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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

**IDS Property Casualty Insurance Company,)
Plaintiff,
vs.
Frank and Bettina Gambrell, et al.,)
Defendants.**

**2:12-cv-01227 JWS (Lead Case)
4:12-cv-00661 JWS**

ORDER AND OPINION

**Frank and Bettina Gambrell,
Plaintiffs,
vs.
IDS Property Casualty Insurance Company;)
Stacey Harrish,)
Defendants.**

**[Re: Motions at dockets
5 and 7 in 4:12-cv-00661]**

I. MOTIONS PRESENTED

Defendant Stacey Harrish (“Harrish”) filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure at docket 5 in Tucson Case No. 4:12-cv-00661 (“Tucson Case”), which Harrish and Defendant IDS Property Casualty Insurance Company (“IDS”; collectively “Defendants”) removed from Pima

1 County Superior Court. In the motion to dismiss, Harrish argues that she was an
2 improperly named party against whom no cause of action can lie.

3 About two weeks after Harrish filed her motion to dismiss, plaintiffs Frank and
4 Bettina Gambrell (“Gambrells” or “plaintiffs”)¹ filed a motion at docket 7 to remand the
5 Tucson Case back to Pima County Superior Court pursuant to 28 U.S.C. § 1447(c),
6 arguing that there is not complete diversity because Harrish is a resident of Arizona.
7 Defendants filed an opposition at docket 11 in the Tucson Case. While they
8 acknowledge that Harrish is a resident of Arizona, they assert that she was “fraudulently
9 joined” to the case while it was in state court, meaning they believe plaintiffs have no
10 valid cause of action against Harrish, and thus, her inclusion was designed to block
11 federal diversity jurisdiction.

12 The Gambrells asked the court to stay the briefing on Harrish’s motion to dismiss
13 until the court resolved the jurisdictional issues in the motion to remand,² but the court
14 denied the request, opting to consider the motions together, given the similarity of the
15 issue at stake in both motions – i.e., whether a claim of bad faith against Harrish exists
16 under Arizona law.³

17 The court consolidated the Tucson Case with Phoenix case 2:12-cv-01227
18 (“Lead Case”), which is IDS’s related declaratory judgment action against the
19 Gambrells. After consolidation, the Gambrells subsequently filed their opposition to
20 Harrish’s motion to dismiss at docket 22 in the Lead Case and filed their reply to the
21 motion to remand at docket 20. Harrish filed her reply to her motion to dismiss at
22 docket 23 in the Lead Case. Both parties requested oral argument, but this court
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25 ¹The Gambrells are the defendants in the Lead Case (2:12-cv-01227), but because the
26 motions at docket 5 and docket 7 were filed in the Tucson Case, the court refers to them as the
plaintiffs.

27 ²Doc. 8.

28 ³Doc. 21.

1 concludes that the briefing for the two motions is extensive and thorough and oral
2 argument is not necessary.

3 **II. BACKGROUND**

4 The two cases involving the Gambrells and IDS arise out of an automobile
5 accident that occurred March 4, 2011, in which Frank Gambrell sustained personal
6 injuries after another car crossed the center line and collided with the truck Gambrell
7 was driving. The truck was owned by Frank Gambrell's employer. His medical
8 expenses totaled over \$87,000, and his loss of earnings totaled over \$6,000. The
9 Gambrells settled with the tort feisor's insurance carrier for the \$15,000 liability limit.
10 He then pursued a claim under the insurance policy that Gambrell's employer
11 maintained on the truck involved in the accident. That policy had underinsured motorist
12 coverage in the amount of \$100,000, and Gambrell collected the full amount under that
13 policy. But, because the amount Gambrell collected from the tort feisor's policy and his
14 employer's policy was allegedly inadequate to compensate Gambrell, he filed a claim for
15 \$100,000 under his personal auto insurance policy that he maintained with IDS. IDS
16 assigned Harrish to adjust the claim. They denied Gambrell's claim. Gambrells asked
17 defendants to reconsider their denial and pointed out reasons why they thought the
18 denial was improper, but defendants maintained their denial.⁴

19 On June 8, 2012, after the parties were unable to settle the claim, IDS initiated a
20 declaratory relief action in federal court by filing the complaint in the Lead Case. In the
21 complaint, IDS asks the court to judicially determine the parties' dispute over coverage.
22 On July 25, 2012, plaintiffs filed the underlying complaint in the Tucson Case in state
23 court. The complaint originally alleged a breach of contract and bad faith claim against
24 IDS.⁵ On August 3, 2012, shortly after defendants declined plaintiffs' request to
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26 ⁴The background facts are taken from the First Amended Complaint, which is filed at
27 doc. 1-3 at p. 20 in the Tucson Case.

28 ⁵Doc. 1-3 at p. 12.

1 stipulate to a remand in the Lead Case, plaintiffs filed an amended complaint in state
2 court, adding Harrish as a defendant and alleging that Harrish was assigned to adjust
3 the claim and that both defendants owed a duty of good faith and fair dealing to
4 plaintiffs, which they breached when they refused without reasonable basis to provide
5 benefits under the policy.⁶ On September 4, 2012, defendants filed their notice of
6 removal.⁷ As noted above, after the motions to dismiss and remand were filed, the
7 court consolidated the two cases, and all filings have since been lodged in the Lead
8 Case.

9 III. STANDARD OF REVIEW

10 **A. Motion to dismiss**

11 A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil
12 Procedure 12(b)(6) tests the legal sufficiency of a plaintiff's claims. In reviewing such a
13 motion, "[a]ll allegations of material fact in the complaint are taken as true and
14 construed in the light most favorable to the nonmoving party."⁸ Dismissal for failure to
15 state a claim can be based on either "the lack of a cognizable legal theory or the
16 absence of sufficient facts alleged under a cognizable legal theory."⁹ Dismissal is not
17 "confine[d] . . . to claims of law which are obviously insupportable."¹⁰ Instead, a claim
18 must be dismissed "without regard to whether it is based on an outlandish legal theory
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23 ⁶See doc. 1-3 at pp. 17-25.

24 ⁷Doc. 1.

25 ⁸*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

26 ⁹*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

27 ¹⁰*Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

1 or on a close but ultimately unavailing one.”¹¹ “Conclusory allegations of law . . . are
2 insufficient to defeat a motion to dismiss.”¹²

3 To avoid dismissal, a plaintiff must plead facts sufficient to “state a claim to relief
4 that is plausible on its face.”¹³ “A claim has facial plausibility when the plaintiff pleads
5 factual content that allows the court to draw the reasonable inference that the defendant
6 is liable for the misconduct alleged.”¹⁴ “The plausibility standard is not akin to a
7 ‘probability requirement’ but it asks for more than a sheer possibility that a defendant
8 has acted unlawfully.”¹⁵ “Where a complaint pleads facts that are ‘merely consistent’
9 with a defendant’s liability, it ‘stops short of the line between possibility and plausibility of
10 entitlement to relief.’”¹⁶ “In sum, for a complaint to survive a motion to dismiss, the non-
11 conclusory ‘factual content,’ and reasonable inferences from that content, must be
12 plausibly suggestive of a claim entitling the plaintiff to relief.”¹⁷

13 **B. Fraudulent joinder**

14 Defendants removed the Tucson Case from state court to federal court pursuant
15 to 28 U.S.C. § 1441(a) based on the court’s diversity jurisdiction. Although defendants
16 acknowledge that Harrish’s presence in the lawsuit destroys complete diversity because
17 she is a resident of Arizona, they maintain that her presence is based on fraudulent
18 joinder and, thus, can be ignored for purposes of diversity jurisdiction.¹⁸ Plaintiffs filed

20 ¹¹*Id.*

21 ¹²*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

22 ¹³*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

23 ¹⁴*Id.*

24 ¹⁵*Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

25 ¹⁶*Id.* (quoting *Twombly*, 550 U.S. at 557).

26 ¹⁷*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

27 ¹⁸Doc. 1 at p. 3.

1 the motion to remand arguing that there is no fraudulent joinder issue and, thus, the
2 case must be remanded pursuant to 28 U.S.C. § 1447(c).

3 Fraudulent joinder is a term of art.¹⁹ A plaintiff's subjective intent does not play a
4 role in the analysis.²⁰ Instead, fraudulent joinder exists, and the non-diverse defendant
5 is ignored for purposes of determining diversity of the parties, if the plaintiff "fails to state
6 a cause of action against a resident defendant, and the failure is obvious according to
7 the settled rules of the state."²¹ "In borderline situations, where it is doubtful whether the
8 complaint states a cause of action against the resident defendant, the doubt is ordinarily
9 resolved in favor of the retention of the cause in the state court."²² It is only where a
10 plaintiff has no possibility of bringing a cause of action against a resident defendant, and
11 therefore has no reasonable grounds to believe he has such an action, that the court
12 can conclude that the resident defendant has been joined to evade jurisdiction in federal
13 court.²³

14 Because there is a presumption against removal, the defendant has the burden
15 of establishing that removal is proper and thus that fraudulent joinder exists.²⁴

19 ¹⁹*McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

20 ²⁰*See Albi v. St. & Smith Publ'ns*, 140 F.2d 310, 312 (9th Cir. 1944) (stating that "it is
21 universally thought that the motive for joining [a non-diverse] defendant is immaterial); *Selman*
22 *v. Pfizer, Inc.*, No. 11-CV-1400, 2011 WL 6655354, at *10 (D. Or. Dec. 16, 2011) (rejecting an
intent test for fraudulent joinder).

23 ²¹*McCabe*, 811 F.2d at 1339.

24 ²²*Albi*, 140 F.2d at 312.

25 ²³*Id.*; *see also Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993) (finding of
26 fraudulent joinder appropriate only if there is no possibility that a claim can be stated); *Filla v.*
27 *Norfolk S. Ry. Co.*, 336 F.3d 806, 810 (8th Cir. 2003) (if there is a "colorable" cause of action,
joinder is not fraudulent and remand is mandatory).

28 ²⁴*Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

1 **IV. DISCUSSION**

2 The court is confronted with two motions presenting the same issue but with
3 different standards of review. Because the standard for proving fraudulent joinder is
4 more exacting than that for dismissing a claim for failure to state a claim—a merely
5 possible claim against a defendant is not enough to survive a 12(b)(6) motion, but it is
6 sufficient to defeat an assertion of fraudulent joinder and prevent removal—the court will
7 address the motion to remand first.

8 Defendants argue that the duty of good faith and fair dealing stems from a
9 contract and because she is not a party to the insurance contract, Harrish cannot have
10 acted in bad faith. Indeed, Arizona courts have held that there is no cause of action
11 when a *third-party claimant* who was not a party to the insurance contract tries to sue
12 the tortfeasor’s insurance company for bad faith in failing to settle his claims.²⁵ Arizona
13 courts have also held that an insured or his assignee may not sue his insurer for
14 negligent handling of claims that is separate and distinct from the claim of breach of
15 contract or bad faith.²⁶ Similarly, the Arizona courts have held that an insurance
16 company’s adjuster did not owe a duty to the insured in the context of a negligence
17 claim.²⁷ However, in the context of a bad faith claim brought by an insured against the
18 insurance claims adjuster, there is no Arizona case law directly on point to support
19 defendants’ argument. Instead, as plaintiffs point out, in *Farr v. Transamerica*
20 *Occidental Life Insurance Co. of California*,²⁸ the Arizona Court of Appeals found that
21 both the insurer and the insurer’s agent owed a common duty to the insured to act in
22 good faith despite the agent’s lack of contractual privity. It reasoned that the insurer
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25 ²⁵*Leal v. Allstate Ins. Co.*, 17 P.3d 95, 98-99 (Ariz. Ct. App. 2000).

26 ²⁶*Miel v. State Farm Mut. Auto. Ins. Co.*, 912 P.2d 1333, 1340 (Ariz. Ct. App. 1995).

27 ²⁷*Meineke v. GAB Bus. Serv. Inc.*, 991 P.2d 267, 271 (Ariz. Ct. App. 1999).

28 ²⁸ 699 P.2d 376 (Ariz. Ct. App. 1984)

1 and its agent were engaged in a joint venture, even if some of the classical elements of
2 a joint venture, such as profit and loss sharing or joint right to control, were lacking.²⁹

3 While the holding in *Farr* could certainly be distinguished in this case because,
4 unlike the adjuster in *Farr*, Harrish is an in-house employee and not a third-party entity
5 hired to administer claims,³⁰ Arizona courts have not specifically addressed the issue.
6 Harrish cites to *Walter v. Simmons*³¹ to argue that the state courts have, in fact,
7 resolved the issue. In *Walter*, the Arizona court held that the plaintiff's voluntary
8 dismissal of the bad faith claim against the adjuster did not require dismissal of that
9 same claim against the insurer. The dismissal of the adjuster and the reason for his
10 dismissal were not at issue in the appeal, but the court nonetheless stated that the
11 independent adjuster "was dismissed from the bad faith claim because he owed no
12 contractual duty to act in good faith or deal fairly with [the insured]."³² That statement
13 was not necessary to the holding, was not expressly deemed a guide for future conduct,
14 and does not provide reasoned consideration of the issue; thus, it is merely dicta.³³

15 While the court is not bound by other decisions in this district on the issue, judges
16 have repeatedly concluded that the law surrounding the viability of a bad faith claim
17 against an insurance adjuster is unsettled in Arizona. In both *Ballesteros v. American*

21 ²⁹*Id.* at 386.

22 ³⁰It is undisputed that Harrish is an employee of IDS. See docket 7, pp. 6-7, n.3.

23 ³¹818 P.2d 214 (Ariz. Ct. App. 1991)

24 ³²*Id.* at 222.

25 ³³ See *Phelps Dodge Corp. v. Ariz. Dept. of Water Res.*, 118 P.3d 1110, 1116 n.9 (Ariz.
26 Ct. App. 2005) (discussing what should be considered judicial dictum and thus should be
27 followed absent a cogent reason for departing from it and obiter dictum that does not have
28 precedential value but can be persuasive); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d
1325, 1329 (9th Cir. 2012).

1 *Standard Insurance Co. of Wisconsin*³⁴ and *Allo v. American Family Mutual Insurance*
2 *Co.*,³⁵ the district courts concluded that it is unclear in Arizona whether an
3 adjuster employed by an insurance company could be held liable for bad faith. The
4 magistrate judge in *Wapniarski v. Allstate Insurance Co.*³⁶ also addressed this issue
5 and found the reasoning in *Ballesteros* persuasive and remanded the case back to state
6 court.

7 Defendants cite to two other District of Arizona cases, *Huffman v. American*
8 *Family Mutual Insurance Co.*³⁷ and *Didyoung v. Allstate*,³⁸ to support their position. But
9 those two cases are inapposite. *Huffman* presented a different issue altogether:
10 whether the plaintiff could amend her complaint to add a non-diverse defendant *after*
11 the case had been removed to federal court. In determining whether the plaintiff could
12 amend to add a non-diverse defendant, the court looked at the strength of her bad faith
13 claim against that defendant and found that it was weak because the covenant of good
14 faith and fair dealing is inherent in a contract, and there was no contract between the
15 proposed defendant and the plaintiff. But, the court in *Huffman* was applying different
16 standards altogether and furthermore, the court agreed that “Arizona courts have not
17 squarely rejected [the plaintiff’s] proposed theory.”³⁹

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23 ³⁴436 F. Supp. 2d 1070 (D. Ariz. 2006).

24 ³⁵No. CV-08-0961, 2008 WL 4217675 (D. Ariz. Sept. 12, 2008).

25 ³⁶No. CV-10-0823, 2010 WL 2534167 (D. Ariz. June 18, 2010).

26 ³⁷No. CV-10-2809, 2011 WL 814957 (D. Ariz. Mar. 4, 2011).

27 ³⁸No. CV-12-348, 2012 WL 1983779 (D. Ariz. June 4, 2012).

28 ³⁹2011 WL 814957, at *3 (D. Ariz. Mar. 4, 2011).

1 *Didyoung* was considering the issue of fraudulent joinder, but the claim was not a
2 bad faith claim but rather a negligence claim,⁴⁰ and under Arizona law, as discussed
3 above, it is clear that an insurance adjuster is not liable for negligent claim handling.

4 Given the holding in *Farr*, that the claims administrator was engaged in a type of
5 joint venture with the insurer and thus could be jointly and severally liable with the
6 insurer, the court must concur with the prior decisions in this district and conclude that
7 Arizona law is not fully settled as to whether an insured can bring a bad faith claim
8 against an in-house insurance adjuster. The court acknowledges Harrish's argument
9 that an employee and employer cannot form a joint venture, but, as noted above, *Farr*
10 did not require a finding that all elements of joint venture be present in the insurance
11 context. Although the court is not persuaded that the reasoning in *Farr* would be
12 applicable to an in-house employee, there is no state case directly on point, and the
13 court must resolve any ambiguities in favor of the plaintiff.

14 Furthermore, when looking at the issue of fraudulent joinder, the court has to
15 consider whether the plaintiffs have at least a reasonable ground to believe such a
16 claim could go forward.⁴¹ Given the district court decisions in *Ballesteros* and *Allo* that
17 found the issue unsettled, there is, in fact, a reasonable basis for the Gambrells to move
18 forward with the bad faith claim against Harrish. While it is a close call, as noted above,
19 ambiguity in the law must favor the plaintiff, and the prior district court cases persuade
20 the court to conclude that Arizona law has not yet closed the matter.

21 Because this court finds that there is no fraudulent joinder, it cannot ignore
22 Harrish's presence in the suit. As such, complete diversity does not exist, and the court
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25 ⁴⁰2012 WL 1983779 at *4 (“[T]he legal theory asserted against [the adjuster] sounds
26 neither in breach of contract nor in bad faith. Rather, . . . the claim against [the adjuster] is
27 limited to a claim sounding in negligence.”).

28 ⁴¹While the defendant notes that the procedural history of this case suggests Harrish
was only added to destroy diversity, the plaintiffs' actual motive is not part of the analysis.

