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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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10 PHILLIP SIMS, individually
11 and on behalf of all others
similarly situated,

12 Plaintiff,

13 v.

14 AT&T MOBILITY SERVICES LLC, a
15 Delaware limited liability
company; and DOES 1 through
16 10, inclusive,

17 Defendants.

No. 2:12-cv-02702-JAM-AC

**ORDER GRANTING DEFENDANT'S
REQUEST TO STAY**

18 Pending before the Court are Plaintiff Phillip Sims's
19 ("Plaintiff") Motion to Remand and for Attorneys' Fees and Costs
20 (Doc. #8) and Defendant AT&T Mobility Services LLC's
21 ("Defendant") Motion to Dismiss Plaintiff's Seventh and Eighth
22 Claims (Doc. #6).¹ Both motions are fully briefed.

23

24

I. BACKGROUND

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This lawsuit was originally filed in San Joaquin County

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27 ¹ The motions were determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing for both
motions was originally scheduled for January 23, 2013.

1 Superior Court. Defendant then removed the action pursuant to 28
2 U.S.C. § 1453 claiming federal jurisdiction under the Class
3 Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). Defendant
4 alleges that CAFA's jurisdictional requirements are met because
5 more than \$5,000,000 is in controversy and minimal diversity of
6 citizenship exists between the parties. After removing the
7 action, Defendant moved to dismiss Plaintiff's seventh and eighth
8 claims and strike Plaintiff's claim for punitive damages.
9 Plaintiff then moved to remand this action to state court because
10 he contests the Court's subject matter jurisdiction over this
11 action.

12 The substantive claims raised by Plaintiff relate to his
13 former employment with Defendant. Plaintiff was a Retail Store
14 Manager ("RSM") for one of Defendant's retail locations.
15 Plaintiff alleges that his position was unlawfully classified as
16 exempt from state overtime and break period laws. Plaintiff
17 accordingly seeks unpaid wages as well as other penalties
18 allegedly due under California law.

20 II. OPINION

21 Plaintiff's Motion to Remand will be addressed first because
22 if the Court lacks subject matter jurisdiction, the action must
23 be remanded to state court without reaching the merits of
24 Defendant's motion to dismiss.

25 A. Subject Matter Jurisdiction

26 1. Legal Standard

27 Federal district courts have subject matter jurisdiction
28 over class actions in which (1) the amount in controversy exceeds

1 \$5,000,000, (2) there exists at least minimal diversity of
2 citizenship between the parties, and (3) the class consists of at
3 least 100 members. CAFA, 28 U.S.C. §§ 1332(d)(2), 1332(d)(5). A
4 defendant may remove such an action from state to federal court.
5 28 U.S.C. § 1441(a).

6 When a defendant removes a class action from state court
7 pursuant to CAFA, it bears the burden of showing jurisdiction.
8 Lowdermilk v. U.S. Bank Nat'l Ass'n, 479 F.3d 994, 997 (9th Cir.
9 2007) (citing Abrego Abrego v. The Dow Chemical Co., 443 F.3d
10 676, 685 (9th Cir.2006) (per curiam)). When a plaintiff
11 specifically pleads an amount in controversy that is less than
12 the \$5,000,000 jurisdictional threshold, the removing defendant
13 must "contradict the plaintiff's own assessment of damages, [and]
14 overcome the presumption against federal jurisdiction" by showing
15 with legal certainty that the amount in controversy exceeds the
16 statutory threshold. Id. at 999-1000. If a plaintiff pleads an
17 amount in controversy greater than the jurisdictional threshold,
18 remand is only proper when it is shown to a legal certainty that
19 the threshold is not actually met. Id. at 998. Finally, where
20 no amount in controversy is pled, a removing defendant need only
21 show that the amount is sufficient by a preponderance of the
22 evidence. Id.

23 The legal certainty standard requires that the Defendant
24 provide enough "concrete evidence . . . to estimate" the actual
25 amount in controversy. Id. at 1000. "The 'legal certainty'
26 standard sets a high bar for the party seeking removal, but it is
27 not insurmountable." Id.

1 2. Discussion

2 Plaintiff seeks remand on the grounds that Defendant has not
3 shown to a legal certainty that the jurisdictional amount in
4 controversy requirement is satisfied. Plaintiff argues that the
5 legal certainty standard applies because the Complaint
6 specifically alleges that the amount in controversy is less than
7 \$5,000,000. In order to rebut Defendant's evidence concerning
8 the amount in controversy, Plaintiff argues that the class size
9 estimated by Defendant is over-inclusive and that Defendant's
10 other damages calculations are supported by insufficient
11 evidence. Plaintiff also argues that he waived recovery beyond
12 \$5,000,000 (the "CAFA waiver"), which defeats federal
13 jurisdiction. Defendant responds to Plaintiff's arguments in two
14 ways. First, Defendant argues that Plaintiff cannot waive
15 recovery beyond \$5,000,000 in order to avoid federal
16 jurisdiction. Defendant also argues that the Complaint does not
17 plead an amount in controversy less than \$5,000,000, but instead
18 pleads a waiver of any recovery beyond that amount. Second,
19 Defendant alternately argues that it has shown that the amount in
20 controversy exceeds the \$5,000,000 threshold. Defendant must
21 first show that the \$5,000,000 threshold is met before the
22 validity of the CAFA waiver affects jurisdiction, so the Court
23 will address the amount in controversy first.

24 a. Amount in Controversy

25 Plaintiff argues that Defendant failed to show to a legal
26 certainty that the \$5,000,000 threshold is met in this case.
27 Plaintiff points to the Notice of Removal and claims that it is
28 not supported by evidence sufficient to show subject matter

1 jurisdiction under the legal certainty standard. Defendant
2 responds that the legal certainty standard does not apply in this
3 case because Plaintiff never pled an amount in controversy in his
4 complaint. Defendant argues that Plaintiff only pled a waiver of
5 damages over \$5,000,000, but not that the amount in controversy
6 is less than \$5,000,000. Defendant adds that Plaintiff's waiver
7 of damages beyond \$5,000,000 was made in bad faith because the
8 validity of such waivers is currently pending before the Supreme
9 Court. Defendant therefore takes the position that it must only
10 show that the threshold is met by a preponderance of the
11 evidence, not that it is met to a legal certainty.

12 The Court disagrees with Defendant's characterization of the
13 complaint. Plaintiff pleads at paragraph 10 of his complaint,
14 "[T]he aggregate amount in controversy is less than five million
15 dollars (\$5,000,000). Plaintiff further waives seeking more than
16 five million dollars (\$5,000,000) regarding the aggregate amount
17 in controversy for the class claims alleged herein." Complaint
18 ¶ 10. Based on this paragraph, Plaintiff has clearly alleged
19 both that the amount in controversy is less than \$5,000,000 and
20 that he waives recovery beyond \$5,000,000 in the event that he is
21 incorrect regarding the amount actually in controversy.

22 The Lowdermilk decision analyzed nearly identical language
23 in determining that the legal certainty standard applied. In
24 Lowdermilk, the plaintiff pled entitlement to damages "in total,
25 less than five million dollars" and also sought attorneys' fees.
26 Lowdermilk, 479 F.3d at 997. The Lowdermilk court held that the
27 language used by the plaintiff triggered the legal certainty
28 standard. Id. at 998-99.

1 With regard to Plaintiff's complaint in this case, the
2 language used to plead entitlement to less than \$5,000,000 in
3 damages is functionally indistinguishable from that used in the
4 Lowdermilk case. Based on Lowdermilk, all a plaintiff has to do
5 to invoke the heightened standard is make some affirmative claim
6 that he or she is entitled to damages below the jurisdictional
7 threshold. That was done in this case, and Defendant therefore
8 bears the burden of showing that the jurisdictional threshold is
9 met to a legal certainty.

10 Defendant's argument that Plaintiff pled entitlement to
11 damages below \$5,000,000 in bad faith is also unpersuasive.
12 Defendant bases this argument on the fact that the validity of
13 waivers to damages over \$5,000,000 in class actions is currently
14 pending before the Supreme Court. The problem with Defendant's
15 argument, however, is that the validity of specifically pleading
16 entitlement to damages less than \$5,000,000 is not being
17 reviewed, and Lowdermilk is still valid. Defendant's bad faith
18 argument may apply to the CAFA waiver, but Defendant has not
19 produced authority to support applying its argument to the
20 allegation that the amount in controversy is below \$5,000,000.²
21 Accordingly, the Court declines to find the mere inclusion of a
22 CAFA waiver in a complaint constitutes bad faith with regard to a
23

24 ² Defendant's argument that 28 U.S.C. § 1446(c)(2)(A) requires a
25 preponderance standard is unpersuasive because that statute
26 refers only to removals under 28 U.S.C. § 1332(a), not CAFA. See
27 Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 684 (9th Cir. 2006)
28 ("Given the care taken in CAFA to reverse certain established
principles but not others, the usual presumption that Congress
legislates against an understanding of pertinent legal principles
has particular force.").

1 separate amount in controversy allegation.

2 Based on the foregoing, Defendant must show enough "concrete
3 evidence . . . to estimate" the actual amount in controversy, and
4 that the amount is over \$5,000,000. In Defendant's notice of
5 removal, Defendant argues that Plaintiff's claims place the
6 following amounts in controversy:

7

8 Overtime Claims	\$3,060,408.00
9 Waiting Time Penalties	\$290,757.60
10 Meal and Rest Period Compensation Claims	\$4,079,836.80
11 Wage Statement Violation Claims	\$836,000.00
12 Total:	\$8,267,001.80

13 If Defendant's amount in controversy is supported by sufficient
14 evidence, it exceeds \$5,000,000 and this Court has jurisdiction.

15 i. Class Size

16 Defendant argues that the class in this litigation contains
17 at least 209 individuals. Defendant relies on the declaration of
18 Jo Anne Barron to support its contention. Barron Decl. (Doc. #1-
19 3). Ms. Barron testified that she is a human resources
20 generalist for Defendant, and that she has access to the employee
21 records of Defendant. Id. ¶ 1. Based on her review of
22 Defendant's records, Ms. Barron determined that 209 individuals
23 worked in Defendant's Northern California district during the
24 relevant time period, with an average of 102 actively employed at
25 any given time. Id. ¶ 3. Ms. Barron also testified that 63 of
26 those 209 individuals are no longer employed with Defendant. Id.
27 ¶ 5. Finally, Ms. Barron testified that the average salary of
28

1 the 209 employees is in excess of \$40,000. Id. ¶ 7.

2 Plaintiff disputes Defendant's estimated class size,
3 claiming that the class used by Defendant is over-inclusive.
4 Plaintiff argues that he only intends to represent RSMs who
5 worked for Defendant at retail locations within California's
6 Central Valley. To show a smaller estimated class size,
7 Plaintiff accessed Defendant's website to list store locations
8 within 50 miles of Sacramento, CA and Fresno, CA. Korvilas Decl.
9 (Doc. #8-3), Exs. D-E.

10 Plaintiff's complaint seeks to represent a class defined as:

11 All Retail Sales Managers ("RSM") in AT&T's district
12 encompassing the Central Valley of California who
13 work(ed) for AT&T Mobility Services LLC at any time
14 within four years prior to the initiation of this
15 action until the present.

16 Complaint ¶ 12.

17 Importantly, the definition used in the complaint relies on
18 Defendant's definition of the district encompassing the Central
19 Valley, but the definition does not limit the class to those RSMs
20 who worked in the geographical area known as the Central Valley
21 of California. Plaintiff argues that Defendant is attempting to
22 expand the geographic region beyond his intent, arguing that his
23 use of a lower case "d" in the word district indicates that he
24 "intended to refer to the smallest geographic subdivision of AT&T
25 including the Central Valley area." Reply (Doc. #17) 8. The
26 Court is not persuaded by Plaintiff's rebuttal. The definition
27 used in the complaint relies on the district established by
28 Defendant that encompasses the Central Valley. Ms. Barron

1 testified that the corresponding district is Defendant's Northern
2 California district. Plaintiff's reliance on Defendant's website
3 is also under-inclusive because it focuses only on the immediate
4 areas around Fresno and Sacramento, not the Central Valley as a
5 whole. Since the district referenced in the complaint
6 encompasses the entire Central Valley, and by implication, at
7 least some areas outside of the Central Valley, focusing only on
8 the Fresno and Sacramento regions fails to consider at least some
9 RSMs who should be included in the class. Accordingly, the
10 un rebutted evidence before the Court shows to a legal certainty
11 that the relevant district is the Northern California district
12 defined by Ms. Barron, and the relevant class size is
13 approximately 209 RSMs.

14 ii. Evidence Supporting Amount in Controversy

15 Defendant bases its estimates of the amount in controversy
16 on 1) the declaration submitted by Ms. Barron, 2) declarations
17 submitted by RSMs in other litigation brought by Plaintiff's
18 counsel, and 3) the allegations in the complaint itself.

19 The gist of the legal certainty standard is that the
20 proponent of federal jurisdiction in a CAFA case must produce
21 some evidence that permits a court to estimate the amount in
22 controversy. Thus, when a Plaintiff specifically pleads that the
23 amount in controversy is less than \$5,000,000, a removing
24 Defendant cannot rely solely on the allegations in the complaint.
25 Bonnel v. Best Buy Stores, L.P., No. C-12-2285 EMC, 2012 WL
26 3195081, *5, - F. Supp. 2d - (N.D. Cal. Aug. 7, 2012). The
27 allegations in the Complaint are still relevant because they
28 indicate what relief the plaintiff is seeking, and therefore

1 provide a basis for estimating the amount in controversy when
2 coupled with additional evidence submitted in support of removal.
3 Kenneth Rothschild Trust v. Morgan Stanley Dean Witter, 199 F.
4 Supp. 2d 993, 1001 (C.D. Cal. 2002).

5 Plaintiff does not dispute that the RSM declarations are
6 accurate, but he does dispute their relevance. Plaintiff points
7 out that two of the three declarants live outside of the Central
8 Valley and that their experiences are not germane to this
9 lawsuit. First, for the reasons discussed with regard to class
10 size, the declarant who worked for Defendant in Susanville, CA is
11 likely a member of the putative class because her city is in
12 Northern California. Second, the declaration from the RSM who
13 worked in Capitola, CA and Monterey, CA is relevant because
14 Capitola is in Northern California and the RSM's experience in
15 Monterey is at least probative of Defendant's overall corporate
16 policies, which are at issue here. In any event, the experiences
17 of the third declarant who worked in Fresno, CA and Clovis, CA
18 are undisputedly relevant and unrebutted by Plaintiff with regard
19 to the number of hours worked by RSMs pursuant to Defendant's
20 alleged policies.

21 With regard to the Court's jurisdiction under CAFA in this
22 case, the question then becomes whether or not Ms. Barron's
23 declaration combined with the allegations in the complaint and
24 the declarations of the RSMs submitted in support of removal
25 permit the Court to estimate an amount in controversy that
26 exceeds \$5,000,000. The Court notes that the following analysis
27 is not intended to comment on the merits of Plaintiff's claims.
28 The Court is required to assume only for jurisdictional purposes

1 the truth of Plaintiff's allegations that Defendant improperly
2 misclassified RSMs as exempt from wage and hour regulations, but
3 the opposite may be proven by Defendant as the case proceeds.

4 iii. Overtime Claims

5 In support of removal, Defendant estimates that each class
6 member seeks, at a minimum, one hour of overtime per day for five
7 days per week. Defendant then calculates a total amount of
8 \$3,060,408.00 based on an average of 102 RSMs employed at any
9 given time multiplied by an hourly overtime rate of \$28.85.³

10 Plaintiff responds to Defendant's calculation by arguing that it
11 is improper under the legal certainty standard to assume one hour
12 of uncompensated overtime per day and five workdays per week.
13 Plaintiff points to Lopez v. Source Interlink Cos., Inc., No.
14 2:12-CV-00003-JAM-CKD, 2012 WL 1131543, at *4, Slip Copy (E.D.
15 Cal. Mar. 29, 2012), a case remanded by this Court partially on
16 the finding that there was no evidence to support the defendant's
17 assumption that workers worked one hour of uncompensated overtime
18 and missed one meal break per week. Plaintiff also argues that
19 in order to meet the legal certainty standard, Defendant must
20 produce a damages analysis with respect to each class member.

21 The legal certainty standard does not require individualized
22 damages analyses with respect to each class member. All that the
23 legal certainty standard requires is the production of concrete

24
25 ³ The calculation is: $(\$28.85/\text{hour}) * (5 \text{ hours/week}) * (4 \text{ years in}$
26 $\text{the statutory period} * 52 \text{ weeks/year}) * (102 \text{ RSMs}) = \$3,060,408.$
27 Defendant derived a \$28.85 hourly wage by dividing the average
28 \$40,000 RSM salary established by Ms. Barron by 52 weeks/year and
by 40 hours/week to arrive at an hourly salary of \$19.23.
Overtime is paid at 1.5 times the regular rate, so the overtime
rate is \$28.85/hour.

1 evidence from which a court can estimate the amount in
2 controversy. Lowdermilk, 479 F.3d at 1000. Plaintiff's
3 reliance on Lopez is also misplaced. In Lopez, the Court
4 declined to include damages based on the removing defendant's
5 assumptions without supporting evidence. Lopez, 2012 WL 1131543,
6 at *4. Here, Defendant produced three declarations from RSMs
7 indicating that they regularly worked far more than five
8 uncompensated overtime hours per week. This evidence accords
9 with Plaintiff's allegations that Defendant "required PLAINTIFF
10 and members of the PLAINTIFF CLASS to work more than eight(8)
11 hours per day, twelve (12) hours per day, and/or forty (40) hours
12 per week." Compl. ¶ 22. A calculation based on only five
13 overtime hours per week when Plaintiff's allegations and the RSM
14 declarations support a much higher sum is reasonable and
15 satisfies the legal certainty standard. Accordingly, Defendant
16 has met its burden on the overtime claims and shown that
17 Plaintiff has placed \$3,060,408.00 in controversy.

18 iv. Waiting Time Penalties

19 Defendant calculates that \$290,757.60 is placed in
20 controversy by Plaintiff's waiting time penalties claims based on
21 Ms. Barron's testimony that 63 putative class members no longer
22 work for Defendant and were thus, according to Plaintiff's
23 allegations, not paid their final wages within the statutorily
24 mandated period.⁴ Plaintiff again challenges the sufficiency of
25 the evidence.

26 Plaintiff alleges that class members no longer employed by

27 ⁴ The calculation is: \$19.23 * 8 hours in a standard work day *
28 30 days * 63 eligible putative class members = \$290,757.60.

1 Defendant are entitled to waiting time penalties pursuant to Cal.
2 Labor Code §§ 201-203. Under those statutes, a terminated
3 employee is entitled to immediate payment of all wages due upon
4 termination. An employee that quits is entitled to all wages due
5 within 72 hours. For each day that the employee waits for final
6 wages, he or she is entitled to penalties in the amount of one
7 normal day's salary up to 30 days. Defendant has identified 63
8 employees that no longer work for Defendant as of November 2,
9 2012 when Ms. Barron's declaration was filed. Plaintiff's
10 allegation is that each terminated employee is entitled to
11 waiting time penalties for unpaid overtime wages, which Plaintiff
12 alleges were systematically never paid during the period
13 applicable to this lawsuit, including all terminated employees up
14 to the present. Ms. Barron's declaration was filed more than 33
15 days ago, so based on her testimony and Plaintiff's allegations,
16 it is certain that each of the 63 employees would be entitled to
17 the maximum waiting time penalty if Plaintiff's suit is
18 successful. Defendant has therefore shown to a legal certainty
19 that the waiting time penalty claims place \$290,757.60 in
20 controversy.

21 v. Meal and Rest Break Claims

22 To estimate the amount in controversy for Plaintiff's meal
23 and rest break claims, Defendant assumes that each of the 102
24 class members employed at any given time during the relevant
25 period missed one meal break and one rest break per shift.
26 Defendant bases its assumption on Plaintiff's allegations, which
27 indicate that Defendant failed to provide meal periods during
28 shifts greater than five hours and rest breaks for shifts over

1 four hours. Compl. ¶¶ 32-33. According to Cal. Labor Code
2 § 226.7(b), an employee is entitled to an extra hour of pay for
3 each shift without sufficient meal breaks and an hour of pay if
4 rest breaks are not provided. Accordingly, Defendant calculated
5 that the aggregate amount in controversy for the meal and rest
6 break claims is \$4,079,836.80.⁵ Plaintiff challenges this
7 calculation by arguing that Defendant needs to present a damages
8 analysis for each individual employee in order to meet the legal
9 certainty standard.

10 For the same reasons discussed with regard to the overtime
11 calculation, the Court finds Defendant's calculation of the
12 amount in controversy with regard to the meal and rest break
13 claims to be reasonable. This amount is again based on the
14 allegations in Plaintiff's complaint, the declarations of RSMs
15 produced by Defendant, and Ms. Barron's declaration. The RSM
16 declarations indicate that RSMs routinely worked more than five
17 shifts exceeding five hours per week, and the complaint alleges
18 that they were never provided the proper breaks. Taking the
19 aggregate of these three sources of information, the Court is
20 satisfied that this estimate is based on concrete evidence and
21 therefore satisfies the legal certainty standard.

22 vi. Wage Statement Violations

23 Defendant argues that the amount in controversy for the wage
24 statement violation claims is \$836,000. Defendant calculates
25 this amount assuming that each of 209 class members are entitled

26 ⁵ The calculation is: $(\$19.23/\text{hour}) * (2 \text{ extra hours/workday}) * (5$
27 $\text{workdays/week}) * (208 \text{ weeks during the four year limitations}$
28 $\text{period}) * (102 \text{ putative class members employed at any given time}) =$
 $\$4,079,836.80.$

1 to \$4,000 in statutory damages, but points out that the amount
2 might be much more if actual damages are proven. This
3 assumption, however, is deficient because there is no evidence in
4 the record as to how long RSMs worked with Defendant and thus how
5 many allegedly deficient wage statements each received.
6 According to Cal. Labor Code § 226(e), each employee is entitled
7 to \$50 for the first violation and \$100 per employee for each
8 subsequent violation, not to exceed \$4,000. It would be
9 improper under the legal certainty standard for the Court to
10 speculate as to how many wage statements each class member
11 received or how often wage statements were issued. Accordingly,
12 Defendant has not shown to a legal certainty an amount in
13 controversy for the Wage Statement Violation claims.

14 vii. Total Amount in Controversy

15 Based on the foregoing analysis, the Court finds that
16 Defendant has satisfied the legal certainty standard with respect
17 to the overtime claims and the meal and rest break claims. Thus,
18 Defendant has shown the amount in controversy to be at least
19 \$3,060,408.00 plus \$4,079,836.80 plus \$290,757.60 for a total
20 amount of \$7,431,002.40. Defendant also argues that Plaintiff's
21 prayer for other damages and attorneys' fees further increases
22 the amount in controversy. It is unnecessary to further analyze
23 the amount in controversy, however, because the \$5,000,000
24 threshold is already exceeded.

25 b. Validity of Plaintiff's CAFA Waiver

26 Finally, Plaintiff argues that since he waives recovery of
27 individual damages in excess of \$75,000 and class damages above
28 \$5,000,000 in aggregate, the Court lacks jurisdiction under CAFA.

1 Defendant argues that remand on this basis is improper because
2 the validity of such waivers will be considered by the Supreme
3 Court during its current term. Defendant cites the Supreme
4 Court's grant of certiorari in Standard Fire Ins. Co. v. Knowles
5 to support its argument. 133 S.Ct. 90 (2012). Standard Fire
6 involves the validity of a nearly identical CAFA waiver. The
7 district court in that case held that the waiver was valid, the
8 Eighth Circuit declined to hear an interlocutory appeal on the
9 issue, and the Supreme Court granted certiorari. Knowles v.
10 Standard Fire Ins. Co., No. 4:11-CV-04044, 2011 WL 6013024, Slip
11 Copy (W.D. Ark. Dec. 2, 2011); Knowles v. Standard Fire Ins. Co.,
12 No. 11-8030, 2012 WL 3828891 (8th Cir. Jan. 4, 2012).
13 Additionally, the Ninth Circuit recently held in abeyance a
14 petition to appeal the remand of a nearly identical case in the
15 Central District of California. Rodriguez v. AT&T Mobility
16 Services LLC; No. 12-80143, Dckt. # 6 (9th Cir. 2012). Plaintiff
17 argues in his reply that there is no need to stay the case
18 because the case should be remanded based on Defendant's failure
19 to show the requisite amount in controversy.

20 As discussed previously, the Court finds that Defendant has
21 shown the requisite amount in controversy. Accordingly, the
22 validity of Plaintiff's waiver to any damages exceeding that
23 amount controls federal subject matter jurisdiction. If the
24 waiver is valid, this case must be remanded because CAFA
25 jurisdiction would not exist. If the waiver is invalid, then
26 Defendant has a right to proceed in this forum.

27 Under the existing law of the Ninth Circuit, CAFA waivers
28 similar to the one made by Plaintiff are probably valid. See

1 Lowdermilk, 479 F.3d at 999-1000 (indicating that class action
2 plaintiffs have a prerogative to forgo a larger recovery if they
3 wish to remain in state court); see also Rodriguez v. AT&T
4 Mobility Services LLC; No. 2:12-cv-03694-GW-FMO, Dckt. # 30 (C.D.
5 Cal. 2012) (holding that a CAFA waiver in a nearly identical case
6 was valid because, in part, other considerations beyond amount of
7 total recovery may support a representative plaintiff's desire
8 for a state forum). The Eighth and Seventh Circuits
9 unequivocally permit such waivers. Bell v. Hershey Co., 557 F.3d
10 953, 958 (8th Cir. 2009); Back Doctors Ltd. v. Metro. Prop. &
11 Cas. Ins. Co., 637 F.3d 827, 831 (7th Cir. 2011). Defendant
12 argues that Plaintiff may lack the authority to waive recovery on
13 behalf of absent putative class members, but the Lowdermilk court
14 considered and dismissed that concern. Lowdermilk, 479 F.3d at
15 999 n.5 (noting that a representative plaintiff may sue for less
16 than the amount they are entitled to, but doing so may undermine
17 his or her adequacy as class representative). Based on this
18 authority, the Court would order this case remanded because of
19 Plaintiff's waiver of any recovery over \$5,000,000. The decision
20 in Standard Fire is likely to change this analysis by clarifying
21 the validity of the CAFA waiver and consequently the Court's
22 jurisdiction in this case. Staying this action will therefore
23 permit the Court to correctly decide the present motion to remand
24 on the basis of Plaintiff's waiver.

25 Before imposing a stay, a court must examine "[1] the
26 possible damage which may result from the granting of a stay,
27 [2] the hardship or inequity which a party may suffer in being
28 required to go forward, and [3] the orderly course of justice

1 measured in terms of the simplifying or complicating of issues,
2 proof, and questions of law which could be expected to result
3 from a stay.” Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th
4 Cir. 2005) (quoting CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th
5 Cir. 1962)).

6 In this case, a stay pending an outcome in Standard Fire
7 will serve several purposes. First, such a stay will avoid
8 possible inconsistent decisions should the Supreme Court
9 invalidate waivers like Plaintiff’s. Second, staying this case
10 will preserve Defendant’s right to a federal forum should
11 Standard Fire indicate that this Court does have subject matter
12 jurisdiction over Plaintiff’s claims. Conversely, Defendant will
13 suffer some hardship if it is forced to proceed in a state forum
14 and it is later determined that federal jurisdiction existed all
15 along. Finally, the Court notes that the Ninth Circuit recently
16 stayed an appeal made pursuant to 28 U.S.C. § 1453(c)(1) in the
17 Rodriguez case, and it makes little sense for this Court to
18 refuse to stay the action only to have the Ninth Circuit do so
19 when Defendant appeals this Court’s order remanding the case to
20 state court. Accordingly, the Court finds that staying this
21 matter pending a decision in Standard Fire will cause little
22 damage to the parties and promote the orderly course of justice.
23 Defendant will also be able to preserve federal jurisdiction in
24 this matter if such jurisdiction exists. Defendant’s request to
25 stay this case is therefore granted.

26 B. Plaintiff’s Attorneys’ Fees

27 Plaintiff seeks an award of attorneys’ fees pursuant to 28
28 U.S.C. § 1447(c) based on Defendant’s removal of this action from

1 state court. Defendant responds that attorneys' fees are not
2 appropriate because removal was reasonable in light of the amount
3 in controversy and the pending decision in Standard Fire related
4 to CAFA waivers.

5 "Absent unusual circumstances, courts may award attorney's
6 fees under § 1447(c) only where the removing party lacked an
7 objectively reasonable basis for seeking removal." Martin v.
8 Franklin Capital Corp., 546 U.S. 132, 141 (2005). The Court
9 finds that Defendant had an objectively reasonable basis for
10 removing the action based on the potential invalidity of
11 Plaintiff's CAFA waiver and its ability to show an amount in
12 controversy over \$5,000,000. Accordingly, Plaintiff's fees
13 motion is denied.

14 C. Defendant's Motion to Dismiss

15 Defendant conceded in its opposition to the motion to remand
16 that a stay of this case pending the outcome of Standard Fire
17 also applies to its motion to dismiss. The Court agrees. If
18 Standard Fire supports the validity of Plaintiff's CAFA waiver,
19 this Court does not have jurisdiction to pass on Defendant's
20 motion to dismiss. Accordingly, decision on Defendant's motion
21 is stayed pending a decision in Standard Fire.

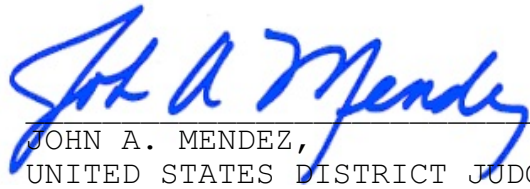
22
23 III. ORDER

24 This action, including Defendant's motion to dismiss, is
25 stayed pending a decision in Standard Fire Ins. Co. v. Knowles,
26 133 S.Ct. 90 (2012). Either party may move the Court to lift the
27 stay within 30 days of a disposition in Standard Fire. At such
28 time, the Court will only consider the validity of Plaintiff's

1 CAFA waiver, but not the analysis related to the amount in
2 controversy. Plaintiff's Motion for Attorneys' Fees is DENIED.

3 IT IS SO ORDERED.

4 Dated: February 26, 2013


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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