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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA



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

10 DAVID KOGOK, Individually and on
11 Behalf of All Others Similarly
12 Situated; et al.,

Plaintiffs,

13 vs.

14 T-MOBILE USA, INC. and DOES 1
15 through 300,

Defendants.

CASE NO. 13-CV-838 BEN (BLM)

**ORDER REMANDING ACTION
TO SAN DIEGO COUNTY
SUPERIOR COURT**

[Docket No. 15]

16
17 Presently before the Court is Plaintiffs' Motion to Remand to State Court.
18 (Docket No. 15.) For the reasons stated below, the Motion is **GRANTED**.

19 **BACKGROUND**

20 This wage and hour class action arises from Defendant T-Mobile USA, Inc.'s
21 alleged failure to pay its California Retail Sales Associates ("RSAs") for their
22 commissionable transactions. Plaintiffs David Kogok, Noe Perez, Xavier Pulido, and
23 Jennifer Ramano are current and former RSAs who each allege to have been
24 undercompensated by T-Mobile.

25 This action was originally commenced in the Superior Court of California,
26 County of San Diego, on June 12, 2012. On July 13, 2012, T-Mobile filed the First
27 Notice of Removal, based on diversity jurisdiction under 28 U.S.C. §§ 1332 and 1441.
28 On July 16, 2012, the Honorable M. James Lorenz found that the First Notice of

1 Removal was facially deficient. Specifically, Judge Lorenz found that T-Mobile had
2 not met its burden to show that the amount in controversy exceeded \$5,000,000, as
3 required by the Class Action Fairness Act (“CAFA”). On July 25, 2012, T-Mobile
4 filed a Petition for Permission to Appeal Under 28 U.S.C. § 1453(c) the Remand Order.
5 The Ninth Circuit denied the Petition on September 7, 2012. The action was remanded
6 to state court.

7 On April 2, 2013, Plaintiffs filed the First Amended Complaint (“FAC”), which
8 is the operative complaint. The FAC alleges: (1) failure to pay all wages when due;
9 (2) unlawful repayment of wages; (3) failure to pay all overtime; (4) failure to provide
10 accurate itemized employee wage statements; (5) failure to provide signed copy of
11 commission contract and obtain signed receipt of the same; (6) failure to pay all wages
12 due upon ending of employment; (7) unfair business practices; (8) breach of contract;
13 and (9) violation of California Labor Code § 2698 *et seq.* On April 5, 2013, T-Mobile
14 again removed this action by filing the Second Notice of Removal. Presently before
15 the Court is Plaintiffs’ Motion to Remand.

16 DISCUSSION

17 Because federal courts are courts of limited jurisdiction, the removal statute is
18 strictly construed against removal jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*
19 *of Am.*, 511 U.S. 375, 377 (1994); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.
20 1992). “The strong presumption against removal jurisdiction means that the defendant
21 always has the burden of establishing that removal is proper.” *Gaus*, 980 F.2d at 566
22 (internal quotation marks omitted). “Federal jurisdiction must be rejected if there is
23 any doubt as to the right of removal in the first instance.” *Id.*

24 CAFA vests district courts with “‘original jurisdiction of any civil action in
25 which, inter alia, the amount in controversy exceeds the sum or value of \$5,000,000,
26 exclusive of interest and costs,’ and in which the aggregate number of proposed
27 plaintiffs is 100 or greater, and any member of the plaintiff class is a citizen of a state
28 different from any defendant.” *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994,

1 997 (9th Cir. 2007) (quoting 28 U.S.C. § 1332(d)). “The burden of persuasion for
2 establishing diversity jurisdiction [rests] on the party asserting it. When challenged on
3 allegations of jurisdictional facts, the parties must support their allegations by
4 competent proof.” *The Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010) (internal
5 citations omitted).

6 Plaintiffs argue that T-Mobile has failed to establish that: (1) the amount in
7 controversy exceeds \$5,000,000; and (2) any member of the plaintiff class is a citizen
8 of a state different from any defendant.

9 I. AMOUNT IN CONTROVERSY

10 Once an action is filed in state court, the defendant must allege and bear the
11 burden of proof that the amount in controversy is above \$5,000,000. *See Abrego*
12 *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006). In the removal petition,
13 the defendant must set forth underlying facts supporting its assertion that the amount
14 in controversy is over \$5,000,000. *Id.* at 689. Conclusory allegations are insufficient.
15 *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996).

16 “A defendant seeking removal of a putative class action must demonstrate, by
17 a preponderance of evidence, that the aggregate amount in controversy exceeds the
18 jurisdictional minimum.” *Rodriguez v. AT&T Mobility Servs. LLC*, ___ F.3d ___, 2013
19 WL 4516757, at *6 (9th Cir. Aug. 27, 2013). “Under [the preponderance of the
20 evidence] burden, the defendant must provide evidence establishing that it is more
21 likely than not that the amount in controversy exceeds [the jurisdictional] amount.”
22 *Sanchez*, 102 F.3d at 404.

23 T-Mobile argues that the amount in controversy exceeds \$5,000,000 for three
24 claims: (1) the California Labor Code § 203 claim; (2) the California Labor Code
25 § 2751 claim; and (3) the California Labor Code § 226 claim.

26 A. California Labor Code § 203 Claim

27 The FAC alleges, “Plaintiffs Romano and Plaintiff Subclass 4 quit or were
28 discharged from their employment and not paid timely. Since Defendants failed to

1 timely pay wages due, Plaintiff Romano and Plaintiff Subclass 4 are owed penalties
2 pursuant to California Labor Code section 203.” (FAC ¶ 82.) In addition, the FAC
3 alleges that T-Mobile “failed to pay said employees any premium payments or timely
4 payment pursuant to California Labor Code sections 201 and 202. Thus, Defendants
5 are liable for waiting time penalties.” (*Id.* ¶ 83.) Plaintiff Subclass 4 is defined as
6 “[a]ll current, former, or prospective non-exempt employees of Defendant in the state
7 of California who held the title Retail Sales Associates at any time during the Class
8 Period who were not timely paid all wages due to them upon separation of their
9 employment with Defendant, in violation of California Labor Code sections.” (*Id.*
10 ¶ 26.)

11 Under California Labor Code § 203, an employer who “willfully fails to pay” any
12 wages due to an employee who is discharged or quits is subject to waiting-time
13 penalties, equal to up to 30 days wages from the date that the final wages should have
14 been paid.

15 T-Mobile argues that it has properly relied on Plaintiffs’ allegations to establish
16 the amount in controversy. According to T-Mobile, because Plaintiffs allege that T-
17 Mobile failed to pay class members all wages due upon termination, the waiting-time
18 penalties for the class members—the 2,450 California RSAs who were either resigned
19 or discharged—amount to \$5,067,090.

20 T-Mobile, however, erroneously assumes that every terminated employee never
21 received timely final paychecks containing all wages owed. The FAC does not allege
22 that every terminated employee received a late final pay check. Rather, Plaintiff
23 Subclass 4 is limited to those terminated employees “who were not timely paid all
24 wages due to them upon separation of their employment with Defendant.” (FAC ¶¶ 26,
25 83.) In addition, the FAC limits even the derivative allegations to only those RSAs
26 who also, according to proof, received untimely final pay. (FAC ¶¶ 26, 82-84
27 (referring to “said employees” within Subclass No. 4, which is limited to only those
28 employees who “were not timely paid all wages due to them upon separation”).)

1 Accordingly, Plaintiffs' allegations do not establish that over \$5 million is in
2 controversy for T-Mobile's alleged violations of California Labor Code § 203.

3 **B. California Labor Code § 2751 Claim**

4 The FAC alleges that “[p]ursuant to Labor Code section 2751, Defendants were
5 required to provide a signed copy of the Compensation Policy Documents to Plaintiffs
6 and obtain a signed receipt of the same from Plaintiffs.” (FAC ¶ 112.) However,
7 “Defendants have never obtained or maintained a copy of the Compensation Policy
8 Documents that was signed by those officers and directors charged with ratifying the
9 Compensation Policy Documents. Nor has Defendant ever provided the Plaintiffs or
10 the Class with a signed copy of the Compensation Policy Documents.” (*Id.* ¶ 75.)
11 Plaintiff Subclass 3 is defined as “[a]ll current, former, or prospective non-exempt
12 employees of Defendants in the State of California who held the title Retail Sales
13 Associate at any time during the Class Period, who have not been provided a signed
14 copy of the applicable Compensation Policy Documents and/or for whom Defendant
15 has failed to maintain a signed receipt evidencing delivery of that contract to the
16 employee in violation of California Labor Code section 2751.” (*Id.* ¶ 26.)

17 Under California Labor Code § 2751, “(a) Whenever an employer enters into a
18 contract of employment with an employee for services to be rendered within this state
19 and the contemplated method of payment of the employee involves commissions, the
20 contract shall be in writing (b) The employer shall give a signed copy of the
21 contract to every employee who is a party thereto and shall obtain a signed receipt for
22 the contract from each employee” A plaintiff may seek penalties in the sum of
23 \$100 per aggrieved employee, per pay period for an initial violation, and \$200 per
24 aggrieved employee, per pay period for each subsequent violation. CAL. LAB. CODE
25 § 2699(f)(2).

26 T-Mobile argues that it has submitted evidence that establishes the number of
27 RSAs who received each of the allegedly unsigned Compensation Policy Documents
28 during the Class Period. According to T-Mobile, because there were 12,381 alleged

1 initial violations of § 2751, the total amount of penalties amounts to at least \$1,238,100
2 (12,381 x \$100). T-Mobile argues that it has also submitted evidence of the number
3 of RSAs who received a subsequent unsigned Compensation Policy Document,
4 resulting in a subsequent violation. According to T-Mobile, there were 7,514 RSAs
5 who received a subsequent unsigned Compensation Plan Document, making the total
6 amount in controversy for the subsequent violations at least \$1,502,800 (7,514 x \$200).

7 T-Mobile, however, erroneously assumes that the alleged § 2751 violation
8 applies to every RSA. In fact, Plaintiff Subclass 3 is limited to those RSAs who “have
9 not been provided a signed copy of the applicable Compensation Policy Documents
10 and/or for whom Defendant has failed to maintain a signed receipt” (FAC ¶ 26.)
11 Paragraphs 75 and 76 of the FAC allege only that T-Mobile failed to provide signed
12 Compensation Policy Documents and to retain signed receipts for the named Plaintiffs
13 and the Class. The FAC does not allege that every RSA did not receive a signed
14 Compensation Policy Document, or that every RSA did not sign a receipt of such a
15 Compensation Policy Document.

16 In addition, the evidence that T-Mobile submits does not establish that the
17 alleged § 2751 violation applies to every RSA. Rather, it demonstrates only how many
18 RSAs were employed during each year of the Class Period, and who remained
19 employed for additional years during this time. (*See* Steele Decl. [Docket No. 1-5]
20 ¶¶ 4-6.) T-Mobile has not submitted evidence confirming that all of these RSAs did
21 not receive a signed copy of the annual version of the Compensation Policy
22 Documents.

23 Accordingly, T-Mobile has not established by a preponderance of the evidence
24 that over \$5 million is in controversy for T-Mobile’s alleged violations of California
25 Labor Code § 2751.

26 C. California Labor Code § 226 Claim

27 The FAC alleges that T-Mobile failed to “itemize all hourly rates of pay,
28 including, without limitation, all overtime and retro-overtime rates of pay” on the

1 RSAs' wage statements. (FAC ¶ 70.) The FAC states that Plaintiff Subclass 2 is
2 defined as those current, former or prospective RSAs during the Class Period "who
3 have not been provided accurate itemized wage statements in violation of the California
4 Labor Code and applicable wage orders." (*Id.* ¶¶ 26.) The FAC does not allege what
5 number or percentage of the wage statements contain inaccuracies or omissions.

6 Under California Labor Code § 226(a), an employer is required to furnish
7 itemized wage statements that include specific information. An employee "suffering
8 injury as a result of a knowing and intentional failure by an employer" to comply with
9 § 226 may recover penalties. CAL. LAB. CODE § 226(e)(1). The first time an employer
10 fails to provide a proper itemized wage statement to an employee, the penalty is \$50.
11 *Id.* For each subsequent violation, the penalty is \$100. *Id.* The maximum is \$4,000
12 per employee. *Id.*

13 T-Mobile argues that it has established by a preponderance of the evidence that
14 over \$5 million is in controversy for T-Mobile's alleged violations of California Labor
15 Code § 226. According to T-Mobile, it has submitted evidence demonstrating that
16 there were at least 720 RSAs who, during the class period defined in the FAC, received
17 more than 41 paystubs containing an aggregate amount for Retro-Overtime pay, but no
18 associated hourly rate of pay. T-Mobile argues that if these 720 employees received
19 the maximum penalty amount, this puts at least \$2,880,000 in controversy for these
20 alleged penalties ($\$4,000 \times 720 = \$2,880,000$). Moreover, T-Mobile argues, there were
21 3,580 additional RSAs who received a total of 53,657 paystubs containing Retro-
22 Overtime pay, each resulting in a minimum violation of \$50. Therefore, the alleged
23 additional amount in controversy for these penalties would be at least \$2,682,850 ($\50
24 $\times 53,657 = \$2,682,850$). According to T-Mobile's calculations, this puts the amount
25 in controversy over \$5 million ($\$2,880,000 + \$2,682,850 = \$5,562,850$).

26 T-Mobile, however, erroneously assumes that all of the wage statements
27 containing "Retro OT" are devoid of the applicable hourly rate and total hours worked.
28 Based on this assumption, T-Mobile calculates penalties for every single RSA who has

1 received “Retro OT,” regardless of whether or not the hourly rate and hours worked
2 appeared on the corresponding wage statement. (*See* Solberg Decl. [Docket No. 1-6]
3 ¶¶ 6-7.) T-Mobile has not presented any evidence that this is an accurate assumption,
4 nor does such an allegation appear in the FAC. Accordingly, T-Mobile has not
5 established by a preponderance of the evidence that over \$5 million is in controversy
6 for T-Mobile’s alleged violations of California Labor Code § 226.

7 II. DIVERSITY

8 A corporation is deemed to be a citizen of the state of its incorporation as well
9 as the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). It is
10 undisputed that T-Mobile is incorporated under the laws of Delaware. (Notice of
11 Removal, Exh. E [First Am. Compl. ¶ 8]; Mattis Decl. ¶ 2.) However, Plaintiffs argue
12 that T-Mobile submitted insufficient evidence of its principal place of business.

13 A corporation’s principal place of business is its “nerve center”:

14
15 the place where a corporation’s officers direct, control, and coordinate the
16 corporation’s activities. . . . And in practice it should normally be the
17 place where the corporation maintains its headquarters—provided that the
18 headquarters is the actual center of direction, control, and coordination . . .
and not simply an office where the corporation holds its board meetings
(for example, attended by directors and officers who have traveled there
for the occasion).

19 *Hertz*, 559 U.S. at 92-93.

20 Plaintiffs are residents of California. (FAC ¶ 7.) T-Mobile asserts that its
21 principal place of business is in the State of Washington. In support of this assertion,
22 T-Mobile submits a declaration and supplemental declaration by Ms. Diane Mattis, a
23 paralegal employed by T-Mobile. Mattis’s declarations, however, are insufficient to
24 meet T-Mobile’s burden under the nerve center test. First, Mattis does not provide a
25 description of her job duties or explain how these duties made it possible for her to
26 obtain personal knowledge regarding the location of the direction, control, and
27 coordination of T-Mobile’s business by the executive officers. *See Martinez v. Morgan*
28 *Stanley & Co. Inc.*, No. 09-CV-2937, 2010 WL 3123175, at *3 (S.D. Cal. Aug. 9,

1 2010) (finding a declaration of an assistant secretary to be insufficient to establish the
2 location of the defendant-company's nerve center because, among other things, the
3 assistant secretary "did not elaborate on her job duties or state how they made it
4 possible for her to acquire the personal knowledge regarding where the executive
5 officers 'direct, control, and coordinate' the company's business"). An executive
6 officer, such as a chief executive officer, vice president of operations, or member of the
7 board of directors, would have been better suited to testify as to the location of T-
8 Mobile's nerve center.

9 Second, Mattis's declarations lack foundation. In the supplemental declaration,
10 Mattis testifies, "I am aware of [where the majority of T-Mobile's executive and
11 administrative functions are carried out] because in my role as Senior Paralegal,
12 Corporate Governance, I have assisted in carrying out *some* of these core functions."
13 (Mattis Supp. Decl. ¶ 3 (emphasis added).) It is unclear, however, which of the "core
14 functions" she assisted in carrying out, because Mattis does not specify which of the
15 "core functions" she assisted with. Moreover, Mattis does not indicate whether she
16 knows anything about those that she did not carry out. Mattis has no apparent basis for
17 knowing that any of the other core functions were not carried out in California.

18 Mattis testifies that "[t]he offices of T-Mobile's President and Chief Executive
19 Officer, Chief Operations Officer, Chief Strategy Officer, Chief Legal Officer and
20 General Counsel, Chief Financial Officer, Chief Human Resources Officer, Chief
21 Technology Officer, and Chief Marketing Officer, are all located in T-Mobile's
22 headquarters [in the State of Washington]." (*Id.* ¶ 4.) By itself, this is not enough.
23 Where the officers are located, without more, does not establish where the principal
24 place of business is located. *See Hertz*, 559 U.S. at 92-93; *Martinez*, 2010 WL
25 3123175, at *3 ("[T]he nerve center test . . . does not consider simply where the officers
26 are located but where they direct, control, and coordinate the corporation's activities.").

27 Accordingly, T-Mobile has not met its burden of establishing that the minimal
28 diversity requirement is met and that removal jurisdiction is proper.

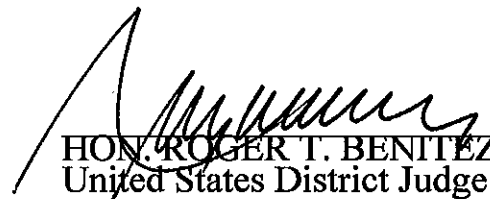
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CONCLUSION

For the reasons stated above, Plaintiffs' Motion to Remand to State Court is **GRANTED**. This action is once again **REMANDED** to the Superior Court of California, County of San Diego.

IT IS SO ORDERED.

DATED: 10/15/13



HON. ROGER T. BENITEZ
United States District Judge