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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

PAULA DITTMAR and PAULINE  
TILTON, individually and on behalf of all  
others similarly situated,  
  
Plaintiffs,  
  
vs.  
  
COSTCO WHOLESAL  
CORPORATION,  
  
Defendant.

CASE NO. 14-CV-1156-LAB-JLB  
**ORDER DENYING MOTION TO  
REMAND (DOCKET NOS. 5 AND  
30)**

Plaintiffs Paula Dittmar and Pauline Tilton seek to bring their employment claims against Costco on behalf of two proposed classes:

- *Pharmacist class*: All current and former non-exempt pharmacists employed by Costco in California since April 3, 2010.
- *Manager class*: All current and former non-exempt managers who were paid hourly compensation and employed by Costco in California since April 3, 2010.

Costco removed from state court. (Docket no. 1.) Plaintiffs seek remand, arguing that the Class Action Fairness Act's (CAFA) \$5,000,000 amount in controversy requirement is met. (Docket nos. 5 and 30.)

**I. Background**

Plaintiffs allege Costco: failed to pay overtime; failed to pay all wages due; failed to provide timely meal breaks; provided inaccurate wage statements; failed to pay unpaid

1 wages at the time of discharge; failed to pay accrued vacation pay at discharge; engaged in  
2 unfair business practices; and engaged in conversion. (Docket no. 1-1.) They contend  
3 Costco committed these violations on a regular basis. (See Docket no. 1-1 at ¶¶ 10, 11,  
4 21–23, 27, 28.) For example, they allege Costco "used uniform policies and procedures that  
5 have consistently violated California labor laws and regulations," (Docket no. 1-1 at ¶¶ 10,  
6 11), "engaged in a uniform policy and procedure" of failing to pay class members "for all  
7 hours worked at the agreed rate," (*id.* at ¶¶ 21–23), and "routinely" denied meal breaks to  
8 class members, (*id.* at ¶¶ 27, 28.) They allege that the pharmacist and manager classes  
9 each include "at least 99 members." (*id.* at ¶¶ 10, 11.) But they don't plead a specific  
10 amount in controversy.

11 To quantify the amount in controversy, Costco declares that:

- 12 • Since April 3, 2010, it has employed more than 400 non-exempt pharmacists, 100  
13 salaried non-exempt pharmacy managers, and 700 salaried non-exempt managers  
14 in California. (Docket no. 1-2 at ¶¶ 4–6.)
- 15 • All 800 of the managers received hourly pay for overtime during the class period.  
16 (Docket no. 41-1 at ¶ 3.)
- 17 • From April 3, 2010 through April 3, 2014, it employed, on average, more than 114  
18 non-exempt pharmacists, 82 salaried non-exempt pharmacy managers, and 624  
19 salaried non-exempt department managers per workweek. (Docket no. 1-2 at ¶¶  
20 4–6.)
- 21 • During that period, 181 non-exempt pharmacists, 10 salaried non-exempt pharmacy  
22 managers, and 25 salaried non-exempt department managers left the employment  
23 of Costco. (*Id.*) 143 of those non-exempt pharmacists, 8 of those salaried  
24 non-exempt pharmacy managers, and 25 of those salaried non-exempt department  
25 managers left Costco between April 3, 2011 and April 3, 2014. (*Id.*) Since April 4,  
26 2014, one additional salaried non-exempt pharmacy manager and 14 additional  
27 salaried non-exempt department managers left Costco. (Docket no. 41-1 at ¶ 5.)
- 28 • During the same time period, non-exempt pharmacists made at least \$58.75 per hour,

1 salaried non-exempt pharmacy managers made at least \$63.22 per hour for overtime  
2 purposes, and salaried non-exempt department managers made \$22.67 per hour for  
3 overtime purposes. (Docket no. 28-1 at ¶¶ 4–6.)

- 4 • The relevant pharmacy department managers and pharmacists generally have been  
5 scheduled to work 8 hours per day and the relevant department managers have been  
6 scheduled to work 9 hours per day. (*Id.* at ¶ 9.)
- 7 • Costco generally doesn't, absent a proven claim of unpaid termination pay, pay  
8 waiting-time penalties to discharged employees. (*Id.* at ¶ 10.)
- 9 • On average, at least 30,000 of Costco's employees have worked each workweek  
10 across all its California warehouses. (*Id.* at ¶ 11.)
- 11 • Costco's payroll clock-in and clock-out records reveal that, from April 2013 through  
12 May 2014, at its California warehouses, there were, on average, 1,279 employees,  
13 per pay period, whose time records are inconsistent with taking a 30-minute meal  
14 break no later than the fifth hour of work during a shift. (*Id.* at ¶ 12.)

15 Plaintiffs admit that they are unable to estimate the frequency of violations suffered  
16 by the class. (Docket nos. 30-1 and 30-2.)

## 17 **II. Legal Standard**

18 28 U.S.C. § 1441(a) gives a defendant the right to remove a civil action to federal  
19 court if the federal court would have original jurisdiction. CAFA gives federal district courts  
20 original jurisdiction in any civil action where: (1) "the matter in controversy exceeds the sum  
21 or value of \$5,000,000, exclusive of interest and costs," (2) the action is pled as a class  
22 action involving more than 100 putative class members, and (3) "any member of a class of  
23 plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d). "[T]he  
24 claims of the individual class members shall be aggregated to determine whether the matter  
25 in controversy exceeds the sum or value of \$5,000,000." 28 U.S.C. § 1332(d)(6).

26 If the complaint does not plead a specific amount in controversy or seek a specific  
27 amount of damages, a defendant asserting removal under CAFA "must demonstrate, by a  
28 preponderance of evidence, that the aggregate amount in controversy exceeds the

1 jurisdictional minimum." *Rodriguez v. AT&T Mobility Servs., LLC*, 728 F.3d 975, 981 (9th Cir.  
2 2013). "In measuring the amount in controversy, a court must assume that the allegations  
3 of the complaint are true and that a jury will return a verdict for the plaintiff on all claims made  
4 in the complaint." *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal.  
5 2008). The preponderance of the evidence standard requires a defendant to "provide  
6 evidence establishing that it is 'more likely than not' that the amount in controversy exceeds  
7 that amount." *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1986).

8 A court cannot base its finding of jurisdiction "on a defendant's speculation and  
9 conjecture." *Roth v. Comerica Bank*, 799 F.Supp.2d 1107, 1118 (C.D. Cal. 2010) (internal  
10 brackets and quotation marks omitted). "Rather, a defendant must set forth the underlying  
11 facts supporting its assertion that the amount in controversy exceeds the statutory minimum."  
12 *Korn*, 536 F.Supp.2d at 1205. Where necessary, a defendant seeking removal under CAFA  
13 may make assumptions when calculating the number of violations, but those assumptions  
14 must be "supported directly by, or reasonably inferred from, the allegations in the complaint."  
15 *Altamirano v. Shaw Indus., Inc.*, 2013 WL 2950600, at \*7 (N.D. Cal. June 14, 2013). Where  
16 doubt exists regarding the right to remove an action, it should be resolved in favor of remand  
17 to state court. *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir.  
18 2003).

### 19 **III. Discussion**

#### 20 **A. Waiting Time Claims**

21 Plaintiffs allege that Costco willfully failed to timely pay all wages owed upon  
22 separation of employees from employment. (Docket no. 1-1 at ¶¶ 33–38.) Under California  
23 law, employers must pay all wages owed within 72 hours when employees resign, and  
24 immediately where the employee is discharged or laid off. Cal. Lab. Code §§ 201–202.  
25 When an employer willfully fails to timely pay wages upon separation, the employee is  
26 entitled to normal wages for every day the wages are late, up to a maximum of 30 days. *Id.*  
27 at § 203.

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1 Because Plaintiffs allege that Costco's violations were regular and pursuant to "a  
2 uniform policy," (Docket no. 1-1 at ¶¶ 10, 11, 21, 22, 23, 27, 28), it's reasonable to assume  
3 each former employee was underpaid at least one time during their employment. *Altamirano*,  
4 2013 WL 2950600, at \*12. The record doesn't suggest Costco paid these unpaid wages in  
5 the thirty days after separation, so awarding penalties for the entire thirty day period is  
6 reasonable. *Id.* Evidence also supports Costco's proposed hourly rate and assumption of  
7 a nine hour work day for department managers and eight hour work day for all other class  
8 members. (Docket no. 28-1 at ¶¶ 4–6, 9.)

9 A three-year statute of limitations applies to waiting time claims, and the limitations  
10 period is considered in determining the amount in controversy. *Mejia v. Prologix Distribution*  
11 *Servs. (W.), LLC*, 2012 WL 5522309, at \*4 (N.D. Cal. Nov. 14, 2012); *Trang v. Turbine*  
12 *Engine Components Technologies Corp.*, 2012 WL 6618854, at \*6 n.5 (C.D. Cal. Dec. 19,  
13 2012). Where appropriate under the class definition, post-removal damages can be  
14 considered in determining the amount in controversy. *See Lao v. Wickes Furniture Co.*, 455  
15 F. Supp. 2d 1045, 1050 (C.D. Cal. 2006) (overruled on other grounds); *Brady v.*  
16 *Mercedes-Benz USA, Inc.*, 243 F. Supp. 2d 1004, 1011 n.4 (N.D. Cal. 2002); *Cruz v. Dollar*  
17 *Tree Stores, Inc.*, 2009 WL 1974404, at \*2 (N.D. Cal. July 2, 2009) (ending class period at  
18 time of certification).

19 Plaintiffs' waiting time claims put **\$2,404,838.10** in controversy. (143 terminated  
20 pharmacists x \$58.75 per hour x 8 hours per day x 30 days) + (9 terminated pharmacy  
21 managers x \$63.22 per hour x 8 hours per day x 30 days) + (39 terminated department  
22 managers x \$22.67 per hour x 8 hours per day x 30 days) + (39 terminated department  
23 managers x \$34.01 per overtime hour x 1 hour per day x 30 days).

#### 24 **B. Unpaid Overtime Claim**

25 Plaintiffs allege class members had to work non-de minimis periods of time off the  
26 clock, and as a result, were under Costco's control for over 8 hours in a day and 40 hours  
27 per workweek, required to work in excess of 12 hours in one day, and required to work more

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1 than 8 hours on the seventh day of a workweek. (Docket no. 1-1 at ¶¶ 17–19.) Under  
2 California law,

3 Any work in excess of eight hours in one workday and any work in excess of  
4 40 hours in any one workweek and the first eight hours worked on the seventh  
5 day of work in any one workweek shall be compensated at the rate of no less  
6 than one and one-half times the regular rate of pay for an employee. Any work  
7 in excess of 12 hours in one day shall be compensated at the rate of no less  
8 than twice the regular rate of pay for an employee. In addition, any work in  
9 excess of eight hours on any seventh day of a workweek shall be  
10 compensated at the rate of no less than twice the regular rate of pay of an  
11 employee.

12 Cal. Lab. Code § 510.

13 Costco argues that Plaintiffs' allegations establish for removal purposes that each  
14 class member worked, without overtime pay, at least one 12 hour day and at least one 8 hour  
15 day on the seventh day of a workweek. (Docket no. 28 at 2–3.) Plaintiffs allege that  
16 Costco's labor violations were consistent, and were made pursuant to Costco's "uniform  
17 policies and procedures." Thus, they provide a reasonable inference that each claimed  
18 violation occurred to each class member at least one time during their employment. *Cf.*  
19 *Jasso v. Money Mart Exp., Inc.*, 2012 WL 699465, at \*5 (N.D. Cal. Mar. 1, 2012) ("Given the  
20 allegations of a 'uniform policy and scheme' and that the violations took place 'at all material  
21 times,' one violation per week on each claimed basis is a sensible reading of the alleged  
22 amount in controversy, as pleaded by Plaintiff.")

23 Plaintiffs' unpaid overtime claim puts **\$822,504** in controversy. (400 pharmacists x  
24 \$88.13 overtime rate x (8 hours worked on a seventh day + 4 hours worked in excess of an  
25 8 hour workday)) + (100 pharmacy managers x \$94.83 overtime rate x (8 hours worked on  
26 a seventh day + 4 hours worked in excess of an 8 hour workday)) + (700 department  
27 managers x \$34.01 overtime rate x (8 hours worked on a seventh day + 4 hours worked in  
28 excess of an 8 hour workday)).

### 29 **C. Meal Break Claim**

30 Plaintiffs allege that Costco "routinely" denied meal breaks. (Docket no. 1-1 at ¶¶ 27,  
31 28.) Under California Labor Code § 226.7, an employer must pay an employee for one hour  
32 at the employee's normal wage for each meal or rest period that it fails to provide.

1 Extrapolating from evidence of the number of class members working per work week, the  
2 total number of employees working per work week, the number of time records that are  
3 inconsistent with taking a meal break, and the number of pay periods in the relevant time  
4 period, Costco establishes by a preponderance of the evidence that Plaintiffs' meal break  
5 claim puts **\$168,014.40** at controversy. (Docket no. 28 at 3 n.8; Docket no. 41 at 3); *Ford*  
6 *v. CEC Entm't, Inc.*, 2014 WL 3377990, at \*4 (N.D. Cal. July 10, 2014) (finding broad  
7 allegations coupled with summary data from time records sufficient to establish estimate).

#### 8 **D. Rest Break Claim**

9 Plaintiffs allege that Costco failed to provide its employees "with required rest  
10 periods." (Docket no. 1-1 at ¶¶ 27, 28.) Because Plaintiffs allege that Costco's violations  
11 were regular and pursuant to a uniform policy, Costco's estimate that each class member  
12 suffered at least two rest break violations during their employment is reasonable. Plaintiffs'  
13 rest break claim puts **\$91,382** at controversy. (400 pharmacists x \$58.75 per hour x 1 hour  
14 x 2 occurrences) + (100 pharmacy managers x \$63.22 per hour x 1 hour x 2 occurrences)  
15 + (700 department managers x \$22.67 per hour x 1 hour x 2 occurrences).

#### 16 **E. Wage Statement Claim**

17 Plaintiffs allege that Costco knowingly and intentionally failed to provide accurate  
18 wage statements, and class members suffered injury as a result. (Docket no. 1-1 at ¶¶  
19 29–32.) They essentially claim that, for each instance of off the clock work and  
20 non-compliant break, the class members' corresponding wage statements were inaccurate.  
21 California Labor Code § 226(e) provides that, where an employer knowingly and intentionally  
22 provides an inaccurate wage statement, the employee:

23 is entitled to recover the greater of all actual damages or fifty dollars (\$50) for  
24 the initial pay period in which a violation occurs and one hundred dollars (\$100)  
25 per employee for each violation in a subsequent pay period, not to exceed an  
aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award  
of costs and reasonable attorney's fees.

26 When a plaintiff shows actual damages flowing from the receipt of an inaccurate wage  
27 statement, the limitations period is two years. Absent actual damages, the limitations period  
28 is one year. Cal. Lab.Code § 226; Cal.Code Civ. Proc. § 340(a).

1 To estimate the number of wage statement violations, Costco assumes that each  
2 class member suffered: (1) one instance of unpaid off the clock work; (2) one instance of  
3 working over 12 hours in a workday without being paid overtime or double time; (3) one  
4 instance of working over 8 hours on the seventh day of a workweek without being paid  
5 overtime or double time; and (4) two rest break violations. (Docket no. 28 at 3–4; see *also*  
6 Docket no. 1-1 at ¶¶ 17, 18, 22, 25, 27.) In addition, from the number of time records that  
7 are inconsistent with taking a 30-minute meal break, it estimates that 36 class members  
8 suffered meal break violations every pay period. (Docket no. 28 at 4; see *also* Docket no.  
9 1-1 at ¶¶ 25, 27.) Because Plaintiffs allege that each of these violations occurred regularly,  
10 Costco's estimates are conservative. Assuming a one year statute of limitations period  
11 applies, Plaintiffs' wage statement claim puts **\$684,000** in controversy. (At least 984<sup>1</sup> class  
12 members worked during the limitations period x \$50 for off the clock work) + (984 x \$100 for  
13 working over 12 hours in a workday without premium pay) + (984 x \$100 for working over 8  
14 hours on the seventh day of a workweek) + (984 x \$100 x 2 occurrences for rest break  
15 violations) + (67 pay periods x 36 inaccurately recorded meal breaks per pay period x \$100).

#### 16 F. Attorney's Fees

17 Attorneys' fees are included in the amount in controversy for purposes of evaluating  
18 diversity jurisdiction. *Jasso*, 2012 WL 699465, at \*6. Costco calculates attorney's fees equal  
19 to 25% of the total amount in controversy. (Docket no. 28 at 4–5.) Ninth Circuit authority  
20 supports a 25% benchmark. See, e.g., *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir.  
21 2003) ("This circuit has established 25% of the common fund as a benchmark award for  
22 attorney fees."). Thus, attorney's fees put **\$1,042,684.63** in controversy.

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26 <sup>1</sup> Costco bases its wage statement claim on the 1,200 putative class members it has  
27 employed since April 3, 2010. But some of those employees left Costco before the relevant  
28 limitations period began. (Docket no. 1-2 at ¶¶ 4–6.) Since 216 putative class members left  
between April 3, 2010 and April 3, 2014, (Docket no. 1-2 at ¶¶ 4–6), Costco's evidence  
demonstrates that it employed at least 984 putative class members during the wage  
statement limitations period.



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**G. Punitive Damages**

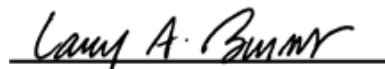
Because Plaintiffs seek punitive damages for conversion, Costco includes punitive damages in its amount in controversy estimate. (Docket no. 28 at 5.) Where available, punitive damages count toward the amount in controversy. See *Gibson v. Chrysler Corp.*, 261 F.3d 927, 946 (9th Cir. 2001). But Plaintiffs cannot maintain a conversion claim based on California Labor Code violations, because the Labor Code provides an exclusive statutory remedy. See, e.g., *Thomas v. Home Depot USA Inc.*, 527 F. Supp. 2d 1003, 1010 (N.D. Cal. 2007). And punitive damages aren't recoverable for violations of the Labor Code. See *Brewer v. Premier Golf Properties*, 168 Cal.App.4th 1243, 1252–56 (2008). Thus, punitive damages don't count toward the amount in controversy. See *Trahan v. U.S. Bank Nat. Assoc.*, 2009 WL 4510140, at \*4 (N.D. Cal. Nov. 30, 2009) (same).

**IV. Conclusion**

Costco has demonstrated by a preponderance of evidence that the aggregate amount in controversy exceeds \$5,000,000. Thus, the Court **DENIES** Plaintiffs' motion to remand. Plaintiffs shall respond to Costco's motion to dismiss (Docket no. 23) no later than 21 days following this order. (See Docket no 29.)

**IT IS SO ORDERED.**

DATED: November 13, 2015



**HONORABLE LARRY ALAN BURNS**  
United States District Judge