IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KING COBRA GROUP, LLC d/b/a COBRA LOUNGE INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS, Plaintiff, v. MOTORISTS COMMERCIAL MUTUAL INSURANCE COMPANY, Defendant.	Civil Action No. 20-1012

NOTICE OF REMOVAL

NOW, comes Defendant, Motorists Commercial Mutual Insurance Company ("MCMIC"), by and through its attorneys, BURNS WHITE LLC, and files this Notice of Removal pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1332(d). MCMIC submits that the United States District Court for the Western District of Pennsylvania has original diversity jurisdiction over this civil action and that this matter may be removed to the District Court in accordance with the procedures provided at 28 U.S.C. § 1446. In addition, and in the alternative, MCMIC submits that the Court has jurisdiction over this putative class action pursuant to the Class Action Fairness Act of 2005 ("CAFA"). In further support of Removal, MCMIC states as follows:

I. THE COURT'S DIVERSITY JURISDICTION

1. MCMIC timely files this Notice of Removal based on the Court's non-discretionary, original, diversity jurisdiction, and, in so doing asserts that:

a. Where the Complaint expressly alleges a "breach of contract" claim relative to first party property coverages that seeks money damages – a claim that

can, alone, be adjudicated in the absence of any declaratory relief sought in the Complaint – the Complaint asserts an independent claim for legal relief, for which jurisdiction is non-discretionary and as to which the DJA and Brillhart/Wilton abstention principles do not apply;

b. Where the denial of coverage at issue allegedly occurred in the past, the Complaint does not, in fact, seek a declaratory judgment applicable to future conduct or obligations, irrespective of the label Plaintiff chose to assign to its claim, and, therefore, the DJA and Brillhart/Wilton abstention principles do not apply; and

c. Even if the Complaint could be read to exclusively seek declaratory relief, the Court should not decline to exercise jurisdiction under Brillhart/Wilton abstention principles, and, in this regard, MCMIC seeks the full opportunity to brief the Court upon a motion to abstain, if made; however, MCMIC presents certain case law and argument for the Court's consideration on this Notice of Removal. If and when such a motion is filed, the motion should be denied, because all of the factors identified by the Third Circuit for determination of such a motion weigh squarely in favor of accepting jurisdiction.

2. As it relates to the litigation of the claims at issue in federal court, MCMIC submits that (i) Plaintiff's counsel in this matter has filed and is already litigating similar insurance coverage issues (including the applicable virus exclusion) in another lawsuit in the United States District Court for the Western District of Pennsylvania (Windber Hospital v. Travelers, 3:20-cv-

00080-KRG),[1] and (ii) cases involving similar coverage issues have been filed and are pending in the United States District Court for the Western District of Pennsylvania (Geneva Foreign & Sports, Inc. v. Erie Insurance Company of New York, 1:20-cv-00093-SPB), the United States District Court for the Middle District of Pennsylvania (Kahn v. Penn Nat'l, 1:20-cv-00781-JEJ), and the United States District Court for the Eastern District of Pennsylvania (Independence Restaurant Group, LLC v. Certain Underwriters at Lloyd's London, 2:20-cv-02365-CFK; Sidkoff, Pincus & Green, P.C. v. Sentinel Ins. Co., 2:20-cv-02083 (MDL pending)), among others. Accordingly, litigation of the insurance coverage issues arising out of the COVID-19 pandemic in federal court is almost certain to occur.

TIMELINESS OF REMOVAL

3. This Notice of Removal is timely filed within thirty (30) days of (i) the filing of this lawsuit by "King Cobra Group, LLC d/b/a Cobra Lounge Individually and on Behalf of Similarly Situated Persons" ("Cobra" or "Plaintiff") in the Court of Common Pleas of Allegheny County, Pennsylvania, at Docket No. GD-20-006546 ("Lawsuit"), and (ii) MCMIC's receipt of a copy of the Complaint filed in the Lawsuit. 28 U.S.C.A. § 1446(b).

4. Plaintiff initiated the Lawsuit by filing a Complaint on June 5, 2020. (See Ex. 1.)

5. MCMIC received a copy of the Complaint filed in the Lawsuit on June 11, 2020.

STATE COURT RECORDS

6. In addition to the Complaint, a copy of the state court docket is attached hereto at Exhibit 2.

[1] A court may take judicial notice of "any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." Netherlands Ins. Co. v. Butler Area Sch. Dist., 256 F. Supp. 3d 600, 604, n. 3 (W.D. Pa. 2017) (Schwab, J.) (taking judicial notice of public documents), *quoting* Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006); see also Kendall v. Lancaster Expl. & Dev. Co., LLC, 323 F. Supp. 3d 664, 671 (M.D. Pa. 2018) (taking judicial notice of docket and documents filed in other matters as public records) (citation omitted).

7. Upon information and belief, the documents attached hereto at Exhibits 1 and 2 reflect and constitute all of the pleadings, process, and orders, which were served on MCMIC and filed in connection with the state court action.

COMPLETE DIVERSITY

A. Whether Plaintiff is a Corporation, as it Alleges, or a Limited Liability Company, Neither it Nor any of its Members Are Citizens of Ohio.

8. According to Plaintiff's sworn, verified allegations, "made subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities," Plaintiff is "a corporation organized and existing under the Commonwealth of Pennsylvania, with its principal place of business located at 4305 Main Street, Pittsburgh, Allegheny County, Pennsylvania." (See Ex. 1, at ¶ 1, Verification.)

9. The Court must accept as true a plaintiff's allegations regarding its own corporate form in considering whether diversity exists. Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987) (in considering remand of a removed case, "the district court must assume as true all factual allegations of the complaint").

10. Indeed, Plaintiff is in the best position to plead factually accurate, sworn facts relative to its form and potential membership. See Lincoln Ben. Life Co. v. AEI Life, LLC, 800 F.3d 99, 108 (3d Cir. 2015) ("The unincorporated association . . . is in the best position to ascertain its own membership.").

11. For purposes of pleading removal, therefore, MCMIC is entitled to rely on Plaintiff's own sworn allegation that it is a "corporation" organized under Pennsylvania law.

12. Given that Plaintiff alleges under oath that it is a "corporation," the need for additional investigation into Plaintiff's citizenship, to the extent called for under Lincoln Benefit Life Co. v. AEI Life, LLC, 800 F.3d 99 (3d Cir. 2015), had Plaintiff pleaded that it is an

unincorporated entity, does not arise. Any factual issue as to the truth of Plaintiff's allegation in this regard is not subject to resolution at the pleading (Notice of Removal) stage, but must be subject to discovery and jurisdictional fact-finding and evidentiary hearing. Lincoln Ben., 800 F.3d at 102 ("*If* the defendant [here, Plaintiff] thereafter mounts a factual challenge, the plaintiff [here, Defendant] *is entitled to* limited discovery for the purpose of establishing that complete diversity exists.") (emphasis added).

13. Nevertheless, in addition and in the alternative, after reasonable investigation and upon information and belief, Plaintiff King Cobra Group, LLC, exists as a Pennsylvania limited liability company, the members of which are citizens of Pennsylvania, not Ohio.

14. Based on self-published information, "Cobra Lounge" is the name under which "King Cobra, LLC" operates a restaurant located at 4305 Main Street, Pittsburgh, Pennsylvania 15224. (See Ex. 3.)

15. However, based on publicly available information from the Pennsylvania Secretary of State, there is no such entity as "King Cobra, LLC." (See Ex. 4.)

16. Rather, based on publicly available information from the Pennsylvania Secretary of State, there is an entity identified as King Cobra Group, LLC, that maintains an address at 4305 Main Street, Pittsburgh, Pennsylvania. (See Ex. 4.)

17. According to the Certificate of Organization of King Cobra Group, LLC obtained from the Pennsylvania Secretary of State, the organizers of King Cobra Group, LLC are Miranda Piso, Derek Burnell, and Matthew Emling, and the company's registered address is 4305 Main Street, Pittsburgh, Pennsylvania 15224. (See Exhibit 5.)

18. Based on information available through the Pennsylvania Secretary of State, Miranda Piso and Derek Burnell both maintain an address at 3720 Butler Street, Pittsburgh, Pennsylvania 15201. (See Ex. 5.)

19. Based on information available through the Pennsylvania Secretary of State, Matthew Emling maintains an address at 731 Superior Street, Carnegie, Pennsylvania 15106. (See Ex. 5.)

20. Based on information available through the Allegheny County Real Estate Portal, 731 Superior Street, Carnegie, Pennsylvania is a residential address owned by Matthew Emling. (See Ex. 6.)

21. "[E]ven the most convoluted association is, at bottom, made up of natural persons and/or corporations, for which bare allegations of citizenship suffice." Lincoln Ben., 800 F.3d at 106.

22. Under any reasonable potentiality, both at the time that Plaintiff initiated this action and at the time of this Removal, Plaintiff and/or all of its members were and are citizens of Pennsylvania.

23. Under any reasonable potentiality, both at the time that Plaintiff initiated this action and at the time of this Removal, Plaintiff and/or all of its members were not and are not citizens of Ohio.

24. "Depriving a party of a federal forum simply because it cannot identify all of the members of an unincorporated association is not a rational screening mechanism. The membership of an LLC is often not a matter of public record. Thus, a rule requiring the citizenship of each member of each LLC to be alleged affirmatively before jurisdictional discovery would effectively

shield many LLCs from being sued in federal court without their consent. This is surely not what the drafters of the Federal Rules intended." Lincoln Ben., 800 F.3d at 108–09.

25. To be certain, "[a] State X [party] may … survive a facial challenge [to diversity] by alleging that none of the [opposing party's] association's members are citizens of State X." Id. at 107.

26. Allegations "on information and belief" that a party is not a citizen of a particular state "suffice[ ] to establish diversity." Id.

27. Here, after reasonable investigation and upon information and belief, none of Plaintiff limited liability company's members are citizens of Ohio.

28. Here, after reasonable investigation and upon information and belief, Plaintiff and all of its members are not citizens of Ohio.

B. MCMIC is a Citizen of Ohio, Not Pennsylvania.

29. For its part, MCMIC, the lone defendant in the Lawsuit, is not a Pennsylvania entity, nor does MCMIC maintain its principal place of business in Pennsylvania. (See Ex. 1, at ¶ 3.)

30. Rather, MCMIC is a mutual insurance company organized under the laws of the State of Ohio with its principal place of business in Ohio, specifically, at 471 E. Broad Street, Columbus, Ohio. (See Ex. 1, at ¶ 3.)

31. Both at the time that Plaintiff initiated this action and at the time of this Removal, MCMIC was and is a citizen of Ohio.

32. Both at the time that Plaintiff initiated this action and at the time of this Removal, MCMIC was not and is not a citizen of Pennsylvania.

33. Accordingly, where Plaintiff and all of its members (Pennsylvania) and Defendant (Ohio) are citizens of different states, the requirement of pleading complete diversity for removal is satisfied as a matter of law. See Lincoln Ben., 800 F.3d at 107.

NON-DISCRETIONARY JURISDICTION

34. In the Complaint, Plaintiff asserts a claim for legal relief – specifically, allegations asserting a "breach of contract," and all its elements, seeking money damages for breach of the Policy – but labeled as a claim for "Declaratory Judgment." (See Ex. 1, generally.)

35. As a general matter, a complaint that seeks money damages seeks legal relief, not declaratory relief, and should not be treated as seeking declaratory relief. See Reifer v. Westport Ins. Corp., 751 F.3d 129, 137 (3d Cir. 2014) ("It may, in some circumstances, be possible for a party's claim for legal relief to masquerade as a declaratory judgment, improperly activating discretionary jurisdiction.").[2]

36. A claim that does not seek a declaration as to future conduct, but seeks relief as to past conduct, does not seek declaratory relief.

> Declaratory judgments are meant to define the legal rights and obligations of the parties in the anticipation of some future conduct. Declaratory judgments are not meant simply to proclaim that one party is liable to another.

Andela v. Admin. Office of U.S. Courts, 569 F. App'x 80, 83 (3d Cir. 2014) (citations omitted).

37. Because the Complaint seeks legal relief for money damages due to breach of contract, the Court has no discretion to abstain from exercising its jurisdiction under

[2] MCMIC notes that the Complaint at issue in Reifer (4:12-cv-00533-MWB, Doc. 2), which is a matter of public record and subject to judicial notice, was devoid of any "breach of contract" allegations and sought only a declaration that the insurer was obligated to pay a judgment entered in another case, distinguishing it from the claims that appear in the Complaint filed in the instant matter – rendering the Complaint at issue here more akin to the Complaints in both Rarick v. Federated Serv. Ins. Co., 852 F.3d 223 (3d Cir. 2017) (2:13-cv-03286-JFL, Doc. 1) and Schodle v. State Farm Mut. Auto. Ins. Co., 2017 WL 1177133 (E.D. Pa. Mar. 30, 2017) (2:17-cv-00407-HB, Doc. 1) – that is, a breach of contract claim masquerading as a declaratory judgment improperly seeking to activate discretionary jurisdiction.

Brillhart/Wilton abstention principles. Wilton v. Seven Falls Co., 515 U.S. 277, 284 (1995) (federal courts have a "virtually unflagging obligation" to "exercise the jurisdiction conferred on them by Congress").

38. Even if the Complaint seeks declaratory relief, in part, it asserts an independent claim for damages – "[w]hen a complaint contains claims for both legal and declaratory relief, a district court must determine whether the legal claims are independent of the declaratory claims." Rarick v. Federated Serv. Ins. Co., 852 F.3d 223, 229 (3d Cir. 2017); Schodle v. State Farm Mut. Auto. Ins. Co., 2017 WL 1177133, at *2 (E.D. Pa. Mar. 30, 2017), *quoting* Rarick, 852 F.3d at 229.

39. "If the legal claims are independent, the court has a 'virtually unflagging obligation' to hear those claims," and Brillhart/Wilton abstention principles are inapplicable. Rarick, 852 F.3d at 229; Schodle, 2017 WL 1177133, at *2, *quoting* Rarick, 852 F.3d at 229.

40. As a general matter, where a breach of contract is alleged, breach of contract claims are independent from declaratory judgment claims concerning the contract provisions, because the breach of contract claim can be decided without the need for a declaration. See Walsh/Granite JV v. HDR Eng'g, Inc., 2017 WL 11485584, at *2 (W.D. Pa. Nov. 7, 2017) (Fischer, J.) ("legal claims are independent of the declaratory judgment claim because 'they are alone sufficient to invoke the court's subject matter jurisdiction and can be adjudicated without the requested declaratory relief.'"), *quoting* Rarick, 852 F.3d at 228. The same is true of claims for breach of an insurance policy. Schodle, 2017 WL 1177133, at *2.

41. Independence is established when the legal claim is "'alone sufficient to invoke the court's subject matter jurisdiction and can be adjudicated without the requested declaratory

relief.'" Griggs Rd., L.P. v. Selective Way Ins. Co. of Am., 2017 WL 2645542, at *4 (M.D. Pa. June 19, 2017), *citing* and *quoting* Rarick, 852 F.3d at 228.

42. In the context of an insured seeking monetary damages for an insurer's alleged breach of a first-party property insurance policy, as Plaintiff seeks here, the claim for damages is independent of any claim for declaratory relief, and is not subject to abstention in the absence of a parallel state court proceeding. Griggs Rd., 2017 WL 2645542, at *4, *citing* Schodle, 2017 WL 1177133, at *2 ("[B]ecause Plaintiffs are undoubtedly seeking monetary relief they aver is owed under the policy, a resolution of the instant controversy can be fully accomplished through the adjudication of the breach of contract claim.").

43. "[D]epriving access to a federal forum simply because there is a request for declaratory relief 'seems especially unwarranted given that nearly all claims, including those for damages or injunctive relief, effectively ask a court to declare the rights of the parties to the suit.'" Rarick, 852 F.3d at 228, *quoting* VonRosenberg v. Lawrence, 781 F.3d 731, 735 (4th Cir. 2015).

44. Here, the Complaint alleges that Plaintiff submitted a claim under the Policy seeking coverage for "losses, damages, and expenses caused by the COVID-19 pandemic." (Ex. 1, at ¶¶ 10, 25, 29, 30.)

45. The Complaint alleges that MCMIC has disclaimed, denied, refused and/or failed to acknowledge coverage under the policies in question relative to the claims at issue. (Ex. 1, at ¶¶ 37, 38, 47(d), 47(e), 67, 68, 71, 72, 73, 74.)

46. The Complaint (i) alleges that Plaintiff (and the members of the purported class) are entitled to "coverage for the losses, damages, and expenses caused by the COVID-19 pandemic," (ii) alleges that the failure to provide that coverage constituted "*a material breach of [the MCMIC] [P]olicy*" in "direct *violation of the specific terms and provisions of the [MCMIC]*

Policy," and (iii) seeks the coverage – that is, monetary relief – allegedly due. (See e.g., Ex. 1, at ¶¶ 47(e), 65, 66, 69, 70, 72, 73, 74.) (emphasis added).

47. Inconsistent with a claim seeking declaratory relief, Plaintiff has confirmed that it seeks money damages in an amount in excess of the applicable arbitration limit. (See Ex. 1, at Civil Cover Sheet.)

48. Accordingly, Plaintiff's claim for money damages is premised on an alleged breach of contract that it contends has already occurred. Such a claim can be fully determined even if Plaintiff did not seek declaratory relief, and it is therefore independent for purposes of determining the basis of the Court's jurisdiction.

49. Plaintiff's allegations here are materially different from those in other cases in which neither party alleges that the other is in "breach," such that neither is yet entitled to monetary relief under the contract, but in which one party seeks a declaration as to the rights and obligations of the parties prior to any breach. In that instance, elimination of the claim for declaratory relief would leave no independent legal claim for breach of contract. See R.R. Street & Co. v. Vulcan Materials Co., 569 F.3d 711, 717 (7th Cir. 2009) (insured's claim for money damages for breach of contract was independent of declaratory relief claim; "Put simply, the non-declaratory claims are independent of the declaratory claim because they could stand alone in federal court – both jurisdictionally and substantively – irrespective of the declaratory claim.") (cited with approval in Rarick, 852 F.3d at 228).

50. Plaintiff's attempt to "artfully plead" a "declaratory judgment" claim should not be permitted to control the Court's jurisdiction and/or deprive MCMIC of its right to remove this matter to federal court. See, *generally*, United Jersey Banks v. Parell, 783 F.2d 360, 367 (3d Cir. 1986) (artful pleading cannot deprive a party of a federal forum), *citing* 14A Wright & Miller,

Federal Prac. and Proc. § 3722 at 270; Eitmann v. New Orleans Public Service, Inc., 730 F.2d 359, 365 (5th Cir. 1984) (plaintiff cannot defeat removal by fraudulent means or artful pleading).

51. But further, the Court can forego the need to look through Plaintiff's artful pleading where, as here, the Complaint contains an independent and expressly stated claim for breach of contract, rendering the "declaratory judgment" claim superfluous and jurisdiction non-discretionary, such that removal must be permitted. Schodle, 2017 WL 1177133, at *2 (denying remand where "breach of contract claim is the essence of this lawsuit," such that the court "need not decide if it is an effort at artful pleading designed to defeat federal jurisdiction"); Rarick, 852 F.3d at 229 (citing the court's virtually unflagging obligation to hear independent legal claims); see also Walsh/Granite, 2017 WL 11485584, at *2 (acknowledging the independent nature of breach of contract and declaratory judgment claims).

52. As the court said in Schodle:

> [T]he motion to remand *must be denied*. The non-declaratory breach of contract claim is independent of the declaratory judgment claim inasmuch as it is alone sufficient to invoke subject matter jurisdiction and can be adjudicated even if the claim for declaratory judgment was to be dismissed. The breach of contract claim is the essence of this lawsuit. The insured surely wants monetary relief, not simply a declaration of his rights. The case before us is somewhat unusual in that it is the insured, rather than the insurer, who seeks declaratory relief. It is puzzling that he has brought this extraneous claim which really adds nothing to his case.

2017 WL 1177133, at *2 (emphasis added).

THE COURT SHOULD NOT ABSTAIN
EVEN IF JURISDICTION IS DISCRETIONARY

53. If a motion to abstain is made (or on the Court's own motion), MCMIC respectfully requests the opportunity to brief the issues raised by the Court, as they are not subject to full and fair determination based only on a Notice of Removal.

54. Nevertheless, MCMIC would show the Court as follows: "The discretion courts exercise in actions seeking only declaratory relief is 'substantial' but nonetheless 'bounded and reviewable.'" Kelly, 868 F.3d at 282, *quoting* Reifer, 751 F.3d at 140. "[T]he 'wholesale' dismissal of certain types of cases brought under the DJA is improper, as litigants should not be unjustifiably denied the right to obtain an authorized remedy in federal court." Id., *quoting* Reifer, 751 F.3d at 147.

55. "Courts should first determine whether there is a 'parallel state proceeding.' Although the existence of a parallel state proceeding is but one factor for courts to consider, it is a significant factor that is treated with 'increased emphasis.'" Id., *quoting* Reifer, 751 F.3d at 143, 144.

56. "'[T]he absence of pending parallel state proceedings *militates significantly in favor of exercising jurisdiction*, although it alone does not require such an exercise.'" Id., *quoting* Reifer, 751 F.3d at 147 (emphasis added).

57. There is no pending parallel state court proceeding in this case.

58. "[I]f a state parallel proceeding does not exist, then 'as part of exercising sound and reasoned discretion, district courts declining jurisdiction should be rigorous in ensuring themselves that the lack of pending parallel state proceedings is outweighed by opposing factors.'" Id., *quoting* Reifer, 751 F.3d at 144.

59. In an insurance declaratory judgment case, the Third Circuit in Kelly found that the district court had abused its discretion in remanding the case, because "[t]he lack of pending parallel state proceedings [there] was not outweighed by opposing factors." Id. at 288.

60. Kelly's analysis of the Reifer factors shows that jurisdiction should also be retained here.

61. First, a declaratory judgment would resolve the uncertainty that prompted filing of the action. Id. "Declaratory relief by the District Court would unquestionably clarify and settle the dispute regarding [the insurer's] obligations under the insurance policy." Id.

62. "Second, none of the parties will be inconvenienced by having this matter adjudicated in the federal forum. The District Court considering the Declaratory Action sits in the same city as the court in which the [insured] originally filed suit." Id.

63. "Third, the parties do not aver that any public interest is at stake other than the usual interest in the fair adjudication of legal disputes, an interest which the District Court is well-equipped to address." Id.

64. On this point, the Kelly court noted that a generalized concern with having a state court decide issues under state common law is not sufficient to abstain from deciding those issues. Absent "an unsettled question of state law or important policy issue implicated by the coverage claims," "there is little reason for a federal court to be reluctant about deciding this case." Id. at 288, n.13.

65. In this case, an insured seeks insurance coverage for lost business income arising out of governmental "stay at home" orders resulting from a virus, under an insurance policy that among other things states, "[w]e will not pay for loss or damage caused by or resulting from any virus." While the current COVID-19 pandemic and resulting shutdown orders may be unprecedented (and MCMIC in no way disputes their serious consequences), the claim involves application of clear policy language to a set of facts involving a private enterprise, which does not involve any novel issues of law or any public interest. See id., *quoting* Reifer, *supra* ("Federal and state courts are equally capable of applying settled state law to a difficult set of facts."); Sayles v. Allstate Ins. Co., 219 A.3d 1110, 1130 (Pa. 2019) ("Insurance contracts, while highly regulated,

are still contracts. They remain arrangements between private parties."); Grode v. Mut. Fire, Marine & Inland Ins. Co., 8 F.3d 953, 959 (3d Cir. 1993) ("Although the state regulates insolvent insurance companies, simple contract actions that happen to involve such companies are not matters of important regulatory concern or actions interfering with important state policies."); Plavin v. Grp. Health Inc., 323 F. Supp. 3d 684, 696 (M.D. Pa. 2018) ("It is essentially a 'private' contract dispute over policy coverage and the processing of a claim which is unique to these parties, not conduct which affects the consuming public at large."), *quoting* New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 321, 639 N.Y.S.2d 283 (1995).

66. Resolution of this dispute will involve the specific terms of MCMIC's Policy and the specific facts of Plaintiff's alleged shutdown. It will not affect the resolution of disputes involving other insureds with different facts and different insurers with different policy language.

67. As to the fourth factor, "[t]he state and federal courts are equally able to grant effective relief." Kelly, 868 F.3d at 289.

68. Fifth and sixth, there is no pending parallel state court case, and therefore no concern with duplicative litigation.

69. Seventh, there is no concern with procedural fencing – "[T]here has been no concern expressed that removal of the Declaratory Action was driven by an improper motive." Id.

70. The eighth factor is inapplicable here, as it relates to declaratory judgment actions relating to liability insurance, where the issue is coverage for a pending tort action against the insured and, typically, whether the insurer has a duty to defend. Id. at 283. This case involves first-party property insurance for the insured's own loss, and there is no related pending state court action and no issue of a "duty to defend."

71. As in Kelly, "[t]hese factors [do] not outweigh the lack of a parallel state proceeding in this case. As a result, 'considerations of practicality and wise judicial administration,' Wilton, 515 U.S. at 288, counsel against abstention …" 868 F.3d at 289.

AMOUNT IN CONTROVERSY

72. Insofar as it concerns the scope of the claim and damages sought, Plaintiff seeks coverage under the Policy for losses, damages, and expenses caused by the COVID-19 pandemic and sustained by Cobra from at least the March 19, 2020 issuance of Pennsylvania Governor Tom Wolf's Order closing the physical locations of non-life sustaining business, through the present, and into the future, such that it appears that Plaintiff seeks an amount in excess of $75,000. (See e.g., Ex. 1, at ¶¶ 20-22, 24-29, 30, 33, 34, 37, 38, 44, 47, 65, 67, 68, 69, 70, 75, 76.)

73. Accordingly, there is a reasonable and good faith reason to believe and assert that the claim exceeds the $75,000 jurisdictional threshold. (See Ex. 1, at Ex. A, Order (no dispute as to the amount in controversy on the same allegations.)[3])

74. Where Plaintiff seeks such sums, the amount in controversy exceeds the jurisdictional requirement of $75,000.

STATEMENT OF DIVERSITY & SUPPLEMENTAL JURISDICTION

75. For the foregoing reasons, where Plaintiff and MCMIC are citizens of different states, Pennsylvania and Ohio, respectively, and because the amount in controversy exceeds $75,000, the United States District Court for the Western District of Pennsylvania has original, non-discretionary jurisdiction over this matter. See 28 U.S.C. § 1332; Rarick, 852 F.3d at 227.

[3] The Complaint filed in Dianoia's v. MMIC, 2:20-cv-00706-NBF, being effectively identical and subject to judicial notice as a public record.

76. Section 1332 confers original jurisdiction over all civil matters where the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and the claim is between citizens of different states.

77. Since complete diversity exists and the requisite $75,000 amount in controversy for an individual plaintiff is satisfied under 28 U.S.C. § 1332(a), this Court has supplemental jurisdiction over the putative class members under 28 U.S.C. § 1367. See Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 549 (2005) (where a named plaintiff in a class action satisfies the amount in controversy requirement, 28 U.S.C. § 1367 authorizes supplemental jurisdiction over the claims of the putative class members); Papurello v. State Farm Fire and Casualty Co., 144 F. Supp. 3d 746, 752 (W.D. Pa. 2015) ("Section 1367 authorizes supplemental jurisdiction over putative class members' claims if 'at least one named plaintiff' satisfies § 1332(a)(1)'s $75,000 amount in controversy requirement and complete diversity is present.")

II. THE COURT'S JURISDICTION PURSUANT TO CAFA

78. In addition to the Court's original, diversity jurisdiction over this matter, and in the alternative, MCMIC submits that the Court has jurisdiction over this matter pursuant to CAFA.

79. This case purports to be a "class action" within the meaning of CAFA because it was brought under a state statute or rule, namely, 231 Pa. Code Part I, Ch 1700, Rule 1701, *et seq.*, which authorizes an action to be brought by one or more representative persons as a class action if the underlying requirements are met. See 28 U.S.C. § 1332(d)(1)(A)-(B); Ex. 1 ¶¶ 36-63.

80. MCMIC does not concede that the proposed class would qualify as a class as defined or that the putative class could be certified based on numerous factors, including but not limited to the fact that (1) the claims of class members will depend on the individual facts and circumstances and individual policy language, which may vary from policy to policy; and (2) the

determination of any entitlement to coverage for business interruption losses will be subject to highly detailed review, examination and calculation based on historical financial accounting records, among other things, and individual accounting and/or expert review, making each claim too individualized for class treatment. But since the Complaint alleges a "class action," it is subject to CAFA.

81. CAFA was enacted to expand federal jurisdiction over class actions. See Walsh v. Defs., Inc., 894 F.3d 583, 586 (3d Cir. 2018), *citing* Standard Fire Ins. Co. v. Knowles, 568 U.S. 588, 595 (2013); see also Kaufman v. Allstate New Jersey Ins. Co., 561 F.3d 144, 148-49 (3d Cir. 2009) (CAFA was intended to broaden federal court jurisdiction over class actions).

82. Removal is proper under CAFA where, as here, (i) there are one hundred (100) or more purported class members, (ii) there is minimal diversity of citizenship, and (iii) the aggregate amount in controversy for the entire proposed class exceeds $5 million, exclusive of costs and interests. See 28 U.S.C. § 1332(d)(2); Judon v. Travelers Prop. Cas. Co. of Am., 773 F.3d 495, 500 (3d Cir. 2014).

A. The Putative Class Satisfies Minimal Diversity.

83. CAFA requires only "minimal diversity," meaning that "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A).

84. As set forth above, (i) MCMIC is a citizen of Ohio, (ii) Plaintiff, which is, itself, a member of the class, is a citizen of Pennsylvania (where it maintains its principal place of business and is organized,[4] see Ex. 5), and (iii) the putative class consists of Pennsylvania entities impacted by the Orders entered by Pennsylvania Governor Wolf and the Pennsylvania Department of

[4] Distinct from the Court's original diversity jurisdiction, under CAFA: "For purposes of this subsection and section 1453, 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. 28 USC 1332(d)(10).

Health, such that, the class contains citizens of Pennsylvania, and there is minimal diversity under CAFA. (Ex. 1, at ¶¶ 36, 38, 40, 48.)

85. Where the minimal diversity requirement under CAFA has been satisfied, this case is removable to this Court.

B. <u>The Putative Class Contains One Hundred or More Members</u>.

86. Plaintiff contends that "the members of the class are so numerous that joinder of them is impracticable." (Ex. 1, at ¶ 41.)

87. Plaintiff purports to "bring[ ] this action individually and on behalf of a class of similarly situated persons." (Ex. 1, at ¶¶ 5, 36.)

88. Plaintiff contends that the class consists of all "persons and organization to whom [MCMIC] ha[s] issued policies of insurance" that have been impacted by the COVID-19 pandemic and/or the Orders by Governor Wolf and the Pennsylvania Department of Health that suspended and/or limited the operations of all "non-life sustaining businesses" in the Commonwealth. (Ex. 1, at ¶¶ 20-23, 25, 28, 32, 33, 34, 37, 38, 47, 66, 68, 70, 74, 76.)

89. MCMIC's records reflect that there are in excess of 1,000 policies that provide business interruption coverage that were in effect – in Pennsylvania – during the relevant time period.

90. Where Plaintiff contends that the class consist of all non-life sustaining businesses in Pennsylvania impacted by COVID-19 and/or the Orders, to whom MCMIC issued policies of insurance (Ex. 1, at ¶ 32), there is good reason to believe and to assert that the putative class consists of more than one hundred (100) policyholders – a number that represents less than ten percent (10%) of the policies issued by MCMIC in Pennsylvania that provide for business interruption coverage during the relevant time period.

91. In addition, to the extent that the named Plaintiff seeks to define the class to include MCMIC policyholders in Pennsylvania allegedly impacted by COVID-19 and/or the Orders without regard to whether such policyholders have made or will make a claim, the number of such policyholders is no doubt a significant percentage of the total number of policyholders to whom MCMIC has issued a policy in Pennsylvania covering the relevant time period. (Ex. 1, at ¶ 32.)

92. Accordingly, MCMIC reasonably and in good faith asserts that there are more than one hundred (100) members in the putative class.

93. Where the requirement relative to the number of class members under CAFA has been satisfied, this case is removable to this Court

C. The Amount in Controversy Exceeds $5 Million.

94. While MCMIC disputes that (i) Plaintiff has stated any viable claims and (ii) Plaintiff and the putative class members are entitled to any relief, the allegations of the Complaint and the nature of Plaintiff's claims are such that MCMIC, reasonably and good faith, asserts that that the amount in controversy exceeds CAFA's jurisdictional threshold of $5 million, exclusive of interest and costs. See 28 U.S.C. § 1332(d)(2) and (6).

95. CAFA provides that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6). Where, as here, "the plaintiff's complaint does not state the amount in controversy, the defendant's notice of removal may do so." Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81, 83 (2014).

96. To establish the amount in controversy sufficient to remove a class action case to federal court, a defendant need not submit proof to establish the amount in dispute, but rather "may

simply allege or assert that the jurisdictional threshold has been met." Id. at 89. Here, the jurisdictional threshold has been met.

97. CAFA's amount in controversy requirement is satisfied where the defendant's notice of removal includes a plausible allegation that the stakes exceed $5 million. See Winkworth v. Spectrum Brands, Inc., 2019 WL 5310121, at *2 (W.D. Pa. Oct. 21, 2019), *quoting* Dart Cherokee Basin Operating Co., 574 U.S. at 89.

98. When removing a suit, the defendant may present an estimate of the amount in controversy based on a "reasonable reading of the value of the rights being litigated." Judon v. Travelers Prop. Cas. Co. of Am., 773 F.3d 495, 507 (3d Cir. 2014), *quoting* Werwinski v. Ford Motor Co., 286 F.3d 661, 666 (3d Cir. 2002).

99. The amount in controversy is satisfied on the possible recovery if Plaintiff and the class were to win on all of its claims; whether they are likely to recover anything based on the merits of the case is irrelevant to the amount in controversy analysis. See Jumara v. State Farm Ins. Co., 55 F.3d 873, 877 (3d Cir. 1995) (noting that indeterminacy of the amount to be recovered does not defeat diversity jurisdiction, and it is immaterial what the plaintiff might eventually recover); Clean Air Council v. Dragon Int'l Grp., 2006 WL 2136246, at *4 (M.D. Pa. July 28, 2006), *citing* Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 217 (3d Cir. 1999), *overruled on other grounds by* Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546 (2005) ("[O]nly if it appears to a legal certainty that Plaintiff cannot recover the minimum [jurisdictional] amount should [the court] remand."); see also Sabrina Roppo v. Travelers Commercial Ins. Co., 869 F.3d 568, 579 (7th Cir. 2017), *citing* Blomberg v. Serv. Corp. Int'l, 639 F.3d 761, 763 (7th Cir. 2011)) ("The party seeking removal does not need to establish what damages the plaintiff will recover, but only how much is in controversy between the parties.").

100. Because Plaintiff and the putative class do not plead specific monetary damages, the Court must consider the amount in controversy presented by Plaintiff's claims. The Third Circuit measures the amount in controversy in declaratory and injunctive actions by reference to "the value of the rights which the plaintiff seeks to protect." Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 539 (3d Cir. 1995); see also Cty. of Washington, Pa. v. U.S. Bank Nat. Ass'n, 2012 WL 3860474, at *19 (W.D. Pa. Aug. 17, 2012) ("With regard to actions seeking declaratory relief, the amount in controversy is the value of the right or the viability of the legal claim to be declared, such as a right to indemnification . . . .").

101. Here, Plaintiff alleges that "Plaintiff, Cobra, is a member of the class that it seeks to represent." (Ex. A, at ¶ 48.)

102. Plaintiff further alleges that "[t]he claims of Plaintiff, Cobra, are typical of the claims of other members of the class which it purports to represent." (Ex. A, at ¶ 49.)

103. As set forth above, where Plaintiff's claim exceeds the $75,000 diversity threshold, and where such claim is allegedly representative of a class of one hundred (100) or more policyholders, the claims, in the aggregate would exceed $7.5 million.

104. Accordingly, MCMIC reasonably and in good faith asserts that the claims of the putative class members, in the aggregate, exceed the sum or value of $5 million.

105. As such, where the jurisdictional threshold under CAFA has been satisfied, this case is removable to this Court.

STATEMENT OF JURISDICTION PURSUANT TO CAFA

106. In addition, and independent of the Court's original, diversity jurisdiction, removal is proper under CAFA, because (a) there are one hundred (100) or more purported class members,

(b) there is minimal diversity of citizenship, and (c) the aggregate amount in controversy for the entire proposed class exceeds $5 million, exclusive of costs and interests.

107. The exceptions under CAFA do not apply because MCMIC is a foreign entity, not a resident or citizen of Pennsylvania. See 28 U.S.C. § 1332(d)(4)(A)(i)(II) (local controversy exception requires at least one defendant to be a citizen of the State in which the action was filed); § 1332(d)(4)(B) (home state controversy exception has the same requirement); 28 U.S.C. § 1332(d)(3) (discretionary exception also requires primary defendants to be citizens of the State in which the action was filed).

WHEREFORE, Defendant, Motorists Commercial Mutual Insurance Company, removes this civil action to the United States District Court for the Western District of Pennsylvania, pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1332(d).

Respectfully submitted,

BURNS WHITE LLC

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on July 6, 2020, the within **NOTICE OF REMOVAL** was filed electronically and will be served upon all counsel as follows:

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