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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

YOLANDA MCGRAW, individually, and  
as the representative of all persons  
similarly situated,

Plaintiff,

v.

GEICO GENERAL INSURANCE  
COMPANY,

Defendant.

CASE NO. C15-5336 BHS

ORDER GRANTING  
PLAINTIFF’S MOTION TO  
REMAND

This matter comes before the Court on Plaintiff Yolanda McGraw’s (“McGraw”) motion to remand (Dkt. 15). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

**I. PROCEDURAL AND FACTUAL BACKGROUND**

On March 13, 2014, McGraw was involved in a car accident. Dkt. 1, Ex. A (“Comp.”) ¶ 1.8. McGraw’s car was damaged, and the repairs cost \$8,140.07. *Id.* McGraw’s car was worth less after it was repaired than before the accident. *Id.* ¶ 1.10.

1 McGraw had a car insurance policy with Defendant Geico General Insurance Company  
2 (“Geico”). *Id.* ¶ 1.9. McGraw sought underinsured motorist coverage under her Geico  
3 policy. *Id.* Geico did not compensate McGraw for her car’s diminished value. *Id.*  
4 ¶ 1.11.

5 On April 17, 2015, McGraw filed a class action complaint against Geico in Pierce  
6 County Superior Court. *See Comp.* McGraw claims that Geico has continuously failed  
7 to pay its policyholders’ diminished value loss. *Id.* ¶ 5.1. McGraw seeks to certify the  
8 following class:

9 All GEICO insureds with Washington policies issued in Washington  
10 State, where the insureds’ vehicle damages were covered under  
Underinsured Motorist coverage, and

- 11 1. The repair estimates on the vehicle (including any  
supplements) totaled at least \$1,000; and
- 12 2. The vehicle was no more than six years old (model year plus  
13 five years) and had less than 90,000 miles on it at the time of  
the accident; and
- 14 3. The vehicle suffered structural (frame) damage and/or  
deformed sheet metal and/or required body or paint work.

15 Excluded from the Class are (a) claims involving leased vehicles or  
total losses, and (b) the assigned judge, the judge’s staff and family.

16 *Id.* ¶ 5.3. McGraw alleges that the number of class members will be about 2,586 and the  
17 average damages will be about \$1,460 per class member. *Id.* ¶ 2.4. Based on these  
18 numbers, McGraw alleges that the amount in controversy is \$3,775,560. *See id.*  
19 McGraw asserts a single breach of contract claim. *Id.* ¶¶ 6.1–6.5.

20 On May 20, 2015, Geico removed the action to this Court under the Class Action  
21 Fairness Act (“CAFA”), 28 U.S.C. § 1332(d). Dkt. 1. Geico’s notice of removal asserts  
22

1 that CAFA requirements are satisfied. *See id.* at 2–3. With respect to the amount in  
2 controversy, Geico alleges that there is \$13,767,800 in controversy. *Id.* at 3.

3 On June 17, 2015, McGraw moved to remand. Dkt. 15. On August 3, 2015,  
4 Geico responded. Dkt. 17. On August 10, 2015, McGraw replied. Dkt. 19.

## 5 II. DISCUSSION

6 McGraw moves to remand, arguing that Geico has not shown by a preponderance  
7 of the evidence that the amount in controversy exceeds CAFA’s jurisdictional  
8 requirement of \$5,000,000.<sup>1</sup> Dkt. 15.

### 9 A. CAFA Removal Standard

10 “A defendant generally may remove a civil action if a federal district court would  
11 have original jurisdiction over the action.” *Allen v. Boeing Co.*, 784 F.3d 625, 628 (9th  
12 Cir. 2015). CAFA vests federal district courts with original jurisdiction over class  
13 actions involving more than 100 class members, minimal diversity, and at least  
14 \$5,000,000 in controversy, exclusive of interests and costs. *Dart Cherokee Basin*  
15 *Operating Co. v. Owens*, 135 S. Ct. 547, 552 (2014) (citing 28 U.S.C. § 1332(d)). A  
16 defendant seeking removal under CAFA must file a notice of removal “containing a short  
17 and plain statement of the grounds for removal.” 28 U.S.C. § 1446(a); *see also Dart*  
18 *Cherokee*, 135 S. Ct. at 551. The burden of establishing removal jurisdiction remains on  
19 the party seeking removal. *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685

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21  
22 <sup>1</sup> It is undisputed that this case satisfies CAFA’s numerosity and minimal diversity requirements.

1 (9th Cir. 2006). There is no presumption against removal under CAFA. *Dart Cherokee*,  
2 135 S. Ct. at 554.

3 **B. Amount in Controversy**

4 To satisfy CAFA’s amount in controversy requirement, the removing defendant  
5 must plausibly allege in the notice of removal that the amount in controversy exceeds  
6 \$5,000,000. *Id.* If the plaintiff challenges the defendant’s allegation, the defendant must  
7 then establish by a preponderance of the evidence that CAFA’s amount in controversy  
8 requirement has been satisfied. *Id.* at 554. “CAFA’s requirements are to be tested by  
9 consideration of real evidence and the reality of what is at stake in the litigation, using  
10 reasonable assumptions underlying the defendant’s theory of damages exposure.” *Ibarra*  
11 *v. Manheim Invs., Inc.*, 775 F.3d 1193, 1198 (9th Cir. 2015). Both parties may submit  
12 evidence outside the complaint, including affidavits, declarations, or other summary-  
13 judgment-type evidence. *Id.* at 1197. “Under this system, a defendant cannot establish  
14 removal jurisdiction by mere speculation and conjecture, with unreasonable  
15 assumptions.” *Id.*

16 In determining the amount in controversy, the Court first looks to the complaint.  
17 *Id.* Generally, “the sum claimed by the plaintiff controls if the claim is apparently made  
18 in good faith.” *St. Paul Mercury Indem. Co. v. Red Cab. Co.*, 303 U.S. 283, 289 (1938).  
19 In her complaint, McGraw alleges that the amount in controversy is \$3,775,560. Comp.  
20 ¶ 2.4.

21 In its notice of removal, Geico alleged that the amount in controversy was  
22 \$13,767,800. Dkt. 1 at 3. McGraw challenges this allegation in her motion to remand.

1 Dkt. 15. In response, Geico contends that the amount in controversy could actually  
2 exceed \$26 million because (1) the proposed class will include at least 3,277 members,  
3 (2) the damages will be at least \$8,000 per class member, and (3) the amount in  
4 controversy should include attorney fees. Dkt. 17 at 7. The Court will address each issue  
5 in turn.

6 **1. Proposed Class Members**

7 Geico first argues that the number of proposed class members will total at least  
8 3,277. Dkt. 17 at 7. Geico arrived at this number by searching its database for claims  
9 involving: (1) Geico insureds with Washington policies; (2) with vehicle damages paid  
10 under the underinsured motorist coverage section of their Geico policy; (3) with loss  
11 payments totaling at least \$1,000; (4) with odometer readings, if available, of less than  
12 90,000 miles; and (5) that were not total losses. Dkt. 17-1, Declaration of David  
13 Antonacci (“Antonacci Dec.”) ¶ 4. Geico’s search resulted in 3,277 claims. *Id.*

14 As McGraw correctly points out, Geico’s search does not track McGraw’s  
15 proposed class definition. *See* Dkt. 19 at 5. McGraw limits her proposed class definition  
16 to only include:

17 All GEICO insureds with *Washington policies* issued in Washington  
18 State, where the insureds’ *vehicle damages were covered under*  
*Underinsured Motorist coverage*, and

- 19 1. *The repair estimates on the vehicle (including any*  
20 *supplements) totaled at least \$1,000; and*
- 21 2. *The vehicle was no more than six years old (model year plus*  
*five years) and had less than 90,000 miles on it at the time of*  
*the accident; and*
- 22 3. *The vehicle suffered structural (frame) damage and/or*  
*deformed sheet metal and/or required body or paint work.*

1 Excluded from the Class are (a) claims involving *leased vehicles* or  
2 *total losses*, and (b) the assigned judge, the judge’s staff and family.

3 Comp. ¶ 5.3 (emphasis added). In light of McGraw’s proposed class definition, Geico’s  
4 search does not account for whether the vehicle was “no more than six years old,”  
5 whether the vehicle “suffered structural (frame damage) and/or deformed sheet metal  
6 and/or required body or paintwork,” whether “loss payments” includes payments for  
7 items other than the cost of repair, or whether the vehicle was leased. *Compare*  
8 Antonacci Dec. ¶ 4, with Comp. ¶ 5.3. *See also* Dkt. 20, Declaration of Scott Nealey  
9 (“Nealey Dec.”) ¶ 8. Geico’s search also fails to identify what portion of its search  
10 sample does not have odometer readings available. Because Geico’s search does not  
11 incorporate all of the factors that define McGraw’s proposed class, Geico’s estimated  
12 number of class members is flawed.

13 Meanwhile, McGraw has submitted evidence showing that the number of class  
14 members will be no more than 2,305. *See* Nealey Dec. ¶¶ 10–19. McGraw arrived at  
15 this number by accounting for the factors that Geico failed to include in its search. *Id.*  
16 McGraw also extrapolated data from class sizes in prior cases involving almost identical  
17 class definitions. *Id.* Based on this evidence, Geico’s estimated number of class  
18 members is likely 29.66% too high. *Id.* ¶ 19. On the current record, the Court finds that  
19 the number of proposed class members is more likely than not around 2,305.

## 20 **2. Damages**

21 Next, Geico asserts that the average amount of damages will be at least \$8,000 per  
22 class member. Dkt. 17 at 9. To support this assertion, Geico submits the file notes from

1 a Geico employee who handled McGraw’s coverage claim prior to the filing of this suit.  
2 *See* Dkt. 18-1, Declaration of Michael Quesada (“Quesada Dec.”), Ex. A. According to  
3 the Geico employee, McGraw “felt her [diminution of value] should be 8–9k.” *Id.* at 5.  
4 The Geico employee told McGraw that he had “never seen a [diminution of value] case  
5 for this amount.” *Id.*

6 The Court must test CAFA’s amount in controversy requirement by considering  
7 “real evidence and the reality of what is at stake in the litigation, using reasonable  
8 assumptions underlying the defendant’s theory of damages exposure.” *Ibarra*, 775 F.3d  
9 at 1198. Although Geico has presented evidence that McGraw believed her claim was  
10 worth at least \$8,000 prior to this suit, Geico has not presented any evidence indicating  
11 that \$8,000 is a reasonable estimate of the proposed class members’ average damages. In  
12 the absence of such evidence, Geico’s damages estimate is “mere speculation and  
13 conjecture, with unreasonable assumptions.” *Id.* Indeed, the minimal evidence submitted  
14 by Geico indicates that \$8,000 per class member is an unreasonable assumption. *See*  
15 *Quesada Dec.*, Ex. A at 5 (“[A]dvised [McGraw] I’d never seen a [diminution of value]  
16 case for this amount.”).

17 McGraw has submitted evidence showing that the average amount of damages  
18 will be \$1,460 per class member. *Nealey Dec.* ¶¶ 21–23, Ex. A. McGraw arrived at this  
19 number by extrapolating damages data from a prior case involving an almost identical  
20 class definition. *Id.* ¶¶ 3, 23. Based on the evidence in the record, the Court finds that  
21 the average amount of damages is more likely than not around \$1,460 per class member.  
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1           **3. Attorney Fees**

2           Finally, Geico argues that McGraw’s attorney fees should be included in the  
3 amount in controversy calculation. Dkt. 17 at 10. Geico’s argument rests on the  
4 assumption that McGraw’s complaint includes claims under the Washington Consumer  
5 Protection Act and Insurance Fair Conduct Act, two state statutes that provide for the  
6 recovery of attorney fees. *See id.* (citing RCW 48.30.015). Under CAFA, the Court may  
7 factor attorney fees into the amount in controversy determination where such fees are  
8 available pursuant to the statute or statutes underlying the plaintiff’s claims. *See*  
9 *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 1000 (9th Cir. 2007), *overruled on*  
10 *other grounds as recognized by Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975,  
11 976–77 (9th Cir. 2013). McGraw, however, has not pled any statutory violations. *See*  
12 *Comp.* Instead, McGraw’s complaint asserts a single breach of contract claim. *Id.*  
13 ¶¶ 6.1–6.5. The Court therefore declines to include attorney fees recoverable under  
14 statutes that are not pled in McGraw’s complaint in the amount in controversy  
15 determination.

16           **4. Remand**

17           In sum, Geico has failed to establish by a preponderance of the evidence that  
18 CAFA’s amount in controversy requirement is satisfied in this case. Based on the  
19 evidence presently before the Court, the amount in controversy is more likely than not  
20 around \$3,365,300. This amount falls short of CAFA’s jurisdictional requirement of  
21 \$5,000,000. *See* 28 U.S.C. § 1332(d). Because Geico has not met its burden of  
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1 establishing removal jurisdiction under CAFA, the Court grants McGraw's motion and  
2 remands this case.

3  
4 **III. ORDER**

5 Therefore, it is hereby **ORDERED** that McGraw's motion to remand (Dkt. 15) is  
6 **GRANTED**. This action is **REMANDED** to Pierce County Superior Court.

7 Dated this 8<sup>th</sup> day of September, 2015.

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BENJAMIN H. SETTLE  
11 United States District Judge