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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 Jill Lopez,

10 Plaintiff,

11 vs.

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13 Government Employees Insurance  
Company, Geico General Insurance  
Company,

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Defendants.

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No. CV-09-02271-PHX-GMS

**ORDER**

17 Pending before the Court is Plaintiff’s Motion to Remand to Maricopa County  
18 Superior Court (“Superior Court”). (Dkt # 10.) For the following reasons, the Court grants  
19 Plaintiff’s motion.

20 **BACKGROUND**

21 The Complaint alleges Defendant GEICO General Insurance Company (“GEICO”),  
22 insured Plaintiff Jill Lopez (“Lopez”), under an automobile insurance policy. This policy was  
23 in force on April 15, 2007, when Lopez was involved in an automobile accident. (Dkt. # 1  
24 Ex. A at 2-3.) Lopez’s vehicle, a 2004 Chevy Trailblazer (“Trailblazer”), sustained  
25 “significant damage” and had to be towed from the scene of the accident. (*Id.* at 3.) Lopez  
26 had the vehicle towed to an automotive repair dealer that was not one of GEICO’s  
27 recommended repair shops. (*Id.* at 3; Dkt. # 12 at 2.) As a result, GEICO did not conduct an  
28 investigation into the vehicle’s damage and refused to pay the vehicle repair costs, unless the

1 vehicle was towed to a GEICO-recommended shop. (Dkt. # 1 Ex. A at 3.) GEICO,  
2 nevertheless, provided Lopez with a rental care reimbursement of \$25 a day for 30 days (*Id.*;  
3 Dkt. # 12 at 2.) After 30 days, the repair shop had yet to finish repairs on Lopez’s vehicle,  
4 and despite Lopez’s earlier request to take the vehicle to another shop, the repair shop  
5 refused to release the car in a timely manner. (Dkt. # 12 at 2.) Additionally, GEICO ceased  
6 its rental car reimbursements after 30 days, so Lopez was left without access to a vehicle.  
7 (Dkt. # 1 Ex. A at 3.) As a result, Lopez purchased another vehicle and stopped making  
8 payments on her Trailblazer. (*Id.*) The Trailblazer was ultimately repossessed, leaving Lopez  
9 with a deficiency balance of \$22,921.17. (*Id.*)

10 The Complaint’s prayer for relief did not seek a specific dollar amount, but instead  
11 sought (1) “[d]amages for failure to pay policy benefits,” (2) “[c]ompensatory damages for  
12 distress, financial harm and other incidental damages in an amount to be determined at trial,”  
13 (3) “punitive and exemplary damages in an amount to be proven at trial to appropriately  
14 punish, deter, and set an example of Defendant,” (4) “[c]osts of suit incurred by Lopez,” (5)  
15 “[r]easonable attorney’s fees,” and (6) “such further relief as the Court deems just and  
16 proper.” (*Id.* at 5.) And while the Complaint does not contain a specific dollar amount, Lopez  
17 did file a Certificate of Compulsory Arbitration with the Complaint, certifying that the  
18 amount sought in the Complaint exceeds \$50,000. (*Id.* at 10.)

19 On October 29th, 2009, GEICO filed a notice of removal to this Court under 28  
20 U.S.C. 1441(a). (*Id.*) GEICO asserts this Court has diversity jurisdiction because the parties  
21 are citizens of different states and the amount in controversy exceeds \$75,000. (*Id.*)

## 22 DISCUSSION

23 “[A]ny civil action brought in a state court of which the district courts of the United  
24 States have original jurisdiction, may be removed by the defendant . . . to the district court  
25 of the United States for the district and division embracing the place where such action is  
26 pending.” 28 U.S.C. § 1441(a). Only “actions that originally could have been filed in federal  
27 court may be removed to federal court by the defendant.” *Caterpillar, Inc. v. Williams*, 482  
28 U.S. 386, 392 (1987). “If at any time before final judgment it appears that the district court

1 lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c). There is  
2 a “strong presumption” against removal, and “[f]ederal jurisdiction must be rejected if there  
3 is any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d  
4 564, 566 (9th Cir. 1992) (citing *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064  
5 (9th Cir. 1979)). “The ‘strong presumption’ against removal jurisdiction means that the  
6 defendant always has the burden of establishing that removal is proper.” *Gaus*, 980 F.2d at  
7 566; see *Prize Frize, Inc. v. Matrix Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999) (“The burden  
8 of establishing federal jurisdiction is on the party seeking removal, and the removal statute  
9 is strictly construed against removal jurisdiction.”) (citing *Emrich v. Touche Ross & Co.*, 846  
10 F.2d 1190, 1195 (9th Cir. 1988)). One way a district court may have removal jurisdiction is  
11 if the plaintiff and defendant are citizens of different states and the “matter in controversy  
12 exceeds . . . \$75,000, exclusive of interest and costs.” 28 U.S.C. § 1332(a). The burden of  
13 proof regarding the amount in controversy depends on whether the face of the plaintiff’s  
14 complaint alleges a specific amount or whether the complaint is ambiguous. *Guglielmino v.*  
15 *McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007); *Sanchez v. Monumental Life Ins.*  
16 *Co.*, 102 F.3d 398, 402, 404 (9th Cir. 1996).

17 **I. GEICO Has Not Shown the Amount in Controversy More Likely Than Not**  
18 **Exceeds \$75,000.**

19 Because Lopez’s complaint is “unclear or ambiguous” regarding the amount in  
20 controversy, *Guglielmino*, 506 F.3d at 699, GEICO “bears the burden of establishing, by a  
21 preponderance of the evidence, that the amount in controversy exceeds [\$75,000].” *Sanchez*,  
22 102 F.3d at 404 (“[T]he defendant must provide evidence establishing that it is ‘more likely  
23 than not’ that the amount in controversy exceeds [\$75,000].”); see also *Gaus*, 980 F.2d at  
24 566-67 (“If it is unclear what amount of damages the plaintiff has sought, . . . then the  
25 defendant bears the burden of actually proving the facts to support . . . the jurisdictional  
26 amount.”). In considering whether the defendant has satisfied the preponderance of the  
27 evidence standard, the Court considers “facts presented in the removal petition as well as any  
28 ‘summary-judgment-type evidence relevant to the amount in controversy at the time of

1 removal.’” *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1090 (9th Cir. 2003).  
2 “[R]emoval ‘cannot be based simply upon conclusory allegations’ where the [complaint] is  
3 silent” as to the dollar amount sought. *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d  
4 373, 377 (9th Cir. 1997). Upon examination of the damages sought by the Complaint,  
5 GEICO has not satisfied its burden of establishing that the amount in controversy  
6 requirement is met.

7 **A. Unpaid Policy Benefits**

8 The unpaid policy benefits Lopez seeks do not alone meet the amount in controversy  
9 requirement. Lopez’s Complaint seeks actual damages for GEICO’s alleged breach of the  
10 policy agreement of \$22,921.17. It is not evident to the Court that this amount continues to  
11 accrue due to a continuing obligation for GEICO to pay rental car payments.

12 **B. Emotional Distress, Punitive Damages, and Attorneys’ Fees**

13 In determining the amount in controversy, courts may also consider damages for  
14 emotional distress, punitive damages, and attorneys’ fees. *See Kroske v. U.S. Bank Corp.*,  
15 432 F.3d 976, 980 (9th Cir. 2005) (considering emotional distress awards in similar cases);  
16 *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001) (“[P]unitive damages are part  
17 of the amount in controversy . . . .”); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th  
18 Cir. 1998) (“[W]here an underlying statute authorizes an award of attorneys’ fees, either with  
19 mandatory or discretionary language, such fees may be included in the amount in  
20 controversy.”). These damages and fees, however, must not leave substantial doubt and must  
21 be more than speculative to meet GEICO’s burden of proving the amount in controversy. *See*  
22 *Sanchez*, 102 F.3d at 404; *Singer*, 116 F.3d at 377. Here, GEICO presents inadequate  
23 evidence to show that the amount in controversy exceeds \$75,000.

24 **(1) Emotional Distress and Punitive Damages**

25 Courts may consider emotional distress and punitive damages for the amount in  
26 controversy if they are recoverable under the applicable law. *Bell v. Preferred Life Assurance*  
27 *Soc’y*, 320 U.S. 238, 240 (1943); *Gibson*, 261 F.3d at 945. Arizona law allows for punitive  
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1 damages awards in bad faith insurance cases. *Filasky v. Preferred Risk Mut. Ins. Co.*, 734  
2 P.2d 76, 83 (Ariz. 1987).

3 Courts sometimes consider comparable awards in determining whether or not punitive  
4 damages would exceed \$75,000. *See Ansley v. Metro. Life Ins. Co.*, 215 F.R.D. 575 (D. Ariz.  
5 2003) (finding that the removing defendant established the amount in controversy  
6 requirement where the notice of removal cited similar cases in which the plaintiff was  
7 awarded at least \$500,000 in punitive damages). The defendant, however, must “articulate  
8 why the *particular facts* that are alleged in the instant action might warrant extraordinary”  
9 damages. *See Haisch v. Allstate Ins. Co.*, 942 F.Supp. 1245, 1249 (D. Ariz. 1996) (emphasis  
10 added) (“It would be inherently speculative . . . to conclude that the amount in controversy  
11 requirement can be met simply by asserting that large punitive damages have been awarded  
12 in the past against insurance companies . . .”).

13 Although GEICO correctly notes that the amount in controversy requirement may be  
14 satisfied by producing an affidavit that highlights the fact that other large punitive awards  
15 have been handed down within that jurisdiction, GEICO’s affidavit in this case is  
16 insufficient. *See Burk v. Med. Sav. Ins. Co.*, 348 F. Supp.2d 1063 (D. Ariz. 2004). In this  
17 case, defense counsel produces an affidavit stating that he “is unaware of a single reported  
18 Arizona case decided in the last 15 years in which a punitive damages award did not exceed  
19 \$75,000.” (Dkt. # 12 Ex. 3 at 3.) This affidavit is virtually identical to the affidavit produced  
20 by defense counsel in *Burk*. *Id.* at 1069. In *Burk*, the court found that such an affidavit was  
21 insufficient to conclude that the plaintiff’s complaint satisfied the amount in controversy  
22 requirement because defense counsel’s affidavit was not supported by citation to a single  
23 “relevant case where punitive damages in excess of \$75,000 were awarded.” *Id.* Similarly,  
24 in *Conrad Assocs. v. Hartford Accident & Indem. Co.*, 994 F.Supp. 1196, 1201 (N.D. Cal.  
25 1998), the court found that even though the defendant had provided tangible evidence of jury  
26 verdicts awarding punitive damages in insurance bad faith cases in excess of \$75,000, the  
27 jurisdictional amount was nonetheless not satisfied because the defendant failed to compare  
28 the facts of the cited cases to the facts of its case. As in *Burk* and *Conrad* GEICO fails to

1 compare the facts of comparable cases to the facts of this case. In fact, GEICO does not even  
2 cite a single case to support defense counsel’s affidavit.

3 **(2) Attorneys’ Fees**

4 Courts may include attorneys’ fees in accessing the amount in controversy when “an  
5 underlying statute authorizes an award of attorneys’ fees, either with mandatory or  
6 discretionary language.” *Lowdermilk v. United States Bank Nat’l Ass’n*, 479 F.3d 994, 1000  
7 (9th Cir. 2007); *Galt*, 142 F.3d at 1156. Arizona law authorizes a discretionary award of  
8 attorneys’ fees in contract actions. Ariz. Rev. Stat. § 12-341.01(A). These fees, however,  
9 must not leave substantial doubt and must be more than speculative to meet GEICO’s burden  
10 of proving the amount in controversy. *See Sanchez*, 102 F.3d at 404; *Singer*, 116 F.3d at 377.

11 GEICO estimates that Lopez’s attorneys’ fees will fall somewhere between \$40,000  
12 to \$60,000. (Dkt. # 12 Ex. 3 at 3.) GEICO supports this argument with an affidavit from  
13 defense counsel, predicting the tasks each side will undertake in litigating the case through  
14 discovery. *Id.* Defense counsel predicts that the tasks through discovery will consume  
15 approximately 200 billable hours. *Id.* Defense counsel estimates that opposing counsel bills  
16 between \$200 to \$300 per hour, yielding a \$40,000 to \$60,000 range for attorneys’ fees. *Id.*

17 Defense counsel’s affidavit relating to attorneys’ fees is essentially identical to the  
18 affidavit produced by the defense counsel in *Burk*. 348 F.Supp.2d at 1068. In *Burk*, the court  
19 found defense counsel’s prediction of plaintiff’s attorneys’ fees to be highly speculative and  
20 therefore held that the affidavit failed to meet the preponderance of the evidence burden of  
21 proof. *Id.* (“[E]ven if Plaintiff’s counsel in fact pursues all of the tasks defense counsel  
22 anticipates, it is nonetheless impossible to calculate the fees those activities will generate  
23 with no evidence of the time they will consume or the rate at which they will be billed.”).  
24 Lopez’s affidavit indicating that she works on a contingency fee, rather than billable hour  
25 basis, and that she has, to date, put in less than ten hours of work on the case, further  
26 illustrates the highly speculative nature of defense counsel’s estimation. (Dkt. # 15 Ex. 1 at  
27 8–9).

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1           **C.     Certificate of Compulsory Arbitration**

2           GEICO next argues that Lopez has admitted in her Certificate of Compulsory  
3 Arbitration that the Complaint, exclusive of attorneys' fees, exceeds \$50,000. According to  
4 GEICO, this makes it more likely than not that the amount in controversy, including  
5 attorneys' fees, exceeds \$75,000. (Dkt. # 12 at 4.) Lopez's admission that the Complaint  
6 exceeds \$50,000 does not establish by a preponderance of the evidence that the amount in  
7 controversy exceeds \$75,000. *Dukes v. Twin City Fire Ins. Co.*, 2010 WL 94109 at \*2 (D.  
8 Ariz. Jan. 6, 2010) ("Plaintiff's admission in her Certificate of Compulsory Arbitration  
9 sufficiently establishes that the amount in controversy exceeds \$50,000, but . . . Defendant  
10 has presented insufficient evidence that the amount in controversy exceeds \$75,000.").  
11 Assuming that Lopez received exactly \$50,000, the question becomes how much Lopez's  
12 attorney would receive in attorneys' fees. Defense counsel's estimate puts opposing  
13 counsel's fees between \$40,000 to \$60,000. Lopez's counsel, in her affidavit, indicated that  
14 she is paid on a contingency fee basis of approximately 26.2%. (*See* Dkt. # 15 Ex. 1 at 8.)  
15 Applying this percentage to \$50,000, the amount of damages that Lopez conceded, provides  
16 Lopez's counsel with \$13,100 in attorneys' fees. (*See id.*) And, while this equates to \$63,100,  
17 it obviously does not show by a preponderance of the evidence that the amount in  
18 controversy exceeds \$75,000.

19           **D.     Lopez's Failure to Stipulate to Damages**

20           Finally, the Court rejects GIECO's contention that Lopez must stipulate that she will  
21 cap her damages at \$75,000. There is no authority that requires her to do so. Instead, the  
22 authority is to the contrary. *See, e.g., Conrad*, 994 F. Supp. at 1199 (holding that failure to  
23 expressly stipulate to damages below \$75,000 is not even persuasive in evaluating the worth  
24 of the claims alleged in a complaint). Indeed, because a defect in subject matter jurisdiction  
25 cannot be stipulated to or waived, attempting to force the plaintiff to enter a stipulation  
26 regarding the potential amount of damages would serve no effect in determining the actual  
27 amount in controversy at the time of removal. *See id.* (citing *Angus v. Shiley, Inc.*, 989 F.2d  
28 142 (3rd Cir. 1993).

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**CONCLUSION**

Removal to this Court was improper because GEICO has not shown by a preponderance of the evidence that the amount in controversy exceeds \$75,000.

**IT IS THEREFORE ORDERED** that Lopez’s Motion to Remand (Dkt. # 10) is **GRANTED**. The Clerk of the Court is directed to **REMAND** this case to Maricopa County Superior Court.

DATED this 12th day of March, 2010.

  
\_\_\_\_\_  
G. Murray Snow  
United States District Judge