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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RICHARD H. PHILLIPS III,
Plaintiff,

No. 2:16-CV-0381-TOR

v.

USAA CASUALTY INSURANCE
CO., a Texas corporation, UNITED
SERVICES AUTOMOBILE
ASSOCIATION, a Texas
intransurance exchange doing
business in the State of Washington,
and AJAI COMBELIC, an individual
resident of Washington State,
Defendants.

ORDER DENYING PLAINTIFF'S
MOTION TO REMAND AND
MOTION TO STRIKE; GRANTING
PLAINTIFF'S MOTION TO
EXPEDITE; DENYING JOINDER

BEFORE THE COURT is Plaintiff Richard H. Philips, III's Motion to Remand (ECF No. 5), Motion to Strike (ECF No. 14), and Motion to Expedite (ECF NO. 15). The Court has reviewed the record and files herein, and is fully informed.

BACKGROUND

The case arises out of a driving accident between Ajai Combelic and

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1 Plaintiff Richard H. Phillips, III, and a subsequent dispute between Mr. Phillips
2 and his insurance provider, USAA Casualty Insurance Company (“USAA CIC”),
3 for uninsured motorist coverage. ECF Nos. 1 at 14, ¶ 2.12; 3 at ¶ 15. It is
4 undisputed that Mr. Combelic was solely at fault for the accident, ECF Nos. 1 at
5 14, ¶ 2.14; 2 at ¶ 18, and that Mr. Combelic’s insurance settled with Mr. Phillips
6 for the policy amount of \$25,000.00. *See* ECF No. 12 at 11. USAA CIC, Mr.
7 Phillips insurance company, allowed Mr. Phillips to accept Mr. Combelic’s limits
8 and agreed to waive it Personal Injury Protection and Underinsured Motorist
9 coverage subrogation rights.¹ *See* ECF No. 12 at 16.

10 USAA CIC admits that it issued an automobile policy to Mr. Phillips for
11 underinsured motorist coverage for the relevant period. ECF Nos. 1 at 12, ¶ 1.4; 3
12 at ¶ 4. According to Mr. Phillips, he was able to get insurance through USAA CIC
13 because of his membership with the United States Automobile Association

14
15 ¹ Plaintiff objects to the admission of this evidence for review on the grounds
16 it is hearsay, not based upon personal knowledge, and cannot be authenticated by
17 USAA CIC’s attorney. ECF No. 14 at 3. Even if true, USAA CIC (through its
18 attorney as its agent) admits Mr. Combelic does not have insurance beyond the
19 \$25,000.00 settlement amount. ECF No. 11 at ¶ 4. As such, the motion is moot to
20 the extent the position reasserts USAA CIC’s position.

1 (“USAA”). ECF No. 3 at ¶ 1.6. USAA is a reciprocal inter-insurance exchange
2 comprised of individual members. ECF No. 3 at ¶ 1.5.

3 After the settlement with Mr. Combilec, Mr. Phillips sought coverage under
4 his underinsured motorist coverage through USAA CIC for injuries allegedly
5 sustained in the accident that exceeded the settlement amount. ECF No. 1 at 17, ¶¶
6 2.44-2.116. Mr. Phillips (through his attorney) and USAA CIC disagreed on the
7 amount of damages covered by the policy. *See* ECF No. 1-2 at 31-69. After
8 several failed attempts to recover the requested amount, Mr. Phillips filed a
9 Complaint against USAA CIC in the Washington State Superior Court for Spokane
10 County on September 27, 2016, captioned *Richard H Phillips III v. USAA*
11 *Casualty Insurance Co.*, Case No. 16-2-3808-0. ECF No. 1 at 2, ¶ 1. Among other
12 things, Mr. Phillips asserted USAA CIC violated Washington Law and breached its
13 duty in failing to properly respond. ECF No. 1 at 3, ¶ 5.

14 USAA CIC removed the case to federal court and filed an Answer (ECF No.
15 2). ECF Nos. 1, 2. In the Answer, USAA CIC denies Mr. Combelic is an
16 underinsured and asserts that there is a dispute as to the “value of the injuries and
17 damages Plaintiff claims were caused by the Incident.” ECF No. 2 at ¶¶ 16, 18.
18 Plaintiff then filed an amended complaint (ECF No. 3) adding two allegedly non-
19 diverse parties: (1) Mr. Combelic for a declaratory judgment that he has no
20 additional insurance, ECF No. 3 at ¶ 1.2, and (2) USAA under a piercing the veil

1 theory for USAA CIC’s potential liability, ECF No. 3 at ¶¶ 1.6-1.7. Plaintiff soon
2 after filed a Motion to Remand (ECF No. 5). USAA CIC filed its Response (ECF
3 No. 10), supported by a Declaration by USAA CIC’s attorney (ECF No. 11),
4 requesting the Court deny the Motion to Remand and deny joinder of Mr.
5 Combelic and USAA. Plaintiff then filed a Motion to Strike (ECF No. 14),
6 requesting the Court strike the majority of the substance of the Declaration. For
7 the reasons discussed below the Court **DENIES** Plaintiff’s Motion to Remand
8 (ECF No. 5) and Motion to Strike (ECF No. 14), **GRANTS** Plaintiff’s Motion to
9 Expedite (ECF No. 15), and denies joinder of Mr. Combelic and USAA.

10 **DISCUSSION**

11 **A. Law**

12 “It is a commonplace that fraudulently joined defendants will not defeat
13 removal on diversity grounds.” *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318
14 (9th Cir. 1998). Fraudulent joinder is a term of art and merely refers to when “the
15 plaintiff fails to state a cause of action against a resident defendant, and the failure
16 is obvious according to the settled rules of the state” *Id.* Where fraudulent
17 joinder is an issue, “The defendant seeking removal to the federal court is entitled
18 to present the facts showing the joinder to be fraudulent.” *Id.* (citing *McCabe v.*
19 *General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). Although a court will
20 generally look to the pleadings alone for removal jurisdiction, *id.*, fraudulent

1 joinder claims may be resolved by considering summary judgment-type evidence
2 such as affidavits. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1068 (9th Cir.
3 2001) (citing *Cavallini v. State Farm Mutual Auto Ins. Co.*, 44 F.3d 256, 263 (5th
4 Cir. 1995)).

5 **B. Mr. Combelic**

6 Plaintiff amended his complaint (ECF Nos. 1, 3) requesting a declaratory
7 judgment “that Mr. Combelic’s \$25,000 automobile liability policy limit was the
8 only insurance available to Mr. Combelic for Mr. Phillips’ damages.” ECF Nos. 3
9 at ¶ 3.23; 5 at 4. Plaintiff argued that this amendment was in response to USAA
10 CIC’s denial that Mr. Combelic is an underinsured, and that the addition is
11 required because only parties before the court are bound by a declaratory
12 judgment. ECF No. 5 at 2, 4. Whether Mr. Combelic is underinsured is important
13 for the instant suit to the extent that USAA CIC will be liable only for the amounts
14 not covered by Mr. Combelic’s insurance. If the amount of insurance available to
15 Mr. Combelic for the underlying accident were truly in debate, joinder would be
16 proper, and the Court would remand the case as Plaintiff now requests (ECF No.
17 5)—that is, assuming Mr. Combelic is a non-diverse party.

18 USAA CIC submitted its Response to Plaintiff’s Motion to Remand (ECF
19 No. 10) explaining that USAA CIC denied Mr. Combelic was an underinsured
20 because USAA CIC disputes whether Plaintiff was damaged beyond the

1 \$25,000.00 settlement. ECF No. 10 at 7-8. In other words, USAA CIC explains
2 the denial was based on a dispute about the *amount of damages, not the amount of*
3 *insurance available* to Mr. Combelic for Plaintiff's injuries. The Response is
4 supported by the declaration of Derek Taylor, an attorney for USAA CIC, ECF No.
5 11 at ¶ 2, which provided the following explanation:

6 Paragraphs 2.11-2.13 of Plaintiff's Complaint contains legal conclusions
7 regarding the status of Mr. Combelic, and therefore, no admission or denial
8 is required. To the extent an answer or denial was required, defendant
9 USAA CIC denied Mr. Combelic was an underinsured driver because there
10 are disputes as to the proximate cause, nature, extent, and value of the
11 injuries and damages Plaintiff claims were caused by the accident with Mr.
12 Combelic. In other words, USAA CIC is contesting the total value of
13 plaintiff's injury claim, which may turn out to not exceed Mr. Combelic's
14 underlying limits, which in fact, would mean Mr. Combelic is not
15 underinsured.

16 ECF No. 11 at ¶ 4. Plaintiff subsequently moved the Court to strike this
17 explanation, reasoning:

18 In paragraph 4, counsel for [USAA CIC] makes out of court statements to
19 assert the truth of these statements. This paragraph 4 is both hearsay and
20 asserts legal conclusions. USAA's answer is a pleading and cannot be
amended by declaration of counsel. It is a pleading and it has independent
significance and must be amended by court rule.

ECF No. 14 at 2.

Ironically, Plaintiff's stance is against its own interest, as USAA CIC's
admission that Mr. Combelic does not have additional insurance puts any
remaining liability for Plaintiff's injuries on USAA CIC as the party liable for

1 damages not covered by insurance (as opposed to claiming there was additional
2 insurance, which would decrease USAA CIC's potential liability and force the
3 Plaintiff's to pursue Mr. Combelic for additional insurance proceeds).

4 Ultimately, the explanation proffered undermines any need to bring Mr.
5 Combelic into the suit, as USAA CIC concedes the very issue Plaintiff asks to
6 settle by a declaratory judgment. The explanation proffered does not amend
7 Defendant's answer (ECF No. 2), nor is it proffered for the truth of the matter
8 asserted—it merely addresses an ambiguity arising from the denial that Mr.
9 Combelic was underinsured by explaining the denial was based on the amount of
10 damages, not amount of insurance available to Mr. Combelic. Mr. Combelic has
11 been released of liability by all parties involved for the underlying accident and
12 there is no other claim asserted against Mr. Combelic. The Court is denying
13 joinder of Mr. Combelic.

14 **C. USAA**

15 Plaintiff's amended complaint (ECF No. 3) adds USAA as a defendant, but
16 does not assert any claims directly against USAA other than for its alleged liability
17 for USAA CIC's conduct under a piercing the veil theory. ECF No. 3 at ¶¶ 1.5-
18 1.8. The Amended Complaint is otherwise devoid of any mention of USAA beside
19 the statement that Plaintiff obtained insurance through USAA and the conclusory
20

1 statement that USAA is responsible through vicarious liability, agency/partnership,
2 and Washington state common law for all acts of USAA CIG. ECF No. 3 at ¶ 1.8.

3 As USAA CIC notes, USAA CIC is a separate and distinct corporate entity
4 from USAA, ECF No. 10 at 9, so USAA CIC may only be liable in the
5 “extraordinary” circumstance that piercing the veil is proper. *Hambleton Bros.*
6 *Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1230 (9th Cir. 2005). In
7 Washington, the corporate entity is disregarded “when the corporation has been
8 intentionally used to violate or evade a duty owed to another.” *Meisel v. M & N*
9 *Modern Hydraulic Press Co.*, 97 Wash.2d 403, 409–10 (1982). This requires two
10 essential factors: “First, the corporate form must be intentionally used to violate or
11 evade a duty” and “second, disregard must be necessary and required to prevent
12 *unjustified* loss to the injured party.” *Id.* (emphasis added, internal quotation
13 omitted). With regard to the first element, the court must find an abuse of the
14 corporate form, which typically involves “fraud, misrepresentation, or some form
15 of manipulation of the corporation to the stockholder’s benefit and creditor’s
16 detriment.” *Id.* (citing *Truckweld Equip. Co. v. Olson*, 26 Wash. App. 638, 645
17 (1980)). “With regard to the second element, wrongful corporate activities must
18 actually harm the party seeking relief so that disregard is necessary. Intentional
19 misconduct must be the cause of the harm that is avoided by disregard.” *Id.*

1 Here, as USAA CIC correctly notes, there is no dispute that USAA CIC is
2 willing to pay the amount *actually* owed—the only dispute centers on how much is
3 actually owed. ECF No. 10 at 10. As a result, it is not the case that USAA CIC is
4 attempting to violate or evade a duty through use of its corporate form, nor is it the
5 case that disregarding the veil is necessary to prevent an unjustified loss. Further,
6 there is no allegation of corporate informalities. See ECF No. 3. As a result,
7 Plaintiff has failed to state a viable cause of action and the Court is denying joinder
8 of USAA. Accordingly, Plaintiff’s Motion to Remand (ECF No. 5) is **DENIED**.
9 Plaintiff’s Motion to Strike is **DENIED** in Part and is rendered **MOOT** otherwise.

10 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 11 1. Plaintiff’s Motion to Remand (ECF No.5) is **DENIED**.
- 12 2. Plaintiff’s Joinder of Defendants’ Ajai Combelic and USAA is **DENIED**.
- 13 3. Plaintiff’s Motion to Strike (ECF No. 14) is **DENIED** in part and
14 **MOOT** in part.
- 15 4. Plaintiff’s Motion to Expedite (ECF No. 15) is **GRANTED**.

16 The District Court Executive is directed to enter this Order and furnish
17 copies to counsel.

18 **DATED** January 3, 2017.



Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge

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