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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANTONIO CALDERON,  
Plaintiff,  
v.  
BKB CONSTRUCTION, LP,  
Defendant.

Case No. [17-cv-01255-DMR](#)

**ORDER GRANTING PLAINTIFF'S  
MOTION TO REMAND AND DENYING  
PLAINTIFF'S MOTION TO STRIKE  
PORTIONS OF DEFENDANT'S  
ANSWER AS MOOT**

Re: Dkt. Nos. 11, 14

Plaintiff Antonio Calderon ("Plaintiff") filed this wage and hour class action in Alameda County Superior Court against his employer, Defendant BKB Construction, L.P. ("Defendant"). [Docket No. 1]. Defendant subsequently removed the case to federal court, invoking the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), as well as diversity jurisdiction. Plaintiff then filed the instant motion to remand and motion to strike portions of Defendant's Answer. [Docket Nos. 11, 14]. The court finds that Plaintiff's motions are appropriate for disposition without a hearing. See Civ. L.R. 7-1(b). Having considered the parties' submissions, the court **GRANTS** Plaintiff's motion to remand, and **DENIES** Plaintiff's motion to strike **AS MOOT**.

**I. FACTS AND PROCEDURAL BACKGROUND**

Plaintiff is a former employee of Defendant. He filed this class action in Alameda County Superior Court on January 24, 2017, alleging violations of various provisions of the California Labor Code. He seeks back wages, unpaid overtime, and statutory penalties on behalf of a putative class of Defendant's current and former non-exempt employees. Compl. [Docket No. 1].

Plaintiff asserts eight claims for relief: (1) failure to pay overtime in violation of California Labor Code ("Labor Code") sections 510 and 1198; (2) failure to provide meal periods in violation of Labor Code sections 226.7 and 512(a); (3) failure to provide rest periods in violation of Labor Code section 226.7; (4) failure to pay minimum wage in violation of Labor Code sections 1194,

1 1197, and 1197.1; (5) failure to pay wages at termination in violation of Labor Code sections 201  
2 and 202; (6) failure to issue accurate and itemized wage statements in violation of Labor Code  
3 section 226(a); (7) failure to reimburse for business-related expenses and costs in violation of  
4 Labor Code sections 2800 and 2802; and (8) violation of California Business and Professions  
5 Code sections 17200 et seq. See generally Compl.

6 Defendant timely removed the complaint. Not. of Removal [Docket No. 1]. Defendant  
7 alleges that removal is proper because diversity jurisdiction exists over Plaintiff’s individual  
8 claims, and CAFA jurisdiction exists over the class claims. Id., ¶¶ 4-14.

9 In support of removal, Defendant submitted the Declaration of Stuart English. English  
10 Decl. [Docket No. 2]. English is Defendant’s Senior Estimator and oversees and manages  
11 Defendant’s employment issues in California. English Decl., ¶ 1. English makes certain  
12 assertions about the putative class and Plaintiff’s individual claims. The court discusses those  
13 assertions in greater detail below. Generally speaking, English states that there are approximately  
14 400 putative class members, and that each earned between \$10 and \$15 per hour. He also purports  
15 to calculate the value of Plaintiff’s individual claims. According to English, Plaintiff’s damages  
16 total \$77,202.00 based on his calculations of Plaintiff’s waiting time penalties, meal and rest  
17 period premiums, overtime and minimum wage damages and penalties, and paystub violation  
18 penalties. Id., ¶¶ 3-8. English offers no damages calculations for the class claims.

19 Plaintiff now moves for remand, arguing that Defendant has failed to establish that  
20 Plaintiff’s individual claims exceed the \$75,000.00 minimum for diversity jurisdiction, or that the  
21 class claims exceed the \$5,000,000.00 jurisdictional minimum under CAFA.

22 **II. LEGAL STANDARDS**

23 Pursuant to 28 U.S.C. § 1441, “any civil action brought in a State court of which the  
24 district courts of the United States have original jurisdiction, may be removed by the defendant or  
25 other defendants, to the district court of the United States for the district and division embracing  
26 the place where such action is pending.” 28 U.S.C. § 1441(a). “The removal statute is strictly  
27 construed against removal jurisdiction, and the burden of establishing federal jurisdiction falls to  
28 the party invoking the statute.” Cal. ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 838 (9th Cir.),

1 *opinion amended on denial of reh'g*, 387 F.3d 966 (9th Cir. 2004) (citing 28 U.S.C. § 1447).

2 **A. Diversity Jurisdiction**

3 A district court has diversity jurisdiction where the parties are diverse and “the matter in  
4 controversy exceeds the sum or value of \$75,000, exclusive of interests and costs.” 28 U.S.C.  
5 § 1332(a)(1). In the context of class actions, when “at least one named plaintiff . . . satisfies the  
6 amount-in-controversy requirement,” and the other elements of diversity jurisdiction are met, a  
7 court can exercise supplemental jurisdiction over the claims of other plaintiffs in the same case,  
8 “even if those claims are for less than the jurisdictional amount specified in the statute setting forth  
9 the requirements for diversity jurisdiction.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545  
10 U.S. 546, 549 (2005).

11 In seeking removal on the basis of diversity jurisdiction, a defendant must show by a  
12 preponderance of evidence that the plaintiff’s individual claim exceeds the \$75,000.00  
13 jurisdictional threshold. See *Patel v. Nike Retail Servs., Inc.*, 58 F. Supp. 3d 1032, 1038 (N.D.  
14 Cal. 2014) (finding that removal statute, 28 U.S.C. § 1446(c)(2)(A)(ii), (B) establishes that the  
15 “preponderance of the evidence . . . is the standard for determining whether the amount in  
16 controversy is satisfied when state law [such as California law] permits the plaintiff to recover in  
17 excess of the amount alleged in the complaint”).<sup>1</sup>

18 **B. CAFA Jurisdiction**

19 “CAFA gives federal district courts original jurisdiction over class actions in which the  
20 class members number at least 100, at least one plaintiff is diverse in citizenship from any  
21 defendant, and the aggregate amount in controversy exceeds \$5 million, exclusive of interest and  
22 costs.” *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1195 (9th Cir. 2015) (citing 28 U.S.C. §  
23 1332(d)).

24 In seeking removal under CAFA, the defendant bears the usual burden of establishing

25 \_\_\_\_\_  
26 <sup>1</sup>Plaintiff wrongly argues that the “legal certainty” standard applies to his individual claim.  
27 Plaintiff relies on a case that the Ninth Circuit has overruled. See *Rodriguez v. AT&T Mobility*  
28 *Servs. LLC*, 728 F.3d 975, 977 (9th Cir. 2013) (expressly holding that “*Loudermilk [v. U.S. Bank*  
*Nat’l Ass’n*, 479 F.3d 994, 1000 (9th Cir. 2007)] has been effectively overruled [by *Standard Fire*  
*Ins. Co. v. Knowles*, 568 U.S. 558 (2013)], and that the proper burden of proof imposed upon a  
defendant to establish the amount in controversy is the preponderance of the evidence standard”).

1 federal jurisdiction. See *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021, 1024 (9th Cir. 2007)  
2 (holding that in a CAFA case the removing party bears the burden of establishing federal  
3 jurisdiction under 28 U.S.C. § 1332(d)(2)). However, unlike other removed cases, there is “no  
4 antiremoval presumption” in CAFA cases. *Dart Cherokee Basin Operating Co., LLC v. Owens*,  
5 135 S. Ct. 547, 554 (2014); see also *Coleman-Anacleto v. Samsung Elecs. Am., Inc.*, No. 16-cv-  
6 02941-LHK, 2016 U.S. Dist. LEXIS 123455, at \*8 (N.D. Cal. Sept. 12, 2016) (citing *Dart*  
7 *Cherokee Basin Operating Co., LLC*, 135 S. Ct. at 554).

8 In order to meet its burden on removal, a defendant must show “by a preponderance of  
9 evidence that the aggregate amount in controversy exceeds \$5 million.” *Ibarra*, 775 F.3d at 1197.  
10 The preponderance of the evidence standard requires the removing party “to ‘provide evidence  
11 establishing that it is more likely than not that the amount in controversy exceeds [the  
12 jurisdictional amount].’” *Coleman-Anacleto*, 2016 U.S. Dist. LEXIS 123455, at \*13 (quoting  
13 *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996) (internal quotation marks  
14 omitted)). The Ninth Circuit has clarified that the preponderance of the evidence applies  
15 irrespective of the specificity of the plaintiff’s allegations regarding the jurisdictional amount in  
16 controversy. See *Ibarra*, 774 F.3d at 1197 (the preponderance of evidence standard applies  
17 whether the complaint is unclear or ambiguous regarding the jurisdictional amount in controversy,  
18 or “affirmatively contend[s] that damages do not exceed \$5 million”).

19 In determining whether a removing defendant has met its burden, a court may consider  
20 “evidence outside the complaint, including affidavits or declarations, or other ‘summary-judgment  
21 type evidence relevant to the amount in controversy.” *Ibarra*, 775 F.3d at 1197 (quoting *Singer v.*  
22 *State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) (internal quotation marks  
23 omitted)). However, a defendant is not required to produce “summary judgment-type” evidence to  
24 demonstrate removability under CAFA. See *Altamirano v. Shaw Indus., Inc.*, No. C-13-0939  
25 *EMC*, 2013 WL 2950600, at \*4 (N.D. Cal. June 14, 2013) (explaining that courts “have rejected  
26 the notion that the fact that courts may consider such evidence necessarily requires the removing  
27 party to produce it;” discussing case where a court noted that a defendant may meet its burden by  
28 relying on allegations made in the complaint) (emphasis in original).

1 But, “[i]f [] . . . the allegations in the complaint provide no basis for certain assumptions in  
2 the calculations, a defendant must provide some evidence rather than relying on mere unsupported  
3 speculation or conclusory allegations.” Altamirano, 2013 WL 2950600, at \*4 (citing Singer, 116  
4 F.3d at 377). “[A] defendant cannot establish removal jurisdiction [under CAFA] by mere  
5 speculation and conjecture, with unreasonable assumptions.” Ibarra, 775 F.3d at 1197; see also  
6 Coleman-Anacleto, 2016 U.S. Dist. LEXIS 123455, at \*13 (“Mere conclusory allegations are  
7 insufficient, as are ‘speculative and self-serving assumptions.’”) (quoting Garibay v. Archstone  
8 Cmtys. LLC, 539 F. App’x 763, 764 (9th Cir. 2013)). “CAFA’s requirements are to be tested by  
9 consideration of real evidence and the reality of what is at stake in the litigation, using reasonable  
10 assumptions underlying the defendant’s theory of damages exposure.” Ibarra, 775 F.3d at 1198.

11 In considering the allegations in the plaintiff’s complaint, “[t]he court must assume that the  
12 allegations of the complaint are true, and that a jury will return a verdict for the plaintiff on all  
13 claims made.” Coleman-Anacleto, 2016 U.S. Dist. LEXIS 123455, at \*13; see also Ibarra, 775  
14 F.3d at 1197. “The ultimate inquiry is what amount is put ‘in controversy’ by the plaintiff’s  
15 complaint, not what a defendant will actually owe.” Korn v. Polo Ralph Lauren Corp., 536 F.  
16 Supp. 2d 1199, 1205 (E.D. Cal. 2008) (emphasis omitted).

17 **III. PLAINTIFF’S EVIDENTIARY OBJECTIONS**

18 Plaintiff objects to the English Declaration on numerous evidentiary grounds including  
19 hearsay, lack of foundation and personal knowledge, speculation, improper expert testimony, and  
20 failure to authenticate. [Docket No. 14-1]. As discussed below, the court largely agrees that the  
21 English Declaration is markedly deficient in numerous ways.

22 Defendant filed the English Declaration with its Notice of Removal. Defendant did not  
23 submit any additional evidence in support of its opposition to the motion for remand. The entire  
24 English Declaration is slightly over one double-spaced page in length. English states that he has  
25 “personal knowledge” of the facts in his declaration, but does not explain how he obtained such  
26 knowledge, and whether he actually reviewed any employee payroll records or other business  
27 records. English Decl., ¶ 1. The declaration includes the following handful of objective facts:  
28 Paragraph 3 provides Plaintiff’s dates of employment and rates of pay, and Paragraph 2 estimates

1 that there were 400 individual non-exempt employees during the class period, and that these  
2 individuals had a regular rate of pay between \$10 and \$15 per hour. Notwithstanding this paucity  
3 of facts, the rest of the declaration consists of English’s “calculations” of Plaintiff’s damages for  
4 his individual claims. As discussed in greater detail below, English’s purported calculations rest  
5 solely on unsupported assumptions.

6 Therefore, the court rules as follows. The objections to ¶¶ 2 and 3 are overruled.  
7 Notwithstanding English’s failure to specify how he obtained personal knowledge of the number  
8 of potential class members, the overall range of their hourly rates of pay during the class period,  
9 and the dates of Plaintiff’s employment and his rates of pay, English states that he has personal  
10 knowledge of these facts because he serves as Defendant’s Senior Estimator who oversees and  
11 manages Defendant’s employment issues in California.

12 The objections to ¶ 4, lines 9-11 are overruled. As discussed in greater detail below,  
13 English’s assumptions that Plaintiff was not paid his wages for at least 30 days after termination  
14 and that Plaintiff worked a minimum of 8 hours per day are supported by allegations in the  
15 complaint. English provides Plaintiff’s rate of pay at the time of his termination in paragraph 2 of  
16 his declaration. Therefore, English’s calculation that Plaintiff would be entitled to the maximum  
17 waiting time penalties of \$3,600.00 has sufficient foundation and is not speculative.

18 The court sustains objections to the following statements because they lack foundation and  
19 are speculative:

- 20 • The conclusion in ¶ 4, lines 11-13 that Plaintiff would be entitled to \$4,000.00 on  
21 his wage statement claim. English does not provide any basis for his assumption  
22 that Plaintiff did not receive a compliant wage statement every pay period.
- 23 • The conclusion in ¶ 5 that Plaintiff would be entitled to \$23,228.00 in penalties for  
24 his missed meal and rest period claims. English does not provide any basis for his  
25 underlying assumption that Plaintiff did not receive one meal and one rest break  
26 every day of his employment.
- 27 • The conclusion in ¶ 6, lines 17-20 that Plaintiff would be entitled to a \$16,380.00  
28 for unpaid overtime. English does not provide any basis for his underlying

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assumption that Plaintiff was paid only straight time wages for 10 hours of overtime worked each week during his employment.

- The conclusion in ¶ 6, lines 21-25 that Plaintiff would be entitled to a \$23,644.00 for unpaid hours worked at minimum wage. English does not provide any basis for his assumption that Plaintiff was not paid for five hours per work week during his employment.
- The conclusion in ¶ 7 that Plaintiff would be entitled to a \$6,350.00 in penalties under Labor Code section 1197.1 for each week he was not paid minimum wages. English does not provide any basis for his underlying assumption that Plaintiff was not paid minimum wages during every pay period throughout his employment.
- The conclusion in ¶ 8 that Plaintiff’s potential damages for his individual claims would be \$77,202.00. As detailed above, because English does not provide any basis for the assumptions underlying all but one of his calculations of Plaintiff’s damages, he lacks adequate foundation to calculate the total of Plaintiff’s potential damages.

**IV. DISCUSSION**

Plaintiff argues that Defendant has failed to meet its burden to demonstrate removability because its damages calculations are speculative, unsupported, and unreasonable. Regarding Plaintiff’s individual claims, Plaintiff contends that the English Declaration improperly assumes that Plaintiff seeks the maximum penalties on his waiting time and wage statement claims, and provides no foundation for his calculations of Plaintiff’s meal and rest period premiums, unpaid overtime and minimum wage damages, and Labor Code section 1197.1 penalties. Regarding the class claims, Plaintiff asserts that Defendant’s allegation that the amount-in-controversy of the class claim exceeds the \$5,000,000.000 jurisdictional threshold is equally unsupported, speculative, and unreasonable.

Defendant contends that the English Declaration is sufficient because the deliberate vagueness in Plaintiff’s pleading entitled Defendant to assume that Plaintiff was seeking the maximum penalties on his waiting time and wage statement claims. Defendant also appears to

1 argue that the court should accept its damages calculations because Plaintiff has not proffered  
2 evidence specifying his actual damages.

3 The court now analyzes each of Defendant’s asserted bases for removal.

4 **A. Diversity Jurisdiction Over Plaintiff’s Individual Claim**

5 In its notice of removal, Defendant submitted the English Declaration to support the  
6 calculation of Plaintiff’s individual damages as totaling \$77,202.00, which breaks down as  
7 follows: \$3,600.00 (Waiting Time Penalties) + \$4,000.00 (Wage Statement Penalties) +  
8 \$23,228.00 (Missed Meal and Rest Period Penalties) + \$16,380.00 (Unpaid Overtime) +  
9 \$23,644.00 (Unpaid Minimum Wages) + \$6,350.00 (Labor Code section 1197.1 Penalties). See  
10 English Decl., ¶¶ 3-8.

11 As discussed below, the court finds that Defendant has failed to establish by a  
12 preponderance of the evidence that Plaintiff’s individual claims exceed the \$75,000.00 threshold  
13 for diversity jurisdiction.

14 **1. Waiting Time Penalties**

15 Plaintiff seeks statutory penalties under Labor Code section 203 for Defendant’s failure to  
16 pay earned wages in a timely manner upon termination. Compl., ¶¶ 79-84. Plaintiff alleges that  
17 Defendant “intentionally and willfully failed to pay Plaintiff and the other class members who are  
18 no longer employed by Defendant[] their wages, earned and unpaid, within seventy-two (72) hours  
19 of their leaving Defendant[‘s] employ.” Id., ¶ 81. Plaintiff further alleges that “Plaintiff and the  
20 other class members are entitled to recover from Defendant[s] the statutory penalty wages for each  
21 day they were not paid, up to a thirty (30) day maximum pursuant to California Labor Code  
22 section 203.” Id., ¶ 84.

23 Labor Code section 201 requires employers to pay final wages to involuntarily terminated  
24 employees immediately upon termination, while Labor Code section 202 requires employers to  
25 pay final wages to employees that have resigned within 72 hours of the end of their employment,  
26 unless advance notice is provided. See Cal. Lab. Code §§ 201-202. Labor Code section 203  
27 provides that if an employer willfully fails to timely pay such wages, “the wages of the employee  
28 shall continue as a penalty from the due date thereof at the same rate until paid or until an action

1 therefor is commenced; but the wages shall not continue for more than 30 days.” Cal. Lab. Code  
2 § 203(a).

3 Defendant contends that Plaintiff’s claim for waiting time penalties amounts to \$3,600.00.  
4 See English Decl., ¶ 4. Defendant arrives at this figure by assuming that Plaintiff was not paid his  
5 earned wages for at least 30 days following his termination, and multiplying that figure by  
6 Plaintiff’s rate of pay at the time of his termination (\$15.00 per hour) and the minimum number of  
7 hours Plaintiff worked in a day (8 hours):  $30 \times \$15.00 \times 8 = \$3,600.00$ . *Id.*

8 The court finds that Defendant’s assumptions are reasonable and supported by facts in the  
9 English Declaration and allegations in the complaint. Plaintiff does not dispute that his last day of  
10 work was August 5, 2016 and that his final hourly rate of pay was \$15. See English Decl., ¶ 4  
11 (stating that “from November 16, 2015 until [Plaintiff’s] final day of work for [Defendant] on or  
12 about August 5, 2016, his regular rate of pay was \$15”). Plaintiff’s complaint alleges that he  
13 worked in excess of 8 hours a day, so it is reasonable for Defendant to assume that Plaintiff  
14 worked a minimum of 8 hours per day. See Compl., ¶¶ 25, 36, 49. Plaintiff filed his complaint on  
15 January 24, 2017, alleging that he and other class members were entitled to receive statutory  
16 penalties “up to a thirty (30) day maximum,” under Labor Code section 203, Compl., ¶ 84. Given  
17 the five-plus month gap between the filing of the complaint and Plaintiff’s final day of work, in  
18 combination with the fact that Plaintiff seeks lost wages (i.e., overtime, minimum wage, and meal  
19 and rest premiums) that by definition are still owed, Defendant reasonably assumes that Plaintiff  
20 was not paid his final wages for at least 30 days following his last day of work. See, e.g., *Ford v.*  
21 *CEC Entm’t, Inc.*, No. CV 14-01420 RS, 2014 WL 3377990, at \*3 (N.D. Cal. July 10, 2014)  
22 (explaining that a plaintiff alleging “up to 30 days” in a section 203 claim did not “preclude [the  
23 defendant] from assuming the statutory maximum” because there was “no averment in the  
24 complaint support[ing] an inference that these sums were ever paid”); *Altamirano*, 2013 WL  
25 2950600, at \*12 (finding that “as there is nothing in the complaint or the record to suggest that  
26 [the defendants] paid employees . . . unpaid wages at some point during the month after they  
27 separated from employment, awarding penalties for the entire 30 pay period is reasonable.”).

28 //

1           **2.       Wage Statement Penalties**

2           Plaintiff seeks damages including statutory penalties based on Defendant’s failure to  
3 provide complete and accurate itemized wage statements under Labor Code section 226(a).  
4 Compl., ¶¶ 85-91. Plaintiff alleges that Defendant “intentionally and willfully failed to provide  
5 Plaintiff and the other class members with complete and accurate wage statements.” Id.,  
6 ¶ 87. Plaintiff further alleges that “Plaintiff and the other class members are entitled to recover  
7 from Defendant[] the greater of their actual damages caused by Defendant[’s] failure to comply  
8 with California Labor Code Section 226(a), or an aggregate penalty not exceeding four thousand  
9 dollars per employee.” Id., ¶ 90.

10           Labor Code section 226(a) provides in relevant part that every “employer . . . shall furnish  
11 to his or her employee . . . an accurate itemized statement” of the wages earned. See Cal. Lab.  
12 Code § 226. Under Labor Code section 226(e)(1), if the employer knowingly and intentionally  
13 fails to provide its employees with accurate itemized wages statements, the employee is entitled to  
14 “recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a  
15 violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent  
16 pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000)” as well as  
17 reasonable attorneys’ fees and costs. Cal. Lab. Code § 226(e)(1).

18           Defendant asserts that Plaintiff’s wage statement penalties are \$4,000 by assuming that  
19 Plaintiff would be entitled to receive the maximum penalty of \$4,000.00 if he prevailed on his  
20 claim. See English Decl., ¶ 4.

21           The court finds that Defendant’s assumption is unsupported. The allegation in the  
22 complaint that Plaintiff and the other class members are entitled to receive the greater of their  
23 actual damages or “an aggregate penalty not exceeding [\$4,000.00] per employee” does not entitle  
24 Defendant to blindly assume that Plaintiff is entitled to a maximum statutory penalty of \$4,000.00.  
25 Compl., ¶ 90. As the removing party, Defendant must establish that its assumption is reasonable.  
26 See Ibarra, 775 F.3d at 1198 (“CAFA’s requirements are to be tested by consideration of real  
27 evidence and the reality of what is at stake in the litigation, using reasonable assumptions  
28 underlying the defendant’s theory of damages exposure.”).

1 Defendant provides no basis from which this court could reasonably assume that Plaintiff  
2 is alleging that he received enough non-compliant wage statements to entitle him to the maximum  
3 penalty available under Labor Code section 226(a). The English Declaration is bereft of any  
4 details necessary to support this assumption including, but not limited to, how many pay periods  
5 Plaintiff worked during his employment, and whether the wage statement format changed over  
6 time. Compare *Raya v. Amazon.com, LLC*, No. C 15-2005 MMC, 2015 WL 4035096, at \*2 (N.D.  
7 Cal. June 30, 2015) (finding defendant’s wage penalty calculation reasonable where defendant  
8 submitted undisputed evidence of the number of pay periods worked by the putative class  
9 members and evidence that the wage statements were “identical in format”). Absent such facts,  
10 Defendant’s assertion is speculative and fails to carry its burden as the removing party under  
11 CAFA. See, e.g., *Garibay*, 539 F. App’x at 764 (explaining that defendant’s evidence was  
12 insufficient to support removal jurisdiction under CAFA where defendant’s calculations  
13 “assume[d] that every single member of the class would be entitled to recover penalties for every  
14 single pay period” under Labor Code section 226(a)); *Beck v. Saint-Gobain Containers*, No. 2:16-  
15 CV-03638-CAS-SK, 2016 WL 4769716, at \*10 (C.D. Cal. Sept. 12, 2016) (finding that the  
16 defendant failed to satisfy its burden in establishing the amount in controversy under CAFA  
17 because defendant “assume[d], without providing supporting evidence, that each and every  
18 putative class member received non-compliant wage statements and [wa]s entitled to the statutory  
19 maximum penalty”).

20 **3. Missed Meal and Rest Periods**

21 Plaintiff seeks statutory damages for Defendant’s failure to provide meal and rest breaks in  
22 violation of Labor Code Sections 226.7 and 512(a). Compl., ¶¶ 53-63, 64-72. In support of his  
23 meal period claim, Plaintiff alleges that “Plaintiff and the other class members who were  
24 scheduled to work for a period of time no longer than six (6) hours, and . . . did not waive their  
25 legally-mandated meal periods . . . [w]ere required to work for periods longer than five (5) hours  
26 without an uninterrupted meal period of not less than thirty (30) minutes and/or rest period.” *Id.*, ¶  
27 58. Plaintiff further alleges that “Plaintiff and the other class members who were scheduled to  
28 work for a period of time in excess of six (6) hours were required to work for periods longer than

1 five (5) hours without an uninterrupted meal period of not less than thirty (30) minutes and/or rest  
2 period.” Id., ¶ 59. Plaintiff also asserts that he and the other class members are “entitled to  
3 recover from Defendant[] one additional hour of pay at the employee’s regular rate of  
4 compensation for each work day that the meal or rest period is not provided.” Id., ¶ 63.

5 In support of his rest break claim, Plaintiff alleges that “Defendant[] required Plaintiff and  
6 other class members to work four (4) or more hours without authorizing or permitting a ten (10)  
7 minute rest period per each four (4) hour period worked.” Id., ¶ 68. Plaintiff further alleges that  
8 “Plaintiff and the other class members are entitled to recover from Defendant[] one additional hour  
9 of pay at the employees’ regular hourly rate of compensation for each work day that the rest  
10 period was not provided.” Id., ¶ 72.

11 Pursuant to Labor Code section 512(a), “[a]n employer may not employ an employee for a  
12 work period of more than five hours per day without providing a meal period of not less than 30  
13 minutes . . . .” Cal. Lab. Code § 512(a). An employer may also not employ an employee for a  
14 work period of more than 10 hours per day without providing the employee with a second meal  
15 period of not less than 30 minutes . . .” Id. Under Labor Code section 226.7, an employer must  
16 pay employees “one additional hour of pay at the employee's regular rate of compensation” for  
17 failure to provide a meal or rest break. Cal. Lab. Code § 226.7; see also Cal. Code Regs. title 8,  
18 § 11040(12)(a) (defining a rest period as “ten minutes net rest time per four hours” of work).

19 Defendant asserts that Plaintiff’s missed meal and rest period claims amount to \$23,228.00  
20 by assuming that Plaintiff experienced at least one meal and one rest violation each day during the  
21 entire class period. English Decl., ¶ 5. Defendant contends that it may assume a 100% violation  
22 rate because Plaintiff’s complaint is purposefully ambiguous regarding the frequency of meal and  
23 rest break violations that occurred during the class period.

24 The court finds that Defendant’s assumption of a 100% violation rate (i.e., an assumption  
25 that Plaintiff missed one meal and rest break every day) is unsupported and therefore  
26 unreasonable. For example, Plaintiff does not allege that Defendants had a “uniform” or  
27 “universal” practice of violating the meal and rest provisions, or even that Defendants had a  
28 “pattern and practice” of violating those laws, and did so on a “regular” basis. As the Ninth

1 Circuit has noted, “‘a pattern and practice’ of doing something does not necessarily mean always  
2 doing something.” Ibarra, 775 F.3d at 1198-99. Where a complaint “does not allege that [a  
3 defendant] universally, on each and every shift, violates labor laws,” the defendant “bears the  
4 burden to show that its estimated amount in controversy relied on reasonable assumptions.”  
5 Ibarra, 775 F.3d at 1199; see also Dobbs v. Wood Grp. PSN, Inc., 201 F. Supp. 3d 1184, 1188-89  
6 (E.D. Cal. 2016) (explaining that “where a plaintiff’s complaint specifically alleges a ‘uniform’  
7 practice, if a defendant in its amount-in-controversy calculus assumes a 100 percent violation and  
8 the plaintiff offers no competent evidence in rebuttal . . . , courts have found a defendant’s  
9 assumption to be reasonable”) (emphasis in original) (citing cases); Dawson v. Hitco Carbon  
10 Composites, Inc., No. CV16-7337 PSG (FFMx), 2016 WL 7235629, at \*3 (C.D. Cal. Dec. 14,  
11 2016) (same and citing cases); Garza v. Brinderson Constructors, Inc., 178 F. Supp. 3d 906, 911  
12 (N.D. Cal. 2016) (explaining that because the second amended complaint did not allege “universal  
13 violations” that the removing defendant had “not established a reasonable basis for its assumption  
14 of a 100% violation rate”); see also Miller v. A-1 Express Delivery Servs., Inc., No. 16-CV-06251-  
15 WHO, 2017 WL 462406, at \*5 (N.D. Cal. Feb. 3, 2017) (explaining that courts in this district have  
16 held that “assumptions of one missed meal and break per pay period are reasonable in light of  
17 policy and practice allegations and allegations that [a] defendant regularly denied class member  
18 breaks”) (emphasis added).

19 **4. Unpaid Overtime**

20 Plaintiff seeks statutory damages for Defendant’s failure to pay overtime wages pursuant  
21 to Labor Code sections 510, 1194, and 1198. Compl., ¶¶ 44-52. Plaintiff alleges that he and other  
22 class members “worked in excess of eight (8) hours a day, and/or in excess of forty (40) hours in a  
23 week,” and that Defendant “intentionally and willfully failed to pay overtime wages owed to  
24 Plaintiff and the other class members.” Id., ¶¶ 49, 50. Plaintiff further alleges that “Plaintiff and  
25 the other class members are entitled to recover unpaid overtime compensation, as well as interest,  
26 costs, and attorneys’ fees.” Id., ¶ 52.

27 Under Labor Code section 510(a), “[a]ny work in excess of eight hours in one workday  
28 and any work in excess of 40 hours in any one workweek and the first eight hours worked on the

1 seventh day of work in any one workweek shall be compensated at the rate of no less than one and  
2 one-half times the regular rate of pay for an employee,” and [a]ny work in excess of 12 hours in  
3 one day shall be compensated at the rate of no less than twice the regular rate of pay for an  
4 employee.” Cal. Lab. Code § 510. Labor Code section 1194 provides that “any employee  
5 receiving less than the legal minimum wage or the legal overtime compensation applicable to the  
6 employee is entitled to recover in a civil action the unpaid balance of the full amount of this  
7 minimum wage or overtime compensation . . . .” Cal. Lab. Code § 1194; see also Cal. Lab. Code  
8 § 1198 (providing that the “employment of any employee for longer hours” than are lawful is  
9 unlawful).

10 Defendant asserts that Plaintiff’s overtime claim should be valued at \$16,380.00 by  
11 assuming that Plaintiff was paid only straight time wages for 10 hours of overtime worked each  
12 week throughout the class period. English Decl., ¶ 6.

13 Again, the court finds that Defendant’s assumption of ten hours of unpaid overtime per  
14 week is unsupported and therefore unreasonable. There are no allegations in the complaint, nor is  
15 there any evidence presented by Defendant about how many total hours or overtime hours Plaintiff  
16 worked each week during the class period. Absent such foundational facts, Defendant’s  
17 assumption is purely speculative.

18 In its opposition, Defendant concedes as much, but instead asserts that this court should  
19 conclude that its assumption is reasonable because Plaintiff has not demonstrated that it is  
20 unreasonable. This argument turns the burden of proof on its head. It is beyond dispute that the  
21 burden remains with Defendant, as the removing party, to prove that Plaintiff’s amount-in-  
22 controversy exceeds the jurisdictional threshold. To the extent Defendant contends that Plaintiff is  
23 required to submit evidence in support of remand, Defendant provides no support for such a  
24 contention. At least one court in this Circuit has expressly held that a plaintiff is not required to  
25 submit evidence in support of remand if a defendant has not met its burden to show that the  
26 amount-in-controversy requirement is met. See *Garcia v. Wal-Mart Stores Inc.*, 207 F. Supp. 3d  
27 1114, 1119–20 (C.D. Cal. 2016) (explaining that a plaintiff is not required to submit evidence in  
28 support of remand, where a defendant has not met its initial burden to show that the amount-in-

1 controversy exceeds the jurisdictional threshold under CAFA) (citing cases); see also Rutledge v.  
2 Healthport Techs., LLC, No. 16-CV-06920-VC, 2017 WL 728375, at \*1, n.1 (N.D. Cal. Feb. 24,  
3 2017) (explaining that the “Ninth Circuit has declined to decide whether the plaintiffs must submit  
4 evidence” in support of remand, and evaluating plaintiff’s remand motion based on the evidence  
5 submitted by defendant since plaintiff did not submit any evidence).

6 **5. Unpaid Minimum Wages and Minimum Wage Penalties**

7 Plaintiff seeks to recover unpaid minimum wages and associated penalties. Compl., ¶¶ 73-  
8 78. Plaintiff alleges that he and the other class members are “entitled to recover a penalty of  
9 \$100.00 for the initial failure to timely pay each employee minimum wages, and \$250.00 for each  
10 subsequent failure to pay each employee minimum wages.” Id., ¶ 77.

11 Defendant asserts that Plaintiff’s minimum wage claim is valued at \$23,644.00 by  
12 assuming that Plaintiff was not paid for five hours of work per work week. English Decl., ¶ 6.

13 As with Defendant’s other damages calculations, there is no support for this assumption,  
14 either in the complaint or in other evidence. Thus, Defendant’s minimum wage damages  
15 calculation is lacking in foundation and is conjectural.

16 Defendant’s calculation of Plaintiff’s minimum wage penalties as \$6,350.00, see English  
17 Decl., ¶ 7, is similarly deficient. There is no allegation or evidence to support Defendant’s  
18 assumption that Plaintiff received less than the minimum wage during every work week that he  
19 worked throughout the relevant period.

20 In sum, the court finds that Defendant has failed to meet its burden of proof to establish  
21 that Plaintiff’s damages meet the \$75,000 threshold for diversity jurisdiction.

22 **B. The Class Claims**

23 In its notice of removal, Defendant asserts that the damages for the class claims exceed the  
24 \$5 million jurisdictional threshold under CAFA. It supports this assertion by stating that the  
25 damages for each of the approximately 400 putative class members exceed \$12,500.00. Not. of  
26 Removal, ¶ 14. This is because: (1) Plaintiff’s counsel will seek attorneys’ fees of “at least  
27 \$1,000,000.00[,]” which amounts to \$2,500.00 per class member; (2) each class member is  
28 entitled to a maximum penalty of \$4,000.00 for the Labor Code section 226 claim; and (3)

1 “[g]iven the breadth of the remaining causes of action for meal and rest periods, failure to pay  
2 overtime, failure to pay minimum wages, liquidated damages and waiting time penalties, and  
3 failure to reimburse business expense, plus interest,” it is “evident that each class member seeks in  
4 excess of \$6,000.00 in damages for these claims.” Id.

5 The court finds that Defendant’s assumptions regarding the class claims are unsupported  
6 and speculative. Defendant provides no facts to support its \$1,000,000.00 attorneys’ fee estimate.<sup>2</sup>  
7 Nor does Defendant submit any facts about the class that could support its assumptions regarding  
8 the various class claims. For example, there are no facts even generally describing the average  
9 length of employment for putative class members, the average weekly hours worked by the class,  
10 or the average pay for class members during the class period. Moreover, Defendant does not  
11 provide a separate analysis for each of the class claims, but instead lumps them together without  
12 explanation or evidence, and asserts that the value of each class member’s claim, other than the  
13 wage statement claim, is at least \$6,000. Opp. at 11. With respect to the \$4,000 estimate for each  
14 class member’s wage statement claim, Defendant’s assumptions are unreasonable for the same  
15 reasons stated above with respect to Plaintiff’s individual wage statement claim.

16 The court finds that Defendant has failed to establish by a preponderance of the evidence  
17 that the amount-in-controversy for Plaintiff’s class claims exceed the \$5 million jurisdictional  
18 minimum under CAFA.

19 \_\_\_\_\_  
20 <sup>2</sup> While the parties correctly point the court to the split in this Circuit on whether “anticipated”  
21 attorneys’ fees should be considered in determining the amount of controversy under CAFA, the  
22 court need not weigh in on this issue because Defendant completely fails to provide any support  
23 for its assumption that Plaintiff and the putative class will incur \$1,000,000.00 in attorneys’ fees.  
24 See, e.g., Vitale v. Celadon Trucking Servs., No. CV-15-5193 PSG (GJSx), 2015 U.S. Dist. LEXIS  
25 135689, at \*17-18 (C.D. Cal. Oct. 2, 2015) (explaining that “[r]egardless of where [the court]  
26 stands on [the]split, [the] [d]efendant has not met its burden of establishing amount in controversy  
27 by a preponderance of the evidence because [the] [d]efendant assumes, without any factual basis  
28 for its assumption, that [the] [p]laintiff will incur \$100,000 in attorney’s fees” and granting the  
29 plaintiff’s remand motion); Walton v. AT&T Mobility, No. 2:11-cv-01988-JHN-JC, 2011 U.S.  
30 Dist. LEXIS 76186, at \*5 (C.D. Cal. July 14, 2011) (declining to reach the issue of whether to  
31 include attorneys’ fees incurred after the date of removal in determining the jurisdictional amount-  
32 in-controversy under CAFA because the defendant “did not provide any factual basis for  
33 determining how much attorney’s fees have been incurred thus far and will be incurred in the  
34 future;” “[b]ald assertions are simply not enough”).

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**V. CONCLUSION**

In conclusion, the court grants Plaintiff's motion to remand, and denies Plaintiff's motion to strike portions of Defendant's Answer as moot. This case is remanded to the Alameda County Superior Court.

**IT IS SO ORDERED.**

Dated: June 16, 2017

