UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-62367-CIV-SINGHAL/VALLE

SUNFARI EXPERIENCES, LLC,

Plaintiff,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, SUBSCRIBING TO YACHTINSURE POLICY NUMBER ASP00154700, INCLUDING ASPEN SYNDICATE 4711 AND BARBICAN SYNDICATE 1955,

Defendant.
_____/

**ORDER GRANTING REMAND**

**THIS CAUSE** is before the Court on Plaintiff's Motion to Remand (DE [8]). The Court has also considered Defendant's Response in Opposition (DE [10]) and Plaintiff's Reply (DE [14]). For the reasons discussed below, the Court grants Plaintiff's Motion.

## I. BACKGROUND

Plaintiff Sunfari Experiences, LLC filed a two-count Complaint (DE [1-2], at 7–70) in state court against Defendant Certain Underwriters at Lloyd's, London Subscribing to Yachtinsure Policy Number ASP00154700, including Aspen Syndicate 4711 and Barbican Syndicate. Counts I and II both seek damages for statutory bad faith under section 624.155, Florida Statutes (2020).

Plaintiff alleges that Defendant engaged in bad faith in adjusting Plaintiff's marine insurance claim for damages to Plaintiff's vessel caused by Hurricane Irma. *See* (DE [1-2], at 5–6). Plaintiff further alleges that Defendant informed Plaintiff that it agreed to pay

$111,790.66 as a payment on account for Plaintiff's hull and machinery claim but rejected another portion of Plaintiff's claim. *See* (DE [1-2], at 19–21). The civil remedy notices attached to Plaintiff's Complaint notify Defendant that it failed to pay the $111,790.66 it admitted it owed Plaintiff. (DE [1-2], at 51, 58). Defendant allegedly paid the $111,790.66 to Plaintiff only *after* the sixty-day cure period in the bad-faith statute. *See* Mot. to Remand ¶¶ 9–10 (DE [8]). Plaintiff does not specify an amount of damages it is seeking in the bad-faith action: It alleges only that it is seeking extra-contractual damages for chartering a replacement boat, its lost charter-hire income, and attorney's fees and costs under section 624.155. (DE [1-2], at 22–23, 24).

Plaintiff filed a related breach-of-contract action against Defendant in the Southern District of Florida, Case No. 19-cv-61516-Martinez/Snow ("the breach-of-contract case") for Defendant's breach of the same insurance policy. *See* (DE [10-1]). That action has not yet been resolved. The amended complaint in the breach-of-contract case alleges that the "amount in controversy exceeds $75,000, exclusive of interest and costs." (DE [10-1], at 3). In count I, Plaintiff seeks to recover unspecified amounts of "costs of repairing the Vessel, the costs of preserving the Vessel from further damage, salvage costs, hurricane haul-out expenses and other damages caused by the delays in getting the Vessel's repairs performed within a reasonable amount of time and in a workmanlike manner." *Id.* at 15. In count II, Plaintiff seeks to recover unspecified amounts of similar costs. *See id.* at 15–16. Finally, the parties' pretrial stipulation in the breach-of-contract case indicates that Plaintiff expects to recover more than $115,000 in prevailing-party attorney's fees under a Florida statute or Virgin Islands statute. (DE [78], at 13).

Defendant removed the current bad-faith action based on diversity of citizenship under 28 U.S.C. § 1332(a) (DE [1]). The parties do not dispute complete diversity, but they dispute whether the amount-in-controversy requirement is satisfied.

## II. LEGAL STANDARD

"Courts should strictly construe the requirements of 28 U.S.C. § 1441 (removal jurisdiction) and remand all cases in which such jurisdiction is doubtful." *Carrion v. Liberty Mut. Fire Ins. Co.*, 2013 WL 12094850, at *1 (S.D. Fla. May 21, 2013) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941)). "[I]n determining whether to remand a case, the Court must consider the facts as they existed at the time of removal." *Id.* (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938)). "Where the plaintiff has not alleged a specific amount of damages, the defendant seeking removal must establish by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional minimum." *S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1315 (11th Cir. 2014) (citing *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 752 (11th Cir. 2010)).

"A court may rely on evidence put forward by the removing defendant, as well as reasonable inferences and deductions drawn from that evidence, to determine whether the defendant has carried its burden." *Id.* (citing *Pretka*, 608 F.3d at 753–54); *see also Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1061–62 (11th Cir. 2010) ("Eleventh Circuit precedent permits district courts to make 'reasonable deductions, reasonable inferences, or other reasonable extrapolations' from the pleadings to determine whether it is facially apparent that a case is removable." (quoting *Pretka*, 608 F.3d at 754)); *Progressive Express Ins. Co. v. Lopez Transp. Servs., Corp.*, 470 F. Supp. 3d 1272, 1275 (S.D. Fla.

2020) ("District courts have original jurisdiction if the minimum jurisdictional amount is stated in *or deducible from* the complaint." (emphasis added) (citing *Co. Prop. & Cas. Ins. Co. v. Metal Roofing Sys.*, 2013 WL 5770730, at *3 (S.D. Fla. Oct. 24, 2013))).

"The general rule is that attorneys' fees do not count towards the amount in controversy unless they are allowed for by statute or contract." *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 808 n.4 (11th Cir. 2003) (citing *Graham v. Henegar*, 640 F.2d 732, 736 (5th Cir. 1981)). "Arguably, when the amount in controversy substantially depends on a claim for attorney fees, that claim should receive heightened scrutiny." *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1080 n.10 (11th Cir. 2000) (citation omitted); *see also Castillo v. GeoVera Specialty Ins. Co.*, 2021 WL 58116, at *3 (S.D. Fla. Jan. 7, 2021) ("[T]he amount in controversy does not include highly speculative, prospective amounts of attorney's fees, but rather includes only those fees accrued as of the time of removal." (citing *Gold v. Travelers Indem. Co.*, 2012 WL 13019199, at *2 (S.D. Fla. Mar. 29, 2012))).[1]

## III. DISCUSSION

Defendant asserts in general terms in its Notice of Removal that Plaintiff's Complaint in this action *and* in the breach-of-contract case seek damages in excess of $75,000 exclusive of costs. Notice ¶ 10 (DE [5]). But Plaintiff argues in its Motion to Remand that it filed the bad-faith action in state court because "it's unsure whether the amount in controversy for the bad faith claim exceeds $75,000.00." Mot. to Remand ¶ 15 (DE [4]). Plaintiff contends that Defendant impermissibly combines the amount in

[1] District courts within the Eleventh Circuit are split about whether statutory attorney's fees should be included in the amount in controversy. *See Castillo*, 2021 WL 58116, at *2 (citing *Bender v. GEICO Gen. Ins. Co.*, 2017 WL 1372166, at *1 (M.D. Fla. Apr. 17, 2017); *Brown v. Am. Exp. Co.*, 2010 WL 527756, at *7 (S.D. Fla. Feb. 10, 2010)).

controversy from this action and the breach-of-contract case to reach the requisite amount in controversy. *See id.* ¶¶ 16, 21. Plaintiff also argues that if the district court in the breach-of-contract case rules that Plaintiff may recover its attorney's fees under a Florida statute, Virgin Islands statute, or general maritime law, then its consequential damages recoverable under section 624.155 will be less than $75,000, and this Court therefore will not have diversity jurisdiction over this bad-faith action. *See id.* ¶¶ 17, 22, 24.

The Court agrees with Plaintiff and finds that, at this time, the amount in controversy in this bad-faith action is too speculative to determine; thus, remand is favored. *See Carrion*, 2013 WL 12094850, at *1. Here, the Complaint alleges that this is an action to recover an unspecified amount of expenses for chartering a replacement boat, lost charter-hire income, and attorney's fees under section 624.155. (DE [1-2], at 22–23). Because the amount of damages is not facially apparent from the Complaint, the Court must look to Defendant's Notice of Removal and then to other evidence in the record to determine whether Defendant has established the requisite jurisdictional amount. *See Castillo*, 2021 WL 58116, at *2.

The Court also agrees with Plaintiff that Defendant, in its Notice of Removal, impermissibly combines the amount of damages in this bad-faith case and the related breach-of-contract case to reach the requisite amount in controversy. Defendant has failed to point to any case law supporting its position that the Court may combine the damages amounts in two separate lawsuits to reach the requisite amount in controversy.[2]

[2] *But cf. Tenet Health Inc. on Behalf of N. Shore Med. Ctr., Inc. v. SelectCare Worldwide Corp.*, 2018 WL 3110782, at *3 (S.D. Fla. Apr. 17, 2018) (discussing cases standing for the proposition that a single plaintiff may combine all of its claims—regardless of whether they are factually related—against a single defendant in a single lawsuit to reach the requisite amount in controversy).

Further, the Court determines that this bad-faith action currently has no value because there has not yet been an actual finding of liability in the underlying breach-of-contract case. *See, e.g.*, *Mace Marine Inc. v. Tokio Marine Specialty Ins. Co.*, 2020 WL 6469980, at *3 (S.D. Fla. June 9, 2020) ("Under Florida law, a claim for bad faith under § 624.155 does not accrue until the underlying first-party action for insurance benefits against the insurer has been resolved in favor of the insured." (citing *Blanchard v. State Farm Mut. Auto Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991))); *Orton v. Encompass Indem. Co.*, 2015 WL 12830479, at *2 (M.D. Fla. Oct. 5, 2015) ("In Florida, a claim for bad-faith does not accrue until there has been a determination of liability and damages in the underlying contract claim. Consequently, Plaintiff's bad-faith claim is premature, and has no value with regard to the amount in controversy." (internal citations omitted)); *Marquez v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 2968452, at *3 (M.D. Fla. June 30, 2014) ("There has been no resolution in state court as to Plaintiff's liability under Count I [for breach of contract] of the state court complaint. Therefore, Plaintiff's bad faith claim has not yet accrued and cannot be considered in determining whether the Court has subject matter jurisdiction over this case. The Court must, therefore, construe the bad faith claim as having no current value."); *Symonette v. MGA Ins. Co.*, 2012 WL 12943077, at *1 (S.D. Fla. Oct. 4, 2012) ("[A]t the time of removal, Plaintiff's bad faith claim was not ripe and was thus not properly before the Court. Consequently, the amount involved in the bad faith claim should not be considered in determining the amount in controversy.").

And although Plaintiff's Complaint in this case seeks attorney's fees under section 624.155, the record contains no evidence of the amount of attorney's fees incurred *as of the time of removal*. *See Castillo*, 2021 WL 58116, at *3. In short, the amount in

controversy in this case depends entirely on whether Plaintiff is permitted to recover its claimed $115,000 in attorney's fees in the separately filed breach-of-contract case; if not, Plaintiff will seek that amount in this action, along with the damages incurred as a result of chartering a replacement boat and the lost charter-hire income. *See* Mot. to Remand ¶¶ 17, 22, 24 (DE [8]). Indeed, Defendant even admits that "the resolution of the pending breach of contract action will dictate the viability of this bad faith action." Resp. in Opp'n 8–9 (DE [10]). Thus, Defendant has failed to establish by a preponderance of the evidence that the amount in controversy in this bad-faith action exceeds $75,000 as of the time of removal. *See S. Fla. Wellness, Inc.*, 745 F.3d at 1315. The Court also notes that Defendant incorrectly places the burden on Plaintiff—instead of itself—to establish the requisite amount. *See* Resp. in Opp'n 9 (DE [8]); *S. Fla. Wellness, Inc.*, 745 F.3d at 1315.

Here, remand is warranted based on the facts as they existed at the time of removal. *See Carrion*, 2013 WL 12094850, at *1. In light of the unspecified amount of damages pleaded in the Complaint for statutory bad faith, the unripeness of the bad-faith claims, the speculative entitlement to attorney's fees, and Defendant's failure to otherwise establish the amount in controversy by a preponderance of the evidence, the Court resolves any jurisdictional doubts in favor of remanding. *See Cohen*, 204 F.3d at 1080 n.10; *Castillo*, 2021 WL 58116, at *2, *3. Plaintiff correctly points out in its Reply (DE [14]) that Defendant is not foreclosed from filing another notice of removal once the amount in controversy becomes ascertainable, if the notice otherwise complies with the statutory requirements. *See* 28 U.S.C. § 1446(b)(3); *Jenkins v. Allstate Ins. Co.*, 2008 WL

4934030, at *3 n.9 (M.D. Fla. Nov. 12, 2008) (discussing timeliness of removal of a statutory bad-faith claim). Accordingly, it is hereby

**ORDERED AND ADJUDGED** that Plaintiff's Motion to Remand (DE [8]) is **GRANTED**. It is therefore improper for this Court to rule on Defendant's motion to dismiss pending in state court. *See* (DE [1-2], at 71–109). This matter is **REMANDED** to the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida. The Clerk of Court is directed to **CLOSE** this case and **DENY AS MOOT** any pending motions in this Court.

**DONE AND ORDERED** in Chambers, Fort Lauderdale, Florida, this 16th day of February 2021.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel via CM/ECF