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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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J & J PUMPS, INC., a  
California corporation,

NO. CIV. 2:11-599 WBS CMK

Plaintiff,

ORDER TO SHOW CAUSE

v.

STAR INSURANCE COMPANY, a  
Michigan corporation; and DOES  
1 through 10, inclusive,

Defendants.

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Plaintiff J & J Pumps, Inc., filed this action in the Superior Court of the State of California for the County of Shasta against defendant Star Insurance Company arising from defendant's denial of plaintiff's insurance claim for employee dishonesty. On March 3, 2011, defendant removed the action to this court. (Docket No. 1.) Defendant subsequently filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure

1 12(b)(6). (Docket No. 5.) That motion is scheduled for a  
2 hearing on April 11, 2011. For the reasons stated below,  
3 defendant will be ordered to show cause within ten days why this  
4 action should not be remanded for lack of jurisdiction and the  
5 hearing on defendant's motion to dismiss will be continued to  
6 April 25, 2011.

7 I. Factual and Procedural Background

8 Defendant issued an insurance policy to plaintiff for  
9 October 1, 2009, through October 1, 2010, and a renewed insurance  
10 policy for October 1, 2010, through October 1, 2011. (Notice of  
11 Removal; Demand for Jury Trial ("Notice of Removal") Ex. A  
12 ("Compl.") ¶ 4 (Docket No. 1).) The policies address employee  
13 dishonesty. (Id. ¶ 5.) The Complaint did not attach the  
14 policies. The policies allegedly state:

15 You may extend the insurance that applies to Your  
16 Business Personal Property to apply to: (a) Loss or  
17 damage to any property . . . resulting from dishonest  
18 acts committed by an "employee," . . . , with the  
manifest intent to: (1) Cause you to sustain loss; and  
also (2) Obtain financial benefit . . . for: a - the  
"employee"; . . . .

19 (Id.)

20 In May of 2010, plaintiff discovered that an employee  
21 had failed to pay plaintiff's taxes to the Internal Revenue  
22 Service ("IRS") and California Employment Development Department  
23 ("EDD"). (Id. ¶ 8.) "Rather, [the employee] was hiding the  
24 money that should have been used to pay those tax deposits in an  
25 undefined account with the intent to benefit herself,  
26 financially, and embezzle said funds." (Id.) Plaintiff  
27 allegedly sustained losses as the result of the employee's  
28 conduct in the form of approximately \$40,000.00 in interest and

1 penalties on the unpaid taxes. (Id. ¶ 10.)

2           On November 3, 2010, plaintiff submitted a claim to  
3 defendant for policy benefits under the employee dishonesty  
4 provision. (Id. ¶ 11.) Upon defendant's request, plaintiff  
5 later provided a "Proof of Loss - Employee Dishonesty Form" and  
6 additional documentation. Defendant attached this form and  
7 additional documentation to its notice of removal. (See Notice of  
8 Removal Exs. C-D.) According to the exhibits attached to the  
9 notice of removal, plaintiff claimed policy benefits for  
10 approximately \$40,000.00 in interest and penalties already  
11 assessed by the IRS and EDD and an unspecified amount of interest  
12 and penalties for the second quarter of 2010 to later be  
13 assessed.

14           On January 17, 2011, defendant's claims administrator,  
15 Meadowbrook Insurance Group, denied plaintiff's claim for policy  
16 benefits for the present and future tax interest and penalties.  
17 (Compl. ¶ 12.) Plaintiff alleges that the denial was without  
18 "sufficient factual or legal basis." (Id.) The Complaint  
19 alleges that defendant's basis for denial was that the employee  
20 had not actually stolen the money that caused the interest and  
21 penalties. (Id. ¶ 24.)

22           Plaintiff has brought three claims: (1) breach of  
23 contract, (2) breach of the implied covenant of good faith and  
24 fair dealing, and (3) declaratory relief. Under the breach of  
25 contract claim, the Complaint alleges that defendant's denial of  
26 policy benefits has caused plaintiff to sustain "actual and  
27 substantial damages including, but not limited to, payment of  
28 penalties and assessments to the IRS and EDD, a reduction in cash

1 flow, receivables, and income resulting from the need to satisfy  
2 the IRS and EDD, all of which has, and will continue have [sic],  
3 a chilling effect on the financial well-being of J & J, a small  
4 family-owned company." (Id. ¶ 20.)

5           Plaintiff alleges that defendant breached its duty by  
6 (1) misrepresenting pertinent facts or policy provisions,  
7 "namely, claiming that the policy requires that [the employee]  
8 actually receive[s] the benefit of her dishonest acts," (2)  
9 "[n]ot attempting in good faith to effectuate prompt, fair, and  
10 equitable settlements of claims in which liability has become  
11 reasonably clear," (3) "[c]ompelling J & J to institute  
12 litigation to recover amounts due under an insurance policy," and  
13 (4) "[f]ailing to promptly provide a reasonable explanation of  
14 the basis relied on in the insurance policy, in relation to the  
15 facts or applicable law, for the denial of the claim." (Id. ¶  
16 24.)

17           The Complaint alleges that defendant continues to  
18 engage "in the aforesaid acts, and other conduct, constituting  
19 bad faith, all of which constitutes a continuing tort, causing  
20 Plaintiff's ongoing damages beyond the date of the filing of this  
21 action." (Id. ¶ 26.) Plaintiff alleges that it "has suffered,  
22 and continues to suffer, general and special damages in an amount  
23 within the jurisdiction of this court, to be shown according to  
24 proof at time of trial." (Id. ¶ 27.) Plaintiff also seeks to  
25 recover "costs of suit, attorneys' fees and related expenses,  
26 including expert witness fees," expended in recovering the policy  
27 benefits. (Id. ¶ 28.) Plaintiff also seeks to recover punitive  
28 damages "in an amount to be shown according to proof at the time

1 of trial." (Id. ¶ 30.)

2 On February 1, 2011, plaintiff filed the instant action  
3 in state court. On March 3, 2011, defendant removed the action  
4 to this court pursuant to 28 U.S.C. § 1441(a). Defendant's  
5 notice of removal states that the court has original jurisdiction  
6 pursuant to 28 U.S.C. § 1332 (diversity jurisdiction).

7 II. Discussion

8 A defendant may remove "any civil action brought in a  
9 State court of which the district courts of the United States  
10 have original jurisdiction . . . to the district court of the  
11 United States for the district and division embracing the place  
12 where such action is pending." 28 U.S.C. § 1441(a). A district  
13 court has original jurisdiction over any civil action between  
14 citizens of different states if the matter in controversy exceeds  
15 the sum or value of \$75,000.00, excluding interest and costs.<sup>1</sup>  
16 28 U.S.C. § 1332(a).

17 There is a strong presumption against removal  
18 jurisdiction, and the burden of establishing jurisdiction rests  
19 on the removing defendant with ambiguities resolved in favor of  
20 remand. Hunter v. Philip Morris USA, 582 F.3d 1039, 1042 (9th  
21 Cir. 2009). The removal statute is strictly construed against  
22 removal jurisdiction. Boggs v. Lewis, 863 F.2d 662, 663 (9th  
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24 <sup>1</sup> A district court also has jurisdiction over "all civil  
25 actions arising under the Constitution, laws, or treaties of the  
26 United States." 28 U.S.C. § 1331. Plaintiff asserts a claim for  
27 declaratory relief. It is not clear whether plaintiff brings  
28 this claim pursuant to federal law. Even if plaintiff did,  
"[t]he use of the declaratory judgment statute does not confer  
jurisdiction by itself if jurisdiction would not exist on the  
face of a well-pleaded complaint brought without the use of 28  
U.S.C. § 2201." Janakes v. U.S. Postal Serv., 768 F.2d 1091,  
1093 (9th Cir. 1985).

1 Cir. 1988). Removal jurisdiction must be rejected if there is  
2 any doubt as to the right of removal in the first instance. Gaus  
3 v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).

4 If it appears before final judgment that the district  
5 court lacks original jurisdiction over a case that has been  
6 removed to federal court, the case must be remanded. 28 U.S.C. §  
7 1447(c). This court is under an independent obligation to  
8 determine whether it has jurisdiction. See FW/PBS, Inc. v. City  
9 of Dallas, 493 U.S. 215, 231 (1990); Harris v. Provident Life &  
10 Accident Ins. Co., 26 F.3d 930, 932 (9th Cir. 1994).

11 Where a complaint filed in state court is unclear or  
12 ambiguous on whether the requisite amount in controversy is pled  
13 for diversity jurisdiction, a removing defendant must prove by a  
14 preponderance of the evidence that the amount in controversy  
15 exceeds the jurisdictional amount. Guglielmino v. McKee Foods  
16 Corp., 506 F.3d 696, 699 (9th Cir. 2007); see generally 16 James  
17 Wm. Moore et al., Moore's Federal Practice § 107.14[2][g][v] (3d  
18 ed. 2010) (discussing amount in controversy in removal context).  
19 To satisfy this burden, "the defendant must provide evidence  
20 establishing that it is 'more likely than not' that the amount in  
21 controversy exceeds that amount." Sanchez v. Monumental Life  
22 Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996).

23 When it is not "facially apparent" from the complaint  
24 that the claims are likely above \$75,000.00, the district court  
25 may consider facts in the notice of removal and may require  
26 affidavits. See Lockett v. Delta Airlines, Inc., 171 F.3d 295,  
27 298 (5th Cir. 1999); Singer v. State Farm Mut. Auto. Ins. Co.,  
28 116 F.3d 373, 377 (9th Cir. 1997) (citing Allen v. R & H Oil &

1 Gas Co., 63 F.3d 1326, 1335-36 (5th Cir. 1995)). A defendant  
2 must state facts in the notice of removal; a mere conclusion that  
3 the amount in controversy exceeds \$75,000.00 is insufficient.  
4 See Gaus, 980 F.2d at 567.

5 The amount in controversy includes attorney's fees if  
6 recoverable as a matter of law. See Galt G/S v. JSS Scandinavia,  
7 142 F.3d 1150, 1155 (9th Cir. 1998). "California law permits  
8 recovery of attorneys fees incurred by the insured in obtaining  
9 the benefits due under the policy when the insurer's conduct in  
10 withholding benefits was tortious." Conrad Assocs. v. Hartford  
11 Acc. & Indem. Co., 994 F. Supp. 1196, 1199 (N.D. Cal. 1998)  
12 (citing Brandt v. Super. Ct., 37 Cal. 3d 813, 816-819 (1985)).  
13 In determining the amount in controversy, "[s]ome courts include  
14 the calculation of attorney's fees incurred after the date of  
15 removal and other courts prohibit it." Killion v. AutoZone  
16 Stores Inc., No. 5:10-cv-01978, 2011 WL 590292, at \*2 (Feb. 8,  
17 2011); see id. at \*2 n.1 (comparing cases). In other words, some  
18 courts consider a "reasonable estimate of fees likely to be  
19 recovered." Brady v. Mercedes-Benz USA, Inc., 243 F. Supp. 2d  
20 1004, 1010-11 (N.D. Cal. 2002). When estimating attorney's fees  
21 to establish jurisdiction, such estimates cannot be "overly  
22 speculative." Galloway v. Volkswagen Grp. of Am., No. CV 11-896,  
23 2011 WL 685822, at \*1 (C.D. Cal. Feb. 17, 2011).

24 The amount in controversy also includes punitive  
25 damages if recoverable as a matter of law. See Gibson v.  
26 Chrysler Corp., 261 F.3d 927, 945 (9th Cir. 2001). "[C]alifornia  
27 law permits recovery of punitive damages for insurance bad faith  
28 claims." Conrad Assocs., 994 F. Supp. at 1200.

1 Here, § 1332's requirement of diversity of citizenship  
2 is met. See 28 U.S.C. 1332(c)(1). Plaintiff, a California  
3 corporation, has its principal place of business in California.  
4 (Notice of Removal ¶ 5.) Defendant, a Michigan corporation, has  
5 its principal place of business in Michigan.<sup>2</sup> (Id.)

6 The Complaint does not specify the amount that  
7 plaintiff seeks to recover. Thus, defendant must prove by a  
8 preponderance of the evidence that the amount in controversy  
9 exceeds \$75,000.00. See Guglielmino, 506 F.3d at 699. Moreover,  
10 it is not "facially apparent" from the Complaint that the amount  
11 in controversy exceeds \$75,000.00. See Lockett, 171 F.3d at 298;  
12 Singer, 116 F.3d at 377. The only dollar amount in the Complaint  
13 is approximately \$40,000.00 in tax interest and penalties  
14 assessed by the IRS and EDD for plaintiff's failure to timely pay  
15 its taxes. (Compl. ¶ 10.) The Complaint suggests that  
16 additional interest and penalties will be assessed. (Id. ¶ 13.)  
17 Under the breach of contract claim, plaintiff seeks recovery of  
18 the tax interest and penalties and alleges damages in the form of  
19 "a reduction in cash flow, receivables, and income resulting from  
20 the need to satisfy the IRS and EDD." (Id. ¶ 20.) Plaintiff  
21 also seeks general and special damages, punitive damages, and

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22  
23 <sup>2</sup> Section 1332 contains language with respect to insurers  
24 suggesting that the defendant, the insurer, is also a citizen of  
25 California because plaintiff, the insured, is a citizen of  
26 California. See 28 U.S.C. 1332(c)(1) (defining citizenship of  
27 insurer in "direct actions" against insurer). However, "[c]ourts  
28 generally have declined to take that approach, which would keep  
many insurance cases out of the federal courts." Nat'l Athletic  
Sportswear, Inc. v. Westfield Ins. Co., 528 F.3d 508, 511 n.1  
(7th Cir. 2008) ("The Seventh Circuit has stated the provision is  
a special rule for insurers in 'direct actions'--that is, cases  
in which a person with a claim against the insured sues the  
insurer directly.") (internal quotation marks omitted).



1 attorney's fees and related costs for breach of the implied  
2 covenant of good faith and fair dealing. (Id. ¶¶ 27-28, 30.)

3           Because the requisite amount in controversy is not  
4 "facially apparent" from the Complaint, the court may consider  
5 facts in the notice of removal and may require affidavits. See  
6 Lockett, 171 F.3d at 298; Singer, 116 F.3d at 377. Defendant's  
7 notice of removal does not provide additional facts that prove by  
8 a preponderance of evidence that the amount in controversy  
9 exceeds \$75,000.00. The notice of removal merely repeats the  
10 allegations in the Complaint and attaches a copy of plaintiff's  
11 claim for policy benefits, which seeks approximately \$40,000.00  
12 and an unspecified amount for additional interest and penalties  
13 to be assessed by the IRS and EDD for the second quarter of 2010.  
14 (Notice of Removal ¶¶ 7-9, Exs. C-D.)

15           Defendant's notice of removal appears to rely heavily  
16 on the fact that plaintiff seeks punitive damages and attorney's  
17 fees. (See Notice of Removal ¶¶ 8-9.) However, defendant may  
18 not meet its burden "simply by pointing out that the complaint  
19 seeks punitive damages and that any damages awarded under such a  
20 claim could total a large sum of money." Conrad Assocs., 994 F.  
21 Supp. at 1201; see also Killion, 2011 WL 590292, at \*2; Walters  
22 v. Sunrise Assisted Living of West Hills, No. CV 10-2848, 2010 WL  
23 2553464, at \*2 (C.D. Cal. June 18, 2010); Hayrapetyan v. Am.  
24 Int'l Grp., No. CV 10-1590, 2010 WL 2044521, at \*3 (C.D. Cal. May  
25 18, 2010); Gordon v. Allstate Ins. Co., No. CV-09-1828, 2010 WL  
26 1949164, at \*3 (D. Ariz. May 13, 2010). Similarly, without  
27 additional facts, defendant may not meet its burden simply  
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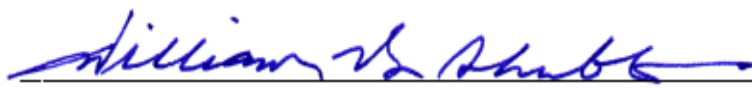
1 because plaintiff seeks attorney's fees.<sup>3</sup> See Galloway, 2011 WL  
2 685822, at \*1.

3 Defendant essentially seeks to establish diversity  
4 jurisdiction with a conclusory allegation of the amount in  
5 controversy in its notice of removal: "Altogether, the amount in  
6 controversy, exclusive of interest and costs, exceeds the sum of  
7 \$75,000.00." (Notice of Removal ¶ 10.) When a defendant removes  
8 an action, a conclusory allegation does not meet the defendant's  
9 burden to prove by a preponderance of the evidence that the  
10 amount in controversy exceeds \$75,000.00. See Gaus, 980 F.2d at  
11 567. Accordingly, the court will order defendant to show cause  
12 why this action should not be remanded for lack of jurisdiction.

13 IT IS THEREFORE ORDERED that within ten days of the  
14 date of this Order, defendant shall file a brief to show cause  
15 why this action should not be remanded to state court for lack of  
16 jurisdiction.

17 IT IS FURTHER ORDERED that the hearing on defendant's  
18 motion to dismiss is hereby continued to April 25, 2011, at 2:00  
19 p.m. in Courtroom No. 5.

20 DATED: April 4, 2011

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23 WILLIAM B. SHUBB  
24 UNITED STATES DISTRICT JUDGE  
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26 <sup>3</sup> Because defendant has not provided any facts relating  
27 to attorney's fees, the court declines to decide whether the  
28 jurisdictional amount in controversy includes attorney's fees  
after removal. See Killion v. AutoZone Stores Inc., No.  
5:10-cv-01978, 2011 WL 590292, at \*2 (Feb. 8, 2011).