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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 Barry Allred and Mandy C. Allred, on  
12 behalf of themselves, all others similarly  
13 situated, and the general public,  
14 Plaintiffs,  
15 v.  
16 Kellogg Company, a Delaware  
17 Corporation, et al.,  
18 Defendants.

Case No.: 17-cv-1354-AJB-BLM

**ORDER DENYING PLAINTIFFS’  
MOTION TO REMAND  
(Doc. No. 11)**

19 Plaintiffs Barry and Mandy Allred seek remand to state court alleging Kellogg failed  
20 to satisfy the amount-in-controversy requirement of the Class Action Fairness Act  
21 (“CAFA”), 28 U.S.C. § 1332(d). Because the Court finds the amount-in-controversy  
22 requirement is met, the Court **DENIES** Allred’s motion.

23 **I. BACKGROUND**

24 This action arises from Kellogg’s alleged violations of California’s consumer  
25 protection laws relating to the packaging, labeling, and advertising of Kellogg’s “Salt and  
26 Vinegar Flavored Potato Crisps.” (Doc. No. 1-2 at 5 ¶ 5–11.) Allred brings this lawsuit on  
27 behalf of “[a]ll consumers who purchased the [p]roduct from a retailer within the state of  
28 California . . . at any time during the period six (6) years prior to the filing of this Complaint

1 and continuing until this Class is certified . . . .” (*Id.* at 16 ¶ 80.)

2 Allred originally filed the action in San Diego Superior Court. (*Id.* at 2.) Kellogg  
3 removed the action, arguing CAFA’s requirements for removal were met.  
4 (Doc. No. 1 at 38.) Allred then filed the instant motion to remand alleging Kellogg failed  
5 to meet the minimum amount-in-controversy requirement. (Doc. No. 11.)

## 6 II. LEGAL STANDARDS

7 CAFA gives federal courts jurisdiction over certain class actions if the class has  
8 more than 100 members, the parties are minimally diverse, and the amount-in-controversy  
9 exceeds \$5 million. U.S.C. § 1332(d)(2), (5)(B); *see Standard Fire Ins. Co. v. Knowles*,  
10 568 U.S. 588, 592 (2013). Allred only challenges the amount-in-controversy element, as  
11 such, the Court will only address that issue. When a defendant alleges the amount-in-  
12 controversy exceeds the CAFA threshold, the notice to remove need only include “a  
13 plausible allegation that the amount-in-controversy exceeds the jurisdictional threshold.”  
14 *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014) (holding  
15 the district court erroneously remanded to state court when the defendant had submitted an  
16 affidavit in support of his calculation on the amount-in-controversy). “[T]he defendant’s  
17 amount-in-controversy allegation should be accepted when not contested by the plaintiff  
18 or questioned by the court.” *Id.* at 553. However, when those allegations are challenged by  
19 the plaintiff, *Dart* instructs that “both sides submit proof and the court decides, by a  
20 preponderance of the evidence, whether the amount-in-controversy requirement has been  
21 satisfied.” *Id.* at 553–54 (internal quotations omitted).

## 22 III. DISCUSSION

23 Allred argues remand to state court is necessary because Kellogg (1) failed to carry  
24 its burden of proving that CAFA’s jurisdictional amount is met, and (2) removed the action  
25 in bad faith. (*See* Doc. No. 11-1.)

### 26 **A. The Amount-in-controversy is Met**

27 It is unclear from the face of Allred’s complaint if the amount-in-controversy  
28 exceeds \$5 million because Allred does not plead specific damage amounts. (Doc. No. 1-

1 2 at 29–30.) Kellogg, however, contends the amount-in-controversy exceeds \$5 million.  
2 (Doc. No. 1 at 4–7.) In support of removal, Kellogg submitted a declaration of Joseph T.  
3 Kramer, Sr., Kellogg’s senior brand manager. (Doc. No. 1-4 at 3 ¶ 1.) Mr. Kramer admitted  
4 that although state-specific sales records are not available, he was able to approximate sales  
5 based on population statistics and gross sales of the product. (*Id.* at 3 ¶¶ 3–5.) He estimated  
6 potential sales in the class period to be approximately \$13 million. (*Id.* at 3 ¶ 6.) To get this  
7 figure, Mr. Kramer divided California’s population (39,250,017) by the U.S. population  
8 (323,127,513) using July 2016 population estimates, which calculated to 12.15%. (*Id.* ¶ 5.)  
9 He then divided national sales (\$108,400,000 from 2013-2016) by 12.15%, which  
10 calculates to \$13,170,600. (*Id.* ¶ 6.) He estimates this as the total California sales.  
11 (Doc. No. 1-4 at 3.) Mr. Kramer noted the sales figure is feasibly higher because the  
12 distributors and retailers Kellogg sold products to likely mark-up the price when sold to  
13 consumers. (*Id.*) This, Kellogg argues, along with punitive damages and attorney’s fees,  
14 meets the amount-in-controversy requirement. (Doc. Nos. 1 at 6–8; 14 at 9–11.)

15 Allred takes issue with Kellogg’s calculation methods, arguing specifically that (1)  
16 Kellogg improperly uses statistics and assumptions in calculating damages; (2) Kellogg  
17 cannot assume a full restitution award of 100% of all possible damages; and (3) Kellogg  
18 failed to provide “summary judgment-quality” damages calculations. (Doc. No. 11-1 at 2.)

19 ***1. Damages Calculations May Use Statistical Assumptions Based in Reason***

20 Allred first argues that estimations, speculation, and “statistical assumptions” cannot  
21 be used to prove the amount-in-controversy requirement. (Doc. No. 11-1 at 10–11.)  
22 Kellogg correctly responds that parties may use estimations and assumptions to prove the  
23 amount-in-controversy so long as they are based in reason. (Doc. No. 14 at 11.)

24 The Ninth Circuit has held that a defendant may rely on “a chain of reasoning that  
25 includes assumptions to satisfy its burden to prove by a preponderance of the evidence that  
26 the amount-in-controversy exceeds \$5 million” so long as “the chain of reasoning and its  
27 underlying assumptions” are “reasonable.” *Ibarra v. Manheim Investments, Inc.*, 775 F.3d  
28 1193, 1199 (9th Cir. 2015); *LaCross v. Knight Transp. Inc.*, 775 F.3d 1200 (9th Cir. 2015).

1 “The parties may submit evidence outside the complaint, including affidavits or  
2 declarations, or other ‘summary-judgment-type evidence relevant to the amount-in-  
3 controversy at the time of removal.’” *Ibarra*, 775 F.3d at 1197 (quoting *Singer v. State*  
4 *Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997)).

5 Allred’s reliance on a recent California case is mistaken, as that case is  
6 distinguishable. (Doc. No. 11-1 at 10–11.) In *Armstrong v. Ruan Trans. Co.*, the Court held  
7 that parties “may not rely on statistical assumptions to prove the amount-in-controversy  
8 requirement.” EDCV 16-1146-VAP(SP<sub>x</sub>), 2016 WL 6267931, at \*2 (C.D. Cal. Oct. 25,  
9 2016) (listing cases). However, in *Armstrong*, Ruan Transportation made assumptions in  
10 calculating damages in an hour and wage claim which were unsupported by any facts, save  
11 for a declaration. *Id.* at \*3. Ruan assumed that “one meal and rest period violation per  
12 workweek per class member is appropriate” in calculating damages, yet the declaration  
13 Ruan submitted failed to address meal and rest period violations, complaints received  
14 regarding these violations, how break periods were scheduled, “or anything else to provide  
15 factual support for Defendant’s assumption of ‘one meal and rest period violation per  
16 workweek’ for every class member.” *Id.* Thus, the Court held, “as Defendant provides no  
17 factual underpinning for the assumption that a meal and rest break violation occurred one  
18 time per week, the Court finds it has failed to sustain its evidentiary burden for purposes  
19 of removal.” *Id.* (internal citations omitted). However, *Armstrong* also relied on the Ninth  
20 Circuit’s *Ibarra* rule that a “damages assessment may require a chain of reasoning that  
21 includes assumptions.” *Id.* (quoting *Ibarra*, 775 F.3d at 1199). Thus, Allred is simply  
22 incorrect that statistical assumptions may not be used.

23 The Court finds that Kellogg has presented a reasonable damages assessment  
24 estimating the amount-in-controversy based in fact. Kellogg provided nationwide sales  
25 figures, an explanation for the lack of state-specific sales figures, and estimations of  
26 population based on recent United States census bureau figures. (*Id.* at 3–4.) The Court  
27 finds it reasonable to assume that if California has 12.5% of the nation’s population, it may  
28 also have at least 12.5% of Kellogg’s sales. At the very least, Kellogg has provided the

1 “chain of reasoning” from their evidence to their assumption as required by the Ninth  
2 Circuit. With a total calculation that is 2.63 times over the minimum amount-in-  
3 controversy required, even if Kellogg was off by 50% in their estimations, they would still  
4 meet the \$5 million threshold in spades. Thus, the Court finds Kellogg’s calculation model  
5 sufficient.

## 6 **2. Kellogg’s Damages Calculations Are Appropriate**

7 Next, Allred argues that Kellogg cannot assume “a restitution award of 100% of all  
8 possible damages,” stating Kellogg “incorrectly assume[d] that Plaintiffs and the class  
9 members will seek a full refund for each retail unit . . . purchased in California during the  
10 class period.” (Doc. No. 11-1 at 11–12.) Allred cites to a California Central District case,  
11 which states a “Defendant may not assume a 100% rate without supporting such an  
12 assumption.” *Tehrani v. Macys West Stores, Inc.*, Case No. LA CV15-07286 JAK (Ex),  
13 2016 WL 1559085, at \*8 (C.D. Cal. Apr. 18, 2016). Kellogg retorts that the \$5 million also  
14 includes attorney’s fees and punitive damages. (Doc. No. 14 at 15.) Punitive damages may  
15 “be included in a computation of the amount-in-controversy necessary for this Court’s  
16 jurisdiction.” *Davenport v. Mutual Ben. Health & Acc. Ass’n*, 325 F.2d 785, 787 (9th Cir.  
17 1963). Attorney’s fees may be calculated as well. *Bayol v. Zipcar, Inc.*, No. 12-4840, 2013  
18 WL 4931756, at \*7 (N.D. Cal. Aug. 18, 2015). As stated above, even if Kellogg’s statistical  
19 assumptions were reduced by 50%, with attorney’s fees and punitive damages calculated  
20 in, \$5 million is easily exceeded. Thus, the Court finds Kellogg meets its burden of  
21 establishing the minimum amount-in-controversy. *See Sanchez v. Monumental Life Ins.*  
22 *Co.*, 102 F.3d 398, 404 (9th Cir. 1996) (“defendant must provide evidence establishing that  
23 it is ‘more likely than not’ that the amount in controversy exceeds that amount.” (emphasis  
24 in original) (citation omitted)); *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 29 1199,  
25 1204 (E.D. Cal. Feb. 27, 2008) (stating the burden is not daunting).

## 26 **3. Kellogg’s Evidence is Sufficient**

27 Allred’s last argument regarding Kellogg’s calculations of the amount-in-  
28 controversy asserts Kellogg’s “evidence and calculations” do not rise to summary

1 judgment level quality. (Doc. No. 11-1 at 15.) In support, Allred cites cases which hold  
2 that calculations may not be considered evidence unless they are made in good faith,  
3 reliable, and based on fact. (*Id.*) See *Ellis v. Pac. Bell Tel. Co.*, No. SACV 10–01141–  
4 CJC(FFMx), 2011 WL 499390, at \*2 (C.D. Cal. Feb. 10, 2011) (holding a party “may rely  
5 on calculations to satisfy their burden so long as their calculations are good faith, reliable  
6 estimates based on the pleadings and other evidence in the record.”); *Lowdermilk v. U.S.*  
7 *Bank National Ass’n*, 479 F.3d 994 (9th Cir. 2007) (overruled by *Standard Fire*, as stated  
8 in *Rodriguez v. AT&T Mobility Services LLC*, 728 F.3d 975, 977 (9th Cir. 2013). But, as  
9 Kellogg points out—and the Court reiterates—“[t]he parties may submit evidence outside  
10 the complaint, **including affidavits or declarations**, or other ‘summary-judgment-type  
11 evidence relevant to the amount in controversy at the time of removal.’” *Ibarra*, 775 F.3d  
12 at 1197 (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir.  
13 1997)) (emphasis added). The Court already found Mr. Kramer’s assumptions and  
14 calculations were based in fact and reasonably deduced. Thus, Kellogg’s use of a  
15 declaration in proving these calculations is appropriate.

### 16 **B. Kellogg Did Not Remove in Bad Faith**

17 Allred accuses Kellogg of removing the case in bad faith, stating Kellogg “attested  
18 that this Court does have subject matter jurisdiction to hear this action” when they filed  
19 removal documents, then reversed course only “days later” in their dismissal motion, where  
20 Kellogg argued Allred lacks “Article III standing to pursue public injunctive relief.”  
21 (Doc. No. 11-1 at 15.) However, Allred is strawmanning Kellogg’s positions a bit.  
22 Kellogg’s arguments—that this Court has subject matter jurisdiction over the case, but that  
23 Allred lacks Article III standing for injunctive relief—are legally consistent positions. That  
24 said, the Ninth Circuit discussed this puzzling dynamic in a recent decision. *Davidson v.*  
25 *Kimberly-Clark Corp.*, 873 F.3d 1103, 1115–16 (9th Cir. 2017). The Court discussed this  
26 “perpetual loop” dilemma, stating:

27 As the district court in *Machlan* explained, by finding that these plaintiffs fail  
28 to allege Article III standing for injunctive relief, we risk creating a “perpetual

1 loop” of plaintiffs filing their state law consumer protection claims in  
2 California state court, defendants removing the case to federal court, and the  
3 federal court dismissing the injunctive relief claims for failure to meet Article  
4 III’s standing requirements. [*Machlan v. Procter & Gamble Co., et al.*, 77 F.  
5 Supp. 3d 954, 961 (N.D. Cal. 2015).] On our Article III standing analysis,  
fully supported for the reasons we have explained by established standing  
principles, this “perpetual loop” will not occur.

6 *Davidson*, 873 F.3d at 1116. The Court concluded by resolving the issue “in favor of  
7 plaintiffs seeking injunctive relief.” *Id.* at 1115. It should be noted *Davidson* came out  
8 months after the parties briefed these motions, yet, this is the very problem Allred is  
9 complaining of. Nevertheless, the Court rejects Allred’s arguments of bad faith. As evident  
10 from the district court split, Kellogg’s positions are not only logically consistent, but are  
11 positions parties have argued—and won on—before. Thus, the Court finds Kellogg’s  
12 removal and subsequent dismissal motion for lack of Article III standing does not amount  
13 to bad faith.

#### 14 IV. CONCLUSION

15 The Court concludes Kellogg properly alleged the amount-in-controversy exceeds  
16 \$5 million and that Kellogg did not remove the action in bad faith. Accordingly, the Court  
17 **DENIES** Allred’s motion for remand. (Doc. No. 11.)

18  
19 IT IS SO ORDERED.

20 Dated: January 9, 2018

21   
22 Hon. Anthony J. Battaglia  
23 United States District Judge  
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