UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

COMMERCE PARK REALTY, LLC, COMMERCE PARK PROPERTIES, LLC, COMMERCE PARK COMMONS, LLC, COMMERCE PARK ASSOCIATES 4, LLC, DARTMOUTH COMMONS, LLC, WARWICK VILLAGE, LLC, NICHOLAS E. CAMBIO and VINCENT A. CAMBIO, Plaintiffs,	:	
v.	:	CA 11-156 L
HR2-A Corp. as General Partner of HR2-A Limited Partnership, John Doe(s), the Limited Partners of HR2-A Limited Partnership, HR4-A Corp., as General Partner of HR4-A Limited Partnership, John Doe(s), the Limited Partners of HR4-A Limited Partnership, MR4A-JV Corp., as General Partner of MR4A-JV Limited Partnership, John Doe(s), the Limited Partners of MR4A-JV Limited Partnership, REALTY FINANCIAL PARTNERS, POTOMAC REALTY CAPITAL, LLC, BRADCO SUPPLY CORP., CONCRETE SYSTEMS, INC., TOWN OF WEST GREENWICH Alias, DAVID ALLEN and DONALD S. BIERER, Defendants.	:	

MEMORANDUM AND ORDER

DENYING MOTION TO REMAND

This is an action which seeks primarily to have certain loans which Plaintiffs obtained declared usurious and unenforceable and to clear title to a parcel of real estate securing the loans. Before the Court is Plaintiffs' Motion for Remand to State Court (Docket ("Dkt.") #4) ("Motion to Remand" or "Motion"). A hearing was held on June 27, 2011. The Motion is addressed by way of this Memorandum and Order in accordance with the holding of Senior

United States District Judge Ronald R. Lagueux that "a motion to remand is nondispositive and can be determined by a magistrate judge by final order." Blue Cross & Blue Shield of Rhode Island v. Korsen, 746 F.Supp.2d 375, 379 (D.R.I. 2010); see also id. (noting that this determination "has not been disturbed by the First Circuit"). For the reasons stated herein, the Motion is denied.

I. Travel

Plaintiffs Commerce Park Realty, LLC ("CP Realty"), Commerce Park Properties, LLC ("CP Properties"), Commerce Park Commons, LLC ("CP Commons"), Commerce Park Associates 4, LLC ("CPA Associates"), Dartmouth Commons, LLC, Warwick Village, LLC, Nicholas E. Cambio, and Vincent A. Cambio (collectively "Plaintiffs") filed this action on April 8, 2011, in the Providence County Superior Court. See Memorandum in Support of Removal Defendants' Objection to Plaintiffs' Motion for Remand to State Court ("Defendants' Mem."), Exhibit ("Ex.") A (Verified Complaint ("Complaint") at 1 (reflecting date stamp of 4/8/11)). The action was removed to this Court on April 14, 2011, by Defendants HR2-A Corp., as General Partner of HR2-A Limited Partnership, HR4-A Corp., as General Partner of HR4-A Limited Partnership, MR4A-JV Corp., as General Partner of MR4A-JV Limited Partnership, Realty Financial Partners ("RFP"), and David Allen (collectively "Removal Defendants"). Plaintiffs filed an Amended Verified Complaint (Dkt. #3) ("Amended Complaint") on April 22, 2011, and moved to have the matter

remanded by filing the instant Motion on April 25, 2011. See Dkt.

The Motion was referred to this Magistrate Judge on June 9, 2011, and a hearing was held on June 27, 2011. Thereafter, the Court took the matter under advisement.

II. Facts

Between 2000 and 2006 some or all of Plaintiffs entered into a series of loan agreements with various Defendants. See Complaint ¶¶ 23-33. The promissory notes were secured by hundreds of acres of real estate located in one or more of the following towns: East Greenwich, West Greenwich, and Coventry, Rhode Island, and Dartmouth, Massachusetts. See id. ¶¶ 23, 25, 27, 29, 31, 33, 34, 35. Plaintiffs Nicholas E. Cambio and Vincent A. Cambio (the "Cambios") jointly and severally provided personal guarantees on the loans. Id. ¶ 41. In 2009, Plaintiff CP Realty negotiated the sale of approximately one acre of land in West Greenwich to Bismarck Real Estate Partners ("Bismarck") for $700,000.00. Id. ¶¶ 42-43. The one acre was to be subdivided from a larger parcel which was held as security for several of the loans. Id. The larger parcel had executions recorded against it by Defendant Bradco Supply Corp. ("Bradco") and Defendant Concrete Systems, Inc. ("Concrete Systems"), as a result of judgments which Bradco and Concrete Systems had obtained against Plaintiff CP Realty in the Kent County Superior Court. Id. ¶¶ 38-39, 42. The larger parcel was also subject to a real estate tax lien by Defendant Town of

West Greenwich. Id. ¶ 42. Bismarck wanted the property for the construction of a Firestone Complete Auto Care Store. Id. ¶ 43. CP Realty obtained all necessary permits and approvals from various municipal and/or state agencies to subdivide the lot. Id. ¶ 46. CP Realty also obtained court approval for the sale. Id. ¶ 47. However, the planned sale hit a snag on March 25, 2011, when Defendant RFP advised CP Realty that it would not provide a partial release of the mortgages securing various loans from the portion of the subdivided lot. Id. ¶ 49.

Alleging that time is of the essence, Plaintiffs filed the instant action which seeks to: (1) have the loans declared usurious, void, and unenforceable, id. ¶¶ 51-54, 59-62, 67-69, 70-77, 82-85; (2) clear title to the one acre parcel in West Greenwich ("the Firestone Parcel"), id. ¶¶ 90-93; (3) clear title to the larger parcel of property in West Greenwich (other than the Firestone Parcel) because Defendants HR2-A, HR4-A, MR4A-JV, Bradco, Concrete Systems, and the Town of West Greenwich have asserted liens against this real estate and several of the liens are null and void because the underlying loans are usurious;[1] id. ¶¶ 94-97;

[1] In addition to these Defendants who are alleged to have asserted liens against the larger parcel of property in West Greenwich (other than the Firestone Parcel), the Complaint also identifies Plaintiff CP Realty as asserting such a lien. See Complaint ¶ 95 ("Defendants HR2 A, HR4 A, MR4A JV, **CPR**, Bradco, Concrete [Systems], and the Town of West Greenwich assert liens ....")(bold added). The Court assumes that this reference to "CPR" (defined in ¶ 1 of the Complaint as "Commerce Park Realty, LLC") was inadvertent and that Plaintiffs may have intended to identify another Defendant. However, the Court declines to guess which Defendant it is.

(4) clear title to property in Coventry because HR2-A, HR4-A, MR4A-JV, CP Realty, Bradco, Concrete Systems, and the Town of Coventry have asserted liens against Plaintiffs' property and several of the liens are similarly null and void because the underlying loans are usurious, id. ¶¶ 98-101; (5) have the Court order Defendants to release the mortgages from the Firestone Parcel[2] or, alternatively, appoint a trustee authorized to provide a release of these mortgages and any other documents necessary to allow the sale to Bismarck to proceed, id. ¶ 105; (6) require RFP to provide an accounting of the payments made on certain of the loans, id. ¶ 107; and (7) restrain Defendants from collecting on the promissory notes during the pendency of this action, including collecting from the guarantors (the Cambios), id. ¶¶ 112-113. Plaintiffs also seek damages from Defendants for violating Rhode Island's Racketeer Influenced and Corrupt Organizations Act ("state RICO"), R.I. Gen. Laws §§ 7-15-1 to 7-15-4, see Complaint ¶¶ 55-56, 63-64, 70-71, 78-79, 86-87, and the United States Racketeer Influenced and Corrupt Organizations Act ("federal RICO"), 18 U.S.C. § 1962, see Complaint ¶¶ 57-58, 65-66, 72-73, 80-81, 88-89, based on allegedly usurious interest rates for the loans. The Complaint additionally contains claims for tortious interference with the contractual relationship

[2] In seeking this particular relief, the Complaint refers to "the parcel being sold to Bismarck ...." Complaint ¶ 105. As this parcel has been defined as "the Firestone Parcel," see Section II. (Facts) supra at 4, the Court identifies it by that name.

between CP Realty and Bismarck, id. ¶¶ 114-117, breach of contract, id. ¶¶ 118-119, and breach of fiduciary duty, id. ¶¶ 123-135. However, the facts allegedly giving rise to these causes of action do not affect the determination of the instant Motion to Remand, and the Court foregoes explication of them.

III. Discussion

A. Basis for Motion

Plaintiffs seek to have this action remanded to the state court on four grounds. First, Plaintiffs cite the fact that as a result of the filing of their Amended Complaint, which omits the federal RICO counts, there no longer is any federal cause of action. Motion at 1. Second, they contend that complete diversity of citizenship does not exist because all Plaintiffs are citizens of Rhode Island and Defendant Town of West Greenwich is also a citizen of this State. Id.; see also Memorandum in Support of Plaintiffs' Motion for Remand to State Court ("Plaintiffs' Mem.") at 7. Third, Plaintiffs charge that Removal Defendants have "acted unilaterally in seeking removal to this Court,"[3] Plaintiffs' Mem. at 5, and have thus "violated the unanimity rule set forth in Chicago Rock Island & Pacific Railway Co. v. Martin, 178 U.S.

[3] This ground for remand is not mentioned in Plaintiffs' Motion. It appears only in Plaintiffs' Mem.

24[5], 248 (1900),"[4] Plaintiffs' Mem. at 5-6. Fourth, Plaintiffs contend that principles of abstention and comity require the Court to remand the matter to state court "as ongoing litigation related to the instant action has been heard and Orders issued therein." Motion at 1.

B. The Amended Complaint

Plaintiffs' reliance on their Amended Complaint as a basis to remand this action is misplaced. "An amendment to a complaint *after removal* designed to eliminate the federal claim will not defeat federal jurisdiction." Ching v. Mitre Corp., 921 F.2d 11, 13 (1st Cir. 1990); see also Brown v. Eastern States Corp., 181 F.2d 26, 28-29 (4th Cir. 1950)(noting clearly established "rule that the case is not to be remanded if it was properly removable upon the record as it stood at the time that the petition for removal was filed"). On April 14, 2011, when Removal Defendants removed the action to this Court, Plaintiffs had not yet filed their Amended Complaint. See Docket. It is immaterial that after removal Plaintiffs dropped their federal claim. Ching, 921 F.2d at 13 ("It is ... immaterial that, after removal, [the plaintiff] moved to strike the federal claim.").

Accordingly, this Court determines whether the case was

[4] In Chicago Rock Island & Pacific Railway Co. v. Martin, 178 U.S. 245, 20 S.Ct. 854 (1900), the Supreme Court held that "it was well settled that a removal could not be effected unless all the parties on the same side of the controversy united in the petition ...." 178 U.S. at 248.

properly removed based on the original Complaint. See id. ("[T]he district court properly determined the nature of [plaintiff]'s claims from the face of the complaint as it stood at the time the petition for removal was filed."); see also Lawrence Builders, Inc. v. Kolodner, 414 F.Supp.2d 134, 136 (D.R.I. 2006)("for purposes of determining whether complete diversity exists, a court must examine the plaintiff's pleading as of the time of the petition for removal"). The Complaint plainly relies upon the federal RICO statute as a basis for several of the counts. See Complaint ¶¶ 57-58, 65-66, 72-73, 80-81, 88-89. This was sufficient to vest jurisdiction in this Court. See Brown, 181 F.2d at 28 (holding that case was properly removable to federal court because "original complaint unquestionably asserted that rights of plaintiff under federal statutes had been invaded; and this was sufficient to vest jurisdiction in the federal courts"). Therefore, Plaintiffs' first argument for remand is rejected.

C. Complete Diversity

Plaintiffs note that complete diversity is required to confer jurisdiction upon the federal court pursuant to 28 U.S.C. § 1332 and that complete diversity exists only where no defendant holds citizenship in any state where any plaintiff hold citizenship. Plaintiffs' Mem. at 7 (citing OnePoint Solutions, LLC v. Borchert, 486 F.3d 342, 346 (8th Cir. 2007)); see also Lawrence Builders, Inc., 414 F.Supp.2d at 137 ("In general, a federal court has

diversity jurisdiction only when complete diversity exists between the parties, that is, when no plaintiff is a citizen of the same state as any defendant.")(citing Diaz-Rodriguez v. Pep Boys Corp., 410 F.3d 56, 58 (1st Cir. 2005)). Because all Plaintiffs are citizens of Rhode Island and Defendant Town of West Greenwich (the "Town") is also a citizen of this State, Plaintiffs contend that complete diversity of citizenship does not exist. Plaintiffs' Mem. at 7.

Removal Defendants, however, charge that Plaintiffs have fraudulently joined the Town in order to defeat jurisdiction and that, therefore, the Town should be disregarded in determining whether there is complete diversity. Defendants' Mem. at 6-7; see also Wilson v. Republic Iron & Steel, Co., 257 U.S. 92, 97, 42 S.Ct. 35 (1921)(stating defendant's "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy"); Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 186, 27 S.Ct. 184 (1907)(affirming finding that non-diverse defendant had been fraudulently joined and cautioning "that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right"); Lawrence Builders, Inc., 414 F.Supp.2d at 137 ("[a] party fraudulently joined to defeat removal ... is disregarded in determining diversity of citizenship")(alterations in original); id. ("[O]nce a court has determined that a party has been

fraudulently joined, it proceeds to analyze jurisdiction without reference to the fraudulently joined party.”).

“Fraudulent joinder is a judicially-created doctrine which applies in two situations: (1) there has been outright fraud in the plaintiff’s recitation of jurisdictional facts, or (2) there is no possibility that the plaintiff would be able to establish a cause of action against the non-diverse defendants in state court.” Id. The linchpin of the fraudulent joinder analysis is whether the joinder of the non-diverse party has a reasonable basis in law and fact. Id. “Because fraudulent joinder describes any improper joinder, a defendant need not prove that the plaintiff intended to mislead or deceive in order to sustain its burden.” Id.

In Lawrence Builders, Inc., this Court found that the plaintiff failed to state a cause of action against either of the non-diverse defendants and that there was no allegation of wrongdoing on their part. 414 F.Supp.2d at 137-38; see also id. at 138 (“The utter dearth of factual allegations concerning either [of the non-diverse defendants] within the four corners of the [c]omplaint belies [the plaintiff’s] assertion that it has stated a claim as regards [those defendants].”). The Court added that there was “no implication of the rights or interests,” id. at 138, of the non-diverse defendants in the plaintiff’s complaint.

Like the plaintiff in Lawrence Builders, Inc., here the Complaint asserts no cause of action or claim against the Town.

Plaintiffs only state that the Town, by operation of law, has an automatic statutory lien for all taxes levied against the West Greenwich Property. See Complaint ¶ 40. Although Plaintiffs contend that the joinder of the Town was required, the absence of factual allegations within the four corners of the Complaint supporting a cause of action against the Town undermines this contention.[5] See Lawrence Builders, Inc., 414 F.Supp.2d at 138. As Removal Defendants accurately point out, while Plaintiffs have alleged that certain liens asserted against the Firestone Parcel are null and void due to the invalidity of the underlying usurious and otherwise unlawful loans being secured by those liens, none of those claims involve the Town. Defendants' Mem. at 6 (citing Complaint ¶¶ 92, 93, 96, 97). Although Plaintiffs mention the Town in Counts XVI and XVII, there is no allegation in the Complaint

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[5] Plaintiffs argue that the Town "enjoys a superior lien on the property to any of the liens of the RFP Defendants. It is the existence of that superior lien that requires the Plaintiffs to join the Town of West Greenwich as a party defendant." Plaintiffs' Mem. at 8. Plaintiffs further claim that:

> It has been the experience of the Plaintiffs that it is often the position taken by cities and towns, including the Town of West Greenwich, that the entire lien for taxes on a given parcel must be satisfied even when only a portion thereof is being conveyed. The Town of West Greenwich, which has the "super" tax lien on the property, is a necessary party to the action wherein, inter alia, the Plaintiffs are seeking to obtain an Order directing that the liens of all interested parties attach to the proceeds of the sale rather than to the real estate itself.

Id. The Court finds this argument unconvincing.

that the Town's statutory liens are invalid.[6] Id. at 6-7.

In short, because there is no possibility that Plaintiffs will be able to establish a cause of action against the Town, the Court finds that Plaintiffs have fraudulently joined it. Therefore, the Town is not considered in analyzing diversity jurisdiction. See Lawrence Builders, Inc., 414 F.Supp. at 138 (disregarding fraudulently joined defendants in analyzing diversity jurisdiction).[7] Disregarding the Town, the Court finds that it has subject matter jurisdiction over this action under 28 U.S.C. § 1332 based upon complete diversity of citizenship.

D. The Unanimity Rule

Plaintiffs note that only the Removal Defendants have sought to have the action removed to this Court and that there are several other defendants in the case who also have an interest in the Firestone Parcel. See Plaintiffs' Mem. at 5. Because there is no evidence that these other defendants concur in the removal,

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[6] Indeed, Plaintiffs indicate in their Amended Complaint (Dkt. #3) filed after removal that the Town's lien of the Firestone Parcel is "valid and enforceable." Amended Complaint ¶ 82.

[7] In Jernigan v. Ashland Oil Inc., the Fifth Circuit indicated that in order to prove improper or fraudulent joinder, a removing party "must show either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts." Jernigan v. Ashland Oil Inc., 989 F.2d 812, 815 (5th Cir. 1993). This Court has adopted the same test for determining whether a party has been fraudulently joined. See Lawrence Builders, Inc. v. Kolodner, 414 F.Supp.2d at 137.

Plaintiffs contend that "the unanimity rule"[8] set forth in Chicago Rock Island & Pacific Railway Co., 178 U.S. at 248, has been violated. Plaintiffs' Mem. at 5; see also Esposito v. Home Depot U.S.A., Inc., 590 F.3d 72, 75 (1st Cir. 2009)("Ordinarily, all of the defendants in the state court action must consent to the removal ....").

The rule of unanimity, however, is subject to exceptions. Esposito, 590 F.3d at 75 (noting existence of exceptions although not applicable to case before court). Removal Defendants make a twofold argument that the rule of unanimity is not applicable in this case. See Defendants' Mem. at 7-11. First, they argue that there is no requirement that fraudulently joined parties, nominal parties, or unserved parties consent to removal. See Defendants' Mem. at 7. The case law supports their position. As the Fifth Circuit has held: "[A]s a general rule, removal requires the consent of all co-defendants. In cases involving alleged improper or fraudulent joinder of parties, however, application of this requirement to improperly or fraudulently joined parties would be nonsensical, as removal in those cases is based on the contention that no other proper defendant exists." Jernigan v. Ashland Oil Inc., 989 F.2d 812, 815 (5th Cir. 1993); accord Rico v. Flores, 481 F.3d 234, 239 (5th Cir. 2007).

Similar to the exception for fraudulently joined parties,

[8] See n.4.

"'[n]ominal' or 'formal' parties need not join in the removal petition." Farias v. Bexar Cnty. Bd. of Trustees for Mental Health Mental Retardation Servs., 925 F.2d 866, 871 (5th Cir. 1991). "To establish that non-removing parties are nominal parties, the removing party must show ... that there is no possibility that the plaintiff would be able to establish a cause of action against the non-removing defendants in state court." Id. (internal quotation marks omitted); see also id. at 872 ("The bottom line concern in determining a nominal party is whether the plaintiff can establish a cause of action against the nonremoving defendant in state court.").

Here Plaintiffs have named Bradco, Concrete Systems, and the Town (collectively the "Non-Removing Defendants") as Defendants in this action. Yet, Plaintiffs have asserted no claims against the Non-Removing Defendants, and, consequently, there is no way that Plaintiffs can establish a cause of action against any of them. The factual allegations involving the Non-Removing Defendants are quite limited. Plaintiffs allege that Bradco and Concrete Systems obtained judgments against Plaintiff CP Realty and recorded executions from those judgments against the real estate owned by CP Realty in West Greenwich. See Complaint ¶¶ 38, 39. With respect to the Town, Plaintiffs allege that it has an automatic statutory lien for all taxes levied against the West Greenwich real estate. Id. ¶ 40. While Plaintiffs allege that certain liens against the

West Greenwich real estate are null and void due to the invalidity of the underlying usurious and otherwise unlawful loans being secured by those liens, those claims do not involve the Non-Removing Defendants. See Complaint ¶¶ 91-93, 95-97, 99-101. Although Plaintiffs mention the Non-Removing Defendants in Counts XVI, XVII, and XVIII, those Counts do not state any claims or causes of action against the Non-Removing Defendants. See id.

The Court, thus, agrees with the Removing Defendants that Plaintiffs have failed to articulate a cause of action against the Non-Removing Defendants because no cause of action exists in law or fact. See Defendants' Mem. at 9. Therefore, this Court finds that Plaintiffs could in no way establish a cause of action in state court against any of the Non-Removing Defendants. In accordance with the Fifth Circuit's holding in Farias and consistent with this Court's ruling in Lawrence Builders, Inc., I further find that the Non-Removing Defendants have all been fraudulently joined and that they are nominal parties whose consent is not required for removal.

The second part of the Non-Removing Defendants' twofold argument is that there is no requirement that unserved parties consent to removal. See Defendants' Mem. at 9. The case law again supports their position. See Cachet Residential Builders, Inc. v. Gemini Ins. Co., 547 F.Supp.2d 1028, 1032 (D. Ariz. 2007)(holding that the consent of a defendant who was not served but who had actual notice of the complaint was not required for removal);

Shaffer v. Northwestern Mut. Life Ins. Co., 394 F.Supp.2d 814, 819 (N.D. W. Va. 2005)("[A] co-defendant is not required to join or consent if it has not been served with the initial pleadings at the time the notice of removal is filed."); see also 14C Charles Alan Wright et al., Federal Practice & Procedure § 3730 (4th ed. 2009) ("[A]s many cases have held, defendants who have not been properly served may be ignored, not only for jurisdictional purposes and for purposes of the bar upon removal of diversity cases that include forum state citizen defendants, but also for the purpose of requiring their joinder in the notice of removal.").

Plaintiffs bear the burden of proving proper service. Estates of Ungar v. Palestinian Auth., 153 F.Supp.2d 76, 95 (D.R.I. 2001) (citing Rivera-Lopez v. Municipality of Dorado, 979 F.2d 885, 887 (1st Cir. 1992)). The Removal Defendants represent on information and belief that "[a]t the time of removal ... the Non-Removing Defendants, Potomac Realty Capital, LLC ("Potomac") and Donald S. Bierer ("S. Bierer") had not been properly served, i.e., service of a summons along with the Complaint." Defendants' Mem. at 10-11. Plaintiffs have not disputed this representation. Moreover, on the same day that the Notice of Removal was filed Removal Defendants also filed in this Court certified copies of all records and proceedings in the state court ("State Court Record"). The State Court Record is devoid of any evidence (e.g., a copy of a summons with proof of service) that any of the Non-Removing Defendants,

Potomac, or S. Bierer were properly served with a summons and the Complaint at the time the Notice of Removal was filed. Thus, the consent of these defendants was not required for the Removal Defendants to effectuate a proper removal of the action to this Court.

Accordingly, Plaintiffs' argument based on the rule of unanimity is rejected because, as explained above, this case falls within the exceptions to the rule. Removal Defendants were not required to obtain consent from parties that were fraudulently joined, nominal parties, or parties who had not been served at the time the action was removed.

E. Abstention

Plaintiffs argue that because the Providence Superior Court has already "acted with respect to the sale," Plaintiffs' Mem. at 4, principles of abstention and comity require that this action be remanded, see id. The act to which Plaintiffs presumably refer is the March 21, 2011, Consent Order entered by Judge Michael A. Silverstein in Estate of Malafronte v. Cambio, C.A. No. P.C. 08-7470. See id., Ex. A (Consent Order on Defendants' Petition for Leave to Sell Real Estate). That Consent Order authorized CP Realty to sell the Firestone Parcel pursuant to a purchase agreement dated April 18, 2010, between CP Realty and Bismark for a purchase price of $691,733.00. See id., Ex. A. According to Plaintiffs, CP Realty is one of several companies operating under

the supervision of Justice Silverstein of the Superior Court. See id. at 2. Plaintiffs represent that as part of that supervision CP Realty was required, as a result of earlier orders issued by the Superior Court, to obtain permission of that court to sell any real estate outside the ordinary course of business. See id. These circumstances, in Plaintiffs' view, satisfy all the elements for the abstention doctrine announced in Younger v. Harris, 401 U.S. 37,40-41, 91 S.Ct. 746 (1971), and that, therefore, this Court must abstain. See Plaintiffs' Mem. At 5; see also Coggeshall v. Massachusetts Bd. of Regist. of Psychologists, 604 F.3d 658, 664 (1st Cir. 2010)("If certain conditions are met, [the Younger abstention doctrine] requires a district court to stay or dismiss the federal action in favor of the continued prosecution of the state-court litigation.").

In Younger, the Supreme Court held that abstention was required where a plaintiff who was defending criminal charges in state court sought to have the federal court enjoin the ongoing state criminal proceedings. Rio Grande Cmty. Health Ctr. Inc. v, Rullan, 397 F.3d 56, 68 (1st Cir. 2005). "Younger is grounded in notions of comity: the idea that the state courts should not, in certain circumstances, be interfered with." Id. at 68-69; see also Rossi v. Gemma, 489 F.3d 26, 34 (1st Cir. 2007)("The Younger doctrine is based on principles of comity, and unless there are extraordinary circumstances, it instructs federal courts not to

"'interfere with ongoing state-court litigation, or, in some cases, with state administrative proceedings.'").

> Younger has been extended to some quasi-criminal (or at least "coercive") state civil proceedings-and even administrative proceedings-brought by the state as enforcement actions against an individual. Maymo-Melendez v. Alvarez-Ramirez, 364 F.3d 27, 31-32, 34 (1st Cir. 2004)(applying Younger principles to state administrative disciplinary proceeding of horse trainer); see, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 434-35, 102 S.Ct. 2515 ... (1982)(Younger abstention appropriate where plaintiff sought to enjoin ongoing state administrative attorney disciplinary proceedings); Moore v. Sims, 442 U.S. 415, 423, 99 S.Ct. 2371 ... (1979)(Younger abstention appropriate in context of state child removal proceedings due to allegations of child abuse); Trainor v. Hernandez, 431 U.S. 434, 444, 97 S.Ct. 1911 ... (1977)(Younger applies to state proceeding to recover fraudulently obtained welfare payments); Huffman [v. Pursue, Ltd.], 420 U.S. [592,] 603-05, 95 S.Ct. 1200 [(1975)](Younger abstention appropriate where plaintiff challenged ongoing state civil nuisance proceedings); Esso Standard Oil Co., 389 F.3d at 217-18 (using Younger to require abstention in case where environmental board brought state administrative proceedings against gasoline station owner seeking to fine it).

Rio Grande Cmty. Health Ctr., 397 F.3d at 69; see also Coggeshall, 604 F.3d at 664 ("Although the Younger case itself dealt with federal interference in an ongoing state criminal prosecution, Younger principles apply to noncriminal proceedings that are judicial in nature.")(internal citations omitted).

The First Circuit has articulated the following analytical framework for Younger abstention. "Abstention is appropriate when the requested relief would interfere (1) with an ongoing state judicial proceeding; (2) that implicates an important state

interest; and (3) that provides an adequate opportunity for the federal plaintiff to advance his federal constitutional challenge." Rossi v. Gemma, 489 F.3d at 34-35;[9] see also Coggeshall, 604 F.3d at 664. Interference is a threshold issue, Rossi v. Gemma, 489 F.3d at 35, and it is "usually expressed as a proceeding that either enjoins the state proceeding or has the practical effect of doing so," id.

Removal Defendants argue that Younger abstention does not apply to the instant case because none of the named Defendants in this action are parties to the Malafronte matter in the Superior Court. See Defendants' Mem. at 12. The Court agrees.[10] Plaintiffs have cited no instances where the Younger abstention doctrine has been extended to cover such situations, and the case law indicates that such an extension would be unwarranted. See Benavidez v. Eu, 34 F.3d 825, 832 (1st Cir. 1994)("Younger's scope is closely circumscribed to parties actually involved in state litigation;

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[9] In Coggeshall v. Massachusetts Board of Registration of Psychologists, 604 F.3d 658 (1st Cir. 2010), the First Circuit stated this same tripartite model using slightly different language: "This model requires that '(1) the [ongoing state] proceedings are judicial (as opposed to legislative) in nature; (2) they implicate important state interests; and (3) they provide an adequate opportunity to raise federal constitutional challenges.'" Id. at 664 (quoting Bettancourt v. Bd. of Regist. in Med., 904 F.3d 772, 777 (1st Cir. 1990)).

[10] At the hearing on the Motion to Remand, counsel for Plaintiffs mentioned two additional actions pending in the state superior court which he believed could provide a basis for abstention. However, as the Court understands that the Removing Defendants are not a party to either of these cases, Plaintiffs' request for abstention based on those actions is similarly unpersuasive. The Court is not convinced that retention of jurisdiction in this matter will interfere with any state proceeding.

even the presence of co-plaintiffs representing identical interests in state proceedings does not extend Younger to parties not actually involved in those proceedings."); Guimbellot v. Rowell, 356 F.Supp.2d 644, 651 (E.D. La. 2004)(finding that Younger abstention was not available because "[t]he dispute in this case does not involve the proceedings in state court or the State interest in the subject matter because the parties are not the same ...."). In OHI Asset (CT) Lender, LLC v. Woodland Manor Improvement Ass'n ex rel. Shine, 687 F.Supp.2d 12, 29 (D.R.I. 2010), this Magistrate Judge found the fact that the federal court plaintiff was not a party to any state court proceeding to be "significant," id. at 29, in concluding that Younger abstention should not be applied. Similarly here, the Court finds the fact that none of the named Defendants in this action are parties to the state court action to weigh heavily against application of Younger abstention.

Thus, the Court concludes that Plaintiffs' request for application of Younger abstention should be rejected because the ongoing state court proceeding does not involve the same parties. In reaching this conclusion, the Court is strongly influenced by the Supreme Court's guidance that the "task in [potential abstention] cases ... is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional'

circumstances, the 'clearest of justifications,' that can suffice ... to justify the *surrender* of that jurisdiction." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25-26, 103 S.Ct. 927 (1983); see also Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S.Ct. 1236 (1976); Benavidez, 34 F.3d at 831 (quoting Moses H. Cone Memorial Hosp., 460 U.S. at 25-26).[11] Here there are neither exceptional circumstances nor the clearest of justifications for this Court to surrender its jurisdiction.

IV. Summary

The fact that Plaintiffs' Amended Complaint drops their federal claim is immaterial because the Court determines whether the case was properly removed based on the original Complaint. Plaintiffs' argument for remand based on an alleged lack of

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[11] In Colorado River Water Conservation District v. United States, the Supreme Court explained that:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S.Ct. 1236 (1976)(internal quotation marks omitted).

complete diversity fails because Plaintiffs have fraudulently joined the Town, and the Town is disregarded in determining whether there is complete diversity. Plaintiffs' argument based on the rule of unanimity also fails because this case falls within the exceptions to the rule. Finally, Younger abstention is not appropriate because the ongoing state proceeding does not involve the same parties.

V. Conclusion

For the reasons stated above, the Motion to Remand is DENIED.

So ordered.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
September 12, 2011