IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LOUIS G. ORSATTI, DDS, P.C.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CASE NO. 20-CV-00840-FB**
	§	
ALLSTATE INSURANCE COMPANY	§	
AND BLESSING SEFOFO WONYAKU,	§	
	§	
Defendants.	§	
	§	
	§	

DEFENDANTS' OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION [DKT. NO. 30]

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE FRED BIERY:

Defendants Allstate Insurance Company ("Allstate") and adjuster Blessing Sefofo Wonyaku ("Wonyaku") hereby file their objections to the Magistrate's Report and Recommendation [Dkt. No. 30] regarding Plaintiff Louis G. Orsatti DDS, P.C.'s ("Orsatti") Motion to Remand [Dkt. No. 3] (the "Motion"). Defendants respectfully object and respond to the findings and conclusions as to diversity in the Report for the reasons set forth below. Defendants incorporate their Opposition to Motion to Remand [Dkt. No. 9] (the "Opposition") as if fully set forth herein.

I. WONYAKU WAS IMPROPERLY JOINED.

Texas federal courts have long recognized the "popular tactic" of naming non-diverse insurance adjusters in an attempt to defeat diversity jurisdiction. *Gonzalez v. State Farm Lloyds*, No. 4:15-CV-305-A, 2015 WL 3408106, at *3 (N.D. Tex. May 27, 2015) (collecting cases); *Lopez v. United Prop. & Cas. Ins. Co.*, No. 3:16-CV-0089, 2016 WL 3671115, at *3 (S.D. Tex. July 11, 2016); *Hill Country Villas Townhome Owners' Ass'n, Inc. v. Everest Indem. Ins. Co.*, No. SA-19-CV-0936-JKP, 2020 WL 373375, at *5 (W.D. Tex. Jan. 23, 2020) ("Some claims by their very nature or the underlying facts may provide no reasonable prospect for recovery against an adjuster. Some may amount to no more than a hypothetical possibility for a viable cause of action. If a plaintiff only asserts either of those types of claims against an adjuster, the federal courts should find the joinder improper and deny the motion to remand.") This is precisely the situation here. Plaintiff is suing a diverse solvent insurer over a policy interpretation question based upon admitted underlying facts. Plaintiff added conclusory legal language against the non-diverse adjuster with no actual alleged wrongdoing and no pre-suit opportunity for the insurer to accept liability on the adjuster's behalf. This Court should not allow this conduct to prevent removal.

See Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) (holding that a defendant's right to removal cannot be defeated by fraudulently joining a non-diverse party.)

On June 19, 2020, Plaintiff filed its Original Petition in a case styled *Louis G. Orsatti, DDS, P.C. v. Allstate Insurance Company and Blessing Sefofo Wonyaku*; Cause No. 2020-CI-11203 in the 407th Judicial District Court for Bexar County, Texas. Plaintiff named Allstate Insurance Company ("Allstate") and adjuster Blessing Sefofo Wonyaku ("Wonyaku") as defendants. There is no dispute that the amount in controversy is met. There is no dispute that Allstate and Orsatti are diverse.[1] There is no dispute that Allstate is a solvent insurance carrier fully answerable in damages without the need to increase the cost or expense of litigation by joining individual parties. There is also no dispute that Plaintiff failed to give Chapter 542A notice such that Allstate could agree in advance to accept liability for Wonyaku to avoid her joinder. Tex. Ins. Code §§ 542A.002(a)(3)(A & B) and 542A.003 Instead, Plaintiff just filed.

The allegations against Wonyaku, further discussed below, are conclusory at best and, contrary to the Report, fail to state a cause of action against Wonyaku. Plaintiff essentially recites the elements of the Texas Insurance Code alleging that Wonyaku engaged in a "pretextual" or otherwise inadequate investigation while failing to allege a single document or piece of evidence that she should have considered. These allegations fail to meet the *Iqbal/Twombly* standard and should not be considered. *Ashcroft v. Iqba*l, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)) (Where a complaint pleads facts that are 'merely consistent

[1] The Report assumes, without finding, that Orsatti is a citizen of Texas. As detailed in the Removal, Plaintiff is a personal dentistry corporation doing business in Bexar County, Texas. (See Ex. C, Petition at ¶¶ 2 & 8 and Ex. C Policy at page 22.) Pursuant to the Policy, Orsatti's primary business location (and insured property) is in San Antonio, Texas. (See, e.g., Opposition Appx., Policy at 19.) Orsatti is also a Texas corporation. (See Exhibit 1 hereto, details from Texas Secretary of State.) Allstate is a citizen of Illinois. (Removal Dkt. 1 at ¶ 6.)

with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'").

Wonyaku's detailed letter denying coverage, (Original Petition, Exhibit E), was based on the complete absence of any physical loss or damage to Plaintiff's property required to establish coverage, as well as the clear and unambiguous virus exclusion in the Policy. Neither Plaintiff's Original Petition nor its amended complaint specify what additional information could or should have been sought that would have changed the coverage analysis in any way. Plaintiff may not agree with the coverage analysis, but that by itself does not establish that Wonyaku's investigation was "pretextual" or in any way "inadequate," and no facts are pleaded that would establish either. *Weldon Contractors, Ltd. v. Fireman's Fund Ins. Co.*, 2009 WL 1437837, at *3-4 (N.D. Tex. 2009) (finding allegations that listed Insurance Code provisions and asserted that "Defendants" violated such provisions "are really legal conclusions couched as factual allegations"); *Lakewood Chiropractic Clinic v. Travelers Lloyds Ins. Co.*, 2009 WL 3602043, at *3 (S.D. 2009) (holding that "near verbatim recitations of portions of Chapters 541 and 542 of the Texas Insurance Code" without "facts illustrating what actions are attributable to [the adjuster] individually" did not provide a reasonable basis of recovery).

Nor would there be any amendment or modification that will allow Plaintiff to assert such facts. Accepting as true Plaintiff's allegations that its business income was adversely impacted by the COVID-19 pandemic and related governmental closure orders, Plaintiff's claims fail. Plaintiff does not allege that COVID-19 was present at its premises for Defendants to inspect. Rather, Plaintiff alleges that the loss of business that it suffered meets the Policy test of "direct physical loss of or damage to the property." The parties disagree (as set forth below), but this disagreement has nothing to do with anything Wonyaku could have done or not done.

Similarly, Plaintiff claims that the Virus Exclusion cannot apply because COVID-19 was not present at its property. Again, Allstate disagrees about whether the COVID-19 pandemic and related governmental closure orders meet the test of "loss or damage caused by or resulting from any virus" but this has nothing to do with anything Wonyaku could have done or not done. The orders and pandemic are common knowledge and admitted. In short, Plaintiff's dispute is with Allstate over Policy interpretation based upon undisputed facts - not with any adjuster.

As shown above and as more fully discussed below, the allegations against Wonyaku are wholly conclusory and, fail to state a claim against her. Moreover, Allstate is a fully solvent carrier answerable in damages for any wrongful denial of coverage, and there was no practical reason to increase the cost or complexity of the litigation by joining Wonyaku on contrived claims except to defeat federal jurisdiction. Accordingly, the Court should reject the Magistrate Judge's Report and Recommendations and deny remand.

II. PLAINTIFF FAILS TO ALLEGE ANY CLAIMS AGAINST MS. WONYAKU.

In order for Wonyaku to be properly joined, there must be a reasonable possibility of recovery against her. Further, "a reasonable possibility of recovery requires more than a 'mere hypothetical possibility that such an action could exist.'" Report citing *Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir. 1999). However, the Report incorrectly concludes that Plaintiff properly stated a claim against Ms. Wonyaku because "[h]ad Wonyaku requested additional information, as she was obliged to do, Orsatti's Amended Petition suggests that Wonyaku would've found the virus exclusion provision inapplicable in this context." Report at 9. The problem with this allegation (and thus the conclusion in the Report) is that: (1) Plaintiff fails to allege what additional investigation Wonyaku would have done that would somehow have produced a different result as to the underlying initial question of having a covered claim, and (2)

the statements in the petition, taken as true, demonstrate that the Virus Exclusion would apply to Plaintiff's claim regardless of any investigation.

A. There Was No Additional Investigation Needed of Plaintiff's Property.

Plaintiff alleges that the denial of coverage was based upon a lack of actual tangible physical alteration to its property. (Petition at ¶ 16 & Ex. E "Your policy 648 261793 does have loss of income coverage; however, the suspension of your operations must be caused by direct physical loss of or damage by a Covered Cause of Loss to property at the described premises.") But Plaintiff admits that there was, in fact, no actual, tangible physical alteration of its property; nothing for Ms. Wonyaku to "investigate" through an onsite property inspection. (Petition at ¶ 16.) Instead, Plaintiff claims its damages were "as a result of fear and actions taken to limit the impact of the pandemic" and that it "suffered physical loss to Covered Property because it was unable to operate." (*Id.*) Thus, there was no physical evidence for Ms. Wonyaku to "investigate."[2]

[2] Several other courts across the country have found no physical loss or damage alleges for similar COVID-19 related claims. *See, e.g., Malaube, LLC v. Greenwich Ins. Co.*, Case No. 20-22615, (S.D. Fl. August 26, 2020) Magistrate Judge Report and Recommendation, filed here at Dkt. 23-2; *Diesel Barbershop, et al. v. State Farm Lloyds*, Case No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020*); Turek Enterprises, Inc. v. State Farm Mutual Auto. Ins. Co.*, Case No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020); *Rose's 1, LLC v. Erie Ins. Exchange*, Case No. 2020 CA 002424 B, 2020 WL 4589206, (D.C.Super. Aug. 06, 2020); *Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, No. 20-258-CB, (Ingham County, MI Circuit Ct.), transcript of July 1, 2020 hearing, filed here at Dkt. 16-1, Ex. 2; *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, Case No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *5 (S.D. Cal. Sept. 11, 2020); *Mudpie, Inc. Travelers Cas. Ins. Co.*, Case No. 20-cv-03213-JST (N.D. Cal. Sept. 14, 2020); *Plan Check Downtown III, LLC, v. AmGuard Ins. Co.*, No. 2:20-cv-6954-GW-SK, filed here at Dkt. 27-1, at 6-7 (C.D. Cal. Sept. 16, 2020) (preliminary ruling on Defendant's motion to dismiss); *Sandy Point Dental, P.C. v. The Cincinnati Ins. Co.*, No. 20-CV-2160, 2020 WL 5630465, *3-5 (N.D. Ill. Sept. 21, 2020); *Mortar and Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, filed here at Dkt. 27-3, Transcript at 31 (N. D. Cal. Sept. 11, 2020); *Franklin EWC, Inc., v. The Hartford Financial Services Group, Inc.*, Case No. 3:20-cv-04434-JSC, 2020 WL 5642483, (N.D. Cal. Sept. 22, 2020); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 4-20-cv-222-CRW-SBJ, filed here at Dkt. 27-5, (S.D. Iowa Sept. 29, 2020); *It's Nice, Inc. v. State Farm Fire and Cas. Co.*, No. 20-L-547, filed here at Dkt. 27-6, Transcript at 27 & 33 (Circuit Court 18th Judicial District, Illinois Sept. 29, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, No. 8:20-CV-1605-T-30AEP, 2020 WL 5791583, (M.D. Fla. Sept. 28, 2020).

Plaintiff's cited improper investigation cases are inapposite. The cases where an adjuster is found to be properly joined involve an adjuster who performed an allegedly inadequate investigation and estimation of actual, tangible physical damage at a property where the insurance company was, thus, reliant upon the eyes and ears of an agent who failed to perform those obligations and misreported his or her findings. *See, e.g., Denley Grp., LLC v. Safeco Ins. Co. of Indiana*, No. 3:15-CV-1183-B, 2015 WL 5836226, at *1 (N.D. Tex. Sept. 30, 2015) (adjuster of fire damage allegedly failed to perform proper damage investigation); *Shade Tree Apartments, LLC v. Great Lakes Reinsurance (UK) PLC*, No. A-15-CA-843-SS, 2015 WL 8516595, at *4 (W.D. Tex. Dec. 11, 2015) (adjuster for hail, windstorm and water damage allegedly conducted substandard investigation that failed to include items of damage and underestimated repairs.)

There is no such claim against Ms. Wonyaku here. She assumed that Plaintiff was accurately representing that it could not operate and had lost business income as a result of the COVID-19 pandemic and related governmental orders. But, nonetheless, Plaintiff had no tangible, physical alteration of its property. On that basis, Allstate denied the claim. Plaintiff cannot assert claims against Ms. Wonyaku based upon an allegedly inadequate investigation of its property.

B. There was No Other Property Loss to Investigate.

Plaintiff also contends that it was entitled to loss of business income under its "Civil Authority Coverage" because "premises not more than one mile from Plaintiff's Property have suffered the same physical loss as Plaintiff has suffered due to the pandemic." (Petition at ¶ 14.) Here, again, Plaintiff fails to allege any particular property address that suffered tangible, physical alteration and damage that Ms. Wonyaku should have, but failed to investigate. Instead, as with the "direct physical damage" to Plaintiff's property, Plaintiff admits that the unnamed surrounding premises did not, in fact, suffer such damage. (*See* Petition at ¶ 14 alleging that physical loss can occur without actual tangible physical damage and that the other properties "suffered the same

physical loss" as Plaintiff.) Thus, there was nothing for Ms. Wonyaku to investigate and Plaintiff's inadequate investigation claims against Ms. Wonyaku must fail.

Separately, Plaintiff could not recover for "Civil Authority Coverage" because it requires that "access to the area immediately surrounding the damaged property is prohibited" (Petition Ex. E), but Plaintiff was permitted to access his property and engage in business by the Bexar County orders (Petition Ex. B.) There is no articulated claim as Ms. Wonyaku here.

C. Ms. Wonyaku Did Not Engage In An Improper Investigation of Exclusions.

Finally, Plaintiff claims that Ms. Wonyaku had no "evidence" that any exclusions applied. (Petition at ¶ 15.) But Plaintiff concedes that its claim was based on business interruption as a result of the COVID-19 pandemic, which itself triggers the Policy's Virus Exclusion, which states, "We will not pay for loss or damage caused by or resulting from any virus..." (Policy at 119, Petition at E.) Plaintiff indeed alleges that its losses "result[ed] from" COVID-19. (*See* Petition at ¶ 9 "This is the first pandemic ***caused by a coronavirus***."; at ¶ 11 "***The pandemic and health care crises has resulted*** in the Plaintiff suffering a direct physical loss to the insured Property"; at ¶ 12 "***The presence of the Covid-19 in Bexar County alone triggers coverage*** because it renders the Property unsafe or makes it unusable for its intended purpose."; ¶ 12 "***The pandemic***, consumer fear, and t***he stay at home Orders have caused*** Plaintiff physical loss of the property…"; ¶ 10 "The described ***purposes of the Orders are to…slow the spread of Covid-19***"; at ¶ 16 "Plaintiff suffered a physical loss of the covered property as a result of fear and actions taken ***to limit the impact of the pandemic*** on the health, safety and welfare of Bexar County citizens." (emphasis added.)) Plaintiff's own allegations demonstrate that the exclusion applies.

Essentially, Plaintiff claims that, in order to apply the "Virus Exclusion," Ms. Wonyaku would have needed to go onsite to Plaintiff's property and find COVID-19 present. (*See generally* Petition.) However, as shown above, the applicability of the Virus Exclusion was apparent from

the very nature of Plaintiff's claim. Moreover, Plaintiff also alleges that COVID-19 was not, in fact, present on site. So there was nothing for Ms. Wonyaku to investigate at the property and no misconduct by Ms. Wonyaku in "investigating" the exclusion.[3]

III. ALTERNATIVELY, TEXAS INSURANCE CODE CHAPTER 542A AND ALLSTATE'S ELECTION ELIMINATES ALL CLAIMS AGAINST MS. WONYAKU.

Allstate elects to accept any liability Ms. Wonyaku may have for the allegations in the Petition under Texas Insurance Code Chapter 542A. This forecloses any liability in Texas state court for Ms. Wonyaku and she should be considered improperly joined. However, the Report finds that Chapter 542A does not apply to this case.

The Report finds that Chapter 542A only applies to "weather-related events" based upon the decision in *Jada Rest. Grp. v. Acadia Ins. Co.*, No. SA-20-cv-00807-XR (W.D. Tex. filed Jul. 10, 2020), Dkt. No. 15 at 5-6. In that case, Judge Xavier Rodriguez concluded that Chapter 542A.001(2)(c) applies only to forces of nature and COVID-19 is not a force of nature. Defendants respectfully disagree with both the Report's restrictive interpretation of Chapter 542A and both the Report and Judge Rodriguez's interpretation of the COVID-19 pandemic.

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[3] Several other courts across the country have applied virus exclusions to bar similar COVID-19 related claims. *Turek Enterprises, Inc. v. State Farm Mutual Auto. Ins. Co.*, Case No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020) ("The only reasonable conclusion is that the Order—and, by extension, Plaintiff's business interruption losses—would not have occurred but for COVID-19."); *Diesel Barbershop, et al. v. State Farm Lloyds*, Case No. 5:20-CV-461-DAE, 2020 WL 4724305, *6 (W.D. Tex. Aug. 13, 2020); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 2:20-CV-00401-FTM-66NPM, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020) ("Because Martinez's damages resulted from COVID-19, which is clearly a virus, neither the Governor's executive order narrowing dental services to only emergency procedures nor the disinfection of the dental office of the virus is a "Covered Cause of Loss" under the plain language of the policy's exclusion."); *Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, No. 20-258-CB, (Ingham County, MI Circuit Ct.), transcript of July 1, 2020 hearing, attached to Dkt. 16-1 as Exhibit 2, pp. 20-23; *Franklin EWC, Inc., v. The Hartford Financial Services Group, Inc.*, Case No. 3:20-cv-04434-JSC, 2020 WL 5642483, (N.D. Cal. Sept. 22, 2020); *It's Nice, Inc. v. State Farm Fire and Cas. Co.*, No. 20-L-547, filed here as Dkt. 27-6,Transcript at 27 & 33 (Circuit Court 18th Judicial District, Illinois Sept. 29, 2020); *Wilson v. Hartford Casualty Co.*, No. 20-cv-03384, filed here as Dkt. 27-8 (E.D. Pa. Sept. 30, 2020).

As to the plain language of Chapter 542A, the statute is not narrowly limited to "weather-related events" as the Report finds, but rather broadly includes "forces of nature." Tex. Ins. Code § 542A.001(2)(C). As further illustration that the statute applies to more than weather, it expressly includes "wildfires" with no distinction that it only applies to those directly caused by lightening rather than those related to acts of mankind. According to Merriam-Webster, a wildfire is "a sweeping and destructive conflagration especially in a wilderness or a rural area."[4] In other words, in order to be a "wildfire" something need not be caused by "weather" - it merely must be a fire in the wild. The statute, thus, applies to any natural force.

There can be little debate that COVID-19 qualifies as a "force of nature." It is not "man-made" so it must be natural.[5] Additionally, in declaring the COVID-19 pandemic a "disaster" under the Texas Government Code, both the State of Texas and Bexar County governments have determined that COVID-19 is "any natural or man-made cause" with "the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property" and it falls within the same class of threats such as "fire, flood, earthquake, wind, storm, wave action." Petition at Ex. B & C; Tex. Gov't Code § 418.004.

Finally, here, Plaintiff itself has claimed here that COVID-19 is a "natural disaster" akin to "tornado, fire or other event." Specifically, in Plaintiff's Response to Defendants Motion to Dismiss Plaintiff's First Amended Complaint, it argued:

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[4] Meriam Webster definition of "wildfire" at https://www.merriam-webster.com/dictionary/wildfire, last accessed 10/15/2020.

[5] *See* Science Daily, March 17, 2020, Scripps Research Institute, "COVID-19 coronavirus epidemic has a natural origin" https://www.sciencedaily.com/releases/2020/03/200317175442.htm ("The scientists found that the RBD portion of the SARS-CoV-2 spike proteins had evolved to effectively target a molecular feature on the outside of human cells called ACE2, a receptor involved in regulating blood pressure. The SARS-CoV-2 spike protein was so effective at binding the human cells, in fact, that the scientists concluded it was the result of natural selection and not the product of genetic engineering.").

> [T]here is also precedent establishing Covid-19 as a natural disaster by at least one court, which described these losses indistinguishable from other events routinely covered by property insurance. In *Friends of Devito v. Wolf*, A.3d—, 2020 Pa. LEXIS 1987, 31-32 (Pa., Apr. 13, 2020), the Pennsylvania Supreme Court overruled challenges to an executive order closing all non-life sustaining businesses and held: [quote omitted] Based on the Wolf court's reasoning, it is not the actual presence of the virus that has caused property damage; but rather, it is the damage associated with the threat of transmission of the virus at any location where people congregate. That threat constitutes a direct physical loss to property, no less than a tornado, fire, or other event rendering property inaccessible or unusable. Accordingly, the Covid-19 pandemic is a natural disaster not meaningfully distinguishable from other events for which insurance coverage has always been intended to provide coverage.

Dkt. 19, Response at 21-22 (emphasis added). Plaintiff cannot take the position that coverage should extend to the loss here because it is "a natural disaster" like a tornado, while at the same time claiming that Tex. Ins. Code Ch. 542A is inapplicable because the loss is not attributable to "forces of nature." Under Plaintiffs' own theory of the case, Tex. Ins. Code Ch. 542A plainly applies, and Wonyaku must be dismissed from this action.

Alternatively, if this Court is inclined to remand this action, Defendants respectfully ask that this Court leave open the question of whether Texas Insurance Code Chapter 542A applies, to be decided by the Texas state courts.

IV. CONCLUSION

For all the reasons set forth in the removal, the Opposition, and above, Ms. Wonyaku was improperly joined and this Court should not consider her citizenship in weighing diversity. Once Ms. Wonyaku is properly disregarded this Court has jurisdiction over the removal pursuant to 28 U.S.C. §§ 1332 and 1441, based on the parties' complete diversity of citizenship and an amount in controversy exceeding $75,000, exclusive of interest and costs. The Motion to Remand should be denied.

Dated: October 21, 2020

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 2020 I caused the foregoing document to be served by ECF on counsel for Plaintiff:

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