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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICK M. GREENBERG,  
Plaintiff,

No. C 12-00552 WHA

v.

RIVERSOURCE LIFE INSURANCE  
COMPANY, and HOWARD BELFER, M.D.,  
Defendants.

**ORDER DENYING  
PLAINTIFF’S MOTION  
TO REMAND AND  
VACATING HEARING**

**INTRODUCTION**

In this fraud and breach-of-contract action, plaintiff moves to remand for lack of complete diversity. For the reasons stated below, the motion is **DENIED**.

**STATEMENT**

*Pro se* plaintiff Rick M. Greenberg filed the instant action in Santa Clara County Superior Court. Plaintiff, a California resident, is a policy holder of insurance coverage provided by defendant RiverSource Life Insurance Company, a Minnesota corporation and citizen. Defendant Dr. Howard Belfer is a medical doctor and a resident of California. The complaint alleges that in December 2007, defendant RiverSource fraudulently denied plaintiff his health insurance benefits, and in doing so, breached its contract to provide disability coverage.

In regard to plaintiff’s fraud claim, plaintiff asserts that RiverSource informed him that an independent medical examination was to be performed before benefit payments would be made, and that no such examination was performed. Plaintiff further alleges that RiverSource

1 then fraudulently represented that defendant Dr. Belfer performed the medical examination.  
2 It is unclear whether plaintiff contends that no medical examination took place, or that the  
3 examination was not in fact “independent” because Dr. Belfer was employed by or engaged in  
4 some sort of scheme with RiverSource to deny benefits. Plaintiff’s breach-of-contract claim is  
5 premised on the allegation that RiverSource’s denial of coverage is a breach of a 1996 contract  
6 to provide long-term disability coverage. Plaintiff is seeking damages in the amount of  
7 \$2,106,200.

8 Defendant RiverSource removed this action pursuant to 28 U.S.C. 1441(b). In support  
9 of removal, defendant asserted: (1) jurisdiction here was proper as the amount in controversy  
10 exceeds \$75,000; (2) defendant RiverSource is incorporated and is a citizen of Minnesota; and  
11 (3) defendant Dr. Belfer’s California citizenship should be ignored because he is a fraudulently  
12 joined defendant (Dkt. No. 1 ¶¶ 9–11). There is no dispute that the amount in controversy has  
13 been met, and therefore, this order need only consider the issue of complete diversity as raised  
14 by the parties. This order follows full briefing.

#### 15 ANALYSIS

16 “[A]ny civil action brought in a State court of which the district courts of the United  
17 States have original jurisdiction, may be removed.” 28 U.S.C. 1441. A case may be remanded  
18 to state court for lack of subject-matter jurisdiction or defects in removal procedure. 28 U.S.C.  
19 1447(c). Diversity jurisdiction requires complete diversity of citizenship and an amount in  
20 controversy greater than \$75,000. 28 U.S.C. 1332(a). The party who sought removal in the first  
21 instance bears the burden of proof in regard to the propriety of the removal. *Wilson v. Republic*  
22 *Iron & Steel Co.*, 257 U.S. 92, 97 (1921). “Federal jurisdiction must be rejected if there is any  
23 doubt as to the right of removal in the first instance,” such that courts must resolve all doubts  
24 as to removability in favor of remand. *Gaus v. Miles Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

25 In support of his motion to remand, plaintiff asserts that his complaint qualifies as a  
26 “direct action” against an insurer pursuant to 28 U.S.C. 1332(c) and therefore, defendant  
27 RiverSource is deemed to be a citizen of California. Defendant contends that Section 1332(c)  
28

1 is inapplicable to plaintiff’s complaint, and also, that defendant Dr. Belfer is a fraudulently  
2 joined defendant and should be ignored for diversity purposes.

3 **1. PLAINTIFF’S CLAIM DOES NOT QUALIFY AS A DIRECT ACTION**  
4 **AGAINST AN INSURER UNDER 28 U.S.C. 1332(c).**

5 In support of his motion, plaintiff relies exclusively on 28 U.S.C. 1332(c)(1), which  
6 states in relevant part:

7 For the purposes of [diversity jurisdiction] . . . [I]n any direct  
8 action against the insurer of a policy or contract of liability  
9 insurance, whether incorporated or unincorporated, to which action  
the insured is not joined as a party-defendant, such insurer shall be  
deemed a citizen of . . . every State and foreign state of which the  
insured is a citizen[.]

10 Plaintiff contends that this action is a “direct action” against insurer RiverSource and,  
11 therefore, defendant is deemed to be a citizen of California, plaintiff’s state of residence.

12 Plaintiff’s argument is misguided. “Courts have uniformly defined the term ‘direct action’ as  
13 used in [Section 1332(c)] as those cases in which a party suffering injuries or damage for which  
14 another is legally responsible is entitled to bring suit against the other’s liability insurer without  
15 joining the insured or first obtaining a judgment against him.” *Beckham v. Safeco Ins. Co. of*  
16 *Am.*, 691 F.2d 898, 901–02 (9th Cir. 1982). Plaintiff is not seeking recovery from an insurance  
17 company for liability incurred by a third-party insured. Instead, plaintiff is seeking recovery  
18 from his own insurer for wrongs suffered by plaintiff directly. Therefore, plaintiff is not entitled  
19 to rely on 28 U.S.C. 1332(c)(1). Plaintiff attempts to distinguish his claims from those at issue  
20 in the direct-action cases cited by defendant. He asserts that those cases all involve liability  
21 insurance, whereas the issue here is the recovery of disability insurance (Reply Br. 2).

22 Unfortunately, plaintiff’s assertion is an admission that his claim is not a “case[] in which a party  
23 suffering injuries or damage for which another is legally responsible is entitled to bring suit  
24 against the other’s liability insurer”, and therefore, does not qualify as a “direct action” as  
25 defined by our court of appeals. *Ibid.*

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**2. DR. BELFER IS A FRAUDULENTLY JOINED DEFENDANT.**

Defendant RiverSource asserts that Dr. Belfer is a fraudulently joined defendant, and should be ignored for the purposes of determining whether complete diversity exists between the parties.

Citizenship of fraudulently joined parties must be ignored in analyzing diversity. If a plaintiff fails to state claims against a resident defendant, and the failure is obvious according to the settled rules of the state, then joinder of the resident defendant is fraudulent. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).

Plaintiff’s motion and reply both rest on the theory that RiverSource standing on its own destroys diversity. Plaintiff has not argued the fraudulent joinder issue as raised by defendant. In light of plaintiff’s *pro se* status, this order will read plaintiff’s reply brief as if it addressed defendant’s fraudulent joinder argument.

**A. Plaintiff Has Not Asserted a Breach-of-Contract Claim Against Dr. Belfer.**

Under California law, a breach-of-contract claim requires “the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages.” *First Commercial Mortgage Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001).

Fatal to plaintiff’s complaint is the lack of an assertion that a contract existed between plaintiff and Dr. Belfer. The only contract referred to is one for “long term disability coverage” which can only exist between RiverSource and plaintiff (Dkt. No. 2, Exh. A, Section 3 at 5)

**B. Plaintiff Has Not Asserted a Fraud Claim Against Dr. Belfer.**

“It is essential that the facts and circumstances which constitute the fraud should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called on to answer, and to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud.” *Scafidi v. W. Loan & Bldg. Co.*, 72 Cal. App. 2d 550, 553 (1946) (internal citation omitted).

The only reference to Dr. Belfer in plaintiff’s complaint is an allegation that RiverSource denied disability coverage following an independent medical examination performed by Dr. Belfer (Dkt. No. 2, Exh. A, Section 3 at 3–4). The complaint does not allege that Dr. Belfer

1 committed fraud, or aided RiverSource in its alleged fraud. It is unclear what role, if any,  
2 Dr. Belfer is accused of playing in the fraud.


3 Read in a light most favorable to plaintiff, this order finds that the complaint is devoid  
4 of any factual allegations to support a claim against Dr. Belfer. Therefore, Dr. Belfer is a  
5 fraudulently joined defendant and must be ignored for purposes of determining diversity.  
6 Thus, this order finds that complete diversity exists between Minnesota defendant RiverSource  
7 and plaintiff, a California resident.

8 **CONCLUSION**

9 For the foregoing reasons, plaintiff's motion to remand is **DENIED**. The hearing  
10 scheduled for April 12, 2012, is **VACATED**.

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12 **IT IS SO ORDERED.**

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14 Dated: April 5, 2012.

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17 WILLIAM ALSUP  
18 UNITED STATES DISTRICT JUDGE  
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