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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Ronald B. Joseph, M.D. and Krista
Joseph,

No. CV-09-1036-PHX-DGC

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Plaintiffs,

ORDER

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vs.

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Metropolitan Life Insurance Company,
et al.,

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Defendant.

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On May 14, 2009, Defendants filed a notice of removal alleging that this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332. Dkt. #1. While Defendants noted that both Plaintiffs and Defendant Thomas Beal are residents of Arizona, Defendants asserted that Beal was fraudulently joined and, therefore, his citizenship should not affect this Court’s subject matter jurisdiction. *Id.* at 4. On June 15, 2009, Plaintiffs filed a motion to remand the case to state court. The motion is fully briefed. For the reasons that follow, the Court will grant the motion to remand.

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I. Removal Principles.

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In an action not involving a federal question, removal is proper “only if none of the parties in interest *properly* joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b) (emphasis added); *see* 28 U.S.C. § 1332(a)(1). In an action removed on the basis of diversity jurisdiction, the requisite diversity must exist

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1 at the time of removal. *See Comtec, Inc. v. Nat'l Technical Schs.*, 711 F. Supp. 522, 523 (D.
2 Ariz. 1989) (citing *Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985)). “If at any time
3 before final judgment it appears that the district court lacks subject matter jurisdiction, the
4 case shall be remanded.” 28 U.S.C. § 1447(c).

5 Courts construe the removal statute against removal jurisdiction. *See Gaus v.*
6 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *Mesa Indus., Inc. v. Eaglebrook Prods., Inc.*,
7 980 F. Supp. 323, 324 (D. Ariz. 1997). There is a “strong presumption” against removal
8 jurisdiction, and “[f]ederal jurisdiction must be rejected if there is any doubt as to the right
9 of removal in the first instance.” *Gaus*, 980 F.2d at 566 (emphasis added); *see Mesa Indus.*,
10 980 F. Supp. at 324. “The ‘strong presumption’ against removal jurisdiction means that the
11 defendant always has the burden of establishing that removal is proper.” *Gaus*, 980 F.2d
12 at 566; *see Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999).

13 **II. Fraudulent Joinder.**

14 “[F]raudulent joinder is a term of art. If the plaintiff fails to state a cause of action
15 against a resident defendant, and the failure is obvious according to the settled rules of the
16 state, the joinder of the resident defendant is fraudulent.” *Ritchey v. Upjohn Drug Co.*, 139
17 F.3d 1313, 1318 (9th Cir.) (quotation omitted); *see In re Med. Lab. Mgmt. Consultants*, 931
18 F. Supp. 1487, 1491 (D. Ariz. 1996). In determining whether a party has been fraudulently
19 joined, courts are not limited to a review of the pleadings, but may also consider other
20 evidence such as declarations and affidavits. *See Ritchey*, 139 F.3d at 1318; *Morris v.*
21 *Princess Cruises, Inc.*, 236 F.3d 1061, 1068 (9th Cir. 2001) (relying on plaintiff’s affidavit
22 attached to motion for remand in deciding whether defendant was fraudulently joined).

23 In evaluating the allegations and evidence, courts employ a presumption against
24 finding fraudulent joinder. *See Plute v. Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005,
25 1008 (N.D. Cal. 2001); *Diaz v. Allstate Ins. Group*, 185 F.R.D. 581, 586 (C.D. Cal. 1998).
26 This presumption often is expressed by a series of requirements placed on the party asserting
27 fraudulent joinder. *Diaz*, 185 F.R.D. at 586. First, “defendants who assert fraudulent joinder
28 carry a heavy burden of persuasion.” *Id.* A defendant cannot merely show that joinder was

1 for the purpose of preventing removal because the court “need not inquire into plaintiff’s
2 motives in joining a nondiverse defendant.” *Levine v. Allmerica Fin. Life Ins. & Annuity Co.*,
3 41 F. Supp. 2d 1077, 1078 (C.D. Cal. 1999); *see Diaz*, 185 F.R.D. at 586. Instead, the
4 defendant ““must demonstrate that there is *no possibility that the plaintiff will be able to*
5 *establish a cause of action* in state court against the alleged sham defendant.” *Good v.*
6 *Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 807 (N.D. Cal. 2001) (citation omitted)
7 (emphasis in original).

8 Second, “it must appear to ‘a near certainty’ that joinder was fraudulent.” *Diaz*, 185
9 F.R.D. at 586 (quoting *Lewis v. Time, Inc.*, 83 F.R.D. 455, 466 (E.D. Cal. 1979), *aff’d*, 710
10 F.2d 549 (9th Cir. 1983)). “This occurs if the plaintiff has *no actual intention to prosecute*
11 *an action against [the] particular resident defendant[.]*” *Id.* (emphasis in original).

12 Third, “merely showing that an action is likely to be dismissed against that defendant
13 does not demonstrate fraudulent joinder.” *Id.* ““The standard is not whether plaintiff[] will
14 actually or even probably prevail on the merits, but whether there is a possibility that [it] may
15 do so.”” *Id.* (citation omitted).

16 Finally, the Court must “resolve all ambiguities in state law in favor of the plaintiff[.]”
17 *Id.* Similarly, given the presumptions against removal jurisdiction and fraudulent joinder,
18 all disputed questions of fact and “all doubts concerning the sufficiency of a cause of action
19 because of inartful, ambiguous or technically defective pleading must be resolved in favor
20 of remand.” *Plute*, 141 F. Supp. 2d at 1008; *see Levine*, 41 F. Supp. 2d at 1078; *Charlin v.*
21 *Allstate Ins. Co.*, 19 F. Supp. 2d 1137, 1140 (C.D. Cal. 1998).

22 **III. Analysis.**

23 Defendant Beal is an Arizona resident. Whether the Court should remand this case,
24 therefore, turns entirely on whether he was fraudulently joined. The parties disagree about
25 whether the Court may examine the Amended Complaint to determine if joinder was
26 fraudulent or if the Court is limited to examining Plaintiff’s original Complaint. The Court
27 need not resolve this issue because Defendants have failed to demonstrate that Defendant
28 Beal was fraudulently joined even if only the original complaint is considered.

1 The original Complaint states that Defendant Tom Beal was an insurance agent and
2 an authorized representative of the other Defendants. Dkt. #1-1 at 4. It alleges that all acts
3 complained of in the Complaint were done by Beal in furtherance of his relationship with the
4 other Defendants or on their behalf. *Id.* at 4. According to the Complaint, Beal sold
5 Plaintiff Ronald Joseph two long-term disability insurance policies which were to provide
6 an income replacement benefit as well as a monthly business overhead expense benefit. *Id.*
7 at 6. Plaintiffs also allege that Defendants failed to pay these benefits once Plaintiff Ronald
8 Joseph became disabled in an accident. *Id.* at 7-11. Plaintiff alleges that Defendant Beal
9 breached his contract with the Plaintiffs, was negligent, and fell below the standard of care
10 for an insurance agent in the sale, maintenance, and handling of Plaintiff Ronald Joseph's
11 policies and claims. *Id.* at 12. Defendant Beal allegedly promised Plaintiff Ronald Joseph
12 that he would receive certain benefits under the policies, but these promises were not
13 honored. *Id.* Plaintiffs further allege that all Defendants breached their duties of good faith
14 and fair dealing regarding the sale, maintenance, and handling of Plaintiff Ronald Joseph's
15 policies and claims. *Id.* at 14.

16 Defendants argue that Defendant Beal was fraudulently joined because there is no
17 viable claim against him. Dkt. #26 at 3-4. Defendants first argue that Beal cannot be liable
18 for breach of contract because the two Lincoln National Insurance policies at issue were
19 contracts between Plaintiff Ronald Joseph and Lincoln National and only the principal, not
20 the agent, can be held liable on the contract. *Id.* at 5-7. Defendants also contend that
21 Defendant Beal cannot be liable for bad faith because he did not participate in the
22 investigation, evaluation, or processing of the insurance claims. *Id.* at 7-10. Defendants fail
23 to address the alleged bad faith of Defendant Beal with regard to the sale of the policies.

24 In reply, Plaintiffs focus on Defendants' second contention. Dkt. #33 at 8-9.
25 Plaintiffs cite several cases in support of an insurance agent owing a duty of good faith and
26 fair dealing to an insured. *Id.* at 8-9; *see Farr v. Transamerica Occidental Life Ins. Co. of*
27 *Cal.*, 699 P.2d 376, 386 (Ariz. Ct. App. 1984) (holding that when an insurer and its agent are
28 engaged in a joint venture, they both owe a common duty to the insured to act in good faith);

1 *Sparks v. Republic Nat'l Life Ins. Co.*, 647 P.2d 1127, 1138 (1982) (holding that where a
2 joint venture exists, the agent and principal are subject to a common duty and are both liable
3 from the entire harm resulting from the failure to perform the duty); *Banker v. Valley Forge*
4 *Ins. Co.*, 585 A.2d 504, 510 (Pa. Super. Ct. 1991) (holding that insurance brokers owe a duty
5 of good faith and fair dealing to their insureds).

6 Defendants have failed to meet their high burden of showing fraudulent joinder.
7 There is a presumption against finding that the joinder was fraudulent, and Defendants have
8 failed to show that there is no possibility that Plaintiffs can establish a cause of action against
9 Defendant Beal in state court. *See Good*, 5 F. Supp. 2d at 807. The above cited Arizona
10 cases demonstrate that brokers and insurers engaged in a joint venture owe a common duty
11 of good faith and fair dealing, and at least one jurisdiction has held that insurance brokers in
12 general owe this duty to their insureds. Defendants have not provided any Arizona case law
13 to the contrary. In addition, Defendants do not address Plaintiffs' allegation that Defendant
14 Beal breached his duty of good faith and fair dealing in the sale of the policies.

15 Defendants have also failed to show that Plaintiffs had no intention of actually
16 prosecuting the claims against Defendant Beal. *See Diaz*, 185 F.R.D. at 586. In fact, the
17 Amended Complaint alleges further claims against Beal and adds his wife and insurance
18 agency as defendants. Dkt. #9.

19 Resolving all ambiguities in favor of Plaintiffs, Defendants have failed to demonstrate
20 that there is no possibility that Plaintiffs will prevail on their claims against Defendant Beal.
21 The Court will remand this case to state court.

22 **IV. Attorneys' fees.**

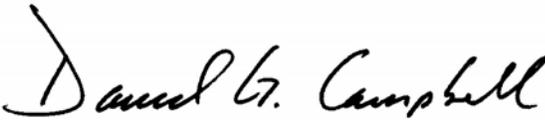
23 Plaintiffs seek to recover reasonable attorneys' fees incurred in responding to
24 Defendants' Notice of Removal. Dkt. #17 at 1-2. Given the presumptions that apply to
25 removal generally and allegations of fraudulent joinder specifically, as well as the nature of
26 the claims asserted against Defendant Beal, the Court concludes that Defendants acted
27 unreasonably in asserting that Defendant Beal was fraudulently joined. The Court will grant
28 Plaintiff's request for attorneys' fees. Defendants "had no objectively reasonable basis for

1 removal.” *Patel v. Del Taco, Inc.*, 446 F.3d 996, 999 (9th Cir. 2006); *see Moore v.*
2 *Permanente Med. Group, Inc.*, 981 F.2d 443, 445 (1992) (holding that district courts retain
3 jurisdiction after remand to award fees and costs under § 1447(c)).

4 **IT IS ORDERED:**

- 5 1. Plaintiffs’ motion to remand (Dkt. #17) is **granted**.
- 6 2. Plaintiffs’ request for attorneys’ fees (Dkt. #17) is **granted**. Plaintiffs may file
7 a motion for attorney’s fees by **September 18, 2009**. Defendants have until
8 **October 2, 2009** to file their response, and Plaintiffs have until **October 9,**
9 **2009** to file their reply in support.
- 10 3. All hearings are vacated and all pending motions (Dkt. ## 21, 22) are **denied**
11 as moot.
- 12 4. The clerk is directed to remand this case the Superior Court of Arizona,
13 Maricopa County.

14 DATED this 31st day of August, 2009.

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David G. Campbell
United States District Judge