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Smulley v. Safeco Insurance Company of Illinois

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of November, two thousand twenty-two.

PRESENT: JOSÉ A. CABRANES,
BARRINGTON D. PARKER,
STEVEN J. MENASHI,
Circuit Judges.

APPENDIX A

DOROTHY A. SMULLEY,
Plaintiff-Appellant, 21-2124-cv

v.

SAFECO NSURANCE COMPANY OF ILLINOIS, and CCC INFORMATION SERVICES, INC. AKA CCC INTELLIGENT SOLUTIONS HOLDINGS INC.,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT:	Dorothy A. Smulley, *pro se*, Stratford, CT.
FOR DEFENDANT-APPELLEE SAFECO INSURANCE COMPANY OF ILLINOIS:	Philip T. Newbury, Jr., Howd & Ludorf, LLC, Hartford, CT.
FOR DEFENDANT-APPELLEE CCC INTELLIGENT SOLUTIONS INC.:	Brian Borchard, Timothy B. Hardwicke, GoodSmith Gregg & Unruh LLP, Chicago, IL.

Appeal from an August 3, 2021 order and judgment of the United States District Court for the District of Connecticut (Jeffrey A. Meyer, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order and judgment of the District Court be and hereby is AFFIRMED.

Appellant Dorothy Smulley, proceeding pro se, sued Safeco Insurance Company of Illinois ("Safeco"), an auto insurance company, and CCC Intelligent Solutions Inc. ("CCC"), a software provider, alleging they violated Connecticut state law while assessing her car after an accident. Smulley appeals the District Court's judgment dismissing her complaint for lack of subject matter jurisdiction and its order denying her recusal motion. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Diversity jurisdiction

Faced with the dismissal of a complaint for lack of subject matter jurisdiction, we review legal conclusions de novo and factual findings for clear error, accept all material facts alleged in the complaint as true, and draw all reasonable inferences in the plaintiff's favor. See *Liranzo v United States*,690 F.3d78, 84(2dCir. 2012).

Subject matter jurisdiction requires either diversity jurisdiction or federal question jurisdiction.

See 28 U.S.C. §§ 1331, 1332. Smulley has established neither. Diversity jurisdiction requires both diverse citizenship of the parties—which neither side contests is true here—and a "reasonable probability" that the amount in controversy exceeds $75,000. Moore v. Betit, 511 F.2d 1004, 1006 (2d Cir. 1975); see 28 U.S.C. § 1332. We measure the amount in controversy associated with a claim for declaratory relief "by the value of the object of the litigation." Correspondent Servs. Corp. v. First Equities Corp. of Fla., 442 F.3d 767, 769 (2d Cir. 2006) (quoting Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 347 (1977)). Here, the object of the litigation is Smulley's car, which is allegedly valued at less than $8,000.

We measure compensatory damages by the "concrete" value lost because of the defendant's alleged wrongful conduct. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). Smulley purchased and insured a replacement car because of Defendants' alleged wrongful conduct. But the concrete value of the replacement car and its insurance would not approach $75,000 because her original car is worth less than $8,000. Thus, the combined values associated with Smulley's claims for declaratory and compensatory relief do not alone total more than $75,000.

Smulley's argument for diversity jurisdiction therefore relies on her request for punitive damages under the Connecticut Unfair Trade Practices Act ("CUTPA"). Only "if punitive damages are permitted under the controlling law" are they includable in the calculation of the amount in

controversy. A.F.A. Tours, Inc. v. Whitchurch, 937 F.2d 82, 87 (2d Cir. 1991). As it happens, punitive damages are not permitted under CUTPA absent "reckless indifference to the rights of others or an intentional and wanton violation of those rights." Tingley Sys., Inc. v. Norse Sys., Inc., 49 F.3d 93, 97 (2d Cir. 1995) (citing Gargano v. Heyman, 25 A.2d 1343, 1347 (Conn. 1987)). Smulley complains only that CCC was negligent. Recklessness, however, is "more than [even] gross negligence." Dubay v. Irish, 542 A.2d 711, 718 (Conn. 1988)(quoting Bordonaro v. Senk, 147 A.136, 137 (Conn. 1929)).

Smulley also fails to allege facts that would permit a finding of recklessness. 1 She claims that CCC designed its software to enable insurance companies to "manipulate" calculated value and repair estimates. This design, she continues, allowed Safeco to improperly revise the repair estimates for her car and deem it ineligible for repair. Yet there are no facts to indicate, and we cannot reasonably infer, that CCC was aware of, participated in, or intentionally facilitated any manipulation. Moreover, the mere fact that an insurance company can "manipulate" CCC's software hardly suggests reckless indifference to, or intentional

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[1] Furthermore, the statutes that Smulley points to as predicates for CCC's CUTPA violations apply only to insurers or repairers. Smulley never alleges that CCC is either. And Connecticut statutes explicitly define the terms "insurer" and "repairer" in ways that do not encompass a company such as CCC. *See* Conn. Gen. Stat. §§ 38a-1(12), 14-51(a)(3).

and wanton violation of, Smulley's rights. Punitive damages are impermissible here, and we may not include them the amount in controversy. Accordingly, we agree with the District Court that Smulley has not demonstrated a reasonable probability that the amount in controversy exceeds $75,000. We thus conclude that diversity jurisdiction does not exist.

II. Federal question jurisdiction

We reach the same conclusion about federal question jurisdiction, which reaches "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "[A] suit 'arises under' federal law for 28 U.S.C. § 1331 purposes 'only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law].'" Vaden v. Discover Bank, 556 U.S. 49, 60 (2009) (alteration in original) (quoting Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908)). Smulley's complaint aims to establish federal question jurisdiction in three different ways. None demonstrates a cause of action based on federal law.

First, Smulley invokes the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02. But "[t]he Declaratory Judgment Act alone does not provide a court with jurisdiction." California v. Texas, 141 S. Ct. 2104, 2115–16 (2021) (citation omitted); see also, Correspondent Servs. Corp., 442 F.3d at 769.

Second, Smulley argues that there is federal question jurisdiction under the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 32308. But, as the District Court observed, Smulley does

not allege that Defendants violated that statute. Even if she had, § 32308 provides no private right of action to consumers such as Smulley. See 49 U.S.C. § 32308(b), (d). That there is no private right of action is strong evidence that federal question jurisdiction is absent. See Bracey v. Bd. of Educ. of Bridgeport, 368 F.3d 108, 114 (2d Cir. 2004).

Third, Smulley argues that the case arises under the Constitution's Commerce Clause because Defendants "engage in activities which are channels of interstate commerce." Plaintiffs may establish federal question jurisdiction by alleging a violation of their constitutional rights. See, e.g., Reilly v. Doyle, 483 F.2d 123, 127 (2d Cir. 1973). But Smulley does not do so. Instead, she alleges only that Defendants—who purportedly committed state law torts against her—participate in interstate commerce. Defendants' participation in interstate commerce is not enough to establish federal question jurisdiction. Cf. In re Reisenberg, 208 U.S. 90, 109 (1908) ("A case under the Constitution or laws of the United States does not arise against a railroad engaged in interstate commerce from that mere fact."). The District Court thus rightfully dismissed the complaint for lack of subject matter jurisdiction.

III. Motion for recusal

We lastly consider whether the District Court properly denied Smulley's motion for recusal, a decision

we review for abuse of discretion. See LoCascio v. United States, 473 F.3d 493, 495 (2d Cir. 2007). Assuming without deciding that Smulley's motion was timely, we conclude that the District Court did not abuse its discretion.[2] Recusal is proper when a party has filed a "timely and sufficient affidavit" demonstrating that "the judge . . . has a personal bias or prejudice . . . in favor of any adverse party." 28 U.S.C. § 144 (emphasis added). Smulley's arguments, however, focus on the court reporter and defense counsel, who worked at the same firm as the court reporter's husband. Her assertion that they violated codes of conduct fails to explain how the violations, if true, might "prevent or impede [Judge Meyer's] impartiality." See Berger v. United States, 255 U.S. 22, 33 (1921).

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Stated differently, we are unconvinced that "a reasonable person . . . would conclude that the court's impartiality might reasonably be questioned." Apple, 829 F.2d at 333. As the District Court noted, other courts have deemed recusal unnecessary where a ministerial court employee uninvolved in substantive

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2 One reason the Judge Meyer declined to recuse himself is that Smulley waited six weeks after the court reporter disclosed her husband's affiliation with the defense counsel's firm to register any discontent. A party must raise "disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim," but Smulley disputes she was aware of the court reporter's disclosure at oral argument. Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 333 (2d Cir. 1987).

decision-making has a connection, through family, to counsel. See, e.g., Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297, 1312–13 (10th Cir. 2015). Furthermore, the District Court considered the issue at length—first of its own accord and then in response to Smulley's filings— and provided detailed reasoning for why it need not recuse. We hold that it did not abuse of discretion in denying Smulley's recusal motion.

CONCLUSION

In sum, we conclude that Smulley fails to establish either the diversity jurisdiction or federal question jurisdiction necessary to sustain the District Court's subject matter jurisdiction. She fails to demonstrate a reasonable probability that the amount in controversy exceeds $75,000. She also fails to demonstrate a cause of action based on federal law. We further conclude that the District Court did not abuse its discretion in denying Smulley's motion for recusal because she did not demonstrate any personal bias or prejudice on Judge Meyer's part.

We have considered all of Smulley's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the August 3, 2021 order and judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of December, two thousand twenty-two.

Dorothy A. Smulley,
Plaintiff -Appellant,

ORDER
Docket No: 21-2124

v.

Safeco Insurance Company of Illinois,
Ccc Information Services, Inc., AKA
Ccc Intelligent Solutions Holdings Inc.,
Defendants - Appellees.

Appellant Dorothy A. Smulley, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX B

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DOROTHY A. SMULLEY, No. 3:20-cv-01888 (JAM)
Plaintiff,

v.

SAFECO INSURANCE COMPANY
OF ILLINOIS et al.,
Defendants.

ORDER DISMISSING COMPLAINT
FOR LACK OF FEDERAL JURISDICTION

This case is about an old car worthless than $8,000. After the plaintiff crashed the car on an icy road, she wanted her insurance company to pay to repair it rather than to declare it "totaled" and pay the replacement value. But because the company did not agree with the plaintiff, she has filed this pro se federal lawsuit against the insurance company as well as another company that furnishes valuation data to the insurance company. The plaintiff seeks declaratory relief against both companies as well as damages against the data-providing company under the Connecticut Unfair Trade Practices Act.

As an initial matter, I will deny the plaintiff's motion to recuse. I also conclude that the complaint must be dismissed for lack of federal jurisdiction. The complaint does not allege a cause of action that arises under federal law for purposes of federal question jurisdiction. Nor does the complaint allege facts

suggesting a reasonable probability that the amount in controversy exceeds $75,000 for purposes of federal diversity jurisdiction. Accordingly, I will dismiss the complaint without prejudice.

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BACKGROUND

In late November 2018, plaintiff Dorothy A. Smulley was driving her car—a 2010 Chrysler Sebring Limited—when she had a car accident on an icy road in western Pennsylvania.1 Her car skidded and hit a metal median resulting in damage to a fender, headlight, and bumper. 2 No other cars were involved in the accident, and neither Smulley nor her spouse who was in the car with her were injured.3 Despite the accident, the car continued to be fully operable, and Smulley drove the car more than 300 miles back to her home in Connecticut.4

Smulley timely reported the accident to her car insurance company, defendant Safeco Insurance Company of Illinois ("Safeco").5 Her policy limited Safeco's liability to pay the lower of either the actual cash value of the car or the amount necessary to repair or replace it.6

On December 5, 2018, a Safeco employee named Juan Carlos Maldonado completed an appraisal of the

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1 Doc. #41 at 4 (¶ 15), 6 (¶ 18). 2 Id. at 6 (¶ 18).
3 Ibid.
4 Ibid. (¶ 19).
5 Id. at 7 (¶ 20).
6 Id. at 4 (¶¶ 15-16).

car. 7 When Safeco performs valuations for purposes of car insurance claims, it uses certain software programs developed by defendant CCC Information Services Inc. aka CCCIntelligent Solutions Holdings Inc. ("CCC").8 CCC is in the business of collecting automobile-related information through software programs and then processing the data to sell to insurance companies like Safeco.9 Using one of CCC's software programs, Maldonado determined the car's pre-loss value to be $7,840.10 He also completed a repair estimate using another CCC software program that estimated repairs

would cost $4,873.75.11 Because the pre-loss value of the car exceeded the estimated repairs, he recommended repair of the car.12 The car was towed by Safeco from Smulley's home in Connecticut to Traynor Collision Center ("Traynor").13 But, according to Smulley, Maldonado had a contentious relationship with Traynor manager Ben Dituri.14 Maldonado told told Zachary Allyn, his supervisor at Safeco, about this conflict after completing his first estimate.15 Maldonado and Allyn

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7 Id. at 8 (¶ 27).
8 Id. at 3 (¶ 12), 13 (¶ 43), 16 (¶ 55).
9 Id. at 13 (¶ 42).
10 Id. at 8 (¶ 27).
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid. 15 Ibid.

decided not to repair the car, and Allyn instructed Maldonado to disassemble it so that it would not operate or function.16 On December 11, 2018, after disassembling the car, Maldonado completed a second repair estimate using CCC's software that increased the repair cost to $5,795.73, and he now reclassified the car as a total loss.17 Allyn told Smulley that he would reclassify and repair the car if it were moved to Breezy Point Auto Body Inc. ("Breezy"), a different Safeco repair facility.18

On December 13, 2018, Smulley's car was towed from Traynor to Breezy, and Breezy paid Traynor $1,471.36 in storage fees.19 Allyn had Breezy employee Paul Kristopik disassemble the car again, and he had him include the towing expenses in the repair estimate as "other charges."20 On December 14, 2018, Kristopik produced a third repair estimate of $7,991.27, and he classified the car as a total loss.21 Allyn left Smulley a message that day stating that the car was a

total loss that would not be repaired, and he then refused any further communication with her. 22

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16 Id. at 8-9 (¶ 27).
17 Id. at 9 (¶ 27).
18 Ibid. (¶ 28).
19 Ibid. (¶ 29).
20 Ibid.
21 Id. at 10 (¶ 29).
22 Ibid. (¶ 30).

In January 2019, Smulley sued Safeco, Traynor, and Breezy in Connecticut state court, alleging that Safeco was negligent and breached Smulley's insurance contract.23 In February 2020, a state court judge granted Safeco's motion to compel binding appraisal or arbitration as to the amount of the loss of Smulley's car, and to stay the litigation pending the appraisal process.24

Smulley filed several motions for reconsideration and appeals, as well as two motions to remove the state court judge, all of which were denied or dismissed.25 Smulley's car has remained at Breezy during the pendency of the state court litigation, which has required Smulley to purchase another car and to incur debt through a car loan and additional insurance payments.26

In December 2020, Smulley filed this federal lawsuit against Safeco and CCC. The amended complaint alleges three counts. Count One seeks a declaratory judgment against Safeco that "declares the original estimate and appraisal dated December 5, 2018 operative under the standard provisions of [Smulley's] basic personal automobile insurance policy in the state of Connecticut."27 Count Two seeks a declaratory judgment that CCC has a duty to comply with three statutory provisions of Connecticut state law: Conn.

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23 Id. at 1-2 (¶¶ 2-4).

24 See id. Doc. #147.15.

25 See id. Docs. #180.10; #183.10; #185.00; #187.00; #190.00; #198.50 #209.20; see also Doc. #44 at 7-8.

26 Doc. #41 at 20 (¶¶ 75-76).

27 Id. at 12 (¶ 38).

Gen. Stat. §§ 14-65f, 38a-353, and 38a-355. 28 Count Three seeks a declaratory judgment that CCC's practices violate the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn Gen. Stat. § 42-110g, and seeks costs, fees, and punitive damages.29

For the public docket in the underlying state court case, see Smulley v. Safeco Ins. Co. of Illinois, et al., FBT-CV19-6082597-S, available at http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=FBTCV196082597S [https://perma.cc/ZY52-JHKR] (last accessed August 3, 2021).

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The defendants have moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Smulley has opposed both motions and cross-moved for summary judgment in her favor. Smulley has also filed a motion for recusal pursuant to 28 U.S.C. § 144. 30

DISCUSSION

I will first address Smulley's motion for recusal before addressing additional issues.

A. Recusal

I held oral argument on the pending motions to dismiss on May 26, 2021. In light of the ongoing

28 Id. at 13-14, 18, 21 (¶¶ 45-47, 60).
29 Id. at 18-21.
30 Doc. #74.
31 Doc. #54.

pandemic, the argument was noticed to proceed by the Zoom video/audio platform, and an entry on the docket stated: "All parties and members of the public may use the Zoom access information to observe the proceeding by video or by audio."31

Each of the parties and counsel identified themselves for the record at the outset of the hearing.32 Smulley appeared pro se by telephone rather than by video.33 Local counsel for CCC—attorney Christopher Williams of the law firm of Conway Stoughton LLC—noted his presence, and the transcript reflects the following exchange involving a disclosure by the court reporter that her spouse works at the same law firm:

MR. WILLIAMS: Good afternoon, Your Honor. Christopher Williams from Conway Stoughton on behalf of CCC.

THE COURT: Great, great. It looks like we've got everybody. Sorry about the late start, we had a sentencing go a little bit late today. If you'd like to proceed, who would like to start today?

THE COURT REPORTER: Your Honor, I don't want to interrupt, but with the appearances mentioned, my husband

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31 Doc. #74

32 Doc. #75 at 3-4.

33 Id. at 3.

works at Conway Stoughton. I just wanted to disclose that.

THE COURT: All right. Thank you. And that was -- just to make sure Ms. Smulley heard that, that was from our court reporter in the case.

MS. SMULLEY: Yes, Your Honor. Thank you.

THE COURT: All right. 34

I then heard argument on the pending motions from Smulley as well as from counsel for the defendants. There was no objection by Smulley or any reference during the remainder of the hearing to the employment of the court reporter's spouse at one of the law firms for one of the parties in the case.

Following the hearing I verified with the court reporter that her husband (who is an attorney) had no involvement with this case, and then I asked my law clerk to research whether the employment status of a court reporter's spouse as an attorney at a law firm that is appearing as counsel in a case constitutes grounds for a judge to recuse under 28 U.S.C. § 455.

The answer was no, and so I entered the following order on July 6, 2021 (approximately six weeks after the

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34 Id. at 4. Although Smulley disputes that attorney Williams appeared at oral argument or that the court reporter made any disclosure at all, see Doc. #74-1 at 6 (¶¶ 23-24), this claim is refuted by the transcript and my independent recollection of the oral argument.

hearing) stating that I had considered the issue and concluded that there was no basis for recusal:

> **MEMORANDUM RE COURT REPORTER.** During the course of oral argument on the motions for summary judgment on May 26, 2021, the court reporter disclosed that her spouse is an attorney at one of the law firms involved in this case (Conway Stoughton LLC). The Court has verified that the court reporter's spouse has no involvement with this case. Because the court reporter serves a ministerial function of recording the proceedings and has no involvement with the Court's substantive decision-making in this case or any case, the Court concludes under 28 U.S.C. § 455(a) that there is no basis for recusal. See, e.g., In re Horne, 630 Fed. App'x 908, 911-12 (11th Cir. 2015) (noting that "we are unable to locate any cases suggesting that a judge's administrative employee's relationship with a

> witness is grounds for the judge's recusal" and that "[t]o the contrary, recusal is warranted on the basis of a judicial employee's relationships only when the employee has (or appears to have) a role in the substantive decision-making process"); see also Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297, 1312-13 (10th Cir. 2015). It is so ordered. Signed by Judge Jeffrey A.

Meyer on 7/6/2021. 35

My order triggered a series of filings by Smulley arguing that I should recuse. I denied Smulley's motion for reconsideration and denied a motion to stay the proceedings for purposes of an interlocutory appeal. 36 Beyond the reasons already stated, I further noted that Smulley's motion was untimely because she had failed to promptly move for recusal after being advised of the issue at oral argument, noting that "'a party must move for recusal at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for a claim.' United States v. Amico, 486 F.3d 764, 773 (2d Cir. 2007)." 37

Most recently, Smulley has filed a motion for recusal with a supporting affidavit pursuant to 28 U.S.C. § 144. 38 That statute provides as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144.

Although this statute might be read to require a judge in the first instance to refer a recusal motion to

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35 Doc. #68.

36 Docs. #70, #73.

37 Doc. #70.

38 Doc. #74.

another judge, case law makes clear that the statute vests authority with the judge whose recusal is sought to decide as an initial matter whether recusal is warranted. See LoCascio v. United States, 473 F.3d 493, 498 (2d Cir. 2007); Chambers v

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U.S. Dep't of Veteran's Affs., 2004 WL 1396424, at *2 (D. Conn. 2004) (collecting cases). To warrant recusal, an "affidavit must show a true personal bias, and must allege specific facts and not mere conclusions or generalities," and "the judge is presumed to be impartial and a substantial burden is imposed on the affiant to demonstrate that such is not the case." Sharkey v. J.P. Morgan Chase & Co., 251 F. Supp. 3d 626, 630 (S.D.N.Y. 2017).39 The analysis for whether I can be impartial in this action under 28 U.S.C. § 144 is the same as the analysis I have previously conducted under 28 U.S.C. § 455. See Sibley v. Geraci, --- Fed. App'x ----, 2021 WL 2224369, at *1 (2d Cir. 2021).

Smulley claims that "a financial conflict of interest was not timely disclosed by any of the financially interested parties," including the court reporter and CCC's counsel. 40 But the timeliness of any disclosure by counsel or the court reporter does not have

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39 Unless otherwise indicated, this ruling omits internal quotation marks, alterations, citations, and footnotes in text quoted from court decisions.

40 Doc. #74 at 1, 4-5.

41 See Doc. #70.

bearing on the issue of whether the judge can be impartial in this matter.41 As the Second Circuit has explained, "[t]o be sufficient an affidavit [under 28 U.S.C. § 144] must show the objectionable inclination or disposition of the judge; it must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968) (per curiam) (emphasis added).

Smulley has not carried her burden to show that I am biased against her or that the circumstances give rise to an appearance of bias. Multiple courts have ruled that a judge is not required to recuse because a court staff member has an affiliation through a family member to a party or counsel in a case provided that the staff member does not take part

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in or appear to take part in the judge's substantive decision-making in a case. See, e.g., In re Horne, 630 Fed. App'x 908, 910-11 (11th Cir. 2015) (recusal not required by the fact that a judge's courtroom deputy was the sister of a paralegal for defendant's counsel and despite fact that the paralegal offered affidavit testimony at trial to contradict testimony of plaintiff; "recusal is warranted on the basis of a judicial employee's relationships only when the employee has (or appears to have) a role in the substantive decision-making process") (citing cases); Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297, 1312-13 (10th Cir. 2015) (recusal not required by the fact that the husband of the

judge's law clerk worked for the defendant's insurance company to monitor the trial because the husband did not work for the party defendant and because the law clerk performed only ministerial functions at trial without a role in the judge's substantive decision-making). Accordingly, because Smulley's affidavit does not provide egally sufficient grounds for recusal, I will deny Smulley's motion for recusal pursuant to 28 U.S.C. § 144.

B. Subject matter jurisdiction

The defendants move to dismiss in part for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). A complaint may not survive unless it alleges facts that, taken as true, give rise to plausible grounds to sustain a federal court's subject matter jurisdiction. See, e.g., SM Kids, LLC v. Google LLC, 963 F.3d 206, 210 (2d Cir. 2020); Lapaglia v. Transamerica Cas. Ins. Co., 155 F. Supp. 3d 153, 155-56 (D. Conn. 2016).

If a plaintiff is proceeding pro se, the allegations of the complaint must be read liberally to raise the strongest arguments that they suggest. See Tracy v. Freshwater, 623 F.3d 90, 101-02 (2d Cir. 2010). Still, however, even a pro se complaint may not survive dismissal if its factual allegations do not meet the basic plausibility standard. See, e.g., Meadows v. United Services,

Inc., 963 F.3d 240, 243 (2d Cir. 2020) (per curiam).

It is a very basic principle of law that federal courts have limited subject matter jurisdiction. See generally Gunn v. Minton, 568 U.S. 251, 256 (2013). In general, federal courts have so-called "federal question" jurisdiction over any claims that arise under federal law. See 28 U.S.C. § 1331. Federal courts also have so-called "diversity" jurisdiction over claims that arise under state law if the parties are citizens of different States and if the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332. I will consider in turn whether Smulley has carried her burden to establish either federal question jurisdiction or diversity jurisdiction.

1. Federal question jurisdiction

The first two counts of the complaint seek relief under the federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq. But because the Declaratory Judgment Act expressly conditions its application on there being an actual controversy that is already within a federal court's jurisdiction, it is well established that a complaint's invocation of the Declaratory Judgment Act is not enough by itself to sustain federal question jurisdiction. See Correspondent Servs. Corp. v. First Equities Corp. of Fla., 442 F.3d 767, 769 (2d Cir. 2006); Albradco, Inc. v. Bevona, 982 F.2d 82, 85 (2d Cir. 1992). Therefore, the fact that the complaint cites and relies on the federal Declaratory Judgment Act does not suffice to establish federal question jurisdiction.

The complaint also cites as a basis for jurisdiction a provision of the federal Motor Vehicle Safety Act, 49 U.S.C § 32308. 42 That statutory provision allows for

civil penalties when a person "(1) fail[s] to provide the Secretary of Transportation with information requested by the Secretary in carrying out this chapter; or (2) fail[s] to comply with applicable regulations prescribed by the Secretary in carrying out this chapter." 49 U.S.C § 32308(a)-(b). It also

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provides that "[t]he Attorney General may bring a civil action in a United States district court to enjoin a violation" of those same provisions. 49 U.S.C § 32308(d)(1).

"Whether federal courts have federal question jurisdiction over an action is typically governed by the well-pleaded complaint rule, pursuant to which federal question jurisdiction exists only if plaintiff's statement of his own cause of action shows that it is based on federal law." *Romano v. Kazacos*, 609 F.3d 512, 518 (2d Cir. 2010) (citing *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009)). 43 Although the complaint cites the Motor Vehicle Safety Act in passing as a basis for federal

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42 Doc. #41 at 3 (¶ 11); Doc. #51-1 at 12-13.

43 The well-pleaded complaint rule is subject to certain exceptions not applicable here. See, e.g., Whitehurst v. 1199SEIU United Healthcare Workers E., 928 F.3d 201, 206 (2d Cir. 2019) (per curiam) (exception for complaints alleging state law causes of action that are with the subject matter scope of certain federal statutes that completely preempt state law); Bracey v. Bd. of Educ. of City of Bridgeport, 368 F.3d 108, 113 (2d Cir. 2004) (exception for complaints alleging state law cause of action that necessarily depends on resolution of a substantial question of federal law).

jurisdiction, it does not allege how any of the defendants violated the Motor Vehicle Safety Act or any federal cause of action that arises under the Motor Vehicle Safety Act. Nor could it plausibly allege a cause of action under the cited provision of th e Motor Vehicle Safety Act because this provision does not provide for any private right of action to enforce its terms.

In a similar vein, Smulley asserts that there is federal jurisdiction under the U.S. Constitution. Her briefing invokes the Commerce Clause because "both Safeco and CCC rely upon interstate commerce of mail and wire communications to accomplish the business goals established."44 And she also contends that "[t]he result of Safeco's actions constitutes a taking of plaintiff's property without just compensation, a violation of the Fifth and Fourteenth Amendment of the United States Constitution."45

But the complaint makes no mention of these federal constitutional provisions. Moreover,

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both the defendants are private companies, and Smulley could not plausibly allege that they are "state actors" for purposes of any claim that they violated her rights under the U.S. Constitution. See, e.g., Fabrikant v. French, 691 F.3d 193, 206-07 (2d Cir. 2012) (discussing the "state action" requirement for constitutional claims).

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44 Doc. #51-1 at 14-16.
45 Id. at 24.

All in all, Smulley has not alleged a cause of action that arises under federal law or that is otherwise sufficient to establish federal question jurisdiction. Accordingly, she has not carried her burden to establish a basis for federal question jurisdiction.

2. Diversity jurisdiction

Smulley further argues that there is federal diversity jurisdiction. Although there is no dispute that Smulley is a citizen of a different State than the two defendants, a party who seeks to invoke federal diversity jurisdiction under 28 U.S.C. § 1332 bears the burden of proving a reasonable probability that the amount in controversy exceeds $75,000. See Pyskaty v. WideWorld of Cars, LLC, 856 F.3d 216, 223 (2d Cir. 2017). A court should presume that the face of the complaint is a good faith representation of the amount in controversy, but a defendant may overcome this presumption by demonstrating to a legal certainty that the plaintiff could not recover the amount alleged or that the damages alleged were feigned to satisfy jurisdictional minimums. Ibid.

The record here establishes to a legal certainty that the amount in controversy is not more than $75,000. As to the first two counts that seek relief under the Declaratory Judgment Act, "[i]n actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." Correspondent Services Corp., 442 F.3d at 769. "[T]he amount in controversy is calculated from the plaintiff's standpoint; the value of

the suit's intended benefit or the value of the right being protected or the

injury being averted constitutes the amount in controversy when damages are not requested." Ibid.

For the purpose of a declaratory judgment action over insurance coverage, it is the value of the underlying insurance claim that determines the amount in controversy, not the face value of the policy. See Merrimack Mut. Fire Ins. Co. v. Hodge, 2021 WL 796272, at *3 (D. Conn. 2021); Amica Mut. Ins. Co. v. Levine, 7 F. Supp. 3d 182, 187 (D. Conn. 2014). The underlying insurance claim in this action is for the value of repairing or replacing Smulley's car. The complaint alleges that the car was worth less than $8,000—far below the $75,000 threshold. 46

For Smulley's declaratory judgment claim against Safeco, the complaint alleges that Smulley "is entitled to a declaratory judgment which declares the original estimate and appraisal dated December 5, 2018 operative under the standard provisions of plaintiff's basic personal automobile insurance policy in the state of Connecticut."47 For Smulley's declaratory judgment claim against CCC, the complaint alleges that Smulley "is entitled to a declaratory judgment which declares

46 See Doc. #41 at 8 (¶ 27); Doc. #51-1 at 14.
47 Doc. #41 at 12 (¶ 38).

CCC's obligations as practiced and described herein under CCC ONE Estimating platform, ValueScope and any other software related module which interfaces or exists in the application of basic personal automobile physical damage in the state of Connecticut."48 Neither of these claims for declaratory relief can be plausibly interpreted to involve an amount in controversy of more than $75,000.

Smulley's third cause of action invokes the Connecticut Unfair Trade Practices Act against CCC, and for this claim she seeks an award of costs, fees, and punitive damages. 49 She claims to have been substantially harmed by the loss of her use of the car and having to buy another car and to insure both cars.50 But considering that her car is worth less than $8,000, these alleged collateral expenses do not plausibly add up to

more than $75,000 in damages.

Nor does Smulley's prayer for punitive damages under CUTPA make up for the amount-in-controversy shortfall. For purposes of assessing whether an action eets the amount-in-controversy requirement, the Second Circuit has made clear that a claim for punitive damages must be given "closer scrutiny" than a claim for actual damages. Peoples Club of Nigeria Int'l, Inc. v.

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48 Id. at 18 (¶ 60).
49 Id. at 18, 21 (¶ (3)).
50 Id. at 20 (¶¶ 72, 75).

Peoples Club of Nigeria Int'l - New York Branch, Inc., 821 F. App'x 32, 35 (2d Cir. 2020).

CUTPA allows a court in its discretion to award punitive damages if there is evidence that reveals "a reckless indifference to the rights of others or an intentional and wanton violation of those rights." Gargano v. Heyman, 203 Conn. 616, 622 (1987); see also Hernandez v. Apple Auto Wholesalers of Waterbury LLC, 460 F. Supp. 3d 164, 190 (D. Conn. 2020) (same). Here, however, the complaint alleges only that CCC was "negligent" in its "duty to comply" with various technical statutory obligations that CCC allegedly "failed to consider."51 Allegations of mere negligence fall well short of recklessness or intentional and wanton conduct; indeed, "[m]ere negligence cannot support a CUTPA claim." Bentley v. Greensky Trade Credit, LLC, 156 F. Supp. 3d 274, 289 (D. Conn. 2015); see also O'Reilly v. BJ's Wholesale Club, Inc., 2018 WL 1336128, at *5 (D. Conn. 2018) (same).

Therefore, even assuming that the complaint plausibly alleges a CUTPA claim at all (which CCC strongly disputes), there is no legal basis for a punitive damages award under CUTPA based on CCC's alleged acts of negligence. Because the allegations of wrongdoing in the complaint preclude an award of punitive damages, the possibility of an award of punitive

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51 Id. at 19 (¶ 66).

damages may not be considered for purposes of satisfying the jurisdictional amount-in-controversy requirement. See Bindrum v. Am. Home Assur. Co. Inc., 441 F. App'x 780, 782 (2d Cir. 2011) (punitive damages not considered for purposes of jurisdictional amount in controversy where complaint failed to plausibly allege culpability prerequisites for an award of punitive damages).

All in all, Smulley has not alleged facts to suggest a reasonable probability that the amount in controversy is more than $75,000. All three of her claims involve amounts far below the jurisdictional threshold. Smulley has not carried her burden to show a basis for federal diversity jurisdiction.

CONCLUSION

For the reasons set forth above, the Court DENIES the motion to recuse (Doc. #74), and the Court GRANTS defendants' motions to dismiss (Docs. #43, #46) to the extent that they seek dismissal for lack of federal jurisdiction. In light of the Court's ruling that it lacks jurisdiction, there are no grounds to address the defendants' additional arguments for dismissal, and the Court DENIES as moot Smulley's cross-motions for summary judgment (Docs. #50, #51) in the absence of federal jurisdiction.

The Clerk of Court shall close this case. The Court's order of dismissal is without prejudice, and Smulley may file a motion to re-open and an amended complaint by September 1, 2021 if she has good faith grounds to file an amended complaint with allegations that are sufficient to redress the concerns stated in this ruling.

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It is so ordered.

Dated at New Haven this 3rd day of August 2021.

/s/Jeffrey Alker Meyer
Jeffrey Alker Meyer
United States District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. V. The Fifth Amendment provides,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1 Fourteenth Amendment provides,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

U.S. Const. Art. I, § 8, cl. 3.

> [The Congress shall have Power...] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;...

The Court has interpreted regulate in the Commerce Clause as Congress's power to prescribe conditions and rules for commercial transactions, keep channels of commerce open, and regulate prices and terms of sale.

In Gibbons v. Ogden, Chief Justice John Marshall discussed Congress's authority to regulate, stating:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution... If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. *Gibbons v Ogden,* 22 U.S. (9 Wheat.) 1, 196-97 (1824)

In *Brooks v. United States,* 267 U.S. 432, 436-37 (1925), the Court explained regulate, observing:

> Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency

> to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this, it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.

Congress's power to regulate interstate commerce is among the most potent Art.I, Section 8 powers. *https://constitution.congress.gov/browse/essay/artI-S8-C3-4/ALDE_00013406/*

15 U.S.C. § 78j provides,

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange... (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

15 U.S.C. § 78aa provides,

> "The district courts... shall have exclusive jurisdiction of violations of [the Exchange Act] or rules and regulations thereunder..."

15 U.S.C. § 1011 Declaration of Policy provides,

> "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurabnce is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

15 U.S.C. § 1012 Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948, provides,

> "(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal trade Commission Act, as amended [15 U.S.C. § 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

28 U.S.C. § 1254 Courts of Appeals; certiorari; certified questions provides,

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;..."

28 U.S.C. § 1337 Commerce and antitrust regulations; amount in controversy, costs provides,

> (a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

17 CFR § 240, 10b-5 Employment of manipulative and deceptive devices provides,

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the

> statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Connecticut General Statute § 42-110g Action for damages provides,

> "In any action brought by a person under this section there shall be a right to a jury trial except with respect to the award of punitive damages under subsection (a) of this section or the award of costs, reasonable attorneys' fees and injunctive or other equitable relief under subsection (d) of this section."