2019 WL 2565669
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United States District Court, E.D. Texas.

John MCADAMS, Plaintiff,
v.
PALOMAR SPECIALTY INSURANCE COMPANY, Wellington Claim Service, Inc., and Nicholas Abdallah, Defendants.

CIVIL ACTION NO. 1:18-CV-633
|
Signed 06/20/2019

Attorneys and Law Firms

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George Howard Arnold, Thompson Coe Cousins & Irons, LLP, Houston, TX, for Defendant Nicholas Abdallah.

MEMORANDUM ORDER ADOPTING REPORT AND RECOMMENDATION

MARCIA A. CRONE, UNITED STATES DISTRICT JUDGE

***1** The court referred this matter to United States Magistrate Judge Keith F. Giblin for consideration and recommended disposition of case-dispositive motions. The magistrate judge issued a report and recommendation on the plaintiff's motion to remand. Judge Giblin recommended that the Court deny the motion to remand. He further recommended dismissal of the adjuster defendants, Wellington Claim Service, Inc. ("Wellington") and Nicholas Abdallah ("Abdallah"), based on the defendant insurer Palomar Specialty Insurance Company's election of liability pursuant to Texas Insurance Code § 542A.006(b).

No party has objected to the magistrate judge's recommendation. After review, the Court finds that Judge Giblin's findings and recommendations should be accepted.

The Court ORDERS that the report and recommendation (#20) is ADOPTED. The Court further ORDERS that the plaintiff's motion to remand (#7) is DENIED.

The plaintiff's claims asserted against defendants Wellington and Abdallah are DISMISSED in their entirety, with prejudice. The Clerk is directed to terminate Wellington and Abdallah as active party defendants at this time. All other causes of action remain pending.

All Citations

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United States District Court,
E.D. Texas, Beaumont Division.

John MCADAMS, Plaintiff,
v.
PALOMAR SPECIALTY INSURANCE CO., Wellington Claim Service, Inc., and Nicholas Abdallah, Defendants.

CIVIL ACTION NO. 1:18-CV-633
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Signed 05/29/2019

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REPORT AND RECOMMENDATION ON MOTION TO REMAND

KEITH F. GIBLIN, UNITED STATES MAGISTRATE JUDGE

***1** Pursuant to 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72, the District Court referred this matter to the undersigned United States Magistrate Judge for pretrial management. Pending before the Court for purposes of this report is the Plaintiff John McAdams' ("Plaintiff" or "McAdams") *Motion to Remand Case to State Court* (doc. #7). After reviewing the motion and all other relevant filings, the Court recommends that the motion to remand be denied. [1]

I. Background

On November 20, 2018, Plaintiff filed suit in the 128th District Court of Orange County, Texas. According to the facts set forth in the plaintiff's Original Petition, McAdams owned property at 6680 Pecamp Road in Orange, Texas. *See Original Petition* (filed with Notice of Removal (doc. #1-1)), at p. 3. The property was insured under a homeowner insurance policy, number PIC-03205-2 ("the Policy"), issued by defendant Palomar Specialty Insurance Company ("Palomar") to Plaintiff. *Id.* The Original Petition states that Plaintiff resides in Orange, Texas; defendant Palomar is a foreign corporation doing business in Texas; defendant Wellington Claim Service Inc. ("Wellington"), is a domestic organization doing business in Texas, and defendant Nicholas Abdallah ("Abdallah") is an individual and citizen of Texas engaged in adjusting insurance claims. *See id.* at p. 2.

McAdams sets forth the following factual basis for his causes of action. The Court summarizes the allegations' herein, but will refer to them as necessary below. On or about August 28, 2017, Mr. McAdams' property sustained significant damage from Hurricane Harvey. *See Original Petition*, at p. 3. Plaintiff contends that wind-driven rain created an opening in the roof of the property, allowing water to penetrate into the property. *Id.* Winds lifted shingles on the roof and extreme rainfall caused water to intrude and migrate into the interior of the attic space and into the ceiling and walls of the house. *Id.*

Following the storm, McAdams filed a claim under the Policy with Palomar. *Id.* Palomar assigned Wellington to investigate and adjust the claim. *Id.* at p. 4. Plaintiff describes the alleged involvement of Wellington in detail, including the September 9, 2017, visit to the property by a Wellington field adjuster. *Id.* McAdams thereafter requested a reinspection which culminated in Mr. Abdallah inspecting the property on November 17, 2017, on behalf of Wellington. *Id.* at pp. 4-5. Plaintiff disputes the accuracy of Abdallah's assessment and describes the alleged errors in his report. *Id.* at p. 5. Wellington accepted Abdallah's report and, on behalf of Palomar, wrote a partial denial and partial acceptance letter to Plaintiff dated January 9, 2018. *Id.* Plaintiff avers that Wellington acknowledged coverage for the claim but determined the covered damage to be below the Policy's deductible. *See id.* Plaintiff also claims that Abdallah found damage to the dining room window and hallway door, but excluded coverage for this damage. *Id.* at pp. 5-6.

Plaintiff generally claims that Palomar wrongly denied coverage for his claim and failed to deny it within the statutorily mandated time. *See id.*

***2** In the Original Petition, McAdams specifically asserts causes of action against all defendants for (1) violations of the Texas Insurance Code Chapters 541 through 542A; (2) violations of the Texas Deceptive Trade Practices-Consumer Practices Act (DTPA), TEX. BUS. & COM. CODE § 17.41 *et seq.*, (3) breach of the duty of good faith and fair dealing, (4) fraud, (5) ambiguity, and (6) waiver/estoppel. *See Original Petition*, at pp. 8-18. McAdams also claims for breach of contract against defendant Palomar only. *Id.* at p. 13.

On December 20, 2018, Palomar filed its Notice of Removal, removing the case to this federal court on the basis of diversity of citizenship. *See Notice of Removal* (doc. #1). Specifically, Palomar contends that removal is proper under 28 U.S.C. § 1332(a)(1) because there is complete diversity of citizenship and Plaintiff "believes his damages exceed $ 200,000.00 but are less than $ 1,000,000.00." *See Notice of Removal*, at p. 6 (quoting Original Petition). In the Notice of Removal, Palomar states that it is domiciled in Oregon with its principal place of business in California. *See id.* at p. 1. Palomar goes on to state that both Wellington and Abdallah are citizens of Texas, but claims they were improperly joined in this action and their citizenship should accordingly be disregarded for purposes of evaluating diversity. *Id.* at pp. 1-2. Palomar specifically argues that its election of liability on behalf of Wellington and Abdallah bars any causes of action against Wellington and Abdallah under Chapter 542A of the Texas Insurance Code. *See id.* at pp. 4-5. Palomar's removal is therefore premised on the contention that the plaintiff cannot assert claims against Wellington and Abdallah and they were, therefore, improperly joined. Based on the purported improper joinder, Palomar contends that there is complete diversity of citizenship between itself and Plaintiff to support federal jurisdiction and removal.

On January 18, 2019, Plaintiff filed his motion to remand (doc. #7). In sum, Mr. McAdams argues that Palomar is incorrect in arguing that its election of liability on behalf of Abdallah and Wellington nullifies their addition to the case for purposes of diversity. *See Motion to Remand*, at p. 6. McAdams argues that Palomar has not met its burden in establishing that these defendants were improperly joined.

Defendant responded to the motion to remand, plaintiff then replied in support of remand, and defendant filed a sur-reply in opposition of remand. *See* doc. #9, 10, 11.[2] The briefs discuss applicable case law and the issue of Palomar's election of liability on behalf of the non-diverse defendants. For the sake of brevity, the Court will not summarize the briefs but will refer to the parties' competing arguments and the citations therein as necessary in the course of the remand analysis, *supra.*

II. Analysis

A. General Jurisdiction, Removal and Remand Procedure

***3** This Court is of limited jurisdiction and may hear a case only when jurisdiction is both authorized by the United States Constitution and confirmed by statute. *Owen Equip. Co. v. Kroger*, 437 U.S. 365, 371 (1978); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *In re Bissonnet Invs. L.L.C.*, 320 F.3d 520, 525 (5th Cir. 2003). 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*, at 377.

Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citing 28 U.S.C. § 1441(a)). Federal courts have subject matter jurisdiction and are authorized to entertain causes of action only where a question of federal law is involved or where there is diversity of citizenship between the parties and the amount in controversy exceeds $ 75,000.00, exclusive of interest and costs. *See* 28 U.S.C. §§ 1331, 1332. In cases where there is no federal question involved, subject matter jurisdiction exists only if there is complete diversity among the parties and the amount in controversy exceeds $ 75,000.00. *See* 28 U.S.C. § 1332; *Halmekangas v. State Farm Fire and Cas. Co.*, 603 F.3d 290, 294 (5th Cir. 2010). Title 28, United States Code, Section 1441(b) permits a defendant to remove an action to federal court based on diversity of citizenship, while Section 1446 sets forth the removal procedure and applicable deadlines for removal. *See* 28 U.S.C. §§ 1441, 1446.

The removing party bears the burden of showing that federal jurisdiction exists and removal was proper. *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002); *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1408 (5th Cir.), *cert. denied*, 516 U.S. 865 (1995); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)(the party asserting federal jurisdiction when it is challenged has the burden of establishing it); *Peoples Nat'l Bank v. Office of Comptroller of Currency of U.S.*, 362 F.3d 333, 336 (5th Cir. 2004) (citing *Pettinelli v. Danzig*, 644 F.2d 1160, 1162 (5th Cir. 1981)). Title 28, United States Code, Section 1447(c) authorizes motions to remand to the state court if the removal was defective. Any ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand. *Settlement Funding, L.L.C. v. Rapid Settlements, Ltd.*, 851 F.3d 530, 536 (5th Cir. 2017)(citing *Manguno*, at 723).

Jurisdiction is fixed at the time of removal. *See Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 456 (5th Cir. 1996). Accordingly, when determining whether jurisdiction is present and removal is proper, the Court is to consider the claims as alleged in the state court petition *as they existed at the time of removal*. *Manguno*, 276 F.3d at 723 (citing *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264 (5th Cir. 1995))(emphasis added).

B. Improper Joinder

To establish the existence of diversity jurisdiction, Palomar must show that Wellington and Abdallah were improperly joined as defendants to this action. *See African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 793 (5th Cir. 2014); *Mumfrey v. CVS Pharmacy, Inc.*, 719 F.3d 392, 401 (5th Cir. 2013). Here, the parties do not appear to dispute that the required amount in controversy exceeds the jurisdictional minimum of $ 75,000.00. [3]

***4** In determining whether a defendant was improperly joined, "the focus of the inquiry must be on the joinder, not the merits of the plaintiff's case." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005); *accord Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 200 (5th Cir. 2016); *McDonal v. Abbott Labs.*, 408 F.3d 177, 183-84 (5th Cir. 2005). The removing party bears the heavy burden of proving that a non-diverse defendant has been fraudulently joined to defeat diversity, either by showing (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court. *Foster v. Deutsche Bank Nat'l Tr. Co.*, 848 F.3d 403, 406 (5th Cir. 2017); *accord Alviar v. Lillard*, 854 F.3d 286, 289 (5th Cir. 2017); *Int'l Energy Ventures Mgmt., L.L.C.*, 818 F.3d at 199; *African Methodist Episcopal Church*, 756 F.3d at 793; *Vantage Drilling*, 741 F.3d at 537. There is no difference between the terms "improper joinder" and "fraudulent joinder" in the context of removal jurisdiction. *See Smallwood*, 385 F.3d at 571 n.1.

As indicated above, a determination of improper joinder must be based on an analysis of the causes of action alleged in the petition at the time of removal. *Lassberg v. Bank of Am., N.A.*, 660 F. App'x 262, 266 (5th Cir. 2016); *Borden v. Allstate Ins. Co.*, 589 F.3d 169, 171 (5th Cir. 2009); *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264 (5th Cir. 1995). The test for improper joinder is "whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *African Methodist Episcopal Church*, at 793 (quoting *Smallwood*, at 572-73). A mere theoretical possibility of recovery in state court will not preclude a finding of improper joinder. *Id.* The federal court's inquiry into the reasonable basis for the plaintiff's state-court recovery is a "Rule 12(b)(6)-type analysis," although the court retains discretion to pierce the pleadings and conduct summary proceedings, including limited jurisdictional discovery. *Id.* Ultimately, "[t]he burden is on the removing party; and the burden of demonstrating improper joinder is a heavy one." *Id.* Any contested issues of facts and any ambiguities of state law must be resolved in favor of remand. *Id.*

When conducting a Rule 12(b)(6)-type analysis, the federal pleading standards must be applied. *Int'l Energy*, at 208. In doing so, the court looks initially at the allegations in the pleadings to determine whether a claim under state law exists against the non-diverse defendant. *Smallwood*, 385 F.3d at 573. Ordinarily, if a plaintiff can survive a Rule 12(b)(6) challenge, there is no improper joinder. *Id.* Under a Rule 12(b)(6)–type analysis, dismissal is appropriate only if the complaint fails to plead "enough facts to state a claim to relief that is plausible on its face." *Young v. Travelers Personal Security Ins. Co.*, No 4:16-

CV-235, 2016 WL 4208566, at *3 (S.D. Tex. Aug. 10, 2016)(quoting *Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) and citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at *3. Quoting *Montoya v. FedEx Ground Package System*, Inc., 614 F.3d 145, 148 (5th Cir. 2010) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "There must be a reasonable possibility of recovery, not merely a theoretical one." *Menendez v. Wal-Mart Stores*, No. 09-40993, 364 F. App'x 62, 69 (5th Cir. Feb. 1, 2010)(quoting *Campbell v. Stone Ins., Inc.*, 509 F.3d 665, 669 (5th Cir. 2007)).

C. Chapter 542A of the Texas Insurance Code and Removal

(1). Election of Legal Responsibility by Insurer Under Chapter 542A

***5** The specific issue for consideration turns on Palomar's election of liability on behalf of the nondiverse Wellington and Abdallah and whether that election made them improperly joined at the time of removal. Palomar's removal is premised on its election of liability. This election, Palomar argues, renders Plaintiff's causes of action against the nondiverse defendants "non-existent," with no "reasonable basis to predict recovery for the allegations asserted against [Wellington and Abdallah]." *See Response* (doc. #9), at p. 4.

Section 542A.006 of the Texas Insurance Code provides an insurer the option to elect to assume legal responsibility for the acts and omissions of an adjuster. The Texas Legislature recently created Chapter 542A, which went into effect on September 1, 2017. The provision at issue here allows carriers to "elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant." TEX. INS. CODE § 542A.006(a). The statute also mandates that the if the insurer makes such an election, no cause of action exists against the agent related to the claim and the agent much be thereafter dismissed with prejudice from any action to which the agent is a party. *See id.* at § 542A.006(b)&(c). Chapter 542A broadly defines "agent" as "an employee, agent, representative, or adjuster who performs any act on behalf of an insurer." TEX. INS. CODE § 542A.001(1).

The newly enacted provision of Chapter 542A "spawns a novel question regarding removal based on diversity of citizenship under 28 U.S.C. §§ 1332(a), 1441(a) and 1446." *Stephens v. Safeco Ins. Co. of Ind.*, No. 4:18-CV-00595, 2019 WL 109395, at *1 (E.D. Tex. Jan. 4, 2019)(Mazzant, J.). "Namely, whether an action instituted in state court against a diverse insurer and a non-diverse adjuster – nonremovable to federal court due to the lack of diversity of citizenship – becomes removable upon, and solely because of, the diverse insurer's election to accept complete liability of the nondiverse adjuster." *Id.*

(2). Removal to Federal Court Predicated on the Election of Responsibility

The viability of removal after a post-filing election of legal responsibility has recently been considered by courts in the Southern and Western Districts of Texas, as well as Judge Mazzant here in the Eastern District in *Stephens*, cited *supra.* The Court will address those cases below. Likely because Section 542A.006 is a recent addition, the Court is unaware of any Fifth Circuit case to date considering this unique issue. *Stephens*, at *5.

Here, there is no disputing that Palomar noticed is election of liability on behalf of its agents, Wellington and Abdallah, before McAdams filed his petition in Orange County. On September 25, 2018, Palomar responded to McAdams' September 10, 2018, demand letter with written correspondence notifying McAdams of Palomar's election of acceptance of "whatever liability an agent might have to [McAdams] for the agent's acts or omissions related to the Claim" under Texas Insurance Code § 542A.006. *See September 25, 2018, Correspondence, Exhibit A to Defendants' Response* (doc. #9-1). [4] Plaintiff filed his Original Petition on November 20, 2018, *subsequent* to this correspondence. *See Original Petition* (doc. #1-1).

***6** This timing of the election of liability and the joinder of the adjusters to suit *post-election* are important because it alleviates the Court's need to weigh the divergent approaches employed by other district courts on this issue when the election is made *post-suit.* In *Electro Grafix*, the defendant insurer provided written notice of its election of liability prior to the adjuster being served, but after suit was filed. *See Electro Grafix, Corp. v. Acadia Ins. Co.*, No. SA-18-CA-589-XR, 2018 WL 3865416, at *3 (W.D. Tex. Aug. 14, 2018). United States District Judge Xavier

Rodriguez concluded that the adjuster was improperly joined given that any claims against the adjuster "will be dismissed under § 542A.006(c)[.]" *Id.* at *4.

Here in the Eastern District, Judge Mazzant agreed with *Electro Grafix* "in so much as it propositions that if a diverse defendant-insurer makes the election before the insured files suit in state court, then a dismissal under Section 542A.006 is tantamount to a finding of improper joinder if a plaintiff-insured attempts to add the non-diverse adjuster to the action." *Stephens*, at *7. "This is because the Texas Insurance Code forecloses on any ability to recover against an adjuster if an insurer makes an election." *Id.* "Therefore, if the election is made pre-suit, an adjuster subsequently joined is joined when state law mandates that there can be no viable claims against him." *Id.*

Most recently, United States District Judge Lee H. Rosenthal provided further guidance on the distinction between pre-suit and post-suit election of liability under Section 542A.006 in terms of removal and remand. *See Vyas v. Atain Spec. Ins. Co.*, No. H-19-960, —— F. Supp. 3d ——, 2019 WL 2119733 (S.D. Tex. May 15, 2019). She explains that "[d]istrict courts in this circuit have disagreed on whether an insurer's § 542A.006 election post-lawsuit allows the insurer to remove based on the agent's improper joinder." *Vyas*, at *3 n. 1 (comparing *River of Life Assembly of God v. Church Mut. Ins. Co.*, No 1:19-CV-49-RP, 2019 WL 1767339, at *3(W.D. Tex. Apr. 22, 2019) ("Church Mutual's election of responsibility ... did not render Harris's joinder improper, because it did not preclude recovery against Harris until months after his joinder."); *Stephens*, at *7 ("[I]f an insurer elects to accept full responsibility of an agent/adjuster after the insured commences action in state court, the insurer must prove that the non-diverse adjuster is improperly joined for reasons independent of the election made under Section 542A.006."); *Massey v. Allstate Vehicle & Prop. Ins. Co.*, No. H-18-1144, 2018 WL 3017431, at *3 (S.D. Tex. June 18, 2018); *Yan Qing Jiang v. Travelers Home & Marine Ins. Co.*, No. 18-CV-758, 2018 WL 6201954, at *2 (W.D. Tex. Nov. 28, 2018), with *Flores v. Allstate Vehicle & Prop. Ins. Co.*, No. 18-CV-742, 2018 WL 5695553, at *5 (W.D. Tex. Oct. 31, 2018) ("[E]ven when a plaintiff asserts viable claims against an insurance agent, an election of liability by the insurer for the agent's acts or omissions is sufficient to show improper joinder on the basis that there is no reasonable basis to predict that the plaintiff might be able to recover against the agent.")).

In *Vyas*, Judge Rosenthal goes on to state that "the parties have not cited, and the court has not found, a case in which, as here, the insurer elected to assume liability before the lawsuit was filed naming the agent as a defendant." *Id.* at *3 (comparing *Electro Grafix, Corp.*, at *3–*4 (the defendant was improperly joined when the insurer elected to accept liability for the agent before the agent was served)). She ultimately determined that the pre-suit election letter meant that the plaintiff had "no possibility of recovery" against the non-diverse defendant when it was sued. *Id.* at *4 (citing *Smallwood*, 385 F.3d at 573). Judge Rosenthal accordingly dismissed the claims against that non-diverse defendant, with prejudice, "as Texas law requires when an insurer has accepted its agent's liability through written notice to the insured." *Id.* Because the remaining defendant insurer was not a Texas citizen and the amount in controversy was met, she therefore concluded that removal was proper. *Id.* The undersigned finds this approach to the pre-suit election clearly on point and persuasive.

***7** In his motion to remand and corresponding briefing, Plaintiff relies heavily on the *Massey* case, cited *supra*. *Massey* is distinguishable because it involved a *post-suit* election under Section 542A.006. *See Vyas*, at *4; *Massey*, at *1. In *Massey*, United States District Judge Gray H. Miller found the case nonremovable when it was commenced and opined it could only become removable by the voluntary act of the plaintiff. *See Vyas*, at *4; *Massey*, at *2-*3. The *Massey* case turned on this voluntary-involuntary rule, under which an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff. *Massey*, at *3-*4; *see also Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 547 (5th Cir. 1967).

This court finds the same rule inapplicable in this case because (1) the election of responsibility here occurred pre-suit, and, therefore, (2) the action was removable when commenced, as explained *infra*. Because the adjusters were improperly joined at the time Plaintiff filed his original petition, the defendant timely removed under 28 U.S.C. § 1446(b), which provides for removal within 30 days after the defendant's receipt of "the *initial pleading* setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons

upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter." 28 U.S.C.A. § 1446 (West)(emphasis added).

Given the circumstances of this case and the timing of Plaintiff's naming Abdallah and Wellington in his initial pleading, it is clear that this suit was indeed removable on its face at the time the plaintiff filed his original petition. The voluntary-involuntary rule does not apply. Palomar's Section 542A.006(b) pre-suit election and acceptance of responsibility for Plaintiff's claims against the adjusters precludes any causes of action against the nondiverse adjuster defendants, thus rendering their joinder improper.

III. Conclusion and Recommendation

Based on the findings and legal reasons stated herein, the undersigned United States Magistrate Judge recommends that the District Court **deny** the plaintiff's *Motion to Remand Case to State Court* (doc. #7). The Court further recommends that all causes of action asserted by the plaintiff against defendants Wellington Claim Service, Inc. and Nicholas Abdallah be **dismissed** in their entirety, with prejudice, pursuant to Palomar's election of legal responsibility for those claims under Texas Insurance Code § 542A.006(b).

IV. Objections

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996)(en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1)(extending the time to file objections from ten to fourteen days).

All Citations

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Footnotes

1 The Fifth Circuit Court of Appeals holds the uniform view that "a motion to remand is a dispositive matter on which a magistrate judge should enter a recommendation to the district court subject to *de novo* review." *Davidson v. Georgia-Pac., L.L.C.*, 819 F.3d 758, 765 (5th Cir. 2016)(joining the "uniform view of the courts of appeals that have considered this question[.]")

2 The Plaintiff argues that Palomar's response (doc. #10) to the motion to remand should not be considered because it was untimely under Local Rule CV-7(e)(setting fourteen (14) day response deadline for all motions except for those seeking summary judgment). *See Plaintiff's Reply*, at p. 1. Given that (1) the response was only four days late; (2) the defendant explained and took responsibility for its error (*see Sur-Reply* (doc. #11)), and (3) there is little prejudice to plaintiff in allowing the response given that he was able to timely file an adequate reply, the Court finds good cause for extending the response deadline here. *See generally Fahim v. Marriott Hotel Svcs. Inc.*, 551 F.3d 344, 348 (5th Cir. 2008)(outlining good cause standard and relevant factors in considering whether to allow a filing after the deadline to do so has expired); *see also Branch Banking & Trust Co. v. Wells*, No. 3:10-CV-2238, 2013 WL 3367266, at *4 (N.D. Tex. July 5, 2013)("any potential prejudice that may result to Defendant by [an amendment to dispositive motion deadline in the scheduling order] can be easily remedied by allowing him the opportunity to file a response to Plaintiff's motion.") The Court therefore finds the response (doc. #9) timely filed for purposes of the record.

3 *See Motion to Remand* (doc. #7), at p. 12: "Plaintiff does not contest that the amount in controversy will exceed $ 75,000.00, but believes that since there is no improper joinder of Defendants Mr. Abdallah and Wellington, there exists no complete diversity of the parties pursuant to 28 U.S.C. § 1332(a)."

4 The undersigned may properly consider the election letter in accordance with the discretion provided in *Smallwood* to "pierce the pleadings and conduct a summary inquiry" in cases where the plaintiff stated a claim but may have misstated or omitted discrete facts. *See Smallwood*, at 573; *Vyas v. Atain Spec. Ins. Co.*, No. H-19-960, —— F. Supp. 3d ——, 2019 WL 2119733, at *3 (S.D. Tex. May 15, 2019).

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