

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID TOMPKINS; individually and)	
on behalf of members of the)	2:11-cv-0703-GEB-EFB
general public similarly)	
situated, and as aggrieved)	
employees pursuant to the)	<u>ORDER GRANTING MOTION TO</u>
Private Attorney General Act)	<u>REMAND</u>
("PAGA"),)	
)	
Plaintiffs,)	
)	
v.)	
)	
C&S WHOLESALE GROCERS, INC., a)	
Vermont corporation; TRACY)	
LOGISTICS, LLC, an unknown)	
business entity; and DOES 1)	
through 100, inclusive,)	
)	
Defendants.)	
)	

On April 13, 2011, Plaintiff David Tompkins filed a motion seeking to remand this case to the Sacramento County Superior Court in California from which it was removed. (ECF No. 10.) Defendants C&S Wholesale Grocers, Inc. and Tracy Logistics, LLC (collectively, "Defendants") oppose the motion. (ECF No. 11.) Defendants argue in their opposition the motion should be denied because diversity jurisdiction exists under 28 U.S.C. § 1332(a) which supports the removal of this case to federal court based on the uncontroverted evidence establishing that the amount in controversy is well in excess of \$75,000." (Opp'n 1:11-

1 12.) For the reasons stated below, Plaintiff's motion to remand will be
2 GRANTED.

3 **I. BACKGROUND**

4 On February 3, 2011, Plaintiff filed a Complaint in the
5 Sacramento County Superior Court, alleging the following three claims
6 under state law. (Compl. ¶¶ 56-102.): (1) failure to pay minimum wages
7 and overtime wages in violation of California Labor Code sections 510
8 and 1198; (2) civil penalties under California Labor Code sections 2698,
9 et seq.; and (3) unfair business practices in violation of California
10 Business and Professions Code sections 17200, et seq. Id. Plaintiff also
11 alleges that the amount in controversy "including claims for
12 compensatory damages, interest, and pro rata share of attorneys' fees,
13 is less than \$75,000." Id. ¶ 1.

14 On March 14, 2011, Defendants filed a Notice of Removal,
15 removing this case to federal court on the basis of diversity
16 jurisdiction. (Notice of Removal ¶ 7.) Defendants' Notice of Removal
17 states that removal is proper since there is complete diversity of
18 citizenship between Plaintiffs and Defendants and the amount in
19 controversy exceeds the sum of \$75,000, exclusive of costs and interest.
20 Id.

21 **II. LEGAL STANDARD**

22 Removal to federal court is only proper under diversity
23 jurisdiction when a case originally filed in state court is between
24 citizens of different states and involves an amount in controversy that
25 exceeds \$75,000. See 28 U.S.C. § 1332(a). "The removal statute is
26 strictly construed against removal jurisdiction [and] [t]he defendant
27 bears the burden of establishing that removal is proper." Provincial
28 Gov't of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1087 (9th Cir.

1 2009) (citations omitted). "Where doubt regarding the right to removal
2 exists, a case should be remanded to state court." Matheson v.
3 Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003).

4 "Where it is not facially evident from the complaint that more
5 than \$75,000 is in controversy, the removing party must prove, by a
6 preponderance of the evidence, that the amount in controversy meets the
7 jurisdictional threshold." Matheson, 319 F.3d at 1090. Defendants need
8 to "provide evidence establishing that it is 'more likely than not' that
9 the amount in controversy exceeds" \$75,000. Sanchez v. Monumental Life
10 Insurance Co., 102 F.3d 398, 404 (9th Cir. 1996). The Court will
11 "consider[] facts presented in the removal petition as well as any
12 'summary judgment-type evidence relevant to the amount in controversy at
13 the time of removal.' Conclusory allegations as to the amount in
14 controversy are insufficient." Matheson, 319 F.3d at 1090-91.

15 Plaintiff, citing Guiglielmino v. McKee Foods Corp., 506 F.3d
16 696, 699 (9th Cir. 2007), argues that since he "unequivocally alleges
17 the amount in controversy . . . is less than \$75,000[,] . . . Defendants
18 must prove to a legal certainty, that the federal jurisdiction amount is
19 met." (Mot. 4:3-5, 18-19.) However, "[i]n a footnote, the Guiglielmino
20 court discussed and left open the question whether the . . . 'legal
21 certainty' standard applies only in the [Class Action Fairness Act
22 ("CAFA")] context." HSBC Bank USA, NA v. Valencia, No.
23 09-CV-1260-OWW-JLT, 2010 WL 546721, at *5 (E.D. Cal. Feb. 10, 2010).
24 Several district courts have extended the legal certainty burden of
25 proof to § 1332(a) diversity jurisdiction cases. See e.g. Lara v. Trimac
26 Transp. Servs. Inc., No. CV 10-4280-GHK (JCx), 2010 WL 3119366, at *1
27 n.1 (C.D. Cal. Aug. 6, 2010) (applying the legal certainty standard in
28 a § 1332(a) diversity jurisdiction case); accord Site Mgmt. Solutions,

1 Inc. v. TMO CA/NV, LLC, No. CV 10-08679 MMM (JEMx), 2011 WL 1743285, at
2 *3 (C.D. Cal. May 4, 2011); but see Lyon v. W.W. Grainger, Inc., No. C
3 10-00884 WHA, 2010 WL 1753194, at *1 (N.D. Cal. Apr. 29, 2010)
4 (explaining “[i]t would be an unprecedented extension of Ninth Circuit
5 caselaw to apply the burden of proof that plaintiff suggests to a
6 non-CAFA case such as this”). However, this issue need not be determined
7 in this case since, as discussed below, Defendants have not met their
8 burden of proof under the preponderance of the evidence standard.

10 **III. Discussion**

11 Plaintiffs argue this action should be remanded to state court
12 since Defendants failed to offer “evidence supporting [their] contention
13 that the amount in controversy exceeds \$75,000[.]” (Mot. for Remand
14 (“Mot.”) 6:1-2.) Defendants respond, arguing diversity jurisdiction
15 exists since the “the uncontroverted evidence establishes that the
16 amount in controversy is well in excess of \$75,000.” (Opp’n 1:11-12.)

17 **A. Unpaid Overtime**

18 Defendants argue the “amount in controversy [is] more than
19 \$75,000 on [Plaintiff’s unpaid overtime] claim alone[.]” (Opp’n 8:13-
20 14.) Plaintiff alleges that “Defendants regularly and consistently
21 failed to pay overtime wages to Plaintiff” and Plaintiff was “required
22 to work more than eight (8) hours per day and/or forty (40) hours per
23 week without overtime compensation.” (Compl. ¶ 40.) Defendants argue
24 they “based their removal calculations on the amount in controversy for
25 Plaintiff’s overtime claim on the assumption that Plaintiff ‘regularly
26 and consistently’ worked at least 10 hours of overtime per week.” (Opp’n
27 6:14-16.) Defendants argue their “estimates [are] credible” since
28 “[w]hen asked to stipulate that he worked less than 10 hours of overtime

1 per week, Plaintiff refused to stipulate." Id. 7:15-17. Plaintiff
2 counters that his "refusal to stipulate to the amount of overtime hours
3 [he] worked is [not] evidence of bad faith" and "Defendants cannot prove
4 their overtime calculations without [their] assumption" that Plaintiff
5 worked ten hours of overtime per week. (Reply 2:24-25, 6:25-26.)

6 Defendants acknowledge their calculations of the amount in
7 controversy in Plaintiff's unpaid overtime claim are based on an
8 "assumption"; Plaintiff's refusal to stipulate to the amount of overtime
9 hours he worked is not evidence and does not support Defendants'
10 "assumption". See Bassel v. 4Access Communications Co., No.
11 07cv2346-L(JMA), 2008 WL 2157005, at *3 (S.D. Cal. May 21, 2008) ("If a
12 plaintiff's refusal to stipulate is sufficient to satisfy that burden,
13 a defendant could force the plaintiff to choose between stipulating
14 against his or her future remedies and remaining in federal court.").
15 Defendants fail to support their calculation of the amount in
16 controversy in Plaintiff's unpaid overtime claim with evidence and
17 "conclusory allegations as to the amount in controversy are
18 insufficient." Matheson, 319 F.3d at 1090-91. Therefore, Defendants
19 cannot establish the amount in controversy in this claim.

20 **B. Unpaid Minimum Wages**

21 Plaintiff also alleges he was "not paid at least minimum
22 compensation for all hours worked." (Compl. ¶ 62.) Defendants argue
23 Plaintiff's Complaint "is completely silent on how many hours for which
24 Plaintiff claims he was not paid minimum wage." (Opp'n 8:24-15.)
25 However, Defendants do not offer any evidence or calculate what
26 Plaintiff is more likely than not to recover for his unpaid minimum wage
27 claim. Therefore, Defendants fail to establish the amount in controversy
28 for this claim.

1 ///

2
3 **C. Liquidated Damages**

4 Plaintiff seeks liquidated damages in his claim for unpaid
5 overtime and minimum wages, under California Labor Code section 1194.2,
6 which states in relevant part: "In any action under Section 1193.6 or
7 Section 1194 to recover wages because of the payment of a wage less than
8 the minimum wage . . . , an employee shall be entitled to recover
9 liquidated damages in an amount equal to the wages unlawfully unpaid and
10 interest thereon." CAL. LAB. CODE § 1194.2(a).

11 Defendants argue that "Plaintiff's request for liquidated
12 damages would double the amount in controversy at issue on the unpaid
13 minimum wages and overtime wages claim." (Opp'n 9:3-4.) However, section
14 1194.2 proscribes that "nothing in this subdivision shall be construed
15 to authorize the recovery of liquidated damages for failure to pay
16 overtime compensation." CAL. LAB. CODE § 1194.2(a). Since Defendants fail
17 to establish the amount in controversy for Plaintiff's unpaid minimum
18 wage claim, Defendant cannot calculate liquidated damages for
19 Plaintiff's unpaid minimum wage claim.

20 **D. Civil Penalties**

21 Plaintiff also seeks to recover civil penalties in his claim
22 for failure to pay overtime and minimum wages, under California Labor
23 Code section 1197.1. (Compl. ¶ 71.) In his second claim, Plaintiff seeks
24 penalties under California's Private Attorneys General Act ("PAGA"),
25 California Code of Regulations Title 8 section 11070, and California
26 Labor Code section 210. (Compl. ¶ 84(a), (b), (c).) Defendants argue that
27 under these provisions Plaintiff will recover \$3,100 in penalties for
28 his first claim, and \$32,000 in penalties for his second claim. (Opp'n

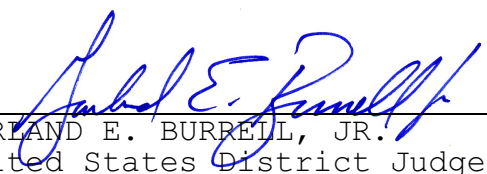
1 9:16-19.) Even assuming *arguendo* that Plaintiff would be entitled to the
2 maximum penalties under these statutes, Defendant establishes \$35,100 in
3 controversy for these claims.

4 **E. Attorneys' Fees**

5 Defendants argue "plaintiff may recover reasonable attorneys'
6 fees" and that these attorneys' fees "add to the amount in controversy."
7 (Opp'n 13:8-10.) Defendants argue that "[u]sing a conservative hourly
8 rate of \$300 per hour for Plaintiff's counsel, if Plaintiff's counsel
9 spent 200 hours on the instant case, it would amount to \$60,000 in
10 attorney's fees." *Id.* 13:10-12. Plaintiff argues that "[a]lthough
11 Defendants make these conclusions relating to the amount of attorneys'
12 fees, [they] failed to submit any supporting evidence." (Mot. 12:3-4.)
13 Defendants counter that "Plaintiff's counsel do not state that their
14 hourly rates are . . . less than \$300" and they do not "state that they
15 will not seek attorney's fees of more than \$60,000[.]" (Opp'n 13:19-21.)
16 However, "[D]efendant[s] bear[] the burden of establishing that removal
17 is proper[,] and their assumptions regarding the attorneys' fees
18 Plaintiff will recover lack a foundation. *Placer Dome, Inc.*, 582 F.3d at
19 1087. Defendants' conclusory argument does not prove by a preponderance
20 of the evidence that Plaintiff will recover \$60,000 in attorneys' fees.

21 Since Defendants have not proved by a preponderance of the
22 evidence that the amount in controversy exceed \$75,000, Plaintiff's
23 remand motion is GRANTED. Therefore, this case is REMANDED to the
24 Sacramento County Superior Court in California.

25 Dated: July 9, 2011

26
27 
28 GARLAND E. BURRELL, JR.
United States District Judge