

Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

OMELYAN STREMBITSKYYY, individually,  
and on behalf of all those similarly situated,

Plaintiff,

vs.

AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY,

Defendant.

Case No.: 2:16-cv-00691-RSL

PLAINTIFF’S MOTION TO REMAND  
AND MEMORANDUM IN SUPPORT  
THEREOF

**NOTE ON MOTION CALENDAR:  
June 10, 2016**

**MOTION TO REMAND**

Plaintiff, through counsel, moves the Court pursuant to 28 U.S.C. § 1447(c) for an order remanding this matter to the Superior Court for King County, Washington, on the grounds that defendant American Family Mutual Insurance Company’s (“AmFam”) removal to this Court is improper, as AmFam has not met its burden of establishing Court jurisdiction under 28 U.S.C. § 1332(a) or 28 U.S.C. § 1332(d). A proposed form of order is submitted concurrently herewith.

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION TO REMAND**

**I. INTRODUCTION**

Plaintiff moves the Court pursuant to 28 U.S.C. § 1447(c) for an order remanding this matter to the Superior Court for King County, Washington. Plaintiff’s motion is based on the

1 fact that AmFam has failed to establish this Court's subject matter jurisdiction, in that it has  
2 failed to satisfy the amount in controversy requirement for purposes of diversity jurisdiction  
3 under either 28 U.S.C. § 1332(a) or 28 U.S.C. § 1332(d). Plaintiff seeks remand to state court  
4 pursuant to 28 U.S.C. § 1447(c).

## 5 **II. FACTS**

6 This case was filed on April 15, 2016, in the King County Superior Court. The sole  
7 defendant is AmFam. AmFam was served through the Washington Insurance Commissioner as  
8 its designated agent on April 18, 2016. *See* Notice of Removal, Exh. A (Dkt. 1-1), at 22-23  
9 (Insurance Commissioner's Certificate of Service). The Complaint asserts claims for breach of  
10 contract, violation of the Washington Consumer Protection Act, RCW § 19.86.010 *et seq.*, bad  
11 faith, and conversion. The Complaint alleges that AmFam's conduct towards Plaintiff is  
12 consistent with its conduct towards other, similarly situated AmFam insureds, and hence seeks  
13 class action status under CR 23. *See generally* AmFam's Notice of Removal ("NOR"), Exh. A,  
14 at 7-15 (Complaint, "Cmplt.>").

15 In its Notice of Removal, AmFam broadly misstates what is at issue in the case.  
16 According to the Complaint, Plaintiff's Toyota was involved in an accident, wherein it sustained  
17 damage. The Toyota had Collision coverage provided by AmFam, with a deductible of \$400  
18 (for purposes of this accident). Cmplt. at ¶¶ 6-9. The damage exceeded the \$400 deductible. So  
19 when Plaintiff had the Toyota repaired, he paid \$400 out of pocket and AmFam paid the rest.  
20 Cmplt. at ¶¶ 9-10.

21 AmFam sought to recover these repair costs from the liability coverage of the other  
22 vehicle involved. AmFam decided that liability would be split on a 90/10 basis, attributing 90%  
23 fault to the other vehicle. As a result, AmFam secured reimbursement for 90% of the total cost  
24 to repair Plaintiff's vehicle. Cmplt. at ¶¶ 11. After securing this 90% reimbursement, AmFam  
25 sent Plaintiff a check for \$360, representing 90% of Plaintiff's collision deductible. This left the  
26 other \$40 of Plaintiff's deductible as uncompensated property damage. Cmplt. at ¶ 12.

1 The AmFam policy contains language to provide AmFam with certain recovery rights.  
 2 See Cmplt. at ¶ 13 (“**Our** Recovery Rights”). By the language of the policy, however, any such  
 3 rights are contingent: “**We** shall be entitled to a recovery under paragraphs a. and b. above only  
 4 after the person has been fully compensated for damages.” Cmplt. at ¶ 13.

5 In its Notice of Removal, AmFam asserts a single basis for this Court’s jurisdiction:  
 6 diversity of the parties. See AmFam’s Notice of Removal at 2 (Dkt. 1). AmFam alleges that the  
 7 amount in controversy requirement for diversity jurisdiction is satisfied under two alternate  
 8 arguments: that the \$5,000,000 threshold is met for the putative class under CAFA, or that the  
 9 \$75,000 threshold is met as to the individual plaintiff. For these two propositions, AmFam  
 10 relies on the assertions and contentions in its Notice of Removal.

### 11 **III. ARGUMENT**

#### 12 **A. REMOVAL STATUTE IS STRICTLY CONSTRUED AGAINST FEDERAL** 13 **JURISDICTION**

14 Federal courts “are courts of limited jurisdiction and ... strictly construe [their]  
 15 jurisdiction.” *Lowdermilk v. U.S. Bank National Ass’n*, 479 F.3d 994, 998 (9th Cir. 2007)  
 16 (citing, *inter alia*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct.  
 17 1673 (1994)). See also *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir.  
 18 2004) (“removal statute is strictly construed against removal jurisdiction”). Indeed, because of  
 19 their limited jurisdiction, federal courts are presumed to lack jurisdiction unless the contrary is  
 20 established. *Gen. Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 968-69 (9th Cir. 1981).

21 Moreover, “[w]here doubt regarding the right to removal exists, a case should be  
 22 remanded to state court.” *Matheson v. Progressive Specialty Ins.*, 319 F.3d 1089, 1090 (9<sup>th</sup> Cir.  
 23 2003) (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9<sup>th</sup> Cir. 1992)). See also *Valdez v. Allstate*  
 24 *Ins. Co.*, 372 F.3d 1115, 1118 (9th Cir. 2004) (“If the district court determines that it is  
 25 sufficiently doubtful that the amount-in-controversy requirement has been met and thus that  
 26 federal subject matter jurisdiction is lacking, the district court should . . . remand to state

1 court.”) (citations omitted).

2 **B. AMFAM HAS THE BURDEN TO ESTABLISH JURISDICTION THROUGH**  
3 **COMPETENT EVIDENCE**

4 “In cases removed from state court, the removing defendant has ‘always’ borne the  
5 burden of establishing federal jurisdiction, including any applicable amount in controversy  
6 requirement.” *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006), 443  
7 F.3d 676, 682-83 (9th Cir. 2006) (citing & partially quoting *Gaus*, 980 F.2d at 566). *See also*  
8 *California*, 375 F.3d at 838. To meet this burden, the removing defendant must provide  
9 sufficient evidence. *See, e.g., Guglielmino v. McKee Foods Corp.*, 506 F.3D 696, 699 (9th Cir.  
10 2007); *Gaus*, 980 F.2d at 567. *See also Singer v. State Farm Mut. Auto Ins. Co.*, 116 F.3d 373,  
11 377 (9th Cir. 1997) (“[R]emoval ‘cannot be based simply upon conclusory allegations’ ...”)  
12 (quoting *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995)). A finding of  
13 jurisdiction cannot be based on speculation and conjecture. *E.g., Lowdermilk*, 479 F.3d at 1002.  
14 *See also Matheson*, 319 F.3d at 1090-91 (“Conclusory allegations as to the amount in  
15 controversy are insufficient.”) (citing *Gaus*, 980 F.2d at 567).

16 **C. AMFAM HAS FAILED TO PROVIDE COMPETENT EVIDENCE SUFFICIENT**  
17 **TO ESTABLISH JURISDICTION**

18 **1. Preponderance of the Evidence Standard**

19 “Where the complaint does not specify the amount of damages sought, the removing  
20 defendant must prove by a preponderance of the evidence that the amount in controversy  
21 requirement has been met.” *Abrego Abrego*, 443 F.3d at 683 (citing *Gaus*, 980 F.2d 564 at 566-  
22 67; *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996)). “Under this  
23 burden, the defendant must provide evidence that it is ‘more likely than not’ that the amount in  
24 controversy” satisfies the federal jurisdictional amount requirement. *Sanchez*, 102 F.3d at 404  
25 (citations omitted).  
26

1           **2. Bare Allegations in the Notice of Removal Are Insufficient to Carry**  
 2           **AmFam’s Burden of Proof to Establish That the Amount in**  
 3           **Controversy Meets the Statutory Requirement**

4           **a. AmFam Has Not Established the Requisite Amount in**  
 5           **Controversy For Jurisdiction Under CAFA**

6           There are several fatal shortcomings with AmFam’s assertion that the \$5,000,000 CAFA  
 7 amount in controversy requirement is met, including at the outset that it’s merely unsupported  
 8 conjecture. But even if AmFam’s calculations did not suffer from this fundamental flaw, they  
 9 suffer from additional fatal deficiencies. For example, AmFam bases its calculations on an  
 10 assertion that there are 6,648 policyholders “who paid a deductible payment to American  
 11 Family for a claim made under the collision coverage of their insurance policies where  
 12 American Family thereafter obtained recovery from third parties for payments made under the  
 13 policy.” NOR at 5, ¶ 19. This vague, unclear parameter, which underlies AmFam’s  
 14 calculations, fails to track allegations in the Complaint. AmFam adds to the problem by  
 15 assuming that the deductibles involved would be either \$400 or \$500. NOR at 5, ¶ 20.

16           Compounding its errors, AmFam takes the two foregoing numbers and calculates a  
 17 further patently meaningless number. AmFam asserts: “it is reasonable to estimate that the  
 18 amount of deductible payments collected by American Family from these 6,648 potential  
 19 putative class members is between \$2,659,200 and \$3,324,000, i.e., [sic] (\$400 multiplied by  
 20 6,648 and \$500 multiplied by 6,648, respectively).” NOR at 6, ¶ 23. AmFam asserts this  
 21 represents a reasonable estimate of the “potential value of compensatory damages.” NOR at 6-  
 22 7, ¶ 25. It plainly does not.

23           In its calculation, AmFam fails to in any way account for the portion of collision  
 24 deductibles it remitted to its insureds. The most ready example is what happened in Plaintiff’s  
 25 situation. Under AmFam’s calculation, \$400 of its total is attributable to Plaintiff’s claim. But as  
 26 set out above, of the funds AmFam secured from the third party’s liability policy, AmFam  
 remitted \$360 to Plaintiff; the portion of Plaintiff’s deductible that remains uncompensated is

1 \$40. In other words, in Plaintiff’s case alone, AmFam’s calculation is *ten times* too high (\$40  
2 versus \$400). Additional fatal flaws with AmFam’s calculations continue from there. For  
3 example, AmFam notes that damages may be trebled under the CPA, but trebles the entirety of  
4 its (already vastly inflated) number, instead of the amount falling within the CPA’s four year  
5 statute of limitation.

6 AmFam proffers two other amounts to reach the amount in controversy requirement:  
7 possible attorneys fees, and the cost of potential injunctive relief. NOR at 7, ¶¶ 28-30; at 8, ¶32-  
8 33. These arguments likewise fail, with one common reason being that both arguments are  
9 mere allegations. *See, e.g., Lowdermilk*, 479 F.3d at 999, 1002. But they fail for additional,  
10 separate reasons well.

11 As for attorneys fees, although attorney’s fees may be included in the amount in  
12 controversy analysis, “there is authority that when a statute . . . calls for an award of attorneys’  
13 fees as part of court costs, rather than as part of damages, said attorneys’ fees are not considered  
14 in determining if the jurisdictional minimum is met.” *Vasquez v. Allstate Ins. Co.*, No. CV-08-  
15 5027 LRS, slip op. at 4-5 (E.D. Wash. June 20, 2008) (citing *Suber v. Chrysler Corp.*, 104 F.3d  
16 578, 588, n.12 (3rd Cir. 1997)). In *Vasquez*, the statute involved was RCW § 48.30.015 which,  
17 similar to RCW § 19.86.090, speaks in terms of recovering cost of the suit, “including . . .  
18 attorney’s fee[s].”

19 Second, to the extent attorney’s fees are considered, since the analysis focuses on the  
20 amount in controversy at the time of removal, only those attorney’s fees incurred at the time of  
21 removal should be included. *See, e.g., Westberry v. Interstate Distributor Co.*, No. C08-5400  
22 BHS, slip op. at 5 (W.D. Wash. Aug. 22, 2008).<sup>1</sup> *See also Gaus*, 980 F.2d at 567 (analysis  
23 concerns the “amount in controversy at the time of removal.”) (citing *Valdez v. Allstate Ins. Co.*,  
24 372 F.3d 1115, 1117 (9th Cir. 2004)). Here, AmFam provides no evidence of the attorney’s fee

25 \_\_\_\_\_  
26 <sup>1</sup> Plaintiff acknowledges that district courts in this circuit have disagreed as to whether attorney’s fees incurred after  
the removal are properly included in the amount in controversy.

1 incurred at the time of removal (notably, the action was filed a short time ago).

2 Third, even if there were some basis to consider the entirety of attorney's fees that might  
3 be incurred in this case, AmFam provides no valid basis to reasonably discern what those fees  
4 might be, and instead relies on speculation and its own erroneous calculations.

5 As for the cost of potential injunctive relief, it similarly fails from having no basis, as it  
6 stands on the same otherwise unsupported and inflated calculations. But the most obvious flaw  
7 is simply that the Complaint does not seek injunctive relief.<sup>2</sup> See Cmplt. at 8 (Prayer for Relief).  
8 Even if it did, however, if the conduct is unlawful, AmFam has no legally protected interest in  
9 continuing the conduct, and any "cost" of acting lawfully is not fairly included in the amount in  
10 controversy. See *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 610  
11 (7<sup>th</sup> Cir. 1997) (including the cost of injunctive relief wasn't argued presumably because "while  
12 an injunction against price fixing might prevent a defendant from engaging in lucrative unlawful  
13 transactions, it would not deprive the defendant of a legally protected interest").

14 **b. AmFam Has Not Established the Requisite Amount in**  
15 **Controversy as to the Individual Claim**

16 AmFam relies on much of the same unsupported speculation, irrelevant or unhelpful  
17 calculations, and misguided arguments to contend that Plaintiff's individual claim meets the  
18 \$75,000 amount in controversy requirement under 28 U.S.C. § 1332(a). And for much same  
19 reasons discussed above, those arguments fail here too. To avoid unnecessary repetition, those  
20 arguments are incorporated here.

21 To those arguments, Plaintiff adds the following. AmFam starts its analysis by stating  
22 Plaintiff may be seeking recovery of "his full \$400 deductible payment for the breach of  
23 contract claim...." NOR at 9, ¶ 37. AmFam ignores that Plaintiff has already been reimbursed  
24 \$360 (or 90%) of that amount. AmFam then goes on to aver that "that amount could be trebled

25 \_\_\_\_\_  
26 <sup>2</sup> AmFam has not averred that Plaintiff is a current policyholder or is otherwise in a position to seek injunctive relief.

1 by up to \$25,000 based upon his CPA claim....” AmFam declines to explain how even if we  
2 trebled the wildly inflated \$400, it would somehow result in \$25,000.

3 AmFam repeats its attorneys fees and injunctive relief arguments, which fail for the  
4 reasons already discussed. But they additionally fail with regard to the individual claim because  
5 this matter is brought as a class action, hence any purported costs of injunctive relief, or possible  
6 attorney’s fees, must be allocated out to the class as a joint benefit to that class. *Kanter v.*  
7 *Warner-Lambert Co.*, 265 F.3d 853, 858 (9th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F.3d  
8 927, 942 (9th Cir. 2001). Finally, even if AmFam were able to establish federal court  
9 jurisdiction over Plaintiff’s individual state law insurance claim, it has provided no reason for  
10 the Court to exercise supplemental jurisdiction over the claims of the putative class. *See, e.g.*,  
11 *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005).

#### 12 **IV. AUTHORITY**

13 The Court has authority for the requested remand order pursuant to 28 U.S.C. § 1447(c).

#### 14 **V. CONCLUSION**

15 AmFam has not met its burden to overcome the presumption against federal court  
16 jurisdiction. Conjecture and conclusory allegations are insufficient, as are inflated and suspect  
17 figures that establish little with regard to the actual amounts at issue. For these reasons and the  
18 others stated, Plaintiff requests that this matter be remanded to the Superior Court of the State of  
19 Washington for King County.

20 Dated: May 19, 2016.

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5 \* \* \*

6 **CERTIFICATE OF SERVICE**

7 I hereby certify that on May 19, 2016, I electronically filed the foregoing Motion to Remand,  
8 and the accompanying Order Remanding Case to State Court [Proposed], with the Clerk of the  
9 Court using the CM/ECF system, which will send notification of such filing to the Attorneys of  
10 record for Defendant American Family Mutual Insurance Company.

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