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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYED NAWAB,

No C 08-05750 VRW

Plaintiff,

ORDER

v

MARKEL INSURANCE COMPANY; and  
DOES 1 to 5, inclusive,

Defendant.

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In late 2008, plaintiff commenced an action in superior court entitled Syed Nawab v Markel Insurance Company, case no RG08420587. On December 24, 2008, plaintiff timely removed the action to this court on the basis of diversity jurisdiction pursuant to 28 USC section 1441(a). Doc #1. On January 21, 2009, plaintiff filed motion to remand the action to state court, arguing that Markel did not and cannot establish that the amount in controversy exceeds \$75,000 as required by 28 USC section 1332. Doc #11. This motion was withdrawn on March 31, 2009, when the

1 parties stipulated to keep the case in federal court. Doc #16.

2 While a party may withdraw a motion to remand and indeed  
3 obtain a stipulation from an adversary to the withdrawal, parties  
4 cannot by stipulation confer jurisdiction on a federal court. On  
5 October 26, 2009, this court ordered Markel to show cause why this  
6 case should not be remanded to state court for lack of diversity  
7 jurisdiction. Doc #39. Markel responded by asserting that  
8 plaintiff's claim against Markel for attorney's fees and costs  
9 amount to \$322,392.40 at the time of removal. Doc #40 at 5. For  
10 reasons discussed below, the court moves sua sponte to REMAND the  
11 case to state court for lack of diversity jurisdiction.

12  
13 I

14 Under 28 USC section 1332, this court has original  
15 jurisdiction over a civil action where the action is between  
16 citizens of different states and the amount in controversy exceeds  
17 the sum or value of \$75,000. It is well established that a  
18 "defendant bears the burden of actually proving the facts to  
19 support jurisdiction, including the jurisdictional amount." Gaus v  
20 Miles, Inc, 980 F2d 564, 566-67 (9th Cir 1992). There is a "strong  
21 presumption" against removal jurisdiction and "federal jurisdiction  
22 must be rejected if there is any doubt as to the right of removal  
23 in the first instance." Id at 566. Where it is unclear or  
24 ambiguous from the face of a state-court complaint whether the  
25 requisite amount in controversy is pled, the removing defendant  
26 must prove by a preponderance of the evidence that the amount in  
27 controversy requirement has been met. Guglielmino v McKee Foods  
28 Corp, 506 F3d 696, 699 (9th Cir 2007). To satisfy its burden, "the

1 defendant must provide evidence establishing that it is more likely  
2 than not that the amount in controversy exceeds that amount."

3 Sanchez v Monumental Life Ins Co, 102 F3d 398, 404 (9th Cir 1996).

4 A defect in jurisdiction cannot be avoided by waiver or  
5 stipulation to submit to federal jurisdiction. Cripps v Life Ins  
6 Co of North America, 980 F2d 1261, 1264 (9th Cir 1992). The court  
7 has a duty to raise lack of subject matter or removal jurisdiction  
8 sua sponte even where the parties consent to federal jurisdiction.  
9 See 28 USC § 1447(c); Harris v Provident Life and Accident Ins Co,  
10 26 F3d 930, 932 (9th Cir 1994). Where the court lacks the  
11 requisite jurisdiction, the entire case should be remanded to the  
12 state court. See Molnar v National Broadcasting Company, 231 F2d  
13 684 (9th Cir 1956).

14  
15 II

16 On the issue of diversity jurisdiction in this matter,  
17 this court makes the following observations.

18 First, plaintiff's first amended complaint (FAC) at the  
19 time of removal is silent on the amount in controversy. Doc #40-1,  
20 Exh E.

21 Second, after reviewing the register of actions in the  
22 state court action, the court is unable to conclude that the amount  
23 in controversy is significantly greater than the \$23,853.26 Markel  
24 already paid to the plaintiff for reimbursement of legal fees. Doc  
25 #11 at 7.

26 Third, for the reasons stated in the order to show cause,  
27 Doc #39, the Eskridge letter, standing alone, does not represent  
28 plaintiff's reasonable estimate of the amount in controversy at the

1 time the initial pleading was filed. Doc #40-1 at 28-29. The  
2 letter was sent an entire ten months prior to commencement of the  
3 instant suit by an attorney who was not the plaintiff's attorney of  
4 record in this matter. Id. The letter also proposed a settlement  
5 amount of \$125,000 for release of claims not named in the instant  
6 action. Id. This court therefore cannot rely on the Eskridge  
7 letter as definitive guidance on the actual amount in controversy.

8 Finally, Markel has failed to carry its burden to show  
9 that it is more likely than not that the amount in controversy  
10 exceeds \$75,000. The figure of \$322,392.40 cited by Markel as  
11 plaintiff's claim against Markel for policy benefits does not  
12 reflect the amount in controversy at the time of removal. Doc #40.  
13 Plaintiff's FAC asserts that Markel "breached the policy of  
14 insurance in that it failed and refused to provide plaintiff with a  
15 defense to the First or Second Amended Cross-Complaints in the  
16 underlying action." Doc #40-1 at 74. The FAC also acknowledges  
17 that Markel "agreed to provide a defense against the third amended  
18 cross-complaint." Id. The amount in controversy, though not  
19 explicitly stated in the FAC, should not include plaintiff's legal  
20 fees and costs prior to Sappal's first amended cross-complaint,  
21 filed in August 2005, or any fees and costs subsequent to Sappal's  
22 third amended cross-complaint, filed in May 2007. The amount cited  
23 by Markel includes total fees and cost incurred by plaintiff's  
24 lawyer from as early as 2004 until November 2007. See Doc ##40 at  
25 4; 40-1 at 6. Based on such a gross overestimate of the actual  
26 attorneys fees and costs at issue, the court cannot determine that  
27 the amount in controversy is more likely than not over \$75,000.

28 Markel further argues that the punitive damages claimed

1 in the FAC should count towards the amount in controversy. Doc #40  
2 at 8. It is well established that punitive damages are part of the  
3 amount in controversy in a civil action. See Bell v Preferred Life  
4 Assur Society, 320 US 238, 240 (1943); Gibson v Chrysler Corp, 261  
5 F3d 927, 945 (9th Cir 2001). California allows for the recovery of  
6 punitive damages for breach of the fiduciary duty. See Cal Civ  
7 Code § 3294(a) (allowing recovery of exemplary damages "for the  
8 breach of an obligation not arising from contract").

9 Plaintiff's FAC asserts punitive damages but fails to  
10 allege a reasonable damages estimate. Doc #40-1 at 77. It thus  
11 remains unclear whether the jurisdictional minimum would have been  
12 met even with these additional damages. Although Markel examines  
13 the constitutional limits of punitive damages awards generally, Doc  
14 #40 at 8, such ratios between compensatory and punitive damages are  
15 of little evidentiary value where the compensatory damages are  
16 unclear. Markel's burden of proof "cannot be met simply by  
17 pointing out that the complaint seeks punitive damages and that any  
18 damages awarded under such a claim could total a large sum of  
19 money, particularly in light of the high burden that must be met in  
20 order for a plaintiff even to be eligible for receipt of  
21 discretionary punitive damages." Conrad Assocs v Hartford Accident  
22 & Indem Co, 994 F Supp 1196, 1201 (ND Cal 1998). Removal  
23 jurisdiction resting on such "questionable ground" is improper.  
24 See Chabner v United of Omaha Life Ins Co, 225 F3d 1042, 1046 note  
25 3 (9th Cir 2000); see also Conrad Assocs, 994 F Supp at 1201 ("It  
26 would be inherently speculative for this Court to conclude that the  
27 amount in controversy requirement can be met by simply asserting  
28 that large punitive damage awards have been awarded in the past

1 against insurance companies.") (internal citation omitted). As a  
2 result, Markel fails to carry its burden in showing by the  
3 preponderance of evidence that the indeterminate punitive damages  
4 combined with the indeterminate general damages would exceed  
5 \$75,000.

6 Markel also points to plaintiff's plea for damages for  
7 intentional infliction of emotional distress in the FAC as a way to  
8 supplement the amount in controversy. Doc ##40 at 7; 40-1 at 77.  
9 As is the case with punitive damages, however, plaintiff fails to  
10 allege an exact amount of emotional distress damages sought.  
11 Likewise, Markel fails to submit any reliable evidence to suggest  
12 that a potential award of emotional distress damages could  
13 sufficiently increase the amount in controversy to meet the  
14 jurisdictional requirement. See Conrad Assocs, 994 F Supp at 1201.

15 Markel cites Richmond v Allstate Ins Co, 897 F Supp 447  
16 (SD Cal 1995) in support of its position that the amount in  
17 controversy is established despite plaintiff's vague pleading. In  
18 Richmond, the court found that vagueness in the plaintiff's  
19 pleadings should not preclude the court from noting that damages  
20 are potentially substantial and thus able to satisfy the amount in  
21 controversy requirement. Id at 449. While that court found that  
22 absence of specifics did not preclude finding of jurisdiction, the  
23 relevant standard in the Ninth Circuit is whether given the absence  
24 of specifics and the record, is it more likely than not that the  
25 amount in controversy exceeds \$75,000. Sanchez, 102 F3d at 404.  
26 The vagueness of damages sought in plaintiff's FAC is not  
27 sufficient to carry the burden of proof to satisfy diversity  
28 jurisdiction.

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III

In light of the above, the court hereby REMANDS the instant case to the Alameda County superior court for lack of diversity jurisdiction. The clerk shall transmit the papers accordingly and close the file.

IT IS SO ORDERED.



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VAUGHN R WALKER  
United States District Chief Judge