

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA**

**SWB YANKEES, LLC, an
unincorporated association,
Plaintiff,**

v.

**CNA FINANCIAL CORPORATION,
THE CONTINENTAL INSURANCE
COMPANY, and CONTINENTAL
CASUALTY COMPANY,
Defendants.**

CASE NO.:

NOTICE OF REMOVAL

**TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

Defendants, CNA Financial Corporation (“CNAF”), The Continental Insurance Company (“CIC”), and Continental Casualty Company (“Continental”) (collectively, “Defendants”), by and through their undersigned counsel, Timoney Knox, LLP, file this Notice of Removal of the above-captioned matter from the Court of Common Pleas of Lackawanna County, Pennsylvania to the United States District Court for the Middle District of Pennsylvania.

This Court has original jurisdiction over this action under 28 U.S.C. § 1332 because there is complete diversity of citizenship between the only proper defendant—Continental—and Plaintiff SWB Yankees, LLC, and the amount in controversy exceeds \$75,000, exclusive of interest and costs. Grounds for removal are set forth in more below.

I. BACKGROUND

A. This Action

1. This action relates to a property insurance claim presented by Plaintiff under a commercial insurance policy issued by Continental bearing policy number 6014607266 (the “Policy”). A certified copy of the Policy is attached as Exhibit “A.”

2. Neither CNAF nor CIC are parties to the Policy.

3. On or around May 21, 2020, Plaintiff commenced this litigation by filing a Complaint in the Court of Common Pleas of Lackawanna County, Pennsylvania, which was docketed at Civil Action No. 20-CV-2155. As required under 28 U.S.C. § 1446(a), a true and correct copy of the Complaint is attached hereto as Exhibit “B.”

4. The Complaint asserts breach of contract, statutory bad faith, and declaratory judgment claims against Defendants, which claims stem from Continental’s denial of Plaintiff’s business interruption insurance claim for losses caused by the COVID-19 pandemic and related governmental orders. *See* Exhibit “B.”

5. Defendants were served with the Complaint on June 30, 2020.

II. THIS COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1332

6. The United States District Courts hold original jurisdiction over, *inter alia*, all civil actions where the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and which are between citizens of different states. 28 U.S.C. § 1332(a)(1).

7. Any civil action brought in a state court over which the District Courts of the United States have original jurisdiction may be removed by the defendant to the District Court of the United States for the district and division embracing the place where such action is pending. 28 U.S.C. § 1441(a).

8. As a general rule, where, as here, other claims are joined with an action for declaratory relief, a district court should not remand or decline to entertain the claim for declaratory relief. *See Mark's Engine Co. No. 28 Rest., LLC v. Traveler's Indem. Co. of Conn.*, 2020 U.S. Dist. LEXIS 132841 (C.D. Cal. July 27, 2020).

9. Moreover, there is no presumption in favor of abstention in insurance coverage cases. *See Mark's Engine Co. No. 28 Rest., LLC v. Traveler's Indem. Co. of Conn.*, 2020 U.S. Dist. LEXIS 132841 (C.D. Cal. July 27, 2020).

10. Defendants seeks to exercise their rights under the provisions of 28 U.S.C. § 1441, *et seq.*, to remove this action from the Court of Common Pleas of Lackawanna County, Pennsylvania, in which said action is now pending, to the

United States District Court for the Middle District of Pennsylvania, which embraces Lackawanna County.

A. There is Complete Diversity of Citizenship Between Plaintiff and all Non-Fraudulently Joined Defendants

11. At the time the Complaint was filed and continuing to the present, Defendant CNAF is a Delaware corporation with a principal place of business located at 151 North Franklin Street, 9th Floor, Chicago, Illinois 60606.¹

12. Pursuant to 28 U.S.C. § 1332(c)(1), CNAF is a citizen of Delaware and Illinois.

13. At the time the Complaint was filed and continuing to the present, Defendant Continental is an Illinois corporation with a principal place of business located at 151 North Franklin Street, 9th Floor, Chicago, Illinois 60606.

14. Pursuant to 28 U.S.C. § 1332(c)(1), Continental is a citizen of Illinois.

15. At the time the Complaint was filed and continuing to the present, Defendant CIC is a Pennsylvania corporation with a principal place of business at 151 North Franklin Street, 9th Floor, Chicago, Illinois 60606.

¹ CNAF is a holding company, not an insurance company. It does not issue, and has never issued, insurance policies in Pennsylvania or any other state; and it did not issue any policy to Plaintiff. Plaintiff therefore has no basis to assert any claim against CNAF. Defendants accordingly assert that CNAF is not a proper party to this suit, and that its citizenship is not relevant for purposes of assessing diversity jurisdiction.

16. Pursuant to 28 U.S.C. § 1332(c)(1), CIC is a citizen of Pennsylvania and Illinois.

17. At the time the Complaint was filed and continuing to the present, Plaintiff SWB Yankees, LLC has been a limited liability company with its principal place of business at 235 Montage Mountain Road, Moosic, PA 18507.

18. For purposes of diversity jurisdiction, the citizenship of a limited liability company is determined by the citizenship of its members. *See Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010).

19. Upon information and belief, Plaintiff has two members: Yankees Global Enterprises, LLC and SWB Investors, LLC.

20. Upon information and belief, no member of Yankee Global Enterprises, LLC is a citizen of either Illinois or Delaware.

21. Upon information and belief, no member of SWB Investors, LLC is a citizen of either Illinois or Delaware.

22. Upon information and belief, therefore, Plaintiff is not a citizen of Illinois or Delaware. *See Zambelli Fireworks, supra*.

B. CIC Is an Improper Defendant to This Action

23. Diversity jurisdiction under 28 U.S.C. § 1332 may not be defeated by joinder of a non-diverse defendant, such as CIC, where the claim asserted against

the adverse party is “wholly insubstantial and frivolous.” *Batoff v. State Farm Ins. Co.*, 977 F.2d 848 (3d Cir. 1992).

24. In determining whether a party has been fraudulently joined, the district court must look to the substantive law of the state to determine if a colorable cause of action exists against that party. *See Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990).

25. Plaintiff asserts three (3) causes of action against CIC: breach of contract, statutory bad faith, and declaratory judgment, each of which stem from Continental’s denial of Plaintiff’s business interruption insurance claim for losses allegedly caused by the COVID-19 pandemic and related governmental orders. *See Exhibit “A.”*

26. It is well established under Pennsylvania law that privity of contract is a mandatory prerequisite for a party to assert a breach of contract claim. *See Electron Energy Corp. v. Short*, 597 A.2d 175, 178 (Pa. Super. 1991) (“It is fundamental contract law that one cannot breach a contract that one is not a party to.”).

27. The Policy at issue in this litigation was issued by Continental, not CIC. CIC is not a party to the Policy. *See Exhibit “A,” Form G55161E (01-17)*, p. 1 of 3.

28. Accordingly, CIC cannot be liable for breach of the Policy as a matter of law.

29. The lack of contractual privity also bars Plaintiff's statutory bad faith claim against CIC as a matter of law. *See Brand v. AXA Equitable Life Ins. Co.*, 2008 U.S. Dist. LEXIS 69661, at *5 (“[I]t is the general rule that an insured may bring claims for breach of contract and bad faith against the insurer who issued the policy but not against related parties . . . who are not in privity with the insured.”). *See also Three Rivers Hydroponics, LLC v. Florists' Mut. Ins. Co.*, 2018 U.S. Dist. LEXIS 20699, at 13–16 (W.D. Pa. Feb. 8, 2018).

30. Similarly, because CIC is not a party to the Policy, no actual controversy exists between Plaintiff and CIC with regard to Plaintiff's claim for a declaration of coverage under the Policy. Accordingly, Plaintiff's declaratory judgment claim against CIC fails as a matter of law. *See Brown v. Com., Liquor Control Board*, 673 A.2d 21, 23 (Pa. Commw. Ct. 1996), *appeal denied*, 683 A.2d 886 (Pa. 1996) (“When the matter does not present a case or controversy, the courts have consistently held that they were without jurisdiction to hear the matter.”).

31. Accordingly, under the substantive law of Pennsylvania, no colorable cause of action exists by Plaintiff against CIC. *See Boyer, supra*.

32. Consequently, this Court may disregard the citizenship of CIC for jurisdictional purposes, assume jurisdiction over this case, and dismiss CIC from the litigation. *See In re Briscoe*, 448 F.3d 201 (3d Cir. 2006); *Cipriani v. Fed. Ins. Co.*, 1999 U.S. Dist. LEXIS 11405 (E.D. Pa. July 20, 1999). *See also Mark's Engine Co. No. 28 Rest., LLC v. Traveler's Indem. Co. of Conn.*, 2020 U.S. Dist. LEXIS 132841 (C.D. Cal. July 27, 2020) (holding that a defendant is fraudulently joined when the claims against that defendant are all based on a contract to which it is not a party).

33. Because the non-fraudulently joined Defendants are citizens of only Illinois and Delaware and Plaintiff is not a citizen of those states, complete diversity exists. 28 U.S.C. § 1332(c)(1); *see also Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990); *Lincoln Prep Co. v. Roche*, 546 U.S. 81, 81 (2005).

C. The Amount in Controversy Exceeds \$75,000

34. Under 28 U.S.C. § 1332(a), diversity jurisdiction requires that the matter in controversy “exceed[] the sum or value of \$75,000, exclusive of interests and costs.” This requirement is met here.

35. A notice of removal “need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold,” *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 89 (2014), and if contested, a court will

determine whether the threshold is met by a preponderance of the evidence. *Id.* at 88; *see also* 28 U.S.C. § 1446(c)(2)(B).

36. Plaintiff alleges that it “has lost significant revenue from [the cancelled] home games and will continue to lose revenue in the future due to the cancellation and/or postponement of future home games.” Exhibit “B,” ¶ 24.

37. Plaintiff also alleges that it “has lost significant income from the loss of sponsorships, concession sales, ticket sales, and advertising revenue.” Exhibit “B,” ¶ 25.

38. As part of its breach of contract claim, Plaintiff seeks damages “in an amount in excess of \$50,000.” *See* Exhibit “B.”

39. The amount in controversy in a declaratory judgment action is determined by the value of the object of the litigation. *See Hunt v. Wash. St. Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977).

40. In a declaratory judgment action regarding an insurance policy, the amount in controversy is measured by the value of the underlying claims for which insurance coverage is sought. *Coregis Ins. Co. v. Schuster*, 127 F. Supp. 2d 683, 686 (E.D. Pa. 2001).

41. As part of its breach of contract claim, Plaintiff seeks a declaration of coverage under, *inter alia*, the Policy’s Business Interruption Coverage, which is

subject to a \$5,200,000 limit of liability. *See* Exhibit “A,” Form G300709A (10-08), p. 4 of 37.

42. Plaintiff also asserts a statutory bad faith claim against Defendants, seeking, *inter alia*, attorneys’ fees and punitive damages. *See* Exhibit “B,” ¶¶ 103-108.

43. Attorneys’ fees and punitive damages are properly included as part of the amount in controversy where they are available to successful plaintiffs under a statutory cause of action, such as Pennsylvania’s bad faith statute. *See Henderson v. Nationwide Mut. Ins. Co.*, 169 F. Supp. 2d 365, 368 (E.D. Pa. 2001) (citing *Suber v. Chrysler Corp.*, 104 F.3d 578 (3d Cir. 1997)).

44. Therefore, while Defendants do not concede that SWB Yankees, LLC is entitled to any relief, a fair reading of the Complaint and the Policy indicates an amount in controversy that exceeds the jurisdictional minimum. *See* 28 U.S.C. § 1332(a).

III. VENUE

45. This action is removable from the Court of Common Pleas of Lackawanna County, Pennsylvania to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1332(a)(1) and 28 U.S.C. § 1441(a) because the citizenship of all non-fraudulently joined parties is diverse

and the amount in controversy, exclusive of interest and costs, is in excess of \$75,000.

IV. CONCLUSION

46. Pursuant to 28 U.S.C. § 1446(b)(1), this Notice of Removal is being filed within thirty (30) days after receipt by Defendants of Plaintiff's Complaint.

47. Pursuant to 28 U.S.C. § 1446(a), copies of all other pleadings, filings and orders served on or by Defendants in the above-captioned litigation are attached hereto at Exhibit "C."

48. Written notice of the filing of this Notice of Removal will be sent forthwith to counsel of record for Plaintiff, Marion Munley, Esquire.

49. A true and correct copy of this Notice of Removal will be filed with the Office of the Prothonotary for the Court of Common Pleas of Lackawanna County, Pennsylvania.

50. The undersigned represents all Defendants in this action, which consent to this removal. There are no other defendants whose consent must be obtained relative to the same.

WHEREFORE, for the reasons set forth above, CNA Financial Corporation, The Continental Insurance Company, and Continental Casualty Company, hereby remove this action from the Court of Common Pleas,

Lackawanna County, Commonwealth of Pennsylvania, to the United States District Court for the Middle District of Pennsylvania.

Respectfully submitted,

TIMONEY KNOX, LLP

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Dated: July 29, 2020

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**CNA FINANCIAL CORPORATION,
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CASE NO.:

CERTIFICATE OF SERVICE

I, Robert M. Runyon III, Esquire, do hereby certify that a true and correct copy of the forgoing was served this date via First Class Mail upon the following:

Marion Munley, Esquire
Munley Law, P.C.
227 Penn Avenue
Scranton, PA 18503

TIMONEY KNOX, LLP

BY: s/Robert M. Runyon III
Robert M. Runyon III, Esquire

Date: July 29, 2020