

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SUMATRA KENDRICK, et al.,

Plaintiffs,

v.

XEROX STATE AND LOCAL  
SOLUTIONS, INC., et al.,

Defendants.

Case No. [18-cv-00213-RS](#)

**ORDER GRANTING MOTION TO  
REMAND**

**I. INTRODUCTION**

Plaintiffs Sumatra Kendrick and Michelle Kelly filed this putative class action in San Francisco Superior Court. The operative complaint asserts state law claims against defendants Bay Area Toll Authority (“BATA”), Golden Gate Bridge Highway and Transportation District (“GGB”), and Conduent State and Local Solutions, Inc. f/k/a Xerox State & Local Solutions (“Conduent”). At issue is toll collection on the Golden Gate Bridge and other Bay Area bridges and the alleged attendant disclosure of consumers’ personally identifiable information (“PII”).

Conduent removed the action to this court pursuant to the Class Action Fairness Act of 2005 (“CAFA”), *see* 28 U.S.C. § 1332(d), contending that the amount in controversy can be reasonably estimated to exceed the \$5 million threshold for jurisdiction under CAFA. Plaintiffs seek remand under three theories: (1) Conduent failed to establish the amount in controversy is sufficient; (2) even if the amount in controversy does meet the jurisdictional requirement, remand is appropriate under at least one exception to CAFA jurisdiction; and (3) removal is precluded

1 under Section 1332(d)(5) because the primary defendants are state actors. Although plaintiffs’  
2 arguments regarding the amount in controversy and exceptions to CAFA jurisdiction fail,  
3 defendants have not carried their burden of satisfying the jurisdictional requirements of Section  
4 1332(d)(5). Therefore, the motion to remand must be granted.

## 5 II. LEGAL STANDARD

6 Under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), federal  
7 courts have original jurisdiction over class actions where there are at least 100 class  
8 members, at least one plaintiff is diverse in citizenship from any defendant, and the amount  
9 in controversy exceeds \$5,000,000, exclusive of interest and costs. *Ibarra v. Manheim*  
10 *Investments, Inc.*, 775 F.3d 1193, 1195 (9th Cir. 2015). A class action that meets CAFA  
11 standards may be removed to federal court. 28 U.S.C. § 1441(a).

12 By enacting CAFA, Congress intended to ease the ability of defendants to remove certain  
13 class or mass actions to federal court. Accordingly, “a defendant’s notice of removal need include  
14 only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.”  
15 *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). Evidentiary  
16 submissions supporting the grounds for removal are not required.

17 A court evaluating a challenge to CAFA jurisdiction looks first to the allegations in  
18 the complaint. In general, “the sum claimed by the plaintiff controls if the claim is  
19 apparently made in good faith.” *Ibarra*, 775 F.3d at 1197. (citing *St. Paul Mercury Indem.*  
20 *Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). “Whether damages are unstated in a  
21 complaint, or, in the defendant’s view are understated, the defendant seeking removal  
22 bears the burden to show by a preponderance of the evidence that the aggregate amount in  
23 controversy exceeds \$5 million when federal jurisdiction is challenged.” *Id.* The defendant  
24 must also persuade the court that the estimate of damages in controversy is a reasonable  
25 one, and that the action satisfies the other requirements of CAFA. When defendants’  
26 amount in controversy estimate is contested by plaintiffs, “both sides submit proof and the  
27 court decides, by a preponderance of the evidence, whether the amount-in-controversy

1 requirement has been satisfied.” *Ibarra*, 775 F.3d at 1197 (citing *Dart*, 135 S. Ct. at 554).  
 2 The parties may provide “summary-judgment type evidence relevant to the amount in  
 3 controversy,” including affidavits, declarations, and other evidence outside the complaint.  
 4 *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997).

5 CAFA instructs the district court to determine its jurisdiction by “adding up the value of  
 6 the claim[s] of each person who falls within the definition of [the] proposed class and  
 7 determin[ing] whether the resulting sum exceeds \$5 million.” *Standard Fire Ins. Co. v. Knowles*,  
 8 133 S. Ct. 1345, 1348 (2013). Once jurisdiction is established, the party seeking remand bears the  
 9 burden of proof as to any express statutory exceptions that bar removal. *See Serrano v. 180*  
 10 *Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007).

### 11 III. DISCUSSION

#### 12 A. Amount in Controversy

13 In its Notice of Removal, Conduent based its amount in controversy estimate on plaintiffs’  
 14 proposed class size of “hundreds of thousands (if not millions) of Class Members” and requested  
 15 “statutory damages in the amount of no less than \$2,500 or \$4,000 (as applicable).” Compl. at 33-  
 16 34. According to Conduent, even a conservative estimate of the amount in controversy, taking into  
 17 account plaintiffs’ additional request for punitive damages and attorneys’ fees, would result in a  
 18 figure well above the \$5 million threshold.

19 In response to plaintiffs’ challenge to its amount in controversy allegations, defendants’  
 20 joint opposition attaches a declaration from the company’s regional vice president David Wilson,  
 21 which calculates the proposed class to be at most 509,983,561 members, which reflects the  
 22 number of motorists assessed a penalty or charged with toll evasion for toll-bridge crossings since  
 23 2012, including over 84,024,846 on the Golden Gate Bridge. *See* Declaration of David Wilson  
 24 (“Wilson Decl.”) ¶ 8. This calculation, however, appears to be based on a class definition asserted  
 25 in an earlier related case, rather than the definition put forth in the operative complaint in this  
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1 case.<sup>1</sup> Here, plaintiffs propose a class consisting of “(a) all consumers who, between May 1, 2011  
2 and the present, had their PII provided to any person who was not authorized to receive the PII  
3 pursuant to California Streets and Highways § 31490; (b) all consumers who between May 1,  
4 2011 and the present had their PII provide[sic] to a person who was not authorized to receive the  
5 PII in violation of the Fastrak application and/or privacy policy.” Compl. ¶ 58. As plaintiffs  
6 correctly point out, Wilson’s calculations do not take into consideration the fact that the class is  
7 limited to those motorists who have had their PII provided to third parties.

8 Despite Conduent’s reasonable reliance upon the complaint’s prayer for relief in assuming  
9 a damages floor of \$2,500 per class member, the lack of relationship between its estimate of the  
10 class size and the class definition calls into question the reasonableness of Conduent’s  
11 calculations. That being said, plaintiffs have offered no evidentiary support suggesting a lower  
12 number of class members, and indeed claim on the face of their complaint that the size of the  
13 putative class is “hundreds of thousands (if not millions).” Thus, while the erroneous class  
14 definition used in the Wilson Declaration renders those calculations flawed, Conduent is entitled  
15 to assume, based on the allegations in the complaint, that class membership consists of at least  
16 100,000 individuals. With a damages estimate of \$2,500 per class member, the amount in  
17 controversy in this case is well over the \$5 million threshold.

## 18 **B. Exceptions to CAFA Jurisdiction**

### 19 **1. Local Controversy**

20 The “local controversy” exception provides that a district court “shall decline to exercise  
21 jurisdiction” under CAFA with respect to a class action in which (1) more than two-thirds of the  
22 proposed plaintiff class(es) are citizens of the state in which the action was originally filed, (2)  
23 there is at least one in-state defendant against whom “significant relief” is sought and “whose  
24 alleged conduct forms a significant basis for the claims asserted” by the proposed class, (3) the  
25 “principal injuries” resulting from the alleged conduct of each defendant were incurred in the state

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27 <sup>1</sup> See *Complaint* ¶ 82, *Kelly v. BATA et al.*, No. 3:16-cv-6837-RS (N.D. Cal. Feb. 3, 2017).

1 of filing, and (4) no other class action “asserting the same or similar factual allegations against any  
2 of the defendants” has been filed within three years prior to the present action. 28 U.S.C. §  
3 1332(d)(4)(A). Conduent contends that the local controversy exception is inapplicable to this case  
4 because plaintiffs fail to satisfy the first and fourth prongs described above.

5 “Where facts are in dispute, [CAFA] requires district courts to make factual findings  
6 before granting a motion to remand a matter to state court.” *Mondragon v. Capital One Auto Fin.*,  
7 736 F.3d 880, 883 (9th Cir. 2013). Remand will not be granted based on the plaintiff’s allegations  
8 in the complaint alone, when they are challenged by the defendant. *See id.* at 884. Here, plaintiffs  
9 seek significant relief from two in-state defendants, BATA and GGB, for injuries they incurred in  
10 California. With respect to the citizenship of the class, plaintiffs submit a 2006 newspaper article  
11 that indicates as much as 70 percent of the traffic on the Golden Gate Bridge might be comprised  
12 of California citizen motorists during rush hour. Defendants challenge the sufficiency of this  
13 showing, as the article dates from outside the class period and describes the use of only one bridge  
14 during a circumscribed period of time. Notwithstanding defendants’ criticism, absent evidence that  
15 the relative number of California citizen bridge crossers varies dramatically across different years,  
16 times of day, or bridges, it is reasonable to assume from the 70 percent figure that at least two-  
17 thirds of the proposed class is comprised of California citizens.

18 Despite satisfying the first three requirements of the local controversy exception, plaintiffs  
19 are precluded from seeking remand by the existence of a prior class action “asserting the same or  
20 similar factual allegations” against the defendants in this action. In *Kelly v. Bay Area Toll*  
21 *Authority et al.*, No. 3:16-cv-6837-RS, plaintiff Michelle Kelly brought suit against BATA, GGB,  
22 and Conduent based on allegations about toll collection procedures on Bay Area bridges. While  
23 appearing to concede that the earlier filed case involved similar parties and factual allegations,  
24 plaintiffs contend that since *Kelly* has been related to this action, it should not be considered a  
25 “prior class action” within the meaning of 1332(d)(4)(A). On this point, plaintiffs’ heavy reliance  
26 upon a single Ninth Circuit case, *Bridewell-Sledge v. Blue Cross of California*, 798 F.3d 923 (9th  
27 Cir. 2015), is misguided. There, the Court considered two cases that were consolidated in state

1 court prior to removal, and concluded they were properly treated as a single action for CAFA  
2 jurisdictional purposes. *See id.* at 925. Plaintiffs offer no persuasive reasons for extending  
3 *Bridewell-Sledge*'s holding to related actions, which proceed before the same judge, but are not  
4 otherwise merged in the same manner as consolidated proceedings. Therefore, despite its relation  
5 to the present case, *Kelly* is a prior class action within the last three years that bars remand under  
6 the local controversy exception.

## 7 2. Home State

8 Under a similar provision of CAFA, dubbed the "home-state controversy" exception, "[a]  
9 district court shall decline to exercise jurisdiction . . . where two-thirds or more of the members of  
10 all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State  
11 in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). As explained in Part B.1,  
12 plaintiffs have made a sufficient showing that more than two-thirds of the proposed class members  
13 are California residents, thus satisfying the first requirement. With respect to the second, two of  
14 the three primary defendants in this action, BATA and GGB, are California citizens. Conduent's  
15 citizenship, according to plaintiffs, should not be factored into the home state exception analysis  
16 because it is not a "primary defendant" within the meaning of CAFA.

17 A definition of "primary defendants" is not included in the statute, and the term has been  
18 subject to considerable interpretation in the district courts. Plaintiffs suggest that districts courts  
19 weigh factors such as whether the defendant is "(1) [one] who has the greater liability exposure;  
20 (2) is most able to satisfy a potential judgment; (3) is sued directly, as opposed to vicariously, or  
21 for indemnification or contribution; (4) is the subject of a significant portion of the claims asserted  
22 by plaintiffs; or (5) is the only defendant in one particular cause of action." *Sorrentino v. ASN*  
23 *Roosevelt Center, LLC*, 588 F. Supp. 2d 350, 359 (E.D.N.Y. 2008). In general, a "primary  
24 defendant" is "anyone 'who has a substantial exposure to a significant portion of the proposed  
25 class in the action.'" *Chalian v. CVS Pharmacy, Inc.*, No. CV1608979, 2017 WL 1377589, at \*3  
26 (C.D. Cal. Apr. 11, 2017).

27 As plaintiffs would characterize it, Conduent is not the main target of their allegations

1 because it merely assists BATA and GGB with the operation and management of toll collection. A  
 2 close examination of the operative complaint, however, gives no indication that Conduent is a  
 3 secondary actor in the wrongdoing. Plaintiffs sue Conduent directly for providing class members'  
 4 personally identifiable information to unauthorized entities, Compl. ¶¶ 70, 80-82, engaging in  
 5 privacy violations, Compl. ¶¶ 89-90, 103, having non-compliant privacy policies, Compl. ¶¶ 110-  
 6 119, violating the Rosenthal Fair Debt Collection Practices Act, Compl. ¶¶ 120-123, and  
 7 breaching the FastTrak agreement, Compl. ¶¶ 147-150. Conduent is the sole defendant named in  
 8 plaintiffs' claims under California's Unfair Competition Law, Compl. ¶¶ 124-136, and  
 9 California's Consumer Legal Remedies Act, Compl. ¶¶ 137-146. Therefore, there is no question  
 10 that Conduent would face substantial liability should class members prevail on their claims.  
 11 Conduent is incorporated in New York and has its principal place of business in Texas. Because  
 12 plaintiffs have submitted no evidence showing that Conduent is in fact a citizen of California, they  
 13 fail to meet their burden of demonstrating the applicability of the home state controversy  
 14 exception.<sup>2</sup>

### 15 C. State Action

16 Section 1332(d)(5) states that CAFA removal is precluded for class actions involving  
 17 fewer than 100 class members and where "the primary defendants are States, State officials, or  
 18 other governmental entities against whom the district court may be foreclosed from ordering  
 19 relief." While some circuits have treated this section as a CAFA "exception," the Ninth Circuit has  
 20 stated clearly its view that the requirements of Section 1332(d)(5) are in fact a prerequisite for  
 21 jurisdiction. *See Serrano*, 478 F.3d at 1020 n.3:

22 The Fifth Circuit characterized § 1332(d)(5) as an "exception" to CAFA jurisdiction  
 23 conferred under § 1332(d)(2). *See Frazier*, 455 F.3d at 546. We view § 1332(d)(5)  
 24 somewhat differently. Although subsection (5) appears later in the statute, it plainly  
 25 provides that "*paragraphs (2) through (4) shall not apply to any class action in which*  
 (A) the primary defendants are States, State officials, or other governmental entities

26 <sup>2</sup> Plaintiffs submit evidence that Conduent has a street address in Virginia, a mailing address in  
 27 Texas, an agent for service of process in California, and corporate officers in New Jersey but does  
 not explain how these facts indicate California citizenship. *See Lindemann Decl.*, Ex. E.

1 against whom the district court may be foreclosed from ordering relief; or (B) the  
 2 number of members of all proposed plaintiff classes in the aggregate is less than  
 3 100.” § 1332(d)(5) (emphasis added). Thus, satisfaction of § 1332(d)(5) serves as a  
 4 prerequisite, rather than as an exception, to jurisdiction under § 1332(d)(2). . . . Our  
 5 approach is consistent with the view adopted by the Seventh Circuit in *Hart*, 457  
 6 F.3d at 679 (holding that the provisions of § 1332(d)(5) must be satisfied before  
 7 CAFA applies to a class action).

8 Neither party disputes that BATA and GGB are government agencies and therefore qualify  
 9 as state actors under the statute. While acknowledging that Conduent is organized as a private  
 10 corporation, plaintiffs argue that its presence should be disregarded for purposes of the state action  
 11 inquiry because it is not a “primary defendant.” As explained *supra* in Part B.2, the nature of  
 12 direct allegations against Conduent, including two claims asserted against Conduent alone,  
 13 demonstrate that Conduent is indeed a primary defendant that is subject to substantial liability.<sup>3</sup>

14 Even assuming that Conduent is a primary defendant, plaintiffs argue that the state action  
 15 requirement is satisfied because Conduent “acted under color of state law when it participated in  
 16 assessing, collecting, and adjudicating tolls and penalties.” Reply at 10. “[S]tate action may be  
 17 found if, though only if, there is such a close nexus between the State and the challenged action  
 18 that seemingly private behavior may be fairly treated as that of the State itself.” *Villegas v. Gilroy*  
 19 *Garlic Festival Ass’n*, 541 F.3d 950, 955 (9th Cir. 2008) (en banc) (quoting *Brentwood Acad. v.*  
 20 *Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001)) (internal quotation marks  
 21 omitted) (alteration in original).

22 “Some of the factors to consider in determining whether there is a ‘close nexus’ are: (1) the  
 23 organization is mostly comprised of state institutions; (2) state officials dominate decision making  
 24 of the organization; (3) the organization’s funds are largely generated by the state institutions; and  
 25 (4) the organization is acting in lieu of a traditional state actor.” *Id.* (citing *Brentwood Acad.*, 531  
 26 U.S. at 295-99. The Supreme Court has “held that a challenged activity may be state action when  
 27 it results from the State’s exercise of coercive power, . . . when the State provides significant

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 3 <sup>3</sup> Unlike CAFA exceptions analysis, Section 1332(d)(5) jurisdictional analysis puts the burden on  
 defendants, rather than plaintiffs, to establish that Conduent *is* a primary defendant. Defendants  
 have satisfied that burden by pointing to the face of the complaint, which alleges a course of  
 wrongful conduct in which Conduent was an integral actor.

1 encouragement, either overt or covert, . . . or when a private actor operates as a willful participant  
 2 in joint activity with the State or its agents.” *Brentwood Acad.*, 531 U.S. at 296 (citations and  
 3 internal quotation marks omitted). The Supreme Court has also “treated a nominally private entity  
 4 as a state actor when it is controlled by an agency of the State, . . . when it has been delegated a  
 5 public function by the State, . . . when it is entwined with governmental policies, or when  
 6 government is entwined in [its] management or control.” *Id.* (citation and internal marks omitted)  
 7 (alteration in original).

8 Here, plaintiffs assert that while Conduent is organized as a private entity, it is a state actor  
 9 for jurisdictional purposes because it (1) “physically operates within the facilities of the BATA  
 10 Defendants,” (2) “wields the authority of the BATA defendants to report toll violations and to  
 11 administer toll proceedings,” and (3) was “compensated based on each notice of violation it sent.”  
 12 Reply at 10; *see also* Compl. ¶ 6. According to plaintiffs, Conduent “provide[s] and administer[s]  
 13 the Fastrak and Pay-By-Plate programs and manage[s] the assessment, notification, and collection  
 14 of fines and penalties pertaining to toll invoices and toll evasion violations on the GCB.” Compl. ¶  
 15 6. The complaint further alleges that Conduent is a “processing agency” within the meaning of  
 16 California Vehicle Code 40250 and has accordingly been delegated a public function by BATA  
 17 and GGB. While these facts do suggest a close relationship between Conduent and the government  
 18 agencies, it is difficult to assess from the pleadings alone, whether Conduent was merely a  
 19 government contractor or had stepped into a role that was “traditionally the exclusive prerogative  
 20 of the State.” *Rendell Baker v. Kohn*, 457 U.S. 830, 842 (1982). That being said, plaintiffs allege  
 21 that Conduent, BATA, and GGB are inextricably intertwined such that the actions of one entity  
 22 can be imputed to the others. As the assessment of tolls on state-owned bridges arguably exercises  
 23 the coercive power of the state, to the extent plaintiffs accuse Conduent of acting in concert with  
 24 government agencies to violate class members’ rights, they have alleged state action on the face of  
 25 the complaint.<sup>4</sup>

26 \_\_\_\_\_  
 27 <sup>4</sup> In sparring over the definitions of “primary defendant” and “state actor,” the parties appear to  
 28 take somewhat inconsistent positions regarding the issue of whether Conduent is a central player

1           Aside from merely asserting that Conduent is a private corporation and government  
2 contractors are not necessarily state actors, defendants fail to address the issue of state action in  
3 any depth. At the hearing on plaintiffs’ motion to remand, defendants suggested that Conduent  
4 cannot be considered a state actor because the complaint named only BATA and GGB as “state  
5 actors” under the subsection “State Action.” In that same subsection, however, plaintiffs also lay  
6 out their reasons for alleging state action against Conduent: (1) pervasive entanglement with  
7 government agencies, (2) joint enterprise with government agencies, and (3) command of the  
8 power of the state. *See* Compl. ¶¶ 30-32. Defendants also argued that Conduent did not engage in  
9 state action because it has no discretion in the execution of its contractual obligations to BATA  
10 and GGB. Conduent’s purported lack of discretion, however, is not evident from the face of the  
11 complaint or any submissions put forth by defendants.<sup>5</sup> As the parties claiming CAFA jurisdiction,  
12 defendants bear the burden of establishing the satisfaction of Section 1332(d)(5)’s requirements.  
13 Because they have not satisfied that burden, Section 1332(d)(5)’s jurisdictional requirements  
14 appear to be lacking and thus, removal was improper.

#### 15           **D. Attorney’s Fees**

16           In addition to remand, plaintiffs seek an award of attorney’s fees incurred as a result of  
17 removal. Attorney’s fees are available under Section 1447(c) only “where the removing party  
18 lacked an objectively reasonable basis for seeking removal.” *Martin v. Franklin Capital Corp.*,  
19 546 U.S. 132, 141 (2005). As the extensive discussion above indicates, although removal appears  
20 to have been improper, defendants’ stated grounds for removal were not objectively unreasonable.

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22 \_\_\_\_\_  
23 in the alleged wrongdoing or only a minor assistant. At the same time, under *Serrano*, it is  
24 defendants’ burden to show that state action does not preclude removal under Section 1332(d)(5),  
25 and the parties’ arguments are analyzed with an eye to that burden.

26 <sup>5</sup> The Declaration of David Wilson states, “Conduent is a private corporation that contracted with  
27 [BATA] to operate and manage toll collection on the Golden Gate Bridge (‘GGB’) . . . as well as  
28 other toll bridges. Conduent manages the FasTrak Regional Customer Service Center (‘FasTrak’),  
which coordinates toll operation and communications with motorists regarding tolls, fines and fees  
pertaining to toll-bridge crossings.” ¶¶ 3, 4. It is impossible to determine from these attestations  
the level of discretion afforded to Conduent in carrying out these tasks.

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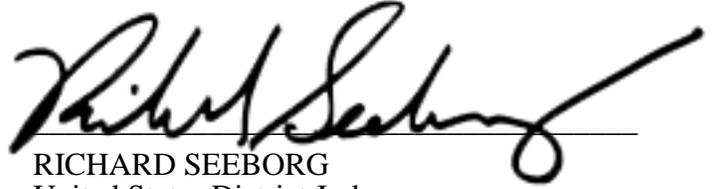
Therefore, plaintiffs’ request for attorney’s fees is denied.

**IV. CONCLUSION**

For the reasons set forth above, plaintiffs’ motion to remand is granted and their request for attorney’s fees is denied.

**IT IS SO ORDERED.**

Dated: April 3, 2018



RICHARD SEEBORG  
United States District Judge

United States District Court  
Northern District of California