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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COLLEEN WILLIAMS, Plaintiff-Appellee, v. VIBRANTCARE REHABILITATION, INC., Defendant-Appellant.	No. 22-16424 D.C. No. 2:21-cv-01179-KJM-JDP MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted November 14, 2022
Pasadena, California

Before: WARDLAW and W. FLETCHER, Circuit Judges, and KORMAN,[**] District Judge.

VibrantCare Rehabilitation, Inc. ("VibrantCare") appeals from the district court's order remanding to state court. Colleen Williams, a former employee,

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

brought a putative class action against VibrantCare in Sacramento County Superior Court alleging, *inter alia*, unpaid overtime wages, missed meal periods and rest breaks, inaccurate wage statements, and untimely final wage payments. The proposed class consisted of all current and former hourly paid or non-exempt employees who worked for VibrantCare within California at any time during the four years preceding the complaint. VibrantCare's hourly paid or non-exempt workforce during that time consisted of approximately 44.2% full-time employees, 15.4% part-time employees, and 40.4% per diem employees.

VibrantCare removed the case to the federal district court for the Eastern District of California under 28 U.S.C. § 1453 on the basis of diversity jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). The district court remanded the case to state court. It held that the case did not satisfy the CAFA subject matter jurisdictional amount in controversy requirement of more than $5,000,000.

We have jurisdiction under 28 U.S.C. § 1453(c)(1). We review the district court's remand order de novo. *Ibarra v. Manheim Inv., Inc.*, 775 F.3d 1193, 1196 (9th Cir. 2015). We review the district court's factual findings for clear error. *Rea v. Michaels Stores Inc.*, 742 F.3d 1234, 1237 (9th Cir. 2014) (per curiam).

VibrantCare first argues that the district court erred in requiring it to prove the amount in controversy by a preponderance of the evidence. In cases where plaintiff makes a facial attack on removal, the district court must only determine if "the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Salter v. Quality Carriers, Inc.*, 974 F.3d 959, 964 (9th Cir. 2020) (internal quotation marks omitted). By contrast, if plaintiff makes a factual attack, "the burden is on the defendant to show, by a preponderance of the evidence, that the amount in controversy exceeds the $5 million jurisdictional threshold." *Harris v. KM Indus., Inc.*, 980 F.3d 694, 699 (9th Cir. 2020). A factual attack is one that makes "a reasoned argument as to why any assumptions on which [defendant's jurisdictional allegations] are based are not supported by the evidence." *Id.* at 700. In this case, Williams clearly made a factual attack. She attacked the factual evidence in the record addressing the number and types of violations, and the attorney's fees calculations, underlying VibrantCare's contentions with respect to the amount in controversy. Therefore, the district court properly used the preponderance of the evidence standard.

Section 1332(d) grants district courts original jurisdiction over class actions with, *inter alia*, an amount in controversy exceeding $5,000,000. The amount in controversy is a measure of "the reality of what is at stake in the litigation."

Ibarra, 775 F.3d at 1198. The assumptions used to estimate the amount in controversy "cannot be pulled from thin air but need some reasonable ground underlying them." *Id.* at 1199. An assumption does not need to be proven. It need only be reasonable. *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 927 (9th Cir. 2019). If a court finds an underlying assumption to be unreasonable compared to a different assumption, it must "consider the claim under the better assumption—not just zero-out the claim." *Jauregui v. Roadrunner Transp. Serv., Inc.*, 28 F.4th 989, 996 (9th Cir. 2022).

The district court erred in addressing the evidence. The court applied a value of $0 to almost all of the claims against VibrantCare, including almost all claims made by full-time employees. The district court concluded that VibrantCare unreasonably calculated the amounts part-time and per diem employees claimed in the same manner as the amounts full-time employees claimed. The court then discounted equally the amounts claimed by all employees. This was error, given that the reasons that supported discounting to $0 the part-time and per diem employees' claims did not apply to the full-time employees' claims.

For purposes of removal, VibrantCare calculated that full-time employees claimed an average of one hour per week of unpaid overtime, two missed meal

breaks a week, and two missed rest periods a week. If that calculation is reasonable and may be used in calculating the amount in controversy for purposes of removal, the amount of damages claimed by the full-time employees is very close to the required removal amount of $5,000,00.01. We recognize that the district court did not independently assess the reasonableness of VibrantCare's calculation of claimed damages for full-time employees based on the violation rates for unpaid overtime and missed meal and rest breaks. The district court simply zeroed out all claims for full-time employees except the wage statement claims. But we see no basis on this record to conclude that VibrantCare's assumption of an average of one hour per week of claimed unpaid overtime, two missed meal breaks, and two missed rest periods for full-time employees was unreasonable.

Part-time and per diem employees make up over half of the proposed class. Even treating as appropriate a very substantial discount in the amount of damages claimed by those part-time and per diem employees, the discounted damages those part-time and per diem employees claim, when combined with the damages full-time employees claim, exceeds $5,000,000.

We therefore conclude that VibrantCare has sufficiently shown that there is more than $5,000,000 in controversy, and that the court erred in remanding to state court.

REVERSED and REMANDED.