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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MARIANA LABASTIDA, et al.,

Plaintiff,

vs.

MCNEIL TECHNOLOGIES, INC., et al.,

Defendant.

CASE NO. 10cv1690-MMA (CAB)

**ORDER DENYING PLAINTIFFS'
MOTION TO REMAND**

[Doc. No. 8]

Plaintiffs Mariana Labastida, Abraham Cecena, and George Van Hemert bring this action, on behalf of themselves and others similarly situated, against Defendants McNeil Technologies, Inc. and Invizion, Inc. for alleged violations of the California labor code. Defendant Invizion, Inc. removed the action on August 11, 2010 pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). Plaintiffs timely filed a motion seeking remand of the case to state court [Doc. No. 8]. Defendants filed an opposition to the motion, to which Plaintiffs replied [Doc. Nos. 12 & 13]. On October 25, 2010, the Court heard oral argument from defense counsel and thereafter took the motion under submission [Doc. No. 14]. For the following reasons, the Court **DENIES** Plaintiffs' motion.

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1 **BACKGROUND**

2 On September 10, 2007, Plaintiffs filed the underlying class action complaint against
3 Defendant McNeil Technologies, Inc. in San Diego County Superior Court on behalf of those who
4 are or have been employed by McNeil in any position in the State of California during the class
5 period. McNeil is a contractor that provides professional services to the federal government.
6 Plaintiffs allege over the course of at least four years prior to the filing of this action, McNeil denied
7 the class of employees overtime compensation and meal and rest periods, and failed to comply with
8 California's wage laws. Since the commencement of the litigation, Plaintiffs filed several amended
9 complaints, including a Third Amended Complaint on November 24, 2008 and a Fourth Amended
10 Complaint on September 24, 2009.

11 The Fourth Amended Complaint is the operative pleading and alleges eight causes of action
12 under California law against Defendant McNeil, including: 1) violation of California Labor Code
13 section 510 and 1194 (failure to pay overtime wages); 2) violation of California Labor code sections
14 226.7 and 512(a) (failure to provide meal periods or pay meal period premiums); 3) violation of
15 California Labor Code section 226.7(a) (failure to provide rest periods or pay rest period premiums);
16 4) violation of California Labor Code section 226(a) (failure to provide accurate, itemized wage
17 statements); 5) violation of California Labor Code sections 201, 202, 203 (failure to timely pay
18 wages ate termination); 6) violation of California Business and Professions Code section 17200, et
19 seq. (unfair competition law); and, 7) declaratory relief under Labor Code section 2698 et seq.
20 (Private Attorneys General Act of 2004 ("PAGA")).

21 On October 20, 2009, Plaintiffs mailed a settlement demand letter to McNeil. The demand
22 letter estimated McNeil's potential exposure at trial to be \$10.3 million. The amount reflected the
23 inclusion of prejudgment interest at the rate of ten percent per anum and PAGA penalties at one
24 hundred percent recovery. On March 2, 2010, Plaintiffs' counsel attended a settlement conference
25 with McNeil's counsel. At the meeting, McNeil's counsel informed Plaintiffs' counsel that McNeil
26 believed its maximum exposure was \$1,985,876.13. After the settlement conference, Plaintiffs
27 requested McNeil's un-redacted payroll records in order to determine a reasonable counter offer.

28 In May 2010, while reviewing the payroll records, Plaintiffs discovered that Invizion, Inc.

1 had also paid the wages of class members. Like McNeil, Invizion is a contractor of professional
2 services for the federal government. On June 28, 2010, Plaintiffs filed an amendment substituting
3 Invizion as a Doe defendant. On July 6, 2010, Plaintiffs served Invizion’s agent for service of
4 process in California with the Fourth Amended Complaint.¹ See *Plaintiffs’ Motion to Remand*, Ex.
5 “A.” Plaintiffs served Invizion at its corporate headquarters in Virginia on July 13, 2010. *Id.*, Ex.
6 “D.” On August 11, 2010, Invizion filed its Notice of Removal alleging federal subject matter
7 jurisdiction pursuant to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §1332(d).

8 DISCUSSION

9 On September 10, 2010, Plaintiffs filed a motion to remand this action to state court, arguing
10 that Invizion’s allegations of timeliness in the removal petition are procedurally defective, and that
11 Invizion has failed to establish by a preponderance of the evidence that the amount in controversy
12 requirement under CAFA is satisfied. Remand may be ordered either for lack of subject matter
13 jurisdiction or due to a defect in the removal procedure. *Aguon-Schulte v. Guam Election Comm’n*,
14 496 F.3d 1236, 1240 (9th Cir. 2006). Courts strictly construe the removal statutes against federal
15 jurisdiction, and jurisdiction must be rejected if there is any doubt as to the right of removal. *Gaus*
16 *v. Miles Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The removing defendant has the burden of showing
17 that it complied with the procedural requirements for removal. See, e.g., *Riggs v. Plaid Pantries,*
18 *Inc.*, 233 F. Supp. 2d 1260, 1264 (D. Or. 2001).

19 A. Amount in Controversy

20 As amended by CAFA, 28 U.S.C. § 1332(d) vests district courts with “original jurisdiction
21 of any civil action in which, *inter alia*, the amount in controversy exceeds the sum or value of
22 \$5,000,000, exclusive of interest and costs,” and in which the aggregate number of proposed
23 plaintiffs is over 100 or greater, and any member of the plaintiff class is a citizen of a state different
24 from any defendant. 28 U.S.C. § 1332(d) (CAFA). Under CAFA, the party seeking removal bears
25 the burden of establishing removal jurisdiction. See *Abrego v. Abrego v. The Dow Chemical Co.*,

27 ¹ The California Code of Civil Procedure lists the titles of individuals to whom service on a
28 corporation may be delivered, including the corporation’s designated agent for service of process,
corporate officers, a general manager, or a person authorized by the corporation to receive service of
process. Cal. Code. Civ. Pro. § 416.10.

1 443 F.3d 676, 685 (9th Cir. 2006).

2 The parties do not dispute numerosity or diversity. Nor do they dispute that Plaintiffs’
3 Fourth Amended Complaint is silent as to the amount in controversy. “Where the complaint does
4 not specify the amount of damages sought, the removing defendant must prove by a preponderance
5 of the evidence that the amount in controversy requirement has been met.” *Abrego Abrego v. The*
6 *Dow Chem. Co.*, 443 F.3d 676, 683 (9th Cir. 2006). “Under this burden, the defendant must provide
7 evidence that it is ‘more likely than not’ that the amount in controversy” satisfies the jurisdictional
8 amount requirement. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996); *see*
9 *also Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007) (“We have since applied
10 the preponderance holding in *Sanchez* to complaints filed under . . . [CAFA] that do not specify a
11 particular amount in controversy.”).

12 Invizion relies upon Plaintiffs’ Third Amended Complaint and the October 2009 settlement
13 demand letter in order to establish that the amount in controversy requirement is met in this case. As
14 Plaintiffs correctly argue, reliance on Plaintiffs’ Third Amended Complaint is not proper as a
15 superseded pleading “may not be considered . . . in determining whether the suit was removable.”
16 *Thiel v. Southern Pac. Co.*, 126 F.2d 710, 712 (9th Cir. 1942). Rather, “whether [this] suit was
17 removable . . . must ‘be determined according to [Plaintiffs’] pleading at the time of the petition for
18 removal.’” *Id.* (quoting *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939) (emphasis added)). Thus,
19 although Plaintiffs’ Third Amended Complaint stated a specific amount of damages sought,
20 Plaintiffs’ Fourth Amended Complaint is silent as to the amount in controversy, giving rise to
21 Invizion’s burden to produce evidence that otherwise establishes that the jurisdictional requirement
22 has been met.

23 Invizion points to Plaintiffs’ October 2009 settlement demand, which far exceeded the \$5
24 million amount in controversy requirement. A plaintiff’s reasonable settlement demand constitutes
25 evidence sufficient to establish the amount in controversy by a preponderance of the evidence.
26 *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002). In *Cohn v. Petsmart, Inc.*, 281 F.3d 837,
27 840 (9th Cir. 2002), the court held that a letter stating the amount necessary to settle a case can be
28 relevant evidence of the amount in controversy if it appears to reflect a reasonable estimate of the

1 claim, especially where the plaintiff does not later disavow the demand as inflated or present
2 contrary evidence. Here, Plaintiffs argue that the settlement demand was improperly inflated and
3 therefore cannot be relied upon at this juncture to establish the amount actually in controversy.
4 Plaintiffs assert that the demand included prejudgment interest, which is excludable from the amount
5 in controversy calculation, and the demand calculated recovery under Plaintiffs' PAGA claim at
6 100% when Plaintiffs are entitled to only 25% of any such recovery (as 75% goes to California's
7 Labor and Workforce Development Agency ("LWDA")). Regarding PAGA recovery, as one court
8 has recently surmised, "the question is not how much Plaintiff or the class will ultimately recover;
9 the amount in controversy is calculated based upon the amount put into controversy by the
10 complaint, regardless of how the recovery is divided. Thus, it makes little difference whether the
11 LWDA shares in the recovery – Plaintiff, by alleging PAGA penalties, has put 100% of the PAGA
12 penalties in controversy." *Schiller v. David's Bridal, Inc.*, 2010 U.S. Dist. LEXIS 81128 (E.D. Cal.
13 July 14, 2010) (citations omitted). Plaintiffs' demand letter estimated the potential PAGA penalties
14 to be in excess of \$4 million.

15 Plaintiffs' demand letter also estimated other penalties owed to be over \$1 million, and
16 wages owed to be just under \$5 million. Plaintiff does not directly undermine the reasonableness of
17 these two estimates, but rather argues that the settlement demand was superseded by McNeil's
18 counter offer of approximately \$2 million. This is beside the point. When measuring the amount in
19 controversy for jurisdictional purposes, courts are under an obligation to assume that the allegations
20 in the operative complaint are true and that the jury will return a verdict in a plaintiff's favor. "The
21 ultimate inquiry is what amount is put 'in controversy' by the plaintiff's complaint, not what a
22 defendant will actually owe," *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D.
23 Cal. 2008), much less what a defendant is willing to admit it *may* owe during the course of ongoing
24 settlement discussions. As such, Plaintiffs' disavowal of the October 2009 settlement demand is
25 unconvincing.

26 The Court finds that Invizion has met the burden of proving by a preponderance of the
27 evidence that the amount in controversy is sufficient to confer jurisdiction. The Court next
28 considers Plaintiffs' argument that removal was untimely.

1 B. Timeliness

2 Plaintiffs assert that removal was untimely because Invizion failed to remove this case
3 within thirty days of service of Plaintiffs' Fourth Amended Complaint on July 6, 2010. Invizion
4 argues that because the Fourth Amended Complaint is silent as to the amount in controversy, it did
5 not become apparent that the matter was removable until August 2, 2010, when Invizion received
6 copies of the above-mentioned Third Amended Complaint and October 2009 demand letter from co-
7 defendant McNeil, which demonstrated that the amount in controversy satisfies CAFA's
8 requirements.

9 Title 28 of the United States Code, section 1446(b) requires the removing defendant to file a
10 notice of removal within thirty days after being served with a complaint alleging a basis for removal.
11 If the defendant's removal notice fails to meet the procedural requirements of section 1446(b), the
12 court may remand the action pursuant to timely motion by the plaintiff. *McAnally Enterprises, Inc.*
13 *v. McAnally*, 107 F. Supp. 2d 1223, 1226 (C.D. Cal. 2000). Specifically, 28 U.S.C. § 1446(b) states,

14 The notice of removal of a civil action or proceeding shall be filed **within thirty days**
15 after the receipt by the defendant, through service or otherwise, **of a copy of the initial**
16 **pleading** setting forth the claim for relief upon which such action or proceeding is
17 based, or within thirty days after the service of summons upon the defendant if such
18 initial pleading has then been filed in court and is not required to be served on the
19 defendant, whichever period is shorter.

20 If the case stated by the initial pleading is not removable, a notice of removal may be
21 filed **within thirty days** after receipt by the defendant, through service or otherwise,
22 of a **copy of an amended pleading, motion, order or other paper** from which it may
23 first be ascertained that the case is one which is or has become removable, except that
24 a case may not be removed on the basis of jurisdiction conferred by section 1332 of
25 this title more than 1 year after commencement of the action.²

26 (emphasis added).

27 Plaintiffs invoke the first paragraph above, and move to remand on the basis that Invizion
28 failed to remove within thirty days of service of Plaintiffs' Fourth Amended Complaint. In the
29 August 11, 2010 Notice of Removal, Invizion alleges timeliness based on service of the Fourth
30 Amended Complaint at the corporate headquarters in Virginia on July 13, 2010. Plaintiffs argue that

31 ² However, "A class action may be removed to a district court of the United States in accordance
32 with section 1446 [28 USCS § 1446] (*except that the 1-year limitation under section 1446(b) [28 USCS*
33 *§ 1446(b)] shall not apply*), without regard to whether any defendant is a citizen of the State in which
34 the action is brought, except that such action may be removed by any defendant without the consent of
35 all defendants." 28 U.S.C. § 1453 (emphasis added).

1 the Court should consider the effective date of service for purposes of assessing the timeliness of
2 removal as the date Invizion’s agent in California accepted service, July 6, 2010.

3 Invizion does not contest the authenticity of the earlier service date, but relies upon the
4 second paragraph above to assert that the thirty day statute of limitations did not begin to run until
5 August 2, 2010, when Invizion received copies of the Third Amended Complaint and the settlement
6 demand letter that provided the information necessary to establish that this action satisfies CAFA’s
7 amount in controversy requirement.

8 The Ninth Circuit has held that “the first thirty-day requirement is triggered by defendant’s
9 receipt of an “initial pleading” that reveals a basis for removal. If no ground for removal is evident
10 in that pleading, the case is “not removable” at that stage. In such case, the notice of removal may
11 be filed within thirty days after the defendant receives “an amended pleading, motion, order or other
12 paper” from which it can be ascertained from the face of the document that removal is proper. *See*
13 28 U.S.C. § 1446(b).” *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 694 (9th Cir. 2005).

14 Here, the Notice of Removal references several specific dates. In paragraph 3 of the Notice,
15 Invizion refers to July 13, 2010 as the date of service of the Fourth Amended Complaint and
16 accompanying documents. Under the heading “Timeliness of Removal,” Invizion states “the
17 Complaint was initially served on Defendant on July 13, 2010. Defendant removes the Complaint to
18 this Court within 30 days of service.” *See id.*, ¶ 18. Invizion clearly cites the July 13, 2010 date of
19 service of the Fourth Amended Complaint in Virginia as the date by which to judge timeliness of
20 removal. Invizion fails in its opposition to Plaintiffs’ motion to explain its reliance on the July 13,
21 2010 date of service rather than the July 6, 2010 date of service in California. Plaintiffs seize upon
22 this discrepancy and assert that removal was untimely because Invizion was properly served with
23 process on July 6, 2010 in California, and did not file its notice of removal until August 13, 2010.
24 Failure to file a notice of removal within the statute’s time period is a sufficient ground on which to
25 remand an action to state court. *See Things Remembered v. Petrarca*, 516 U.S. 124, 128 (1995)
26 (stating that remand based on untimely removal is “precisely the type of removal defect
27 contemplated by § 1447(c).”); *see also* 28 U.S.C. §§ 1446(b), 1447(c). However, this case was not
28 removable at the time Invizion received service of the Fourth Amended Complaint, either in

1 California or Virginia, because the complaint was silent as to the amount in controversy, as noted
2 above.

3 This leaves the question of whether Invizion’s removal is procedurally defective because the
4 Notice of Removal inaccurately alleges the timeliness of removal based on the July 13, 2010 date of
5 service of the Fourth Amended Complaint, rather than the August 2, 2010 date upon which the case
6 became removable through the service of “other paper,” to wit, the settlement demand letter,
7 establishing the Court’s jurisdiction under CAFA. *See Babasa v. LensCrafters, Inc.*, 498 F.3d 972,
8 975 (9th Cir. 2007) (holding that a demand letter sent during the course of the state court action can
9 constitute “other paper” within the meaning of section 1446(b) if it reflects a reasonable estimate of
10 the plaintiff’s claim). Invizion clearly relies on the Third Amended Complaint and the settlement
11 demand letter to establish this Court’s jurisdiction under CAFA, but does not rely on those
12 documents to establish the timeliness of removal. *See Notice of Removal* ¶¶ 7-10 (stating that the
13 FAC is silent as to the amount in controversy, and asserting that Plaintiffs’ Third Amended
14 Complaint, “filed in the San Diego Superior Court on November 24, 2008, alleges damages in
15 excess of \$12 million”) and ¶ 13 (referencing the October 20, 2009 settlement demand letter,
16 “asserting that the Plaintiffs’ claims were worth in excess of \$10 million dollars”).

17 As noted previously, the removal statute is strictly construed against removal. *Ethridge v.*
18 *Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir. 1988); *Indus. Tectonics, Inc. v. Aero Alloy*, 912
19 F.2d 1090, 1092 (9th Cir. 1990). Invizion’s Notice of Removal could plausibly be considered
20 technically defective because it misstated the date when this matter became removable, and
21 inaccurately calculated the timeliness of removal therefrom. However, evidence offered in
22 opposition to a motion to remand can be construed as an amendment to a notice of removal. *Cohn v.*
23 *Petsmart, Inc.*, 281 F.3d 837, 840 n.1 (9th Cir. 2002); *see also Willingham v. Morgan*, 395 U.S. 402,
24 405 n.3 (1969) (“it is proper to treat the removal petition as if it had been amended to include the
25 relevant information contained in the later-filed affidavits”). After thirty days, the removal petition
26 cannot be amended to add allegations of substance, but it can be amended to clarify defective
27 allegations of jurisdiction previously made. *Barrow Dev. Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317
28 (9th Cir. 1969).

