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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Elite Performance LLC,
10 Plaintiff,

11 v.

12 Echelon Property & Casualty Insurance
13 Company,
14 Defendant.

No. CV-20-00552-TUC-RM (LAB)

ORDER

15 Pending before the Court is Plaintiff Elite Performance LLC's Motion to Remand
16 (Doc. 4), and Magistrate Judge Leslie A. Bowman's Report and Recommendation
17 ("R&R") (Doc. 14), recommending that the Motion to Remand be denied. Plaintiff filed
18 an Objection to the R&R (Doc. 15), to which Defendant Echelon Property & Casualty
19 Insurance Company responded (Doc. 18). For the following reasons, the R&R will be
20 accepted and adopted in full and the Motion to Remand will be denied.

21 **I. Background**

22 Plaintiff brought this action in Pima County Superior Court on December 4, 2020.
23 (Doc. 1.) Plaintiff alleges that, in a prior lawsuit, it obtained a stipulated judgment of
24 \$475,000.00 against Defendant's insureds—AC/DC Electric, Inc. ("AC/DC"), its owner
25 Daniel Fazio, and his wife Monica Fazio (collectively, the "Insureds")—based on
26 AC/DC's negligent work at a property owned by Plaintiff. (Doc. 1-3 at 3-6.)¹ Defendant
27 denied coverage in the prior suit, and the Insureds assigned to Plaintiff their claims

28 ¹ All record citations herein refer to the page numbers generated by the Court's electronic filing system.

1 against Defendant, pursuant to *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969). (*Id.* at 4-5,
2 8.) In the present action, Plaintiff alleges claims for breach of contract and insurance bad
3 faith, seeking to recover reimbursement of attorneys’ fees and costs from the underlying
4 suit against the Insureds, as well as the outstanding balance due on the \$475,000.00
5 judgment from that suit. (*Id.* at 7-9)

6 Defendant removed the action to this Court based on diversity jurisdiction. (Doc.
7 1.) In its Notice of Removal, Defendant avers that Plaintiff is an Arizona limited liability
8 company with its principal place of business in Arizona; Defendant is an Illinois
9 corporation with its principal place of business in Illinois; and over \$75,000 is in
10 controversy. (*Id.* at 1-2.) Plaintiff filed a Motion to Remand, arguing that the Arizona
11 citizenship of the Insureds is imputed to Defendant under 28 U.S.C. § 1332(c)(1), and
12 thus that complete diversity of citizenship does not exist between the parties. (Doc. 4.)

13 **II. Standard of Review**

14 A district judge “may accept, reject, or modify, in whole or in part, the findings or
15 recommendations” made by a magistrate judge. 28 U.S.C. § 636(b)(1). The district
16 judge must “make a de novo determination of those portions” of the magistrate judge’s
17 “report or specified proposed findings or recommendations to which objection is made.”

18 *Id.*

19 **III. Discussion**

20 District courts have diversity jurisdiction of civil actions between citizens of
21 different states in which the matter in controversy exceeds \$75,000. 28 U.S.C. § 1332(a).
22 A corporation is deemed a citizen of the state in which it has been incorporated and the
23 state in which it has its principal place of business, “except that in any direct action
24 against the insurer of a policy or contract of liability insurance . . . to which action the
25 insured is not joined as a party-defendant,” the insurer is also deemed a citizen of the
26 state “of which the insured is a citizen.” 28 U.S.C. § 1332(c)(1)(A).

27 The R&R finds that the “direct action” provision of § 1332(c)(1) is inapplicable
28 here because this lawsuit is not a direct action. (Doc. 14. at 3-5.) In reaching this

1 conclusion, the R&R analyzes case law interpreting § 1332(c)(1), as well as the
2 legislative history of the statute. (*Id.*)

3 In its Objection to the R&R, Plaintiff argues that this case is a direct action based
4 on a dictionary definition of that term and because Plaintiff is bringing suit against
5 Defendant without joining the Insureds. (Doc. 15 at 3-4, 6.) Plaintiff further argues that
6 it is inappropriate to “[r]esort[] to legislative history” in interpreting § 1332(c)(1) because
7 the statute uses the word “any” and thus should be interpreted expansively. (Doc. 15 at
8 1-5.) Plaintiff concedes that Arizona does not have a direct action statute, but it argues
9 that if Congress intended § 1332(c)(1) to be limited to cases brought under a direct action
10 statute, it would have drafted the statutory language to refer not to “direct actions” but
11 instead to actions “brought under a direct action statute.” (*Id.* at 5 (internal quotation
12 marks omitted).) Plaintiff also argues that the insurance policy at issue allows for a direct
13 action because it permits an entity to sue Defendant to recover on a final judgment
14 against an insured of Defendant. (*Id.* at 5-6.) In response to Plaintiff’s Objection,
15 Defendant argues that the language of 28 U.S.C. § 1332(c)(1) and the insurance policy at
16 issue, as well as all cases interpreting § 1332(c)(1) and the statute’s legislative history,
17 make clear that this case is not a direct action. (Doc. 18.)

18 Because “the meaning of ‘direct action’” in 28 U.S.C. § 1332(c)(1) “is not clear
19 from the statutory language,” the statute’s “legislative history must be consulted.”
20 *Searles v. Cincinnati Ins. Co.*, 998 F.2d 728, 730 (9th Cir. 1993). The legislative history
21 reveals that § 1332(c)(1) was enacted to eliminate diversity jurisdiction in cases in which
22 the tortfeasor and the injured party are both residents of the same state but a state’s
23 “‘direct action’ statute” allows the case to “be brought directly against a foreign
24 insurance carrier without joining the local tort-feasor as a defendant.” *Northbrook Nat’l*
25 *Ins. Co. v. Brewer*, 493 U.S. 6, 9-10 (1989) (emphasis and internal quotation marks
26 omitted). In light of § 1332(c)(1)’s legislative history, “[c]ourts have uniformly defined
27 the term ‘direct action’ as used in this section as those cases in which a party suffering
28 injuries or damage for which another is legally responsible is entitled to bring suit against

1 the other's liability insurer without joining the insured or first obtaining a judgment
2 against him." *Beckham v. Safeco Ins. Co. of Am.*, 691 F.2d 898, 901-02 (9th Cir. 1982).
3 An insurance bad faith action is not a "direct action" under § 1332(c)(1) because it does
4 not seek to impose liability on an insurer for the negligence of an insured but, instead,
5 seeks to impose liability on the insurer "for its own tortious conduct." *Id.* at 902; *see also*
6 *Searles*, 998 F.2d at 728, 730.

7 It is undisputed that Arizona does not have a direct action statute. (*See* Doc. 15 at
8 5.) Plaintiff could not have brought this action without first obtaining a judgment against
9 the Insureds and being assigned their claims against Defendant. The fact that the
10 insurance policy at issue allows an entity to sue Defendant to recover on a final judgment
11 against an insured of Defendant (*see* Doc. 15 at 5-6) does not mean that the policy allows
12 for a "direct action," because a case is not a direct action if a plaintiff must first obtain a
13 judgment against a tortfeasor in order to bring suit against the tortfeasor's liability
14 insurer. *Beckham*, 691 F.2d at 901-02. Plaintiff's arguments are contrary to binding
15 precedent and fail to cast any doubt on the reasoning and analysis of the R&R. Because
16 this is not a direct action, § 1332(c)(1)(A) is inapplicable.

17 For purposes of diversity jurisdiction, Defendant is a citizen of Illinois, where it is
18 incorporated and has its principal place of business, and Plaintiff is a citizen of Arizona.
19 (Doc. 1.) There is complete diversity of citizenship between the parties, and over
20 \$75,000 is in controversy. Accordingly, this Court has diversity jurisdiction under 28
21 U.S.C. § 1332, and Plaintiff's Motion to Remand will be denied.

22 **IT IS ORDERED** that the Report and Recommendation (Doc. 14) is **accepted**
23 **and adopted in full.**

24 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Remand (Doc. 4) is
25 **denied.**

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