



Respectfully submitted,

*/s/ Vincent J. Hess*

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**ATTORNEYS FOR DEFENDANT PHH**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon counsel of record *via electronic notice* pursuant to the Texas Rules of Civil Procedure on this 27th day of June, 2022:

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*/s/ Vincent J. Hess*

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Counsel for Defendant PHH

**EXHIBIT A**

*Unofficial Copy Office of Marilyn Burgess District Clerk*



“any foreclosure attempts are invalid and void;” and other relief concerning the real property located at 406 Spring Lakes Haven, Spring, Texas 77373 (the “Property”).

3. PHH has appeared in the State Court Action through its Answer filed on June 27, 2022. *See* Ex. I.

4. The consent of named defendants Power Default Services, Inc. (“PDS”) and AVT Title Services, LLC (“AVT”) is not required for this Notice of Removal, because those defendants have not been served, and moreover, those defendants are nominal defendants that have been improperly joined. *See, e.g., Getty Oil Corp. v. Ins. Co. of North Am.*, 841 F.2d 1254, 1261 and n.9 (5th Cir. 1988) (an acknowledgment of consent is not required of a defendant who is improperly joined; “Defendants . . . who are unserved when the removal petition is filed need not join in it.”); *HDNet MMA 2008 v. Zuffa, LLC*, No. 3:08-CV-0442-G, 2008 WL 958067, at \*3 n.5 (N.D. Tex. April 9, 2008); *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986).

5. PHH has not been properly served with a citation and a copy of the Petition in this matter. Therefore, this Notice of Removal is timely under 28 U.S.C. § 1446(b).

6. PHH removes the State Court Action to this Court on the basis of diversity jurisdiction.

## **II.** **PROCEDURAL REQUIREMENTS**

7. This action is properly removed to this Court, as the lawsuit is pending within the district and division. *See* 28 U.S.C. § 1441; 28 U.S.C. § 124(b)(2).

8. The United States District Court for the Southern District of Texas, Houston Division, has original jurisdiction over this action based on diversity jurisdiction, because PHH is now, and was at the time this action commenced, diverse in citizenship from Plaintiff, and the amount in controversy exceeds the minimum jurisdictional amount. *See* 28 U.S.C. § 1332(a).

Defendants PDS and AVT are nominal defendants that have been improperly joined. In any event, PDS is likewise diverse in citizenship.<sup>1</sup>

9. Pursuant to 28 U.S.C. § 1446(a) and Southern District of Texas Local Rule LR81, this Notice of Removal is accompanied by copies of the following materials:

- Exhibit A** Index of Matters Being Filed;
- Exhibit B** Civil Cover Sheet;
- Exhibit C** Plaintiff's Verified Application for Temporary Restraining Order, Temporary Injunction and Original Petition;
- Exhibit D** Order Granting Plaintiff's Verified Application for Temporary Restraining Order, Temporary Injunction and Petition for Declaratory Judgment;
- Exhibit E** Clerk's Certificate of Cash Deposit in Lieu of Injunction Bond Per Order of the Court;
- Exhibit F** Requests for Issuance of Service;
- Exhibit G** Motion to Extend Temporary Restraining Order;
- Exhibit H** Order on Motion to Extend Temporary Restraining Order;
- Exhibit I** Defendant PHH's Original Answer;
- Exhibit J** Copy of the State Court Docket Sheet;
- Exhibit K** List of all counsel of record, including addresses, telephone numbers and parties represented; and
- Exhibit L** Harris County Appraisal District valuation for the Property.

10. Simultaneously with the filing of this Notice of Removal, PHH is filing a copy of the Notice of Removal in the 151<sup>st</sup> Judicial District Court of Harris County, Texas, pursuant to 28 U.S.C. § 1446(d).

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<sup>1</sup> PDS is a nominal defendant that has been improperly joined. In any event, PDS is incorporated in Delaware and has its principal place of business in Georgia, and therefore PDS is a citizen of Delaware and Georgia for diversity purposes.

**III.**  
**DIVERSITY JURISDICTION**

11. Where there is complete diversity among the parties and the amount in controversy exceeds \$75,000, exclusive of interest and costs, an action may be removed to federal court. *See* 28 U.S.C. §§ 1332(a), 1441(a). Complete diversity exists in this case because Plaintiff is not a citizen of the same state as PHH. Additionally, this action involves an amount in controversy that exceeds \$75,000, exclusive of interest and costs.

**A. THERE IS COMPLETE DIVERSITY AMONG THE PARTIES**

12. Plaintiff is a natural person, so his citizenship for diversity purposes is determined by “where [he is] domiciled, that is, where [he has] a fixed residence with the intent to remain there indefinitely.” *Margetis v. Ray*, No. 3:08-CV-958-D, 2009 WL 464962, at \*3 (N.D. Tex. Feb. 25, 2009) (citing *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 555-56 (5th Cir. 1985)). Plaintiff is domiciled in Harris County, Texas. *See* Petition at §§ I, II, IV and Ex. 1 (Ex. C). Therefore, Plaintiff is a citizen of Texas for diversity purposes.

13. Defendant PHH is a corporation and is considered to be a citizen both of its state of incorporation and of its principal place of business. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 88-89 (2005); *see also* 28 U.S.C. § 1332(c)(1). PHH is a New Jersey corporation with its principal place of business in New Jersey. Therefore, PHH is a citizen of New Jersey for diversity purposes. *See id.*

14. Plaintiff has also sued PDS. Plaintiff has stated that PDS is a “foreign corporation” but has not indicated facts which would otherwise reveal the citizenship of PDS. *See generally* Petition. Its citizenship, regardless of whether it is not Texas, however, should be disregarded for purposes of determining diversity jurisdiction under 28 U.S.C. § 1332, because PDS has been

improperly joined as demonstrated below in ¶¶ 16-21. *See Larroquette v. Cardinal Health 200, Inc.*, 466 F.3d 373, 376 (5th Cir. 2006).

15. Plaintiff has further sued AVT in its capacity as the substitute trustee for the foreclosure proceedings at issue. Plaintiff has stated that AVT is a “Texas llc” but has not indicated facts which would otherwise reveal the citizenship of AVT. *See generally* Petition. Its citizenship, regardless of whether it is Texas or elsewhere, however, should be disregarded for purposes of determining diversity jurisdiction under 28 U.S.C. § 1332, because AVT has been improperly joined as demonstrated below in ¶¶ 16-21. *See Larroquette*, 466 F.3d at 376.

16. A removing party establishes improper joinder by showing that the plaintiff cannot establish a cause of action against the non-diverse defendant under state law. *Id.* This requires the Court to conduct “a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether, under state law, the complaint states a claim against the in-state defendant.” *Id.* A “mere theoretical possibility” of recovery under state law does not suffice to preclude removal. *Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2000). Whether the plaintiff has alleged a valid cause of action “depends upon and is tied to the factual fit between the plaintiff[’s] allegations and the pleaded theory of recovery.” *Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir. 1999). A plaintiff must at least state “specific actionable conduct” sufficient to support a cause of action against a non-diverse defendant. *See id.* at 699. “A mere formulaic recitation of the elements of a cause of action asserted against a non-diverse defendant is not sufficient under this standard.” *Felder v. Countrywide Home Loans*, No. CIV.A. H-13-0282, 2013 WL 6805843, at \*4 (S.D. Tex. Dec. 20, 2013).

17. **AVT is improperly joined:** “[C]ourts routinely hold that the mere inclusion of a non-diverse trustee as a nominal party will not defeat diversity jurisdiction.” *Mendez v. Wells*

*Fargo Bank, N.A.*, No. SA-14-CV-326-XR, 2014 WL 1923056, at \*2 (W.D. Tex. May 13, 2014); *see also Eisenberg v. Deutsche Bank Trust Co. Ams.*, No. SA-11-CV-384-XR, 2011 WL 2636135, at \*4 (W.D. Tex. July 5, 2011) (“Texas law recognizes that a trustee named solely in his or her capacity as trustee under a deed of trust or security instrument is not a necessary party in a suit to prevent a foreclosure.”); *Turner v. JP Morgan Chase Bank, N.A.*, No. 3:12-CV-2701, 2013 WL 2896883, at \*3 (N.D. Tex. Jun. 13, 2013) (trustee named solely in action to enjoin foreclosure is a nominal party whose presence does not affect diversity jurisdiction); TEX. PROP. CODE § 51.007 (providing procedure for dismissal of causes of action asserted against trustees solely in their capacity as trustees under a deed of trust, contract lien, or security instrument).

18. In addition, the Texas Property Code provides a safe harbor for substitute trustees. *See* TEX. PROP. CODE § 51.007(f). “Courts considering the good faith element of § 51.007(f) have generally held that ‘§ 51.007(f) imposes a substantive pleading requirement on a plaintiff seeking to recover against a substitute trustee.’” *Williams v. Wells Fargo Bank*, 4:13-CV-825, 2014 WL 1024003, at \*5 (S.D. Tex. Mar. 13, 2014) (citing *Felder v. Countrywide Home Loans*, No. H-13-0282, 2013 WL 6805843, at \*5 (S.D. Tex. Dec. 20, 2013); *Cantor v. Wachovia Mortg., FSB*, 641 F. Supp. 2d 602, 611 (N.D. Tex. 2009)). “Where the plaintiff did not allege bad faith on the part of the defendant, courts have held that substitute trustees were improperly joined for the purposes of establishing diversity jurisdiction.” *Williams*, 2014 WL 1024003, at \*5 (quoting *Purported Lien or Claim Against Bond v. Barrett Daffin Frappier Turner & Engel, LLP*, No. G-12-188, 2013 WL 1619691, at \*3 (S.D. Tex. March 22, 2013) (aggregating cases)). *See also Rojas v. Wells Fargo Bank, N.A.*, 571 F. App’x. 274, 277 (5th Cir. 2014) (holding that the substitute trustee “was improperly joined because the Texas Property Code creates a qualified immunity for mortgage

trustees who make good faith errors” and plaintiff did not allege bad faith, so plaintiff had no reasonable basis for recovery) (citing Tex. Prop. Code § 51.007(f)).

19. Here, Plaintiff does not plead any factual allegations in the Petition that would suggest bad faith on the part of AVT, the substitute trustee. There are simply no factual allegations supporting the conclusion that AVT was not acting in good faith because there are no allegations with respect to it at all. *See generally* Petition. “Therefore, the Substitute Trustee[] cannot be liable for any error they may have made which contributed to the alleged . . . violation of the Property Code, or wrongful foreclosure,” *Williams*, 2014 WL 1024003, at \*5, and Plaintiff has no plausible basis to recover against AVT. The mere fact that Plaintiff seeks to avoid a foreclosure sale and seeks relief which would presumably enjoin a substitute trustee from acting, however, does not preclude a finding of improper joinder, because relief preventing foreclosure is dependent on an underlying cause of action. *See Cook v. Wells Fargo Bank, N.A.*, No. 3:10-CV-0592-D, 2010 WL 2772445, at \*4 (N.D. Tex. July 12, 2010). AVT has been improperly joined.

20. **PDS is improperly joined:** Plaintiff has also named PDS as a defendant. However, Plaintiff does not plead any factual allegations in the Petition that would suggest any activity, much less bad faith, on the part of PDS. There are simply no factual allegations supporting the conclusion that PDS engaged in wrongful conduct or did not act in good faith, because there are no allegations with respect to it at all. *See generally* Petition. Plaintiff’s reasons for naming PDS as a defendant are unclear. Plaintiff does not assert a cause of action specifically against PDS. In sum, Plaintiff has no plausible basis to recover against PDS. The mere fact that Plaintiff seeks to avoid a foreclosure sale and seeks relief which would presumably enjoin PDS from acting does not preclude a finding of improper joinder, because relief preventing foreclosure is dependent

on an underlying cause of action. *See Cook v. Wells Fargo Bank, N.A.*, No. 3:10-CV-0592-D, 2010 WL 2772445, at \*4 (N.D. Tex. July 12, 2010). PDS has been improperly joined.

21. In sum, Plaintiff does not raise the “theoretical possibility” that any cause of action could be maintained against PDS or AVT. The Petition contains no substantive allegations against either of them. *See Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 259-60 and n.8 (5th Cir. 1995) (citation omitted) (affirming denial of motion to remand, in part, on grounds that the plaintiff’s complaint did not contain allegations which could support a claim against the non-diverse defendant); *see also Cantor v. Wachovia Mortgage, FSB*, 641 F. Supp. 2d 602, 611-12 (N.D. Tex. 2009) (denying remand and disregarding the citizenship of the defendant trustee upon a finding that no reasonable basis existed for plaintiff’s recovery against the trustee). PDS and AVT are nominal parties and have been improperly joined, and their respective citizenship should be disregarded for removal purposes. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 (5th Cir. 2002) (holding that where non-diverse defendant is improperly joined, case is properly in federal court).

22. Because no properly joined defendant is a citizen of Texas, there is complete diversity in this case.

**B. AMOUNT IN CONTROVERSY**

23. Where a defendant can show, by a preponderance of the evidence, that the amount in controversy more likely than not exceeds the jurisdictional minimum, removal is proper. *See White v. FCI U.S.A., Inc.*, 319 F.3d 672, 675–76 (5th Cir. 2003). A defendant can meet this burden if it is apparent from the face of the petition that the claims are likely to exceed \$75,000, or, alternatively, if the defendant introduces other evidence to show that the amount in controversy more likely than not exceeds \$75,000, exclusive of interest and costs. *See St. Paul Reins. Co. v.*

*Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998); *Berry v. Chase Home Fin., LLC*, No. C-09-116, 2009 WL 2868224, at \*2 (S.D. Tex. Aug. 27, 2009).

24. “In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.” *Farkas v. GMAC Mortgage, LLC*, 737 F.3d 338, 341(5th Cir. 2013) (quoting *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977)); *St. Paul Reins. Co.*, 134 F.3d at 1252-53; *Martinez v. BAC Home Loans Servicing*, 777 F. Supp. 2d. 1039, 1044 (W.D. Tex. 2010). Specifically, the *Farkas* Court held that: “[i]n actions enjoining a lender from transferring property and preserving an individual’s ownership interest, it is the property itself that is the object of the litigation; the value of that property represents the amount in controversy.” *Id.* (citing *Garfinkle v. Wells Fargo Bank*, 483 F.2d 1074, 1076 (9th Cir. 1973)). Thus, “[w]hen . . . a right to property is called into question in its entirety, the value of the property controls the amount in controversy.” *Nationstar Mortgage LLC v. Knox*, No. 08-60887, 351 Fed. Appx. 844, 848 (5th Cir. 2009) (quoting *Waller v. Prof'l Ins. Corp.*, 296 F.2d 545, 547-48 (5th Cir. 1961)); see also *Alsobrook v. GMAC Mortg., L.L.C.*, 541 Fed. Appx. 340, 342 n.2 (5th Cir. 2013); *Copeland v. U.S. Bank Nat’l Ass’n*, No. 11-51206, 485 Fed. Appx. 8, 9 (5th Cir. 2012) (relying on the value of the property to satisfy the amount in controversy in exercising diversity jurisdiction over appeal of foreclosure-related claims). Where a plaintiff files suit specifically seeking to enjoin the foreclosure of real property, the amount in controversy is the “current appraised fair market value of the [p]roperty” itself because “absent judicial relief [the plaintiff] could be divested of all right, title and interest to the property.” *Berry*, 2009 WL 2868224 at \*3.

25. Further, the Court may also consider a plaintiff’s claims, actual damages, and attorney’s fees in determining the amount in controversy. See *White*, 319 F.3d at 675-76; *St. Paul*

*Reins. Co.*, 134 F.3d at 1253 n.7; *Rawlings v. Travelers Property Cas. Ins. Co.*, No. 3:07-CV-1608-O, 2008 WL 2115606, at \*\*8-9 (N.D. Tex. May 20, 2008) (considering plaintiff's request for exemplary damages and potential recovery pursuant to TEX. CIV. PRAC. & REM. CODE § 41.008, and finding that the amount in controversy "more likely than not" exceeded \$75,000); *Grant v. Chevron Phillips Chemical Co. L.P.*, 309 F.3d 864, 874 (5th Cir. 2002) ("[W]e hold that when there is state statutory authority for the court to award attorney's fees . . . such fees may be included in the amount in controversy."); *Ray Mart, Inc. v. Stock Building Supply of Texas, L.P.*, 435 F. Supp. 2d 578, 588 (E.D. Tex. 2006) (including potential award of attorney fees in calculating the amount in controversy).

26. Based on a review of the Petition and the evidence presented, the amount in controversy exceeds \$75,000, exclusive of interest and costs. This is because Plaintiff expressly seeks "monetary relief of \$250,000 or more." Petition at § X.

27. In addition, Plaintiff seeks declaratory and injunctive relief to preclude the foreclosure of the Property, and as a result, the entire value of the Property is squarely at issue. See *Bardwell v. BAC Home Loans Servicing, LP*, No. 3:11-CV-1002-B, 2011 WL 4346328, at \*2 (N.D. Tex. Sept. 16, 2011) (finding value of the property at issue was an appropriate measure of the amount in controversy where the plaintiff sought to preclude the defendants from exercising their rights in the property); *Nationstar Mortgage LLC*, 351 Fed. Appx. at 848; *Martinez*, 777 F. Supp. 2d. at 1047; *Waller*, 296 F.2d at 547-48; see also Petition at §§ V-VIII and XVI; Order Granting Plaintiff's Verified Application for Temporary Restraining Order, Temporary Injunction and Petition for Declaratory Judgment (Exhibit D). According to the Harris County Appraisal District, the current market value of the Property is \$332,660.<sup>2</sup> See Ex. L.

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<sup>2</sup> Pursuant to Rule 201 of the Federal Rules of Evidence, PHH respectfully requests that the Court take judicial notice of the Harris County Appraisal District valuation for the Property.

28. Plaintiff also seeks actual, statutory and exemplary damages in the State Court Action, as well as attorney's fees. *See* Petition at §§ XII, XIII, XIV.

29. Although PHH vehemently denies that Plaintiff is entitled to any injunctive, declaratory, monetary or other relief, once the value of the Property is included in the amount in controversy calculus plus Plaintiff's claims for damages and attorney's fees, it is clear that the amount in controversy exceeds \$75,000, exclusive of interest and costs.

30. Because there is complete diversity among the parties and because the amount in controversy requirement is satisfied, this Court has jurisdiction pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Therefore, removal is proper.

**IV.**  
**CONCLUSION**

WHEREFORE, PHH removes this action from the 151<sup>st</sup> Judicial District Court of Harris County, Texas, to the United States District Court for the Southern District of Texas, Houston Division, so that this Court may assume jurisdiction over the cause as provided by law.

Respectfully submitted,

*/s/ Vincent J. Hess*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon counsel for Plaintiff *via the Court's electronic notice system; certified mail, return receipt requested; and/or email* pursuant to the Federal Rules of Civil Procedure on this 27th day of June, 2022:

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/s/ Vincent J. Hess  
Counsel for Defendant PHH

Unofficial Copy Office of Marilyn Burgess District Clerk

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