UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EDMOND JOHNSTON, JR., individually and as the representative of all persons similarly situated, Plaintiff, v. UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA"), Defendant.	No. 3:14-cv-5660 **NOTICE OF REMOVAL**

TO: THE CLERK OF THE COURT;

AND TO: Edmond Johnston, Jr., Plaintiff;

AND TO: Law Offices of Stephen M. Hansen, P.S., attorneys for Plaintiff.

PLEASE TAKE NOTICE that Defendant United Services Automobile Association ("USAA"), in accordance with the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2, 199 Stat. 4, codified in pertinent part at 28 U.S.C. §§ 1332(d), 1446, and 1453, hereby removes to this Court the lawsuit captioned *Johnston v. United Services Automobile*

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

Association, No. 14-2-10507-5, filed in the Superior Court of the State of Washington in and for the County of Pierce (the "Action"). In support of this Notice of Removal, Defendant states:

I. INTRODUCTION

1. On July 15, 2014, Plaintiff Edmond Johnston, Jr. filed this Action on behalf of himself and a putative Class of plaintiffs. (*See* Ex. 1 ("Complaint"), attached hereto.)

2. Plaintiff is a Washington auto insured of Defendant USAA and alleges that USAA breached his insurance policy and violated the Insurance Fair Conduct Act ("IFCA") by, among other things, not paying what Plaintiff contends is the appropriate amount for the alleged "diminution in value" of his vehicle resulting from an auto accident. (*E.g.*, *id.* ¶¶ 1.1 – 1.5, 6.4.)

3. Plaintiff contends that on April 17, 2014, his wife was in an auto accident. (*E.g.*, *id.* ¶ 1.7.) Plaintiff alleges that the vehicle was repaired, but "could not be fully restored to its pre-loss condition." (*Id.* ¶¶ 1.7 – 1.8.) Plaintiff asserts that his insurance claim was treated by USAA as a covered loss under the uninsured/underinsured motorist ("UM/UIM") coverage of his policy (*id.* ¶ 1.7), and that USAA "attempted to settle his diminished value claim for less than the amount to which a reasonable man would have believed he was entitled" (*id.* ¶ 1.10). Plaintiff told USAA that his "diminished value" claim was worth anywhere from $2,500 to $4,000. (A. Bush Decl. ¶ 10 & Ex. 1.) In the Complaint, Plaintiff asserts that the "average loss due to diminished value" is approximately $1,460. (Complaint ¶¶ 2.3, 5.11.)

4. Plaintiff defines the putative Class as follows:

> All USAA insureds with auto policies issued in Washington State, where the insured's vehicle's damages was covered under the policy's Underinsured Motorist coverages, and

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1) the repair estimates on the vehicle (including any supplements) totaled at least $1,000;

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

3) the vehicle suffered structural (frame) damage and/or deformed sheet metal and/or required body or paint work.

Excluded from the Class are (a) claims involving leased vehicles or total losses, (b) employees of USAA, (c) the assigned judge, the judge's staff and family, (d) underinsured motorist claims where the then in-force policy had a DV exclusion, and (e) accidents occurring before July 1, 2008.

(Complaint ¶ 5.4.)

5. Plaintiff's Complaint has two Counts. Count I is for breach of contract. (*Id.* ¶¶ 6.1 – 6.5.) Count II is for alleged violation of the IFCA. (*Id.* ¶¶ 6.6 – 6.9.) The Prayer for Relief explicitly seeks "[p]ayment of the difference between the insured vehicle's pre-loss value and its projected market value as a repaired vehicle after the accident"; an award of statutory attorneys' fees and costs under RCW 48.30.015(3); costs of suit and post-judgment interest; and injunctive, declaratory, and other equitable relief. (*Id.* ¶¶ 6.9, 7.1) Statutory treble damages are also provided for violations of the IFCA. *See* RCW 48.30.015(2).

6. As demonstrated below, this Action is removable pursuant to CAFA. The Action is a "class action" within the meaning of 28 U.S.C. §§ 1332(d)(1)(A), (B), and 1453(a);[1] the removal is timely; there is diversity of citizenship between Plaintiff and Defendant; there are at least 100 putative plaintiff Class members; and the amount in controversy exceeds $5,000,000, exclusive of interests and costs. *See id.* §§ 1332(d)(2), (d)(5)(B), (d)(6), 1441, 1446, 1453.

[1] The term "class action" means "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). This action is brought by Plaintiff pursuant to the Washington class action statute on behalf of a putative plaintiff class.

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7. Intradistrict Assignment: This Action was originally filed in the Superior Court in and for the County of Pierce, and is therefore removable to the Tacoma Division of this District. *See* 28 U.S.C. § 1441(a); LCR 3(d); LCR 101(e). Defendant reserves, and does not waive, any objection it may have to service, jurisdiction, or venue, and any and all other defenses or objections to the Action.

8. Pursuant to 28 U.S.C. § 1446(a) and Local Rule CR 101(b), Defendant has filed the Attorney Verification of State Court Record simultaneously with this Notice of Removal. Defendant will also file with the Superior Court a copy of this Notice of Removal.

II. TIMELINESS OF REMOVAL

9. Plaintiff filed the Action on July 15, 2014. *See supra* ¶ 1. On July 21, 2014, Plaintiff served the Washington State Insurance Commissioner with the Complaint and a summons directed to Defendant; the Commissioner forwarded those documents to CT Corporation (Defendant's agent for service of process), which received them on July 23, 2014. (*See* Ex. 2.) This Notice of Removal is therefore timely. *See* 28 U.S.C. §§ 1446(b), 1453.

III. DIVERSITY OF CITIZENSHIP

10. This Action satisfies CAFA's requirements for diversity of citizenship.

11. Under CAFA, complete diversity of citizenship no longer is required. Instead, CAFA requires only "minimal diversity": "any member of a class of plaintiffs is a citizen of a State different from any defendant." *See id.* § 1332(d)(2)(A). Moreover, under CAFA the citizenship of unincorporated associations is now treated like that of corporations: "an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." *Id.* § 1332(d)(10).

12. In this Action there not only is minimal diversity, but complete diversity. Plaintiff is a Washington resident (Complaint ¶¶ 2.6, 3.1), and Defendant USAA is citizen of

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Texas. As Paragraph 3.2 of the Complaint correctly alleges, USAA is a reciprocal interinsurance exchange (an unincorporated association) organized under the laws of the State of Texas, with its principal place of business in Texas. (*Id.* ¶ 3.2; *see* A. Bush Decl. ¶ 5 (same).) Because Defendant is a Texas citizen, and Plaintiff is a Washington citizen, complete diversity exists.

13. Plaintiff's allegation that there is no diversity is wrong as a matter of fact and law. (*See* Complaint ¶¶ 2.5 – 2.6.) Plaintiff's contention is based on an allegation that appears to have been inadvertently carried over from another complaint filed against other, multiple defendants: Paragraph 2.5 alleges that "*all* of the Defendant*s*" are citizens of Washington, even though USAA is the only Defendant here. (*See* Complaint ¶ 2.5 (emphasis added).) Paragraph 2.5 contradicts the specific (and correct) allegations of USAA's Texas citizenship in Paragraph 3.2.

14. Furthermore, the "home state" and "local controversy" exceptions to CAFA jurisdiction cited by Plaintiff (*see* Complaint ¶ 2.6) are inapplicable here: those exceptions apply only if the defendant is a citizen of the forum state. *See* 28 U.S.C. §§ 1332(d)(4)(A), (d)(4)(B); *see also id.* § 1332(d)(3). USAA is not a citizen of Washington for purposes of CAFA.

15. Finally, Plaintiff's reliance on the "direct action" provisions of 28 U.S.C. §§ 1332(c)(1)(A) and (C) (*see* Complaint ¶ 2.5) is misplaced. This Action is not a "direct action," because it is brought by an insured against his own insurer. 28 U.S.C. §§ 1332(c)(1)(A) and (C) apply to actions "in which a party suffering injuries or damage for which another is legally responsible is entitled to bring suit against the other's liability insurer without joining the insured or first obtaining a judgment against him. A 'first party' insurance action, or a suit by an insured against an insurer, is not a 'direct action.' " *Thykkuttathil v. Keese*, No. C12–1749RSM, 2013 WL 208931 at *2 (W.D. Wash. Jan. 17, 2013) (internal

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BAUMGARDNER & PREECE LLP
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citations and quotations omitted).

IV. NUMBER OF PUTATIVE PLAINTIFF CLASS MEMBERS

16. Under CAFA, "the number of members of all proposed plaintiff classes in the aggregate" must be 100 or more. *See* 28 U.S.C. § 1332(d)(5)(B).

17. Here, the number of putative plaintiff Class members is at least 100. Plaintiff alleges that there are more than 1,000 putative Class members. (Complaint ¶ 5.1.) Moreover, although Defendant denies that the proposed Class and claims are proper, for purposes of this Notice Defendant agrees that there are more than 1,000 putative Class members. (A. Bush Decl. ¶ 8.) This CAFA requirement is therefore satisfied.

V. THE AMOUNT IN CONTROVERSY

18. Defendant disputes that Plaintiff has stated any viable claims, and also disputes that Plaintiff and the putative Class members are entitled to any relief. Nevertheless, it is evident from the allegations of the Complaint and the nature of Plaintiff's claims that the amount in controversy exceeds CAFA's jurisdictional threshold of $5,000,000, exclusive of interest and costs. *See, e.g., Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395, 400 (9th Cir. 2010) ("The amount in controversy is simply an estimate of the total amount in dispute, not a prospective assessment of defendant's liability.").

19. Plaintiff contends that the total maximum "*damages* recoverable" is $3,979,960. (Complaint ¶ 2.4 (emphasis added).)[2] But Plaintiff also seeks attorneys' fees and costs under RCW 48.30.015(3), which must be included in the amount in controversy. *See, e.g., Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998) (statutory fees

[2] Plaintiff derives this figure by multiplying the upper end of his estimate of class claims (2,726) by the alleged average value of a "diminished value" claim ($1,460). (*See* Complaint ¶¶ 2.3 – 2.4.) Plaintiff's estimate of the value of his own claim (from $2,500 - $4,000), however, when applied to the putative class, would yield a much higher classwide damages estimate: $6.8 million – $10.9 million.

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included in amount in controversy, regardless of whether they are discretionary or mandatory); *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 1000 (9th Cir. 2007), *overruled on other grounds*, *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975 (9th Cir. 2013). For example, in the *Busani* case referenced in the Complaint, Plaintiff's counsel here received an award of 30% of the value of the settlement fund. (*See* Ex. 3.) In addition, "in class claims, courts in the Ninth Circuit may employ a 25% 'benchmark' in calculating awardable fees." *Levy v. Salcor, Inc.*, No. C14-5022 BHS, 2014 WL 775443 at *5 (W.D. Wash. Feb. 25, 2014). Based on Plaintiff's own calculations of putative classwide actual damages (and not including all other types of relief, such as injunctive relief and treble damages), attorneys' fees of $994,000 - $1.19 million have been put in controversy by Plaintiff, and must be included in the amount in controversy.

20. Plaintiff also seeks declaratory and injunctive relief against the challenged practices. Given Plaintiff's own allegations, the annual value of such an injunction would be at least $660,000.[3] *See Tuong Hoang v. Supervalu Inc.*, 541 Fed. App'x 747, 748 (9th Cir. 2013) (value of injunction must be included in amount in controversy).

21. Finally, statutory treble damages are available under the Insurance Fair Conduct Act. *See* RCW 48.30.015(2). The fact that Plaintiff has not explicitly demanded treble damages in the Complaint is irrelevant for purposes of determining the amount in controversy: if such damages are potentially available under the statute, Plaintiff has put them "in controversy." *See, e.g.*, *Gibson v. Chrysler Corp.*, 261 F.3d 927, 946 (9th Cir. 2001) (Even though "Plaintiffs did not explicitly request punitive damages [under a statute] . . . the potential for such damages may still be considered for purposes of amount in controversy."); *see also Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348-50 (2013) (class

[3] Plaintiff alleges a six-year class period beginning July 1, 2008. Plaintiff's damages estimate of $3,979,960 over six years yields an annual value of more than $660,000.

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representative has no authority to attempt to reduce value of putative class claims in order to evade federal jurisdiction). The limitations period for IFCA claims is three years. *See, e.g.*, *Walker v. Metropolitan Prop. & Cas. Co.*, No. C12-0173JLR, 2013 WL 942554 at *5 (W.D. Wash. Mar. 8, 2013); RCW 4.16.080(2). Thus, according to Plaintiff's own allegations, three years' worth of treble damages would amount to at least $5.9 million, which also must be included in the amount in controversy.[4]

22. In fact, the actual number of claims implicated by Plaintiff's putative class is greater than Plaintiff's allegations: at least 3,300 claims for the entire class period, 1,747 claims for the three-year IFCA period, and at least 582 claims annually (based on an average of the IFCA period). (*See* Bush Decl. ¶ 9.) Accordingly, Plaintiff's $1,460/claim estimate would yield more than $4.8 million in alleged damages for the class period, more than $7.65 million in treble damages, nearly $850,000 for one year's worth of injunctive relief, and between $1.2 million - $1.4 million in fees (the range of 25%-30% of the alleged actual damages, and not including other forms of relief).

23. Accordingly, the amount in controversy in this matter exceeds $5,000,000.00, exclusive of interest and costs.

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[4] *See supra* note 3.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

Dated: August 20, 2014

s/ Michael Moore
s/ Sarah Tilstra

Michael A. Moore, WSBA No. 27047
Sarah E. Tilstra, WSBA No. 35706
CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154
Tel: (206) 625-8600
Fax: (206) 625-0900
Email: mmoore@corrcronin.com
stilstra@corrcronin.com

DECLARATION OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Defendant herein.

2. On this date, I caused true and correct copies of the foregoing to be served on the attorneys of record herein by depositing the same in the U.S. Mail, postage prepaid, in envelopes addressed to the following:

Stephen M. Hansen
1821 Dock Street, Suite 103
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of August, 2014, at Seattle, Washington.

Donna Patterson

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900