UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LASHAWN VELASQUEZ, individually, and on behalf of other members of the general public similarly situated, and as aggrieved employee pursuant to the Private Attorneys General Act

Plaintiff,

v.

HMS HOST USA, INC., a Delaware Corporation, et al.,

Defendants.

No. 2:12-cv-02312-MCE-CKD

MEMORANDUM AND ORDER

Plaintiff Lashawn Velasquez ("Plaintiff") seeks redress from Defendants HMS Host USA, Inc., Donald Frazee, and Host International, Inc. (collectively, "Defendants") for violations of California state law.

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On July 13, 2012, Plaintiff filed a Class Action Complaint in the Superior Court of the State of California, County of Sacramento, against Defendants, on behalf of herself and others similarly situated, alleging claims for unpaid overtime in violation of California Labor Code sections 550 and 1198, unpaid minimum wages in violation of Labor Code sections 1194, 1197, and 1197.1, failure to timely pay wages due upon termination in violation of Labor Code section 201 and 202, unlawful wage deductions in violation of Labor Code sections 221 and 224, violations of the Private Attorneys General Act of 2004, and unfair and unlawful competition in violation of California Business and Professions Code section 17200, et seq. Defendants removed the case to this Court on September 7, 2012, pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). (ECF No. 1.) On October 4, 2012, Plaintiff moved to remand the case to state court. (ECF No. 6.) Defendants filed a timely opposition to Plaintiff's motion.[1] (ECF No. 10.)

FACTUAL BACKGROUND[2]

Plaintiff alleges that she was employed as a non-exempt, hourly paid "Cashier" from August 2009 to December 2010 at Defendants' Sacramento, California, airport location. While Plaintiff was employed at the Sacramento location, employees were not paid for all hours worked because all hours worked were not recorded. Furthermore, although Defendants knew or should have known that Plaintiff and putative class members were entitled to receive certain wages as overtime compensation, Plaintiff and putative class members did not receive such wages.

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[1] Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

[2] The following recital of facts is taken from Plaintiff's Class Action Complaint. (ECF No. 1, Ex. 1.)

Additionally, Plaintiff and putative class members were entitled to receive at least minimum wages for work that Defendants required be done off the clock, but Plaintiff and putative class members did not receive such wages for this off the clock work. Similarly, Plaintiff and putative class members did not receive all rest periods that they were entitled to. Plaintiff and putative class members likewise did not receive complete and accurate wage statements from Defendants, although Defendants knew or should have known that Plaintiff and putative class members were entitled to these statements. Plaintiff and putative class members were also entitled to timely payment of all wages during their employment and to timely payment of wages earned upon termination, but did not receive timely payment of these wages either during their employment or upon termination. Finally, although Defendants did not have express written authorization to do so, Defendants deducted the costs of non-slip shoes that Plaintiff and putative class members were required to wear.

LEGAL BACKGROUND[3]

In September 2003, the California Legislature enacted the Labor Code Private Attorneys General Act of 2004 ("PAGA"). Cal. Lab. Code § 2698, et seq. The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for violations of the Labor Code, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.

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[3] The following summary of the Private Attorneys General Act of 2004 is taken from Arias v. Sup. Ct., 46 Cal. 4th 969, 980-81 (2009).

Pursuant to PAGA, an "aggrieved employee" may bring a civil action personally and on behalf of other current, or former, employees to recover civil penalties for violations of the California Labor Code. Cal. Lab. Code § 2699(a). PAGA defines an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." Id. § 2699(c). Seventy-five percent of the civil penalties recovered go to the Labor and Workforce Development Agency, leaving the remaining twenty-five percent for the "aggrieved employees." Id. § 2699(i).

STANDARD

When a case "of which the district courts of the United States have original jurisdiction" is initially brought in state court, the defendant may remove it to federal court "embracing the place where such action is pending." 28 U.S.C. § 1441(a). There are two bases for federal subject matter jurisdiction: (1) federal question jurisdiction under 28 U.S.C. § 1331, and (2) diversity jurisdiction under 28 U.S.C. § 1332. A district court has federal question jurisdiction in "all civil actions arising under the Constitution, laws, or treaties of the United States." Id. § 1331. A district court has diversity jurisdiction "where the matter in controversy exceeds the sum or value of $75,000, . . . and is between citizens of different states, or citizens of a State and citizens or subjects of a foreign state . . . ." Id. § 1332(a)(1)-(2).

Diversity jurisdiction requires complete diversity of citizenship, with each plaintiff being a citizen of a different state from each defendant. 28 U.S.C. § 1332(a)(1); Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68 (1996) (stating that complete diversity of citizenship is required); Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001) (same). The "one exception to the requirement of complete diversity is where a non-diverse defendant has been 'fraudulently joined'" to defeat diversity. Morris, 236 F.3d at 1067.

Allegations of fraudulent joinder can succeed only on a showing that the plaintiff has failed to assert a cause of action against that defendant, "and the failure is obvious according to the well-settled rules" of state law. United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 761 (9th Cir. 2002) (citing Morris, 236 F.3d at 1067). The court may look beyond the pleadings and consider affidavits or other evidence to determine if the joinder was a sham. See Morris, 236 F.3d at 1068 (citing Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 263 (9th Cir. 1995) ("[F]raudulent joinder claims may be resolved by 'piercing the pleadings' and considering summary judgment-type evidence such as affidavits and deposition testimony.")).

A motion to remand is the proper procedure for challenging removal. "The party invoking the removal statute bears the burden of establishing federal jurisdiction." Ethridge v. Harbor House Rest., 861 F.2d 1389, 1393 (9th Cir. 1988) (internal citations omitted). Courts "strictly construe the removal statute against removal jurisdiction." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (internal citations omitted). "[I]f there is any doubt as to the right of removal in the first instance," the motion for remand must be granted. Gaus, 980 F.2d at 566. Therefore, if it appears "at any time before final judgment that the district court lacks subject matter jurisdiction, the case shall be remanded" to state court. 28 U.S.C. § 1447(c).

ANALYSIS

A. Diversity Jurisdiction and Fraudulent Joinder

"Fraudulent joinder is a term of art" used to describe a non-diverse defendant who has been joined to an action for the sole purpose of defeating diversity. McCabe v. Gen Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987).

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"In the Ninth Circuit, a non-diverse defendant is deemed fraudulently joined if, after all disputed questions of fact and all ambiguities in the controlling state law are resolved in the plaintiff's favor, the plaintiff could not possibly recover against the party whose joinder is questioned." Nasrawi v. Buck Consultants, LLC, 776 F. Supp. 2d 1166, 1169-70 (E.D. Cal. 2011) (citing Kruso v. Int'l Tel. & Tel. Corp., 872 F.2d 1416, 1426 (9th Cir. 1989)). "[T]here is a general presumption against fraudulent joinder," and the defendant bears a heavy burden, as "[f]raudulent joinder must be proven by clear and convincing evidence." Hamilton Materials, Inc. v. Dow Chem. Corp., 494 F.3d 1203, 1206 (9th Cir. 2007) (internal citations omitted). "A court may look beyond the pleadings to determine if a defendant is fraudulently joined, but 'a plaintiff need only have one potentially valid claim against a non-diverse defendant' to survive a fraudulent joinder challenge." Nasrawi, 776 F. Supp. at 1170 (citing Knutson v. Allis–Chalmers Corp., 358 F. Supp. 2d 983, 993–95 (D. Nev. 2005); Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998)). "Accordingly, a defendant seeking removal based on an alleged fraudulent joinder must do more than show that the complaint at the time of removal fails to state a claim against the non-diverse defendant." Id. (citing Burris v. AT&T Wireless, Inc., No. C 06-02904 JSW, 2006 WL 2038040, at *2 (N.D. Cal. July 19, 2006)). "Remand must be granted unless the defendant shows that the plaintiff would not be afforded leave to amend his complaint to cure [the] purported deficiency." Id. Thus, "[t]he non-diverse defendant is not fraudulently joined if there is *any possibility* that the plaintiff will succeed in its claim against that defendant." Wong v. Michaels Stores, Inc., No 1:11-cv-00162-AWI, 2012 WL 718646, at *4 (E.D. Cal. Mar. 5, 2012) (emphasis in original).

In this case, Plaintiff is a citizen of California. (ECF No. 1 at 21). Defendants HMS Host USA, Inc. and Host International, Inc. are citizens of Delaware, their state of incorporation, and Maryland, where they each have their principal place of business. (ECF No. 1 at 3.) Defendant Frazee is a California citizen. (ECF No. 1 at 21.)

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Thus, on the face of the complaint, Plaintiff is not diverse from all Defendants, and thus diversity jurisdiction does not exist.

Defendants first contend that Frazee is fraudulently joined because the complaint fails to adequately allege facts establishing a cause of action against Defendant Frazee. However, the test for whether a defendant is fraudulently joined is whether the plaintiff can state a claim in state court against that defendant. McCabe, 811 F.3d at 1339. Because "Twombly and Iqbal clarify the federal pleading standard set forth by Rule 8(a) but make no comment as to the propriety of pleading under California law[,] . . . courts have refused to apply the Twombly and Iqbal standards to determine whether a defendant was fraudulently joined." Wong, 2012 WL 718646, at *5 (internal citations omitted). "Rather, courts employ the pre-Twombly 'no set of facts' standard of Conley v. Gibson, 355 U.S. 41, 45-46 (1957)." Id. (citing Black Donuts, Inc. v. Sumitomo Corp. of Am., 2010 U.S. Dist. LEXIS 30859 (C.D. Cal. Mar. 3, 2010)). That standard provides that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46.

Plaintiff alleges that Defendant Frazee was the General Manager for Host at the Sacramento airport location while Plaintiff was employed there. (Id.) Plaintiff also alleges that "Defendants"—a phrase which Plaintiff defines to include Frazee—failed to properly staff the work locations which resulted in depriving Plaintiff and class members of overtime and meal breaks. (ECF No. 1 at 22.) Plaintiff asserts that Defendant Frazee "is named as a 'person acting on behalf of an employer' who violated, and caused to be violated, various sections of Division 2, art 2, Chapter 1, and various sections of the applicable Industrial Welfare Commission Order which regulate days and hours of work." (Id.) Plaintiff thus seeks recovery from Defendant Frazee under PAGA and section 558 of the California Labor Code. Section 558 of the Labor Code permits civil actions against high-level employees who contribute to a corporate employer's Labor Code violations.

1 See Cal. Lab. Code § 558(a). While Plaintiff's claim against Defendant Frazee does not
2 meet the Rule 8(a) standard for pleading, the Twombly requirements do not control for
3 purposes of determining whether to remand. See supra. Rather, the Court must assess
4 whether Plaintiff could prove a set of facts that would entitle her to relief against
5 Defendant Frazee under PAGA or section 558 of the Labor Code. See supra. Under
6 Labor Code section 558, claims against corporate agents succeed when the plaintiff
7 alleges specific actions taken by the individual defendants that caused labor code
8 provisions to be violated. See Ochoa-Hernandez v. Cjaders Foods, Inc.,
9 No. C 08-02073 MHP, 2009 WL 1404694, at *3-4 (N.D. Cal. May 19, 2009) (citing
10 Ontiveros v. Zamora, No. 2:08-cv-00567-LKK (E.D. Cal. Jan. 20, 2009) (holding that
11 claims can be maintained against an individual defendant who was a corporate officer
12 when plaintiff adequately pleads that the individual defendant "caused" the wage and
13 hour violations alleged in the complaint); Mendoza v. M.A.T. & Sons Landscape, Inc.,
14 No. CV032292 (Sup. Ct. Cal., County of San Joaquin, Dec. 8, 2008) (same)). Given
15 Plaintiff's allegations regarding Defendant Frazee's position at the Sacramento location,
16 and Plaintiff's allegations regarding the violations committed at that location, Plaintiff
17 could feasibly amend her complaint to include more specific actions taken by Defendant
18 Frazee that would entitle Plaintiff to relief against him pursuant to section 558.
19 Defendants have thus failed to meet their high burden of showing that there is not "*any*
20 *possibility* that the plaintiff will succeed in its claim against that Defendant," and have
21 failed to show that the claim is futile. Wong, 2012 WL 718646, at *4.

22 Second, Defendants argue that Defendant Frazee cannot be held liable under
23 Section 558 as a matter of law because there is "an absence of authority where an
24 individual manager has been held liable for civil penalties under section 558. Rather,
25 where an individual has been found liable, that individual has been an owner who was
26 alleged to have exercised a high degree of control over the employees at issue." (ECF
27 No. 10 at 11.) However, section 558 clearly allows liability to lie with an "employer or
28 person acting on behalf of an employer . . . ." Cal. Lab. Code § 558(a).

To the extent that there is an absence of authority regarding whether an individual manager can be held liable for civil penalties under this section, it is an ambiguity in controlling state law that must be "resolved in the plaintiff's favor." Nasrawi, 776 F. Supp. 2d at 1169-70. Resolving this ambiguity in Plaintiff's favor requires finding that an individual manager, and thus Defendant Frazee, could be held liable for civil penalties under section 558.

Moreover, Vigil v. HMS Host USA, Inc., No. C 12-02982, 2012 WL 3283400 (N.D. Cal. Aug. 10, 2012), belies Defendants' assertion that an individual must be an owner to be liable under section 558. In Vigil, the Northern District remanded a section 558 claim against a store manager who was a non-diverse defendant, suggesting that a section 558 claim against a non-owner is proper, or at least is not invalid as a matter of law. Id. Similarly, in Ochoa-Hernandez, the Northern District held that a plaintiff may amend her complaint to include a section 558 action against individual defendants not simply because the proposed individual defendants "own and/or control [the company]" but because "each of [the] individual[] [Defendants] took specific actions on behalf of [the company] to violate or cause to be violated wage and hour provisions." 2009 WL 1404694, at *4. This holding supports Plaintiff's position that ownership is not necessary for a successful section 558 claim. As noted above, Plaintiff could feasibly amend her complaint to allege that Defendant Frazee took specific actions on behalf of the company to violate wage and hour provisions.

Accordingly, the Court finds that Defendant Frazee is not fraudulently joined. Because the Court finds that the parties are not completely diverse, and diversity jurisdiction therefore does not provide a basis for subject matter jurisdiction in this case, the Court declines to address whether the amount in controversy for diversity jurisdiction is met.

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1 **B. CAFA Jurisdiction**

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3 Under the Class Action Fairness Act of 2005 ("CAFA"), federal district courts have
4 original jurisdiction in any civil action where (1) "the matter in controversy exceeds the
5 sum or value of $5,000,000, exclusive of interest and costs," (2) the action is pled as a
6 class action involving more than 100 putative class members, and (3) "any member of a
7 class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C.
8 § 1332(d). CAFA also provides that "the claims of the individual class members shall be
9 aggregated to determine whether the matter in controversy exceeds the sum or value of
10 $5,000,000." Id. § 1332(d)(6). Because CAFA allows for federal jurisdiction where only
11 minimal, rather than complete, diversity exists, "[§] 1332(d) thus abandons the complete
12 diversity rule of covered class actions." Abrego Abrego v. Dow Chem. Co., 443 F.3d
13 676, 680 (9th Cir. 2006). The Ninth Circuit has explained that CAFA did not disturb the
14 traditional allocation of the burden of establishing removal jurisdiction, holding "that
15 under CAFA the burden of establishing removal jurisdiction remains, as before, on the
16 proponent of federal jurisdiction." Id. at 685.

17 The Jurisdiction and Venue allegations of Plaintiff's Complaint state: "Plaintiff
18 alleges that the amount in controversy for each class representative, including claims for
19 monetary damages, restitution, penalties, injunctive relief, and a pro rata share of
20 attorneys' fees, is less than seventy-five thousand dollars ($75,000) and that the
21 aggregate amount in controversy for the proposed class action, including monetary
22 damages, restitution, penalties, injunctive relief, and attorneys' fees, is less than five
23 million dollars ($5,000,000), exclusive of interests and costs. Plaintiff reserves the right
24 to seek a larger amount based upon new and different information resulting from
25 investigation and discovery." (ECF No. 1 at 20.)

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Plaintiff's prayer for relief again states: "Plaintiff, on behalf of all others similarly situated, prays for relief and judgment against Defendants, jointly and severally, as follows: (1) For damages, restitution penalties, injunctive relief, and attorneys' fees in excess of twenty-five thousand dollars but not to exceed five million dollars, exclusive of interests and costs. Plaintiff reserves the right to seek a larger amount based upon new and different information resulting from investigation and discovery." (ECF No. 1 at 42.)

1. Defendants' Burden

Plaintiff contends that the Court lacks CAFA jurisdiction because Plaintiff has pled an amount in controversy less than CAFA's requirement for federal jurisdiction ($5 million), and Defendant has failed to prove with legal certainty that CAFA's jurisdictional amount is met. Lowdermilk v. United States Bank National Association provides that "where the plaintiff has pled an amount in controversy less than $5,000,000, the party seeking removal must prove with legal certainty that CAFA's jurisdiction amount is met." 479 F.3d 994, 1000 (9th Cir. 2007). Defendants, on the other hand, argue that because Plaintiff's Complaint includes language reserving the right to seek a larger amount, Plaintiff's asserted amount in controversy is unclear or ambiguous, and thus Defendants must prove the jurisdictional amount only by a preponderance of the evidence. A preponderance of the evidence is the appropriate standard "where it is unclear or ambiguous from the face of a state court complaint whether the requisite amount in controversy is pled." Guglielmino v. McKee Foods Corp., 506 F.3d 696, 699 (9th Cir. 2007) (citing Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996)).

More specifically, Defendants argue that because Plaintiff has reserved the right to seek damages greater than $5 million later, Plaintiff has not actually "[foregone] a potentially larger recovery to remain in state court," and thus Plaintiff's asserted amount in controversy is unclear or ambiguous.

The Central District of California dealt with identical language in the complaint, and an identical argument by the defendant, in Jones v. ADT Security Services, Inc., No. CV 11-7750 PSG, 2012 WL 12744 (C.D. Cal. Jan. 3, 2012). There, the Court stated:

> On its face, the Complaint alleges the amounts in controversy are less than the statutory minimums for diversity jurisdiction. Nonetheless, Defendant argues the Complaint is ambiguous . . . [because] Plaintiffs' reservation of rights . . . creates an ambiguity. The Court disagrees. The 'reservation of rights' language used by the Plaintiffs states nothing more than what Plaintiffs would already have the right to do. If Plaintiffs find 'based upon new and different information resulting from investigation and discovery that their potential discovery is larger, then they could seek to amend their Complaint. In other words, the 'reservation of rights' does not add anything material to the Complaint, and, thus, cannot create an ambiguity as to the amount of damages Plaintiffs are seeking at this time.

2012 WL 12744, at *2. The Court went on to note that "if Plaintiffs were to later exercise those rights 'reserved' and amend the Complaint to allege greater damages, then Defendant would have another thirty-day period in which to remove this case to federal court." Id. at *3 (citing 28 U.S.C. § 1446(b)). While the right to remove based on a later filing is normally limited to the first year after an action is filed, that limitation does not apply to cases removed pursuant to CAFA. Id. (citing 28 U.S.C. § 1453(b) (providing that the one year limitation under § 1446(b) does not apply to class actions)). The Court observed that this CAFA provision "protected [Defendant] from the possibility that Plaintiffs could plead below the jurisdictional threshold now, wait out Defendant's right to remove, and then amend to allege a large amount in controversy." Id.

In this case, as in Jones, Plaintiff's reservation of right does not create an uncertainty about the amount in controversy; it does no more than state a right that Plaintiff already possesses. Because Plaintiff has specifically alleged that her case does not meet the diversity jurisdiction threshold required for CAFA jurisdiction, Defendants must establish with legal certainty that the amount in controversy exceeds the statutory minimum of $5,000,000. See Lowdermilk, 479 F.3d at 999. "The legal certainty standard sets a high bar for the party seeking removal, but it is not insurmountable." Id.

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2. Amount in Controversy Calculations

a. Unpaid Overtime

Plaintiff's first cause of action alleges that she and other non-exempt putative class members "were not paid overtime premium for all the hours they worked in excess of eight hours in a day, in excess of twelve hours in a day, and/or in excess of forty hours in a week." (ECF No. 1 at 31.) Defendants claim that the amount in controversy for this claim is $843,274. (ECF No. 1 at 10.) Defendants arrive at this amount by "using the modest assumption" that each of the 744 putative class members will claim an average of 1 hour of unpaid overtime per week, earned the average wage for their position ($9.56 per hour), and worked for an average of 1.52 years during the statute of limitations period. (Id.) Thus, Defendants provide the following calculation: 744 class members multiplied by $9.56 per hour, multiplied by 1.5 overtime rate, multiplied by 1 hour per week, multiplied by 52 weeks in a year, multiplied by 1.52 years equals $843,274. (Id.)

However, Defendants' "calculations require the Court to make assumptions that lack evidentiary support." Vigil, 2012 WL 3283400, at *5. As in Vigil, "Defendants do not cite to any evidence for [their] assumptio[n] that each class members worked one hour of overtime per week . . . ." Id. Plaintiff's complaint alleges that each putative class member worked an unspecified amount of overtime and that each putative class member is entitled to compensation for that time, but Plaintiff does not allege facts supporting Defendants' assumption that every putative class member is entitled to one hour of overtime every week. As such, "[d]efendant[s'] calculations call for too much extrapolation and speculation for the court to determine damages to a legal certainty." Id. Thus, this amount cannot be used in calculating whether Plaintiff's damages reach the jurisdictional threshold of $5 million.

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b. Waiting Time Penalties

Plaintiff's third cause of action alleges that Defendants failed to pay Plaintiff and putative class members formerly employed by Defendants "all their earned wages, including, but not limited to, overtime wages, minimum wages, and missed meal and rest period premiums, either at the time of discharge or within seventy-two hours of leaving Defendants' employ." (ECF No. 1 at 34.) Defendants submitted the affidavit of Henry Tanjuatco, Defendant Host's Human Relations Information Systems Analyst, which states that 373 non-exempt employees employed at Sacramento Airport have separated from employment with Defendant Host during the statutory period. (ECF No. 1-1 at 2.) Defendants calculate that the amount in controversy for this claim is $845,964. (ECF No. 1 at 10.) Defendants reach this amount by assuming that the maximum penalty of eight hours per day for thirty days applies to Plaintiff's case. (Id.) Defendants thus provide the following calculations: 373 employees multiplied by eight hours per day, multiplied by 30 days, multiplied by $9.45 earned per hour. (Id.)

However, as in Vigil, "[D]efendants do not cite [P]laintiff's complaint nor provide concrete support for assuming the maximum penalty for each class member." 2012 WL 3283400, at *6 (citing Garcia v. Roadlink USA Pac., LLC, No. SACV 11–0445 DOC, 2011 WL 2261273 (C.D. Cal. Jun 7, 2011) ("Defendants cannot assume that every class member is seeking maximum penalties when plaintiffs did not allege so.")). Moreover, Defendants fail to provide support for their assumption that the 373 class members worked an average of eight hours per day, or that each putative class member who separated from Defendants during the statutory period is entitled to waiting time penalties at all. "By merely assuming the maximum aggregate penalty and average hours worked, Defendants do not carry [their] heavy burden of proving damages with legal certainty." Id. This amount therefore cannot be used in calculating whether Plaintiff's damages reach the jurisdictional threshold of $5 million.

c. PAGA

Defendants contend that the total amount in controversy for Plaintiff's PAGA claims is no less than $2,612,700. (ECF No. 1 at 10.) PAGA penalties are $100 for each initial violation and $200 for each subsequent violation. Cal. Lab. Code § 2699(f)(2). Defendants employed approximately 325 employees during the period covered by PAGA, and that these employees worked a total of 13,226 pay periods during the statutory period. (ECF No. 1-1.) Defendants reach the alleged amount in controversy by calculating: (325 pay periods with initial violations x $100) + (12,901 subsequent violations x $200) = $2,612,700. (ECF No. 1 at 10.) However, Defendants again offer no evidence to support their assertion that each putative class member is entitled to maximum penalties under PAGA. Defendants have thus failed to establish this amount in controversy with legal certainty, and this amount likewise cannot be used in calculating whether Plaintiff's damages reach the jurisdictional threshold of $5 million.

d. Violations of California Business & Professions Code 17200

Plaintiff seeks to enjoin Defendants from committing future wage and hour infractions. (ECF No. 1 at 40.) Defendants contend that the request for an injunction "nearly doubles the amount in controversy, as the value to the defendant in enjoining the alleged violation is the cost of the damages created by those violations." (ECF No. 1 at 11.) Thus, Defendants take the figures calculated above ($2,612,700 + 845,964 + $843,274) and find that the amount in controversy under the claim for injunctive relief is $4,301,938. (Id.) Plaintiff contends that Defendants' cost of compliance cannot be included in calculating the amount in controversy, because "Defendant is supposed to comply with state law regardless. Thus, the prospective costs of complying with the injunctive relief requested are incidental to that relief." (ECF No. 6 at 27.)

Plaintiff is correct. "Incidental costs are not included in the amount in controversy analysis. Thus, the costs of injunctive relief properly considered for remand purposes are costs such as restitution of improperly withheld wages, and not the cost of merely complying with the law." Lopez v. Source Interlink Companies, Inc., No. 2:12-cv-00003-JAM-CKD, 2012 WL 1131543, at *5 (E.D. Cal. Mar. 29, 2012). Moreover, even if these incidental costs could be included in the calculation of the amount in controversy under CAFA, they are too uncertain, as set forth above, for Defendant to meet the requisite "legal certainty" standard.

e. Attorneys' Fees

Defendants finally contend that the amount in controversy should take into account reasonable attorneys' fees. However, as Plaintiff points out, "no potential attorneys' fees can be considered in calculating the amount in controversy because Defendants do not actually provide an estimation of the amount of attorneys' fees at issue." (ECF No. 6 at 28.) Defendants cite only to previous cases in which Plaintiff's counsel represented similar plaintiffs with similar claims. (ECF No. 1 at 12.) Defendants provide no dollar amount for the attorneys' fees that Defendants request the Court include in calculating the amount in controversy, and fail to provide any evidence suggesting what that amount might be. Defendants' allegations regarding attorneys' fees clearly do not meet the legal certainty standard.

In sum, Defendants have failed to establish to a legal certainty that the amount in controversy exceeds $5 million. Accordingly, CAFA does not provide a proper basis for subject matter jurisdiction.

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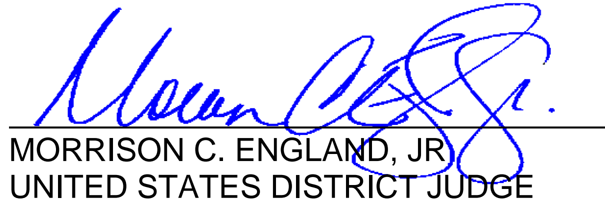
CONCLUSION

Because there is no basis for federal subject matter jurisdiction in this case, Plaintiff's motion to remand is GRANTED.[4] The case is hereby remanded to the Superior Court of the State of California, County of Sacramento.

IT IS SO ORDERED.

Dated: December 4, 2012



MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

[4] Accordingly, Defendant's Motion to Dismiss is denied as moot. (ECF No. 4.)