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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JORGE LOPEZ, individually, and on behalf of other members of the general public similarly situated, and as aggrieved employees pursuant to the Private Attorneys General Act ("PAGA"),)	Case No. 2:12-CV-00003-JAM-CKD
)	
)	<u>ORDER GRANTING PLAINTIFF'S</u>
)	<u>MOTION TO REMAND</u>
)	
)	
Plaintiff,)	
)	
v.)	
)	
SOURCE INTERLINK COMPANIES, INC., a Delaware corporation;)	
COMPLETE PERSONNEL LOGISTICS, INC., an Ohio corporation; and)	
DOES 1 through 10, inclusive,)	
)	
Defendants.)	

This matter is before the court on Plaintiff Jorge Lopez's ("Plaintiff") Motion to Remand for Lack of Subject Matter Jurisdiction (Doc. #9). Defendant Source Interlink ("Defendant") opposes the motion (Doc. #12), and Plaintiff filed a Reply (Doc. #13). For the reasons given below, Plaintiff's motion is GRANTED.

I. BACKGROUND

Plaintiff filed a class action complaint in San Joaquin County Superior Court on October 28, 2011 (Doc. #1, Ex. A). Defendant then removed the action to this court on December 30, 2011 (Doc.

1 #1). Defendant's Notice of Removal asserts that this Court has
2 subject matter jurisdiction over Plaintiff's complaint pursuant to
3 the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d).
4 Plaintiff asserts that removal was improper and seeks remand on the
5 grounds that Defendant has not met CAFA's jurisdictional amount in
6 controversy requirement.

7 Plaintiff is a truck driver formerly employed by Defendants.
8 Plaintiff was hired by defendant Consolidated Personnel Logistics
9 ("CPL") and then leased to work for Defendant. Plaintiff's
10 complaint contains seven causes of action against all defendants
11 asserted on behalf of himself and others similarly situated:

- 12 1) Violation of California Labor Code §§ 510 and 1198 (Unpaid
13 Overtime); 2) Violation of California Labor Code §§ 1194,
14 1197, 1197.1 (Unpaid Minimum Wages); 3) Violation of
15 California Labor Code § 226(a) (Non-compliant Wage
16 Statements); 4) Violation of California Labor Code §§ 2800
17 and 2802 (Unpaid Business Expenses); 5) Violation of
18 California Labor Code §§ 201 and 202 (Wages Not Timely Paid
19 Upon Termination); 6) Violation of California Labor Code §§
20 2698, et seq. (Private Attorneys General Act ("PAGA")); and 7)
21 Violation of California Business and Professions Code §§
22 17200, et seq.

23 24 II. OPINION

25 A. Legal Standard

26 Federal district courts have subject matter jurisdiction over
27 class actions in which the amount in controversy exceeds \$5,000,000
28 and there exists at least minimal diversity of citizenship between

1 the parties and the class consists of at least 100 members. CAFA,
2 28 U.S.C. §§ 1332(d)(2), 1332(d)(5). A defendant may remove such
3 an action from state to federal court. 28 U.S.C. § 1441(a).

4 When a defendant removes a class action from state court
5 pursuant to CAFA, it bears the burden of showing jurisdiction.
6 Lowdermilk v. U.S. Bank Nat'l Ass'n, 479 F.3d 994, 997 (9th Cir.
7 2007) (citing Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676,
8 685 (9th Cir.2006) (per curiam)). When a plaintiff specifically
9 pleads an amount in controversy that is less than the \$5,000,000
10 jurisdictional threshold, the removing defendant must “contradict
11 the plaintiff’s own assessment of damages, [and] overcome the
12 presumption against federal jurisdiction” by showing with legal
13 certainty that the amount in controversy exceeds the statutory
14 threshold. Id. at 999-1000. The legal certainty standard requires
15 that the Defendant provide enough “concrete evidence . . . to
16 estimate” the actual amount in controversy. Id. at 1000. “The
17 ‘legal certainty’ standard sets a high bar for the party seeking
18 removal, but it is not insurmountable.” Id.

19 B. Analysis

20 The parties do not dispute that the class is sufficiently
21 numerous and that minimal diversity exists. Plaintiff argues that
22 remand is proper only because he pleads entitlement to less than \$5
23 million in damages. Defendant opposes remand arguing that despite
24 Plaintiff’s allegations, the amount in controversy is greater than
25 \$5 million.

26 1. Consideration of Evidence Introduced in Defendant’s
27 Opposition

28 Defendant claims in the Notice of Removal that Plaintiff’s

1 claims place more than \$5,000,000 in controversy. In the notice,
2 Defendant calculates that Plaintiff is claiming the following:

3 Sixth Cause of Action (PAGA)	\$418,300
4 Third Cause of Action (Wage Statements)	\$516,000
5 Fifth Cause of Action (Waiting Time Penalties)	\$203,040

6 Defendant then claims that the remaining causes of action, in
7 addition to attorney's fees and other relief sought, would place
8 the amount above \$5 million, relying on an assumption that
9 compensatory damages and attorneys' fees will exceed \$25,000 for
10 each of the 89 estimated class members. Lombardi Decl., Notice of
11 Removal, ¶¶ 29-30 (Doc.#1-2).

12 Plaintiff's Motion to Remand focuses on the amounts projected
13 in Defendant's Notice of Removal. In opposition, however,
14 Defendant re-calculates all of the amounts allegedly claimed by
15 Plaintiff in order to assert significantly different sums:

16 Sixth Cause of Action (PAGA)	\$9,489,200
17 Third Cause of Action (Wage Statements)	\$1,536,000
18 Fifth Cause of Action (Waiting Time Penalties)	\$867,000
19 Injunctive Relief	\$720,488
20 Attorneys' Fees	\$2,973,140

21 Based on these new sums, the statutory threshold would be met by
22 Plaintiff's PAGA claim alone.

23 In the Reply, Plaintiff argues that the Court cannot consider
24 evidence presented outside of Defendant's Notice of Removal.
25 Defendant argues that the new evidence is properly considered as an
26 amendment to the notice. "[I]t is proper to treat the removal
27 petition as if it had been amended to include the relevant
28 information contained in the later-filed affidavits." Willingham

1 v. Morgan, 395 U.S. 402, 408 n. 3 (1969). Accordingly, the Court
2 will consider the sums in Defendant's Opposition insofar as they
3 are based on adequate evidence.

4 2. The Size of the Class

5 Plaintiff next argues that the sums in the Opposition include
6 recovery by individuals who do not fall under the class definitions
7 in the complaint. Plaintiff points out that the projected class
8 size for some of the claims in the Notice of Removal was only 89,
9 but that it is 180 in Defendant's Opposition. The Opposition
10 relies on a declaration by John Hehnen which states, "[A] technical
11 reading of Plaintiff's definition is that it consists only of
12 drivers who worked for Source Interlink and CPL. . . . Nonetheless
13 . . . I have assumed that Plaintiff's allegations are broader and
14 that he purports to represent all drivers CPL leased in California,
15 not just those leased to Source Interlink." (Hehnen Decl. ¶¶ 4-5).
16 Based on this broadened class definition, Defendant includes truck
17 drivers in the class that worked for CPL in California, but not
18 Defendant.

19 Defendant bears the burden of showing to a legal certainty
20 that the Court has subject matter jurisdiction under CAFA.
21 Lowdermilk, 479 F.3d at 999-1000. The Court finds that Mr.
22 Hehnen's assumption, which is not based on the language in the
23 Complaint or concrete evidence, does not meet the Lowdermilk
24 standard, and therefore the additional class members can not be
25 considered in this motion. The remaining drivers identified by
26 Defendant are those that worked for Defendant, either directly or
27 after being leased by CPL. The Court finds that those drivers are
28 properly considered class members based on the class definitions

1 for the purposes of subject matter jurisdiction.

2 3. The Amount in Controversy

3 a. The PAGA Claim

4 Plaintiff argues that the PAGA claim amount in controversy is
5 inflated by the inclusion of drivers that do not fall under class
6 definitions and because the class's recovery is limited to 25% of
7 the amount awarded, with the rest going to the State of California.

8 According to PAGA, a successful aggrieved employee who sues
9 for civil damages must give 75% of the award to the California
10 Labor and Workforce Development Agency, and may keep only 25%.
11 Cal. Labor Code § 2699(h) (i). The 75% awarded to the state is not
12 considered to be an amount in controversy for jurisdictional
13 purposes. Pulera v. F & B, Inc., No. 2:08-cv-00275-MCE-DAD, 2008
14 WL 3863489, at *4 (E.D. Cal. Aug. 19, 2008). After accounting for
15 the improperly included class members (57 for this claim) and the
16 75% due to the state, the Court finds that the estimated amount in
17 controversy shown by Defendant for this cause of action is, at
18 most, approximately \$1,407,175.¹ The Court notes that this
19 estimate is also inflated since it is based on the assumption that
20 all of the drivers in the class worked the full year, even though
21 Defendant admits that this is not true. See Hehnen Decl. ¶ 12
22 (Some drivers quit part way through the year).

23 b. The Non-Compliant Wage Statements Claim

24 For the reasons discussed above, 198 drivers employed by CPL

25 _____
26 ¹ 123 Drivers x \$100 for first violation x 7 causes of action =
27 \$86,100. 34 Drivers (paid weekly) x \$200 for second violation x 7
28 causes of action x 51 remaining pay periods = \$2,427,600. 89
Drivers (paid bi-weekly) x \$200 for second violation x 7 causes of
action x 25 remaining pay periods = \$3,115,000. Plaintiff is only
entitled to 25% of the sum total or 25% x \$5,628,700 = \$1,407,175.
Oppo., at 3-5.

1 but not leased to Defendant were improperly included as class
2 members in Defendant's calculations in the Opposition. Oppo., at
3 4. After removing those drivers, the amount in controversy for
4 this claim is not \$1,536,000 as estimated by Defendant, but is more
5 accurately calculated by multiplying \$4,000 in maximum statutory
6 damages by 129 of Defendant's Drivers plus 57 drivers provided by
7 CPL to Defendant for a total of \$744,000. Id.; Cal. Labor Code §
8 226(a) (Maximum damages of \$4,000). The Court recognizes that this
9 amount is also inflated because Defendant has not produced evidence
10 to support maximum damages for every driver. See Cifuentes v. Red
11 Robin Int'l, Inc., No. C-11-5635-EMC, 2012 U.S. Dist. LEXIS 27211,
12 at *14-15 (N.D. Cal. Mar. 1, 2012) (Defendant failed to meet legal
13 certainty standard when it did not provide an evidentiary basis for
14 its assumptions and estimates).

15 c. Waiting Time Penalties

16 For this cause of action, Defendant calculates damages based
17 on the statutory maximum of 30 days for every driver who terminated
18 their employment during the preceding four years. Plaintiff
19 responds that there is no evidence that every driver waited 30 days
20 or longer, and that the statute of limitations for this claim is
21 three years, not four.

22 The Court agrees that Defendant's calculation is not based on
23 concrete evidence, and thus does not meet the legal certainty
24 standard. See Cifuentes, 2012 U.S. Dist. LEXIS 27211, at *14-15.
25 Further, Plaintiff is correct that the statute of limitations for
26 waiting time penalties, distinct from back wages claimed through
27 Plaintiff's § 17200 claim, is three years. Pineda v. Bank of Am.,
28 N.A., 241 P.3d 870, 876 (Cal. 2010). Accordingly, the Court finds

1 that Defendant has not met its burden to show an amount in
2 controversy with legal certainty based upon concrete evidence and
3 therefore cannot include any amount for this claim in the total
4 amount in controversy calculation.

5 d. Other Damages

6 Defendant argues that other claims pleaded by Plaintiff will
7 also increase the amount in controversy. In support of this
8 argument, Defendant asks the Court to assume that "each driver
9 worked one hour of uncompensated overtime and missed one meal break
10 per week." Opp., at 11. Plaintiff responds that those damages are
11 entirely speculative and based on insufficient evidence in light of
12 Defendant's burden to prove jurisdiction.

13 The Court agrees with Plaintiff's argument. Defendant cites
14 no evidence to support the claim that all of the drivers went
15 uncompensated for overtime and meal breaks at the rate of one hour
16 and meal per week. The calculation of other damages in the
17 original Notice of Removal are improper for the same reason, as
18 those damages were based on the assumption that compensatory
19 damages will exceed \$25,000 per class member without evidentiary
20 support. Accordingly, Defendant has not proven these damages to a
21 legal certainty and they can not be considered by the Court. See
22 Cifuentes, 2012 U.S. Dist. LEXIS 27211, at *14-15.

23 e. The Cost of Compliance of Injunctive Relief

24 Defendant presents evidence that injunctive relief sought in
25 Plaintiff's Business & Professions Code § 17200 claim will cost
26 \$130,088 in the first year and \$65,600 each additional year. Thus,
27 for a 10 year injunction, the cost will be \$720,488 and the cost
28 will be unlimited for a permanent injunction. Plaintiff responds

1 that the cost of compliance with an injunction is not considered
2 for amount in controversy analyses.

3 The rule cited by Plaintiff originates in Snow v. Ford Motor
4 Co., 561 F.2d 787 (9th Cir. 1977). The holding in that case was
5 based on a then-existing rule that the costs of complying with
6 injunctive relief could not be used for jurisdictional purposes
7 because class claims could not be aggregated. Id. at 790. CAFA,
8 passed in 2005, requires the aggregation of claims, so the Snow
9 rule is of dubious applicability to the present case.

10 Turning to the merits of Defendant's position, the Court finds
11 that the costs of complying with an injunction are not properly
12 considered to be an amount in controversy for jurisdictional
13 purposes in this particular case. The relief requested by
14 Plaintiff is that Defendant be ordered to comply with state wage
15 and hour laws insofar as they are applicable to Defendant.
16 Plaintiff's injunction will not create the costs associated with
17 compliance because, if Plaintiff's allegations are true, Defendant
18 is supposed to comply with state law regardless. Thus, the
19 prospective costs of complying with the injunctive relief requested
20 are incidental to that relief. Incidental costs are not included
21 in the amount in controversy analysis. Parham v. McDonald's Corp.,
22 No. C 11-511 MMC, 2011 WL 2860095, at *1 (N.D. Cal. July 20, 2011)
23 (citing In re Ford Motor Co., 264 F.3d 952, 958 (9th Cir.2001)
24 (holding, where injunctive relief sought, "amount in controversy is
25 the pecuniary result to either party which the judgment would
26 directly produce")) (emphasis added). Thus, the costs of
27 injunctive relief properly considered for remand purposes are costs
28 such as restitution of improperly withheld wages, and not the cost

1 of merely complying with the law.

2 f. The Aggregate Amount in Controversy

3 After adjusting the total amount in controversy to reflect the
4 Court's findings, it is clear that Defendant has not met its burden
5 of showing with concrete evidence that the amount in controversy is
6 greater than \$5,000,000. The amount in controversy shown by
7 Defendant is, at most, as follows:

8 PAGA Claim	\$1,407,175
9 Non-Compliant Wage Statements Claim	\$744,000
10 Waiting Time Penalties Claim	Insufficient evidence.
11 Attorneys' fees (Defendant Calculates as 25% of Damages)	\$537,793.75
12 Injunctive Relief	Cannot be included in calculation
13 Other Damages	Insufficient evidence.
14 Total:	\$2,019,368.75

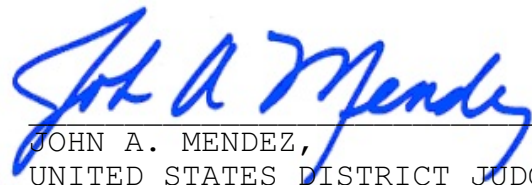
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16 Plaintiff disputes other components of the amounts listed above. It
17 is not necessary to reach Plaintiff's arguments concerning the
18 propriety of assuming maximum damages for certain claims, and the
19 statute of limitations assumed by Defendant since the Court already
20 finds that Defendant has not met its burden to show \$5 million in
21 controversy. Accordingly, Plaintiff's motion is granted.

22 III. ORDER

23 For the reasons discussed above, the Court GRANTS Plaintiff's
24 Motion to Remand. This action is hereby remanded back to the
25 Superior Court of San Joaquin County, California. The Court orders
26 the clerk to close this case.

27 IT IS SO ORDERED.

28 Dated: March 28, 2012


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE