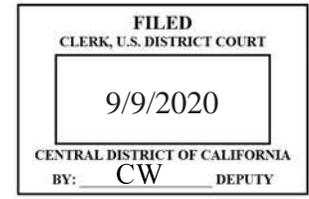


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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**

**RICK MELEAD, an individual, on  
behalf of himself, and on behalf of the  
general public similarly situated,**

**Plaintiff,**

**v.**

**TVI, INC., d.b.a. SAVERS; and DOES 1  
through 50,**

**Defendants.**

**Case No.: SACV 20-01224-CJC(ADSx)**

**ORDER GRANTING PLAINTIFF'S  
MOTION TO REMAND [Dkt. 9]**

**I. INTRODUCTION**

Plaintiff Rick Melead filed this putative wage-and-hour class action against Defendant TVI, Inc., d/b/a Savers (“TVI”) and unnamed Does in Orange County Superior Court. (Dkt. 1-2 Ex. A [Complaint, hereinafter “Compl.”].) TVI removed the

1 action to this Court pursuant to the Class Action Fairness Act of 2005 (“CAFA”),  
2 28 U.S.C. § 1332(d). (Dkt. 1 [Notice of Removal, hereinafter “NOR”].) Before the  
3 Court is Plaintiff’s motion to remand. (Dkt. 9 [hereinafter “Mot.”].) For the following  
4 reasons, the motion is **GRANTED**.<sup>1</sup>

## 6 **II. BACKGROUND**

8 Plaintiff worked for TVI as an hourly non-exempt sales clerk from October 2015 to  
9 October 2019 in Yorba Linda, California. (Compl. ¶ 6.) The Complaint does not include  
10 any other details about Plaintiff’s role, salary, or terms of employment.

12 On May 11, 2020, Plaintiff brought this suit in Orange County Superior Court.  
13 (Compl.) Plaintiff asserts a claim for (1) violations of California’s Unfair Competition  
14 Law, as well as six causes of action under California’s Labor Code for (2) failure to pay  
15 overtime wages, (3) failure to pay minimum wages, (4) failure to provide meal periods,  
16 (5) failure to provide rest periods, (6) failure to provide accurate itemized statements, and  
17 (7) failure to pay wages when due. (*See id.*) Plaintiff asserts these claims on behalf of a  
18 proposed class of “current and former non-exempt California employees [of TVI] . . . at  
19 any time between April 6, 2016 [and] a date determined by the Court.” (*Id.* ¶ 7.)

21 Plaintiff alleges broadly that TVI had a “uniform policy and practice which” failed  
22 to provide Plaintiff and the class with (1) legally compliant meal and rest periods, (2) pay  
23 for all hours worked, and (3) accurate itemized wage statements. (*Id.* ¶ 8.) The  
24 boilerplate allegations in the complaint assert that TVI failed to properly compensate  
25 employees, forced them to work through required breaks, and failed to keep accurate

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27 <sup>1</sup> Having read and considered the papers presented by the parties, the Court finds this matter appropriate  
28 for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set  
for September 14, 2020 at 1:30 p.m. is hereby vacated and off calendar.

1 records. (*See id.* ¶¶ 13–29.) Plaintiff has not alleged any other facts about TVI’s  
2 practices and policies, the frequency of the alleged Labor Code violations, or the  
3 resulting damages.

4  
5 Plaintiff served TVI with a summons and the Complaint on June 11, 2020. (*See*  
6 Dkt. 1-2 Ex. B.) On July 10, 2020, TVI filed a Notice of Removal to this Court pursuant  
7 to CAFA. (NOR.) The Court now considers Plaintiff’s motion to remand to state court.  
8

### 9 **III. ANALYSIS**

10  
11 A civil action brought in a state court, but over which a federal court may exercise  
12 original jurisdiction, may be removed to a federal district court by the defendant. CAFA  
13 provides original federal jurisdiction over class actions in which the amount in  
14 controversy exceeds \$5 million, there is minimal diversity between the parties, and the  
15 number of proposed class members is at least 100. 28 U.S.C. §§ 1332(d)(2),  
16 1332(d)(5)(B). “Congress designed the terms of CAFA specifically to permit a defendant  
17 to remove certain class or mass actions into federal court. . . [and] intended CAFA to be  
18 interpreted expansively.” *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir.  
19 2015). The Supreme Court has also held that “no antiremoval presumption attends cases  
20 invoking CAFA” because CAFA was enacted to facilitate federal courts’ adjudication of  
21 certain class actions. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547,  
22 550 (2014).

23  
24 Plaintiff contends that this case must be remanded because TVI has not properly  
25 established that the amount in controversy exceeds \$5 million.<sup>2</sup> “[A] defendant’s notice  
26

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27 <sup>2</sup> Plaintiff does not dispute that the other two CAFA requirements—minimal diversity and minimum  
28 class size—have been met. (*See generally* Dkt. 9-1 [Plaintiff’s Memorandum of Points & Authorities,  
hereinafter “Mem.”].) Plaintiff and TVI are citizens of different states for diversity purposes, and  
records show that TVI employed over 100 qualifying class members. (*See* NOR ¶¶ 13–20, 29–30.)

1 of removal need include only a plausible allegation that the amount in controversy  
2 exceeds the jurisdictional threshold.” *Dart Cherokee*, 135 S. Ct. at 554. However, if the  
3 asserted amount in controversy is contested after removal, “[e]vidence establishing the  
4 amount is required.” *Id.* at 554. “In such a case, both sides submit proof and the court  
5 decides, by a preponderance of the evidence, whether the amount-in-controversy  
6 requirement has been satisfied.” *Id.* at 550. Ultimately, the defendants bear the burden  
7 of proving that the amount in controversy is met. *See Rodriguez v. AT&T Mobility Servs.*  
8 *LLC*, 728 F.3d 975, 978 (9th Cir. 2013). “Under this system, CAFA’s requirements are  
9 to be tested by consideration of real evidence and the reality of what is at stake in the  
10 litigation, using reasonable assumptions underlying the defendant’s theory of damages  
11 exposure.” *Ibarra*, 775 F.3d at 1198.

12  
13 TVI argues that it reaches the \$5 million threshold on the “waiting time penalties”  
14 alone, estimating them at \$6,633,600. In the alternative, TVI contends that it can reach  
15 the threshold based on the following “conservative” estimates:

- 16
- 17 • Waiting time penalties: \$4,772,875.20
- 18 • Missed meal breaks: \$1,754,034.40
- 19 • Missed rest breaks: \$1,754,034.40
- 20 • Attorneys’ Fees: \$250,000
- 21 • **Total: \$8,530,944**

22  
23 (Dkt. 12 [TVI’s Opposition to Mot., hereinafter “Opp.”] at 6–8.) After reviewing the  
24 allegations in the complaint and the evidence presented by TVI, the Court finds that these  
25 estimates rely on unreasonable and unsubstantiated assumptions.

26  
27 1. Waiting Time Penalties

1 Plaintiff asserts a cause of action for violations of California Labor Code § 203,  
2 which provides that “[i]f an employer willfully fails to pay, without abatement or  
3 reduction . . . any wages of an employee who is discharged or who quits, the wages of the  
4 employee shall continue as a penalty from the due date thereof at the same rate until paid  
5 or until an action therefor is commenced; but the wages shall not continue for more than  
6 30 days.” Cal. Lab. Code § 203. In other words, an employer accrues a penalty of one  
7 day’s wages for every day that the employee’s final wages are willfully withheld—with a  
8 maximum penalty of thirty days’ wages. *See id.* TVI asserts that the amount in  
9 controversy for Plaintiff’s final wages claim is \$6,633,600. (Opp. at 4.) In its alternate  
10 scenario, TVI assumes waiting time penalties of \$4,772,875.20. (Opp. at 6.) Both  
11 estimates rely on several assumptions that the Court finds unreasonable.

12  
13 To calculate the amount in controversy for Plaintiff’s final wages claim, TVI  
14 submits a declaration from Teresa Moss, its Director of Team Member Relations and  
15 Employment Law Compliance. (Dkt. 1-3 [hereinafter “Moss Decl.”].) Based on Moss’s  
16 review of company records, she offers the following facts: (1) TVI terminated 2,744  
17 employees in the relevant period, (2) the “combined average hourly rate” paid to the  
18 terminated employees was \$13.82, and (3) there have been approximately 835 active  
19 employees in California during the relevant time period. (*Id.*) No other evidence was  
20 presented by either party.

21  
22 As is common in wage-and-hour cases, the amount in controversy turns on the  
23 frequency of the alleged violations of California labor laws. *See, e.g., Gant v. ALDI, Inc.*,  
24 2020 WL 1329909 (C.D. Cal. Mar. 20, 2020); *Lopez v. First Student, Inc.*, 2019 WL  
25 8137149 (C.D. Cal. Dec. 2, 2019). The complaint does not specify how often the  
26 violations occurred, but alleges a “uniform policy and practice.” (Compl. ¶ 8.) In *Arias*  
27 *v. Residence Inn by Marriott*, the Ninth Circuit addressed how courts should resolve the  
28 resulting ambiguity. 936 F.3d 920 (9th Cir. 2019). It explained that a removing

1 defendant is entitled to make “reasonable assumptions” about violation rates to estimate  
2 the amount in controversy. *Id.* at 925. “[A]n assumption may be reasonable if it is  
3 founded on the allegations of the complaint.” *Id.* These assumptions must also cohere  
4 with the actual evidence presented by the parties. *See id.*

5  
6 TVI assumes that 2,000 employees who were terminated during the relevant period  
7 were denied final wages for the statutory maximum thirty days. (*See* Opp. at 4; NOR  
8 ¶ 25). It multiplied 2,000 employees, by 30 days, 8 hours per day, and by the \$13.82  
9 average hourly rate to reach its \$6,633,600 final wages claim total. (Opp. at 4.) While  
10 TVI calculates the waiting time penalty using 73% of the total terminated employees, it  
11 argues that it could have used 100% because Plaintiff alleges a “uniform policy and  
12 practice” of violations. (Opp. at 4–5.) Plaintiff counters, arguing that his Complaint  
13 merely alleges “sporadic violations ‘from time to time.’” (Dkt. 14 [Plaintiff’s Reply  
14 Brief] at 4; *see also* Compl. ¶¶ 14–17, 20–21, 24.) “[W]here a plaintiff’s complaint  
15 specifically alleges a ‘uniform’ practice, if a defendant in its amount-in-controversy  
16 calculus assumes a 100 percent violation rate *and* the plaintiff offers no competent  
17 evidence in rebuttal to a defendant’s showing, courts have found a defendant’s  
18 assumption to be reasonable.” *Hernandez v. Starbucks Corp.*, 2017 WL 2971858, at \*3  
19 (C.D. Cal. July 12, 2017).

20  
21 Reading the Complaint as a whole, the Court finds it does not support a 100%  
22 violation rate. *See Brancaccio v. Knauf Insulation, Inc.*, 2020 WL 1686253, at \*4 (C.D.  
23 Cal. Apr. 7, 2020) (citing *Arias*, 936 F.3d at 926) (“A removing party can assume  
24 extreme violation rates only if supported by allegations in the pleadings.”). The gap  
25 between a 100% violation rate and violations “from time to time” is immense. A uniform  
26 policy and practice of committing violations from time to time does not allege that a  
27 violation occurred with every employee. Because Plaintiff’s allegations in the pleadings  
28 are vague—likely purposefully so—TVI cannot rely on Plaintiff’s complaint alone and

1 must offer additional evidence or reasoning to justify its assumed violation rate. *See*  
2 *Ibarra*, 775 F.3d at 1199.

3  
4 While defendants may make reasonable assumptions based on the complaint and  
5 from evidence, “those assumptions cannot be pulled from thin air but need some  
6 reasonable ground underlying them.” *Ibarra*, 775 F.3d at 1199; *see also Rutledge v.*  
7 *Healthport Technologies, LLC*, 2017 WL 728375, at \*2 (N.D. Cal. Feb. 24, 2017)  
8 (“[Defendants are] not permitted to pull potential violation rates out of thin air.”). Moss’s  
9 cursory declaration of the number of employees in the purported class and combined  
10 average hourly rate does nothing to establish a violation rate. TVI also fails to provide  
11 any reasoning for the 73% rate other than it “rounded-down” to the nearest thousand.  
12 (Opp. at 4.) The assertion that it could have used a 100% violation rate does not  
13 independently justify a lower rate.

14  
15 TVI has also not justified its assumption of an 8-hour work day for every employee  
16 class member. Crucially, TVI has not provided any evidence suggesting how many of  
17 the 2,744 terminated employees were full-time employees, as opposed to part-time  
18 employees. Nor has it provided an average of hours worked by class members.  
19 Accordingly, TVI has failed to sustain its evidentiary burden regarding waiting-period  
20 penalties for purposes of removal.

21  
22 2. Missed Meal and Rest Breaks

23  
24 Like its assumed waiting time penalties, TVI’s assumed meal break and rest break  
25 penalties are also unsupported by the evidence before the Court. TVI assumes one meal  
26 break violation and one rest break violation per 5-day work week, calculating total meal  
27 and rest break claims of \$3,508,068.80. (Opp. at 8.) Moss’s declaration sets forth only  
28 the number of class members and their average hourly pay rate. She does not address

1 anything that would provide factual support for TVI’s assumption that one meal break  
2 violation and one rest break violation occurred per work week. Because TVI “provides  
3 no factual underpinning for the assumption that a meal and rest break violation occurred  
4 one time per week,” the Court finds it has failed to carry its evidentiary burden for  
5 purposes of removal. *Weston v. Helmerich & Payne Inter. Drilling Co.*, 2013 WL  
6 5274283, at \*6 (E.D. Cal. Sept. 17, 2013).

7  
8 3. Attorneys’ Fees  
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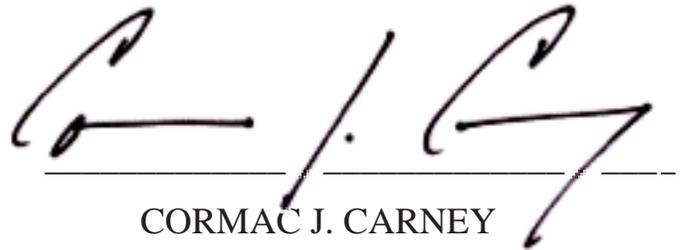
10 TVI calculated its exposure for attorneys’ fees as \$250,000. (NOR ¶ 26.) While  
11 courts in the Ninth Circuit have considered potential attorneys’ fees in calculating the  
12 amount in controversy in wage-and-hour cases, TVI’s fee estimate is based on a  
13 conjectural damages calculation and should be disregarded. *See Campbell v. Vitran*  
14 *Express, Inc.*, 2010 WL 4971944, at \*4 (C.D. Cal. Aug. 16, 2010) (“[B]ecause such  
15 uncertainty surrounds Defendant’s calculation of damages and penalties, the Court cannot  
16 find that the inclusion of a 25% attorneys’ fee, which Defendant recommends, would  
17 necessarily place the amount in controversy over the \$5,000,000 CAFA threshold.”).

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1 **IV. CONCLUSION**

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3 For the foregoing reasons, TVI has not carried its burden to show that the Court  
4 has subject matter jurisdiction over this action under CAFA. Accordingly, Plaintiff's  
5 motion to remand is **GRANTED**, and this case is hereby **REMANDED** to Orange  
6 County Superior Court.

7  
8 DATED: September 9, 2020

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11 CORMAC J. CARNEY

12 UNITED STATES DISTRICT JUDGE  
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