

JS-6

1
2
3
4
5
6
7
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 Before the Court is Plaintiff's Motion to Remand, which was filed on January 12,
20 2018. (Dkt. No. 7.) Defendant TransGuard Insurance Company of America, Inc.
21 ("TransGuard") filed an opposition, and Plaintiff filed a reply. (Dkt. Nos. 21, 26.) The
22 Court deems this matter appropriate for decision without oral argument and vacates the
23 hearing scheduled for February 9, 2018. *See* Fed. R. Civ. P. 78; LR 7-15. For the
24 following reasons, the Court **GRANTS** Plaintiff's Motion.

25 **I. BACKGROUND**

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

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. & Profs. 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.**

4
5 Dated: February 08, 2018

A handwritten signature in black ink, appearing to read "André Birotte Jr.", with a long horizontal flourish extending to the right.

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

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28