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10 JEFF GUTSCH

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DIVISION OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 JEFF GUTSCH, an individual,

15 Plaintiffs,

16 v.

17 JASON REED, an individual; LIBERTY
18 MUTUAL INSURANCE CORPORATION, a
19 Vermont Corporation; RICARDO LARA, in his
20 capacity as California Insurance Commissioner,
21 and DOES 1-10, inclusive,

22 Defendants.

Case No. 3:19-cv-06415-RS

[Assigned to Hon. Richard Seeborg in
Courtroom 3 – 17th Floor, San Francisco
Division]

**PLAINTIFF JEFF GUTSCH’S MOTION
TO REMAND THE ENTIRE ACTION
TO SONOMA COUNTY SUPERIOR
COURT**

1 **I. Background.**

2 Petitioner Jeff Gutsch's home was destroyed in the 2017 Tubbs fire. His home insurer,
3 Respondent Liberty Mutual Insurance Corporation ("Liberty"), repeatedly violated the California
4 Insurance Code and Fair Claims Settlement Practices Act Regulations in regard to his claim.
5 These actions greatly reduced the benefits Gutsch is justly entitled to under his Liberty
6 homeowners policy.

7 Gutsch submitted consumer complaints to the California Insurance Commissioner and
8 Liberty denied any wrongdoing, triggering two statutory duties for the Insurance Commissioner.
9 First, the Insurance Commissioner was required to decide whether Gutsch's allegations justified
10 setting a penalty hearing against Liberty. Second, the Insurance Commissioner was required to
11 give Gutsch notice of his right to demand a mediation with a mediator trained by the Department
12 of Insurance that is paid for by Liberty and comes with numerous statutory benefits not available
13 in a standard mediation. If Gutsch asked for that mediation, the law requires he gets it. The
14 Insurance Commissioner, however, failed to fulfill these duties.

15 Due to the Insurance Commissioner's failure to allow Gutsch his right to mediation and
16 his failure to consider bringing a penalty hearing, Gutsch alleges two writs of mandamus asking
17 the Sonoma County Superior Court to order the Insurance Commissioner to: (1) give Gutsch
18 notice of his right to mediation, and (2) exercise his discretion as to whether a penalty hearing is
19 justified. Gutsch also filed causes of action against Liberty for its bad faith claim handling. If the
20 Insurance Commissioner had decided to hold a penalty hearing, it could have speedily,
21 adequately, and plainly produced evidence of Liberty's bad faith and stopped Liberty from
22 persisting in bad faith conduct. Similarly, if the Insurance Commissioner had given Gutsch
23 notice of his right to mediation, Gutsch could have adequately, plainly, and speedily gone to a
24 free pre-suit mediation that could have precluded the need for litigation.

25 Liberty removed this matter contending that Gutsch fraudulently joined the Insurance
26 Commissioner to defeat diversity jurisdiction. Under that standard, Liberty has an exceedingly
27 high burden of proving that the allegations of the Complaint, read in Gutsch's favor, obviously
28 fail to state a claim under settled California law. *Morris v. Princess Cruises, Inc.*, 236 F. 3d

1 1061, 1067 (9th Cir. 2001). Gutsch properly alleged that the Insurance Commissioner failed to
2 carry out his obligations, which, moreover, is supported by the factual record. Accordingly,
3 Liberty cannot satisfy its high burden. Nevertheless, Liberty’s Notice of Removal ignores the
4 applicable standard. Instead, Liberty presents a self-servingly narrow view of the law on writ of
5 mandamus, and improperly argues the merits of Gutsch’s claims instead of the sufficiency of the
6 allegations. Because Gutsch’s claims are not obviously contrary to established law, the case
7 should be remanded.

8 **II. Proving Fraudulent Joinder Is an Incredibly High Burden.**

9 “Fraudulent joinder is a term of art, it does not reflect on the integrity of plaintiff or
10 counsel[.]” *AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1003
11 (4th Cir. 1990) (cleaned up.) The Ninth Circuit has a “strong presumption against removal
12 jurisdiction” and a “general presumption against fraudulent joinder.” *Hunter v. Philip Morris*
13 *USA*, 582 F.3d 1039, 1046 (9th Cir. 2009); *Hamilton Materials, Inc. v. Dow Chemical Corp.*,
14 494 F.3d 1203, 1206 (9th Cir. 2007). This has been described as a “heavy burden.” *Grancare,*
15 *LLC v. Thrower by and through Mills*, 889 F.3d 543, 548 (9th Cir. 2018). This strong
16 presumption means “the defendant always has the burden of establishing that removal is proper,
17 and that the court resolves all ambiguity in favor of remand to state court.” *Hunter v. Philip*
18 *Morris USA*, 582 F.3d at 1046; citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992) (per
19 curiam); *Robertson v. GMAC Mortg., LLC*, 640 Fed.Appx. 609, 611 (9th Cir. 2016).

20 The elements of “fraudulent” joinder are (1) “whether the plaintiff *fails* to state a cause of
21 action”; and (2) “whether the *failure* is *obvious* according to the *settled* rules of the state.”
22 *Morris*, 236 F.3d at 1067 (emphasis added). The removing party must be able “to show that the
23 individuals joined in the action cannot be liable on *any theory*.” *Ritchey v. Upjohn Drug Co.*, 139
24 F.3d 1313, 1318 (9th Cir.1998) (emphasis added). Thus, “if there is a *possibility* that a state court
25 would find that the Complaint states a cause of action against any of the resident defendants, the
26 federal court *must* find that the joinder was proper and remand the case to the state court.”
27 *Hunter*, 582 F.3d at 1046 (emphasis added); see also *Brazina v. Paul Revere Life Ins. Co.*, 271
28 F.Supp.2d 1163, 1168 (N.D. Cal. 2003) (explaining that as long as it is “*possible*” that there is

1 “*some basis*” a California court could find the claim valid, the case must be remanded)
 2 (emphasis added); *Graybill-Bundgard v. Standard Ins. Co.*, 793 F.Supp.2d 1117, 1120 (N.D.
 3 Cal. 2011) (remanding because the insured stated a “*plausible*” cause of action against the
 4 Insurance Commissioner) (emphasis added.)

5 **III. The Case Must Be Remanded Because Gutsch’s Claims for Writs of Mandate Are
 6 Not Obviously Contrary to Settled California Law.**

7 When the Court reviews Gutsch’s claim through the demanding rubric of fraudulent
 8 joinder, it is obvious that the case should be remanded, not that it fails to state a claim under
 9 settled California law after all allegations are construed in Gutsch’s favor.

10 **A. The Elements of a Writ of Mandate.**

11 The elements of a writ of mandate are a: (1) a public functionary has failed to perform a
 12 duty in the method proscribed by law (a “ministerial” duty), or, has failed to perform a
 13 discretionary duty whatsoever; (2) the petitioner lacks a plain, speedy, and adequate alternative
 14 remedy; and (3) the petitioner has a clear and beneficial right to performance. *Ridgecrest Charter*
 15 *School v. Sierra Sands Unified School Dist.*, 130 Cal.App.4th 986, 1002 (2005); *People ex rel.*
 16 *Younger v. County of El Dorado*, 5 Cal.3d 480, 491 (1971); *Brazina*, 271 F. Supp.2d at 1168,
 17 citing *Payne v. Superior Court*, 17 Cal.3d 908, 925 (1976).

18 Notably, Liberty’s Notice of Removal incorrectly argues that a writ of mandate cannot lie
 19 for a discretionary duty. This contention is wrong. “While a party may not invoke mandamus to
 20 force a public entity to exercise discretionary powers *in any particular manner*, if the entity
 21 refuses to act, mandate is available to compel the exercise of those discretionary powers *in some*
 22 *way.*” *Ellena v. Department of Ins.*, 230 Cal. App. 4th 198, 205 (2014) (emphasis added.) As
 23 explained below, this incorrect contention, as well as others, doom Liberty’s fraudulent joinder
 24 claim.

25 **B. Gutsch’s Claim for a Writ Mandating the Insurance Commissioner to
 26 Consider Holding a Penalty Hearing Is Valid Because a Writ Lies for
 27 Discretionary Duties.**

28 Gutsch’s Complaint alleges that the Sonoma County Superior Court should order the
 Insurance Commissioner to exercise his duty to review the evidence submitted in connection

1 with Gutsch's consumer complaints and determine whether it justifies holding a penalty hearing
2 against Liberty. Gutsch further alleges that the Commissioner failed to even consider whether to
3 hold a hearing. The Commissioner's duty is set forth in Cal. Ins. Code § 790.05, which
4 prescribes:

5 Whenever the commissioner *shall* have reason to believe that a person has
6 been engaged or is engaging in this State in any unfair method of competition
7 or any unfair or deceptive act or practice defined in Section 790.03, and that a
8 proceeding by the commissioner in respect thereto would be to the interest of
9 the public, he or she *shall* issue and serve upon that person an order to show
10 cause containing a statement of the charges in that respect, a statement of that
11 person's potential liability under Section 790.035, and a notice of a hearing
12 thereon to be held at a time and place fixed therein, which *shall* not be less
13 than 30 days after the service thereof, for the purpose of determining whether
14 the commissioner should issue an order to that person to, pay the penalty
15 imposed by Section 790.035, and to cease and desist those methods, acts, or
16 practices or any of them.

17 (emphasis added.)

18 As to the first element for a writ of mandate, Gutsch's Complaint alleges that the
19 Commissioner failed to exercise his discretion one way or another in response to Gutsch's
20 consumer complaints. Therefore, he seeks a writ mandating the Commissioner to act, *one way or*
21 *the other*. The facts support this allegation because the Insurance Commissioner sat on Gutsch's
22 complaints for several months and feigned an investigation, as he has done for many other
23 insureds, to save his office's time and resources. In its Notice of Removal, Liberty argues the
24 first element of a writ of mandate was not met based on a misstatement of the law, contending
25 that a writ cannot lie for a discretionary duty. As explained above, this argument has no merit.
26 See, e.g., *Ellena.*, 230 Cal.App.4th at 205.

27 Regarding the second and third elements of a writ of mandate claim, Liberty tacitly
28 concedes that it cannot meet the high standard for fraudulent joinder by arguing the *merits*, not
whether Gutsch's Complaint has obviously failed to state any possible basis for a legal claim.
See *Morris*, 236 F.3d at 1067. Regarding the second element, Liberty argues that Gutsch's
lawsuit against Liberty is a "speedy, plain and adequate" alternative to the Commissioner's
review. That may or may not prove true, but the fact that it is even possible this action may not
be is enough reason to remand the case. Moreover, the general view in this District (and

1 experience of Gutsch’s counsel) is that a civil lawsuit against an insurer for misconduct is not a
2 “speedy” alternative to the Insurance Commissioner taking action. *Brazina*, 271 F. Supp. 2d at
3 1169. This lawsuit is also not an “adequate” alternative because Gutsch cannot bring causes of
4 action for violations of the Insurance Code or regulations, nor can he request that the Court
5 impose statutory penalties—only the Insurance Commissioner can do that. *Moradi-Shalal v.*
6 *Fireman's Fund Ins. Companies*, 46 Cal. 3d 287 (1988). This lawsuit is also not a “plain” or
7 “adequate” alternative to a writ because Gutsch must prove additional elements like causation
8 and damages, whereas the Insurance Commissioner focuses solely on whether a statutory or
9 regulatory violation exists, without regard to causation or damages.

10 Finally, Liberty also argues the merits in regard to the third element, which is that Gutsch
11 must have a beneficial interest in the Insurance Commissioner acting. *Ridgecrest Charter School*,
12 130 Cal.App.4th at 1002. Liberty argues that Gutsch is not a beneficiary because he cannot get
13 damages from the Insurance Commissioner. While that is true, that does not irrefutably establish
14 that Gutsch would not benefit from the Insurance Commissioner holding a penalty hearing. If the
15 Insurance Commissioner finds that Liberty violated the law in regard to Gutsch and penalizes it,
16 Gutsch will certainly benefit in his lawsuit against Liberty *and* the Insurance Commissioner can
17 order Liberty to cease its bad faith conduct toward Gutsch.

18 Accordingly, Gutsch states a possible claim for writ of mandamus under California law,
19 and his claim is not “obviously” contrary to established California law. See *Morris*, 236 F.3d at
20 1067. Accordingly, the Court should remand this action.

21 **C. Gutsch’s Claim for a Writ Mandating the Insurance Commissioner to Give**
22 **Gutsch Notice of his Mediation Right is Valid Because the Duty Is**
23 **Mandatory, but, even if It Is Discretionary, the Writ Claim Is Still Valid.**

24 Gutsch’s Complaint alleges that he submitted consumer complaints to the Insurance
25 Commissioner who then transmitted them to Liberty for a response, and, thereafter, Liberty
26 denied any wrongdoing. Gutsch alleges that the Insurance Commissioner did nothing in response
27 to this, but feigned an investigation while sitting on his hands in order to save his office time and
28 resources, something he is doing to many other insureds as well. Under the California Insurance
Code’s mandatory mediation program:

1 If the insurer notifies the department of the failure to resolve the dispute
 2 [arising from the insured’s consumer complaints], the department *shall notify*
 3 the insured of the insured’s ability to request mediation *and ask* the insured
 whether the insured requests mediation. If the insured responds affirmatively,
 the department *shall refer* the dispute to mediation.

4 Cal. Ins. Code § 10089.74(a) (emphasis added).¹

5 Because the Insurance Commissioner has not fulfilled these duties yet, Gutsch has been
 6 deprived of his right to force Liberty to a free mediation with a mediator trained by the Insurance
 7 Commissioner at Liberty’s expense. See Cal. Ins. Code § 10089.77(a) (regarding mediator
 8 training); § 10089.79(a) (requiring the insurer to bear the cost). Thus, Gutsch alleges he is
 9 entitled to a writ mandating the Insurance Commissioner to do so.

10 Gutsch has no speedy, adequate, or plain alternative remedy—he cannot force Liberty to
 11 pay for a mediation, right now, with a mediator certified by the Department of Insurance.

12 Further, a mediation under the mediation scheme comes with a significant number of guarantees
 13 not available in traditional mediations, including:

- 14 • The insurer must come with a representative who “shall know the facts of the case
 15 and be familiar with the allegations of the complainant” (Cal. Ins. Code §
 16 10089.80(a));
- 17 • The insurer must “produce at the settlement conference a copy of the policy and
 18 all documents from the claims file relevant to the degree of loss, value of the
 19 claim, and the fact or extent of damage” (*Id.*);
- 20 • The insurer must “negotiate in good faith” and “have the authority to immediately
 21 settle claims” (§ 10089.81);
- 22 • The insurer must “pay the consumer for his or her actual expenses incurred in
 23 attending the conference plus the value of lost wages” if the insurer fails to attend
 24 (*Id.*);

26
 27 ¹ In its Notice of Removal, Liberty cites the incorrect statutes. The relevant statute, quoted above, is Ins.
 28 Code § 10089.74(a). Liberty instead cites a section that discusses the Commissioner’s discretion to
 initially transmit a consumer complaint to the insurer for a response in the first place, § 10089.71, and §
 10089.70(a)(1), which only regards disputes for amounts over the policy limits.

- 1 • The insurer must give the insured “three business days to rescind” any settlement
2 agreement (§ 10089.82);
- 3 • The “mediator may also order production of other documents that the mediator
4 determines to be relevant to the issues under mediation” which can be enforced by
5 the Insurance Commissioner. (*Id.*); and more.

6 Gutsch cannot get any of these guarantees any other way besides through the Insurance
7 Commissioner acting pursuant to his duties under the Insurance Code. For example, from this
8 counsel’s experience, it is fairly common in high-value insurance bad faith cases like this one
9 that the insurer will not pay for the entire cost of mediation; will not mediate in good faith or
10 bring enough authority to settle unless the mediation is just before trial; will not provide the key
11 documents to the insured unless the insured obtains them through discovery, often after multiple
12 motions to compel; and more. These are benefits Gutsch cannot get simply by litigating.

13 Liberty contends in its Notice of Removal that there is no cause of action here for writ of
14 mandated because the duty is discretionary. That is not the law. See *Ellena*, 230 Cal.App.4th at
15 205. But even if it was, *arguendo*, the statute is in fact mandatory. *Michelson v. Mid-Century Ins.*
16 *Co.*, 83 Cal.App.4th 450, 458 (2000) (noting that § 10089.70 et seq. “is replete with provisions
17 directing the Department of Insurance and the mediator to give a variety of pre-mediation notices
18 to the insured and the insurer.”) Further, applying the rules of statutory construction yields the
19 same result. The Court must “give effect to the intent of the enacting legislative body” by giving
20 the statutory language its “ordinary and usual meaning.” *Ellena*, 230 Cal.App.4th at 208. “Where
21 a statute or ordinance clearly defines the specific duties or course of conduct that a governing
22 body must take, that course of conduct becomes mandatory and eliminates any element of
23 discretion.” *Carrancho v. California Air Resources Board*, 111 Cal.App.4th 1255, 1267 (2003).
24 The Legislature here chose to use the word “shall” and specifically defined the Insurance
25 Commissioner’s course of action. In many other parts of the statutory scheme, the Legislature
26

1 chose the term “may.”² “[T]he various parts of a statutory enactment must be harmonized by
2 considering the particular clause or section in the context of the statutory framework as a whole.”
3 *Rodriguez v. Solis* 1 Cal.App.4th 495, 505 (1991). “[W]here different words or phrases
4 are used in the same connection in different parts of a statute, it is presumed
5 the Legislature intended a different meaning.” *Briggs v. Eden Council for Hope & Opportunity*,
6 19 Cal.4th 1106, 1117 (1999).

7 Next, Liberty argues that Gutsch defeated his own cause of action when he filed suit
8 because Cal. Ins. Code § 10089.74 provides, “[i]f the insured has filed a civil complaint, the
9 insurer is excused from mediating under this chapter any claims or disputes involved in the civil
10 action.” (emphasis added.) That is irrelevant because Gutsch seeks to compel *the Commissioner*
11 to give Gutsch notice of his right to demand mediation, not to compel *Liberty* to attend
12 mediation. Gutsch could, after receiving that notice, dismiss some of the claims against Liberty
13 without prejudice and exercise his right to a free mediation. Moreover, Gutsch’s Complaint,
14 which must be read in his favor, clearly alleges that he did not raise all of his “claims or
15 disputes” with Liberty in this suit. Furthermore, “Referral to mediation or the pendency of a
16 mediation under this article is not a basis to prevent or stay the filing of civil litigation arising in
17 whole or in part out of the same facts.” Cal. Ins. Code § 10089.82(d).

18 Liberty also argues that this lawsuit is a plain, adequate, and speedy alternative remedy,
19 and that Gutsch would receive no direct benefit from the Insurance Commissioner fulfilling his
20

21 ² See, e.g., Cal. Ins. Code §10089.71 (“The department *shall*, if deemed appropriate, notify the insurer
22 against whom the complaint is made of the nature of the complaint, *may* request appropriate relief for
23 the complainant, and *may* meet and confer with the complainant and the insurer in order to attempt
24 resolution of the dispute”) (emphasis added); §10089.72(a) (“If, after the department’s intervention, the
25 insurer and the insured do not reach agreement, the department *may* notify the insurer that in order to
26 avoid referral to mediation, the insurer shall have 28 calendar days to resolve the dispute, unless the
27 department, for good cause, extends the period by an additional 7 calendar days”) (emphasis added); §
28 10089.77(a) (“Mandatory training that *may* be provided by the department, which *shall* include, at a
minimum, the legal rules for insurance policy interpretation and the rights of insureds under California
law, and methods of determining costs of construction and reconstruction and costs of automobile
repair in given geographical areas”) (emphasis added); § 10089.79(a) (“The commissioner *may* set a fee
not to exceed one thousand five hundred dollars (\$1,500)...”) (emphasis added); Ins. Code §
10089.83(c) (“The department *may* adopt regulations, including reporting requirements, in the
commissioner’s discretion, to implement this chapter”) (emphasis added).

1 duty to give Gutsch notice of mediation rights. As set forth above, this contention is patently
2 incorrect. Gutsch cannot compel Liberty to pay for a mediation with all the added benefits the
3 mediation scheme provides, and he clearly benefits from such a mediation. In any event, this
4 argument goes to the merits of the claim, and not whether Gutsch possibly states a claim when
5 the allegations are viewed most favorably to him. It is clearly possible that Gutsch benefits from
6 a mediation ordered by the Insurance Commissioner, and that is enough to remand.

7 Accordingly, this claim for writ of mandate is valid, and the matter must be remanded.


8 **III. Conclusion.**

9 Gutsch has raised valid claims against the Insurance Commissioner—at the very least a
10 California court could “possibly” so find—and Liberty failed to carry its burden to demonstrate
11 the claims are “obviously” invalid under “settled” law. The case must be remanded.

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