

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MYSPINE, PS,

Plaintiff,

v.

USAA CASUALTY INSURANCE  
COMPANY, et al.,

Defendants.

CASE NO. C13-2179

ORDER

**I. INTRODUCTION**

This matter comes before the court on two motions from Plaintiff MySpine, PS: a motion to remand this action to King County Superior Court and a motion to sanction Defendants for removing it. Although Defendants requested oral argument, oral argument is not necessary. For the reasons stated below, the court GRANTS the motion for remand (Dkt. # 24) and orders Defendants to pay MySpine’s attorney fees as detailed in this order. The court GRANTS the motion for sanctions (Dkt. # 31) in part, but instead of the sanction MySpine proposed, the court imposes a sanction of \$5,000 payable to this court. The court imposes a July 3 deadline for the sanction payment and for the parties’ first submission with respect to attorney fees.

**II. BACKGROUND**

Defendants have already removed this putative class action once. The court remanded it after Defendants conceded that the court did not have subject matter

1 jurisdiction because Defendants could not demonstrate that the amount in controversy  
2 exceeded the \$5 million jurisdictional threshold of the Class Action Fairness Act. *See* 28  
3 U.S.C. § 1332(d)(2) (granting subject matter jurisdictions in certain class actions “in  
4 which the matter in controversy exceeds the sum or value of \$5,000,000”); *see also* Case  
5 No. C12-1973RAJ, Jul. 10, 2013 order (Dkt. # 59) at 3 (“[E]veryone finally agrees that  
6 the amount in controversy falls below the jurisdictional minimum.”). After about five  
7 months of litigation in state court, Defendants removed the action again. This time, they  
8 contended that MySpine had announced an expansion of its claimed damages that put  
9 more than \$5 million in controversy. That contention was frivolous and the court  
10 concludes that Defendants made it for an improper purpose.

11 To understand the circumstances of this second removal, the court again  
12 summarizes the substantive dispute, a dispute it has not considered on its merits. Briefly,  
13 MySpine contends that Defendants, who issue car insurance policies to thousands of  
14 Washingtonians, fail to make full personal injury protection (“PIP”) payments to medical  
15 providers who treat their insureds. MySpine, a chiropractic clinic, is one of those  
16 providers. According to MySpine, Defendants rely on a third party to compile prices  
17 charged for various medical procedures, and they deny payments to providers serving  
18 their PIP insureds to the extent that the amount billed for a procedure exceeds the 80th  
19 percentile of those prices. MySpine not only contends that it has been damaged by this  
20 practice, but that thousands of providers across Washington have been damaged as well.

21 MySpine sued only two Defendants: USAA Casualty Insurance Company and  
22 USAA General Indemnity Company. The court will refer to these Defendants as “USAA  
23 Casualty” and “USAA General.” That nomenclature is important, because both  
24 Defendants are subsidiaries of United Services Automobile Association, whom the court  
25 will call “USAA.” USAA issues its own insurance policies to Washington motorists.

1 In August 2013, MySpine propounded discovery that included an interrogatory  
2 asking for information about reductions like the reductions at issue in this case, but made  
3 by any USAA employee. The court has no idea what language the interrogatory used,  
4 because despite the glut of evidence in the record, MySpine never cited or submitted the  
5 interrogatory itself. Instead, it cited its description of that interrogatory in a motion to  
6 compel that it filed in state court on November 19, 2013. Mot. to Remand at 6 & n.16.

7 That description is as follows:

8 Interrogatory no. 1 seeks information on all RF or RF\_1 reductions made  
9 by an employee of USAA (i.e. United Services Automobile Association)  
10 because discovery shows that all adjusters who reduced Washington  
11 provider bills were employees of USAA and that the adjusters used the  
12 same practices at issue when reducing bills submitted under a USAA  
13 Casualty, USAA General, Garrison Property & Indemnity, or USAA auto  
14 policy in Washington.

15 Mot. to Compel at 4. The motion to compel then explained that the “reductions at issue  
16 were taken by employees of USAA and the existence of a general, common practice,  
17 applied to all Washington provider bills is clearly at issue in this class action. Equally,  
18 the issue of whether the practice affects the public interest by affecting a substantial  
19 number of providers is relevant to establishing an unfair CPA practice.” *Id.* at 4-5.

20 When Defendants received the motion to compel, they knew that MySpine’s  
21 argument was that because everyone who adjusted claims for USAA General or USAA  
22 Casualty was an employee of USAA, the actions of those employees on any claim – even  
23 claims submitted on USAA policies – were relevant to the claims in this action.

24 Defendants insist, however, that the motion to compel did more than advise them  
25 of a theory by which USAA’s conduct was relevant to proving MySpine’s claims against  
26 USAA General and USAA Casualty – it expanded MySpine’s damage claims to include  
27 every claim that a USAA employee reduced, including claims on USAA policies.

28 Defendants’ interpretation is exceedingly difficult to comprehend on its face, because the  
court is aware of no means by which MySpine could obtain damages flowing from

1 USAA’s reductions of payments on USAA policy claims *without suing USAA*. But  
2 Defendants would have the court believe that they believed exactly that. To demonstrate  
3 why, they point to this paragraph from earlier in MySpine’s motion to compel:

4 Plaintiff alleges that all USAA auto companies in Washington use this  
5 same practice [(the 80th percentile reductions)] and that all companies use  
6 adjusters who are employees of United Services Automobile Association  
7 (“USAA”) to reduce the bills submitted by all Washington health care  
8 providers. Plaintiff filed this action as a class action on behalf of all  
9 Washington providers whose bills were reduced by USAA using an RF or  
10 RF\_1 reason code.

11 Mot. to Compel at 2. As the language suggests, the paragraph was part of MySpine’s  
12 summary of its case. Defendants contend that their receipt of that paragraph was a  
13 crucial moment, because it announced for the first time that MySpine would seek  
14 damages not just from reduced payments on USAA General and USAA Casualty claims,  
15 but on USAA claims. In Defendants’ view, adding damages from USAA claims to  
16 damages from USAA General and USAA Casualty claims, plus other elements of the  
17 “amount in controversy,” (including attorney fees and the costs of complying with an  
18 injunction against the adjustment practices) pushed the amount in controversy above \$5  
19 million. Defendants filed a second notice of removal on December 5, 2013.

20 MySpine’s motion to remand followed, and MySpine followed that motion with a  
21 motion to sanction Defendants \$35,000 in addition to MySpine’s attorney fees for  
22 fighting for remand.

### 23 III. ANALYSIS

#### 24 A. Removal & Remand: Burden of Proof, Amount in Controversy, and 25 Timeliness Requirement

26 Defendants, as the parties seeking a federal forum, bear the burden of proving that  
27 this court has jurisdiction. *Rodriguez v. AT&T Mobility Servs., LLC*, 728 F.3d 975, 978  
28 (9th Cir. 2013). The Class Action Fairness Act’s \$5 million minimum amount in  
controversy is the only jurisdictional requirement in dispute. Defendants must therefore

1 prove by a preponderance of the evidence that the amount in controversy in this dispute  
2 exceeds that threshold. *Id.* at 981.

3         Moreover, Defendants must prove that they did not know more than 30 days  
4 before they removed the case that the amount in controversy exceeded \$5 million.  
5 MySpine challenges the timeliness of Defendants’ removal, noting that 28 U.S.C. § 1446  
6 mandates removal either within 30 days of the initial pleading that states a controversy  
7 worth more than the jurisdictional amount (§ 1446(b)(1)) or, if the initial pleading does  
8 not state a controversy worth that much, within 30 days of “receipt . . . through service or  
9 otherwise” of an amended pleading or “other paper” that contains that information. 28  
10 U.S.C. § 1446(b)(3). 28 U.S.C. § 1446(c)(3)(A) clarifies that when “the case stated by  
11 the initial pleading is not removable solely because the amount in controversy does not  
12 exceed the amount specified in section 1332(a), information relating to the amount in  
13 controversy in the record of the State proceeding, or in responses to discovery, shall be  
14 treated as an ‘other paper’ under subsection (b)(3).”

15 **B. The Court Will Not Decide if Defendants Timely Removed.**

16         In Defendants’ view, MySpine’s motion to compel was the “other paper” that first  
17 informed them that the amount in controversy exceeded \$5 million. That motion came  
18 fewer than 30 days before Defendants removed, but MySpine claims that it was not the  
19 first time Defendants learned of the alleged new damages, because the interrogatory at  
20 issue in the relevant portion of the motion to compel came nearly three months sooner, in  
21 August. Ultimately, the court will not resolve that contention. As noted, MySpine failed  
22 to cite the actual interrogatory, and the court will not sift through the several-thousand-  
23 page record of the state court litigation (Dkt. # 4) in search of its text. MySpine also cites  
24 an email it sent (more than 30 days before removal) to Defendants’ counsel requesting  
25 responses to its discovery requests, but that email contained no specific information about  
26 the interrogatory at issue. Breskin Decl. (Dkt. # 25), Ex. 4. The court bypasses  
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1 MySpine’s evidentiary shortcomings as to the timeliness of removal, because  
2 Defendants’ removal was invalid even if it was timely. To explain why, the court returns  
3 again to the motion to compel.

4 **C. There Is No Colorable Argument that MySpine’s Motion to Compel**  
5 **Announced a New Category of Damages.**

6 No reasonable attorney could have believed that MySpine’s motion to compel  
7 announced a new category of damages based on claims that USAA (as opposed to USAA  
8 General and USAA Casualty) had unlawfully reduced on claims from providers serving  
9 its insureds (as opposed to the insureds of USAA General and USAA Casualty). To  
10 begin, as the court has already noted, Defendants have not even attempted to explain how  
11 MySpine could recover damages flowing from USAA’s unlawful reductions *without*  
12 *suing USAA*. Defendants, who have strenuously resisted essentially every contention in  
13 the motion now before the court, would have the court believe that they accepted  
14 uncritically that MySpine could somehow recover damages based on USAA’s payments  
15 of claims arising from its own policies even though USAA is not a party to this suit.  
16 Defendants would also have the court believe that they formed that belief based on a  
17 single sentence from MySpine’s motion to compel. That sentence, stripped of every  
18 shred of context, states as follows: “Plaintiff filed this action as a class action on behalf of  
19 all Washington providers whose bills were reduced by USAA using an RF or RF\_1  
20 reason code.” A person reading that sentence alone might believe MySpine was seeking  
21 damages arising from payments made on claims under USAA policies. Of course, a  
22 person reading that sentence alone might also believe that USAA General and USAA  
23 Casualty policies were not at issue in this case. Attorneys are charged with reading  
24 sentences in context, and however imprecisely MySpine described its lawsuit in that  
25 sentence, Defendants knew that there was no support elsewhere for the notion that  
26 MySpine was seeking damages flowing from improper reductions on USAA PIP claims.  
27 MySpine’s complaint does not seek those damages, and Defendants do not contend

1 otherwise. Indeed, Defendants point to nothing beyond that single sentence (and  
2 MySpine’s failure to expressly disavow, without any prompting from Defendants, the  
3 meaning that Defendants purportedly ascribed to it) to support their theory that they  
4 learned of a new theory of damages when MySpine filed its motion to compel.  
5 Defendants do not address the remainder of the motion to compel, wherein MySpine  
6 explained its theory that reductions made on USAA policies (as well as “Garrison  
7 Property & Indemnity” policies) were relevant because they were made by the same  
8 group of adjusters who made the reductions at issue in this case, which helped prove not  
9 only the existence of the reduction practice, but helped demonstrate the public interest  
10 impact that the Washington Consumer Protection Act requires.<sup>1</sup> They do not explain  
11 why they never, so far as the record reveals, inquired of MySpine whether it or the  
12 putative class intended to seek damages based on damages flowing from USAA policies.

13 Even if the court were to strain mightily to assume, for the sake of argument, that  
14 Defendants genuinely believed that MySpine’s motion to compel announced a new  
15 category of damages, Defendants would have no more legitimate basis for removal. By  
16 relying on the motion to compel as the “other paper” that first announced that basis for  
17 removal, they admit that the new category of damages was not previously part of the  
18 case. To make the new damages category part of the case, MySpine would have to  
19 amend its complaint. Virtually every court to consider the issue has held that a case is  
20 not removable based on the new portions of an amended complaint until the state court  
21 issues an order allowing that complaint to be filed. *Sullivan v. Conway*, 157 F.3d 1092,

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22 <sup>1</sup> The removability of a case is judged at the time of removal, *Allen v. FDIC*, 710 F.3d 978, 984  
23 (9th Cir. 2013), so the court has not considered MySpine’s express disavowal of any damages  
24 based on USAA’s improper reductions on claims involving its insureds. *E.g.*, Pltf.’s Reply (Dkt.  
25 # 34) at 3 (noting that the complaint “limited the class claims to Casualty and General PIP  
26 claims”). Defendants complain repeatedly, as they did when they removed the first time, that  
27 MySpine’s counsel’s practice is to minimize damages while seeking remand only to attempt to  
28 expand damages once a case has returned to state court. As the court stated the first time, there  
is nothing this court can do about that. Jul. 10, 2013 ord. at 2. The court, unlike Defendants, has  
faith that the state court (prompted by Defendants’ tireless advocacy) will ensure that MySpine  
does not succeed by making inconsistent representations to different courts.

1 1094 (7th Cir. 1998); *Freeman v. Blue Ridge Paper Prods, Inc.*, 551 F.3d 405, 410 (6th  
2 Cir. 2008); *Lion Raisins, Inc. v. Fanucchi*, 788 F. Supp. 2d 1167, 1172-73 (E.D. Cal.  
3 2011) (noting absence of Ninth Circuit authority, adopting view that order permitting  
4 amended pleading, not the request to amend, is the trigger for removal); *Svoboda v. Smith  
5 & Nephew, Inc.*, 943 F. Supp. 2d 1018, 1020-22 (E.D. Mo. 2013) (surveying courts  
6 nationwide, noting majority and minority views). Surely Defendants, who have opposed  
7 MySpine vigorously throughout this litigation, would have insisted that a “new” category  
8 of damages worth millions of dollars required an amended pleading.

9 Defendants had no valid reason to remove this action a second time. The court  
10 reaches that conclusion solely by rejecting Defendant’s contention that MySpine’s  
11 motion to compel announced a new category of damages based on USAA’s improper  
12 actions with respect to claims under its insurance policies. That makes it unnecessary to  
13 consider MySpine’s numerous other attacks on Defendants’ notice of removal, including  
14 its contentions that even with the new USAA-based damages, the amount in controversy  
15 does not exceed \$5,000,000.

16 **D. The Court Awards MySpine Its Reasonable Attorney Fees and Expenses For**  
17 **Obtaining Remand and Imposes Sanctions Payable to the Court.**

18 When a court remands an improperly removed action, it “may require payment of  
19 just costs and any actual expenses, including attorney fees, incurred as a result of the  
20 removal.” 28 U.S.C. § 1447(c). In general, a court should make an award under this  
21 provision “only where the removing party lacked an objectively reasonable basis for  
22 seeking removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). This is  
23 just such a case. The court accordingly orders Defendants to pay the reasonable attorney  
24 fees and reasonable expenses MySpine incurred in obtaining a remand of this case. The  
25 parties shall meet and confer to determine if they can agree on a payment. If they do so,  
26 they shall file a statement in this court (which will retain jurisdiction for purposes of  
27 finalizing a fee and expense award) no later than July 3, 2014. If they are unable to



1 agree, MySpine may file a motion for attorney fees and expenses by the same deadline.  
2 The court will sanction any party who takes an unreasonable position in support of or in  
3 opposition to that motion.

4 What remains is MySpine's separate motion for sanctions, which invokes Federal  
5 Rule of Civil Procedure 11, 28 U.S.C. § 1927, and the court's inherent power as bases for  
6 the court to impose a "fine[] [of] \$35,000 in fees, costs and sanctions." Mot. for  
7 Sanctions at 12. MySpine does not explain what fees and costs are at issue beyond those  
8 that it will already recover via 28 U.S.C. § 1447(c), nor does it explain why it chose  
9 \$35,000, as opposed to another figure, as the amount of the award. The court assumes,  
10 therefore, that MySpine seeks a \$35,000 award purely as a sanction for Defendants'  
11 improper removal and as a deterrent to similar future conduct. MySpine's motion relies  
12 not only on the lack of a legal basis for removal, but on a blow-by-blow description of  
13 Defendants' conduct in seeking removal the first time and its misconduct in state court,  
14 including an allegation that Defendants removed this case to avoid producing discovery  
15 that the state court had ordered just before removal and to avoid a string of losses on  
16 motions in state court. Defendants respond with their own account of events, wherein it  
17 is MySpine who was on a losing streak in state court (a losing streak that would suggest  
18 that Defendants would want to remain in state court), and MySpine who engaged in  
19 litigation misconduct. The court dislikes refereeing such squabbles in disputes in its own  
20 court; it will not do so for dispute in another court. The court is confident that the state  
21 court will impose sanctions on remand if they are appropriate.

22 Each of the bases for sanctions that MySpine announces requires an exercise of  
23 the court's discretion. *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d  
24 1112, 1117 (9th Cir. 2000) (reviewing sanctions imposed under § 1927 and court's  
25 inherent power); *Sneller v. City of Bainbridge Island*, 606 F.3d 636, 638 (reviewing Rule  
26 11 sanctions). In exercising that discretion, the court starts with Defendants' objectively  
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1 baseless removal. Although sanctions are an extraordinary measure, the court agrees  
2 with MySpine to the extent it notes that the court ought to discourage Defendants and any  
3 similarly-situated defendant from derailing a state court action on a frivolous basis. The  
4 court also notes the strong possibility that Defendants removed not because they  
5 legitimately believed they had a right to federal forum, but simply for the purpose of  
6 delay or other tactical gain. The court does not believe Defendants' counsel to be  
7 incompetent, and therefore concludes that counsel knowingly filed a frivolous notice of  
8 removal for reasons other than ultimately having this dispute decided in federal court.  
9 That is egregious. Mitigating against sanctions is that the only specific finding of  
10 misconduct the court will make is that Defendants knowingly filed a legally and factually  
11 unsupported notice of removal for an improper purpose, and continued that misconduct in  
12 opposing MySpine's motion for remand. Beyond that specific finding, court does not  
13 believe that combing through the parties' competing assertions of bad conduct and bad  
14 motives is likely to reveal a picture of anything except a litigation in which the parties'  
15 relationship has deteriorated well beneath the standards of civility that this court imposes  
16 on the parties who appear before it. The court's prior orders already expressed its  
17 disappointment in both parties for their approach to litigating this matter after  
18 Defendants' first removal. Jul. 10, 2013 ord. at 2 ("Were the court's resources infinite, it  
19 might engage in its own inquiry, to determine how to apportion fault among Plaintiff and  
20 Defendants for this eight-month detour. It is hard to imagine that anybody, the parties,  
21 the putative class, this court, or the state court, has benefitted from that detour."). In  
22 addition, the court will not impose a sanction award based on Defendants' choice to  
23 remove this litigation the first time. MySpine could have requested sanctions at that time,  
24 and the court will not consider a belated request for conduct that previously went  
25 unmentioned.

1           Considering all of these factors, the court imposes a sanction of \$5,000, payable  
2 into the registry of this court. It does so because it concludes that Defendants violated at  
3 least three of Rule 11’s prohibitions, which include prohibitions on filing documents that  
4 raise claims for an improper purpose or based on unsupported legal or factual  
5 contentions. Fed. R. Civ. P. 11(b)(1)-(4) (listing sanctionable conduct); *see also* Fed. R.  
6 Civ. P. 11(c)(1) (permitting imposition of sanctions on “any attorney, law firm, or party  
7 that violated the rule”). The court imposes that sanction both to punish Defendants’  
8 egregious conduct and to acknowledge that Defendants have made demands on this  
9 court’s limited resources for no legitimate purpose. The court orders the payment into  
10 the court’s registry, rather than to MySpine, because MySpine will already be  
11 compensated for its efforts in obtaining remand, and because the court believes that  
12 making the award payable to MySpine would be an unjustified windfall. The court notes  
13 that it is the state court who likely suffers the greatest damage from Defendants’  
14 shenanigans, and the court’s decision not to impose a greater sanction acknowledges that  
15 a sanctions award in this court cannot remedy the harm done to the state court.

16           The court imposes the sanction on “Defendants” generically. The court expects  
17 that the Defendants and their counsel will be able to decide amongst themselves who was  
18 responsible for the decision to remove this case this time.

19           Defendants shall make their sanctions payment into the registry of this court, they  
20 shall do so no later than July 3, 2014, and they shall file proof of their payment by the  
21 same deadline.

#### 22   **IV. CONCLUSION**

23           For the reasons stated above, the court GRANTS MySpine’s motion to compel  
24 (Dkt. # 24), and directs the clerk to REMAND this action to King County Superior Court.  
25 The court GRANTS MySpine’s motion for sanctions (Dkt. # 31) solely to the extent  
26 described above. The court retains jurisdiction to finalize its award of attorney fees and  
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1 expenses and to confirm Defendants' payment of sanctions. That payment, along with  
2 the parties' joint statement or MySpine's motion for fees and expenses, is due no later  
3 than July 3, 2014.

4 DATED this 23rd day of June, 2014.

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8 The Honorable Richard A. Jones  
9 United States District Court Judge  
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