

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARIA ISABEL DELGADO,
Plaintiff,
v.
PRIMERICA LIFE INSURANCE
COMPANY, et al.,
Defendants.

Case No. [17-cv-03744-HSG](#)

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF’S MOTION TO REMAND AND DENYING AS MOOT DEFENDANTS’ MOTIONS TO DISMISS

Re: Dkt. Nos. 11, 13, 17, 22, 27

Pending before the Court is Plaintiff Maria Isabel Delgado’s motion to remand and four motions to dismiss filed by each of the Defendants: Primerica Life Insurance Company and Primerica Financial Services Insurance Marketing, Inc. (collectively, “Primerica”); National Union Fire Insurance Company of Pittsburgh, PA (“National Union”); Wells Fargo & Co. and Wells Fargo Bank, N.A. (collectively, “Wells Fargo”); and American International Group, Inc. (“AIG”). See Dkt. Nos. 11, 13, 17, 22, 27.¹ For the reasons set forth below, Plaintiff’s motion is **GRANTED IN PART** and **DENIED IN PART** and Defendants’ motions are **DENIED AS MOOT**.

I. BACKGROUND

A. Factual Allegations

In 2007, Plaintiff and her husband, Ramiro Alvarez Conejo (“Alvarez”) opened a bank account at a Wells Fargo branch in San Francisco. Dkt. No. 1-1 (“Complaint” or “Compl.”) ¶ 28. During that transaction, without Alvarez’s consent, Wells Fargo² also signed him up for a life

¹ The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. See Civil L.R. 7-1(b).

² It is unclear from the Complaint whether it was Wells Fargo & Co., Wells Fargo Bank, N.A., or another, non-party Wells Fargo entity that set up Alvarez’s life insurance policy.

1 insurance policy, administered by AIG and operated by National Union. See id. ¶¶ 28-29, 33.
2 After becoming aware later that year that they were paying for the AIG/National Union policy,
3 Plaintiff and Alvarez ultimately decided to keep it. See id. ¶ 31. Approximately eight years later,
4 in or around July 2015,³ they met with a Primerica insurance agent,⁴ who issued Alvarez a life
5 insurance policy shortly thereafter. See id. ¶¶ 15, 19.

6 On June 2, 2016, Alvarez died from injuries he sustained while riding a horse. See id. ¶¶
7 11-14. Upon his death, Plaintiff filed a claim with Primerica as the beneficiary of his life
8 insurance policy. Id. ¶ 20. Primerica denied her claim on August 31, 2016. Id. ¶ 22. Plaintiff
9 also filed a claim under the AIG/National Union policy, which AIG denied. Id. ¶ 36.

10 **B. Procedural Posture**

11 On May 26, 2017, Plaintiff filed a complaint in San Francisco Superior Court, naming
12 Primerica, AIG, National Union, and Wells Fargo. See id. ¶¶ 2-8. She alleged causes of action for
13 (1) breach of contractual duty to pay a covered insurance claim, see id. ¶¶ 37-46; (2) insurance bad
14 faith, see id. ¶¶ 47-61; (3) intentional misrepresentation and fraud, see id. ¶¶ 62-78; (4) negligent
15 misrepresentation, see id. ¶¶ 79-92; (5) breach of fiduciary duty, see id. ¶¶ 93-102; and (6) unfair
16 business practices under California’s Unfair Competition Law, see id. ¶¶ 103-08.

17 On June 29, 2017, Primerica removed the matter to this Court. Dkt. No. 1 (“Notice”). On
18 July 20, 2017, Plaintiff filed this motion to remand. Dkt. No. 17 (“Mot.”). Primerica filed its
19 opposition on August 3, 2017, Dkt. No. 21 (“Opp.”), and Plaintiff replied on August 10, 2017,
20 Dkt. No. 31 (“Reply”). Defendants also filed four motions to dismiss between July 6, 2017 and
21 August 4, 2017. See Dkt. Nos. 11, 13, 22, 27.

22 **II. LEGAL STANDARD**

23 A defendant may remove a state court action to federal court on the basis of diversity of
24 citizenship. 28 U.S.C. § 1441(b); see also 28 U.S.C. § 1332. Diversity jurisdiction exists only
25 where there is: (1) complete diversity between the citizenship of the plaintiffs and the defendants;

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³ Plaintiff later claims the events in this paragraph took place in June 2015. See Compl. ¶ 22.

28 ⁴ It is unclear throughout the Complaint whether Plaintiff’s allegations concern Primerica Life Insurance or Primerica Financial Services Marketing.

1 and (2) an amount in controversy greater than \$75,000. 28 U.S.C. § 1332(a). Where either
2 element is lacking, federal courts lack subject matter jurisdiction and must remand the action to
3 state court. See *id.* § 1447(c); see also *ARCO Env'tl. Remediation, L.L.C. v. Dep't of Health &*
4 *Env'tl. Quality of Mont.*, 213 F.3d 1108, 1113 (9th Cir. 2000).

5 On a motion to remand, a federal court must presume that a cause of action lies beyond its
6 subject matter jurisdiction, *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009), and
7 must grant remand “if there is any doubt as to the right of removal in the first instance,” *Gaus v.*
8 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Courts must resolve all ambiguity in favor of
9 remand. *Hunter*, 582 F.3d at 1042.

10 **III. ANALYSIS**

11 There is no diversity of citizenship between Plaintiff and Wells Fargo in this case, a point
12 which Primerica does not refute. Instead, Primerica urges the Court to apply the Eleventh
13 Circuit’s “fraudulent misjoinder” exception to the requirement of complete diversity. See Notice
14 ¶¶ 10, 22-28. Primerica invokes this exception to argue that Wells Fargo should be severed from
15 the case, the end result of which would be the complete diversity necessary for this Court to
16 exercise subject matter jurisdiction.⁵ See Notice ¶¶ 9-10. For the reasons stated below, the Court
17 declines to apply the doctrine of fraudulent misjoinder and finds that remand is proper.

18 **A. There Is Not Complete Diversity of Citizenship Between Plaintiff and Defendants.**

19 The Court lacks subject matter jurisdiction over this case because there is not complete
20 diversity of citizenship between Plaintiff and Defendants. See 28 U.S.C. § 1332(a)(1). Plaintiff is
21 a citizen of California. See Compl. ¶ 2; Notice ¶ 4.⁶ And because Wells Fargo Bank & Co. (like
22 its subsidiary, Wells Fargo Bank, N.A.) is headquartered in California, see Compl. ¶ 8, it is a
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24 ⁵ Primerica also argues that each of the other Defendants should be severed from the case because
25 they were also fraudulently misjoined. See Notice ¶¶ 7-10. For purposes of this Motion, however,
the Court need only address the application of this theory to Wells Fargo.

26 ⁶ Although Plaintiff styles herself as a “resident” of California in the Complaint, Compl. ¶ 2, there
27 appears to be no dispute among the parties that she is a citizen of California. See Notice ¶ 4.
Citizenship, not residency, is the controlling factor in determining diversity of parties. See *Seven*
28 *Resorts, Inc. v. Cantlen*, 57 F.3d 771, 774 (9th Cir. 1995) (“It is black letter law that, for purposes
of diversity, residence and citizenship are not the same thing.”) (citation, internal quotation marks,
and brackets omitted). In any event, any ambiguity must be resolved in favor of remand. *Hunter*,
582 F.3d at 1042.

1 California citizen as well, see 28 U.S.C. § 1332(c)(1) (stating that a corporation is a citizen of the
2 state where it has its “principal place of business”); *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010)
3 (explaining that the principal place of business “should normally be the place where the
4 corporation maintains its headquarters—provided that the headquarters is the actual center of
5 direction, control, and coordination, i.e., the ‘nerve center[.]’”). This Court accordingly lacks
6 subject matter jurisdiction, unless Primerica can establish that some exception to the rules of
7 diversity jurisdiction applies.

8 **B. The Court Declines to Apply the Doctrine of Fraudulent Misjoinder, Which the**
9 **Ninth Circuit Has Not Adopted.**

10 The exception Primerica attempts to invoke is fraudulent misjoinder, which was first
11 articulated by the Eleventh Circuit. See *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360
12 (11th Cir. 1996), overruled on other grounds by *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072
13 (11th Cir. 2000). A fraudulent misjoinder occurs “where a diverse defendant is joined with a
14 nondiverse defendant as to whom there is no joint, several or alternative liability and where the
15 claim against the diverse defendant has no real connection to the claim against the nondiverse
16 defendant.” *Thakor v. Burlington Ins. Co.*, No. C 09-1465 SBA, 2009 WL 1974511, at *3-4 (N.D.
17 Cal. July 8, 2009) (quoting *Tapscott*, 77 F.3d at 1360). *Tapscott* “does not stand for the broad rule
18 that all procedural misjoinder is fraudulent,” however; rather, there must be evidence that the
19 misjoinder is “egregious” and “borders on a sham.” See *id.*

20 Courts have been slow to adopt the rule of *Tapscott*. “Three circuits, including the Ninth,
21 have declined to adopt the doctrine when presented with the opportunity.” *In re: Bard Ivc Filters*
22 *Prods. Liab. Litig.*, No. CV-16-00344-PHX-DGC, 2016 WL 2347430, at *4 (D. Ariz. May 4,
23 2016) (citing *Cal. Dump Truck Owners Ass’n v. Cummins Engine Co., Inc.*, 24 F. App’x 727, 729
24 (9th Cir. 2001)). Moreover, a “decided majority” of district courts within the Ninth Circuit have
25 declined to apply it. See *Garcia v. Allstate Ins. Co.*, No. 2:14-CV-06478-CAS(AGR_x), 2014 WL
26 12611285, at *2 (C.D. Cal. Oct. 3, 2014); see also *Alaniz v. Merck & Co, Inc.*, No. CV 05-2487-
27 JFW (MAN_x), 2005 WL 6124308, at *3 (C.D. Cal. June 3, 2005) (declining to apply the
28 doctrine); *Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127-28 (E.D. Cal. 2004) (same);
Brazina v. Paul Revere Life Ins. Co., 271 F. Supp. 2d 1163, 1172 (N.D. Cal. 2003) (“Even if this

1 court were to extend Tapscott to [the action at bar], there is no evidence that the claims are so
2 unrelated as to constitute ‘egregious’ misjoinder.”).

3 In short, the Court agrees with Garcia’s characterization of the issue: “in the absence of
4 any direction from the Ninth Circuit to apply the fraudulent misjoinder exception, the better course
5 is not to do so.” See 2014 WL 12611285, at *3.

6 **C. The Ninth Circuit Recognizes the Fraudulent Joinder Doctrine, Under Which
Primerica Fails to Meet Its Heavy Burden.**

7 The Ninth Circuit does, however, recognize fraudulent joinder. Under this doctrine, a
8 court may exercise diversity jurisdiction over a case without complete diversity if the removing
9 party can show that the non-diverse party was fraudulently joined. See *Hunter*, 582 F.3d at 1043.
10 A defendant qualifies for the fraudulent joinder exception only if it can show that “the plaintiff
11 fails to state a cause of action against a resident defendant, and the failure is obvious according to
12 the settled rules of the state.” See *Tucker v. Travelers Indem. Co. of Conn.*, No. 17-cv-04613-
13 HSG, 2017 U.S. Dist. LEXIS 164845, at *2 (N.D. Cal. Feb. 7, 2017) (citing *Hunter*, 582 F.3d at
14 1043); see also *Garcia*, 2014 WL 12611285, at *1 (“It is well established in this circuit that an
15 exception to the requirement of complete diversity exists where it appears that a plaintiff has
16 fraudulently joined a ‘sham’ non-diverse defendant.”) (citing treatise). There is a “general
17 presumption against fraudulent joinder,” and defendants who assert the doctrine carry a “heavy
18 burden.” *Tucker*, 2017 U.S. Dist. LEXIS 164845, at *2. Defendants must effectively “show that
19 the individuals joined in the action cannot be liable on any theory.” *Id.* (citing *Ritchey v. Upjohn
20 Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998)).

21 Nowhere in the papers does Primerica even attempt to apply the fraudulent joinder
22 standard. In choosing to focus its argument on fraudulent misjoinder, it has failed to meet the
23 “heavy burden” required to show that the Court can exercise diversity jurisdiction over the parties
24 in this case notwithstanding the lack of complete diversity. Even if Primerica did contend that
25 Wells Fargo was fraudulently joined, however, its argument would fail because Plaintiff has not
26 obviously failed to state a claim against those defendants under settled California law. Plaintiff
27 alleges a number of facts that could conceivably allow it to prevail under California law on its
28 claims of fraud, negligent misrepresentation, and breach of fiduciary duty against Wells Fargo.

1 See, e.g., Compl. ¶¶ 71-72 (alleging that Wells Fargo knowingly and intentionally misrepresented
2 the nature of Alvarez’s life insurance policy with AIG because, despite a Wells Fargo banker’s
3 representation that the policy would pay approximately \$1 million upon death, AIG has refused to
4 pay); id. ¶¶ 88-89 (alleging negligent misrepresentation on the same facts); id. ¶ 96 (alleging
5 breach of fiduciary duty on the same facts).

6 Primerica fails to apply the correct standard, and thus fails to show that Plaintiff
7 fraudulently joined Wells Fargo. Accordingly, remand is proper because this Court lacks subject
8 matter jurisdiction.

9 **D. Attorney’s Fees Are Not Warranted.**

10 Plaintiff seeks to recover attorney’s fees for this motion to remand. See Reply at 11.
11 Under 28 U.S.C. § 1447(c), “[a]n order remanding the case may require payment of just costs and
12 any actual expenses, including attorney’s fees, incurred as a result of the removal.” The decision
13 to award such fees “should turn on the reasonableness of the removal,” and an award is proper
14 “only where the removing party lacked an objectively reasonable basis for seeking removal.”
15 *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

16 The Court cannot conclude that Primerica lacked an objectively reasonable basis for
17 removal. Although the Ninth Circuit has not adopted the doctrine of fraudulent misjoinder,
18 neither has it affirmatively rejected it. Although it did not prevail, Primerica made a reasonable,
19 good-faith argument in support of removal. See *Dent v. Lopez*, No. CV14-00442-LJO-SMS, 2014
20 WL 3838837, at *3 (E.D. Cal. July 30, 2014). Plaintiff’s fee request is therefore denied.

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IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion is **GRANTED** insofar as the case is remanded and **DENIED** as to her request for attorney's fees. Defendants' motions to dismiss are **DENIED AS MOOT**. The Clerk is directed to remand the case forthwith to the San Francisco County Superior Court and close the case.

IT IS SO ORDERED.

Dated: 2/13/2018


HAYWOOD S. GILLIAM, JR.
United States District Judge