UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 22-7344-GW-ASx	Date	January 6, 2023
Title	*FullStory, Inc. v. North American Capacity Insurance Company, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: **IN CHAMBERS - TENTATIVE RULING ON PLAINTIFF'S MOTION TO REMAND AND REQUEST FOR COSTS AND EXPENSES UNDER 28 U.S.C. § 1447(C) [35]**

Attached hereto is the Court's Tentative Ruling on Plaintiff's Motion [35] set for hearing on January 9, 2023 at 8:30 a.m.

Initials of Preparer JG

FullStory, Inc. v. North American Capacity Ins. Co., et al.; Case No. 2:22-cv-07344-GW-(ASx)
Tentative Ruling on Motion to Remand and Request for Costs and Expenses

I. Background

Plaintiff FullStory, Inc. ("Plaintiff" or "FullStory") sued Defendants North American Capacity Insurance Company ("NACIC"), Peleus Insurance Company ("Peleus"), Coalition, Inc. ("Coalition"), and Coalition Insurance Solutions, Inc. ("CIS"), and Does 1 through 5 for claims stemming from an alleged breach of contract related to a failure to defend and indemnify per an insurance policy. *See generally* Complaint ("Compl."), ECF No. 1-1, Ex. A, at p. 4-15 of 172. Plaintiff alleges four causes of action against Defendants: (1) breach of contract, Compl. ¶¶ 27-38; (2) breach of implied covenant of good faith and fair dealing, *id.* ¶¶ 39-49; (3) violations of the Unfair Competition Law, Business and Professions Code § 17200, *id.* ¶¶ 50-53; and (4) punitive damages under Cal. Civ. Code § 3294(a). Essentially, Plaintiff sought indemnity under its Cyber Insurance Policy No. C-4LQK-067610[1] (the "Policy") for an underlying legal settlement, but Defendants denied coverage. Specifically, Plaintiff seeks coverage related to six civil proceedings:

- *Sofoian v. General Nutrition Corp.*, No. 2:20-cv-10586 (C.D. Cal.);
- *Johnson v. Blue Nile, Inc.*, No. 3:20-cv-8183 (C.D. Cal.);
- *Graham v. Noom, Inc.*, No. 3:20-cv-6903 (N.D. Cal.);
- *Saleh v. Hudson's Bay Co.*, No. 2:20-cv-9095 (C.D. Cal.);
- *Holden v. Found Health, Inc.*, No. 2:20-cv-1988 (E.D. Cal.); and
- *Saleh v. Nike, Inc.*, No. 2:20-cv-9581 (C.D. Cal.)

Compl. ¶ 13.

Plaintiff brought this suit against Defendants on September 12, 2022, in the Superior Court of the State of California, Los Angeles County. *See generally* Notice of Removal ("Removal"), ECF No. 1. Defendants NACIC and Peleus removed this action from the Superior Court of Los Angeles County to this Court on the basis of diversity jurisdiction, stating that Defendants Coalition and CIS were fraudulently joined so their citizenship is not applicable to the jurisdictional analysis. *Id.* Plaintiff has now filed a Motion to Remand and Request for Costs and Expenses uunder 28 U.S.C. § 1447(c) ("Motion" or "Mot."). ECF No. 35. Plaintiff asserts that there is a lack of complete diversity because Plaintiff and Coalition are both citizens of Delaware

[1] The Policy was issued for the period of June 24, 2020 to June 24, 2021. *See* Compl., Ex. A. While Plaintiff alleges the Policy was issued by all named Defendants, the Defendants contend that the Policy was issued by CIS *on behalf of* North American Capacity Insurance Company and Peleus. *See generally* Opp.

and that CIS is an at-home defendant here in California thereby preventing proper removal. Defendant filed an Opposition to the Motion ("Opp."), ECF No. 47; and Plaintiff filed a Reply, ECF No. 48.

II. Legal Standard

"Federal courts are courts of limited jurisdiction," so they "possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A defendant may invoke federal removal jurisdiction if the case could have been filed originally in federal court. 28 U.S.C. § 1441. "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (internal citations omitted). If the defendant fails to meet this burden, the case will be remanded to the state court. 28 U.S.C. § 1447.

For removal based on 28 U.S.C. § 1332 to be proper, the law requires that the parties be diverse and the amount in controversy exceeds seventy-five thousand dollars.[2] *See* 28 U.S.C. § 1332(a). The Supreme Court has interpreted the diversity statute to require "complete diversity" such that no defendant is a citizen of the same state as any plaintiff. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005) ("[T]he presence . . . of a single plaintiff from the same [s]tate as a single defendant deprives the district court of original diversity jurisdiction."). "The burden of establishing jurisdiction falls on the party invoking the removal statute, which is strictly construed against removal." *Sullivan v. First Affiliated Sec., Inc.,* 813 F.2d 1368, 1371 (9th Cir. 1987) (internal citations omitted); *see also Corral v. Select Portfolio Servicing, Inc.*, 878 F.3d 770, 773 (9th Cir. 2017). Courts resolve all ambiguities "in favor of remand to state court." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (citing *Gaus v. Miles, Inc*., 980 F.2d 564, 566 (9th Cir. 1992)).

Joinder can be fraudulent in one of two ways. First, there can be "actual fraud in the pleading of jurisdictional facts." *Grancare, LLC v. Thrower*, 889 F.3d 543, 548-49 (9th Cir. 2018). Second, it can be fraudulent "if the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state." *Hunter*, 582 F.3d at 1043 (quoting *Hamilton Materials*, *Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir.

[2] The parties here do not dispute that Plaintiff's case satisfies the amount in controversy requirement. Opp. at 1, n.1. Specifically, because Plaintiff seeks defense costs and indemnification for a settlement of $137,500.00, that requirement is satisfied. *See* ECF No. 1-1, Ex. G at 2.

2007)). Conversely, "if there is any possibility that the state law might impose liability on a resident defendant under the circumstances alleged in the complaint, the federal court cannot find that joinder of the resident defendant was fraudulent, and remand is necessary." *Id*. at 1044. "If [a] plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe v. Gen. Foods Corp*., 811 F.2d 1336, 1339 (9th Cir. 1987). The fraudulent joinder doctrine requires courts to disregard the citizenship of defendants when no viable cause of action has been stated against them, or when evidence presented by the removing party shows that there is no factual basis for the claims alleged against the resident defendant. *See Morris v. Princess Cruises, Inc*., 236 F.3d 1061, 1067 (9th Cir. 2001).

"[T]he party invoking federal court jurisdiction on the basis of fraudulent joinder bears a 'heavy burden' since there is a 'general presumption against fraudulent joinder.'" *Weeping Hollow Ave. Trust v. Spencer*, 831 F.3d 1110, 1113 (9th Cir. 2016) (quoting *Hunter*, 582 F.3d at 1046). Not surprisingly, then, fraudulent joinder must be proven by clear and convincing evidence. *See Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). If there is a possibility that a state court would find that the complaint states a cause of action against a resident defendant, the federal court must find that the joinder was proper and remand the case to the state court. *Hunter*, 582 F.3d at 1046.

Several district courts within the Ninth Circuit have also concluded or suggested that all disputed questions of fact should be resolved in favor of the plaintiff in undertaking a fraudulent joinder analysis. *See, e.g.*, *Warner v. Select Portfolio Servicing*, 193 F. Supp. 3d 1132, 1135 (C.D. Cal. 2016); *Sanchez v. Lane Bryant, Inc.*, 123 F. Supp. 3d 1238, 1241-42 (C.D. Cal. 2015). However, that presupposes the existence of material facts in dispute. Additionally, the court may look beyond a plaintiff's complaint to resolve any factual disputes. *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 174 (2014) (holding that courts may "look behind the pleadings to ensure that parties are not improperly creating or destroying diversity jurisdiction"). Similarly, the Ninth Circuit has upheld rulings where "a defendant presents extraordinarily strong evidence . . . that a plaintiff could not possibly prevail on her claims against the fraudulently joined defendant." *Grancare*, 889 F.3d at 548 (citation omitted). Finally, in determining whether a removing defendant has met its burden, courts may consider not only the plaintiff's complaint (plus matters referenced therein and/or subject to judicial notice) but also additional "summary

judgment type evidence." *Valdez v. Allstate Ins. Co*., 372 F.3d 1115, 1117 (9th Cir. 2004); *Morris*, 236 F.3d at 1068 (citing *Cavallini v. State Farm Mutual Auto Ins. Co.*, 44 F.3d 256, 263 (5th Cir. 1995) ("[F]raudulent joinder claims may be resolved by 'piercing the pleadings' and considering summary judgment-type evidence such as affidavits and deposition testimony.")).

III. Discussion

A. Fraudulent Joinder

1. Background

As noted by the Supreme Court, the diversity jurisdiction statute requires courts in certain contexts to look behind the pleadings to ensure that a plaintiff is not attempting to keep a case out of federal court by fraudulently naming a nondiverse defendant. *See Hood*, 571 U.S. at 174. Therefore, a removing defendant may respond to a plaintiff's motion to remand by producing summary judgment-type evidence such as affidavits and declarations that show that the plaintiff cannot possibly prevail on his claims against the allegedly fraudulently joined defendant. *See GranCare, LLC*, 889 F.3d at 548; *cf. Cavallini*, 44 F.3d at 263.

Plaintiff is a citizen of Delaware. *See* Removal, ¶ 3. NACIC is a citizen of New Hampshire; Peleus is a citizen of Virginia; CIS is a citizen of California; but Defendant Coalition is a citizen of Delaware like Plaintiff. *Id.* Because both Plaintiff and Coalition are citizens of Delaware, Plaintiff argues that complete diversity does not exist. Plaintiff seeks to remand the case to California state court, therefore, because complete diversity fails. *See* Mot. at 3. Further, Plaintiff argues that because CIS is a citizen of California and this suit was brought in California, the case is not removeable per 28 U.S.C. § 1441(b)(2).

2. Contentions of the Parties

Plaintiff seeks to remand the case to California state court because both Plaintiff and Defendant Coalition are Delaware citizens, thereby obviating complete diversity. *See* Mot. at 3. Further, Plaintiff argues that because CIS is a citizen of California and this suit was brought in California, the case is not removeable per 28 U.S.C. § 1441(b)(2).

The basis for Plaintiff's Motion is that all named Defendants are proper defendants in this matter, which obviates diversity jurisdiction. Plaintiff alleges that Coalition and CIS issued the insurance policy at issue, and the "Policy Defendants were obligated to indemnify and defend FullStory." Compl. ¶¶ 5, 6. Plaintiff continues that the language of the Policy frequently references Coalition and CSI, thereby demonstrating that they are parties to that contract.

First, Plaintiff argues that the language of the Policy includes frequent references to Coalition and CIS. Mot. at 6. Specifically, the relevant portions include the signature page, operative wording in the Policy, and frequent use of Defendants' names, marks, and contact information throughout the Policy. *Id.* As to Coalition, Plaintiff references headers and footers used in the Policy and other materials,[3] which include references to "Coalition" and "trademarks of Coalition, Inc." Mot. at 11-13. Thus, Plaintiff contends that the logos, language, and references to Coalition support the conclusion that Coalition is a party to the Policy. Mot. at 15.

Second, Plaintiff points to the fact that Defendant CIS signed the Policy, *see* Compl., Ex. A, at p. 24 of 172, to support that CIS was a party to the Policy. Specifically, Plaintiff argues that the language surrounding the signature line further demonstrates that CIS's signature demonstrates that it is a party to the Policy. *Id.* (stating that the agreement and attached documents "constitute the entire policy between *us*, the entity named in Item 1 of the Declarations, and any insured") (emphasis added). Plaintiff also cites to the header of the Policy, which includes CIS's Georgia license number and address, and the footer of the first two pages of the Policy, which states "Insurance products underwritten by Coalition Insurance Solutions, Inc." along with CIS's California license number. *Id.* at 17-18 of 172. For these reasons, Plaintiff argues that Coalition and CIS are parties to the Policy. Further, Plaintiff states that any ambiguities in the Policy are to be read in favor of the Plaintiff. Mot. at 15-16; *see Gaines v. Sargent Fletcher, Inc. Group Life Ins. Plan*, 329 F. Supp. 2d 1198, 1216 (C.D. Cal. 2004) (stating that "when one party is responsible for the drafting of an instrument, absent evidence indicating the intention of the parties, any ambiguity will be resolved against the drafter"). Thus, any ambiguity as to which Defendants are a party to the Policy should weigh against a finding of fraudulent joinder. Mot. at 16.

In response, Defendants argue that Defendants Coalition and CIS were fraudulently joined because they are not parties to the contract; thus, Plaintiff cannot possibly bring a cause of action against them, and they can be ignored for purposes of diversity jurisdiction. First, Defendants argue that Coalition is the parent company of CIS, is not a signatory to the Policy, and has no

[3] Plaintiff includes a number of screenshot examples of language from Coalition promotional material. It is not clear to this Court if this promotional material, *see* ECF No. 1-1, Ex. A, at p. 17-18 of 172, is incorporated into the Policy or is a separate document. As an example, Plaintiff includes examples of Coalition speaking universally about the cyber risk insurance policies it offers: "Cyber risk, solved. Coalition is the best way for a company to manage cyber risk. We provide comprehensive insurance coverage, free cyber security tools to protect your business, and expert claims response to help you quickly recover from a cyber incident." *See* Mot. at 12; *see also* ECF No. 1-1, Ex. A, at p. 17 of 172.

connection to the Policy or FullStory. Opp. at 6-8. In addition to not signing, Coalition did not produce the Policy, and it has no obligations to perform as an insurer under it. *Id.* at 7. Defendants further state that Coalition received no premium under the Policy. As indicated in the Policy:

Item 7. Insurers and Quota Share Percentage

Insurer	Policy No.	Quota Share % of Loss	Quota Share Limit of Liability	Premium
North American Capacity Insurance Company	CCP1012257-00	51.0%	$2,550,000	$7,994.25
Peleus Insurance Company	CCP1012257-00	49.0%	$2,450,000	$7,680.75

The obligations of each Insurer in this Item 7. of these Declarations are limited to the extent of its Quota Share % of Loss up to its Quota Share Limit of Liability.

See Compl., Ex. A, at p. 22 of 172.

Second, Defendants argue that CIS is also fraudulently joined in this matter because it is not an insurer for the Policy. *See id.* Instead, CIS was, at all times, acting as an agent of the Insurers. *See Lippert v. Bailey*, 241 Cal. App. 2d 376, 382-83 (1966) (stating that agent of insurer generally cannot be held independently liable for acts committed while acting within the scope of its agency). Even though CIS's signature is found on the Policy, this does not necessarily make it a party to the contract. *See Turner Ent. Networks, Inc. v. Spurlock*, No. CV 18-2490-R, 2018 WL 8755497, at *2 (C.D. Cal. June 21, 2018) ("a signatory is not necessarily a party to a contract; a signatory may not be liable for breach of contract if the contract makes a distinction between the liable parties and the signatory."); *see also Smith v. Simmons*, 638 F. Supp. 2d 1180, 1194-95 (E.D. Cal. 2009) (holding that even though an individual defendant signed the agreement, the individual was not liable for breach of contract since the agreement referred only to the plaintiff and the corporation defendant as the parties). When an insurance policy specifically lists the names of the insurers, and the individual Defendants are not included in that list, then the Defendants are clearly distinguishable from the parties to the insurance contract. *See Turner Ent. Network*, 2018 WL 8755497, at *2. Defendants argue that the Policy clearly distinguishes between CIS and the actual insurers of the Policy, thereby signifying that CIS is neither insurer nor party to the contract.

Further, Defendants argue that the Policy acknowledges that CIS provided the Policy on behalf of "Insurers." *See* Compl., Ex. H at 1 ("We represent FullStory . . . in connection with its claim for coverage . . . under the Coalition Cyber Policy . . . that Coalition Insurance Solutions, Inc. issued to FullStory on behalf of the [Insurers]." Because CIS is an agent, Plaintiff must allege

an exception[4] to the rule that an insurer's agent is not liable to the insured for acts within the scope of the agency in order to allege a claim against CIS. Opp. at 19. But Plaintiff has not alleged any such exception and cannot do so. Opp. at 19-22. Specifically, Defendants contend that Plaintiff was informed that CIS was acting as an agent for the Insurers, and Plaintiff failed to allege that CIS made any misrepresentations to FullStory. Opp. at 22. Thus, the Complaint contains no factual allegations to support a viable claim against CIS, and its citizenship must be ignored in the jurisdictional analysis. *Id.*

3. Analysis

In light of the above, the Court would conclude that although Plaintiff's Complaint seemingly asserts that Coalition and CIS are parties to the Policy, *see* Compl. ¶¶ 5, 6, 35, the face of the Policy clearly demonstrates otherwise. *See Safeco Ins. Co. v. Robert S.*, 26 Cal.4th 758, 762 (Cal. 2001) ("Insurance policies are contracts and are therefore subject to the rules of construction governing contracts."); *Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co. of Brooklyn*, 158 Cal. 367, 369 (Cal. 1910) ("[c]ourts will not undertake to relieve parties from the express and plain stipulations into which they have entered"); *see also AIU Ins. Co. v. Super. Ct.*, 51 Cal. 3d 807, 822 (1990) (stating that policy terms in insurance contracts are interpreted by their "clear and explicit" meaning in the context of the policy). The plain language of the Policy supports the fact that Defendants Coalition and CIS are not liable as insurers to Plaintiff. *See generally* Policy, ECF No. 1-1, Ex. A at 20 -53 of 172. The Policy itself states that North American Capacity Insurance Company and Pelesus are the insurers under the Policy. *See* Compl., Ex. A, at p. 22 of 172. Specifically, the Policy states that North American Capacity Insurance Company is responsible for 51.0% of a covered Loss and Pelesus is responsible for 49.0% of a covered Loss. *Id.* Further, the Policy provides that $7,994.25 of Plaintiff's premium is to be paid to North American Capacity Insurance Company, and $7,680.75 of Plaintiff's premium is to be paid to Pelesus. *Id.* Thus, the plain meaning of the Policy clearly and explicitly demonstrates that Defendants Coalition and CIS are not insurers on the Policy, as they are not designated as such in the Policy. Further, Coalition and CIS are not liable for a covered Loss and receive no premium

[4] First, a "dual agency" exception applies when an agent "act[s] on behalf of the insured in some way beyond his or her capacity as an agent for the insurer." *Carter v. Nationwide Ins.*, No. 12-cv-01356-SVW-OP, 2012 WL 447084, at *4 (C.D. Cal. Sept. 25, 2012). Second, a "special duty" exception applies when an agent makes an affirmative representation to an insured regarding the nature, extent or scope of coverage. *Id.* Finally, an agent can be held personally liable for its own intentional misrepresentations or fraud. *Id.*

payment. *Id.*

The Court also addresses Defendants' argument that Defendant Coalition appears nowhere within the Policy. While Defendant CIS appears as a witness signatory in the Policy, it is clear that CIS is not an insurer and, therefore, bears no financial obligation under the Policy. Moreover, CIS' signature on the Policy is as a "Witness Whereof, we have caused this Policy to be signed officially below." *Id.* at p. 24 of 172. Such signature and the use of CIS letterhead does not make CIS an insurer, especially in light of the fact that the Policy specifically names the insurers, as discussed above. *See* Compl., Ex. A, at p. 22 of 172. Thus, as non-insurer Defendants, CIS and Coalition are not parties to the insurance agreement such that they can be liable for the alleged claims of breach of contract or the covenant of good faith and fair dealing. *See Kramer v. Allstate Ins. Co.*, No. cv-11-07079-GAF-FFMx, 2011 WL 13221012, at *3 (C.D. Cal. Oct. 20, 2011) (citing *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1039 (Cal. 1973)).

Given that Coalition and CIS are not liable as insurers to Plaintiff under the explicit terms of the Policy, the Court would conclude that Plaintiff cannot sustain its alleged claims against them. Thus, Coalition and CIS were fraudulently joined, and their citizenship is immaterial to the Court's jurisdictional analysis. Because complete diversity exists between Plaintiff and the remaining Defendants, the Court denies Plaintiff's Motion.

B. Removal by an "At-Home" Defendant

Plaintiff further argues that because Defendant CIS is a California citizen, and therefore at-home, the case cannot be removed to federal court per 28 U.S.C. § 1441(b)(2). Mot. at 3. Given the Court's analysis above concluding that CIS was fraudulently joined, this argument is moot.

C. Whether the Court Should Award Fees

The Court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). When removal is wrong as a matter of law, a court may award attorney fees. *Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858, 864 (9th Cir. 2003).

Plaintiff argues that because of CIS's signature on the Policy, CIS is a party to the contract. Despite "other indicia in the Policy," the Plaintiff's had a basis for alleging claims against CIS. Mot. at 17. Thus, the Removing Defendants' arguments about fraudulent joinder are "wrong as a matter of law." *Id.* Because removal was improper, Plaintiff argues that it is entitled to costs and actual expenses. *Id.* at 17-18. Defendants respond that even if the Court were to find that remand

is proper, attorney fees and costs should be awarded "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005). Defendants argue that there are objectively reasonable bases for seeking removal in this case. First, Defendant Coalition is not a signatory of the insurance contract and Plaintiff points to no specific interaction that would create liability in the context of this Policy coverage dispute. Second, Defendant CIS is not named as an insurer under the Policy, received no payment from Plaintiff for the Policy, and has no obligation to pay any portion of a covered Loss pursuant to the Policy. Opp. at 23. Because CIS was simply acting as an agent for the insurers, they cannot be liable for any of the alleged claims. *Id.* For these reasons, Defendants contend that they had a reasonable belief that removal was proper.

In light of the Court's conclusion above that Defendants Coalition and CIS were fraudulently joined because it is not plausible to assert the alleged claims against them and subsequently that removal was proper, the Court need not assess whether costs and fees are appropriate here.

IV. Conclusion

Based on the foregoing discussion, the Court **DENIES** the motion.