

1 Collection Practices Act, California Civil Code §§1788–1788.33 which prohibits debt collectors
2 from engaging in abusive, deceptive, and unfair practices, and California Civil Code §§
3 1812.700–1812.702 which requires that California consumers be provided a “Consumer
4 Collection Notice.” (ECF No. 1-2 at 5–19.) Plaintiff defines the class as “all persons with
5 addresses in California (ii) to whom Defendants sent, or caused to be sent, an initial written
6 communication in the form of Exhibit ‘1,’ (iii) in an attempt to collect a defaulted consumer debt
7 originally owed to Bank of America, N.A., (iv) which were not returned as undeliverable by the
8 U.S. Post Office (v) during the period one year prior to the date of filing this action through the
9 date of class certification.” (ECF No. 1 ¶ 28.)

10 On February 03, 2017, Defendant filed a Notice of Removal, alleging that this Court has
11 jurisdiction pursuant to the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d), and 28
12 U.S.C. § 1441(b). (ECF No. 1 ¶ 3.) In support of removal, Defendant submitted the declaration
13 of Mark E. Ellis, the Managing Partner of Ellis Law Group, LLP, attorneys for Defendant. (Ellis
14 Decl., ECF No. 6-1 at 1–2.) Mr. Ellis alleges that a nearly identical complaint (“The Timlick
15 Complaint”) was filed in Lake County Superior Court by Lisa Arlene Timlick on December 27,
16 2016. (Ellis Decl. ¶ 2.)

17 On February 9, 2017, Plaintiff filed the instant motion to remand for lack of subject matter
18 jurisdiction. (ECF No. 4.) Plaintiff’s sole challenge is whether the amount in controversy
19 requirement of CAFA is satisfied. In its Opposition, Defendant contends the total amount in
20 controversy exceeds \$5,000,000. (ECF No. 6 at 3.) The alleged total is not derived from any
21 practical calculus and instead relies upon the theoretical future claims of potential class members
22 not yet present in this action, asserting, “the aggregated claims of all class members may
23 theoretically exceed the jurisdictional limit of \$5 million.” (ECF No. 6 at 3.)

24 II. STANDARD OF LAW

25 “[A]ny civil action brought in a State court of which the district courts of the United
26 States have original jurisdiction, may be removed by the defendant or the defendants, to the
27 district court of the United States for the district and division embracing the place where such
28 action is pending.” 28 U.S.C. § 1441(a). However, “[i]f at any time before final judgment it

1 appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28
2 U.S.C. § 1447(c).

3 CAFA gives federal district courts jurisdiction where: (1) the amount in controversy
4 exceeds \$5,000,000; (2) the number of members of all proposed plaintiff classes in the aggregate
5 is 100 or greater; and (3) there is minimal diversity between the defendants and plaintiffs. 28
6 U.S.C. § 1332(d). In calculating the amount in controversy, a court must assume that the
7 allegations in the complaint are true and that a jury will return a verdict for plaintiffs on all claims
8 alleged. *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008).
9 Moreover, the claims of class members may be aggregated to determine whether the amount in
10 controversy requirement has been satisfied. *Id.*; 28 U.S.C. § 1332(d)(6). In a CAFA case, “the
11 proper burden of proof imposed on a [removing] defendant to establish the amount in controversy
12 is the preponderance of the evidence standard.” *Rodriguez v. AT&T mobility Services, Inc.*, 728
13 F.3d 975, 977 (9th Cir. 2013).

14 “[N]o antiremoval presumption attends cases invoking CAFA, a statute Congress enacted
15 to facilitate adjudication of certain class actions in federal court.” *Dart Cherokee Basin*
16 *Operating Co., LLC v. Owens*, 135 U.S. 547, 550 (2014). However, “[t]he burden of establishing
17 removal jurisdiction under CAFA lies with the proponent of federal jurisdiction.” *Turner v.*
18 *Corinthian Int’l Parking Servs., Inc.*, No. C 15-03495 SBA, 2015 WL 7768841, at *1 (N.D. Cal.
19 Dec. 3, 2015) (citing *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1199 (9th Cir. 2015)).
20 Thus, Defendant must establish that this Court has jurisdiction over Plaintiff’s claims. *Abrego*
21 *Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 685 (9th Cir. 2006). In order to determine
22 whether the removing party has met this burden, a court may consider the contents of the removal
23 petition and “summary-judgment-type evidence.” *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115,
24 1117 (9th Cir. 2004).

25 III. ANALYSIS

26 Plaintiff does not dispute that this matter as pled involves more than 100 class members or
27 that minimal diversity exists between the parties. (*See* ECF No. 4.) The only question before the
28 Court is whether Defendant has established by a legal certainty that the amount in controversy

1 exceeds \$5 million. Defendant argues the amount in controversy is at least \$5,000,000 based on
2 the theoretical aggregate future claims of potential class members. (ECF No. 6 at 2.) Plaintiff
3 asserts Defendant fails to meet its burden of proof because Defendant relies on a declaration
4 unsupported by any calculations or estimates. (ECF No. 7 at 2.) The Court agrees. As explained
5 below, under the legal certainty standard, Defendant has failed to satisfy its burden.

6 A. California Consumer Collection Notice Violation

7 Plaintiff seeks statutory damages for himself and all others similarly situated for violations
8 of the California Rosenthal Fair Debt Collection Practices Act in violation of California Civil
9 Code §§ 1788–1788.33, 1812.700–1812.702. (ECF No. 1 at 5.) Defendant contends in its
10 opposition that the estimated amount in controversy is in excess of \$5,000,000. (ECF No. 6 at 3.)
11 Plaintiff asserts that Defendant’s calculations are not only too speculative, but also completely
12 impossible because Defendant assumes without support that “the combined claims of all class
13 members [will] exceed[] \$5,000,000, exclusive of interest and costs[.]” (ECF No. 4-1 at 3.)
14 Plaintiff contends the statute caps recovery at \$1000 for individual claims and \$500,000 for class
15 claims. (ECF No. 7 at 2.) Defendant counters Plaintiff cannot limit the damages of putative class
16 members prior to class certification. (ECF No. 6 at 5.) Defendant further contends Plaintiff
17 cannot legally bind any unnamed members of the proposed class to disclaim any recovery other
18 than statutory damages until the class is certified. (ECF No. 6 at 5–6 (citing *Standard Fire Ins.*
19 *Co. v. Knowles*, 568 U.S. 1345, 1349 (2013).))

20 Where the plaintiff has alleged facts and pled damages, and there is no evidence of bad
21 faith, the defendant must not only contradict the plaintiff’s own assessment of damages, but must
22 overcome the presumption against federal jurisdiction. *St. Paul Mercury Indem. Co. v. Red Cab*
23 *Co.*, 303 U.S. 283, 290 (1938). “[T]he familiar ‘legal certainty’ standard best captures the proof
24 the defendant must produce.” *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 999–1000 (9th
25 Cir. 2007). It is already required that the party seeking remand for a case initially filed in state
26 court must show with ‘legal certainty’ that the claim is actually for less than the federal
27 jurisdictional minimum. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 401–02 (9th Cir.
28 1996). Accordingly, where the plaintiff has pled an amount in controversy less than \$5,000,000,

1 the party seeking removal must prove with legal certainty that CAFA’s jurisdictional amount is
2 met. *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d at 999–1000.

3 Here, Defendant has failed to provide any evidentiary calculations in support of its
4 assertion that the amount in controversy exceeds \$5,000,000. Defendant alleges that “the
5 aggregated claims of all class members may theoretically exceed the jurisdictional limit of \$5
6 million.” (ECF No. 6 at 3.) These allegations, “although attempting to recite some ‘magical
7 incantation,’ neither overcomes the ‘strong presumption’ against removal jurisdiction, nor
8 satisfies [Defendant]’s burden of setting forth...the underlying facts supporting its assertion [for]
9 the amount in controversy [.]” *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992). Defendant
10 has not brought forth any calculations to persuade the Court that its assumption that unnamed
11 class members will bring aggregate claims exceeding \$5,000,000 is a legal certainty. To keep the
12 case from being remanded, Defendant would have to plead an additional \$4,500,000 in punitive
13 damages aside from the \$500,000 maximum statutory amount that Plaintiff has asserted. While
14 states possess discretion over the imposition of punitive damages, it is well established that there
15 are procedural and substantive constitutional limitations on these awards. *Cooper Industries State
16 Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

17 “[T]he Ninth Circuit in *Planned Parenthood* held that an extremely
18 high ratio of exemplary damages to compensatory damages may be
19 appropriate in cases involving ‘particularly egregious’ behavior and
20 ‘insignificant economic damages,’ it nevertheless acknowledged
that, as a general matter, a proper exemplary damages award can
equal four times the compensatory damages award.”

21 *See Mattel, Inc. v. MGA Entm’t, Inc.*, 801 F. Supp. 2d 950, 955 (C.D. Cal. 2011) (citing *Planned
22 Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 962 (9th
23 Cir. 2005)). Based on the aforementioned case, at maximum Defendant could plausibly assert an
24 additional \$2,000,000 in punitive damages for a total of \$2,500,000 in controversy, which still
25 does not meet the CAFA minimum of \$5,000,000 in controversy. Accordingly, Defendant has
26 failed to meet its burden to demonstrate the amount in controversy on Plaintiff’s California
27 Consumer Collection Notice claim is in excess of \$5,000,000. Plaintiff’s Motion to Remand is
28 GRANTED.

1 B. Attorney's Fees

2 “An order remanding the case may require payment of just costs and any actual expenses,
3 including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c). After remand,
4 it is clear that an award of attorney's fees is a collateral matter over which a court normally
5 retains jurisdiction even after being divested of jurisdiction on the merits. *Moore v. Permanente*
6 *Med. Grp., Inc.*, 981 F.2d 443, 445 (9th Cir. 1992). The Supreme Court stated recently:

7 Assessing costs and fees on remand reduces the attractiveness of
8 removal as a method for delaying litigation and imposing costs on
9 the plaintiff. The appropriate test for awarding fees under §
10 1447(c) should recognize the desire to deter removals sought for the
11 purpose of prolonging litigation and imposing costs on the
12 opposing party, while not undermining Congress' basic decision to
13 afford defendants a right to remove as a general matter, when the
14 statutory criteria are satisfied.

15 In light of these “large objectives,” [citation omitted] the standard
16 for awarding fees should turn on the reasonableness of the removal.
17 Absent unusual circumstances, courts may award attorney's fees
18 under § 1447(c) only where the removing party lacked an
19 objectively reasonable basis for seeking removal. Conversely,
20 when an objectively reasonable basis exists, fees should be denied.

21 *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140-141 (2005). Plaintiff conducted calculations
22 regarding attorney's fees and requests an amount of \$6,304.50. (ECF No. 4-1 at 5–6.) Plaintiff
23 alleges that he has incurred \$2,704.50 in attorney's fees, costs and expenses for researching,
24 preparing and filing this Motion for Remand to address Defendant's removal of this case. (ECF
25 No. 4-1 at 5.) Plaintiff asserts that he anticipates that he will incur an additional \$3,600.00 in
26 attorney fees for travel and attendance at the hearing in this matter. (ECF No. 4-1 at 5.)
27 Additionally, to prepare this motion Plaintiff has also incurred the cost and expense of having to
28 obtain PACER copies of many documents contained in the Court's file at a cost of \$4.50. (ECF
No. 4-1 at 5.)

 Plaintiff's generalized calculations are insufficient to support finding an award for
attorney's fees. Under Local Rule 293(b), “[a]ll motions for awards of attorney's fees pursuant to
statute shall, at a minimum, include an affidavit showing:

 that the moving party was a prevailing party, in whole or in part, in

1 the subject action, and, if the party prevailed only in part, the
2 specific basis on which the moving party claims to be a prevailing
3 party; (2) that the moving party is eligible to receive an award of
4 attorneys' fees, and the basis of such eligibility; (3) the amount of
5 attorneys' fees sought; (4) the information pertaining to each of the
6 criteria set forth in (c); and (5) such other matters as are required
7 under the statute under which the fee award is claimed."

8 L.R. 293(b)(1)-(5). Plaintiff has failed to submit an affidavit to evidence his eligibility for an
9 award of reasonable costs and fees. L.R. 293(c)(1). While rough estimates of Plaintiff's
10 attorney's fees and costs have been provided within Plaintiff's Reply in support of his Motion to
11 Remand, these estimates are inadequate to support an award of attorney's fees and costs.

12 Further, pursuant to 28 U.S.C. § 1447(c), it does not appear that Defendant removed the
13 case without a reasonable basis for removal or in an attempt to delay litigation or impose costs on
14 Plaintiff. The Court cannot say Defendant's removal was objectively unreasonable as would
15 warrant the award of attorney's fees. Accordingly, Plaintiff's Motion for Attorney's Fees and
16 Costs is DENIED.

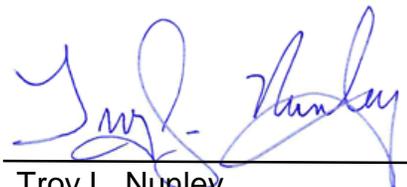
17 **IV. CONCLUSION**

18 For the above state reasons, the Court ORDERS as follows:

- 19 1. Plaintiff's Motion to Remand (ECF No. 4) is hereby GRANTED.
- 20 2. Plaintiff's request for attorney's fees and costs is hereby DENIED.
- 21 3. The Clerk of Court is directed to close the case.

22 IT IS SO ORDERED.

23 Dated: September 11, 2017



24 Troy L. Nunley
25 United States District Judge