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On May 19, 2016, BONY, the Trust, and Ditech LLC (collectively, “Defendants”) timely filed their Notice of Removal on the basis of diversity jurisdiction. Doc. 1. In their Notice of Removal, Defendants recited the citizenship of the following parties in support of their claims of diversity jurisdiction: Plaintiffs (Texas), BONY (Delaware/New York), the Trust (Delaware/New York—on account of the Trustee’s citizenship), Countrywide (Delaware/New York), BOA (Delaware/North Carolina), CWABS, Inc. (Delaware), Ditech LLC (Florida, Delaware, Minnesota, Maryland), and Full Spectrum (Delaware/North Carolina). Doc. 1 at ¶¶ 10–16. Plaintiffs responded with their Motion to Remand, arguing that in light of the Supreme Court’s March 7, 2016 ruling in *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 194 L. Ed. 2d 71 (2016), Defendants were required to prove the citizenship of all the Trust’s members/beneficiaries in order to shoulder their burden that removal was proper. Doc. 8 at ¶ 3. Because Defendants have not done so, Plaintiffs argue that this Court lacks subject-matter jurisdiction. *Id.* Plaintiffs’ Motion to Remand is now ripe for adjudication.

## II. Legal Standard

Under the federal removal statute, “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). Although suits arising under federal law are removable without regard to the citizenship of the parties, diversity suits are removable only “where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different States.” 28 U.S.C. § 1332(a). The

burden is on the removing party to show removal is proper. *Mumfrey v. CVS Pharmacy, Inc.*, 719 F.3d 392, 397 (5th Cir. 2013) (citation omitted). “Any doubts regarding whether removal jurisdiction is proper should be resolved against federal jurisdiction.” *Vantage Drilling Co. v. Hsin-Chi Su*, 741 F.3d 535, 537 (5th Cir. 2014) (per curiam) (quoting *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000)) (internal quotation marks omitted).

### III. Analysis

There is no disagreement between the parties regarding the amount in controversy; only the citizenship of the Trust is in dispute. The rule relied on by Plaintiffs is that “[w]hile humans and corporations can assert their own citizenship, other entities take the citizenship of their members.” *Americold*, 136 S. Ct. at 1014. Plaintiffs argue that this rule squarely applies because the Trust is neither a corporation nor a traditional trust. Doc. 8. Thus, Plaintiffs argue, *Americold* makes clear that the Trust takes on the citizenship of all of its members. *Id.* In a number of supplemental filings, Plaintiffs cite two recent district court cases that have applied *Americold* to similar disputes and remanded the case because the court concluded that the trust defendant was a business trust and the citizenship of all the members was not demonstrated. Docs. 17, 22 (citing and attaching *Swoboda v. Ocwen Loan Servicing, LLC*, No. CV H-13-2986 (S.D. Tex. Sept. 16, 2016) (Ellison, J.) and *Juarez v. DHI Mortg. Co., Ltd*, No. CV H-15-3534, 2016 WL 3906296, at \*3 (S.D. Tex. July 19, 2016) (Miller, J.)).

In their Reply, Defendants first point out that Plaintiffs’ Motion to Remand named “CWABS Inc. Asset-Backed Certificates Series 2004-12,” and argue that Plaintiffs’ Motion must fail because CWABS Inc. is a corporation, not a trust. Doc. 13 at ¶¶ 4–5. Defendants next argue that, “assuming arguendo that Plaintiffs meant to argue that the CWABS Trust is a business trust,” Plaintiffs’ reliance on *Americold* is misplaced, because unlike the Maryland statute at

issue in that case, “[h]ere, Plaintiffs have failed to provide any facts or legal authority to support their conclusory contention that CWABS Trust is a business trust.” *Id.* ¶¶ 6–9. Defendants go on to argue that the Trust is not a business, pointing to their Securities 10-K filing in support,<sup>1</sup> which states “Not applicable” under the Trust’s business description. Doc. 13-2. Defendants further argue that because the Trust does not act on its own, but rather BONY acts on its behalf, such as in the filing of a foreclosure suit, the Trust cannot be a business. *Id.* ¶ 9. Finally, Defendants point to the Pooling and Servicing Agreement (“PSA”) to argue that the Trust “governs the ‘fiduciary relationship between multiple people’”—the *Americold* standard for a traditional trust. *Id.* ¶ 11. In support of this position, Defendants direct the Court’s attention to a similar case in which the district court retained jurisdiction because it concluded that the trust defendant was indeed a traditional trust and the defendants had established that the parties were diverse without regard to the citizenship of the trust’s members. Doc. 23. (citing and attaching *May v. New Century Mortg. Corp.*, No. H-16-1272 (S.D. Tex. Sept. 16, 2016) (Lake, J.)). Alternatively, Defendants argue that the Trust’s citizenship should be disregarded because it is not a real and substantial party as demonstrated by the fact that Plaintiffs fail to plead factual allegations as to the Trust in support of any cause of action. Doc. 13 at ¶¶ 14–17.

The Court easily dismisses Defendants’ first argument. It is clear from the Complaint and the record as a whole that Plaintiffs’ reference to “CWABS, Inc. Asset-Backed Certificates Series 2004-12 Business Trust” in their Motion to Remand was a mistake. Doc. 8 at ¶ 2. The title

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<sup>1</sup> Plaintiffs object to the 10-K and Pooling and Service Agreement (“PSA”) excerpts that Defendants submitted as exhibits with their Reply. Doc. 17 at ¶ 3. Plaintiff argues that the 10-K is incomplete because Defendants only attached the first two pages of the SEC filing and what Defendants’ claim is the PSA is actually the Prospectus Supplement and not the actual PSA. *Id.* However, Plaintiffs direct the Court to no authority to support their objections. Both documents are public records and relevant to the issue at the heart of this dispute. Moreover, their admission does not prejudice Plaintiffs. Accordingly, the Court does not believe exclusion is warranted and overrules Plaintiffs’ objections.

of Plaintiffs' Original Petition makes it clear that CWABS, Inc. and the CWABS Asset-Backed Certificates Trust 2004-12 are separate entities sued in their individual capacities. Doc. 1-4 at 2. Moreover, it is clear from the Motion to Remand that, regardless of whether they misnamed the Trust, Plaintiffs are attacking the jurisdictional claims of the Trust, not the corporation. *See* Doc. 8.

Defendants' alternative argument that the Trust is not the real party in interest also fails. First, in their Original Petition, Plaintiffs list BONY in its capacity as a trustee for the Trust, and then separately list the Trust as a party. Doc. 1-4. That they named BONY as the trustee does not mean that they are only pursuing claims against BONY. Under Texas law, Plaintiffs could only bring the Trust into the suit by also listing BONY, the Trustee, in the pleadings. *See Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006) (citations omitted) ("The general rule in Texas (and elsewhere) has long been that suits against a trust must be brought against its legal representative, the trustee."). Second, Plaintiffs' allegations are directed at the Trust. They specifically allege that the loan on their property never vested in the Trust and the Trust wrongfully attempted to foreclose on the property. Doc. 1-4. Finally, Defendants relied upon the citizenship of the Trust (as based on the Trustee) in removing this case to begin with. Doc. 1 at 5. As Judge Ellison stated when rebuffing the same argument (that the defendant trust's citizenship should be disregarded because it was not a real party in interest) in one of the cases cited by Plaintiffs, "[b]y relying on the RASC Trust's citizenship in establishing federal diversity jurisdiction, Defendants acknowledged the trust as a real and substantial party to the lawsuit." Doc. 22-1, *Swoboda*, at 3 n.2.

After a thorough review of *Americold* and the three Southern District of Texas cases cited by the parties, the Court concludes that Plaintiffs' Motion to Remand should be granted. The

burden here is on Defendants to establish that removal is proper and unlike the *May* case on which they rely to argue against remand, Defendants have not born “the burden of classifying the trust by a preponderance of the evidence.” Doc. 23-1, *May*, at 13. In that case, the Court only concluded that it had jurisdiction for two reasons. First, the record made it clear that “upon execution and delivery of the PSA, ‘all right, title and interest’ of the Trust assets is to be transferred to the Trustee.” *Id.* at 11. Second, all “[a]ctions taken on behalf of the trust are ‘authorized and empowered’ by the Trustee, rather than the certificateholders.” *Id.* Although the PSA in this case does indicate that the “all right, title, and interest” in the trust will be assigned to the trustee, Doc. 13-4 at 7, Defendants direct the Court to no further statements elucidating how the Trust operates. Instead, Defendants make much of the fact that the Trust is not operating as a business and has no officers or directors. Doc. 13 at ¶¶ 8–9. But this argument misses the mark. So too does Plaintiffs’ focus on the fact that the Trust is divided into shares represented by transferable certificates. Doc. 8 at ¶ 12. Determining whether a trust is a traditional trust or business trust does not rise and fall on what business the trust conducts or whether there are transferrable shares; rather, who exerts control and how the entity operates is the focus of the inquiry. *See* Doc. 23-1, *May*, at 11 (“Neither conducting business nor the existence of transferrable shares is dispositive.” (citation omitted)).

Here, the burden is on Defendants to classify the trust, establish its citizenship, and prove complete diversity. *Juarez*, 2016 WL 3906296, at \*3 (citation omitted). Defendants have not done so. This failure, coupled with Plaintiffs’ assertions, is “sufficient to cast doubt on whether this court has subject matter jurisdiction.” *Id.* (citing *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281–82 (5th Cir. 2007)). Accordingly, this Court must remand.

**IV. Conclusion**

For the foregoing reasons it is hereby

**ORDERED** that Plaintiffs' Motion to Remand, Doc. 8, is **GRANTED** and this case is remanded to the 240<sup>th</sup> Judicial District Court of Fort Bend County, Texas. Accordingly, it is further

**ORDERED** that all other pending motions are **DISMISSED FOR WANT OF JURISDICTION**.

SIGNED at Houston, Texas, this 14th day of February, 2017.



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MELINDA HARMON  
UNITED STATES DISTRICT JUDGE