UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERTO MARTINEZ, an individual, Plaintiff, v. JOE'S CRAB SHACK, INC., and DOES 1 through 100, inclusive, Defendants.	CV 09-2084 SVW (JWJx) ORDER GRANTING PLAINTIFF'S MOTION TO REMAND [7] [JS-6]

Plaintiff Roberto Martinez ("Plaintiff") filed this putative class action in California state court alleging violations of California wage and hour laws. On March 25, 2009, Defendant Joe's Crab Shack Holdings, Inc. ("Defendant") filed a Notice of Removal, thereby removing the action to federal court. Defendant contends that jurisdiction exists under the Class Action Fairness Act ("CAFA") because there are more than 100 members of the class, minimal diversity exists, and the amount in controversy exceeds $5 million. Plaintiff now seeks to remand the action back to state court on the basis that (1) removal was untimely, and (2) the amount in controversy does not exceed $5,000,000.

A. Timeliness of Removal

This action was initially filed in state court in September 2007. In the past eighteen months, the parties have been engaged in a pitched discovery battle in state court. One of the discovery disputes between the parties has gone up to the California Court of Appeal, which issued a published opinion on the matter. Defendant argues that removal was timely because the amount in controversy was not clear from the face of the complaint, and it was not until February 23, 2009, that Plaintiff finally responded to Defendant's request for interrogatories. It was in those interrogatories, Defendant contends, that Plaintiff for the first time stated how much overtime and how many meal breaks Plaintiff had allegedly missed.

"[I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b). In order for the thirty day period to run from the initial pleading, it must be "unequivocally clear and certain" from the face of the pleading that the jurisdictional basis has been satisfied. Bosky v. Kroger Texas, LP, 288 F.3d 208, 211 (5th Cir. 2002). Here, the face of the complaint did not disclose from its face the amount Plaintiff was seeking; in fact, the complaint stated that the amount of damages in the action was less than $5 million. (Compl. ¶ 1.)

Plaintiff argues that the calculations Defendant now puts forward in support of its removal reveal that the amount of statutory damages

at the time of filing exceeded $5 million. Plaintiff notes that these statutory damages are calculated solely on the basis of the number of employees that Defendant had during the relevant time period, which was not information that Defendant had to wait to obtain from Plaintiff in discovery. However, "notice of removability under § 1446(b) is determined . . . not through the subjective knowledge or a duty to make further inquiry." Harris v. Bankers Life & Cas. Co., 425 F.3d 689, 694 (9th Cir. 2005). The fact that Defendant may have known, or should have known, that Defendant had a certain number of employees and that statutory damages could exceed $5 million does not require Defendant to remove at the time of the initial pleading. The complaint in this action did not allege the number of employees involved or the number of meal and rest breaks that they missed, and therefore, Defendant's subjective knowledge that the amount in controversy could have been satisfied is irrelevant.

Because the complaint did not disclose the amount in controversy, Defendant had a duty to remove only when some "other paper" allowed Defendant to ascertain that the case had become removable. See 28 U.S.C. § 1446(b). It appears that the first disclosure that Plaintiff made, which was relevant to the amount in controversy, was Plaintiff's responses to interrogatories. Discovery responses can serve as the "other paper" mentioned in the removal statute. See Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1251 (9th Cir. 2006). Thus, the time for removal began on February 23, 2009, and Defendant's notice of removal was timely.

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1 **B. Amount in Controversy**

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3 Because Plaintiff did not allege a specific amount in controversy
4 in the complaint, Defendant must prove by a preponderance of the
5 evidence that it exceeds $5 million.[1] Lowdermilk v. U.S. Bank Natal
6 Assen, 479 F.3d 994, 998 (9th Cir. 2007). The "defendant must provide
7 evidence establishing that it is 'more likely than not' that the amount
8 in controversy exceeds" the jurisdictional minimum. Sanchez v.
9 Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996). In
10 measuring the amount in controversy, a court must assume that the
11 allegations of the complaint are true and that a jury will return a
12 verdict for the plaintiff on all claims made under the complaint.
13 Kenneth Rothschild Trust v. Morgan Stanley Dean Winter, 199 F. Supp. 2d
14 993, 1001 (C.D. Cal. 2002).
15 In order to determine whether the defendant has satisfied its
16 burden of demonstrating that the amount in controversy exceeds the
17 jurisdictional minimum by a preponderance of the evidence, the court
18 may consider "facts presented in the removal petition as well as any
19 'summary-judgment-type evidence relevant to the amount in controversy
20 at the time of the removal.'" Matheson v. Progressive Specialty Ins.
21 Co., 319 F.3d 1089, 1090 (9th Cir. 2004) (quoting Singer v. State Farm
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23 [1] Plaintiff alleged that damages were less than $5 million, but this
24 is not sufficient to invoke the "legal certainty" standard, given
that the amount in controversy takes into consideration other forms
25 of relief. Compare Guglielmino v. McKee Foods Corp., 506 F.3d 696,
700 n.4 (9th Cir. 2007) (finding that a complaint alleging that
26 "damages and injunctive relief" was less than $5 million did not
invoke the "legal certainty" standard), with Lowdermilk, 479 F.3d at
27 996 (applying the legal certainty standard to a complaint that
alleged that "[t]he aggregate total of the claims pled herein do not
28 exceed five million dollars").

Mut. Auto. Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997)). "Conclusory allegations as to the amount in controversy are insufficient." Id. at 1090-91. Any doubt regarding the right of removal is to be resolved in favor of remand. Id. at 1090; see also Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) ("We strictly construe the removal statute against removal jurisdiction."); Valdez v. Allstate Ins. Co., 372 F.3d 1115, 1117 (9th Cir. 2004) (affirming remand because the defendant "needed to 'provide evidence establishing that it is more likely than not that the amount in controversy exceeds that amount'" (quoting Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403-04 (9th Cir. 1996))).

The Court finds that Defendant has not sustained its burden of demonstrating that the amount in controversy exceeds $5 million because the evidence put forward in support of Defendant's removal is too conclusory and unsupported by the facts. Defendant states that Plaintiff's discovery responses revealed that he worked approximately 60 to 70 hours per week, his standard hourly wage was $22, and his overtime wage was $33. (Notice of Removal ¶ 54.) Plaintiff also alleged that he was never given a meal or rest break during the time that he worked there. (Id.) From this information, Defendant then makes conclusory remarks such as: "Based on Plaintiff's assertions that he worked approximately 20-30 hours of overtime per week, the potential claims for overtime for the putative class members are $3,666,459 using 20 hours of overtime for each week a putative class member worked." (Cottingim Decl. ¶ 6.) Defendant makes similar assertions with regard to missed meal and rest breaks and other statutory penalties. (Id. ¶¶ 7-11.)

Absent from the evidence set forward in Defendant's removal papers, however, is any indication of the number of work weeks that Defendant used in its calculations. This number is critically important given that nearly all of Defendant's calculations are made on a weekly or pay-period basis. For example, with regard to overtime and meal and rest breaks, Defendant assumes that all class members missed 20 hours of overtime, 5 meal breaks, and 5 rest breaks per week. (See Cottingim Decl. ¶¶ 6, 7.) Defendant's calculation of the other statutory penalties is calculated for the most part using a weekly or pay-period basis.

Yet, Defendant never reveals how many work weeks or pay-periods Defendant is using as the basis for this calculation. Defendant states that as of April 1, 2009, Defendant employed 44 managers. (Id. ¶ 4.) It is not clear, however, whether Defendant presumes that these managers worked throughout the entire four-year class period, or whether Defendant specifically calculated the number of weeks that each class member worked. If it was the former, this would certainly be inadequate, but at this point there is no way to tell, given the conclusory nature of the calculations.

The only calculation that appears to have been made on a per occurrence basis is the penalty for not paying terminated employees in a timely manner pursuant to California Labor Code §§ 201, 202, 203. (See Cottingim Decl. ¶ 10.) By Defendant's calculation, however, this violation would only put $330,400 in controversy. (Id.)

The Court finds Defendant's showing insufficient to prove that the amount in controversy exceeds the jurisdictional minimum by a preponderance of the evidence. The evidence presented by Defendant

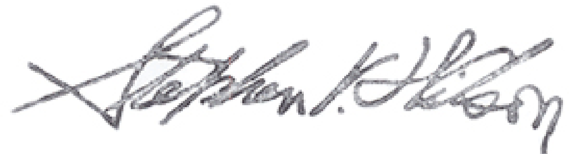
consists of conclusory amounts based on unknown underlying information. See Matheson, 319 F.3d at 1090 (noting that "summary-judgment-type evidence" is required). Without a more detailed showing, the Court is not able to assess whether the amount in controversy is satisfied. See Freebird, Inc. v. Merit Energy Co., 597 F. Supp. 2d 1245, 1250 (D. Kan. 2009) ("Figures of total revenue absent percentages or an explanation of the calculation of royalties are insufficient to establish the jurisdictional amount in controversy as to unpaid royalties."); Bartnikowski v. NVR, Inc., 2008 WL 2512839, at *5 (M.D.N.C. 2008) (remanding case because the defendant used unit of measurement without explaining what it means, how it was determined, or what it represents, and therefore, finding that the calculations were too speculative to discharge the defendant's burden); Wastier v. Schwan's Consumer Brands, 2007 WL 4277552, at *3 (S.D. Cal. 2007) (remanding because the defendant's calculations were "speculative, lack evidentiary support, and are conclusory at best").

Defendant's failure to include this information is inexcusable given that Defendant is undoubtedly in possession of its own employee records. See Amoche v. Guarantee Trust Life Ins. Co., 556 F.3d 41, 51 (1st Cir. 2009) (noting that the court may consider "which party has better access to the relevant information"); Evans v. Walter Indus., Inc., 449 F.3d 1159, 1164 n.3 (11th Cir. 2006) (finding significant in the context of removal the fact that "[d]efendants have better access to information about conduct by the defendants"). Defendant's failure to provide the basis for its calculations impairs Plaintiff's ability to effectively rebut the charge.

The Court also has serious doubts regarding the propriety of extrapolating Plaintiff's number of missed overtime and meal/rest breaks across the entire class. Although Plaintiff must allege that his claims are "typical" to the class, the typicality requirement pertains to nature of the lead plaintiff's "claims and defenses," not to the amount of damages. See Fed. R. Civ. P. 23(a)(3). Indeed, the amount of damages can vary amongst the members of the class. See Mendoza v. Zirkle Fruit Co., 222 F.R.D. 439, 446 (D. Wash. 2004) ("The fact that damage claims will vary among [class members] does not defeat typicality."). Plaintiff's assumption that all of the class members will have missed the same number of overtime hours and meal/rest breaks is not supported by any evidence. Thus, these doubts should also be resolved in favor of remand.[2]

In light of these serious flaws in Defendant's removal papers, the Court finds that Defendant has not met its burden of establishing the requisite amount in controversy by a preponderance of the evidence. Plaintiff's Motion to Remand is GRANTED.

IT IS SO ORDERED.



DATED: June 4, 2009

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

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[2] Plaintiff has submitted a recent order from Judge Guilford where he found similar extrapolation of overtime hours and meal/rest breaks to be insufficient. See Coronado v. M.A.C. Cosmetics Inc., CV 09-0233 AG (JWJx) (C.D. Cal., Apr. 27, 2009).

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