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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SHIRLEY GARNETT, on behalf of
herself and all others
similarly situated,

 Plaintiff,

 v.

ADT LLC, and Does 1 through
50, inclusive,

 Defendants.

CIV. NO. 2:14-2851 WBS DAD

MEMORANDUM AND ORDER RE: MOTION
TO REMAND

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Plaintiff Shirley Garnett brought this putative class
action against defendant ADT LLC, asserting claims arising out of
the alleged failure to reimburse her and others for work-related
expenses and failure to provide wage statements required by
California law. Defendant removed the action from San Joaquin
County Superior Court under the Class Action Fairness Act of
2005. 28 U.S.C. §§ 1332(d), 1446. Plaintiff now moves to remand
pursuant to 28 U.S.C. § 1447(c).

1 I. Factual and Procedural History

2 Plaintiff worked for defendant during the four years
3 preceding this lawsuit. (FAC ¶ 10 (Docket No. 1).) During that
4 time, plaintiff alleges that defendant required her and other
5 employees to use their personal vehicles in the course of
6 performing their jobs without reimbursing them for the expenses
7 they incurred. (Id. ¶¶ 19, 28.) Plaintiff also alleges that
8 defendant failed to provide her and other employees with hard
9 copies of their wage statements, as required by California law.
10 (Id. ¶¶ 15, 23, 28.) Her First Amendment Complaint¹ ("FAC")
11 asserts claims under California Labor Code section 2802,
12 California Business & Professions Code sections 17200 et seq.,
13 and California's Private Attorneys General Act of 2004, Cal. Lab.
14 Code §§ 2698, et seq. (Id. ¶¶ 18-29.) As part of plaintiff's
15 third claim, she seeks statutory damages under California Labor
16 Code section 226, which governs the furnishing of wage statements
17 to employees. (See id. ¶ 28 (citing Cal. Lab. Code § 226).)

18 Defendant removed the action to federal court on
19 December 5, 2014, asserting that, based solely on the statutory
20 penalties available under California Labor Code section 226(e),
21 the amount in controversy is approximately \$6,794,550. (Def.'s
22 Notice of Removal ¶¶ 15-16 (Docket No. 1).) Defendant originally
23 supported this number with the declaration of Doug Cuellar, a
24 manager employed by defendant to maintain and review human
25 resources data. (See Cuellar Decl. (Docket No. 3).) Defendant

26 ¹ Plaintiff reportedly amended her Complaint before
27 serving the original Complaint on defendant. (See Def.'s Notice
28 of Removal at 2-3.)

1 has since acknowledged a typographical error in Cuellar's
2 declaration misstating the time period that Cuellar used to
3 calculate the number of wage statements issued by defendant.
4 (See Def.'s Opp'n at 8-9 (Docket No. 10).) It corrected this
5 error by submitting a new declaration listing the correct dates,
6 this time by HR Workforce Analyst Lori Pencis. (See Pencis Decl.
7 (Docket No. 10-1).) Both declarations arrived at the same
8 number. Plaintiff disputes defendant's calculations and
9 maintains that the amount in controversy fails to reach the
10 required \$5 million minimum. (Pl.'s Mot. to Remand (Docket No.
11 8).)

12 II. Discussion

13 "[A]ny civil action brought in a State court of which
14 the district courts of the United States have original
15 jurisdiction, may be removed by the defendant or the defendants,
16 to the district court of the United States for the district . . .
17 where such action is pending." 28 U.S.C. § 1441(a). If "it
18 appears that the district court lacks subject matter
19 jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

20 The Class Action Fairness Act of 2005 ("CAFA") grants
21 district courts original jurisdiction over civil class action
22 lawsuits if the parties are minimally diverse and the amount in
23 controversy exceeds \$5 million. 28 U.S.C. § 1332(d)(2).

24 Plaintiff's FAC does not specify a particular amount of
25 alleged damages. In such cases, "the removing defendant bears
26 the burden of establishing, by a preponderance of the evidence,
27 that the amount in controversy exceeds [\$5 million]." Sanchez v.
28 Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996). The

1 Supreme Court recently clarified this burden by explaining that
2 “the defendant’s amount-in-controversy allegations should be
3 accepted when not contested by the plaintiff or questioned by the
4 court.” Dart Cherokee Basin Operating Co., LLC v. Owens, ____
5 U.S. ____, 135 S. Ct. 547, 553 (2014). “If the plaintiff
6 contests the defendant’s allegations . . . both sides submit
7 proof and the court decides, by a preponderance of the evidence,
8 whether the amount in controversy requirement has been
9 satisfied.” Id. at 553-54. “[N]o antiremoval presumption
10 attends cases invoking CAFA, which Congress enacted to facilitate
11 adjudication of certain class actions in federal courts.” Id. at
12 554.

13 A. Statutory Damages

14 The parties’ disagreement over the amount in
15 controversy stems from their different interpretations of
16 California Labor Code section 226(e), which provides:

17 An employee suffering injury as a result of a knowing
18 and intentional failure by an employer to comply with
19 subdivision (a) is entitled to recover the greater of
20 all actual damages or fifty dollars (\$50) for the
21 initial pay period in which a violation occurs and one
22 hundred dollars (\$100) 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.

23 Cal. Lab. Code § 226(e).

24 Defendant interprets “subsequent” to mean a pay period
25 that occurs chronologically after the first pay period in which
26 an employer fails to comply with section 226(a). (Def.’s Opp’n
27 at 10-11.) After noting that a one-year statute of limitations
28

1 applies to plaintiff's wage-statement claim, defendant calculated
2 the amount in controversy using three different penalty rates:

3 (1) a set of 1,040 employee wage statements where the
4 number of wage statements for each employee in the
5 relevant period was such (at least 41) that the \$4,000
6 maximum penalty is reached with regard to them; (2)
7 additional "initial" wage statements (total of 1,751)
8 for employees who are not included in the 1,040
9 putative class members . . . because they did not have
a sufficient number of wage statements to reach the
maximum; and (3) additional "subsequent" wage
statements (a total of 25,465) for the individuals
included in category (2).

10 (Id. at 9-10.)

11 Plaintiff argues that this computation overestimates
12 the amount in controversy because "subsequent" has a special
13 meaning within the California Labor Code that triggers heightened
14 statutory penalties only after an employer has learned that its
15 conduct violates the Labor Code. (Pl.'s Mem. at 7-10.)

16 Plaintiff asserts that, if defendant correctly states the number
17 of wage statements issued within the one-year limitation period,
18 the correct amount in controversy is \$4,064,800. (Id. at 9-10.)

19 Plaintiff relies principally on Amaral v. Cintas Corp.,
20 a California Court of Appeal case that rejected a purely temporal
21 understanding of the term "subsequent" and interpreted its use in
22 California Labor Code sections 210 and 225.5 to require that "the
23 employer has been notified that it is violated a Labor Code
24 provision" before higher penalties are triggered. 163 Cal. App.
25 4th 1157, 1207-09 (1st Dist. 2008). Amaral did not examine
26 section 226(e). However, plaintiff argues that its
27 interpretation applies to the Labor Code generally by pointing to
28 a federal court's application of Amaral to California Labor Code

1 section 2699(f) (2), see Chen v. Morgan Stanley Smith Barney, LLC,
2 Civ. No. 8:14-01077 ODW, 2014 WL 4961182, at *2 (C.D. Cal. Oct.
3 2, 2014), and, in this district, Magistrate Judge Thurston's
4 application of Amaral to section 226(e). See Perez v.
5 WinnCompanies, Inc., Civ. No. 1:14-01497 LJO, 2014 WL 5823064, at
6 *7 (E.D. Cal. Nov. 10, 2014) (finding that a defendant faced only
7 \$50 penalties for each failure to provide an accurate wage
8 statement under section 226(e)).

9 It is a "well-established canon of statutory
10 interpretation" that the use of different words or terms within a
11 statute demonstrates an intent to convey a different meaning for
12 those words. Spencer Enterprises, Inc. v. United States, 345
13 F.3d 683, 689 (9th Cir. 2003) (citing SEC v. McCarthy, 322 F.3d
14 650, 656 (9th Cir. 2003)). It is therefore significant that
15 sections 210, 225.5, and 2699 use the term "subsequent" in a
16 different way than section 226(e). The term "subsequent" in
17 those sections modifies the word "violation," so that a defendant
18 faces enhanced penalties "for each subsequent violation."² The

19 ² California Labor Code section 210 states:

20 (1) For any initial violation, one hundred dollars
21 (\$100) for each failure to pay each employee. (2) For
22 each subsequent violation, or any willful or
23 intentional violation, two hundred dollars (\$200) for
24 each failure to pay each employee, plus 25 percent of
the amount unlawfully withheld.

24 Cal. Lab. Code § 210(a) (emphasis added).

25 California Labor Code section 225.5 provides:

26 (a) For any initial violation, one hundred dollars
27 (\$100) for each failure to pay each employee. (b) For
28 each subsequent violation, or any willful or
intentional violation, two hundred dollars (\$200) for
each failure to pay each employee, plus 25 percent of

1 Amaral court thus reasoned that an initial "violation" could
2 encompass multiple failures to pay an employee under sections 210
3 and 225.5. See Amaral, 163 Cal. App. 4th at 1209 (noting that
4 "each failure to pay each employee" may have "occurred in an
5 initial violation").

6 This contrasts with section 226(e)'s use of the term
7 "subsequent" to modify the noun "pay period," so that enhanced
8 penalties apply "per employee for each violation in a subsequent
9 pay period." Cal. Lab. Code § 226(e) (emphasis added). It is
10 not at all clear that the Amaral court would have interpreted
11 this language the same way it interpreted the language of
12 sections 210 and 225.5. In fact, one of the parties in Amaral
13 argued that sections 210 and 225.5 should be distinguished from
14 "examples of other statutes that expressly impose penalties 'per
15 pay period,'" see Amaral, 163 Cal. App. 4th at 1208 (citing Cal.
16 Lab. Code § 2699(f)(2)), but the court's opinion leaves ambiguous
17 whether the court agreed with that understanding. Although Judge
18 Thurston applied Amaral's approach to section 226(e) in Perez,
19 she did so without analyzing the difference in language between

21 the amount unlawfully withheld.

22 Cal. Lab. Code § 225.5 (emphasis added).

23 California Labor Code section 2699 provides:

24 If, at the time of the alleged violation, the person
25 employs one or more employees, the civil penalty is
26 one hundred dollars (\$100) for each aggrieved employee
27 per pay period for the initial violation and two
28 hundred dollars (\$200) for each aggrieved employee per
pay period for each subsequent violation.

Cal. Lab. Code § 2699(f)(2) (emphasis added).

1 the two statutes or discussing the intent behind section 226's
2 penalties. See Perez, 2014 WL 5823064, at *7 (E.D. Cal. Nov. 10,
3 2014). The court thus finds that opinion of limited persuasive
4 value here.

5 The Amaral court may also have found significant the
6 use of the phrase "[f]or each subsequent violation, or any
7 willful or intentional violation, . . ." See Cal. Lab. Code
8 § 210(a); Cal. Lab. Code § 225.5. This statutory language
9 reinforces Amaral's conclusion that a subsequent violation occurs
10 only after an employer gains notice of the Labor Code's
11 requirements, making any post-notice violation a "willful or
12 intentional" one. Notably, section 226(e) does not contain the
13 phrase "willful or intentional violation." Instead, the statute
14 predicates all liability upon a "knowing and intentional failure
15 by an employer to comply with subdivision (a)." Cal. Lab. Code §
16 226(e). This difference casts more doubt on the application of
17 Amaral here.

18 Having distinguished Amaral, and in the absence of
19 controlling authority, the court will interpret the language of
20 section 226(e) according to its plain meaning. Defendant faces a
21 \$50 penalty for each violation in an initial pay period, and a
22 \$100 penalty per employee for each violation that occurs in a pay
23 period after the initial pay period. Accordingly, the court will
24 accept defendant's estimate of the amount in controversy as
25 approximately \$6,794,550,³ and finds more likely than not that

26 ³ Notably, defendant urges the court to reject Amaral for
27 purposes of calculating the amount in controversy, but it
28 "reserves the right" to argue that Amaral applies on the merits.
(Def.'s Opp'n at 10.)

1 this case exceeds the \$5 million minimum required by CAFA.⁴

2 B. Attorneys' Fees

3 Even if the court were to apply the Amaral approach and
4 adopt plaintiff's lower estimate of statutory damages under
5 section 226(e), the court must also consider attorneys' fees.

6 "[W]here an underlying statute authorizes an award of attorneys'
7 fees, either with mandatory or discretionary language, such fees
8 may be included in the amount in controversy." Guglielmino v.
9 McKee Foods Corp., 506 F.3d 696, 700 (9th Cir. 2007) (considering
10 attorneys' fees for purposes of calculating the amount in
11 controversy for a case asserting violations of California's Labor
12 Code). Section 226(e) provides for "an award of costs and
13 reasonable attorney's fees." Cal. Lab. Code § 226(e). "The
14 reasonableness of attorney's fees, when such fees are
15 unascertainable on the face of the complaint, can be calculated
16 by looking to other attorney's fees awards in similar cases."
17 Garcia v. ACE Cash Express, Inc., Civ. No. 14-0285 DOC, 2014 WL
18 2468344, at *5 (C.D. Cal. May 30, 2014) (citing Kroske v. U.S.
19 Bank Corp., 432 F.3d 976, 980 (9th Cir. 2005)).

20 Assuming that plaintiff correctly estimates the
21 statutory damages available under section 226(e) as \$4,064,800,
22 an attorney award of \$935,200--or approximately 23 percent of
23 estimated recovery--would suffice to push this case over CAFA's

24
25 ⁴ It is also worth noting that none of these calculations
26 take into account plaintiff's other causes of action. Neither
27 party has addressed potential recovery under plaintiff's other
28 claims, including her claim for failure to reimburse work-related
expenses pursuant to California Labor Code section 2802 (FAC §§
18-20). Presumably, this claim could further increase the amount
in controversy.

1 \$5 million requirement. Defendant argues that a reasonable
2 attorneys' fee in this case is 25 percent of total recovery.⁵
3 (Def.'s Opp'n at 13.) In support, it offers two California cases
4 that included, among other claims, a claim similar to the instant
5 one for failure to provide accurate wage statements. See Godfrey
6 v. Oakland Port Servs. Corp., 230 Cal. App. 4th 1267, 1271 (1st
7 Dist. 2014); Pellegrino v. Robert Half Int'l, Inc., 182 Cal. App.
8 4th 278, 283 (4th Dist. 2010).

9 In Godfrey, a California Court of Appeal upheld a
10 \$487,810.50 award of attorneys' fees in a case where the
11 plaintiff's class was awarded \$964,557.80--a fee award of more
12 than 50 percent of total recovery. See Godfrey, 230 Cal. App.
13 4th at 1270, 1272, 1288. The court in Pellegrino employed the
14 "lodestar" method for calculating attorneys' fees from a common
15 fund.⁶ See Pellegrino, 182 Cal. App. 4th at 285-87. The court
16 upheld the use of a 1.75 multiplier, ultimately awarding
17 \$978,121.98 in attorneys' fees. In common fund cases, the Ninth

18 ⁵ Defendant has not provided the court with information
19 on plaintiff's counsel's hourly billing rate or estimated the
20 amount of time the case will require. Defendant only offers a
percentage estimate based on the total recovery.


21 ⁶ Common fund cases are distinct from other cases
22 involving an award of attorneys' fees. Ordinarily, the amount of
23 attorneys' fees awarded does not impact the amount of recovery.
24 However, "[u]nder regular common fund procedure, the parties
25 settle for the total amount of the common fund and shift the fund
26 to the court's supervision. The plaintiffs' lawyers then apply
27 to the court for a fee award from the fund." Staton v. Boeing
28 Co., 327 F.3d 938, 969 (9th Cir. 2003) "The court then
determines the amount of attorney's fees that plaintiffs' counsel
may recover from this fund, thereby diminishing the amount of
money that ultimately will be distributed to the plaintiff
class." Id. (quoting Florin v. Nationsbank of Georgia, N.A., 34
F.3d 560, 563 (7th Cir. 1994)).

1 Circuit as also approved a "benchmark" percentage of 25 percent
2 when considering what percentage of a fund to award in reasonable
3 attorneys' fees. See In re Bluetooth Headset Products Liab.
4 Litig., 654 F.3d 935, 942 (9th Cir. 2011).

5 The cases provided by defendant do not align perfectly
6 with the present action, and therefore, they cannot provide a
7 faultless basis on which to estimate attorneys' fees. No two
8 cases are ever perfectly alike. The court must nonetheless do
9 its best to estimate attorneys' fees, and in light of these
10 cases, the court finds that defendant's fee estimation of 25
11 percent of recovery is a reasonable one. Even from plaintiff's
12 lower calculation of statutory damages (\$4,064,800), this equates
13 to a fee of approximately \$1,016,200. The total amount in
14 controversy thus exceeds \$5 million.

15 IT IS THEREFORE ORDERED that plaintiff's motion to
16 remand be, and the same hereby is, DENIED.

17 Dated: February 10, 2015

18 
19 **WILLIAM B. SHUBB**
20 **UNITED STATES DISTRICT JUDGE**