Orran
9-15-2010

UNITED STATES DISTRICT COURT

Eastern District of Virginia
1000 East Main Street, Room 305
Richmond, Virginia 23219-3525

chambers of
Richard L. Williams
Senior District Judge

Telephone
(804) 916-2240

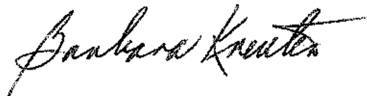
TO THE PUBLISHING COMPANIES:

Re: Wayne E. Lee v. Citimortgage, Inc., 3:10CV601

Enclosed for publication are an order and memorandum opinion in the above mentioned case. Also enclosed is a list showing counsel for the parties.

If you have any questions, please feel free to call.

Sincerely,



Barbara W. Kreuter
Secretary to Judge Williams

Enclosures

Wayne E. Lee v. Citimortgage, Inc., 3:10CV601

Counsel for Plaintiff Wayne E. Lee:

Henry W. McLaughlin, III, Esq.
The Law Office of Henry McLaughlin, P.C.
Eighth and Main Building
707 East Main Street
Suite 1375
Richmond, VA 23219
(804) 205-9020
email: henry@mclaughlinvalaw.com

Counsel for Defendant Citimortgage, Inc.:

Diana Margeaux Witherspoon, Esq.
Miles & Stockbridge PC
1751 Pinnacle Drive
Suite 500
McLean, VA 22102-3833
(703) 903-9000
email: mwitherspoon@milestockbridge.com

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

WAYNE E. LEE,

Plaintiff,

v. Civil Action Number 3:10cv601

CITIMORTGAGE, INC.,

Defendant.

ORDER

This matter is before the Court on the Plaintiff's Motion for Remand (Docket No. 7). For the reasons set forth in the accompanying Memorandum Opinion, the Court FINDS that it lacks subject matter jurisdiction over this matter, GRANTS the Plaintiff's motion, and REMANDS the matter to the Circuit Court of New Kent County, Virginia.

It is so ORDERED.

Let the Clerk send a copy of this Order and accompanying Memorandum Opinion to all counsel of record and the Clerk of the Circuit Court of New Kent County, Virginia.

September 15, 2010
DATE

/s/
RICHARD L. WILLIAMS
SENIOR UNITED STATES DISTRICT JUDGE

U.S. District Court
Eastern District of Virginia - (Richmond)
CIVIL DOCKET FOR CASE #: 3:10-cv-00601-RLW
Internal Use Only

Lee v. Citimortgage, Inc.
Assigned to: District Judge Richard L. Williams
Cause: 28:1441 Notice of Removal-Foreclosure

Date Filed: 08/24/2010
Jury Demand: None
Nature of Suit: 220 Real Property: Foreclosure
Jurisdiction: Diversity

Plaintiff

Wayne E. Lee represented by **Henry W. McLaughlin , III**
The Law Office of Henry McLaughlin, P. C.
Eighth and Main Building
707 East Main St
Suite 1375
Richmond, VA 23219
(804) 205-9020
Fax: (804) 575-0245
Email: henry@mclaughlinvalaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Citimortgage, Inc. represented by **Diana Margeaux Witherspoon**
Miles & Stockbridge PC (McLean)
1751 Pinnacle Dr
Suite 500
McLean, VA 22102-3833
703-903-9000
Fax: 703-610-8686
Email: mwitherspoon@milesstockbridge.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

James Douglas Cuthbertson
Miles & Stockbridge
1751 Pinnacle Dr
Suite 500
McLean, VA 22102-3833
(703) 610-8664
Email: jcuthbertson@milesstockbridge.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

WAYNE E. LEE, Plaintiff, v. CITIMORTGAGE, INC., Defendant.	Civil Action Number 3:10cv601

MEMORANDUM OPINION

This matter is before the Court on Plaintiff Wayne E. Lee's ("the Plaintiff") Motion for Remand (Docket No. 7). The Court will dispense with oral argument because the facts and legal contentions are adequately presented in the materials presently before the Court and argument would not aid in the decisional process. For the reasons set forth herein, the Court will grant the Plaintiff's motion.

I. Background

A. Factual Background

On December 15, 2008, the Plaintiff entered into a mortgage loan with Metamerica Mortgage Bankers, Inc. The loan, evidenced by a Note and secured by a Deed of Trust, was a Federal Housing Administration ("FHA") loan governed by FHA regulations of the federal Department of Housing and Urban Development ("HUD"). Defendant Citimortgage, Inc. ("the Defendant") is, and has been for some time, the holder of the Note.

Under the terms of the Deed of Trust that secured the loan, the holder of the Note can foreclose on the home in the event of arrearage on payment of the Note only if the holder has

complied with FHA regulations. One such regulation incorporated into the terms of the Deed of Trust is 24 C.F.R. § 203.604 that provides in relevant part as follows: "The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced . . . ." 24 C.F.R. § 203.604(b).

The Plaintiff fell into arrears on the Note. The Defendant appointed Wittstadt Title and Escrow Company, LLC ("WT&E") as substitute trustee on the Deed of Trust and instructed WT&E to foreclose on the Plaintiff's home. WT&E then scheduled a foreclosure sale for July 19, 2010 without the Defendant or any other creditor entity ever having a face-to-face meeting with the Plaintiff or attempting to arrange for such a meeting.

B. Procedural Background

Believing that the Defendant's failure to have, or attempt to have, a face-to-face meeting violated the conditions set forth in 24 C.F.R. § 203.604(b) as incorporated into the Deed of Trust, the Plaintiff filed his Complaint on July 23, 2010 in the Circuit Court of New Kent County, Virginia seeking a declaratory judgment that the Defendant has not complied with the terms of the Deed of Trust sufficient to allow the Defendant to go forward with a foreclosure of the home. The Defendant removed the matter to this Court on August 24, 2010. In its Notice of Removal, the Defendant argues that "[t]his action is removable to federal court pursuant to 28 U.S.C. § 1441 because it could have been filed originally in this Court pursuant to the federal question jurisdiction conferred by 28 U.S.C. § 1331 and the diversity jurisdiction conferred by 28 U.S.C. § 1332."

With respect to its federal question jurisdiction allegations, the Defendant, referencing the Plaintiff's charge that the Defendant violated federal regulations, believes jurisdiction exists under 28 U.S.C. § 1331 "because [the] Plaintiff asserts claims involving questions of federal law." With respect to its diversity jurisdiction allegations, the Defendant represents that "all relevant parties are diverse and the amount in controversy exceeds $75,000." Specifically, the Defendant alleges that the Plaintiff is a citizen of Virginia, that the Defendant is a citizen of New York and Missouri, and that the "Plaintiff's Complaint also meets the $75,000 amount-in-controversy requirement based upon the principal balance owed on the Promissory Note secured by the Deed of Trust at issue." The Defendant did not offer affidavits or any other supplemental support for its jurisdictional allegations.

II. Analysis

"Federal courts are courts of limited jurisdiction and the 'threshold requirement in every federal case is jurisdiction.'" *Barclay Square Props. v. Midwest Fed. Sav. & Loan Ass'n*, 893 F.2d 968, 969 (8th Cir. 1990) (quoting *Sanders v. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir. 1987)). A civil action that is filed in state court may be removed if the federal district court has original jurisdiction pursuant to 28 U.S.C. § 1331 or § 1332. *See* 28 U.S.C. § 1441(a). The burden of establishing federal jurisdiction falls upon the party seeking removal. *Mulcahey v. Columbia Organic Chems.*, 29 F.3d 148, 151 (4th Cir. 1994). It is well-established that federal courts "'are obliged to construe removal jurisdiction strictly because of the significant federalism concerns implicated' and that 'if federal jurisdiction is doubtful, a remand to state court is necessary.'" *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 333-34 (4th Cir. 2008) (quoting *Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 260 (4th Cir. 2005)).

The Defendant suggests that the Court has subject matter jurisdiction over this suit based on both federal question jurisdiction under 28 U.S.C. § 1331 and diversity jurisdiction under 28 U.S.C.

§ 1332. Federal question jurisdiction under § 1331 "exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 12 (2003). In declaratory judgment actions, such as in the case at bar, "if the declaratory judgment plaintiff is not alleging an affirmative claim arising under federal law against the declaratory judgment defendant, the proper jurisdictional inquiry is whether the complaint alleges a claim arising under federal law that the declaratory judgment defendant could affirmatively bring against the declaratory judgment plaintiff." *Morgan Cnty. War Mem'l Hosp. ex rel. Bd. of Dirs. of War Mem'l Hosp. v. Baker*, 314 Fed. Appx. 529, 532 (4th Cir. 2008) (quoting *Columbia Gas Trans. Corp. v. Drain*, 237 F.3d 366, 370 (4th Cir. 2001)). And, "[i]f the answer to this question is yes, federal question jurisdiction exists." *Id.* at 533 (quoting *Columbia Gas*, 237 F.3d at 370). In answering the question, the Court must keep in mind Justice Holmes' timeless acknowledgment that most lawsuits "arise under the law that creates the cause of action." *Id.* (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)).

When, as here, the underlying cause of action for both parties is created by state law, the Court possesses federal question jurisdiction only in the "small class of cases where, even though the cause of action is not created by federal law, the case's resolution depends on resolution of a federal question sufficiently substantial to arise under federal law within the meaning of 28 U.S.C.A. § 1331." *Id.* (quoting *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996)). Thus, "a case may arise under federal law where the vindication of a right under state law necessarily turn[s] on some construction of federal law, but only [if] . . . the plaintiff's right to relief necessarily depends on a *substantial question* of federal law." *Id.* (citations and quotation marks omitted) (emphasis added). The Supreme Court has summarized the inquiry as follows: "the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum

may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)).

In the case at bar, the Plaintiff's demand is for a declaration that the Defendant has not complied with the terms of the parties' contract – the Deed of Trust. Specifically, the parties' contract incorporated 24 C.F.R. § 203.604 – a federal HUD regulation – as a condition of the contract. Thus, while the Plaintiff's declaratory judgment action necessarily requires analysis of a federal regulation, the suit actually relates to rights and obligations under the parties' contract. Further, any claim raised in the Plaintiff's Complaint that the Defendant could affirmatively bring against the Plaintiff would also necessarily relate to rights and obligations under the parties' contract. These rights and obligations are governed by state law.[1] *Kestler v. Bd. of Trs. of N.C. Local Gov'tal Emps.' Ret. Sys.*, 48 F.3d 800, 803 (4th Cir. 1995) ("[T]he issue of whether a contract right exists is governed by state law."); *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Univ.*, 489 U.S. 468, 474 (1989) (interpretation of private contracts is a question of state law). Therefore, as state law creates the underlying causes of action in the Complaint, federal question jurisdiction exists in this case only if the Complaint "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and

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[1] Of course, the Court recognizes that state law can be pre-empted by both federal statutes and federal regulations. *See Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes."). Yet, the parties do not cite, and the Court is not aware of, any principles of preemption that would operate to suggest that the absence of a federal cause of action under the NHA was intended to prevent parties from entering into an agreement to make otherwise unenforceable conditions enforceable under state principles of contract law.

state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)).

Prior to the United States Supreme Court's articulation in *Grable* of the proper inquiry, the Fourth Circuit long held that, if a federal law does not provide a private right of action, a state law action based on its violation does *not* raise a substantial federal question as would allow for federal jurisdiction under § 1331. *See Mulcahey*, 29 F.3d at 152 (interpreting *Merrell Dow*, 478 U.S. 804). In other words, a plaintiff's state law claim alleging the violation of a federal statute – or, as here, a federal regulation promulgated pursuant to a federal statute – was insufficient to confer federal question jurisdiction if the underlying federal statute did not provide a private right of action. *See id.*; *see also Healthtek Solutions, Inc. v. Fortis Benefits Ins. Co.*, 274 F. Supp. 2d 767, 774 (E.D. Va. 2003) ("[A] plaintiff's claim of a violation of federal statute does not create federal jurisdiction unless the plaintiff could avail himself of the remedies provided by the federal statute."). In the case at bar, it is undisputed that the FHA, NHA, and HUD regulations do *not* provide the Plaintiff with a private right of action. Therefore, the Plaintiff's claim that the Defendant violated a federal regulation that was incorporated as a condition of the parties' state law-governed contract is clearly insufficient under *Mulcahey* to confer federal question jurisdiction over this matter. *Mulcahey* has never been expressly overturned, but *Grable* articulates a less-rigid inquiry than that adopted in *Mulcahey*.

Even so, the Plaintiff's claim is still insufficient under *Grable* and its progeny. In interpreting *Merrell Dow* differently than did the Fourth Circuit, the Supreme Court explained that "*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires." *Grable*, 545 U.S. at 318. *Merrell Dow* and *Grable* counsel courts to "examin[e] the strength of the federal interest at stake and the implications of opening the federal forum," being

mindful that "questions of jurisdiction over state-law claims require careful judgments about the nature of the federal interest at stake." *Id.* at 316-17 (citations and quotation marks omitted). In the case at bar, the federal interest at issue – interpretation of an obscure provision contained in a federal administrative regulation – falls well-short of the most important of federal stakes. Additionally, a general rule of exercising federal jurisdiction over declaratory judgment actions related to rights and obligations set forth in a state law-controlled contract would "herald[] a potentially enormous shift of traditionally state cases into federal courts." *Grable*, 545 U.S. at 319. As was the *Merrell Dow* Court, this Court is concerned over the "increased volume of federal litigation" and notes the importance of adhering to "legislative intent." *Merrell Dow*, 478 U.S. at 811-12. It is improbable that the Congress, having made no provision for a federal cause of action in the NHA or its associated regulations, would have meant to welcome into federal court any state law-governed contract that incorporates language from the NHA or its relevant administrative regulations. Indeed, the Plaintiff's Complaint does not necessarily raise a stated federal issue, actually disputed and substantial, that a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities. Accordingly, the Court finds that it does not have federal question jurisdiction over the subject matter of this case.

As such, the propriety of removal in the case at bar depends on whether the case falls within the provisions of 28 U.S.C § 1332. Under that statutory provision, federal district courts have original jurisdiction over a case if the case involves citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs. 28 U.S.C.A. § 1332 (2009). The complete diversity rule of § 1332 requires that the citizenship of each plaintiff be different from the citizenship of each defendant. *Athena Auto., Inc. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir. 1999) (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978)). The Court is satisfied that complete diversity

exists in this case, as the Plaintiff is a citizen of Virginia, and the Defendant is a citizen of New York and Missouri. Neither party has alleged otherwise, and nothing before the Court indicates that the parties are not citizens as alleged in the Defendant's Notice of Removal. Therefore, the Court need only address whether the amount in controversy exceeds $75,000.

"In determining whether an amount in controversy is sufficient to confer jurisdiction, courts apply one of two legal standards depending on whether damages are specified or unspecified in the complaint." *LJT & Assocs., Inc. v. Koochagian*, No. WDQ-09-2405, 2009 WL 4884525 slip op. at *3 (D. Md. Dec. 10, 2009) (quoting *Momin v. Maggiemoo's Int'l, LLC*, 205 F. Supp. 2d 506, 509 (D. Md. 2002)). "When a plaintiff claims damages less than $75,000, 'removal is proper only if the defendant can prove to a 'legal certainty' that the plaintiff would . . . recover more than that if she prevailed.'" *Id.* (quoting *Momin*, 205 F. Supp. 2d at 509). If, as in the case at bar, "the complaint does not specify damages, 'a defendant need only prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional minimum.'" *Id.* (quoting *Momin*, 205 F. Supp. 2d at 509-10). "The defendant must establish the amount in controversy with 'competent proof.'" *Id.* (quoting *Momin*, 205 F. Supp. 2d at 510) (requiring "summary judgment-type evidence" to demonstrate the required amount in controversy)). "Mere allegations in the notice of removal are insufficient." *Id.* (citing *Green v. Metal Sales Mfg. Corp.*, 394 F. Supp. 2d 864, 866 (S.D. W. Va. 2005)).

In actions seeking declaratory or injunctive relief, such as in the case at bar, "it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977) (citing cases). "In determining the value of the object of litigation, the majority of courts follows the 'plaintiff approach,' in which the court considers only the value of the controversy to the plaintiff." *Liberty Mut. Fire Ins. Co. v.*

Hayes, 122 F.3d 1061 table op. at *2 (4th Cir. 1997). The Fourth Circuit, however, "has employed the 'either party approach,' examining the potential pecuniary effect that a judgment would have on either party to the litigation." *Id.* (citing *Gov't Emps. Ins. Co. v. Lally*, 327 F.2d 568, 569 (4th Cir. 1964)). "Under this 'value' test, the jurisdictional amount in controversy requirement is met if either the 'direct pecuniary value' of the right the plaintiff seeks to enforce, or the cost to the defendant of complying with any prospective equitable relief exceeds $75,000." *Lee School Lofts, L.L.C. v. Amtax Holdings 106 LLC*, No. 3:08cv427, 2008 WL 4936479, at *3 (E.D. Va. Oct. 29, 2008) (citations omitted).

"In applying this test, courts are required to look to the underlying rights and obligations of the litigants to 'calculate the potential pecuniary impact of [a] judgment to either party.'" *Wood v. Gen. Dynamics Advanced Info. Sys., Inc.*, No. 1:08CV624, 2009 WL 1687967 slip op. at *4 (M.D.N.C. June 17, 2009) (quoting *Market Am., Inc. v. Tong*, No. 1:03CV00420, 2004 WL 1618574, at *2 (M.D.N.C. July 15, 2004)). "In so doing, the Court may not weigh the merits of the case, but should consider all the evidence in the record, including the pleadings and the affidavits submitted by the parties." *Id.* When analyzing the direct pecuniary value of the right at issue from the Plaintiff's perspective, the Fourth Circuit counsels courts to "determine whether [the Plaintiff], if granted declaratory relief on all her claims, would be entitled to recover more than $75,000 from [the Defendant]." *Toler v. State Farm Mut. Auto. Ins. Co.*, 25 Fed. Appx. 141, 143 (4th Cir. 2001). "The Court's duty then is to find the economic worth of the 'object in controversy,' keeping in mind that 'any one case may be legitimately valued in a number of different ways,' and that '[n]o one economic analysis will be right for all cases.'" *Cole v. Captain D's, LLC*, No. 5:08CV21-V, 2008 WL 4104577, *2 (W.D.N.C. Aug. 29, 2008) (quoting *Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d 475, 481-82 (M.D.N.C. 1998)). In so doing, "it is important to specify exactly what relief [the] Plaintiff[] seek[s]

to understand what evidence might be relevant to its pecuniary value." *Tyler v. Berger*, No. Civ.A. 605CV00030, 2005 WL 2596164, at *4 (W.D. Va. Oct. 13, 2005).

Here, the Plaintiff's lawsuit presents only a controversy as to the relative rights and duties under the parties' relevant contract – the Deed of Trust. More specifically, the Plaintiff's lawsuit simply asks the Court to determine whether the Defendant owed the Plaintiff the duty to have, or attempt to have, a face-to-face meeting with him prior to commencing foreclosure.[2] Thus, the amount in controversy may be either (1) the direct pecuniary value to the Plaintiff of having the right to have the Defendant hold, or attempt to hold, a face-to-face meeting with the Plaintiff prior to commencing foreclosure, or (2) the costs to the Defendant of complying with the condition that it hold, or attempt to hold, a face-to-face meeting with the Plaintiff prior to commencing foreclosure. Neither party has reported the monetary figure by which they value this right. Indeed, as the object of the litigation is simply the right to have a face-to-face meeting prior to foreclosure proceedings, such a right is not readily measurable in monetary terms, and "a claim not measurable in 'dollars and cents' fails to meet the jurisdictional test of amount in controversy." *McGaw v. Farrow*, 472 F.2d 952, 954 (4th Cir. 1973). Even if figures were to be assigned to this right, they would be far too speculative to meet

[2]In his Complaint, the Plaintiff defines his "Cause of Action" as follows: "Lee is entitled to a declaratory judgment that [the Defendant] has not complied with the terms of the deed of trust sufficient to allow it to go forward with a foreclosure of the home and that, therefore, any foreclosure sale of the home on July 29, 2010 would be void." Pl.'s Compl. at 4. The Court construes the demand as a request for a declaration that the Defendant failed to comply with the terms of the Deed of Trust because the Defendant failed to have a face-to-face meeting with him prior to commencing foreclosure. The Plaintiff does not seek an injunction, preliminary or permanent, and his Complaint presents a justiciable controversy only as to whether the Defendant owed the Plaintiff the duty to have, or attempt to have, a face-to-face meeting with him prior to commencing foreclosure. The "sufficient to allow" language in the Complaint does not operate to convert the Plaintiff's declaratory judgment action into an injunction action or other form of suit.

even the preponderance of the evidence standard, and the Court cannot imagine even a speculative sum that would exceed $75,000.

Even if the Court were to, instead, find that the value of the Plaintiff's property or the principal balance owed on the promissory note properly represents the "value of the object of the litigation," the Plaintiff still would *not* be entitled to recover more than $75,000 from the Defendant if granted the requested declaratory relief on his claim. *See Toler*, 25 Fed. Appx. at 143. This is not a suit to quiet title or even for simple breach of contract, and if granted the requested declaratory relief, neither party has established that the Plaintiff stands to recover *any* amount of money from the Defendant or that the Defendant would lose *any* of the principal owed or incur any other cost of complying that would exceed $75,000. The Plaintiff stands to recover only the right to have the Defendant hold, or simply attempt to hold, a face-to-face meeting with him. Even if granted such a right where such a meeting were to take place, the outcome of that meeting is similarly too speculative to establish a reliable enough "value" for the instant controversy. Indeed, nothing before the Court suggests that a face-to-face meeting with the Defendant prior to its having commenced foreclosure would have "saved" the Plaintiff's home from foreclosure. Additionally, nothing before the Court indicates that holding, or attempting to hold, the face-to-face meeting would have cost the Defendant more than $75,000. More importantly, the Defendant has never provided an affidavit or other "competent proof" of the principal balance owed on the Note, or the property's value – assessed, appraised, estimated, or otherwise. In short, the Defendant has failed to prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional minimum.

Even though this Court finds that the "value of the object of the litigation" is the value associated with having (or complying with) the right of the Plaintiff to have a face-to-face meeting with the Defendant prior to the commencement of foreclosure, under any approach and analysis, the

pecuniary value and costs to both parties are simply "too speculative and immeasurable to satisfy the amount in controversy requirement." *Vargo v. Del. Title Loans, Inc.*, Civ. No. L-10-1251, 2010 WL 2998788 slip op. at *2 (D. Md. July 27, 2010). The Defendant made mere allegations in its Notice of Removal and has failed to provide the Court with competent proof of diversity jurisdiction. The Court will not assume, infer, or hazard a guess at whether jurisdiction exists, as that burden lies squarely with the removing Defendant. The Court simply will not play fast and loose with subject matter jurisdiction, and this suit must be guided by the federalism principle that favors remand where subject matter jurisdiction is doubtful. Construing removal jurisdiction strictly, as it must, the Court finds that the Defendant has failed to establish that removal was proper, and the Court is left with no choice but to remand the case.

An appropriate Order shall issue.

September 15, 2010
DATE

/s/
RICHARD L. WILLIAMS
SENIOR UNITED STATES DISTRICT JUDGE

Sinead

UNITED STATES DISTRICT COURT
Eastern District of Virginia
1000 East Main Street, Room 305
Richmond, Virginia 23219-3525

chambers of
Richard L. Williams
Senior District Judge

Telephone
(804) 916-2240

December 9, 2008

TO THE PUBLISHING COMPANIES:

Re: United States v. Mario Terrell Day, 3:08CR00403

Gentlemen:

Enclosed for publication are an order and memorandum opinion in the above mentioned case. Also enclosed is a list showing counsel for the parties.

If you have any questions, please feel free to call.

United States v. Mario Terrell Day 3:08CR00403

Counsel for Plaintiff: Michael C. Moore
United States Attorney's Office
600 East Main Street, Suite 1800
Richmond, Virginia 23219-2447
804-819-5400

Counsel for Defendant: Mary Elizabeth Maguire
Office of the Federal Public Defender
701 East Broad Street, Suite 3600
Richmond, Virginia 23219
804-565-0875

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA v. MARIO TERRELL DAY, Defendant.		Criminal Action Number 3:08cr403

ORDER

This matter is before the Court on the defendant's motion to suppress. For the reasons stated in the accompanying Memorandum Opinion, the Court DENIES the motion as to the firearm but GRANTS the motion as to the marijuana and any statements about the marijuana or firearm.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

December 1, 2008
DATE

/s/
RICHARD L. WILLIAMS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA v. MARIO TERRELL DAY, Defendant.	Criminal Action Number 3:08cr403

MEMORANDUM OPINION

This matter is before the Court on the defendant's motion to suppress. For the reasons stated below, the defendant's motion is granted in part and denied in part.

I. FACTS

On July 5, 2008, Officers Costa and Slader of the American Security Group were on duty at the Regency Lake apartment complex. They are both "armed security officers" with the power to arrest pursuant to Virginia Code Section 9.1-138 *et seq.* While patrolling, the officers noticed a gathering at 6464 Planet Road. Shortly after midnight, they observed individuals later identified as Evan Moore and Mario Day, the defendant, in the middle of the road arguing with unseen individuals inside the apartment. The officers observed Day retrieve a gun from a nearby Caprice. Holding the gun at the "low and ready," Day began advancing on the apartment while continuing to shout at the individuals inside. Exiting their patrol car, the officers drew their weapons and yelled at Day to freeze as they ran towards him. Day immediately placed the gun on the floorboard of the Caprice and raised his hands. The officers placed Day in restraints and conducted a *Terry* search, wherein they found no suspicious bulges or hard objects. Nevertheless, and without giving any *Miranda* warnings, Officer Costa asked Day if he had

"anything illegal" on him. Day admitted he has a little marijuana; Officer Costa reached into Day's pants pocket and retrieved the marijuana. The officers also questioned Day about the firearm, which he said he was carrying for his safety.

The officers contacted their superior, Lieutenant Pentato, and the Chesterfield police department. Chesterfield Police Officer Neville arrived and took over custody of Day and Moore. The parties agree that Officer Neville discovered the firearm was reported stolen before questioning Day about the gun. Likewise, it is undisputed that Officer Neville failed to read Day his *Miranda* rights before questioning him about the gun and marijuana.

II. ANALYSIS

The Fourth Amendment protects against unreasonable searches and seizures by government officials and private parties acting as governmental agents or instruments. *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 613-614 (1989). The degree of governmental involvement in the private individual's activities, judged under the totality of the circumstances, determines whether the governmental conduct requirement is met. *Id.* at 614. The government's mere passive acceptance or acquiescence in private conduct is insufficient to implicate Fourth Amendment protections; some type of affirmative encouragement or governmental participation is necessary. *United States* v. *Jarrett*, 338 F.3d 339, 344, 346 (4th Cir. 2003).

In analyzing this situation, we must look to Virginia Code Section 9.1-138 *et seq.*, which regulates private security services within the Commonwealth. To be an armed security officer in Virginia, one must obtain "a valid registration issued by the Department [of Criminal Justice.]" Va. Code Ann. § 9.1-139 (2006). To become a registered armed security officer, an individual must satisfy "the compulsory minimum training standards established by the [Criminal Justice

Services] Board[1]" and pass a background check of the Virginia Criminal History Records and the National Criminal Records. *Id.* § 9.1-139(F). Once registered, armed security officers remain subject to investigation and discipline by the Criminal Justice Services Board.[2] *Id.* § 9.1-141. Importantly, Virginia Code Section 9.1-146 endows these registered armed security officers with "the power to effect an arrest for an offense occurring * * * in his presence on [the] premises" wherein the officer is on duty. As such, the armed security officer "shall be considered an arresting officer" for the purposes of Virginia Code Section 19.2-74, dealing with the issuance of summonses in misdemeanor cases. *Ibid.*

To understand the implications of these statutes, it is helpful to look at the analysis of armed security officials under Section 1983, which provides redress for violations of federal or constitutional rights by those acting under color of law. See 42 U.S.C. § 1983. Although some Justices have posited that "clear[ly] * * * the delegation of police power to a private party will entail state action," see *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 172 n.8 (1978) (Stevens, J., dissenting), the Court has explicitly left open the question of "the constitutional status of private police forces," *id.* at 163 n.14. Recently, in the thoughtful and persuasive opinion of *Romanski* v. *Detroit Entertainment, L.L.C.*, 428 F.3d 629 (2005), the Sixth Circuit examined the substantial body of case law on the treatment of such officers under Section 1983. The court explained that a line has been drawn between "cases in which a private actor exercises a power traditionally reserved to the state, but not exclusively reserved to it, e.g., the common law shopkeeper's

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1 The Criminal Justice Services Board is a policy board in the executive branch of Virginia's government. Va. Code Ann. § 9.1-108.

2 With the advisement of the Private Security Services Advisory Board, an advisory board in the executive branch of Virginia's government, see *id.* § 9.1-143, the Criminal Justice Services Board is empowered to establish the qualifications for, and examine the qualifications of, armed security officer applicants; adopt regulations to ensure the continued competency of armed security officers; receive and investigate complaints and take disciplinary action against armed security officers; and revoke, suspend, or fail to renew the registration of armed security officers. *Id.* § 9.1-141.

privilege, from cases in which a private actor exercises a power exclusively reserved to the state, e.g., the police power. Where private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test."[3] *Id.* at 637. This is because "[u]nlike the common law privileges at issue in *Wade* [v. *Byles*, 83 F.3d 902 (7th Cir. 1996)] (the use of deadly force in self-defense, the right to detain for trespass, and the right to carry a weapon) and *Chapman* [v. *Higbee Co.*, 319 F.3d 825 (6th Cir. 2003) (en banc)] (the shopkeeper's privilege), which may be invoked by any citizen under appropriate circumstances, the plenary[4] arrest power enjoyed by private security police officers licensed pursuant to [Michigan law] is a power traditionally reserved to the state alone." *Id.* at 638. This delineation is logical given that "[i]t is beyond dispute that the police function is 'one of the basic functions of government' * * * [a]nd an arrest is 'the function most commonly associated with the police.'" *Rodriguez* v. *Smithfield Packing Co., Inc.*, 338 F.3d 348, 355 (4th Cir. 2003)(quoting *Foley* v. *Connelie*, 435 U.S. 291, 297-298 (1978)). Moreover it accords with the Supreme Court's declaration that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[5] *Evans* v. *Newton*, 382 U.S. 296, 299 (1966).

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3 Hence, assertions that defendants were a mall police officer and mall security officers involved in an alleged incident of false imprisonment and illegal search and seizure carried a Section 1983 claim through a frivolity review. *Benson* v. *Plaza Assocs., Inc.*, No. 507-cv-87, 2007 WL 2021794 (E.D.N.C. July 9, 2007).

4 "Plenary" in this situation means that while on duty at the employer's premises, a private security officer could make warrantless arrests to the same extent as public police officers: "at one's discretion and for any offenses." *Romanski*, 428 F.3d at 638 & n.3.

5 It is noteworthy that at least one million individuals are employed in private security work throughout the United States, constituting at a minimum half of the crime-related security personnel in the country. See William E. Ringel, *"Government Conduct" and Private Searches – Security Guards, Private Police, and Off-duty Police Officers*, Searches & Seizures, Arrests & Confessions §2:4 (2008). Within the past thirty-five years, private security officers have come to "vastly outnumber public law enforcement officers" – indeed, according to the Department of Labor, there were over one million private security officers and only 624,000 public officers in 2006 – with twice as much

Without limitation, the Virginia Code endows armed security officers with the power to effect arrests for any offenses occurring in an on-duty officer's presence. Va. Code Ann. §9.1-146. A similar grant of power led the Sixth Circuit to declare a security officer was, as a matter of law, a state actor. See *Romanski*, 428 F.3d at 638. This particular provision has prompted the Virginia Court of Appeals to observe that armed "[s]ecurity officers have several powers normally reserved for police officers," for "[t]hrough substantial regulation, the General Assembly has clothed [them] with many of the powers reserved for public employees or officers. Indeed, in some instances, a security officer is treated exactly like a police officer." *Coston* v. *Commonwealth*, 512 S.E.2d 158, 159 (1999).

For the purposes of our analysis, it is enough to observe that the Virginia legislature specifically granted Officers Slader and Costa the power to arrest as armed security officers. These officers were vetted, trained, and continue to be subject to disciplinary action under the aegis of the state's Criminal Justice Services Board. In this context, the state is not a mere passive participant; rather, it affirmatively encouraged and enabled these officers to engage in the complained-of conduct, for without their state-granted authority, these officers could not have acted as *de facto* police. In short, the state was the genesis of their power and activities rather than a mere passive recipient of the largess of their actions. Cf., *e.g.*, *United States* v. *Kinney*, 953 F.2d 863 (4th Cir. 1992)(officers' mere presence insufficient to turn privately initiated search into government conduct).

Clearly Officers Slader and Costa were operating as *de facto* police on the night in question. The officers were "patrolling" the area in their unmarked sedan (a car of sufficient similarity to the stereotypical image of an unmarked police car that a Chesterfield officer

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spent on private as public security. Ric Simmons, *Private Criminal Justice*, 42 Wake Forest L. Rev. 911, 920-921 & n.34 (2007).

"assumed" it must be the security officers' vehicle); noticing a potentially disorderly gathering in their rounds, the officers returned to this area, parking where they could observe the burgeoning situation. Observing a "verbal altercation" that escalated to Day's retrieval of a gun from a nearby car, the officers exited their vehicle, drawing their weapons and yelling "freeze" as they ran towards Day. Both officers were wearing black uniforms with gold emblems on the sleeves, displaying a gold badge virtually identical to a police shield, and bearing handguns; in short, they were the quintessential image of law enforcement as they ran with weapons drawn towards Day. The officers placed Day in restraints, "terried" him, and began questioning him about the gun and whether he had "anything illegal" on his person. Clearly the officers acted with the intent of deterring crime and assisting law enforcement.[6] Compare *Jarrett*, 338 F.3d 339 (hacker conducted searches aimed at child pornographers to assist law enforcement), with *Kinney*, 953 F.2d 863 (girlfriend opened locked closet to show guns with which boyfriend had threatened her to the police she had summonsed to their apartment).

Therefore, the Court finds that Officers Slader and Costa were acting as governmental agents in their interactions with Day. As such, the Court must consider whether Day's Fourth Amendment rights were violated by these officers.

An investigative detention or stop is constitutional if supported "by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980). Moreover, where an officer observes unusual conduct that reasonably leads him to conclude that criminal activity might be afoot and that the people with whom he is dealing might be armed and dangerous, the officer is entitled to conduct a carefully

6 The styling of the officers' incident report further supports their purpose in acting as *de facto* police, containing as it does the following form questions: Number of Victims ___; Number of Witnesses___; Number of Subjects ____; Arrest made: YES/NO; Released on Summons: YES/NO; Summons #___; VA Code ___ or County Ordinance ___; Charges:___.

circumscribed search of the outer clothing of such individuals in order to discover weapons that could be used against him. *Terry* v. *Ohio*, 392 U.S. 1 (1968). The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. Such a detention does not require probable cause, but it does require something more than an "inchoate and unparticularized suspicion or 'hunch.'" *Id.* at 27.

In determining whether reasonable suspicion exists, a court must consider "the totality of the circumstances confronting a police officer including all information available to an officer and any reasonable inferences to be drawn at the time of the decision to stop a suspect." *United States* v. *Crittendon,* 883 F.2d 326, 328 (4th Cir. 1989). Here, the officers had observed an escalating verbal altercation between Day, Moore, and an unknown number of individuals within the apartment. They saw Day retrieve a handgun from a nearby car and begin approaching the apartment, holding the gun at the "low and ready" while continuing to yell at the unseen inhabitants. The officers testified that a gun is held at the "low and ready" for ease of use and/or self-defense. This was clearly a volatile situation with at least one armed and potentially dangerous individual, notwithstanding the fact that Day immediately complied with the officers' instructions to drop the gun. The gun was on the floorboard of the car, in plain view of the officers through the open car door as they approached Day, who was standing next to the vehicle. To ensure their safety and that of bystanders, the officers were justified in conducting the pat-down of Day's clothing in an attempt to discern whether he had more weapons on his person. The seizure of the plainly visible gun was likewise justified.

However, Officer Costa admits that he found nothing indicative of either a weapon or contraband in conducting this pat-down. The Supreme Court has held that "[i]f the protective

search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota* v. *Dickerson*, 508 U.S. 366, 373 (1993). Hence, Officer Costa's subsequent retrieval of the marijuana from Day's pants pocket cannot be justified as deriving from the *Terry* search.

This brings us to the issue of whether Day's Fifth Amendment rights were violated by improper official questioning. Custodial interrogation refers to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona,* 384 U.S. 436, 444 (1966). The determination of whether a defendant is in custody is "objective" and focuses on "how a reasonable man in the suspect's position would have understood his situation." *Davis* v. *Allsbrooks*, 778 F.2d 168, 171 (4th Cir. 1985) (quoting *Berkemer* v. *McCarty,* 468 U.S. 420, 442 (1984)). Relevant factors for determining whether an individual is in custody include "the time, place and purpose of the encounter, the words used by the officer, the officer's tone of voice and general demeanor, the presence of multiple officers, the potential display of a weapon by an officer, and whether there was any physical contact between the officer and defendant." *United States* v. *Weaver*, 282 F.3d 302, 312 (4th Cir. 2002). In this case, the officers were holding Day at gunpoint, had ordered him to freeze as they ran towards him, had placed him in handcuffs, and had conducted a *Terry* search of his person. Therefore, Day was in custody.

Interrogation encompasses both "express questioning" and any activity by officers "reasonably likely to elicit an incriminating response." *Rhode Island* v. *Innis,* 446 U.S. 291, 301 (1980). There is a narrow public safety exception to the prophylactic requirement of giving *Miranda* warnings, but only for "questions necessary to secure [the officers'] safety or the safety of the public" rather than questions designed to "elicit testimonial evidence from a suspect."

New York v. *Quarles*, 467 U.S. 649, 659 (1984). Such questions must relate "to an objectively reasonable need to protect the police or public from an[] immediate danger associated with [a] weapon." *Id.* at 659 n.8. The prototypical example would be the location of possible weapons in a volatile situation. See, *e.g.*, *United States* v. *Young*, 58 Fed. Appx. 980 (4th Cir. 2003) (unreported).

The public safety exception is inapplicable in this case. The officers had secured the firearm and conducted a fruitless *Terry* search before they began questioning Day about the firearm; at this point, there was no objectively reasonable need to protect anyone from an immediate danger associated with a weapon. Moreover, the officers' questions were impermissibly designed to elicit testimonial information (*e.g.*, why Day possessed the gun). Therefore, any statements about the firearm must be suppressed.

Similarly Day's statements about the marijuana must be suppressed. It is hard to envision a question more likely to "elicit an incriminating response" than Officer Costa's query of whether Day had "anything illegal" on him. Having already conducted a fruitless *Terry* search, the officers could not get a second bite at the apple by engaging in custodial interrogation without issuing a *Miranda* warning.

The government has conceded that Officer Neville engaged in custodial interrogation without advising Day of his *Miranda* rights. To ensure utmost clarity for the parties, however, the Court notes that since Neville learned the firearm was reported stolen prior to engaging in this interrogation, any gun-related questions were necessarily likely to elicit incriminating responses. Therefore, any statements Day made to Neville about either the marijuana or the gun must be suppressed.

III. CONCLUSION

For the aforementioned reasons, Day's motion to suppress will be denied as to the firearm, but will be granted as to the marijuana and to all statements about the firearm or marijuana.

An appropriate Order shall issue.

December 1, 2008 /s/

DATE

RICHARD L. WILLIAMS
SENIOR UNITED STATES DISTRICT JUDGE