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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Joseph Didyoung and Donna Didyoung,  
10 husband and wife,

11 Plaintiffs,

12 v.

13 Allstate Insurance Company, a stock  
14 company and a foreign corporation and  
15 subsidiary of Allstate Property and Casualty  
16 Insurance Company; Frontier Adjusters of  
17 Show Low, an Arizona corporation,

18 Defendants.

No. CV-12-348-PHX-GMS

**ORDER**

19 Pending before the Court are Plaintiffs' Motion to Remand for Lack of Complete  
20 Diversity and an accompanying Motion for Costs and Fees. (Doc. 7.) For the reasons  
21 discussed below, both of Plaintiffs' motions are denied.

22 **BACKGROUND**

23 Plaintiffs are husband and wife, who jointly owned and resided in property located  
24 in Show Low, Arizona. On or about January 22, 2010, Plaintiffs' property was destroyed  
25 by record snowfall, which caused the collapse of the roof of the property. (Doc. 1-1, ¶6.)

26 At the time of the collapse, the property was insured by Defendant, Allstate  
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1 Property and Casualty Insurance Company. (Doc. 1-1, ¶5.) Allstate Property and  
2 Casualty Insurance Company, an Illinois insurance company, is wholly owned by  
3 Defendant Allstate Insurance Company. Allstate Insurance Company is incorporated in  
4 Delaware. (Doc. 2 at 2).

6 Plaintiffs have also named Frontier Adjusters of Show Low as Defendants.  
7 Frontier Adjusters of Arizona is incorporated in Arizona and provides independent  
8 adjusting services to Allstate Defendants (Doc. 1-1, ¶4; Doc. 4, ¶4). Frontier was served  
9 only after the Allstate Defendants moved for removal. (Doc. 7-1).

11 Plaintiffs allege that Allstate failed to adjust the loss properly, based on a negligent  
12 evaluation performed by Frontier. (Doc 1-1, ¶8). Plaintiffs further allege that the failure  
13 to properly adjust was the result of a systemic claims process redesign enacted by Allstate  
14 in the 1990s. (Doc 1-1, ¶¶14-21). As a result, Plaintiffs seek compensatory damages  
15 from Allstate and Frontier (Doc 1-1, ¶A) and additional bad faith and exemplary damages  
16 from Allstate, together with reasonable attorney’s fees and costs. (Doc 1-1, ¶¶B–D)

## 19 DISCUSSION

### 20 I. Legal Standard

#### 21 A. Remand and Fraudulent Joinder

22 “The party asserting jurisdiction has the burden of proving all jurisdictional facts.”  
23 *Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) (citing *McNutt v. Gen.*  
24 *Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). A case may be properly removed  
25 from state court if the district court could have exercised original jurisdiction. 28 U.S.C. §  
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1 1441(a) (2006). The Court has subject-matter jurisdiction of cases in which defendants  
2 and plaintiffs are citizens of different states and the amount in controversy is greater than  
3 \$75,000. 28 U.S.C. § 1332 (2006). The Supreme Court has interpreted § 1332 to require  
4 complete diversity between parties, where “the citizenship of each plaintiff is diverse  
5 from the citizenship of each defendant.” *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68  
6 (1996). However, if a plaintiff names a non-diverse Defendant to defeat diversity  
7 jurisdiction, but, “fails to state a cause of action against a resident defendant, and the  
8 failure is obvious according to the settled rules of the state,” the district court may  
9 determine that the party is fraudulently joined, and exercise jurisdiction. *McCabe v.*  
10 *General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

14 Ordinarily courts determine federal jurisdiction “solely by an examination of the  
15 plaintiff’s case, without recourse to the defendant’s pleadings,” *Ritchey v. Upjohn Drug*  
16 *Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). However, when “fraudulent joinder is an issue,  
17 [courts] will go somewhat further.” *Id.* Courts have found fraudulent joinder where  
18 plaintiff’s claims are barred procedurally, *Ritchey*, 139 F.3d at 1319, or where there is no  
19 cognizable claim stated against the resident defendant under state law, *McCabe*, 811 F.2d  
20 at 1339. Importantly, joinder is not fraudulent when “the assertion made by the removing  
21 defendant ‘went to the merits of the action as an entirety, and not to the joinder; that is to  
22 say, it indicated that the plaintiff’s case was ill founded as to all the defendants.’”  
23 *Ritchey*, 139 F.3d at 1318 (quoting *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S.  
24 146, 153 (1914)).

1           In considering whether a defendant is fraudulently joined, “[t]he Court must  
2 therefore walk a very fine line: it must consider the merits of a matter without assuming  
3 jurisdiction over it.” *Davis v. Prentiss Props. Ltd.*, 66 F. Supp. 2d 1112, 1114 (C.D. Cal.  
4 1999). Courts in the Ninth Circuit have thus concluded “that some room must exist  
5 between the standard for dismissal under Rule 12(b)(6), for example, and a finding of  
6 fraudulent joinder.” *Id.* at 1115. Even a “‘glimmer of hope’ that plaintiff can establish  
7 claim is sufficient to preclude application of fraudulent joinder doctrine.” *Ballesteros v.*  
8 *Am. Standard Ins. Co. of Wisc.*, 436 F. Supp. 2d 1070, 1072 (D. Ariz. 2006) (quoting  
9 *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993)). Where there is a  
10 “glimmer of hope,” “Federal jurisdiction must be rejected if there is any doubt as to the  
11 right of removal.” *Id.* (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)).  
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15           **B. Dismissal Under Rule 12(b)(6)**  
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17           “Analytically, a fraudulent joinder finding compels dismissal of the ‘sham  
18 defendants.’” *Isaacs v. Broido*, 358 F. App’x 874, 876 (9th Cir. 2009). Dismissal for  
19 failure to state a claim can be based on either the “lack of a cognizable legal theory or the  
20 absence of sufficient facts alleged under a cognizable legal theory.” *Balistren v. Pacifica*  
21 *Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).  
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24           To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil  
25 Procedure 12(b)(6), a complaint must contain more than “labels and conclusions” or a  
26 “formulaic recitation of the elements of a cause of action”; it must contain factual  
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1 allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atl.*  
2 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a complaint need not contain  
3 detailed factual allegations . . . it must plead ‘enough facts to state a claim to relief that is  
4 plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.  
5 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the  
6 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
7 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937,  
8 1949 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility standard “asks for more  
9 than a sheer possibility that a defendant has acted unlawfully.” When a complaint does  
10 not “permit the court to infer more than the mere possibility of misconduct, the complaint  
11 has alleged—but it has not shown—that the pleader is entitled to relief.” *Iqbal*, 129 S.Ct.  
12 at 1950 (internal quotation omitted).

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17 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll  
18 allegations of material fact are taken as true and construed in the light most favorable to  
19 the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However,  
20 legal conclusions couched as factual allegations are not given a presumption of  
21 truthfulness, and “conclusory allegations of law and unwarranted inferences are not  
22 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.  
23 1998).

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26 Dismissal under Rule 12(b)(6) may occur either by motion or sua sponte. *Wong v.*  
27 *Bell*, 642 F.2d 359, 361-62 (9th Cir. 1981). Where a motion to dismiss is granted, a  
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1 district court should provide leave to amend unless it is clear that the complaint could not  
2 be saved by any amendment. *Oliver v. Long*, CV-06-2429-PCT-LOA, 2007 WL 1098527  
3 (D. Ariz. Apr. 12, 2007) (citing *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir.  
4 2002)). In the past, the Ninth Circuit has instructed District Courts to dismiss fraudulently  
5 joined parties, sua sponte. *See, e.g., Isaacs*, 358 F. App'x at 876. When dismissing a  
6 claim on its own initiative, “the court must give notice of its sua sponte intention to  
7 invoke Rule 12(b)(6) and afford plaintiffs an opportunity to at least submit a written  
8 memorandum in opposition to such motion.” *Wong*, 642 F.2d at 361-62 (citing *Crawford*  
9 *v. Bell*, 599 F.2d 890, 893 (9th Cir. 1979)). However, “[s]uch a dismissal may be made  
10 without notice where the claimant cannot possibly win relief.” *Omar v. Sea-Land Serv.,*  
11 *Inc.*, 813 F.2d 986, 991 (9th Cir. 1987).

## 12 **II. Analysis**

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18 While Frontier is a resident Defendant, Plaintiff has not stated a cognizable cause  
19 of action against Frontier. Frontier is, therefore, a sham defendant. Sham defendants must  
20 be dismissed from the case, and do not destroy diversity jurisdiction.

### 21 **A. Remand and Fraudulent Joinder**

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23 “Absent a cause of action against a resident defendant, where the failure is obvious  
24 according to the settled rules of the state, the joinder of the resident defendant is  
25 fraudulent.” *McCabe*, 811 F.2d at 1339. “[F]raudulent joinder inquiry focuses on the  
26 validity of the legal theory being asserted against the non-diverse defendant.” *Davis*, 66  
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1 F. Supp. 2d at 1114. “Accordingly, if the facts alleged in the Complaint taken as true and  
2 drawing all inferences in Plaintiff’s favor, can possibly state a claim under Arizona law  
3 against [the defendant] in question, there is no fraudulent joinder....” *Ballesteros*, 436 F.  
4 Supp. 2d at 1073.  
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6 In *McCabe*, the Ninth Circuit was asked to find that a defendant was fraudulently  
7 joined. There, the Court noted that the facts alleged against that defendant were not  
8 sufficient to establish the elements required for the claims asserted under California state  
9 law. *McCabe*, 811 F.2d at 1339. Therefore, the Ninth Circuit noted, “[o]n the basis of the  
10 complaint alone, the district court could rightly conclude that no cause of action had been  
11 stated against” defendants” and that they were, therefore fraudulently joined. *Id.*  
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14 Plaintiffs style this case as a “breach of contract” and “bad faith” case. (Doc. 1-1  
15 at 3.) In two prior cases in this district, this Court has addressed the question of whether  
16 an adjuster may be held liable for breach of the duty of good faith and fair dealing under  
17 Arizona law. In both cases the Court found the question to be unsettled. *Allo v. American*  
18 *Family Mut. Ins. Co.*, CV-08-0961-PHX-FJM, 2008 WL 4217675 (D. Ariz. Sept. 12,  
19 2008); *Wapniarski v. Allstate Ins. Co.*, CV-10-0823-PHX-LOA, 2010 WL 2534167 (D.  
20 Ariz. June 18, 2010). Because any doubt as to whether the plaintiff has stated a valid  
21 cause of action under the laws of the state should be resolved in against a finding of  
22 fraudulent joinder, *see Albi*, 140 F.2d at 312, both cases were remanded.  
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26 However, despite the styling of the case itself, the legal theory asserted against  
27 Frontier sounds neither in breach of contract nor in bad faith. Rather, as clarified by  
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1 Plaintiffs' Reply, the claim against Frontier is limited to a claim sounding in negligence,  
2 which, in this state, is without merit. (Doc. 12 at 1, 2.)

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4 To establish negligence in Arizona, a plaintiff must show there was a duty on part  
5 of defendant towards Plaintiff. *Holliman v. United States*, 22 F. Supp. 2d 1111, 1112 (D.  
6 Ariz. 1998) (citing *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200, 204 (1983)).  
7 Plaintiffs have not, however, alleged that Frontier owed them duty. Frontier was hired by  
8 Allstate; no privity of contract existed between Plaintiffs and Frontier. Similarly,  
9 Plaintiffs make no assertion of an implied contractual duty of good faith and fair dealing  
10 owed insureds by third-party adjusters in the state of Arizona.

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13 Negligent claim handling is not a cause of action recognized by the state of  
14 Arizona against insurers. *Miel v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 104, 111, 912  
15 P.2d 1333, 1340 (App. 1995). Similarly, Arizona has rejected holding independent  
16 adjusters liable for negligent claim handling. *Meineke v. GAB Business Services*, 195  
17 Ariz. 564, 568 (App. 1999) ("We see no reason to apply a different rule when the  
18 insurer's agent, the adjuster, mishandles a claim."). Where there is no duty, there is no  
19 cause of action for negligence, and such a failure is "obvious according to the settled  
20 rules of the state." *McCabe*, 811 F.2d at 1339.

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23 In reply, Plaintiffs argue that while Arizona has not adopted liability for  
24 independent adjusters, a minority of jurisdictions have. *See, e.g., Morvay v. Hanover Ins.*  
25 *Cos.*, 127 N.H. 723, 506 A.2s 333, 335 (1986) (holding that independent investigator  
26 owes a duty to insured to conduct a fair and reasonable investigation); *Brown v. State*  
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1 *Farm Fire & Cas. Co.*, 2002 OK CIV APP 107, 58 P.3d 217, 223 (holding that  
2 independent adjuster owes a duty to insured to conduct fair and a reasonable  
3 investigation).  
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5 As in the presenting case, in *Meineke*, Plaintiffs sued a third party insurance  
6 adjuster hired by Plaintiffs' insurer to investigate a fire loss. There, the Arizona Court of  
7 Appeals declined to find liability for the third party adjuster on grounds that "the  
8 relationship between adjuster and insured is sufficiently attenuated by the insurer's  
9 control over the adjuster to be an important factor that militates against imposing a  
10 further duty on the adjuster to the insured." *Meineke* 185 Ariz. at 270.  
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13 For the purposes of determining whether Frontier was properly joined, it would be  
14 enough to find that Plaintiffs have "a glimmer of hope" that a state court may so find.  
15 *Ballesteros*, 436 F. Supp. 2d at 1072. Here, however, Plaintiffs bring a suit against a third  
16 party insurance adjuster hired to investigate a property loss. Given the similarity to  
17 *Meineke*, which is directly on point, Plaintiffs do not have even a "glimmer of hope" that  
18 an Arizona court will find Frontier liable. Sham defendants do not defeat diversity  
19 jurisdiction. *Ritchey*, 139 F.3d at 1318. Because the amount at controversy is not in  
20 dispute, and because the parties are diverse, this court has subject-matter jurisdiction.  
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23 **B. Dismissal Under Rule 12(b)(6)**

24 Because Frontier was fraudulently joined, Frontier must be dismissed from the  
25 case. "Analytically, a fraudulent joinder finding compels dismissal of the 'sham  
26 defendants.'" *Isaacs v. Broido*, 358 F. App'x 874, 876 (9th Cir. 2009). To survive  
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1 dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6),  
2 a complaint must contain more than “labels and conclusions” or a “formulaic recitation of  
3 the elements of a cause of action”; it must contain factual allegations sufficient to “raise a  
4 right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
5 (2007).  
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8 Plaintiffs do not assert any factual allegations against Frontier sufficient to raise a  
9 right to relief. Beyond the mere allegation that Frontier performed a “negligent evaluation  
10 . . . which completely misrepresented the scope of and severity of the damage to the  
11 residence” and did not “perform a complete investigation of this loss,” (Doc. 12 at 1, 2),  
12 However, “conclusory allegations of law and unwarranted inferences are not sufficient to  
13 defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). Plaintiffs  
14 have not included any factual allegations indicating a duty on the part of Frontier that  
15 would give rise to a negligence claim. Therefore, as indicated above, under a theory of  
16 negligence, there is no a cognizable claim in Arizona law under which Plaintiffs may  
17 proceed against Frontier.  
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21 Additionally, as indicated above, Plaintiffs have not alleged facts adequate to  
22 support a claim against Frontier in “breach of contract” or “bad faith.” Nor have Plaintiffs  
23 indicated any other factual basis under which they may have a “right to relief.” Because  
24 Frontier was fraudulently joined, and because Plaintiffs have not presented a cognizable  
25 claim against Frontier, dismissal of Defendant Frontier under Rule 12(b)(6) is  
26 appropriate.  
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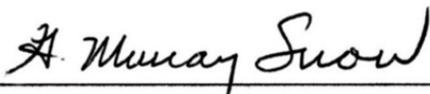
**CONCLUSION**

Despite the strong presumption against removal, where there is not a “glimmer of hope” that Arizona will recognize a cause of action against Frontier, this court must conclude that Frontier is a sham defendant, fraudulently joined. *Ballesteros*, 436 F. Supp. 2d at 1072. Diversity jurisdiction therefore exists and this Court will not remand the case for lack of diversity. Fraudulently joined parties can and will be dismissed by this Court, sua sponte. *Wong*, 642 F.2d at 361; *Isaacs v. Broido*, 358 F. App’x at 876.

**IT IS THEREFORE ORDERED:**

- 1. Plaintiffs’ Motion to Remand (Doc. 7) is **DENIED**.
- 2. Plaintiffs’ request for Costs and Fees is **DENIED**.
- 3. Plaintiffs’ claims against Frontier are **DISMISSED** with leave to amend, **within 30 days** of the date of this Order, to state a cognizable claim. If Plaintiff fails to amend, the Clerk of Court is directed to terminate Defendant Frontier Adjusters of Show Low, without further leave of the Court.
- 4. The Motion for Leave to File Sur-Reply (Doc. 13) is denied.

Dated this 1st day of June, 2012.

  
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G. Murray Snow  
United States District Judge