Ninth Circuit which will permit Plaintiff to seek immediate *en banc* review. *See Antonio*

v. Wards Cove Packing Co., 810 F.2d 1477, 1478–79 (9th Cir. 1987). Moreover, the *Rouse* Holding is the subject of a widely acknowledged circuit split which, if necessary, will permit Plaintiff to file a petition for a *writ of certiorari*. Counsel for Plaintiff have an active practice before the United States Supreme Court and would appreciate the opportunity to seek immediate appellate review of this extremely important "controlling question of law as to which there is substantial ground for difference of opinion [where] an immediate appeal [will] materially advance the ultimate termination of th[is] litigation . . . ." 28 U.S.C. § 1292(b).

Rejection of the *Rouse* Holding by an *en banc* panel of the Ninth Circuit or by the United States Supreme Court will render the Non-Party Remover a citizen of California. And, should that occur, there will be no basis for federal subject matter jurisdiction even under the law as articulated in the removal petition. Interlocutory appeal of the *Rouse* Holding is therefore preferable to appellate review of that threshold jurisdictional question after final judgment on the merits of this litigation.

STATEMENT OF THE FACTS

This case involves one plaintiff, Donna Holloway, and one defendant, Wells Fargo & Company. Plaintiff's complaint was properly filed in the Superior Court of California for the County of Orange on May 14, 2014. *See* Complaint, Dkt. No. 1-1. The Complaint asserts claims against Defendant for various violations of California law, including discrimination, failure to pay wages, unfair business practices, and intentional infliction of emotional distress. *Id.* ¶¶ 38–137.

On July 25, 2014, this case was removed to this federal court on the basis of diversity jurisdiction. [1] Curiously, the notice of removal was not filed by

[1] Three days prior, the Non-Party Remover (and not the named Defendant) purported to file an answer to Plaintiff's complaint in state court.

Defendant. Instead, it was filed by a company that is not a party to this proceeding at all: Non-Party Remover Wells Fargo Bank, N.A. For purposes of this motion, it is thus necessary to briefly address the citizenship of Plaintiff, Defendant, and the Non-Party Remover, as well as their relationship to this dispute.

A. Plaintiff: Donna Holloway

Ms. Holloway is a sixty-nine year-old woman who spent the last nine years of her life working in a call center that was owned and operated by several different entities and ultimately ended up under the ownership and umbrella control of Wells Fargo Bank, N.A. and its parent company, Wells Fargo & Company. During her employment, Plaintiff was injured by Defendant's unlawful misconduct, and, in this lawsuit, she seeks relief for those injuries. As alleged in her complaint, at all relevant times she was a resident of Orange County, California. *Id.* ¶ 12.

B. The Non-Party Remover: Wells Fargo Bank, N.A.

According to the declaration of an employee of the Non-Party Remover, the Non-Party Remover employed Plaintiff for nine years. Declaration of Valeda Huff ¶ 3, Dkt. No. 1 ("Huff Decl."). The Non-Party Remover believes that Plaintiff's claims should have properly been brought against it. Notice of Removal, Dkt. No. 1. To be sure: it appears likely that the Non-Party Remover correctly believes that Plaintiff has viable claims against it. But, as explained below, it is wrong that Plaintiff has no viable claims against its parent company, Defendant.

The Non-Party Remover is a national banking association. In accordance with a recent (and highly controversial) Ninth Circuit decision, *Rouse v. Wachovia Mortgage*, 747 F.3d 707 (9th Cir. 2014), a national banking association is only a citizen for purposes of federal diversity jurisdiction of the state in which its main office is located. The Non-Party Remover's main office is in South Dakota. Notice of Removal ¶ 11, Dkt. No. 1. Thus, under *Rouse,* the Non-Party Remover is only a citizen of South Dakota for purposes of federal diversity jurisdiction.

C. Defendant: Wells Fargo & Company

Defendant is the publically traded parent company of the Non-Party Remover. Huff Decl. ¶ 5, Dkt. No. 1. Defendant was an employer of Plaintiff during periods of time that are relevant to the claims asserted in the complaint. For example, when Plaintiff sustained an elbow injury and filed a workers' compensation claim, Defendant's workers' compensation insurance carrier processed and approved the claim on behalf of *Defendant*, not the Non-Party Remover. Declaration of Peter K. Stris ("Stris Decl."), Exh. A (September 6 and September 19, 2013 Letters of Sedgwick Examiner). Indeed, on two separate occasions, the carrier explicitly recognized Wells Fargo & Company as Plaintiff's employer. *Id.* Similarly, when Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), Defendant spearheaded the internal investigation and represented to the EEOC that it was in charge of reviewing and responding to Plaintiff's claims. Stris Decl., Exh. B (July 30, 2013 Letter of Kristina F. Brown, Assistant Vice President of Wells Fargo & Company Law Department).

Defendant is also believed to be the employer of individuals whose misconduct gives rise to Plaintiff's claims for intentional infliction of emotional distress and violations of California Business and Professions Code §§ 17200 et seq. To the extent Defendant acted illegally through its own employee-representatives to Plaintiff's detriment, Plaintiff may seek relief under those theories directly against Defendant without the need to prove any employment relationship. And given Defendant's extensive involvement in human resource, accommodation, and other decisions relating to Plaintiff's employment-related grievances with Defendant, it is very likely that tortious and statutorily prohibited misconduct alleged in the complaint was committed by Defendant.

Defendant is a citizen of California for purposes of federal diversity jurisdiction. Defendant's corporate headquarters building is in San Francisco,

California. *See* Stris Decl., Exh. C (Wells Fargo & Company's SEC Form 10-K) ("SEC Form 10-K"). Defendant's bylaws explicitly state that its principal place of business is San Francisco, California. *See* Stris Dec., Exh. D (Wells Fargo & Company's By-Laws, as amended through January 2011 at 4) ("By-Laws"). Defendant is also a citizen of Delaware, its state of incorporation. By-Laws at 4.

ARGUMENT

The right to remove a case to federal court is entirely a creature of statute. *See Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). The removal statute, 28 U.S.C. § 1441, allows defendants to remove when a case filed in state court presents a federal question or is between citizens of different states and involves an amount in controversy that exceeds $75,000. *See* 28 U.S.C. §§ 1441(a), (b). *See also* 28 U.S.C. §§ 1331, 1332(a). Only state court actions that could originally have been filed in federal court can be removed. 28 U.S.C. § 1441(a); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

The Ninth Circuit "strictly construe[s] 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, 566 (9th Cir. 1992). "The 'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." *Id.* at 566. Any doubt as to whether the removal is proper should be resolved in favor of remand to state court. *See* 28 U.S.C. § 1447(c).

I. THIS CASE MUST BE REMANDED FOR WANT OF SUBJECT MATTER JURISDICTION.

In this case, the Non-Party Remover has asserted one basis, and one basis only, for removal: federal diversity jurisdiction. *See* Notice of Removal at 2, Dkt. No. 1. In a case where subject matter jurisdiction is predicated on diversity of citizenship there must be complete diversity. *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003). Here, the presence of Defendant, a

California citizen, makes complete diversity impossible. Even disregarding Defendant's citizenship, however, the Non-Party Remover's existence cannot create diversity because it is not a party to the case. Thus, under no conception of the federal removal statute is removal authorized here.

At bottom, this removal dispute is the product of opposing counsel's strange attempt to bootstrap a motion to dismiss to a notice of removal so they can litigate this case in their preferred forum on behalf of the entity that they believe should have been named. But the only ways that Defendant (the only party to this litigation) may be dismissed are through a properly filed state court motion to dismiss or the voluntary amending of the complaint by Plaintiff. And the only way the Non-Party Remover can be added to this case is if Plaintiff amends her complaint to include it. As both of these events have not occurred, this case must be remanded for further state court proceedings.

A. Plaintiff and Defendant Are California Citizens.

Jurisdiction in a diversity case is determined at the time of removal. *Infuturia Global Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133, 1137 (9th Cir. 2011). There were only two relevant parties at the time this case was removed: Plaintiff and Defendant. And both are indisputably citizens of California.

As the Non-Party Remover acknowledges in its own removal papers, Plaintiff is a citizen of California because, at all relevant times, she was a resident of Orange County, California. *See* Notice of Removal ¶ 8, Dkt. No. 1 (citing Complaint ¶ 12, Dkt. No. 1-1).

Defendant is also a citizen of California. For purposes of establishing diversity of citizenship, a corporation is deemed to be a citizen of every state in which it has been incorporated *and* where it has its principal place of business. 28 U.S.C. § 1332(c)(1). The phrase "principal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities. *Hertz Corp. v. Friend*, 559 U.S. 77, 80–81 (2010). This

place is metaphorically referred to as the corporation's "nerve center." *Id.* And it is well-settled that Defendant's "nerve center" is in San Francisco, California. *See* By-Laws at 4 (noting that Defendant's principal place of business is in San Francisco); SEC Form 10-K (listing corporate headquarters in San Francisco).

B. The Citizenship of Defendant May *Not* Be Disregarded.

An exception to the requirement of complete diversity exists where a defendant has been fraudulently joined to defeat diversity. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). "If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is deemed fraudulent." *Hamilton Materials, Inc. v. Dow Chemical Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). Where joinder is deemed fraudulent, the defendant's presence is ignored for the purposes of determining diversity. *Morris*, 236 F.3d at 1067.

Any claim of fraudulent joinder must be supported by "clear and convincing evidence." *Hamilton Materials, Inc.*, 494 F.3d at 1206. The party seeking removal bears a heavy burden in proving that joinder of the in-state defendant is improper. *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1044 (9th Cir. 2009). In addressing the issue of fraudulent joinder, the Ninth Circuit looks to whether the facts in the complaint would preclude the plaintiff's recovery against the non-diverse defendant. *See Morris*, 236 F.3d. at 1067–68. If there is any possibility that the plaintiff would be able to establish liability against the defendant the joinder is not fraudulent. *Bear Valley Family v. Bank Midwest, N.A.*, 2010 WL 3369600, at *2 (C.D. Cal. Aug. 23, 2010) (citing William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, CAL. PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL § 2:672 (The Rutter Group 2009)).

In this case, the Non-Party Remover cannot successfully allege "fraudulent joinder" because there has been no "joinder" at all. Joinder is the "joining or

coupling together; uniting two or more constituents or elements in one; [or] uniting with another person in some legal step or proceeding." Black's Law Dictionary 836 (6th ed. 1990); *see also* Fed. R. Civ. Pro. 20. Plaintiff sued Defendant and only Defendant. There has been no "coupling" or "union" of any kind and thus no joinder, fraudulent or otherwise.

Even assuming that suing one party could be considered "joinder" for the purpose of the fraudulent joinder exception, the Non-Party Remover has not shown—and cannot possibly show—that the joinder is "fraudulent." To do so, the Non-Party Remover would have to show by clear and convincing evidence that the facts in the complaint would preclude Plaintiff's recovery against Defendant on every single cause of action. But Defendant is liable for its violations of California's Fair Employment and Housing Act ("FEHA"), Gov. Code §§ 12900-12996, and the California Labor Code as *one of* Plaintiff's employers. *See Mathieu v. Norrell Corp.*, 115 Cal. App. 4th 1174, 1184 (Cal. Ct. App. 2004) (employee may recover from any employer under FEHA); *Martinez v. Combs*, 49 Cal. 4th 35, 76 (Cal. 2010) (Labor Code designed to "reach situations in which multiple entities control different aspects of the employment relationship").

Under FEHA, the existence of an employment relationship is a fact-intensive inquiry that weighs, among other factors, whether the putative employer pays employment benefits, whether it has the authority to discipline or discharge, and the duration of the relationship between the parties. *Vernon v. State*, 116 Cal. App. 4th 114, 125 (Cal. Ct. App. 2004). The Labor Code defines "employer" more broadly as one "who directly or indirectly, or through an agent or any other person, employs *or* exercises control over the wages, hours, or working conditions of any person." *Martinez*, 49 Cal. 4th at 48, 48 n.9 (emphasis added). "Employ" means "to engage, suffer, or permit to work." *Id.*

At this stage, the Non-Party Remover cannot show by clear and convincing evidence that Defendant does not meet the criteria of either statute. With respect

to Plaintiff's FEHA claims, Defendant's insurance carrier approved Plaintiff's worker's compensation claim and identified Plaintiff as Defendant's employee in its claim approval letter, meaning that Defendant paid Plaintiff these employment benefits. Defendant also conducted an internal investigation and submitted employer filings after Plaintiff lodged her EEOC complaint, suggesting that Defendant was responsible for disciplining Plaintiff and her colleagues. *See id.* And the duration of Plaintiff's relationship with Defendant was coextensive with her relationship with the Non-Party Remover. Defendant's actions in response to the EEOC complaint also show that Defendant "suffered" or "permitted" Plaintiff to work within the meaning of the Labor Code by "'fail[ing] to perform the duty of seeing to it that the prohibited condition [does] not exist'" when it was within Defendant's power to do so. *Martinez*, 49 Cal. 4th at 69 (quoting *People v. Sheffield Farms-Slawson-Decker Co.*, 180 A.D. 615 (N.Y. App. Div. 1917)).

In any event, Defendant's alleged misconduct gives rise to potential liability even in the absence of an employer-employee relationship. Given Defendant's extensive involvement in numerous aspects of the Non-Party Remover's operations, it is far from clear that the misconduct giving rise to Plaintiff's claims of intentional infliction of emotional distress and violations of California Business and Professions Code §§ 17200 et seq. are not attributable to Defendant's actions (as opposed to those of the Non-Party Remover). Plaintiff is entitled to pursue these claims against Defendant, unless it obtains dismissal through a properly brought motion to dismiss.

C. Disregarding Defendant Would *Not* Create Jurisdiction.

The Non-Party Remover cites no authority for the proposition that the federal removal statute is an appropriate procedural vehicle for a third party that has not been sued due to an alleged "error" to *substitute* itself for a named party in existing state court proceedings (and to defeat the plaintiff's choice of forum in the process). Nor could it. Here, the purported removal was filed by the Non-Party

Remover who unquestionably is not a defendant. And it will not be a defendant unless Plaintiff names it.

As such, there would be no subject matter jurisdiction in this case *even if* the citizenship of Defendant were disregarded. The reason is simple: disregarding the citizenship of Defendant would leave *no defendant* for purposes of diversity jurisdiction analysis. And without *some* defendant whose citizenship could be considered, there is no way that the requirements of 28 U.S.C. § 1332(a) could possibly be satisfied. Similarly, 28 U.S.C. § 1441(a) could not possibly be satisfied because it only authorizes removal by a *defendant*.

To be clear: the Wells Fargo entities were/are not without recourse. They could have utilized (and should be required to utilize) well-established procedures for addressing their belief (real or imagined) that the Non-Party Remover is the only proper defendant to this litigation. For example, opposing counsel could have easily resolved any confusion over the proper defendant(s) to this lawsuit in one of the two following ways.

First, opposing counsel could have sought an informal resolution through a meet and confer with Plaintiff's counsel. Had opposing counsel contacted Plaintiff's counsel, explained the reasons why they believe that the Non-Party Remover was *not* sued in error (and why they believe Defendant *was* sued in error), and requested that that the Non-Party Remover be substituted into the case, Plaintiff could and would, if appropriate, have dismissed some (but not all) of its claims against Defendant and amended the complaint to replace Doe 1 with the Non-Party Remover alleging pertinent claims against it. The case would still need to proceed in state court (for lack of complete diversity), but opposing counsel would have furthered their goal of focusing Plaintiff's claims against what they believe is the correct entity. Calling Plaintiff's counsel would have been costless to Plaintiff, Defendant, the Non-Party Remover, and the state and federal courts.

Instead, opposing counsel necessitated the preparation of this lengthy motion by filing, without warning, their notice of removal.

Second, opposing counsel could have filed a motion to dismiss in the state court (i.e., utilized a procedure that every court in the United States recognizes is appropriate for seeking dismissal of an improperly named defendant). If the state court found Plaintiff's claims to be adequately pleaded, the motion to dismiss would be denied, and Plaintiff's *non-removable* case would continue. If the state court found Plaintiff's claims to be inadequately pleaded, then the motion to dismiss would be granted, and Plaintiff's case against Defendant *would be over*. At that point, Plaintiff could sue the Non-Party Remover. She would not be required to do so. But if she did, the Non-Party Remover, now a party to a case with complete diversity of citizenship (assuming the continued validity of the *Rouse* Holding, see *infra* pages 12–18), would be entitled to remove.

Here, opposing counsel did neither of these things, attempting instead to subvert Plaintiff's right to sue in the forum of her choosing by injecting itself into a lawsuit in which it was never included. In so doing, it invites this Court to simultaneously dismiss each and every claim brought by Plaintiff against Defendant under an unprecedented and unauthorized perversion of the federal removal statute. This Court should decline that invitation.

II. IF THE COURT DISAGREES, PLAINTIFF REQUESTS CERTIFICATION OF THE *ROUSE* QUESTION.

In the Ninth Circuit, a pronounced split currently exists over the question of whether national banks like Wells Fargo Bank, N.A. can, for purposes of diversity jurisdiction, avoid being considered a citizen of the state in which they have their principal place of business. On one side stand two panel decisions, *Am. Surety Co. v. Bank of California*, 133 F.2d 160, 162 (9th Cir. 1943) and *Bank of California Nat'l Ass'n v. Twin Harbors Lumber Co.*, 465 F.2d 489 (9th Cir. 1972), which held that national banks are citizens in "those states in which their principal places

of business are maintained." *Am. Surety*, 133 F.2d at 162; *see also Twin Harbors*, 465 F.2d at 489 (A national bank whose principal place of business is California is, "for diversity purposes, . . . a 'citizen' of California."). On the other side stands *Rouse*, where a divided panel held that a national bank, for diversity jurisdiction purposes, is a citizen *only* "of the state in which its main office . . . is located." 747 F.3d at 709. That intra-circuit split warrants immediate *en banc* review. *See Antonio*, 810 F.2d at 1478–79 ("[T]he appropriate mechanism for resolving an irreconcilable [intra-circuit] conflict is an en banc decision."). If this Court refuses remand here, it should certify this question for interlocutory appeal to the Ninth Circuit. *See* 28 U.S.C. § 1292(b) (certifying interlocutory appeal is appropriate where "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation").

A. *Rouse* Sparked an Intra-Circuit Conflict and Deepened a Nationwide Divide.

Before *Rouse*, the Ninth Circuit had twice interpreted 28 U.S.C. § 1348's jurisdictional grant for national banks. In both cases, the Ninth Circuit held that, under this statute, national banks are citizens in "those states in which their principal places of business are maintained." *Am. Surety*, 133 F.2d at 162; *see also Twin Harbors Lumber Co.*, 465 F.2d at 489. There are literally dozens of district court decisions in this Circuit that say the same thing and apply the same rule. *See, e.g.*, *Garcia v. Wells Fargo Bank, N.A.*, 2014 WL 29354, at *6 (C.D. Cal. Jan. 3, 2014); *Taheny v. Wells Fargo, Bank, N.A.*, 878 F. Supp. 2d 1093, 1096 (E.D. Cal. 2012). The *Rouse* opinion disregards these earlier and controlling panel decisions, without even mentioning one (*Twin Harbors*) and citing the other (*American Surety*) once. The upshot: this issue is now the subject of a clear intra-circuit split that can only be resolved through en banc review. A certified interlocutory appeal would, under the Ninth Circuit's own internal rules, allow that review to occur

immediately—because "if there is an irreconcilable conflict between two cases from this Circuit, a panel's only choice is to call for rehearing en banc." *In re Exxon Valdez*, 270 F.3d 1215, 1235 (9th Cir. 2001); *see also U.S. v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) ("Unless an alternative method is provided by rule of this court, a panel faced with such a conflict *must* call for en banc review.") (internal quotations and alterations omitted); *Antonio*, 810 F.2d at 1479 (same).

Making matters worse, by disregarding its own Circuit precedent, the panel in *Rouse* exacerbated a nationwide split among the circuits. Before *Rouse*, two circuits—the Fifth and Seventh—had relied on *American Surety* to hold that, under § 1348, a national bank's citizenship includes *both* the state of its principal place of business and its main-office state. *Horton v. Bank One, N.A.*, 387 F.3d 426, 436 (5th Cir. 2004); *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 994 (7th Cir. 2001). In *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303 (2006), the U.S. Supreme Court affirmed *Firstar* and *Horton* and endorsed their use of the jurisdictional parity principle to interpret § 1348. *See Wachovia Bank*, 546 U.S. at 309. Applying that principle, the Supreme Court explained that "in comparison to the access afforded state banks and other state-incorporated entities," national banks' access to a federal forum would be "drastically curtailed" if a national bank were deemed a citizen of every state where it maintained a branch. *Id.* at 307. So the point of § 1348, in the Supreme Court's view, was to confer a typical understanding of diversity jurisdiction on national banks, not "to effect a radical departure from the norm." *Id.* at 318; *see also id.* at 317 ("[W]hile corporations ordinarily rank as citizens of at most 2 States, Wachovia, under the Court of Appeals' novel citizenship rule, would be a citizen of 16 States.").

Rouse threw this lesson out the window. Instead of harmonizing its opinion with *Horton* and *Firstar*—let alone *Wachovia Bank*'s own embrace of these sister-circuit decisions—*Rouse* opposed them. It aligned itself instead with the Eighth

Circuit. In *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d 702 (8th Cir. 2011), that court had held, over a vigorous dissent, that "a national bank is a citizen only of the state in which its main office is located." *Id.* at 709. In reaching this conclusion, the Eighth Circuit determined that jurisdictional parity retains "little support," *id.* at 708, such that "the concept no longer applies," *id.* at 709.

That *Rouse* exacerbated a circuit split only adds to the litany of reasons why interlocutory appeal, and *en banc* review, is appropriate here.

B. *Rouse* Presents an Important Question.

Rouse does more than merely upset the law in the Ninth Circuit. It also radically rejiggers state- and federal-court jurisdiction, creating massive opportunities for forum manipulation. Under *Rouse*, federal courts in this Circuit will be flooded with state-law lawsuits like this one. Interlocutory appeal would allow the Ninth Circuit to reconsider the wisdom of such a rule.

First, *Rouse* flouts the entire point of diversity jurisdiction—"namely, opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties." *Hertz Corp.,* 559 U.S. at 85. The idea is to protect outsiders from the provincialism of state courts. But consider Wells Fargo for even a minute, and it is clear it is no outsider. This bank has had its principal place of business in California since 1852; it "opened for business in the gold rush port of San Francisco;" and it actively associates itself with quintessential California iconography—it repeatedly touts its connection to the California Gold Rush and even sells stagecoach salt-and-pepper shakers. *See* Wells Fargo, *Since 1852* (last visited August 22, 2014), https://www.wellsfargo.com/about/history/adventure/since_1852 (discussing the Gold Rush); Wells Fargo, *The Museum Store Catalog* (last visited August 22, 2014), http://wfmuseum.imsfastpak.com/ (selling the shakers). It is hard to imagine California state courts giving Wells Fargo short shrift because of "outsider" status. *See Ghaderi v. United Airlines*, 136 F. Supp. 2d 1041, 1047 (N.D. Cal. 2001) ("Parties who have a great deal of

contact with the public in a particular state are not likely to be considered outsiders and, therefore not likely to be victims of discrimination by 'locals.'").

But under *Rouse*'s rule, California federal district courts will continue to be "flooded" with state cases "removed from California State Courts . . . in what seems to be a routine strategy." *Perez v. Wells Fargo Home Mortgage, Inc.*, 2013 WL 6876445, at *1 (C.D. Cal. Apr. 5, 2013); *see also Damato v. Wells Fargo Bank, N.A.*, 2013 WL 7965662, at *1 (C.D. Cal. Sept. 12, 2013) (examining "yet another foreclosure-related case removed from state court" where "Wells Fargo bases removal on diversity jurisdiction alone").

Permitting diversity jurisdiction in these cases not only floods the federal courts, but threatens principles of federalism by "denying California state courts the opportunity to interpret California law." *Perez*, 2013 WL 6876445, at *1; *see Rouse*, 747 F.3d at 716 (Gould, J., dissenting) (state courts should have a "say in resolving their residents' disputes"); *see also Ghaderi*, 136 F. Supp. 2d at 1047 (noting that public policy concerns favor "reducing the federal courts' diversity case load" and "allowing state courts to adjudicate state law claims"). These are cases brought under California law, by Californians, against a bank headquartered and long associated with California. These cases belong in California courts.

Second, *Rouse*'s holding also opens the door for national banks to manipulate jurisdiction. Just days after *Rouse* was decided, one industry commentator observed that the decision "creates a significant federal court removal advantage for national banks by allowing them to choose a remote state as the location of their main office to create federal court diversity jurisdiction." *See* JD Supra, Rouse v. Wachovia*: A Victory for National Banks* (April 11, 2014), http://www.jdsupra.com/legalnews/rouse-v-wachovia-a-victory-for-nationa-24399/. Such a standard "would in fact grant national banks greater access to federal court in the states where they have the most ties and the least justification for being able to select a federal forum." Michael Podolsky, *Determining*

Diversity Jurisdiction of National Banks after Wachovia Bank v. Schmidt, 81 FORDHAM L. REV. 1447, 1483 (2013) (arguing that national banks are "located" in their principal-place-of-business state). Wells Fargo clearly believes that it will have the advantage in federal court, and *Rouse* hands Wells Fargo that advantage, even in the state in which it does the bulk of its business.

C. All of the Requirements for Interlocutory Appeal Are Met.

The diversity jurisdiction question at stake in this case checks every box for interlocutory review under § 1292(b). It involves (1) a "controlling question of law" over which there are (2) "substantial grounds for difference of opinion," and for which (3) "an immediate appeal may materially advance the ultimate termination of the litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). The court should therefore certify the appeal if it decides not to remand the case.

To begin, there can be no serious doubt that the question of whether Wells Fargo, as a national bank, can establish diversity jurisdiction—and automatically guarantee access to federal court—in any case filed against it by a California citizen is a "controlling question of law." 28 U.S.C. § 1292(b). Appeals from orders denying remand are quintessentially appropriate interlocutory appeals, precisely because resolving the issue on appeal "will determine whether the litigation continues in the district court at all." *Regal Stone Ltd. v. Longs Drug Stores California, LLC*, 881 F. Supp. 2d 1123, 1131 (N.D. Ca. 2012). The Ninth Circuit has not hesitated to accept interlocutory review over similar jurisdictional questions. *See, e.g.*, *Urbino v. Orkin Servs. of California, Inc.*, 726 F.3d 1118, 1120 (9th Cir. 2013) (accepting interlocutory appeal to resolve diversity jurisdiction question); *Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1012 (9th Cir. 2006) (same).

Moreover, the issue presented in this case easily meets § 1292(b)'s second requirement. As explained above, *Rouse* generated a clear intra-circuit split over

the question while simultaneously exacerbating a deep divide among the circuits. Add to that the scores of disagreeing district court opinions on this question, and the result is clear: courts and judges are divided over how to interpret and apply § 1348. That landscape justifies immediate review. *See, e.g.*, *Johnson v. Washington Area Transit Auth.*, 790 F.Supp. 1174, 1180 (D.D.C. 1991) (granting § 1292(b) certification where "[t]here is a possible intracircuit split [on the disputed] issue [and e]ven absent the split the case law is confused.").

And because a decision granting the motion to remand would mean that the federal court would "cede jurisdiction" to the "California state courts, effectively ending federal litigation" of the case, an interlocutory appeal would "materially advance the ultimate termination of the litigation." *Regal Stone Ltd.*, 881 F. Supp. 2d at 1131.

CONCLUSION

The motion to remand should be granted.

Dated: August 25, 2014

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