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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

REPLY MEMORANDUM 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

PRELIMINARY STATEMENT

In 2004, Donna Holloway (a 58 year old, hearing impaired woman) was hired to work at a call center in California. After years of success, she was eventually promoted to Team Lead. In December 2011, however, things began to change. Ms. Holloway (then age 66) was assigned a new manager (age 36) who launched a relentless and prolonged campaign of age and disability discrimination, harassment, and retaliation. In February 2013, Ms. Holloway was demoted. In May 2013, she filed a complaint with the appropriate state and federal agencies. In September 2013, she was terminated. And in May 2014, she filed this lawsuit in Orange County Superior Court (the "Complaint") against Wells Fargo & Co. ("WF Company").

Representatives of WF Company were *unquestionably* involved in events giving rise to this litigation. For example, Ms. Holloway dealt with Jan Frame, an "Accommodations Management Consultant" in "Wells Fargo Corporate HR" from at least January of 2012 until June of 2013 regarding necessary accommodations for her hearing disability[1] and other medical condition.[2] And as Ms. Frame confirmed under penalty of perjury in another case, she is a longstanding employee of WF Company.[3]

To be sure: Ms. Holloway has viable claims against at least one subsidiary of WF Company – Wells Fargo Bank N.A. ("WF Bank") as well as individual employees of WF Bank. But the Complaint (which was drafted and filed by Ms. Holloway's former attorneys) did not assert any claims against WF Bank or its employees. It asserted claims *only* against WF Company. To be clear: these are legitimate claims – not baseless allegations asserted to manipulate jurisdiction.

One week after the Complaint was filed, Ms. Holloway terminated her attorneys and retained current counsel. Shortly thereafter (July 24, 2014), the lawsuit

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[1] *See* Declaration of Peter K. Stris ("Stris Decl."), Exh. A.
[2] *See* Stris Decl. Exh. B (mentioning prior correspondence in January of 2012).
[3] *See* Stris Decl. Exh. C.

was removed by WF Bank to this Court. On August 25, 2014, Ms. Holloway (though current counsel) filed a Motion to Remand ("Motion"). And on September 8, 2014, WF Bank filed an Opposition to the Motion. In that Opposition, WF Bank attempted to meet its "burden of establishing that removal is proper" by overcoming "[t]he 'strong presumption' against removal jurisdiction . . . ." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). For two independent reasons, it has failed to do so:

1. WF Bank cannot establish that this court has "original jurisdiction" over the "civil action [filed in] State court . . . ." 28 U.S.C. § 1141(a). The removal petition claims that this Court has diversity of citizenship jurisdiction under 28 U.S.C. § 1332. But it does not. Ms. Holloway is a California citizen whose complaint asserts purely state-law causes of action against WF Company, another California citizen. WF Bank argues that the citizenship of WF Company "should be disregarded because it is a sham defendant." Opp. at 4–10. But, as noted above, representatives of WF Company were unquestionably involved in events giving rise to this litigation. And given that involvement, WF Bank cannot possibly meet the high burden of establishing that WF Company is a sham defendant whose citizenship should be disregarded.

2. Even if this Court is somehow persuaded that Ms. Holloway has *no* viable claims against WF Company, removal is nonetheless improper. There is no statutory authority for a non-party (WF Bank) to substitute itself for a named defendant (WF Company) in order to employ the federal removal statute. *See* 28 U.S.C. § 1441(a) (a "civil action brought in a State court" "may be removed *by the defendant or the defendants* . . . .") (emphasis added). Nor is there any judicial precedent whatsoever for such "removal by proxy."[4] That is simply not how the

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[4] Where a plaintiff erroneously names one entity instead of another, *and the plaintiff asks* a federal court to substitute the proper entity for the erroneously named one, the federal court may be permitted to do so. *See, e.g.*, Opp. at 10 (citing *Brazina v. Paul Revere Life Ins. Co.*, 271 F. Supp. 2d 1163 (N.D. Cal. 2003); *Rice v.*

fraudulent joinder doctrine works, and it is not what the fraudulent joinder doctrine was designed to accomplish. As explained below, WF Bank's assertions to the contrary reflect insufficient sensitivity to the delicate balance of power between the state and federal courts.

If, however, this Court somehow determines that WF Bank should be treated as the only relevant defendant in this case, Ms. Holloway respectfully requests that the Court certify its order denying remand for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). There is a split between circuits and within the Ninth Circuit itself about whether a national bank (such as WF Bank) is a citizen *only* "of the state in which its main office . . . is located," e.g., *Rouse v. Wachovia Mortgage*, 747 F.3d 707 (9th Cir. 2014), or whether it is *also* a citizen of the state in which it has its principal place of business, e.g. *Am. Surety Co. v. Bank of California*, 133 F.2d 160, 162 (9th Cir. 1943). As explained below, the immediate appeal of that "controlling question of law" will "materially advance the ultimate termination of this litigation." And, as evidenced by inter- and intra-circuit splits on the question, there is "substantial grounds for difference of opinion . . . ." As such, certification under 28 U.S.C. § 1292(b) is warranted.

ARGUMENT

I. This Case Must Be Remanded.

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),

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Hamilton Air Force Base Commissary, 720 F.2d 1082 (9th Cir. 1983)). That is obviously not the case here.

(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 only alleged basis in the Notice of Removal for original jurisdiction in this case is diversity of citizenship pursuant to 28 U.S.C. § 1132. Notice of Removal, Dkt. No. 1, at 2. As explained below, WF Bank's Notice of Removal is improper because, as a purely factual matter, there is no diversity jurisdiction to be found in this case. Ms. Holloway, a California citizen, sued WF Company, a properly named non-diverse defendant. As also explained below, even if naming WF Company were somehow improper, this case must still be remanded because WF Bank, an unnamed party, lacks the authority to initiate removal. The principles of federalism and policies justifying fraudulent joinder do not support (and in fact condemn) the procedural maneuver employed by WF Bank here.

A. Diversity Jurisdiction Does Not Exist Because WF Company Is a Properly Named, Non-Diverse Defendant.

The doctrine of fraudulent joinder permits a federal court to disregard the citizenship of a fraudulently joined party for the purpose of assessing diversity of citizenship. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). That doctrine imposes a demanding standard: in order to prevail, WF Bank must prove by *clear and convincing evidence* that every claim pleaded in the Complaint fails, "and the failure is obvious according to the settled rules of the state." *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007) (quoting *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)). If any "colorable" claim exists against WF Company, removal is barred; "doubtful questions" of law must be determined in state court. *Charlin v. Allstate Ins. Co.*, 19 F. Supp. 2d 1137, 1140 (C.D. Cal. 1998). Indeed, "it must appear to '*a near certainty*' that joinder . . . was fraudulent." *Charlin*, 19 F. Supp. 2d at 1140 (quoting *Bennett v.*

Allstate Ins. Co., 753 F.Supp. 299, 302 (N.D.Cal.1990)) (emphasis added). As explained next, WF Bank cannot possible meet that heavy burden.

1. Representatives of WF Company Were Unquestionably Involved in Key Events Giving Rise to This Lawsuit.

The gravamen of the Complaint filed by Ms. Holloway is that she was mistreated because of her age and disability. Complaint, Dkt. No. 1-1, ¶ 21–27, 31–32, 36, 37. She asserted thirteen causes of action against WF Company each of which relate in some way to that misconduct. Yet, according to WF Bank, "[WF Company] Has No Connection to This Action." Opp. at 5. That is clearly and demonstrably false. The following example is illustrative:

Paragraph 21 of the Complaint states that "DEFENDANT knew of MS. HOLLOWAY's hearing disability. MS. HOLLOWAY repeatedly told her Supervisors that she required a hearing amplifier to accomplish her responsibilities at work. On or about January 2013, DEFENDANT changed phone systems for its operations and MS. HOLLOWAY asked for an enhanced headset (which included an amplifier within the headset). DEFENDANT provided the headset, however, the hearing amplifier was broken and MS. HOLLOWAY was told to fix the hearing amplifier herself with super glue." Complaint, Dkt. No. 1-1.

Luckily, Ms. Holloway had the good sense to retain some of her email correspondence regarding her request for this enhanced headset. For example, Ms. Holloway exchanged five emails on June 12, 2013 with Jan Frame on this issue. Stris Decl. Exh. B (Ms. Frame asks "Did you get the in-line amplifier for your headset? Is it helping you?") (Ms. Holloway replies "I have received noting regarding my head set.") (Ms. Frame replies "Ok I'm glad I asked! I'll check with your supervisor about it."). As explained above, Ms. Frame is *unquestionably* an employee of WF Company. Indeed, according to her own sworn testimony, Ms. Frame has "been employed *by Wells Fargo & Co.* . . . since December 2008 as an 'Accommodation

Management Specialist.'" Stris Decl. Exh. C (September 5, 2013 Affidavit of Jan Coddington Frame).

In accusing Ms. Holloway of engaging in fraudulent joinder, WF Bank boldly asserts that "[WF Company] was not involved in *any of the events alleged in Plaintiff's Complaint*, and is a sham defendant." Opp. at 1 (emphasis added). As its only evidence for this claim, WF Bank submits the sworn affidavit of Kathy Reimer. In her affidavit, Ms. Reimer declares under penalty of perjury that "all of the employees in the human resources department that was responsible for making decisions relating to Ms. Donna L. Holloway's employment with [WF Bank] were employed by [WF Bank], not [WF Company]." Declaration of Kathy Riemer, Dkt. No. 22-2 ("Riemer Decl."), ¶ 7.

The suggestion that Ms. Frame (and all other actors in the WF Company human resources department) were the exclusive employees of WF Bank is truly remarkable. How can it be that Ms. Frame, an individual who swore to a federal court that she was an employee of WF Company, is not an employee of WF Company? WF Bank offers no answer.

Even more troubling is the fact that this is not the only misrepresentation of its kind. In her motion, Ms. Holloway argued that another employee of WF Company, Kristina F. Brown, had acted in a manner that might give rise to an employment relationship between WF Company and Ms. Holloway. Motion at 10. In her attempt to fully disclaim WF Company's connection to this dispute, Ms. Reimer swears that "Kristina F. Brown was employed by [WF Bank], not [WF Company]." *See* Opp. at 6 (citing Reimer Decl. ¶ 8). In doing so, Ms. Reimer directly contradicts Ms. Brown's representation to the federal government of being an "Assistant Vice President" of the "Wells Fargo *& Company* Law Department." Declaration of Peter K. Stris, Dkt. No. 19-2, Exh. B. As with Ms. Frame, WF Bank makes no attempt to explain the obvious inconsistency. Put simply, WF Bank cannot credibly maintain that WF Company has no connection to this dispute.

2. Plaintiff's Non-Employment Claims Against WF Company Are More than Colorable.

WF Bank's failure to support its core factual premise directly undermines its legal arguments about why Ms. Holloway has no case against WF Company. For example, in response to Ms. Holloway's claims of intentional infliction of emotional distress and violation of California Business and Professions Code §§ 17200 *et seq.*, WF Bank asserts that because such claims are derivative of Ms. Holloway's employment with WF Bank, they necessary fail. Opp. at 8.

As an initial matter, these claims are related to (but hardly "derivative" of) Ms. Holloway's employment. To be clear: an employment relationship is not required to sustain such claims. The only pertinent question is whether WF Bank has proved to a near certainty that Ms. Holloway's claims will fail against WF Company. It has not. To the contrary, it is clear that the conduct of some (if not multiple) WF Company employees touched the heart of Ms. Holloway's case.

It is thus unsurprising that WF Bank offers a fall back position, suggesting that regardless of WF Company's connection to the matter, it will have a defense in the form of preemption under California's Workers Compensation Act. That defense, however, is untenable. Workers compensation preemption only applies to injuries caused by incidents "which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances." *Yau v. Santa Margarita Ford, Inc.*, G048013, 2014 WL 4198060 (Cal. Ct. App. Aug. 26, 2014). It is well settled that "a claim for emotional and psychological damage, arising out of employment, is *not* barred where the distress is engendered *by an employer's illegal discriminatory practices*." *See, e.g.*, *Accardi v. Superior Court*, 17 Cal.App.4th 341 (1993) (emphasis added).

3. Plaintiff's Employment and Labor Code Claims Against WF Company Are More than Colorable.

As explained in the Motion, Ms. Holloway believes that she has viable employment-based claims against WF Company as one of her employers. Motion at 8–10. That is the case even if WF Bank was also her employer. *Id.* And California law explicitly allows Ms. Holloway to advance such a theory of relief. *Id.* Indeed, the California Labor Code itself was designed to "reach situations in which multiple entities control different aspects of the employment relationship." *Id.* (quoting *Martinez v. Combs*, 49 Cal. 4th 35, 76 (Cal. 2010)). *See also Mathieu v. Norrell Corp.*, 115 Cal. App. 4th 1174, 1184 (Cal. Ct. App. 2004) (employee may recover from any employer under FEHA).

Conspicuously absent from the Opposition is any discussion of relevant California employment law or other direct response to Plaintiff's arguments. Instead, WF Bank merely asserts that WF Company had no connection to Ms. Holloway's employment at all and therefore cannot possibly be liable. As explained above, that assertion is demonstrably false.

To be clear: the oversight of a subsidiary by a parent company in precisely the ways that occurred here can, under California law, confer employer status. Indeed, just today, the California Court of Appeals decided a case reiterating this principle. *See Castaneda v. Ensign Group, Inc., et al.*, B249119 (Cal. Ct. App. Sept. 15, 2014) (reversing grant of summary judgment because triable issues of fact existed regarding whether a parent company was a joint employer with its subsidiary in case where the parent excised control over "information technology, *human resources*, *accounting*, *payroll*, legal, risk management, educational and other key services.") (emphasis in original). WF Bank fails to address, let alone refute, this reality of California employment law.

Instead, WF Bank cites one case from the Western District of Washington that is wildly off base: *Campidoglio LLC v. Wells Fargo & Co.*, C12-949 TSZ, 2012 WL

5844693 (W.D. Wash. Nov. 19, 2012) ("*Campidoglio*"). Opp. at 9. *Campidoglio* is not an employment case and does not espouse any employment law principles; it is a case involving breach of contract. *Id.* at *1. In *Campidoglio*, a plaintiff sought to impose vicarious liability on WF Company for exercising control over WF Bank with whom the plaintiff held a contract. *Id.* at 2. Unsurprisingly, the district court held that the mere exercise of control by WF Company over WF Bank did not give rise to vicarious liability for breach of contract. *Id.* The reason is obvious: a contract is established by agreement.

Unlike a contract, the employment relationship is established not by agreement, but by conduct. *See Vernon v. State*, 116 Cal. App. 4th 114, 125 (Cal. Ct. App. 2004) (explaining that the existence of an employment relationship is a fact-intensive inquiry that weighs various factors); *Martinez*, 49 Cal. 4th at 48, 48 n.9 ("Labor Code defines "employer" 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."). And the fact of control unquestionably can give rise to the existence of the employment relationship. Indeed, California courts have held that "[a]n entity that *controls* the business enterprise may be an employer *even if it did not 'directly hire, fire or supervise' the employees*." *Castaneda v. Ensign Group, Inc., et al.*, B249119 (Cal. Ct. App. Sept. 15, 2014) (quoting *Guerrero v. Superior Court,* 213 Cal.App.4th 912, 950 (2013)) (emphasis added).[5]

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[5] WF Bank's arguments about FEHA/EEOC exhaustion are equally off the mark. WF Bank cites the right to sue letter send by the relevant California agency which was addressed to WF Bank. What they fail to mention, however, is the Charge of Discrimination filed by Ms. Holloway with the agency. *See* Stris Decl. Exh. D. In that document (prepared by Ms. Holloway prior to being represented by an attorney), Ms. Holloway did not list WF Bank as her employer. *Id.* She listed Wells Fargo Dealer Services (a non-jurisdicial entity. *Id.* The text prepared by Ms. Holloway serves the purpose of exhaustion against both WF Bank (of which Wells Fargo Dealer Services

B. In Any Event, the Propriety of WF Company's Inclusion as a Defendant Must Be Decided By the State Court.

The removal statute is clear that only a "defendant" may remove a case. 28 U.S.C. § 1441(a) (a "civil action brought in a State court" "may be removed *by the defendant or the defendants* . . . .") (emphasis added). The removal petition in this case was filed by WF Bank, but WF Bank was never named as a defendant by Plaintiff. The only named defendant is WF Company. WF Bank argues that the fraudulent joinder doctrine allows this Court to substitute WF Bank for WF Company. But the doctrine does not work this way.

The fraudulent joinder doctrine is an exception to the requirement of complete diversity of citizenship. *Morris*, 236 F.3d at 1067 (9th Cir. 2001). It permits a federal court to ignore the citizenship of a non-diverse party. It is not a doctrine that is used to substitute one entity for another. That this is true is easily confirmed by (1) noticing that Defendant does not cite a *single* case in which a federal court used the doctrine in the way in which WF Bank is seeking to use it now and (2) considering the rationale for the doctrine.

Fraudulent joinder exists to ensure that a plaintiff cannot simply join a non-diverse, nominal defendant to avoid removal. The doctrine is necessary because plaintiffs could otherwise costlessly avoid removal: the plaintiff would never worry about ultimately losing all the claims against the sham defendant because there would remain another viable defendant. And by the time the claims against the sham

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is a division) *and* WF Corporation (of which WF Bank is a subsidiary). Put simply, Ms. Holloway – a lay person – clearly put both entities on notice of the sum and substance of her claims. Indeed, WF Corporation can hardly deny being on notice when a member of the WF Corporation legal department prepared a formal response to Ms. Holloway's allegations for the EEOC. *Cf. Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990).

defendant were dismissed, the remaining diverse defendant might no longer be able to remove because more than one year might have elapsed from the filing of the complaint in state court and so 28 U.S.C. § 1446(c) might forbid removal.[6] This, of course, is not the situation *at all* when the plaintiff sues only one defendant. The plaintiff will have a steep price to pay if it loses all of its claims against the defendant: its lawsuit will be over. Thus, the doctrine of fraudulent joinder is unnecessary when a plaintiff sues only one non-diverse defendant.

It would be unwise to extend the doctrine of fraudulent joinder to a case like this one, because it unnecessarily intrudes upon state judicial power. In a lawsuit by one California citizen against another, asserting only state-law causes of action, the California state court should be permitted to decide whether the plaintiff has "sued the wrong defendant." If Congress has decided that even cases involving a non-California citizen should be decided in state court – subject to the limited exception of the fraudulent joinder doctrine – then surely a case involving only a California defendant should be within the state court's control. A non-party that believes it should properly be named as a defendant should be required to utilize state procedural rules to join the lawsuit before being allowed to remove the case. WF Bank's own arguments demonstrate the precise problem with a contrary ruling: WF Bank is unhappy because WF Company would have to follow California state-law procedures if WF Bank were not permitted to remove the case. Opp. At 12–13. But this is exactly the result federalism compels.

WF Bank cannot cite a single case in which the fraudulent joinder doctrine was used to allow a non-party to file a petition for removal. *Morris*, 236 F.3d 1061, *McCabe*, 811 F.2d 1336, *West America Corp. v. Vaughan Basset Furniture*, 765 F.2d

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[6] Of course, the defendant may be permitted to remove despite the one-year time bar "if the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c).

932 (9th Cir. 1985), and *Charlin v. Allstate Ins. Co.*, 19 F. Supp. 2d 1137 (C.D. Cal. 1998) certainly do not provide support for such a proposition. Those are all cases in which there were multiple defendants, and when the courts decided that it was appropriate to disregard the citizenship of the non-diverse defendant(s), there remained diverse defendant(s) that had been originally named in the complaint. The other three cases cited by WF Bank are similarly unavailing. *Rice v*, 720 F.2d 1082, is not about removal, diversity jurisdiction, or the fraudulent joinder doctrine. Instead, the issue in that case was whether plaintiff had satisfied the technical requirements of section 717 of the Equal Opportunity Employment Act, "a remedial statute to be liberally construed in favor of the victims of discrimination." *Id.* at 1084 (citation omitted). *Brazina*, 271 F.Supp.2d at 1166, was about removal, and it was even about the ability of a court to look beyond the caption to determine whether a particular entity has been sued, but it is decidedly not a case in which the court used the fraudulent joinder doctrine to allow a non-named party to remove the case. Indeed, the court there granted plaintiff's motion to remand. Finally, *Rendel v. National City Bank*, No. C 10-00638 WHA, 2010 U.S. Dist. LEXIS 39743 (N.D. Cal. Mar. 26, 2010) , involved removal of a case in which the named defendant no longer existed because it had merged with another entity, PNC. A state statute made clear that the merged corporation had ceased to exist and that its successor – PNC – succeeded it. The court therefore permitted PNC to remove the case. At best, *Rice*, *Brazina*, and *Rendel* stand for the proposition that a federal court may overlook a clerical error with respect to the naming – or failure to name – a defendant.

In addition to being incorrect about the function of the fraudulent joinder doctrine, Defendant is simply wrong that Plaintiff should not be permitted to ever join Wells Fargo Bank as a co-defendant in the future. That is exactly the type of choice that is *entirely* within Plaintiff's right as master of her own complaint. And it is the type of choice that she should have been permitted to make in the context of state procedural rules. Upon remand, Plaintiff may ask for jurisdictional discovery

and may choose to add Wells Fargo Bank as a co-defendant. She may add individual co-defendants as well. At that point – and only at that point – Wells Fargo Bank may remove the case, and if it wishes, it may argue to a federal court that the non-diverse defendants should be disregarded because they have been fraudulently joined.

II. If This Court Disagrees, An Interlocutory Appeal of the Legal Question of WF Bank's Citizenship Is Warranted.

There are three requirements for certifying an interlocutory appeal under 28 U.S.C. § 1292(b): (1) where an issue involves 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). Nowhere in the Opposition is there any discussion of these three factors as they relate to the jurisdictional question in this case. Instead, WF Bank has opted to focus on other things, like the identity of Ms. Holloway's lawyers, the Ninth Circuit's denial of en banc review in *Rouse*, or this Court's own decisions on this question. None of that matters. The point of allowing an interlocutory appeal is to avoid wasting "precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of . . . law." 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3929 (2d ed. 1987) (quoting *Hadjipateras v. Pacific, S.A.*, 290 F.3d 697, 703 (5th Cir. 1961)). The jurisdictional issue in this case (i.e., what is the citizenship of a National Bank?) has been the subject of enormous disagreement and confusion, both within and without this Circuit, for years, and it remains so to this day. Our request here seeks merely to advance the resolution of this important issue if the Court declines to remand this case. Given the split among the Circuits and the conflicting panel decisions in the Ninth Circuit, this request easily satisfies the requirements of 28 U.S.C. § 1292(b). Put simply, it makes little – if any – sense to delay this inevitable

appeal (which questions the very jurisdiction of this Court to hear the case) until a final judgment on the merits of this lawsuit.

A. The Jurisdictional Issue Involves a Controlling Question of Law and Certifying It Will Materially Advance the Litigation.

WF Bank does not dispute that the diversity jurisdiction issue meets the first and third requirements of 28 U.S.C. § 1292(b), and for good reason. As courts and commentators have made clear, a ruling involving subject matter jurisdiction is a controlling question of law whose early resolution will materially advance the litigation because a "reversal of the district court's order would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990); *see also Mattel, Inc. v. Bryant*, 441 F. Supp. 2d 1081, 1099 (C.D. Ca. 2005) ("Resolution of the [diversity jurisdiction] issue will both materially advance the litigation and avoid the needless expenditure of judicial resources if the Court of Appeals concludes this court lacks jurisdiction."); Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 15 MOORE'S FEDERAL PRACTICE at § 3855 (2d ed. 1986) ("The propriety of some form of interlocutory review seems quite clear if the issue goes to the power of the district court to make the order it did and only a question of law is presented."). That is particularly true where the ruling comes packaged in a court's decision refusing to remand a case to state court. *See* James W. Moore, MOORE'S FEDERAL PRACTICE ¶ 110.22[2] at 271–72 (2d ed. 1996) (an order refusing to remand an action to the state court presents a controlling question of law and it may be certified for interlocutory appeal). All that leaves is the second requirement of 28 U.S.C. § 1292(b) – whether there is a reasonable difference of opinion over the question – to which we now turn.

B. There is Substantial Ground For Difference of Opinion Over The Question of the Citizenship of a National Bank Like WF Bank.

WF Bank spends most of its time arguing that *Rouse* is "controlling law in the Ninth Circuit" and consistent with this Court's own view on the issue. Opp. at 13-14. That completely misses the point. Under 28 U.S.C. § 1292(b), interlocutory review is warranted where a case "involves an issue over which reasonable judges might differ." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). On this score, the disagreement here could hardly be clearer. In fact, the Opposition underscores that the "difference in opinion" on this question involves two distinct issues: (1) the meaning of the Ninth Circuit's earlier opinion in *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943); and (2) the actual merits question concerning the appropriate interpretation of 28 U.S.C. § 1348's use of the word "located." Either of these questions would, standing alone, justify interlocutory review. Taken together, they all but demand it.[7]

On the first point of disagreement, Ms. Holloway explained in the Motion that the Ninth Circuit's decision in *Rouse* created "an irreconcilable conflict between two cases" – *Rouse* and *American Surety* – that, by rule, should be resolved by an en banc

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[7] WF Bank maintains that the Ninth Circuit's decision not to rehear *Rouse* en banc demonstrates that there is no "pronounced split" within the Circuit, and that Plaintiff's request here is simply "a second bite at the apple" and "improper gamesmanship." Opp. at 15. Not so. As explained below, an irreconcilable conflict between two Ninth Circuit cases did not exist *until Rouse* became final. So the reason why *en banc* review is appropriate now differs from why it might have been in *Rouse* itself. *See In re Exxon Valdez*, 270 F.3d at 1235 (explaining that only "[i]f there is an irreconcilable conflict between two cases from this circuit," must a panel call for rehearing *en banc*). Moreover, if WF Bank were actually right (that Plaintiff's request is "improper"), then a party could never seek *en banc* review in a later case applying one of two conflicting panel decisions if those earlier decisions had not themselves been accepted for *en banc* review. That is obviously not the rule.

court of the Ninth Circuit. Motion at 14 (citing *In re Exxon Valdez*, 270 F.3d 1215, 1235 (9th Cir. 2001)). In response, WF Bank offers the following two contentions: (i) *American Surety* is, in fact, fully consistent with *Rouse* because, when the Ninth Circuit said in *American Surety* that a national bank's principal place of business can be used to determine its citizenship, it really "was a shorthand reference to the national bank's main office." Opp. at 15-16. And (ii) even if *American Surety* "could be read to have decided the issue in *Rouse*," it was abrogated by the Supreme Court's opinion in *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303 (2006). Opp. at 16. Both contentions are wrong.

First, no court or judge has ever suggested that, when *American Surety* used "principal place of business," it really meant "main office, as designated in its articles of association," Opp. at 16, precisely because the language in *American Surety* is so clear. Here is what it said: "a logical interpretation of the phraseology of [§ 1348] leads to the conclusion that the 'States in which they (national banking associations) are respectively located' are those states in which their principal places of business are maintained." *Am. Sur. Co.,* 133 F.3d at 162; *see also Wells Fargo Bank N.A. v. WMR e-PIN, LLC*, 653 F.3d 702, 719 (8th Cir. 2011) (Murphy, J., dissenting) ("When § 1348 was enacted in 1948, the only appellate court to have expressly considered the issue now before us had held that a national banking association is 'located' in, and therefore a citizen of, the state of its principal place of business. *See Am. Sur. Co.*, 133 F.2d at 162."). That language could not be clearer.[8]

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[8] WF Bank attempts this same trick with *Twin Harbors*, maintaining that the reference to "principal office" there also "may well have been a reference to the bank's 'main office.'" Opp. at 17. That assertion, too, finds no support in the case law. *See, e.g., Taheny v. Wells Fargo Bank, N.A.*, 878 F. Supp. 2d 1093, 1096 (E.D. Ca. 2012) (explaining that *Twin Harbors* cited *American Surety* as authority on where a national bank is "located"); *Martinez v. Wells Fargo Bank*, 946 F. Supp. 2d 1010, 1016 (N.D. Ca. 2013) (same).

Indeed, before *Rouse*, dozens of district court opinions viewed *American Surety* as controlling on the citizenship question. To wit, the district court in *Rouse* itself included an entire (bolded) section of its opinion called "This Court Is Bound By The Ninth Circuit's Precedent In *American Surety*" which began by stating that "The rule from *American Surety* is clear: 'the 'States in which they (national banking associations) are respectively located' are those states in which their principal places of business are maintained.'" *Rouse,* 2012 WL 174206, at *8 (quoting *American Surety*, 133 F.2d at 162). There are scores more. *See, e.g.*, *Garcia v. Wells Fargo Bank, N.A.*, 990 F. Supp. 2d 1028, 1032 (C.D. Ca. 2014) ("[B]ecause it is clear that *American Surety* focused on the jurisdictional issue and made a deliberate decision to resolve it, the principal place of business test is binding precedent for this Court [and] [t]he Court thus declines Wells Fargo's invitation to ignore the Ninth Circuit's holding.") (internal quotations omitted); *Vargas v. Wells Fargo Bank, N.A.*, 2013 WL 6235575, at *8 (N.D. Ca. Dec. 2, 2013) (explaining that "the core holding in *American Surety*" is "that a national bank is a citizen of the state in which its principal place of business is located"); *Guinto v. Wells Fargo Bank*, 2011 WL 4738519, at *1 (E.D. Ca. Oct. 5, 2011) (stating that, in *American Surety*, "the Ninth Circuit, interpreting the predecessor statute to 28 U.S.C. § 1348, has held that a national bank is located in the State where it maintains its 'principal place of business'").

This understanding about what *American Surety* stands for was not limited to district courts within this Circuit. Both the Seventh and the Fifth Circuit cited *American Surety* for the proposition that national banks can be citizens of two states for diversity purposes because a national bank is "located" for purposes of 28 U.S.C. § 1348 in the state where the bank's principal place of business is found and the state listed on its organization certificate. *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 989, 989 n.3 (7th Cir. 2001); *Horton v. Bank One, N.A.*, 387 F.3d 426, 436 (5th Cir. 2004). And Judge Murphy, in his dissent in the Eighth Circuit's decision on this question,

made clear his view of *American Surety* as holding that "a national banking association is a citizen of the state of its principal place of business." *Wells Fargo Bank N.A. v. WMR e-PIN*, 653 F.3d at 716–17 (8th Cir. 2011) (Murphy, J., dissenting). These authorities should, at a minimum, put to rest the idea that the Ninth Circuit meant something completely different than what it actually said.

As for WF Bank's second argument — that *Wachovia Bank* silently abrogated *American Surety* — it, too, runs headlong into the overwhelming weight of authority. In support of its contention, WF Bank observes that "[n]umerous district courts" have recognized that *American Surety* "cannot be reconciled with" *Wachovia Bank*. *See* Opp. at 16 n.5. But this only makes our point — that there is a substantial ground for a difference of opinion on this issue — because, for every post-*Wachovia Bank* decision finding *American Surety* no longer good law, there might be two finding that it still controls. *See, e.g.*, *Ellis v. Wells Fargo Bank, NA*, 2014 WL 585627 (S.D. Cal. Feb. 14, 2014); *Sako v. Wells Fargo Bank, N.A.*, 2014 WL 584268 (S.D. Cal. Feb. 11, 2014); *Garcia v. Wells Fargo Bank, NA*, 2014 WL 29354 (C.D. Cal. Jan. 3, 2014); *Martinez v. Wells Fargo Bank*, 946 F. Supp. 2d 1010 (N.D. Cal. 2013); *Grace v. Wells Fargo Bank, N.A.*, 926 F. Supp. 2d 1173 (S.D. Cal. 2013); *Olsen v. Wells Fargo Bank, NA*, 961 F. Supp. 2d 1149 (C.D. Cal. 2013); *Vargas v. Wells Fargo Bank, NA*, 2013 WL 6235575 (N.D. Cal. Dec. 2, 2013); *Shirey v. Wells Fargo Bank, N.A.*, 2013 WL 5716882 (C.D. Cal. Oct. 11, 2013); *Ortiz v. Wells Fargo Bank, N.A.*, 2013 WL 1702790 (S.D. Cal. Apr. 19, 2013); *Bickoff v. Wells Fargo Bank, N.A.*, 2013 WL 100323 (S.D. Cal. Jan. 4, 2013); *Taheny v. Wells Fargo Bank, N.A.*, 878 F. Supp. 2d 1093 (E.D. Cal. 2012); *Inyang v. Resmae Morg. Corp.*, 2012 U.S. Dist. LEXIS 181975 (C.D. Cal. Dec. 26, 2012); *Cesar v. Wells Fargo Bank. N.A.*, No. C–12–1614 MCE, 2012 WL 5289332 (E.D. Cal. Oct. 23, 2012); *Haqq–Ali v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 124502 (C.D. Cal. Aug. 31, 2012); *Adams v. Wells Fargo Bank, N.A.*, 2013 WL 1907746 (E.D. Cal. May 7, 2013); *Brew v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 6796 (E.D. Cal. Jan. 19, 2012); *McCrady v. Wells*

Fargo, N.A., 2011 WL 6009966 (C.D. Cal. Nov. 29, 2011); *Uriarte v. Wells Fargo Bank, NA*, 2011 WL 5295285 (S.D. Cal. Nov. 3, 2011); *Guinto v. Wells Fargo Bank*, 2011 WL 4738519 (E.D. Cal. Oct. 5, 2011); *Stewart v. Wachovia Mortg. Corp.*, 2011 WL 3323115 (C.D. Cal. Aug. 2, 2011); *Goodman v. Wells Fargo Bank, N.A.*, 2011 WL 2372044 (C.D. Cal. June 1, 2011); *Gutterman v. Wachovia Mortg.*, 2011 WL 2633167 (C.D. Cal. Mar. 31, 2011); *Saberi v. Wells Fargo Home Mortg.*, 2011 WL 197860 (S.D. Cal. Jan. 20, 2011); *Mount v. Wells Fargo Bank, N.A.*, 2008 WL 5046286 (C.D. Cal. Nov. 24, 2008). Every one of these cases – post-*Wachovia Bank* – remanded claims against a national bank to state court for lack of diversity jurisdiction under *American Surety*, and it is not an exhaustive list. Our goal here, though, is not to tally cases; it is, instead, to stress that there is (again, at a minimum) good faith disagreement (and even confusion) over the meaning of *American Surety*, and how it can be reconciled with *Rouse*. That disagreement should be resolved by the Ninth Circuit sooner, rather than later.[9]

The meaning of *American Surety*, moreover, is not the only source of disagreement. There is also a clear split among the circuits over the actual citizenship question under § 1348. As explained in the Motion, in aligning itself with the Eighth

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[9] WF Bank sensibly avoids arguing that the panel in *Rouse* itself silently overruled *American Surety*. Not only could that not have happened, *see U.S. v. Hernandez-Castro*, 473 F.3d 1004, 1008 (9th Cir. 2007) ("[A] three judge-panel may not overturn Ninth Circuit precedent."); Fed. R. App. P. 35(b)(1)(A), but nowhere in *Rouse* did the majority ever imply that it was doing so. And, overruling an earlier precedent based on an intervening Supreme Court decision requires more than just some tension between the decisions; the two must be "clearly irreconcilable." *Miller v. Gammie*, 355 F.3d 889, 900 (9th Cir. 2003) (en banc); *see also Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (intervening authority must do more than "cast doubt" on prior precedent). Given the *Rouse* majority's own admission that *Wachovia Bank* did "not squarely decide[] the issue," it had no authority to discard earlier precedent. 747 F.3d at 708.

Circuit's decision in *WMR e-PIN*, *Rouse* exacerbated this split. In *Firstar Bank*, the Seventh Circuit considered whether a national bank with its principal place of business in Ohio, but with a number of bank branches in Illinois, was diverse from citizens of Illinois. *Firstar Bank*, 253 F.3d at 985. The Seventh Circuit held that "a national bank is located in, and thus a citizen of, the state of its principal place of business and the state listed in its organization certificate." *Id.* at 994 (quotation omitted). Similarly, in *Horton*, the Fifth Circuit considered a national bank with a principal place of business and organization certificate from Illinois, but with branches in Texas, and held citizenship "limited to the national bank's principal place of business and the state listed in its organization certificate and articles of incorporation." *Horton,* 387 F.3d at 428, 436.

Wells Fargo brushes these rulings aside, saying only that these courts' "statements" that, for purposes of § 1348, a national bank is a citizen of *both* the state of its principal place of business *and* the state listed in its organization certificate were "unnecessary to the court's decision." Opp. at 18. But that's certainly not how the Eighth Circuit read *Firstar* and *Horton* when it disagreed with them. It explicitly disavowed these courts' holdings, finding their interpretation of § 1348 (permitting citizenship in *both* places) a "strain" and rejecting their "model[ing] the citizenship of national banks after that of corporations." *WMR e-Pin*, 653 F.3d at 708. And it's not how district courts have read these cases. *See, e.g.*, *Sako*, 2014 WL 584268, at *3 (explaining that, "[a]s the Supreme Court [in *Wachovia Bank*] did not determine whether a national bank could also be a citizen where it has its principal place of business, the appellate and district courts have taken two different approaches on the issue," and citing *WMR e-Pin* on the one hand and *Firstar* and *Horton* on the other).

And, it's not even how the majority in *Rouse* read these cases. *See Rouse*, 747 F.3d at 708 ("[T]he court are split on the question.").[10]

Ending where we began, one point remains clear: there is legitimate confusion and disagreement over an important jurisdictional question that categorically controls where state-law cases against national banks will be heard. *Rouse* did not finally resolve this issue, both because it did not overrule, and conflicts with, *American Surety*, and because it deepened an existing Circuit split on this question. If the Court refuses to remand this case, that landscape warrants interlocutory review.

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[10] Alternatively, WF Bank contends that both of these decisions are no longer good law because "[b]oth Circuits have issued decisions after *Wachovia Bank* holding that a national bank is a citizen only of the state in which its main office is located." Opp. at 18 (citing *Nguyen v. Bank of America, N.A.*, 539 Fed. App'x 325, 357 n.1 (5th Cir. 2013) and *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006)). That is both wrong and badly mischaracterizes these cases. *Nguyen* never said that a national bank is a citizen *only* of the state in which its main office is located — as WF Bank asserts. It merely said that, per *Wachovia Bank*, a "national bank *may* be considered a citizen of the State designated in its articles of association as its main office.'" *Nguyen*, 539 Fed. App'x at 327 n.1 (emphasis added). And *Hicklin* discussed this issue only in reference to the "every branch" theory of jurisdiction. *Hicklin*, 439 F.3d at 348 (noting that *Wachovia Bank* rejected this theory of jurisdiction). In any case, the idea that these two one-line cases have effectively overruled longstanding circuit precedent without even mentioning them is difficult to take seriously – as is WF Bank's half-hearted effort to rope other Circuits into their corner. *See* Opp. at 16 n.5. None of these Circuits has actually decided this issue.

CONCLUSION

The motion to remand should be granted.

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