

USDC SCAN INDEX SHEET



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3:05-CV-01359 RIPPEE V. BOSTON MARKET CORP

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11	JACLYN RIPPEE, an individual,)	Case No. 05-CV-1359-BTM (JMA)
12	et al.,)	
13	Plaintiffs,)	ORDER DENYING PLAINTIFF'S
14	v.)	REQUESTS FOR CLASS SURVEY AND
15	BOSTON MARKET CORPORATION, et)	LAST KNOWN ADDRESS AND
16	al.,)	TELEPHONE NUMBER OF MEMBERS OF
17	Defendants.)	THE PROPOSED CLASS IN
)	CONNECTION WITH EXPEDITED
)	DISCOVERY ON THE AMOUNT IN
)	CONTROVERSY

18 On July 5, 2005, Defendant Boston Market Corporation removed
19 this action pursuant to the Class Action Fairness Act of 2005, 28
20 U.S.C. § 1332(d) (2) ("CAFA"). On July 12, 2005, the Court issued
21 an Order to Show Cause ("OSC") why the case should not be
22 remanded for lack of jurisdiction. After conducting a hearing on
23 the OSC, the Honorable Barry Ted Moskowitz ordered the parties to
24 engage in limited expedited discovery over the course of ninety
25 days on the issue of the amount in controversy, and to attend a
26 discovery conference before Magistrate Judge Jan M. Adler.

27 This Court required the parties to meet and confer in
28 advance of the discovery conference and submit a joint statement

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1 regarding the proposed scope of discovery pertaining to the
2 amount in controversy. Rather than submitting a joint statement
3 as ordered by the Court, the parties submitted separate
4 statements to the Court on August 31, 2005. During the course of
5 the Discovery Conference, held on September 7, 2005, this Court
6 confirmed the scope of discovery which had previously been agreed
7 upon by the parties, issued rulings on those areas that had not
8 been agreed upon by the parties, and set deadlines as
9 appropriate. The Court's Orders filed on September 23, 2005 and
10 September 29, 2005 set forth the pertinent agreements, decisions,
11 and deadlines relating to jurisdictional discovery. See Doc.
12 Nos. 26, 29. Plaintiff's requests for (a) a class survey and (b)
13 the last known address and telephone number of each member of the
14 proposed class were contested by Defendant and were taken under
15 submission by the Court.

16 The parties do not dispute that Plaintiff shall, at some
17 point, be permitted to send a survey to all members of the
18 proposed class. Indeed, Judge Moskowitz made this abundantly
19 clear during the August 11, 2005 hearing on the OSC. See
20 Transcript of OSC at 31:19-21, 39:10-42:3.¹ The issue that the
21 parties do not agree upon, and that is presently before the
22 Court, is whether a class survey should be permitted forthwith,
23 during the period of expedited jurisdictional discovery.

24 For the reasons set forth below, Plaintiff's request to send
25

26 ¹Furthermore, during the Discovery Conference, Defendant's
27 counsel, Mark Kemple, Esq., represented to Plaintiff's counsel and to
28 the Court that while Defendant opposed the sending of a survey to the
members of the proposed class in connection with jurisdictional
discovery, it would not oppose the sending of a survey to the members
of the proposed class at a later date in the case.

1 a survey to the members of the proposed class is denied.
2 Additionally, because Plaintiff's only articulated reason for
3 seeking the last known address and telephone number of each
4 member of the proposed class relates to sending a class survey,
5 this request is also denied.

6 **A. LEGAL STANDARDS**

7 **1. Amount in controversy**

8 Generally, the amount in controversy is to be decided from
9 the complaint itself. Richmond v. Allstate Ins. Co., 897 F.
10 Supp. 447, 449 (S.D. Cal. 1995). See also Pachinger v. MGM Grand
11 Hotel-Las Vegas, Inc., 802 F.2d 362, 363 (9th Cir. 1986) ("The
12 amount in controversy is normally determined from the face of the
13 pleadings.") The calculation of the amount in controversy takes
14 into account claims for "general" damages, "special" damages,
15 punitive damages if recoverable as a matter of law, and
16 attorneys' fees recoverable by statute or contract. Id.
17 (citations omitted). The amount in controversy does not include
18 accruing or accrued interest or the costs of the suit. Id.
19 (citation omitted). According to the Report of the Senate
20 Committee on the Judiciary on CAFA, the requirement under CAFA
21 that the amount in controversy exceed \$5,000,000 in the aggregate
22 may be established "either from the viewpoint of the plaintiff or
23 the viewpoint of the defendant, and regardless of the type of
24 relief sought (e.g., damages, injunctive relief, or declaratory
25 relief)." S. Comm. on the Judiciary, Class Action Fairness Act
26 of 2005, S.Rep. No. 109-14, at 40 (Feb. 28, 2005), *reprinted in*
27 *2005 U.S.C.C.A.N. 3, 2005 WL 627977.*

28 The procedure in the Ninth Circuit for determining the

1 amount in controversy on removal requires a district court to
2 first consider whether it is "facially apparent" from the
3 complaint that the jurisdictional amount is in controversy. See
4 Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 377 (9th
5 Cir. 1997). If it is not, the court may consider facts in the
6 removal petition as well as evidence submitted by the parties,
7 including "summary-judgment-type evidence relevant to the amount
8 in controversy at the time of removal." Id. A defendant who
9 bears the burden of proving the propriety of removal must provide
10 facts supporting its assertions as to the minimum jurisdictional
11 requirement. See, e.g., Alexander v. FedEx Ground Package
12 System, Inc., 2005 WL 701601, at *1 (N.D. Cal. 2005), citing Gaus
13 v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992).²

14 2. Jurisdictional discovery

15 Jurisdictional discovery is permissible when the Court is
16 unable to determine, on the existing record, whether it has
17 jurisdiction. See generally Wells Fargo & Co. v. Wells Fargo
18 Exp. Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977); GTE New Media
19 Servs., Inc. v. BellSouth Corp., 199 F.3d 1343, 1351-52 (D.C.
20 Cir. 2000). Such discovery should be "precisely focused" and
21 "aimed at addressing matters relating to [] jurisdiction." See
22 GTE, 199 F.3d at 1352; see also Crane v. Carr, 814 F.2d 758, 764

23
24 ²During the August 11, 2005 OSC hearing, Judge Moskowitz observed
25 that notwithstanding the Report of the Senate Committee on the
26 Judiciary on CAFA, which states that the burden of demonstrating that
27 a case should be remanded to state court is on the plaintiff (see
28 S.Rep. No. 109-14, at 41), the text of CAFA itself is silent with
respect to the burden. Judge Moskowitz further noted that case law
decided prior to the enactment of CAFA places the burden of
establishing federal jurisdiction on the removing party, and that, as
of the time of the OSC, at least one court had decided that the burden
remains on a removing defendant even under CAFA. Transcript of OSC at
4:3-5:20.

1 (D.C. Cir. 1987) (finding that "reasonable discovery addressed to
2 the jurisdictional issue" should be permitted). The Senate
3 Committee on the Judiciary made clear that jurisdictional
4 discovery under CAFA is to be limited in scope:

5 The Committee understands that in assessing the various
6 criteria established in all these new jurisdictional
7 provisions, a federal court may have to engage in some
8 fact-finding, not unlike what is necessitated by the
9 existing jurisdictional statutes. The Committee
10 further understands that in some instances, *limited*
11 discovery may be necessary to make these
12 determinations. However, the Committee cautions that
13 these jurisdictional determinations should be made
14 largely on the basis of *readily available information*.
15 Allowing substantial, burdensome discovery on
16 jurisdictional issues would be contrary to the intent
17 of these provisions to encourage the exercise of
18 federal jurisdiction over class actions. For example,
19 in assessing the citizenship of the various members of
20 a proposed class, it would in most cases be improper
21 for the named plaintiffs to request that the defendant
22 produce a list of all class members (or detailed
23 information that would allow the construction of such a
24 list), in many instances a massive, burdensome
25 undertaking that will not be necessary unless a
26 proposed class is certified. Less burdensome means
27 (e.g., factual stipulations) should be used in creating
28 a record upon which the jurisdictional determinations
can be made.

18 S.Rep. No. 109-14, at 42 (emphases added). Jurisdictional
19 discovery in CAFA cases, as in pre-CAFA cases, therefore, should
20 be "sufficiently tailored" to lead to information concerning the
21 jurisdictional issue. See, e.g., Schwartz v. Comcast Corp., 2005
22 WL 1799414, at *7 (E.D. Pa. July 28, 2005).

23 B. DISCUSSION

24 During the OSC hearing, Judge Moskowitz focused on
25 Plaintiff's "big ticket" claims, *i.e.*, Plaintiff's overtime and
26 "waiting time penalty" claims under the California Labor Code,
27 for purposes of analyzing the amount in controversy. As Judge
28 Moskowitz observed, the potential amount of "waiting time

1 penalties" at stake can be calculated by multiplying the number
2 of former employees in the proposed class by thirty days' wages;
3 thirty days' wages can be calculated by multiplying the average
4 number of hours worked by the average rate of pay. See Cal.
5 Labor Code § 203. These are calculations that can therefore be
6 performed by using Defendant's own numbers. Transcript of OSC at
7 23:18-24:18. Although the results of a class survey could reveal
8 the *bases* for the assessment of waiting time penalties, e.g., by
9 providing information concerning the number of missed meal and
10 rest breaks alleged by the employees, this information is not
11 necessary to ascertain the amount of waiting time penalties at
12 stake.

13 Similarly, a significant component of Plaintiff's overtime
14 claims can be ascertained using Defendant's own numbers. Under
15 California Labor Code section 510, an employee is entitled to
16 overtime at the rate of no less than one-and-one-half times his
17 or her regular rate of pay if the employee works in excess of
18 eight hours per day or forty hours per week. Cal. Labor Code §
19 510. Unpaid overtime is therefore only potentially an issue for
20 those employees who work either a "full-time" schedule or close
21 to such a schedule. Presumably, a "part-time" employee, e.g., an
22 employee who works only a few hours per shift, would not likely
23 ever reach the eight hours per day or forty hours per week
24 threshold for overtime pay. Determining, from Defendant's own
25 records, the actual number of employees who worked an eight hour
26 per day or forty hour per week schedule, or close to such a
27 schedule, and who thus potentially would have been eligible for
28 overtime, will help to test the assumptions upon which the

1 overtime calculations previously set forth by Defendant rest, and
2 could result in a revision of those numbers. See Def.'s Response
3 to OSC, at 10-11.³

4 The amount of overtime claims in controversy can thus be
5 calculated using a combination of Defendant's own numbers and
6 Plaintiff's allegations; information obtained via a class survey
7 is not required for this determination. While it is correct, as
8 Plaintiff contends, that determining the actual amount of
9 overtime allegedly owed would require information directly from
10 the employees, since Plaintiff alleges "off-the-clock" overtime
11 that will not be documented in Defendant's records, an estimate
12 of the amount of unpaid overtime *in controversy* can be calculated
13 using information from Defendant's own records, as discussed
14 above. As stated by Judge Moskowitz, "It's not a question as to
15 what you would owe. It's a question as to what is in
16 controversy." Transcript of OSC at 10:4-5. See also Scherer v.
17 Equitable Life Assurance Society of the United States, 347 F.3d
18 394, 397-99 (2nd Cir. 2003) (stating that the ultimate or
19 provable amount of damages is not what is considered when
20 determining the amount in controversy; rather, it is the amount
21 put in controversy by the plaintiff's complaint).

22 Allowing a class survey during the period of expedited
23 discovery, while the Court's jurisdiction remains unsettled,
24 would be contrary to the principle of limited discovery as
25 provided under existing case law and in the Senate Judiciary
26

27 ³The overtime calculations set forth by Defendant in response to
28 the OSC were premised upon the assumption that all of the members of
the proposed class work, or worked, eight hours per day. See Def.'s
Response to OSC, at 10-11.

1 Committee Report on CAFA. Plaintiff has not set forth any
2 persuasive argument or authority supporting the need for a class
3 survey on the amount in controversy. Rather, Plaintiff's need
4 for the survey is clearly more germane to the merits of the case
5 rather than to the amount in controversy. Longstanding
6 authority, however, requires that jurisdiction be established as
7 a threshold matter before a federal court may consider a case on
8 its merits. See Steel Co. v. Citizens for a Better Environment,
9 523 U.S. 83, 94-95 (1998).

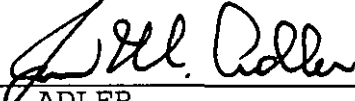
10 The Court further observes that Judge Moskowitz was inclined
11 to place the burden of demonstrating that the amount in
12 controversy exceeds \$5 million on Defendant. See Transcript of
13 OSC at 4:3-5:20; see also supra fn. 1. The placing of this
14 burden on Defendant supports not allowing Plaintiff to conduct a
15 class survey now. If Defendant bears the burden, Defendant, not
16 Plaintiff, must provide evidence that it is "more likely than
17 not" that the amount in controversy exceeds the \$5 million
18 minimum. See, e.g., Sanchez v. Monumental Life Ins. Co., 102
19 F.3d 398, 404 (9th Cir. 1996). The Court believes that the
20 evidence to be produced in accordance with this Court's orders
21 should provide more than an ample record upon which to determine
22 the amount in controversy. Finally, permitting a class survey
23 now would require the consideration of a host of disputed issues
24 including, *inter alia*, attorney-client privilege issues, issues
25 concerning whether Defendant is entitled to vet the survey prior
26 to its issuance, and statistical analysis issues, which are
27 clearly not contemplated by a limited and expedited discovery
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1 period.⁴

2 C. CONCLUSION

3 Based on the foregoing reasons, Plaintiff's requests for a
4 class survey and for the last known address and telephone number
5 of all members of the proposed class, in connection with
6 expedited discovery on the amount in controversy, is denied.

7 IT IS SO ORDERED.

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9 Dated: October 12, 2025 
10 JAN M. ADLER
United States Magistrate Judge

11 COPY TO:

12 HONORABLE BARRY TED MOSKOWITZ
13 UNITED STATES DISTRICT JUDGE

14 ALL COUNSEL OF RECORD
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27 _____
28 ⁴These issues were raised in the parties' statements concerning
the scope of discovery and during the Discovery Conference before
Magistrate Judge Adler.