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United States District Court
For the Northern District of California

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

MIGUEL A. PALMA,

Plaintiff,

v.

PRUDENTIAL INSURANCE COMPANY,
COMMISSIONER OF THE CALIFORNIA
DEPARTMENT OF INSURANCE, and DOES 1-
50,

Defendants.

No. 11-00957 CW

ORDER GRANTING
PLAINTIFF'S MOTION
FOR REMAND AND
DENYING PLAINTIFF'S
REQUEST FOR
ATTORNEYS' FEES

Plaintiff Miguel A. Palma moves to remand this removed action to state court and requests attorneys' fees and costs. Defendant Prudential Insurance Company opposes the motion. Having considered all of the papers filed by the parties, the Court grants Plaintiff's motion for remand and denies Plaintiff's request for attorneys' fees and costs.

BACKGROUND

Plaintiff filed this case in state court alleging that Prudential wrongfully denied benefits owing to him under his long

1 term disability insurance policy, when he became disabled from his
2 occupation as a certified public accountant. Plaintiff also
3 alleges that Prudential violated California Insurance Code
4 § 790.03(h)(1)¹ by knowingly misrepresenting the correct definition
5 of "total disability" to California claimants, including Plaintiff.
6

7 Plaintiff asserts claims against Prudential for breach of
8 contract, breach of the covenant of good faith and fair dealing,
9 intentional misrepresentation and intentional infliction of
10 emotional distress. In the same complaint, Plaintiff seeks a writ
11 of mandate against the Commissioner of the California Department of
12 Insurance, under California Insurance Code § 10290, which requires
13 the Commissioner to review and approve all disability insurance
14 policies sold, issued or delivered in California; California
15 Insurance Code § 10291.5, which provides standards for the
16 Commissioner's approval of insurance policies; and California
17 Insurance Code § 12926, which provides that the Commissioner shall
18 require insurers to comply with all provisions of Insurance Code.
19 Plaintiff seeks a mandate compelling the Commissioner (1) to
20 discharge a duty under § 10291.5 to determine whether his policy
21 should be revoked or reformed in accordance with California law and
22 (2) to revoke and or reform the definition of total disability in
23 the policy.

24 Prudential removed this action to federal court on the basis
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26 ¹California Insurance Code § 790.03(h)(1) prohibits insurers
27 from misrepresenting to claimants pertinent facts of insurance
28 policy provisions.

1 of diversity jurisdiction, claiming that there is complete
2 diversity between the parties once the citizenship of the
3 Commissioner is disregarded because he is a sham defendant.
4 Plaintiff moves to remand, arguing that the Commissioner is not a
5 sham defendant, and seeks to recover his attorneys' fees and costs
6 incurred as a result of the removal.

7 LEGAL STANDARD

8 A defendant may remove a civil action filed in state court to
9 federal district court so long as the district court could have
10 exercised original jurisdiction over the matter. 28 U.S.C.
11 § 1441(a). "The 'strong presumption' against removal jurisdiction
12 means that the defendant always has the burden of establishing that
13 removal is proper." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th
14 Cir. 1992). Federal jurisdiction "must be rejected if there is any
15 doubt as to the right of removal in the first instance." Duncan v.
16 Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996) (citations omitted).

17 District courts have original jurisdiction over all civil
18 actions "where the matter in controversy exceeds the sum or value
19 of \$75,000, exclusive of interest and costs, and is between . . .
20 citizens of different States." 28 U.S.C. § 1332(a). When federal
21 subject matter jurisdiction is predicated on diversity of
22 citizenship, complete diversity must exist between the opposing
23 parties. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365,
24 373-74 (1978).

25 A non-diverse party named in a complaint can be disregarded
26 for purposes of determining whether diversity jurisdiction exists
27 if a district court determines that the party's inclusion in the
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1 action is a "sham" or "fraudulent." McCabe v. General Foods Corp.,
2 811 F.2d 1336, 1339 (9th Cir. 1987). "If the plaintiff fails to
3 state a cause of action against a resident defendant, and the
4 failure is obvious according to the settled rules of the state, the
5 joinder of the resident defendant is fraudulent." Id. The
6 defendant need not show that the joinder of the non-diverse party
7 was for the purpose of preventing removal. The defendant need only
8 demonstrate that there is no possibility that the plaintiff will be
9 able to establish a cause of action in state court against the
10 alleged sham defendant. Id.; Ritchey v. Upjohn Drug Co., 139 F.3d
11 1313, 1318 (9th Cir. 1998). However, there is a presumption
12 against finding fraudulent joinder and defendants who assert it
13 have a heavy burden of persuasion. Emrich v. Touche Ross & Co.,
14 846 F.2d 1190, 1195 (9th Cir. 1988).

15 DISCUSSION

16 The parties do not dispute that Plaintiff and Prudential are
17 citizens of different states. Therefore, the issue is whether the
18 Commissioner's presence as a defendant defeats diversity
19 jurisdiction. Prudential argues that, under California law,
20 Plaintiff cannot petition for a writ of mandate against the
21 Commissioner and, even if he can do so, the Commissioner's presence
22 does not defeat diversity.

23 I. Petition for Writ of Mandate Against Commissioner

24 The issuance of a disability policy in California requires
25 approval from the Commissioner. Van Ness v. Blue Cross of
26 California, 87 Cal. App. 4th 364, 368 (2001); see also Cal. Ins.
27 Code § 10290. The Commissioner may give explicit endorsement to a
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1 policy by "written approval" or implicit consent by failing to act
2 within thirty days of receipt of the copy of the policy that must
3 be sent to the Commissioner by the insurer. Id. The Commissioner
4 may also, with good cause, revoke approval for any policy that does
5 not comply with the California Insurance Code. 10 Cal. Code Regs.
6 § 2196.4(a).

7 Section 10291.5(b)(1) of the California Insurance Code
8 provides that the Commissioner:

9 shall not approve any disability policy for insurance
10 . . . if he finds that it contains any provision . . .
11 which is unintelligible, uncertain, ambiguous, or
12 abstruse, or likely to mislead a person to whom the
13 policy is offered, delivered or issued.

14 The purpose of § 10291.5(b) is to prevent fraud and unfair
15 trade practices and to insure that the language of all insurance
16 policies can be readily understood and interpreted. Cal. Ins. Code
17 § 10291.5(a). Under § 12921.5(a), the Commissioner has an
18 obligation to fulfill the duties imposed by the Insurance Code.
19 Peterson v. American Life & Health Ins. Co., 48 F.3d 404, 410 (9th
20 Cir. 1995).

21 The Code also provides that "the commissioner shall require
22 from every insurer a full compliance with all the provisions of the
23 code." Cal. Ins. Code § 12926. The Commissioner's actions are
24 subject to judicial review. Cal. Ins. Code §§ 12940; 10291.5(h).

25 Under California law, a writ of mandate may be issued by a
26 court to any inferior tribunal . . . to compel the performance of
27 an act which the law specially enjoins, as a duty resulting from an
28 office, trust or station." Cal. Civ. Proc. Code § 1085(a); see
also Cal. Civ. Pro. Code § 1094.5 (providing procedures for

1 mandamus actions). Section 1085(a) permits judicial review of
2 ministerial duties as well as quasi-legislative acts of public
3 agencies. Schwartz v. Poizner, 187 Cal. App. 4th 592, 596 (2010).
4 A mandamus court may "compel the performance of a clear, present,
5 and ministerial duty where the petitioner has a beneficial right to
6 performance of that duty." Id. Mandamus may also issue to correct
7 the exercise of quasi-legislative discretionary power, but only if
8 the action taken is so unreasonable and arbitrary that abuse of
9 discretion is shown as a matter of law. Id. (citing Carrancho v.
10 California Air Resources Bd., 111 Cal. App. 4th 1255, 1264-65
11 (2003)).

12 Plaintiff seeks a mandate that the Commissioner exercise
13 discretion to determine if his policy should be reformed or revoked
14 so as to conform to California law or, if the Court finds the
15 Commissioner abused his discretion in approving his policy, to
16 compel the Commissioner to reform it so that it conforms to
17 California law. Pursuant to the above authority, this relief is
18 properly sought in a mandamus action. Prudential, however, argues
19 that Plaintiff cannot obtain the mandamus relief that he seeks.
20 Citing Schwartz, Prudential argues that the Commissioner's
21 enforcement duties are not ministerial, but are discretionary and,
22 as such, are not subject to mandamus review.

23 In Schwartz, the court explained:

24 A ministerial act is an act that a public officer is
25 required to perform in a prescribed manner in obedience
26 to the mandate of legal authority and without regard to
27 his own judgment or opinion concerning such act's
28 propriety or impropriety, when a given state of facts
exists. . . . Thus, where a statute or ordinance clearly
defines the specific duties or course of conduct that a

1 governing body must take, that course of conduct becomes
2 mandatory and eliminates any element of discretion.
3 187 Cal. App. 4th at 596-97. The court held that mandamus relief
4 was not available under §§ 12921² and 12926 of the Insurance Code,
5 even though they state that the Commissioner shall take enforcement
6 actions against certain insurer misconduct. Id. The court
7 reasoned that the Commissioner's enforcement acts are not
8 ministerial because other provisions of the Insurance Code indicate
9 that the Commissioner has discretion to pursue particular remedies.
10 Id. at 597. Prudential argues that the insurance statutes relied
11 upon by Plaintiff also authorize the Commissioner to take
12 enforcement action as a matter of discretion and, thus, are not
13 subject to mandamus review.

14 In Common Cause of Cal. v. Bd. of Supervisors, 49 Cal. 3d 432,
15 442 (1989), the California Supreme Court explained that, although
16 mandamus will not lie to control an exercise of discretion--that
17 is, to compel an official to exercise discretion in a particular
18 manner--mandamus may issue to compel an official both to exercise
19 discretion, if required by law to do so, and to exercise it under a
20 proper interpretation of the law. In its opinion, the Schwartz
21 court did not address the distinction made in Common Cause.

22 Plaintiff is not requesting that the Court order the Commissioner
23 to exercise discretion in a particular manner. He seeks an order
24 requiring that the Commissioner use the authority granted in
25 California Insurance Code §§ 23926 and 10291.5(b)(1) to exercise

26 ²Section 12921 provides, "The commissioner shall perform all
27 duties imposed upon him or her by the provisions of this code . . .
28 and shall enforce the execution of those provisions . . ."

1 discretion to review the allegedly illegal language in the policy.
2 Under Common Cause this relief could properly be sought by way of a
3 writ of mandate.

4 Furthermore, mandamus lies to correct an abuse of discretion
5 by an official acting in an administrative capacity. Common Cause,
6 49 Cal. 3d at 442; see also Glendale City Employees' Ass'n, Inc. v.
7 City of Glendale, 15 Cal. 3d 328, 344 n.24 (1975). Relying on
8 California law, the Ninth Circuit has held that, if an insured
9 believes that the Commissioner has abused his or her discretion by
10 approving a policy in violation of the Insurance Code or its
11 implementing regulations, the insured may petition for a writ of
12 mandamus requiring the Commissioner to revoke the approval.
13 Peterson, 48 F.3d at 410. Other cases hold the same. See
14 Contreras v. Metropolitan Life Ins. Co., 2007 WL 4219167, *7 (N.D.
15 Cal.) ("in this circuit, if an insured believes that the
16 Commissioner has abused his discretion by approving a policy in
17 violation of the Insurance Code . . . then he may petition for a
18 writ of mandamus requiring the Commissioner to revoke his
19 approval"); Brazina v. Paul Revere Life Ins. Co., 217 F. Supp. 2d
20 1163, 1167 (N.D. Cal. 2003) (same); Van Ness, 87 Cal. App. 4th at
21 371-72 (if insured believes Commissioner has abused discretion in
22 approving a policy in violation of section 10291.5, insured may
23 petition for writ of mandamus requiring Commissioner to revoke
24 approval).

25 Prudential argues that these prior opinions cannot be followed
26 because they did not have the benefit of the reasoning in Schwartz.
27 In Schwartz, the court explained that, to show an abuse of
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1 discretion for purposes of mandamus relief, a claimant must allege
2 that the decision was arbitrary, capricious, unlawful, entirely
3 lacking in evidentiary support, or procedurally unfair. 187 Cal.
4 App. 4th at 615-16. However, Schwartz's statement of the abuse of
5 discretion standard is not new law; for authority it cited
6 Carancho, 111 Cal. App. 4th at 1265, which, in turn, relied on
7 Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ., 32
8 Cal. 3d 779, 786 (1982). Therefore, the prior cases holding that
9 mandamus is a proper remedy for a claim that the Commissioner
10 abused his or her discretion cannot be distinguished based on any
11 new reasoning in Schwartz.

12 Based on the weight of authority on this issue, the Court
13 concludes that Plaintiff properly may bring a claim for mandamus
14 relief based on an abuse of the Commissioner's discretion.

15 II. Bars to Mandamus Relief

16 Prudential argues that, even if Plaintiff may seek mandamus
17 relief, it is barred because: (1) the Commissioner cannot regulate
18 in-force insurance; (2) the claim was not properly exhausted;
19 (3) the claim is barred by the statute of limitations; and (4) the
20 Commissioner has been misjoined under Federal Rule of Civil
21 Procedure 20.

22 A. Regulation of In-Force Insurance Policy

23 Prudential argues that a writ of mandate may not be used to
24 reform or revoke an in-force insurance policy. However, Van Ness,
25 87 Cal. App. 4th at 371-72, cited by Prudential, stated that "if an
26 insured believes the commissioner has abused his or her discretion
27 in approving a policy in violation of section 10291.5, the insured
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1 may petition for a writ of mandamus requiring the commission to
2 revoke the approval." Furthermore, the insurance regulations
3 specifically provide that the Commissioner may revoke a policy if
4 it does not comply with the provisions of the Insurance Code. 10
5 Cal. Code Regs. § 2196.4(a). Prudential's argument that the
6 Commissioner may not revoke an in-force policy, therefore, is not
7 correct as a matter of settled California law.

8 B. Exhaustion of Administrative Remedies

9 Prudential argues that Plaintiff's claim for mandamus is
10 barred because he has failed to exhaust available administrative
11 remedies. Exhaustion of administrative remedies is a prerequisite
12 for state court jurisdiction and, thus, the failure to exhaust may
13 be considered for purposes of determining fraudulent joinder.
14 Brazina, 271 F. Supp. 2d at 1171. Exhaustion of administrative
15 remedies does not apply, however, if an administrative remedy is
16 unavailable or inadequate. Id. (citing Tiernan v. Trustees of Cal.
17 State Univ. & Colls., 33 Cal. 3d 211, 217 (1982)).

18 Brazina held that the defendant had not established that there
19 was any administrative appeal process available to challenge the
20 Commissioner's approval of an insurance policy, notwithstanding the
21 public complaint process in § 12921.3 of the Insurance Code. Id.
22 at 1171; see also Blake v. Unumprovident Corp., 2007 WL 4168235, *3
23 (N.D. Cal) (ability of an insured to complain under § 12921.3 is
24 not an administrative appeal); Contreras, 2007 WL 4219167, at *6
25 (same).

26 Prudential argues that the Brazina court was incorrect because
27 it did not address all of the statutory avenues for administrative
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1 review. However, Brazina specifically addressed and rejected
2 Prudential's argument that §§ 12921.3 and 12921.4, which provide a
3 "process for the public to complain about the conduct of insurers,"
4 are a means of administrative appeal. 271 F. Supp. 2d at 1169.
5 Furthermore, Contreras rejected Prudential's argument that
6 Insurance Code §§ 790.04, 790.05, and 790.06 provide a means for an
7 administrative appeal. 2007 WL 4219168, at *6. Likewise,
8 Prudential fails to show how three additional statutes it cites
9 provide an administrative process for an insured who contests the
10 Commissioner's approval of an insurance policy.

11 Accordingly, Prudential fails to establish that there is an
12 administrative process that Plaintiff could have utilized before
13 proceeding with his mandamus action. Plaintiff, therefore, has not
14 failed, under settled California law, to exhaust administrative
15 remedies.

16 C. Statute of Limitations

17 The parties agree that, because the Insurance Code provides no
18 specific statute of limitations for judicial review of an action
19 taken by the Commissioner, see Cal. Ins. Code § 10291.5(h), the
20 appropriate statute of limitations is the three-year limitation
21 provided in California Code of Civil Procedure § 338(a) for "an
22 action upon a liability created by a statute." The parties
23 disagree, however, when the three-year period accrues. Prudential
24 argues that it begins to run at the time a claimant first obtains
25 the policy; Plaintiff argues that it begins to run upon the denial
26 of benefits. The outcome of this dispute is significant because
27 Plaintiff filed his complaint more than ten years after the

1 issuance of the policy, but within two years from the denial of
2 benefits.

3 No California decisions directly address this issue. However,
4 at least five Northern District courts have addressed the statute
5 of limitations for this precise application of the writ of
6 mandamus. Only one district court found that the statute of
7 limitations began to run on the date of the Commissioner's approval
8 of a policy. See Borsuk v. Massachusetts Mut. Life Ins. Co., No.
9 C-03-630 VRW (N.D. Cal. 2003) (Docket No. 26). The remaining four
10 courts were unwilling to hold that the statutory clock began to run
11 on the date of the Commissioner's approval because the plaintiff
12 may not have sufficient notice of his injury until the insurance
13 company rejects his claim. See Brazina, 271 F. Supp. 2d at 1170-
14 71; Sullivan v. Unum Life Ins. Co. of Amer., 2004 WL 828561, *4
15 (N.D. Cal.); Glick v. UnumProvident Corp., No. C 03-4025 WHA (N.D.
16 Cal. 2004) (Docket No. 17); Maiolino v. UnumProvident Corp., 2004
17 WL 941235, *5 (N.D. Cal.).

18 In Borsuk, the court found that the statute of limitations had
19 expired, summarily concluding that "Borsuk was on notice . . . no
20 later than . . . the date he agreed to the terms of the policy" and
21 that the statute began to run either on the date of that agreement
22 or on the date the Commissioner approved the policy. Borsuk at 18.
23 Because the Borsuk court did not provide the basis for its decision
24 on this matter, the Court finds that decision unpersuasive.
25 Furthermore, subsequent to Borsuk, the same judge decided the same
26 issue in Sukin v. State Farm Mut. Ins. Co., No. C-07-2829 VRW (N.D.
27 Cal. 2007) (Docket No. 27), holding that the plaintiff did not have
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1 standing to sue until his claim for insurance benefits had been
2 denied and, therefore, the statute did not begin to run until then.

3 In Brazina, the court did not address the triggering of the
4 statute of limitations directly, but rejected the defendants'
5 argument that the writ of mandamus was unavailable at any time
6 after the effective date of the Commissioner's decision. Despite
7 the fact that the plaintiff filed suit fourteen years after the
8 issuance of the policy, the Brazina court stated that "it seems
9 likely that a California court would interpret the language [of
10 section 10291.5(h)] to allow this action to proceed." Brazina, 271
11 F. Supp. 2d at 1171.

12 Sullivan, Maiolino, and Glick directly addressed the statute
13 of limitations and, finding the issue of when the statute begins to
14 run to be uncertain, construed the ambiguity in favor of granting
15 remand because a cause of action had been stated. In Sullivan, the
16 court concluded, "It seems unfair to hold categorically that
17 Plaintiff had notice of the way defendants would administer the
18 policy before Unum denied him benefits" and decided that remand was
19 appropriate because the complaint had been filed within three years
20 of the denial of benefits. 2004 WL 828561 at *4. Maiolino and
21 Glick adopted similar reasoning. Maiolino 2004 WL 941235 at *5
22 (granting remand in the absence of well-settled rules of state law
23 on the statute of limitations issue); Glick, at 3-4 (noting that
24 although defendants' contention that statute of limitations had
25 expired might ultimately prevail in state court, they had not met
26 their high burden of establishing absence of viable claim against
27 Commissioner).

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1 This reasoning is bolstered by California cases holding that,
2 where it would be manifestly unjust to deprive a plaintiff of a
3 cause of action before it is aware it has been injured, accrual
4 begins when the plaintiff actually discovers its injury and the
5 cause or could have discovered its injury and the cause through
6 reasonable diligence. Manqini v. Aerojet-General Corp., 230 Cal.
7 App. 3d 1125, 1150 (1991). As noted by the Sullivan court, it is
8 doubtful that insurance policy holders would be aware of the harm
9 posed by the Commissioner's approval of ambiguous terms in their
10 policies before they "had notice of the way [insurers] would
11 administer the policy" to deny them benefits. Sullivan, 2004 WL
12 828561 at *4. Furthermore, it is unreasonable to assume that
13 policy holders would be "put on notice" of the injury caused by the
14 Commissioner's approval of an illegal policy simply by his or her
15 inaction--i.e. failure to disapprove of the policy within thirty
16 days. See Cal. Ins. Code § 10290(b).

17 These observations are not to suggest that Plaintiff will
18 necessarily succeed in persuading a state court to follow his
19 suggested application of the statute of limitations, but support
20 the conclusion that, on the face of the pleading, Plaintiff's claim
21 for a writ of mandate is not barred by settled California law on
22 the statute of limitations.

23 D. Misjoinder

24 Federal Rule of Civil Procedure 20(a)(2) permits the joinder
25 of defendants in one action if: (1) the plaintiffs assert any right
26 to relief arising out of the same transaction, occurrence, or
27 series of transactions or occurrences; and (2) there are common

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1 questions of law or fact. Coughlin v. Rogers, 130 F.3d 1348, 1350
2 (9th Cir. 1997). "Misjoinder of parties is not ground for
3 dismissing an action." Fed. R. Civ. P. 21. However, if the Rule
4 20(a) test for permissive joinder is not satisfied, "a court, in
5 its discretion, may sever the misjoined parties, so long as no
6 substantial right will be prejudiced by the severance." Coughlin
7 at 1350.

8 Under California law, defendants may be joined if there is
9 asserted against them:

10 (a) (1) Any right to relief jointly, severally, or in the
11 alternative, in respect of or arising out of the same
12 transaction, occurrence, or series of transactions or
13 occurrences and if any question of law or fact common to
14 all these persons will arise in the action; or

15 (2) A claim, right or interest adverse to them in the
16 property or controversy which is the subject of the
17 action.

18 (b) It is not necessary that each defendant be interested
19 as to every cause of action or as to all relief prayed
20 for. . . .

21 Cal. Code Civ. Proc. § 379.³

22 Prudential argues that Plaintiff cannot meet the first element
23 of Rule 20(a) because, against Prudential, he seeks money damages
24 based upon breach of contract and torts arising from the alleged
25 improper handling of his disability claim and, against the
26 Commissioner, he seeks a writ of mandate ordering the Commissioner

27 ³The parties both assume Federal Rule of Civil Procedure 20(a)
28 applies. However, in a diversity action, state law may apply. See
29 HVAC Sales, Inc. v. Zurich American Ins. Gp., 2005 WL 2216950, *6
30 n.13 (N.D. Cal.) (applying state law to similar misjoinder issue);
31 Osborn v. Metropolitan Life Ins. Co., 341 F. Supp. 2d 1123, 1127-28
32 (E.D. Cal. 2004) (raising question whether state or federal joinder
33 law applies).

1 to exercise discretion and to rescind approval of his policy.
2 Prudential also argues that the second element of Rule 20(a) is not
3 met because there are no questions of law or fact common to the
4 contract and tort claims against it, and the administrative claims
5 against the Commissioner.

6 In Brazina, the court rejected a similar misjoinder claim,
7 reasoning as follows:

8 Since a policy approved by the Commissioner is presumed
9 valid in compliance with section 10291.5, Peterson, 48
10 F.3d at 410, the outcome of the insurance contract
11 dispute between defendants and Brazina may very well
12 depend on whether the Commissioner will withdraw approval
13 of the policy in question.

14 271 F. Supp. 2d at 1172.

15 Likewise, the Court finds that there is sufficient overlap
16 between the claims against Prudential and the Commissioner for
17 joinder to be proper under Rule 20(a). Under California law, the
18 result would be the same because its joinder rule is broader than
19 the federal rule. See Osborn, 341 F. Supp. 2d at 1128.

20 Therefore, all of Prudential's arguments for barring
21 Plaintiff's mandamus action against the Commissioner fail.

22 III. Commissioner's Effect on Diversity Jurisdiction

23 Prudential argues that, even if the Commissioner is a
24 Defendant, this does not affect diversity because the Commissioner
25 has no citizenship for diversity purposes. This argument is based
26 on two premises. First, Prudential correctly points out that the
27 Commissioner, in his or her official capacity, is not a "citizen of
28 California." See Morongu Band of Mission Indians v. California
State Bd. of Equalization, 858 F.2d 1376, 1382 n.5 (9th Cir. 1988)

1 (state officers have "no citizenship" for purposes of 28 U.S.C. §
2 1332). Second, Prudential contends that the Commissioner, as a
3 non-citizen, should be ignored for the purposes of analyzing
4 diversity jurisdiction.

5 Prudential's argument has no basis in the text of the removal
6 statute or any precedent in this or any other circuit. Although
7 infrequently raised, this argument has been rejected by other
8 courts. Jakoubek v. Fortis Benefits Ins. Co., 301 F. Supp. 2d
9 1045, 1049 (D. Neb. 2003); Batton v. Georgia Gulf, 261 F. Supp. 2d
10 575, 583 (M.D. La. 2003).

11 In Batton, the court rejected an argument identical to that
12 raised by Prudential after examining the diversity statute and
13 concluding, "Nowhere is there any provision allowing diversity
14 jurisdiction where a non-citizen state is a party. Clearly,
15 Congress contemplated the situation of non-citizens and
16 specifically allowed for suits by those non-citizens it thought
17 appropriate." 261 F. Supp. 2d at 582. The court in Jakoubek
18 similarly found the plain language of the statute dispositive,
19 stating:

20 28 U.S.C. § 1332(a)(1) grants federal diversity
21 jurisdiction only when plaintiffs and defendants are
22 citizens of different states. Since the State defendants
23 are not citizens, they and the plaintiff cannot be
24 citizens of different states. If a party is not a
citizen of a state at all, then it is not a citizen of a
different state and it would be inappropriate to allow
that party . . . to be subject to federal jurisdiction
based only on diversity of citizenship.

25 301 F. Supp. 2d at 1049; see also Contreras, 2007 WL 4219167, *4
26 (no diversity because Commissioner is not a citizen). The Court
27 agrees with the reasoning of the Batton and Jakoubek courts and
28

1 concludes that diversity jurisdiction does not exist here because
2 of the presence of the Commissioner, a non-citizen, as a Defendant.
3 This case must be remanded.

4 III. Attorneys' Fees and Costs

5 On granting a motion to remand, the court may order the
6 defendant to pay the plaintiff its "just costs and any actual
7 expenses, including attorney fees, incurred as a result of the
8 removal." 28 U.S.C. § 1447(c). "Absent unusual circumstances,
9 attorney's fees should not be awarded when the removing party has
10 an objectively reasonable basis for removal." Martin v. Franklin
11 Capital Corp., 546 U.S. 132, 136 (2005).

12 Although the Court was not persuaded by Prudential's
13 arguments, it had an objectively reasonable basis for removal.
14 Therefore, the Court declines to award Plaintiff's attorneys' fees
15 and costs under § 1447(c).

16 CONCLUSION

17 For the foregoing reasons, the Court grants Plaintiff's motion
18 for remand and denies his request for attorneys' fees and costs.
19 The Clerk of the Court shall remand the case to the Superior Court
20 for the County of San Francisco and close the file in this Court.

21
22 IT IS SO ORDERED.

23
24 Dated: 5/25/2011


25 CLAUDIA WILKEN
26 United States District Judge
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28