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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 EARL WAYNE PULLEN, a dba of  
11 Carole & Jan's Moving & Storage, a  
California sole proprietorship,

12 Plaintiff,

13 v.

14 TRANSGUARD INSURANCE  
15 COMPANY OF AMERICA, INC.,  
16 SCOTT MICKELSON, MARLENE  
MACIOLEK and Does 1 through 50,  
inclusive,

17 Defendants.  
18

Case No.: CV17-08631-AB (JEMx)

[LASC Case No. LC106405  
Filed: October 25, 2017]

**ORDER GRANTING PLAINTIFF'S  
MOTION TO REMAND**

19  
20 Before the Court is Plaintiff's Motion to Remand, which was filed on January 12,  
21 2018. (Dkt. No. 7.) Defendant TransGuard Insurance Company of America, Inc.  
22 ("TransGuard") filed an opposition, and Plaintiff filed a reply. (Dkt. Nos. 21, 26.) The  
23 Court deems this matter appropriate for decision without oral argument and vacates the  
24 hearing scheduled for February 9, 2018. *See* Fed. R. Civ. P. 78; LR 7-15. For the  
25 following reasons, the Court **GRANTS** Plaintiff's Motion.

26 **I. BACKGROUND**

27 Plaintiff filed a complaint ("Complaint") in the Superior Court of the State of  
28 California, County of Los Angeles on October 25, 2017 against defendants

1 TransGuard Insurance Company of America, Inc. (“TransGuard”), Scott Mickelson  
2 (“Mickelson”), and Marlene Maciolek (“Maciolek”), collectively (“Defendants”).  
3 (“Compl.,” Dkt. No. 1-1).

4 In the Complaint, Plaintiff asserts four causes of action under California law  
5 arising from a denial of coverage for defense and indemnity regarding a prior case  
6 against Plaintiff. (*Id.*) As averred in the Complaint, Plaintiff owns and does business  
7 as Carole & Jan’s Moving & Storage (“C&J”). (*Id.* ¶ 1.) Plaintiff purchased an  
8 insurance policy from TransGuard for its motor carriers that provides comprehensive  
9 general liability, commercial general liability, and motor carrier coverages, among  
10 others. (*Id.* ¶¶ 8–9.) On September 12, 2015, C&J employees parked a C&J moving  
11 van in a 7-Eleven parking lot in Van Nuys, California, and an incident arose involving  
12 a man named William Cohen who told the C&J employees that the van was parked  
13 illegally. (*Id.* ¶¶ 10–11.) Cohen filed a case against C&J in state court “alleging  
14 personal injury and damages arising from Plaintiff’s use and employment of the  
15 moving van.” (*Id.* ¶ 14.)

16 Plaintiff tendered a claim to Mickelson, a TransGuard claims adjuster, for  
17 defense and indemnity of the Cohen case, and Mickelson allegedly told Plaintiff the  
18 claim was covered. (*Id.* ¶ 16.) Later, Mickelson denied the claim in its entirety and  
19 stated TransGuard would not provide a defense. (*Id.* ¶ 17.) Plaintiff hired private  
20 counsel to defend C&J and continuously sent invoices and updates on the case to  
21 TransGuard. (*Id.* ¶ 19.) On or about October 12, 2017, Maciolek, who Plaintiff  
22 alleged was an agent and representative of TransGuard, told Plaintiff that Defendants  
23 accepted defense of Plaintiff’s claim. (*Id.* ¶¶ 4, 20.) The Los Angeles Superior Court  
24 granted Plaintiff’s motion for summary judgment against Cohen on October 16, 2017.  
25 (*Id.* ¶ 21.) Plaintiff’s counsel sought confirmation from Defendants of their  
26 acceptance of the defense of the Cohen case, but TransGuard has not responded to  
27 requests for reimbursement of Plaintiff’s attorneys’ fees and costs. (*Id.* ¶ 22.)

28 Based on these actions, Plaintiff brings an action against TransGuard for breach

1 of written contract (Claim 1) and breach of the implied covenant of good faith and fair  
2 dealing (Claim 2). Plaintiff alleges two actions against all Defendants for violation of  
3 California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200, *et*  
4 *seq.* (Claim 3) and declaratory relief (Claim 4).

5 On November 29, 2017, defendant TransGuard removed the state court case to  
6 this Court on the basis of diversity jurisdiction. (Dkt. No. 1 ¶ 2.) The following day,  
7 TransGuard filed an Amended Notice of Removal (“Am. Notice of Removal,” Dkt.  
8 No. 5.) TransGuard states that Plaintiff is a California citizen, and TransGuard is an  
9 Illinois citizen. (*Id.* ¶ 6.) TransGuard contends that Mickelson and Maciolek are  
10 fraudulently joined and, therefore, their citizenship should be disregarded. (*Id.* ¶¶ 8–  
11 9.) Mickelson permanently resides and is domiciled in Illinois (Decl. Scott Mickelson  
12 Decl. ¶ 2, Dkt No. 21-3) The Complaint does not allege Maciolek’s state of residence.  
13 However, Plaintiff did serve a copy of the summons and complaint on Maciolek at her  
14 business address in Riverside, California. (Decl. Natasha Riggs ¶ 2, Dkt. No. 17.)

15 The removing defendant, TransGuard, filed a motion to dismiss for failure to  
16 state a claim under Rule 12(b)(6) on January 5, 2018. (Dkt. No. 13.) Plaintiff filed  
17 his motion to remand on January 12, 2018. (Dkt. No. 17.) Defendant Mickelson filed  
18 a motion to dismiss on January 26, 2018. (Dkt. No. 28.) Although TransGuard’s  
19 motion was filed before Plaintiff’s motion to remand, Plaintiff’s motion concerns the  
20 issue of subject matter jurisdiction. Because jurisdiction must “be established as a  
21 threshold matter,” this Court must first resolve the threshold question of subject matter  
22 jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95  
23 (1998).

## 24 II. LEGAL STANDARD

25 Under 28 U.S.C. § 1441(a), an action may be removed by one or more  
26 defendants to the district court where the action is pending if the district court has  
27 original jurisdiction over the action. A district court has “original jurisdiction of all  
28 civil actions where the matter in controversy exceeds the sum or value of \$75,000,

1 exclusive of interests and costs,” and the controversy is between citizens of different  
2 states. 28 U.S.C. § 1332. Section 1332(a)(1) specifically requires complete diversity,  
3 meaning that “the citizenship of each plaintiff is diverse from the citizenship of each  
4 defendant.” *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). Under § 1441(b)(2), an  
5 action may not be removed if any defendant “properly joined and served . . . is a  
6 citizen of the State in which such action is brought.” The party asserting diversity  
7 jurisdiction bears the burden of proof as to the citizenship of the parties. *Lew v. Moss*,  
8 797 F.2d 747, 749 (9th Cir. 1986).

9 “If at any time before final judgment it appears that the district court lacks  
10 subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c). The  
11 removal statute is “strictly construe[d] against removal jurisdiction.” *Gaus v. Miles*,  
12 *Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). “Federal jurisdiction must be rejected if there  
13 is any doubt as to the right of removal in the first instance.” *Id.* The removing  
14 defendant has the burden of proving that removal is proper due to the “strong  
15 presumption” against removal jurisdiction. *Id.*

### 16 **III. DISCUSSION**

17 The parties do not dispute that this litigation places more than \$75,000 in  
18 controversy. Diversity jurisdiction, then, depends on whether complete diversity  
19 exists between Plaintiff and Defendants. Plaintiff is a citizen of California. Both  
20 Mickelson and TransGuard are domiciled in Illinois, but Plaintiff has asserted  
21 evidence, which Defendants do not dispute, that Maciolek resides in California. (*See*  
22 *Riggs Decl.* ¶ 2.) Because both Plaintiff and Maciolek reside in California, complete  
23 diversity does not exist between the Plaintiff and Defendants. As long as Maciolek  
24 remains a defendant in this action, the Court lacks subject matter jurisdiction.

25 Although TransGuard fails to establish that Maciolek resides anywhere other  
26 than California, they argue that Maciolek’s residence is irrelevant. A non-diverse  
27 defendant may be disregarded for purposes of determining diversity jurisdiction if  
28 joinder of the defendant was “fraudulent” or “sham.” *McCabe v. General Foods*

1 *Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). “Fraudulent joinder is a term of art.” *Id.*  
2 The test for whether a defendant is fraudulently joined is whether “the plaintiff [has  
3 failed] to state a cause of action against a resident defendant, and the failure is obvious  
4 according to the settled rules of the state.” *Id.* “A ‘colorable’ claim against a non-  
5 diverse defendant bars removal under the fraudulent joinder doctrine; ‘doubtful  
6 questions’ of law must be determined in state court.” *Charlin v. Allstate Ins. Co.*, 19  
7 F. Supp. 2d 1137, 1140 (C.D. Cal. 1998).

8 The removing party has the heavy burden of proving that there is “no possibility  
9 that the plaintiff will be able to establish a cause of action in State court against the  
10 alleged sham defendant.” *Good v. Prudential Ins. Co. of America*, 5 F. Supp. 2d 804,  
11 807 (N.D. Cal. 1998). While the removing defendant may present facts to prove that  
12 the joinder is fraudulent, the district court “must resolve all disputed questions of fact  
13 in favor of the plaintiff.” *Id.* See also *Gonzalez v. Metropolitan Life Ins. Co.*, No.  
14 CV15-2870-R, 2015 WL 4133512 at \*2 (C.D. Cal. July 7, 2015) (“[A] non-diverse  
15 defendant is deemed a sham defendant if, after all disputed questions of fact and all  
16 ambiguities in the controlling state law are resolved in the plaintiff’s favor, the  
17 plaintiff could not possibly recover against the party whose joinder is questioned.”).

18 Here, Defendants argue that Plaintiff fraudulently joined Maciolek for two  
19 reasons. First, they claim that Maciolek cannot be held individually liable as an  
20 insurance agent unless Plaintiff establishes that she was a dual agent. Second, they  
21 argue that Plaintiff cannot allege sufficient facts to state a UCL claim against  
22 Maciolek.

### 23 **A. Dual Agency**

24 TransGuard principally argues that Plaintiff cannot possibly state a claim  
25 against Maciolek because she cannot be held individually liable. “It is well  
26 established that, unless an agent or employee acts as a dual agent . . . , she cannot be  
27 held individually liable as a defendant unless she acts for her own personal  
28 advantage.” *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 826 (9th Cir. 2003). Under

1 California law, when an insurance agent contracts in the insurer’s name and does not  
2 exceed her authority, “the insurer is liable and not the agent.” *Briano v. Conseco Life*  
3 *Ins. Co.*, 126 F. Supp. 2d 1293, 1297–98 (C.D. Cal 2000) (citations omitted).

4 However, “if a dual agency exists, the law does not foreclose recovery by the  
5 insured.” *Id.* at 1298. Where an insurance agent is a dual agent, the agent owes a duty  
6 to both the insurer and the insured, and “the agent may be liable to the insured for  
7 negligence or other tortious behavior even if committed within the scope of [the  
8 agent’s] role as an agent of the fully disclosed insurer.” *Levine v. Allmerica Life Ins.*  
9 *& Annuity Co.*, 41 F. Supp. 2d 1077, 1079 (C.D. Cal. 1999). An agent can be  
10 considered a dual agent when “she is either an independent broker or has a long-term,  
11 special relationship with the insured.” *Id.* (quoting *Good v. Prudential Ins. Co. of*  
12 *Am.*, 5 F. Supp. 2d 804, 808 (N.D. Cal. 1998))

13 Plaintiff alleged in the Complaint that he was informed and believed that  
14 defendant Marlene Maciolek was an agent and authorized representative of  
15 TransGuard. (Compl. ¶ 4.) TransGuard contends, however, that Maciolek is not a  
16 TransGuard agent, but rather is Plaintiff’s insurance broker who works for another  
17 company. (Am. Notice of Removal ¶ 9; Dkt. No. 21 at 7.) Defendant Mickelson  
18 states that he believes Maciolek is employed by Hub International, an insurance  
19 broker. (Mickelson Decl. ¶ 3.) In other words, Defendants’ own assertions indicate  
20 that Maciolek was not an agent for TransGuard, but rather was an independent broker.  
21 The issue of whether Maciolek acted as a dual agent is a question of fact. *See*  
22 *Gonzalez*, 2015 WL 4133512 at \*2. Viewing all disputed questions of fact in the light  
23 most favorable to Plaintiff, the Court determines for purposes of Plaintiff’s Motion  
24 that Maciolek was an independent broker, not a TransGuard agent. Maciolek  
25 therefore might have been a dual agent, and Plaintiff retains a potential claim against  
26 her.

## 27 **B. California’s UCL**

28 California’s UCL provides a private right of action for unlawful, unfair, or

1 fraudulent business practices. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320  
2 (2011) (citing Cal. Bus. & Prof. Code § 17200). Courts have sustained UCL claims  
3 against insurers that misrepresent the scope and extent of their coverage. *See, e.g., R*  
4 *& B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 333, 336, 360  
5 (2006), *as modified* (July 5, 2006) (reversing dismissal of unfair competition claims  
6 based on the insurer’s representations about the scope of coverage). Additionally, “an  
7 insurance agent may be directly liable for misrepresenting the extent or nature of  
8 coverage, or if the agent holds himself out as having expertise in the area of insurance  
9 sought by the insured.” *Gonzalez*, 2015 WL 4133512 at \*2; *see Fitzpatrick v. Hayes*,  
10 57 Cal. App. 4th 916, 927 (1997).

11 Plaintiff alleges in his Complaint that Maciolek represented to Plaintiff that  
12 “Defendants accepted defense of the claim” and that they “engaged in unfair,  
13 deceptive, untrue, and/or misleading advertising by promising to provide timely  
14 defense coverage in the event of a covered claim when they had no intention of doing  
15 so.” (Compl. ¶¶ 20, 49.) Because there is an allegation that Maciolek misrepresented  
16 the extent or nature of coverage, there is a potential claim that she is liable under the  
17 settled law.

18 The Court need not decide at this stage whether Plaintiff’s UCL claim against  
19 Maciolek, as alleged, would survive a motion to dismiss. Rather, the Court finds that  
20 there is some possibility that Plaintiff will be able to establish a claim against  
21 Maciolek for unfair, deceptive, untrue, and/or misleading advertising. Because  
22 Defendants have not met their heavy burden of demonstrating fraudulent joinder, the  
23 Court cannot exercise subject matter jurisdiction in this case.

#### 24 **IV. CONCLUSION**

25 For the foregoing reasons, the Court hereby **GRANTS** Plaintiff’s Motion for  
26 Remand and directs the Clerk to **REMAND** this action to the Superior Court of  
27 California, County of Los Angeles for lack of subject matter jurisdiction pursuant to  
28 28 U.S.C. § 1447(c). Therefore, the Court will not address Defendant TransGuard’s

1 and Defendant Mickelson's Motions to Dismiss. (Dkt. Nos. 13, 28.)

2  
3 **IT IS SO ORDERED.**

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5 Dated: February 08, 2018



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6 HONORABLE ANDRÉ BIROTTE JR.  
7 UNITED STATES DISTRICT COURT JUDGE

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