UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

FRED VERNON, II,	§	
	§	
Plaintiff,	§	
	§	
versus	§	CIVIL ACTION NO. 1:21-CV-375
	§	
PALOMAR SPECIALTY INSURANCE COMPANY, WELLINGTON CLAIM SERVICES, INC., ONE CALL CLAIMS, DAVID CARDENAS, and TANYA SPALDING,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending before the court is Plaintiff Fred Vernon, II's ("Vernon"), Motion to Remand (#8). Defendant Palomar Specialty Insurance Company ("Palomar") responded (#9), opposing the motion. Having considered the motion, Palomar's response, the record, and the applicable law, the court is of the opinion that the motion should be denied.

I. Background

On March 19, 2021, Vernon filed his original petition in the 58th Judicial District Court of Jefferson County, Texas, asserting claims against Defendants Wellington Claim Services, Inc. ("Wellington"), One Call Claim ("One Call"), Tanya Spalding ("Spalding"), and David Cardenas ("Cardenas") (collectively, "Adjuster Defendants"), as well as Palomar for violations of Texas Insurance Code § 541.060(a). Vernon also asserted claims against Palomar, individually, for breach of contract, violations of Texas Insurance Code §§ 542.055, 542.056, and 542.058, and breach of the duty of good faith and fair dealing. Vernon is a citizen and resident of the State of Texas. Palomar is an Oregon corporation, with its principal place of business in the State of

California; Wellington is a Texas corporation, with its principal place of business in the State of Texas; One Call is a limited liability company with one member, Kelly Smoot, purportedly a citizen and resident of the State of Arizona; Cardenas is a citizen and resident of the State of Texas; and Spalding is a citizen and resident of the State of Texas.

On July 21, 2021, Palomar removed the case to this court on the basis of diversity of citizenship, alleging that complete diversity exists among the real parties in interest and that the amount in controversy exceeds $75,000.00, exclusive of interest and costs. Palomar asserts that because Wellington, One Call, Cardenas, and Spalding were fraudulently joined as defendants to defeat diversity, they should be dismissed as parties to this action and their citizenship ignored for jurisdictional purposes. On August 20, 2021, Vernon filed a motion to remand the case to state court, contending that Wellington, One Call, Cardenas, and Spalding were properly joined, and, therefore, because complete diversity does not exist among the parties, this court lacks subject matter jurisdiction.

II. Analysis

A. Removal Jurisdiction

"Federal courts are courts of limited jurisdiction." *Home Depot U. S. A., Inc. v. Jackson*, ___ U.S. ___, 139 S. Ct. 1743, 1746 (2019) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)); *accord Gunn v. Minton*, 568 U.S. 251, 256 (2013); *Gonzalez v. Limon*, 926 F.3d 186, 188 (5th Cir. 2019); *Quinn v. Guerrero*, 863 F.3d 353, 359 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 682 (2018); *Hotze v. Burwell*, 784 F.3d 984, 999 (5th Cir. 2015), *cert. denied*, 577 U.S. 1181 (2016). "They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen*, 511 U.S. at 377; *accord*

Gonzalez, 926 F.3d at 188. The court "must presume that a suit lies outside [its] limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Gonzalez*, 926 F.3d at 188 (quoting *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir.), *cert. denied*, 534 U.S. 993 (2001)); *accord Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010); *Settlement Funding, L.L.C. v. Rapid Settlements, Ltd.*, 851 F.3d 530, 537 (5th Cir. 2017). In an action that has been removed to federal court, a district court is required to remand the case to state court if, at any time before final judgment, it determines that it lacks subject matter jurisdiction. *See* 28 U.S.C. § 1447(c); *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638 (2009); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 231-32 (2007); *Atkins v. CB&I, L.L.C.*, 991 F.3d 667, 669 n.1 (5th Cir. 2021); *Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 183 (5th Cir. 2018); *Spear Mktg., Inc. v. BancorpSouth Bank*, 791 F.3d 586, 592 (5th Cir. 2015).

When considering a motion to remand, "[t]he removing party bears the burden of showing that federal jurisdiction exists and that removal was proper." *Barker v. Hercules Offshore Inc.*, 713 F.3d 208, 212 (5th Cir. 2013) (quoting *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002)); *accord Mitchell v. Bailey*, 982 F.3d 937, 940 (5th Cir. 2020); *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 611 (5th Cir. 2018); *see* 13E CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3602.1 (3d ed. 2013). "The removal statute ties the propriety of removal to the original jurisdiction of the federal district courts." *Frank v. Bear Stearns & Co.*, 128 F.3d 919, 922 (5th Cir. 1997); *see* 28 U.S.C. § 1441(a); *Grace Ranch, L.L.C. v. BP Am. Prod. Co.*, 989 F.3d 301, 307 (5th Cir. 2021); *Hoyt v. Lane Constr. Corp.*, 927 F.3d 287, 295 (5th Cir. 2019); *Allen*, 907 F.3d at 183. Because removal

raises significant federalism concerns, the removal statutes are strictly and narrowly construed, with any doubt resolved against removal and in favor of remand. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Valencia v. Allstate Tex. Lloyd's*, 976 F.3d 593, 595 (5th Cir. 2020); *Settlement Funding, L.L.C.*, 851 F.3d at 536; *African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 793 (5th Cir. 2014); *Barker*, 713 F.3d at 212.

B. Diversity Jurisdiction

In removed cases where, as here, there is no suggestion that a federal question is 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; *Home Depot U. S. A., Inc.*, 139 S. Ct. at 1746; *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). Complete diversity requires that no plaintiff be a citizen of the same state as any defendant. *Exxon Mobil Corp.*, 545 U.S. at 552; *Lewis*, 519 U.S. at 68; *Moss v. Princip*, 913 F.3d 508, 514 (5th Cir. 2019); *Vaillancourt v. PNC Bank Nat'l Ass'n*, 771 F.3d 843, 847 (5th Cir. 2014). "In cases removed from state court, diversity of citizenship must exist both at the time of filing in state court and at the time of removal to federal court." *Ashford v. Aeroframe Servs., L.L.C.*, 907 F.3d 385, 386-87 (5th Cir. 2018) (quoting *Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996)); *see Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570-71 (2004); *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 171 (5th Cir. 2009).

C. Improper Joinder

In the case at bar, although there is no dispute that Vernon and Palomar are citizens of different states and that more than $75,000.00 is at issue, complete diversity may still be lacking because Vernon, Wellington, Cardenas, and Spalding are citizens of Texas.[1] Therefore, to establish the existence of diversity jurisdiction, Palomar must show that the Adjuster Defendants were improperly joined[2] as defendants to this action. *See Hicks v. Martinrea Auto. Structures (USA), Inc.*, ___ F.4th ___, No. 20-60926, 2021 WL 4058331, at *2 (5th Cir. 2021); *African Methodist Episcopal Church*, 756 F.3d at 793; *Mumfrey v. CVS Pharmacy, Inc.*, 719 F.3d 392, 401 (5th Cir. 2013); *see also In re 1994 Exxon Chem. Fire*, 558 F.3d 378, 384-85 (5th Cir. 2019). 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." *Hicks*, 2021 WL 4058331, at *2 (quoting *Smallwood*, 385 F.3d at 573); *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

[1] The parties incorrectly assert that One Call is a citizen of Texas. "[T]he citizenship of a[n] LLC is determined by the citizenship of all of its members." *Acadian Diagnostic Lab'ys, L.L.C. v. Quality Toxicology, L.L.C.*, 965 F.3d 404, 408 n.1 (5th Cir. 2020) (quoting *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008)); *MidCap Media Fin., L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 314 (5th Cir. 2019). One Call, a limited liability company, has one member who is a citizen of the State of Arizona. Thus, for jurisdictional purposes, One Call is a citizen of Arizona. Because One Call does not share the same citizenship as Vernon, it does not destroy diversity jurisdiction. Since the improper joinder analysis is substantially the same for One Call as it is for the other Adjuster Defendants, however, the court will analyze whether One Call is improperly joined to this action.

[2] There is no difference between the terms "improper joinder" and "fraudulent joinder" in the context of removal jurisdiction. *See Hoyt*, 927 F.3d at 303; *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 571 n.1 (5th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005).

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 Waste Mgmt., Inc. v. AIG Specialty Ins. Co.*, 974 F.3d 528, 533 (5th Cir. 2020); *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 Co. v. Hsin-Chi Su*, 741 F.3d 535, 537 (5th Cir. 2014).

In the instant case, because Palomar does not claim actual fraud in Vernon's recitation of jurisdictional facts, it must demonstrate that there is no possibility that Vernon could establish a cause of action against Wellington, Cardenas, and Spalding. *See Hicks*, 2021 WL 4058331, at *2; *Foster*, 848 F.3d at 406; *Int'l Energy Ventures Mgmt., L.L.C.*, 818 F.3d at 205; *African Methodist Episcopal Church*, 756 F.3d at 793; *Mumfrey*, 719 F.3d at 401. In other words, the court should find improper joinder if "there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Alviar*, 854 F.3d at 289 (quoting *Smallwood*, 385 F.3d at 573 (rejecting all other phrasings)); *see Hicks*, 2021 WL 4058331, at *2; *Int'l Energy Ventures Mgmt., L.L.C.*, 818 F.3d at 205; *Mumfrey*, 719 F.3d at 401. "Nevertheless, 'a mere theoretical possibility of recovery under local law will not preclude a finding of improper joinder.'" *Gonzales v. Bank of Am.*, 574 F. App'x 441, 443 (5th Cir. 2014) (quoting *Smallwood*, 385 F.3d at 573 n.9); *see Ayala v. Enerco Grp., Inc.*, 569 F. App'x 241, 245 (5th Cir. 2014); *Grant v. Casas*, No. 5:21-CV-05-DAE, 2021 WL 2792431, at *2 (W.D. Tex. Mar. 4, 2021).

The United States Court of Appeals for the Fifth Circuit has held unequivocally that "[a] federal court must apply the federal pleading standard" when determining whether a plaintiff has a reasonable basis for recovery under state law. *Int'l Energy Ventures Mgmt., L.L.C.*, 818 F.3d

at 208; *see Waste Mgmt., Inc.*, 974 F.3d at 533. Furthermore, the Fifth Circuit instructs that, in the absence of a decision to "pierce the pleadings and conduct a summary inquiry," the court *must* conduct a Rule 12(b)(6)-type analysis. *Int'l Energy Ventures Mgmt., L.L.C.*, 818 F.3d at 207-08; *accord Hicks*, 2021 WL 4058331, at *2-3; *Waste Mgmt., Inc.*, 974 F.3d at 533. Specifically, the court must consider whether the plaintiff has pleaded "enough facts to state a claim to relief that is plausible on its face" against the in-state defendant. *Hicks*, 2021 WL 4058331, at *2 (quoting *Int'l Energy Ventures Mgmt., L.L.C.*, 818 F.3d at 208); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Waste Mgmt., Inc.*, 974 F.3d at 533. If the plaintiff's claim does not survive the Rule 12(b)(6) inquiry, the court must dismiss that party without prejudice as being improperly joined to defeat diversity jurisdiction. *Int'l Energy Ventures Mgmt., L.L.C.*, 818 F.3d at 209; *Probasco v. Wal-Mart Stores Tex., L.L.C.*, 766 F. App'x 34, 36 (5th Cir. 2019); *Alviar*, 854 F.3d at 291.

Under Rule 12(b)(6), "the plaintiff's complaint [must] be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *accord Davis v. Tex. Health & Human Servs. Comm'n*, 761 F. App'x 451, 454 (5th Cir. 2019); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 533 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1374 (2017); *In re La. Crawfish Producers*, 772 F.3d 1026, 1029 (5th Cir. 2014). "Where the well-pleaded facts of a complaint do not permit a court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir.

2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Hence, "a complaint's allegations 'must make relief plausible, not merely conceivable, when taken as true.'" *Id*. (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009)); *see Hicks*, 2021 WL 4058331, at *2; *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 263 (5th Cir. 2019) ("Though the complaint need not contain 'detailed factual allegations,' it must contain sufficient factual material to 'allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" (quoting *Iqbal*, 556 U.S. at 678)).

Moreover, claims for violations of the Texas Insurance Code must satisfy the pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure. *Gilmour v. Blue Cross & Blue Shield of Ala.*, No. 4:19-CV-160-SDJ, 2021 WL 1196272, at *9 (E.D. Tex. Mar. 30, 2021); *Univ. Baptist Church Fort Worth v. Lexington Ins. Co.*, No. 4:17-CV-962-A, 2018 WL 2372645, at *3 (N.D. Tex. 2018) (citing *Frith v. Guardian Life Ins. Co. of Am.*, 9 F. Supp. 2d 734, 742 (S.D. Tex. 1998)). Rule 9(b) provides that in order to state a claim for fraud in federal court, the plaintiff must state with particularity the circumstances constituting the fraud. *See* FED. R. CIV. P. 9(b); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007); *Port of Corpus Christi Auth. v. Sherwin Alumina Co., L.L.C. (In re Sherwin Alumina Co., L.L.C.)*, 952 F.3d 229, 235 (5th Cir. 2020); *Mun. Emps.' Ret. Sys. of Mich. v. Pier 1 Imports, Inc.*, 935 F.3d 424, 429 (5th Cir. 2019); *Neiman v. Bulmahn*, 854 F.3d 741, 746 (5th Cir. 2017). Specifically, Rule 9(b) states:

> In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

FED. R. CIV. P. 9(b); *see Tellabs, Inc.*, 551 U.S. at 319; *In re Sherwin Alumina Co., L.L.C.*, 952 F.3d at 235; *Mun. Emps.' Ret. Sys. of Mich.*, 935 F.3d at 429; *IAS Servs. Grp., L.L.C. v. Jim Buckley & Assocs., Inc.*, 900 F.3d 640, 647 (5th Cir. 2018). Therefore, instead of the "short and plain statement of the claim" required by Rule 8(a) of the Federal Rules of Civil Procedure, Rule 9(b) imposes a heightened standard of pleading for averments of fraud. *See* FED. R. CIV. P. 8(a), 9(b); *In re Sherwin Alumina Co., L.L.C.*, 952 F.3d at 235; *Mun. Emps.' Ret. Sys. of Mich.*, 935 F.3d at 429. A party must plead, at the minimum, the "who, what, when, where, and how of the alleged fraud." *In re Sherwin Alumina Co., L.L.C.*, 952 F.3d at 235; *United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365, 371 (5th Cir. 2017).

Here, in his state court petition, Vernon seeks damages against Wellington, One Call, Cardenas, and Spalding for violations of the Texas Insurance Code. An insurance adjuster, like Cardenas and Spalding, may be held liable in his or her individual capacity for deceptive or misleading acts in violation of the Texas Insurance Code. *See Waste Mgmt., Inc.*, 974 F.3d at 533 ("This court and the Texas Supreme Court have both recognized that 'Texas law clearly authorizes [Chapter 541] actions against insurance adjusters in their individual capacities.'" (quoting *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281 (5th Cir. 2007))); *MB2 Dental Sols. LLC v. Zurich Am. Ins. Co.*, No. 3:20-CV-01430-N, 2021 WL 90111, at *2 (N.D. Tex. Jan. 11, 2021). In this instance, the issue presented is whether Vernon has alleged sufficient facts to support a reasonable basis to predict recovery against Wellington, One Call, Cardenas, and Spalding. If Vernon has pleaded even one plausible claim for violation of the Texas Insurance Code, then joinder of the Adjuster Defendants was proper. *See Escuadra v. Geovera Specialty Ins. Co.*, 739 F. Supp. 2d 967, 985 (E.D. Tex. 2010) (stating that if the facts are sufficient in the

plaintiff's petition to render at least one statutory claim plausible then the joinder of the in-state, non-diverse defendant is proper); *see also Home Run House, LLC v. Cincinnati Indem. Co.*, No. 1-20-CV-827-LY, 2020 WL 8340388, at *3 (W.D. Tex. Dec. 4, 2020), *adopted by* 2021 WL 298603 (W.D. Tex. Jan. 8, 2021).

In his state court petition, Vernon alleges that Cardenas and Spalding failed to investigate Vernon's damages properly. As for Wellington, which employed Spalding, and One Call, which employed Cardenas, Vernon alleges that they provided inadequate and improper instruction and training. Specifically, Vernon asserts that the Adjuster Defendants committed the following unfair insurance practices:

> (1) Misrepresented to Vernon that the damage to his property was not covered under his policy, even though the damage was caused by a covered occurrence, in violation of Texas Insurance Code § 541.060(a)(1);
>
> (2) Failed to make an attempt to settle Vernon's claim in a fair manner, although they were aware of their liability to Vernon under his policy, in violation of Texas Insurance Code § 541.060(a)(2)(A);
>
> (3) Failed to offer Vernon adequate compensation without any explanation why full payment was not being made and did not communicate that any future settlements or payments would be forthcoming to pay for the entire losses covered under Vernon's policy, in violation of Texas Insurance Code § 541.060(a)(3);
>
> (4) Failed to affirm or deny coverage of Vernon's claim within a reasonable time, in violation of Texas Insurance Code § 541.060(a)(4); and
>
> (5) Refused to fully compensate Vernon under the terms of his policy even though they failed to conduct a reasonable investigation, in violation of Texas Insurance Code § 541.060(a)(7).

Vernon's factual allegations concerning the purported violations of the Texas Insurance Code are near-verbatim recitals of the statute itself; he does not describe any specific, actionable conduct by the Adjuster Defendants. *See Waste Mgmt., Inc.*, 974 F.3d at 534 ("These threadbare

factual allegations, along with [the plaintiff's] conclusory recitation of the elements of a claim under the Texas Insurance Code, are insufficient to state a plausible claim for relief."); *Bermudez v. Indem. Ins. Co. of N. Am.*, No. 4:20-CV-538, 2020 WL 5544561, at *4 (E.D. Tex. Sept. 16, 2020) (holding that where the plaintiffs asserted "simply boilerplate legal allegations without factual matter supporting them," the plaintiffs did not sufficiently plead their "claims against [the defendant] capable of withstanding scrutiny under Rule 12(b)(6)"); *Helayas Logistics LLC v. Stineman*, No. 4:20-CV-210, 2020 WL 1939187, at *5 (E.D. Tex. Apr. 22, 2020); *see also Centro Cristiano Cosecha Final, Inc. v. Ohio Cas. Ins. Co.*, No. H-10-1846, 2011 WL 240335, at *14 (S.D. Tex. Jan. 20, 2011) (denying remand where petition "for the most part . . . merely tracked the statutory provisions"); *Hayden v. Allstate Tex. Lloyds*, No. H-10-646, 2011 WL 240388, at *8 (S.D. Tex. Jan. 20, 2011) ("If Plaintiff merely names a non-diverse individual as a party and recites the words of the statute without pointing out facts that establish the claim, the paucity of factual allegations leads to the conclusion that the non-diverse individual has been named merely to defeat diversity."). Thus, Vernon has not pleaded sufficient factual matter in his state court petition to support claims against the Adjuster Defendants under a Rule 12(b)(6) analysis.

Moreover, courts have held that Sections 541.060(a)(2)(A), (a)(3), (a)(4), and (a)(7) of the Texas Insurance Code are not applicable to adjusters. *See Lopez v. United Prop. & Cas. Ins. Co.*, 197 F. Supp. 3d 944, 950 (S.D. Tex. 2016) (collecting cases and noting that federal courts have found sections 541.060(a)(2)(A), (a)(3), and (4) to be inapplicable to adjusters); *accord Univ. Baptist Church Fort Worth*, 2018 WL 2372645, at *4-5 (holding that sections 541.060(a)(2)(A), (a)(3), and (a)(7) do not apply to adjusting companies). Furthermore, section 551.060(a)(1)

prohibits "misrepresenting to a claimant a material fact or policy provision relating to coverage at issue." TEX. INS. CODE § 541.060. "The misrepresentation must be about the details of a policy, not the facts giving rise to a claim for coverage." *Messersmith v. Nationwide Mut. Fire Ins. Co.*, 10 F. Supp. 3d 721, 724 (N.D. Tex. 2014); *accord J.P. Columbus Warehousing, Inc. v. United Fire & Cas. Co.*, No. 5:18-CV-100, 2021 WL 799321, at *11 (S.D. Tex. Jan. 13, 2021). Thus, the adjuster would have had to represent that Vernon "'would receive a particular kind of policy that it did not receive' or 'denied coverage against loss under specific circumstances that it previously had represented would be covered.'" *Messersmith*, 10 F. Supp. 3d at 724 (quoting *United States Fire Ins. Co. v. Confederate Air Force*, 16 F.3d 88, 91 (5th Cir. 1994)); *accord Weyerts v. S. Farm Bureau Life Ins. Co.*, No. P:19-CV-19-DC, 2020 WL 6325726, at *4 (W.D. Tex. Sept. 14, 2020).

In his complaint, Vernon made the following factual allegations against the Adjuster Defendants:

> 20. The Insurance Company, without requiring written notice of the claim from [Vernon], assigned, Cardenas and Spalding (jointly referred to herein as "Adjuster") who was improperly trained by Palomar and/or Wellington and/or One Call (Wellington and One Call are jointly referred to herein as "Adjusting Company") as the adjusters to investigate [Vernon's] claim. Cardenas and Spalding, because of inadequate and improper instruction and training, failed to perform an investigation of [Vernon's] that met the minimum standards of performance pursuant to industry standards, [§§ 21.203 and 21.05] of the Texas Administrative Code, applicable law, or otherwise.
>
> 21. Cardenas, who worked for One Call, was the adjuster assigned to the claim who prepared the estimate during the claims handling process. Cardenas inspected the Property on March 4, 2020[,] and completed the estimate on May 7, 2020. The damages on the estimate totaled less than the $4,520.00 deductible and failed to include an amount for overhead and profit.

> 22. Spalding and/or Wellington then sent correspondence to Plaintiff dated May 21, 2020, that stated "I did determine that you have coverage but the amount owed is less than your deductible." Adjusters', Adjusting Companies[',] and/or the Insurance Company's estimate did not allow adequate funds to cover the cost of repairs to all the damage sustained.
>
> 23. Adjuster's inadequate investigation and review of the file was relied upon by the Insurance Company and Adjusting Companies in this matter and resulted in the Claim not being properly paid.
>
> 24. The Insurance Company['s] and Adjusting Companies' personnel failed to thoroughly review and properly oversee the work of their assigned adjusters, ultimately ratifying and approving an improper adjustment and inadequate, unfair settlement of Plaintiff's Claim.

Vernon's allegations center on the adequacy of the Adjuster Defendants' investigation rather than a misrepresentation made by the Adjuster Defendants regarding Vernon's policy.[3] Morever, Vernon has not identified which policy provision the Adjuster Defendants allegedly misrepresented. Instead, Vernon's claims go to the extent of damage rather than the "extent of the policy's coverage." *J.P. Columbus Warehousing, Inc.*, 2021 WL 799321, at *11.

Vernon's allegations are insufficient to support a claim that Wellington, through Spalding, or One Call, through Cardenas, misrepresented the *details* of Vernon's policy, much less, to support such a claim with the specificity required by Rule 9(b) of the Federal Rules of Civil Procedure. "Because [Vernon] failed to clearly identify the requisite 'who, what, when, where,

[3] In his complaint, Vernon claims that the Adjuster Defendants "misrepresented to [Vernon] that the damage to the Property was not covered under the Policy, even though the damage was caused by a covered occurrence." It is apparent that this allegation is based on the adjuster's determination that Vernon's damages did not exceed the Policy's deductible, as set forth in paragraphs 21 and 22 above. Hence, this claim relates to the extent of damages rather than the details of the policy, such as the amount of the deductible. *See Messersmith*, 10 F. Supp. 3d at 724; *Weyerts*, 2020 WL 6325726, at *4. Even if the court were to interpret this statement as supporting a misrepresentation about the details of Vernon's policy, it remains a conclusory statement that fails to provide the particularity required by Rule 9(b). *See Tellabs, Inc.*, 551 U.S. at 319; *In re Sherwin Alumina Co., L.L.C.*, 952 F.3d at 235; *Mun. Emps.' Ret. Sys. of Mich.*, 935 F.3d at 429; *IAS Servs. Grp., L.L.C.*, 900 F.3d at 647. Thus, the above-referenced statement is insufficient to support a cause of action against the Adjuster Defendants.

and how, of any purported violation related to any of the statements it alleges [the Adjusters] made," such allegations fail to state a claim upon which relief can be granted. *See Univ. Baptist Church Fort Worth*, 2018 WL 2372645, at *5. Accordingly, there is no reasonable basis for the court to predict that Vernon might be able to recover against the Adjuster Defendants; thus, joinder is improper. *See Hicks*, 2021 WL 4058331, at *2; *Alviar*, 854 F.3d at 289; *Int'l Energy Ventures Mgmt., L.L.C.*, 818 F.3d at 205; *Mumfrey*, 719 F.3d at 401. Because joinder of the in-state defendants was improper, Wellington, One Call, Spalding, and Cardenas must be dismissed from this suit. Accordingly, diversity of citizenship exists, and remand is not warranted.

III. Conclusion

An evaluation of the relevant facts and controlling law reveals that this court has subject matter jurisdiction over this action. Although no federal question is presented, complete diversity of citizenship exists between the parties, as the in-state defendants were improperly joined, and neither party has challenged that the amount in controversy exceeds $75,000.00. Therefore, this case was properly removed, and remand is not warranted.

Accordingly, Vernon's Motion to Remand (#8) is DENIED. As the court finds that Wellington, One Call, Spalding, and Cardenas were improperly joined to this suit, they are DISMISSED as parties to this action.

SIGNED at Beaumont, Texas, this 20th day of October, 2021.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE