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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

MARTHA SCALZO,  
Plaintiff,  
v.  
ALLIED PROPERTY AND CASUALTY  
INSURANCE COMPANY, a corporation and  
DOES 1 through 10,  
Defendants.

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) 1:11-cv-00612 LJO GSA  
)  
) **FINDINGS AND RECOMMENDATIONS**  
) **REGARDING MOTION TO REMAND**  
)  
) (Document 10)

**RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

On March 8, 2011, Plaintiff Martha Scalzo filed a complaint in the Madera County Superior Court, asserting the following causes of action: breach of contract, breach of implied covenant of good faith and fair dealing, and intentional misrepresentation. In addition to general damages and the recovery of attorneys fees and costs, Plaintiff sought an award of punitive damages. Generally speaking, Plaintiff alleges that Defendant Allied Property and Casualty Insurance Company, Inc. breached a policy of insurance between the parties following damages sustained at Plaintiff's home in Madera, California, caused by a rain storm that occurred on May 23, 2010. (See Doc. 1, Ex. A.)

1 On April 15, 2011, Defendant filed a Notice of Removal with this Court. More  
2 specifically, Defendant removed the action from state court on the basis of diversity. (Doc. 1.)

3 On April 22, 2011, Defendant filed an answer to the complaint. (Doc. 8.)

4 On June 9, 2011, Plaintiff filed a Motion to Remand for Lack of Subject Matter  
5 Jurisdiction. (Docs. 10-12.) Thereafter, on June 24, 2011, Defendant opposed the motion to  
6 remand. (Doc. 15.) On July 1, 2011, Plaintiff filed a reply. (Doc. 16.)

7 On July 5, 2011, this Court determined the matter was suitable for decision without oral  
8 argument pursuant to Local Rule 230(g).<sup>1</sup> The hearing scheduled for July 8, 2011, was vacated  
9 and the matter was deemed submitted for written findings. (Doc. 17.)

### 10 LEGAL STANDARD

11 Title 28 of the United States Code section 1441(a) provides that a defendant may remove  
12 “any civil action brought in a State court of which the district courts . . . have original jurisdiction  
13 . . .” Removal is proper when a case originally filed in state court presents a federal question or  
14 where there is diversity of citizenship among the parties and the amount in controversy exceeds  
15 \$75,000. *See* 28 U.S.C. §§ 1331, 1332(a).

16 Section 1447(c) provides that “[i]f at any time before final judgment it appears that the  
17 district court lacks subject matter jurisdiction, the case shall be remanded.” “The removal statute  
18 is strictly construed against removal jurisdiction [and] [t]he defendant bears the burden of  
19 establishing that removal is proper.” *Provincial Gov’t of Marinduque v. Placer Dome, Inc.*, 582  
20 F.3d 1083 (9th Cir. 2009). The Ninth Circuit has held that “[w]here doubt regarding the right to  
21 removal exists, a case should be remanded to state court.” *Matheson v. Progressive Specialty*  
22 *Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003).

23 A motion to remand is the proper procedure for challenging removal. *Babasa v.*  
24 *LensCrafters, Inc.*, 498 F.3d 972, 974 (9th Cir. 2007). When reviewing a motion to remand, a

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26 <sup>1</sup>The Court carefully reviewed and considered all of the pleadings, including arguments, points and  
27 authorities, declarations, and exhibits. Any omission of a reference to an argument or pleading is not to be construed  
28 that this Court did not consider the argument or pleading.

1 district court must analyze jurisdiction “on the basis of the pleadings filed at the time of removal  
2 without reference to subsequent amendments.” *Sparta Surgical Corp. v. Nat’l Ass’n of Sec.*  
3 *Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998) (citation omitted). If a defendant has  
4 improperly removed a case over which the district court lacks subject matter jurisdiction, the  
5 district court shall remand the case to the state court. 28 U.S.C. § 1447(c); *see also Durham v.*  
6 *Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006) (noting that a district court resolves  
7 all ambiguity in favor of remand). However, a district court lacks discretion to remand a case to  
8 the state court if the case was properly removed. *Carpenters S. Cal. Admin. Corp. v. Majestic*  
9 *Hous.*, 743 F.2d 1341, 1343 (9th Cir. 1984); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S.  
10 343, 356, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988).

11         Where the parties in an action are citizens of different states, a district court “shall have  
12 original jurisdiction . . . where the matter in controversy exceeds the sum or value of \$75,000,  
13 exclusive of interest and costs.” 28 U.S.C. § 1332(a). This amount includes claims for general  
14 and special damages (excluding costs and interests), attorneys fees if recoverable by statute or  
15 contract, and punitive damages, if recoverable as a matter of law. *Conrad Assocs. v. Hartford*  
16 *Accident & Indem. Co.*, 994 F.Supp. 1196, 1198 (N.D. Cal. 1998). The amount in controversy is  
17 “determined at the time the action commences, and a federal court is not divested of jurisdiction  
18 . . . if the amount in controversy subsequently drops below the minimum jurisdictional level.”  
19 *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 757 (9th Cir. 1999).

20         Where the complaint does not specify the amount sought as damages, the removing party  
21 must prove by a preponderance of the evidence that the amount in controversy meets the  
22 jurisdictional threshold. *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007);  
23 *Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 683 (9th Cir. 2006); *Sanchez v. Monumental*  
24 *Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996).

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1 **DISCUSSION**

2 Plaintiff seeks remand to state court, asserting that Defendant has not met its burden of  
3 establishing that removal was proper. More particularly, Plaintiff argues that Defendant has  
4 failed to establish that the amount in controversy exceeds \$75,000. (Doc. 10 at 2-5.)  
5 Additionally, Plaintiff argues that Defendant has failed to prove diversity of citizenship. (Doc.  
6 10 at 5-7.) Defendant opposes the motion, contending the amount of controversy has in fact been  
7 met, and that diversity of citizenship exists between the parties. (Doc. 15 at 2-8.)

8 For the foregoing reasons, this Court will recommend the matter be remanded to the  
9 Madera County Superior Court.

10 **A. Amount in Controversy**

11 Where a complaint does not specify a particular amount of damages, the Ninth Circuit has  
12 held the removing party bears the burden of establishing, by a preponderance of the evidence,  
13 that the recovery sought meets the amount in controversy requirement. *Abrego v. The Dow*  
14 *Chemical Co.*, 443 F.3d at 683. Therefore, the removing party must provide evidence that it is  
15 more likely than not that the amount in controversy exceeds \$75,000. *Id.*, citing *Sanchez v.*  
16 *Monumental Life Ins. Co.*, 102 F.3d at 404. Where this burden is not met, the case must be  
17 remanded to the state court where it was originally filed. Fed. R. Civ. P. 1447(c). As previously  
18 noted, the removal statute is strictly construed against removal. *Provincial Gov't of Marinduque*  
19 *v. Placer Dome, Inc.*, 582 F.3d 1083; *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th  
20 Cir. 1988).

21 Plaintiff's complaint does not specify a particular amount of damages sought. Rather,  
22 Plaintiff seeks general, special, economic and consequential damages, attorney fees, prejudgment  
23 interest, costs of suit, and punitive damages. (Doc. 1, Ex. A at 12.) Thus, Defendant must show  
24 by a preponderance of the evidence that the amount in controversy exceeds \$75,000.

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1                   **1.       Punitive Damages**

2           Defendant asserts that Plaintiff’s bad faith and punitive damages claims establish that the  
3 amount in controversy is met. Specifically, Defendant cites to a number of cases wherein  
4 “[j]uries in California render verdicts in the millions of dollars based on the alleged bad faith  
5 denial of insurance benefits and punitive damages claims.” (Doc. 15 at 3.) Counsel for  
6 Defendant also appended copies of jury verdicts in three matters to her supporting declaration.  
7 (Doc. 15-1, Exs. A-C.)

8           However, “[i]t would be inherently speculative for this Court to conclude that the amount  
9 in controversy requirement can be met by simply asserting that large punitive damage awards  
10 have been awarded in the past against insurance companies” for bad faith failure to pay claims.  
11 *Conrad Assocs. v. Hartford Accident & Indem. Co.*, 994 F.Supp. at 1201 (internal citation  
12 omitted). Here, Defendant has not provided any factual data on the cases cited and “has made no  
13 effort to compare the facts of [those cases] with the alleged facts of this case.” *Id.*, at 1201. The  
14 cases cited by Defendant involve a different kind of insurance - workers’ compensation,  
15 disability and automobile - and do not provide information regarding value of the underlying  
16 claim or damages sought. Defendant “has failed to articulate why the *particular facts* that are  
17 alleged in the instant case might warrant extraordinary damages.” *Id.*, at 1201.

18           Further, while Plaintiff’s complaint seeks damages for emotional distress related to a  
19 breach of the implied covenant of good faith and fair dealing, Defendant also has not provided a  
20 sound basis for this Court to estimate a potential award of said damages, and the Court will not  
21 speculate. The evidence offered by Defendant is too vague to establish subject matter  
22 jurisdiction.

23                   **2.       Attorney’s Fees**

24           Defendant further contends that whether Plaintiff can recover only “40% of the contract  
25 damages, or an hourly calculation based on the amount of fees incurred in pursuit of contract  
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1 damages . . . [e]ither method results in significant potential attorney’s fees that can be awarded in  
2 this case and contribute to the amount in controversy.” (Doc. 15 at 4-5.)

3 Plaintiff’s complaint does include a prayer for attorney’s fees. In her moving papers,  
4 Plaintiff indicates that “the only legal work performed . . . has been the preparation of the  
5 complaint.” (Doc. 10 at 4.) In her reply to Defendant’s opposition, Plaintiff asserts that  
6 Defendant has failed “to present credible evidence as to the fees attributable to recovering  
7 benefits . . . at the time of removal.” (Doc. 16 at 2.)

8 California law permits recovery of attorneys fees incurred by the insured in  
9 obtaining benefits due under the policy when the insurer’s conduct in withholding  
10 benefits was tortious. The theory permitting this recovery is that when an  
11 insurer’s tortious conduct reasonably compels the insured to retain an attorney to  
12 obtain the benefits due under a policy, it follows that the insurer should be liable  
13 in a tort action for that expense. However, only attorney fees attributed to an  
14 attorney’s efforts in obtaining benefits due under the insurance contract are  
15 recoverable, and fees attributable to obtaining any portion of the plaintiff’s award  
16 which exceeds the amount due under the policy are not recoverable. Since the  
17 amount in controversy may include attorneys fees if recoverable by statute or  
18 contract, attorney fees recoverable . . . may be considered in determining whether  
19 the amount in controversy exceeds the jurisdictional floor.

20 *Conrad Assocs. v. Hartford Accident & Indem. Co.*, 994 F.Supp. at 1199 (internal citations &  
21 quotation marks omitted). As noted by Plaintiff in her moving papers, attorney fees are minimal  
22 “because at the time of removal the only legal work performed . . . [was] the preparation of the  
23 complaint.” (Doc. 10 at 4.)

24 Defendant’s prediction that an award of attorney fees could be significant is too vague to  
25 establish subject matter jurisdiction. See *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th  
26 Cir. 1998); *Conrad Assocs. v. Hartford Accident & Indem. Co.*, 994 F.Supp. at 1200. The  
27 amount in controversy must be determined as of the date of removal. *Conrad Assocs. v.*  
28 *Hartford Accident & Indem. Co.*, 994 F.Supp. at 1200. This Court is not persuaded that the  
attorney fee exposure here works to establish that the amount in controversy exceeds \$75,000.

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1                   **3. Plaintiff’s Refusal to Stipulate**

2                   In his declaration in support of the remand motion, counsel for Plaintiff declares that  
3 Defendant offered to stipulate to remand in exchange for Plaintiff’s stipulation to a limit of her  
4 claims, including costs, to \$75,000. (Doc. 12, ¶ 2.)

5                   To the degree Defendant can be said to assert that Plaintiff’s failure to stipulate that her  
6 case is worth less than \$75,000 can be interpreted as evidence that potential damages meet the  
7 jurisdictional requirement (*see* Doc. 15-1, Ex. E), any such assertion is incorrect. In *Conrad*  
8 *Assocs. v. Hartford Accident & Indem. Co.*, the court held that plaintiff’s refusal to stipulate that  
9 the case was worth less than \$75,000 was not enough to establish diversity jurisdiction. *Conrad*  
10 *Assocs.*, 994 F.Supp. at 1199 (finding a defect in the subject matter jurisdiction cannot be  
11 stipulated to or waived).

12                   **4. The Settlement Offer**

13                   Defendant asserts that because Plaintiff “has offered nearly the jurisdictional minimum as  
14 a settlement offer,” or \$68,500, her “claim of \$20,000 in disputed damages . . . is disingenuous.”  
15 (Doc. 15 at 6; Doc. 15-1, Ex. D.)

16                   “A settlement letter is relevant evidence of the amount in controversy if it appears to  
17 reflect a reasonable estimate of the plaintiff’s claim.” *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840  
18 (9th Cir. 2002). In *Cohn*, the Court determined that a settlement letter demanding \$100,000  
19 dollars for alleged violations of a trademark was sufficient evidence that the amount in  
20 controversy exceeded \$75,000. *Id.* The Court noted that “Cohn could have argued that the  
21 demand was inflated and not an honest assessment of damages, but he made no attempt to  
22 disavow his letter or offer contrary evidence. Rather, he consistently maintained that his mark is  
23 worth more than \$100,000.” *Id.*

24                   Here, Plaintiff’s counsel sent a letter to defense counsel following receipt of Defendant’s  
25 notice of removal. Counsel for Plaintiff asserted that removal was improper because the amount  
26 in controversy did not establish this Court’s jurisdiction. In conclusion, the letter states as

1 follows: “We are authorized by our client to settle this case for \$68,500. This offer will remain  
2 in effect until 5pm on May 20, 2011, at which time it will automatically be revoked and our  
3 office will proceed to vigorously litigate this matter.” (Doc. 15-1, Ex. D.)

4 The settlement offer here appears to be a reasonable estimate of Plaintiff’s claim. *Cohn v.*  
5 *Petsmart, Inc.*, 281 F.3d at 840. A claim that is less than this Court’s required jurisdictional  
6 minimum. Additionally, in insurance claims matters, “the jurisdictional amount in controversy is  
7 measured by the value of the underlying claim - not the face amount of the policy.” *Hartford Ins.*  
8 *Group v. Lou-Con Inc.*, 293 F.3d 908, 911 (5th Cir. 2002); *see also Budget Rent-A-Car, Inc. v.*  
9 *Higashiguchi*, 109 F.3d 1471, 1473 (9th Cir. 1997); *Infinity Ins. Co. v. Guerrero*, 2007 WL  
10 2288324 (E.D. Cal. 2007). Plaintiff asserts in her motion that this matter “arises out of a \$20,000  
11 dispute over insurance policy benefits.” (Doc. 10 at 2; *see also* Doc. 10 at 3.) A. Michael De  
12 Cesare, a licensed public adjuster retained by Plaintiff, provided a declaration in support of the  
13 motion. In relevant part, the declaration provides:

14 Attached as Exhibit A to my declaration is a true and correct copy of my  
15 letter to Roger Cummings, Property Claims Representative, dated October 21,  
16 2010. Attached to the letter was a notarized proof of loss in the amount of  
17 \$41,523.40. The proof of loss is sworn to by Ms. Scalzo. Allied paid \$14,451.94  
towards the claim. As schedule A to the Proof of loss states there is a net amount  
payable of \$20,288.75 [less depreciation and deductible], in policy benefits.

18 (Doc. 11, ¶ 3.) Plaintiff has consistently maintained the value of her claim does not exceed the  
19 jurisdictional minimum. Also, as Plaintiff noted in her reply to Defendant’s opposition,  
20 “[s]ettlement offers embody numerous considerations other than just the amount in controversy  
21 at the time of removal.” (Doc. 16 at 3.)

22 Finally, like the Northern District court in *J. Marymount, Inc. v. Bayer Healthcare, LLC*,  
23 2009 WL 4510126 \*3 (Nov. 30, 2009), this Court is persuaded by the following reasoning:

24 In *Faulkner [v. Astro-Med, Inc.]*, 1999 U.S. Dist. LEXIS 15801 (N.D. Cal.  
25 Oct. 1, 1999)], the plaintiff made an initial offer to settle his claims including “all  
26 compensatory damages, attorney’s fees and punitive damages” for “\$72,000, with  
27 each side to bear their own fees and costs.” *Id.* at \*8. Subsequently, the Plaintiff  
made a second settlement offer of \$50,000 that “also included compensatory  
damages, attorney’s fees and punitive damages.” *Id.* The Court found that the



1 two settlement offers supported “plaintiff’s claim that he [was] seeking a total of  
2 less than \$75,000,” and ultimately found that the defendant had not shown that the  
amount in controversy exceeded \$75,000. *Id.* \*8, 12.

3 Other districts have come to similar conclusions. In *Vasquez v. CSX*  
4 *Transportation, Inc.*, the plaintiff made a settlement offer of \$70,000. *See id.*,  
2009 U.S. Dist. LEXIS 57825, \*1 (N.D. Ill. July 1, 2009). There, the court  
5 acknowledged that “when litigants settle lawsuits, they usually take the risk of  
going to trial into account. Thus, plaintiffs usually settle for less than what they  
6 believe they could get if they prevailed at trial. *Id.* at \*7. However, the court  
noted that the \$70,000 settlement offer was an initial offer, and typically initial  
7 offers are used to anchor the negotiations in [a party’s] favor by starting the  
process with a high number.” *Id.* Accordingly, the court refused “to jump to the  
8 conclusion that because [the plaintiff’s] initial settlement offer was \$70,000, the  
amount in controversy” exceeded \$75,000. *Id.* at \*7-8.

9 This Court will not simply conclude that Plaintiff’s settlement offer of \$68,500 is evidence that  
10 Plaintiff’s claim exceeds the required jurisdictional minimum.

11 For all of the foregoing reasons, this Court finds that Defendant has failed to meet its  
12 burden of establishing the amount in controversy in this matter exceeds \$75,000. Lastly, because  
13 this Court so finds, it need not reach the issue of whether or not diversity of citizenship exists  
14 between the parties. Accordingly, this Court will recommend Plaintiff’s motion to remand this  
15 matter to state court be granted.

16 **B. *Attorney’s Fees Related to the Instant Motion***

17 Plaintiff seeks an award of \$2,100 in attorney’s fees related to the preparation and filing  
18 of the motion for remand. (Doc. 10 at 7; Doc. 12, ¶ 3.)

19 An award of costs and fees is authorized only where remand occurs for “a defect in  
20 removal procedure” or for a lack of subject matter jurisdiction. 28 U.S.C. § 1447(c). A federal  
21 court may order the defendant to pay plaintiff its “just costs and any actual expenses, including  
22 attorney fees, incurred as a result of the removal.” *Martin v. Franklin Capital Corp.*, 546 U.S.  
23 132, 136, 126 S.Ct. 704, 708-09 (2005). The award of attorney fees is not automatic where  
24 plaintiff has prevailed; it is discretionary. *Id.*, at 136. The key factor regarding such an award is  
25 the propriety of the removal, “absent unusual circumstances, attorney’s fees should not be  
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1 awarded when the removing party has an objectively reasonable basis for removal.” *Id.*, at 136;  
2 *see also Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008).

3 Here, an award of fees and costs is not warranted. While the Court has in fact decided  
4 against Defendant on the issue of removal, it cannot be said its basis for seeking to remove this  
5 action from the state court is objectively unreasonable. *Martin v. Franklin Capital Corp.*, 546  
6 U.S. at 136.

7 In sum, this Court will recommend that Plaintiff’s request for an award of attorney fees  
8 related to the instant motion be denied.

9 **RECOMMENDATIONS**

10 For the reasons stated above, this Court RECOMMENDS that Plaintiff’s Motion for  
11 Remand for Lack of Subject Matter Jurisdiction be granted in part. More specifically, the Court  
12 recommends this matter be remanded to the Madera County Superior Court in its entirety.  
13 However, as to Plaintiff’s request for an award of attorney’s fees related to preparation of the  
14 instant motion, this Court RECOMMENDS the request be denied.

15 These findings and recommendations are submitted to the district judge assigned to this  
16 action, pursuant to Title 28 of the United States Code section 636(b)(1)(B) and this Court’s Local  
17 Rule 304. Within fifteen (15) days of service of this recommendation, any party may file written  
18 objections to these findings and recommendations with the Court and serve a copy on all parties.  
19 Such a document should be captioned “Objections to Magistrate Judge’s Findings and  
20 Recommendations.” The district judge will review the magistrate judge’s findings and  
21 recommendations pursuant to Title 28 of the United States Code section 636(b)(1)(C). The  
22 parties are advised that failure to file objections within the specified time may waive the right to  
23 appeal the district judge’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

24  
25 IT IS SO ORDERED.

26 **Dated: July 11, 2011**

**/s/ Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE