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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JOSE SORIANO,  
Plaintiff,  
v.  
USAA INSURANCE AGENCY, INC.,  
Defendant.

3:09-CV-00661-RCJ-(RAM)  
**ORDER**

This is an action against an insurer for denial of a claim. Plaintiff Jose Soriano ("Plaintiff") sued his insurer, Defendant USAA General Indemnity Co.<sup>1</sup> ("Defendant"), in state court for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair claims practices under Nevada Revised Statutes §§ 686A.310 *et seq.* Defendant removed the case to this Court. Presently before the Court is Plaintiff's Motion to Remand (#4). Defendant filed an opposition (#11) and Plaintiff replied (#13). The Court heard oral argument on May 28, 2010. The Court now issues the following order. IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (#4) is GRANTED.

**I. BACKGROUND**

Plaintiff purchased automobile insurance for his vehicle from Defendant. Plaintiff purchased the vehicle for \$35,000. Defendant alleges that Plaintiff spent \$7,000 to upgrade the vehicle. Plaintiff alleges his vehicle was stolen and destroyed. He notified Defendant of

<sup>1</sup> Defendant asserts that it was improperly sued as "USAA Insurance Agency Inc."

Soriano vs USAA Insurance Agency, Inc.

1 the alleged loss on January 3, 2009. Defendant investigated the loss and determined that  
2 Plaintiff had made misrepresentations and concealed pertinent facts. Defendant denied  
3 Plaintiff's claim.

4 Plaintiff sued Defendant in state court for breach of contract, breach of the implied  
5 covenant of good faith and fair dealing, and unfair claims practices under Nevada Revised  
6 Statutes §§ 686A.310 *et seq.* Plaintiff asked for damages in excess of \$10,000 and for  
7 punitive damages. On November 9, 2009, Defendant removed to this Court. Plaintiff moved  
8 to remand back to state court on November 13, 2009.

9 On November 30, 2009, Defendant tried to get Plaintiff to stipulate to cap damages at  
10 \$75,000. Plaintiff refused.

## 11 II. LEGAL STANDARD

12 "If at any time before final judgment it appears that the district court lacks subject matter  
13 jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Removal statutes are strictly  
14 construed against removal jurisdiction. *Ritchey v. Up John Co.*, 139 F.3d 1313, 1316 (9th Cir.  
15 1998); *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992). "Federal jurisdiction must be  
16 rejected if there is any doubt as to the right of removal in the first instance." *Id.* (quoting  
17 *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir.1979)). The defendant  
18 always has the burden of establishing that removal is proper. *Gause*, 980 F.2d at 566.

## 19 III. ANALYSIS

20 Diversity jurisdiction requires that the amount in controversy exceed \$75,000. 28  
21 U.S.C. § 1332(a). When a plaintiff has alleged a specific amount in controversy in his  
22 complaint, his allegation is given weight. In actions originally brought in state court, a plaintiff  
23 has no incentive to inflate his damages to achieve diversity jurisdiction. Therefore, if a plaintiff  
24 brings an action in state court and alleges an amount in controversy greater than the minimum  
25 for diversity jurisdiction, a diverse defendant may remove to federal court unless there is a  
26 legal certainty that plaintiff will not recover an amount above the minimum for diversity  
27 jurisdiction. Because a plaintiff may inflate his damages to achieve diversity jurisdiction in  
28 actions originally brought in federal court, if a plaintiff brings an action in federal court and

1 alleges *in good faith* an amount in controversy greater than the minimum for diversity  
2 jurisdiction, the court may only dismiss the action if there is a legal certainty that the plaintiff  
3 will not recover an amount above the minimum for diversity jurisdiction. *Sanchez v.*  
4 *Monumental Life Ins. Co.*, 102 F.3d 398, 402 (9th Cir. 1996).

5 Where a plaintiff has not alleged a specific amount in controversy, the defendant  
6 claiming removal jurisdiction bears the burden of establishing a sufficient amount in  
7 controversy by a preponderance of the evidence. *Id.* at 404; *McCaa v. Massachusetts Mutual*  
8 *Life Ins. Co.*, 330 F. Supp. 2d 1143, 1145 (D. Nev. 2004). The defendant cannot rely on bare  
9 allegations. He must produce evidence to support a sufficient amount in controversy for  
10 diversity jurisdiction. See *Sanchez*, 102 F.3d at 405; *McCaa*, 330 F. Supp. 2d at 1146. A  
11 complaint that prays for damages "in excess of \$10,000.00" does not specify an amount in  
12 controversy greater than the minimum for diversity jurisdiction and thus a removing defendant  
13 bears the burden of proving a sufficient amount in controversy by the preponderance of the  
14 evidence. *McCaa*, 330 F. Supp. 2d at 1146. Because Nevada law does not allow a plaintiff  
15 to plead specific damages greater than \$10,000, no adverse inference should be taken from  
16 a plaintiff's failure to specifically plead damages above \$10,000 but below the minimum for  
17 diversity jurisdiction. *Id.* at 1150.

18 A plaintiff's claims for punitive damages and attorney's fees may be included in the total  
19 used to satisfy the minimum amount for diversity jurisdiction. *Id.* at 1148–50. However,  
20 defendant must produce evidence to show that plaintiff is more likely than not to recover  
21 punitive damages and attorney fees. *Id.* A defendant may use the amount a plaintiff attached  
22 to his claim in a settlement demand letter as evidence that the amount in controversy exceeds  
23 the minimum for diversity jurisdiction. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir.  
24 2002). When the settlement demand is reasonable and the plaintiff does not contend that the  
25 amount assigned to his claim in his demand letter was inflated or dishonest, the defendant can  
26 meet his burden based on the demand letter alone. *Id.*; but see *Fitzpatrick v. Dufford*, No.  
27 Civ.A. 5:05CV128, 2006 WL 839513, at \*3–4 (N.D. W. Va. March 28, 2006) (holding that  
28 plaintiffs' settlement demand for \$100,000 was insufficient to establish that the amount in

1 controversy exceeds the jurisdictional minimum when plaintiffs were currently demanding  
2 \$70,000).

3 A plaintiff's refusal to stipulate to cap damages at \$75,000 is not sufficient to establish  
4 removal jurisdiction. "[T]here are several reasons why a plaintiff would not stipulate to the  
5 amount in controversy, so that a refusal to stipulate, standing alone, does not satisfy a  
6 defendant's burden of proof." *Sibilia v. Makita Corp.*, 674 F. Supp. 2d 1290, 1293 (M.D. Fla.  
7 2009) (citing *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1320 (11th Cir. 2001)); see also  
8 *Wilson v. Union Security Life Ins. Co.*, 250 F. Supp. 2d 1260, 1265 n.8 (D. Idaho 2003). To  
9 allow a defendant to support removal jurisdiction by showing that the plaintiff failed to stipulate  
10 to damages under \$75,000 would shift the burden to the plaintiff. *Wilson*, 250 F. Supp. 2d at  
11 1265 n.8. But the defendant always bears the burden of establishing removal jurisdiction.  
12 *Gause*, 980 F.2d at 566.

13 Defendant must establish diversity jurisdiction in his petition for removal. He cannot  
14 rely on mere conclusory allegations in his petition that the amount in controversy exceeds the  
15 jurisdictional minimum. The removing defendant must rely on underlying facts in his petition.  
16 However, the district court may, at its discretion, treat facts and argument raised by a  
17 defendant in an opposition to a motion to remand after removal as an amendment to the  
18 original petition for removal. *Cohn*, 281 F.3d at 840 n.1.

19 Defendant essentially makes two arguments against remand. First, Defendant argues  
20 that Plaintiff's request for punitive damages is sufficient to establish removal jurisdiction based  
21 on diversity because punitive damages may exceed \$75,000. Second, Defendant argues that  
22 Plaintiff's refusal to stipulate to cap damages at \$75,000 is sufficient to establish removal  
23 jurisdiction. Both arguments fail. Defendant bears the burden of establishing that the amount  
24 in controversy exceeds \$75,000 by a preponderance of the evidence and cannot rely on  
25 conclusory allegations. Plaintiff's refusal to stipulate to a damages cap does not alter the  
26 burden. The mere possibility that Plaintiff may recover punitive damages in excess of \$75,000  
27 is not enough to satisfy Defendant's burden.

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1 Defendant relies on *Coleman v. Assurant, Inc.*, 463 F. Supp. 2d 1164 (D. Nev 2006).<sup>2</sup>  
2 In *Coleman*, the court held that it had removal jurisdiction based on diversity because the  
3 plaintiff asserted a claim for punitive damages, which may be unlimited in bad faith insurance  
4 actions, and because the plaintiff refused to stipulate that the value of his case was less than  
5 \$75,000. 463 F. Supp. 2d at 1168. The court, however, applied the wrong standard. The  
6 court held that it must appear to a legal certainty that the plaintiff could not recover above  
7 \$75,000 in order to remand. *Id.* This test was rejected by the Ninth Circuit. See *Sanchez*,  
8 102 F.3d 298, 403 (9th Cir. 1996). The Ninth Circuit reasoned:

9 In our view, application of the “converse legal certainty” test in cases where the  
10 plaintiff’s complaint does not specify a particular amount of damages is  
11 inappropriate, because it may result in an unwarranted expansion of federal  
12 diversity jurisdiction. For example, if a plaintiff actually seeking \$10,000 in  
13 damages were to file a complaint in state court which did not specify the amount  
14 of damages sought, and the defendant were to then remove the case to federal  
15 court, application of the “converse legal certainty” test in these circumstances  
16 would force the federal court to exercise jurisdiction even if there was only a  
17 legal possibility that the amount in controversy exceeded [the jurisdictional  
18 minimum]. This result is clearly inconsistent with the limits which Congress has  
19 placed on both removal and diversity jurisdiction.

20 *Id.*

21 The court in *Coleman* relied on the Supreme Court case of *Bell v. Preferred Life*  
22 *Assur. Soc. of Montgomery Ala.*, 320 U.S. 238 (1943). *Coleman*, 463 F. Supp. 2d at 1168.  
23 In *Bell*, the plaintiff filed his complaint in federal court and specifically asked for \$200,000  
24 in actual and punitive damages. 320 U.S. at 239–40. The Supreme Court noted that  
25 recovery of actual damages was likely limited to \$1,000, below the then \$3,000 minimum  
26 amount-in-controversy requirement. *Id.* at 240. The Supreme Court held that the district  
27 court had jurisdiction unless the amount in controversy, to a legal certainty, was below  
28 \$3,000. *Id.* at 241. Because punitive damages could meet the jurisdictional minimum, the  
Supreme Court reversed the district court’s dismissal of the case for lack of jurisdiction. *Id.*  
at 241–43.

The Supreme Court dealt with a very different situation than the one in *Coleman* and

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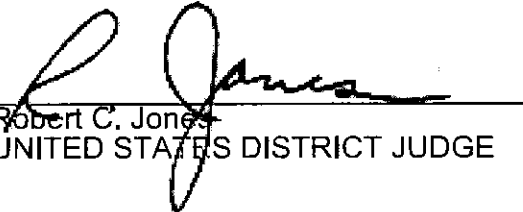
<sup>2</sup> Defendant also relies on several out-of-jurisdiction cases. Because Ninth Circuit law is clear, the court need not consider them.

1 this case. If a plaintiff pleads damages in excess of the jurisdictional amount in federal court,  
2 his good faith allegations are given weight and dismissal is only appropriate if there is a legal  
3 certainty that the amount in controversy is below the jurisdictional amount. *Sanchez*, 102 F.3d  
4 at 402. If, as in *Coleman* and this case, the plaintiff pleads an unspecified amount in state  
5 court, the defendant must prove that the amount in controversy is in excess of the  
6 jurisdictional minimum by a preponderance of the evidence to establish removal jurisdiction  
7 based on diversity. *Id.* at 404. Defendant has failed to establish by a preponderance that the  
8 amount-in-controversy is greater than \$75,000. Therefore, this case must be remanded to the  
9 state court.

10 **IV. CONCLUSION**

11 Accordingly, IT IS ORDERED that Plaintiff's Motion to Remand (#4) is GRANTED.

12 DATED: This 24<sup>th</sup> day of June, 2010.

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16 Robert C. Jones  
17 UNITED STATES DISTRICT JUDGE  
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