JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 17-2434 JGB (SPx)**	Date	February 1, 2018
Title	***Juan Manuel Perez Reyes, et al. v. National Distribution Centers, LLC, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) GRANTING Plaintiffs' Motion to Remand (Dkt. No. 17); (2) REMANDING the Case; and (3) VACATING the February 5, 2018 Hearing (IN CHAMBERS)**

Before the Court is Plaintiffs Juan Manuel Perez-Reyes and Myra Perez-Reyes's Motion to remand. (Dkt. No. 17.) The Court determines the Motion is appropriate for resolution without a hearing. See Fed. R. Civ. 78; L.R. 7-15. After considering the papers filed in support of, and in opposition to the Motion, the Court GRANTS the Motion and REMANDS the case to state court. The February 5, 2018 hearing is VACATED.

I. BACKGROUND

On May 3, 2017, Plaintiffs filed a putative class action complaint against Defendant National Distribution Center ("Defendant" or "NDC") in Superior Court for the County of San Bernardino. ("Complaint," Dkt. No. 1-1.) Plaintiffs bring this action on behalf of themselves and similarly situated employees who worked for NDC in California as receiving clerks/administrative assistants, material handlers, and other like positions. (Compl. ¶ 1.) Plaintiffs allege nine causes of action under California law: (1) failure to pay minimum wages, (2) failure to pay overtime wages, (3) failure to provide meal periods, (4) failure to provide rest periods, (5) failure to reimburse for necessary expenditures, (6) failure to keep accurate payroll records, (7) failure to pay wages upon ending employment, (8) violation of California Business and Professions Code §§ 17200, et seq., and (9) violation of California's Private Attorney General Act. (See Compl.)

Dockets.Justia.com

Defendant removed the action on December 4, 2017. ("Notice of Removal ('NOR')," Dkt. No. 1.) Defendant asserts the Court has jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). (NOR ¶ 1.) Plaintiff filed the Motion on January 3, 2018. ("Motion," Dkt. No. 17.) Defendant opposed the Motion on January 12, 2018. ("Opposition," Dkt. No. 19.) Plaintiffs replied on January 22, 2018. ("Reply," Dkt. No. 22.)

II. LEGAL STANDARD

Federal courts have original jurisdiction under CAFA where the number of proposed plaintiffs is greater than 100, there is a diversity of citizenship between any member of the class and any defendant, and the amount in controversy is more than $5,000,000, exclusive of interests and costs. 28 U.S.C. § 1332(d); Ibarra v. Manheim Investments, Inc., 775 F.3d 1193, 1195 (9th Cir. 2015). In determining the amount in controversy, courts first look to the complaint. Ibarra, 775 F.3d at 1197. Where damages are unstated in a complaint, the defendant bears the burden of proving the amount in controversy is met. Id.

Though a notice of removal need only include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold, when the amount in controversy is contested, "both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied." Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S.Ct. 547, 550 (2014).

Generally, courts must "strictly construe the removal statute against removal jurisdiction." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). However, no anti-removal presumption exists in cases invoking CAFA. Dart Cherokee, 135 S.Ct. at 554.

III. DISCUSSION

The parties do not dispute Plaintiffs allege claims on behalf of more than 100 putative class members. Plaintiffs move to remand on the grounds that NDC failed to establish CAFA's jurisdictional requirements of minimum diversity and that the amount of controversy exceeds $5 million. (Mot. at 5.)

A. Minimum Diversity

Plaintiffs assert Defendant is an unincorporated entity, and there remains "an open question" as to whether the trusts who are partners of NFI, LP, its owning entity, are citizens of California. (Mot. at 15-16.) Plaintiffs are both citizens of California. (Compl. ¶¶ 7-8.)

CAFA requires a defendant show that "at least one plaintiff is diverse from at least one defendant." Luther v. Countrywide Home Loans Servicing LP, 533 F.2d 1031, 1034 (9th Cir. 2008). The citizenship of a limited liability company ("LLC") for purposes of diversity jurisdiction is that of each of its members. Johnson v. Columbia Properties Anchorage, LP, 437

F.3d 894, 899 (9th Cir. 2000). If any member of an LLC is itself a partnership or association, the citizenship of each submember must also be known. Id.

NDC submitted a declaration by Sarah Pontoski, the Associate General Counsel of NFI Management Services, a position in which she provides legal services to Defendant. (Pontoski Decl. ¶ 1, Dkt. No. 5.) Pontoski avers NDC is an LLC wholly owned by NFI, LP, a limited partnership. (Id. ¶ 3.) NFI, LP is a limited partnership consisting of three partners and six trusts: (1) Sidney Brown, a resident of Pennsylvania, (2) Ike Brown, a resident of Texas, (3) Jeffrey Brown, a resident of New Jersey, and six traditional trusts, the trustees of which are citizens of Pennsylvania, Texas, and New Jersey. (Id. ¶ 4.) Therefore, for purposes of diversity jurisdiction, Defendant is a citizen of Pennsylvania, Texas, and New Jersey. As Plaintiffs are citizens of California, there is minimal diversity between the parties.[1]

B. Amount in Controversy

In its NOR, Defendant asserts the amount of controversy is met through the penalties of just two of Plaintiffs' causes of action. (NOR ¶ 23.) Plaintiffs argue Defendant relies on a series of unsupported assumptions in calculating the amount in controversy. (Mot. at 9-10.) Among them, Defendant's reliance on the assumptions that all 1,227 of the putative class members worked eight hours a day, earned at least $13.71 per hour, and there was a 100% violation rate for the approximately 1,227 putative class members. (Id.) Principally, Plaintiffs contend Defendant's proffered declaration by Martha Michel is insufficient to sustain Defendant's calculations.[2] (Id. at 11.)

In support of its NOR, Defendant submitted Michel's declaration. ("Michel Decl.," Dkt. No. 4.) Michel is employed by BFI Management Services, LLC and reviews employment data for NDC as part of her job. (Michel Decl. ¶¶ 1-2.) Michel avers NDC employs over 1,544 full

---

[1] The Court also notes the Fourth Circuit analyzes the citizenship of an LLC for purposes of CAFA is like that of a corporation, by assessing its principal place of business and place of incorporation. See Ferrell v. Express Check Advance of S.C., LLC, 591 F.3d 698, 705 (4th Cir. 2010.) Pontoski also declares NDC is a Delaware LLC with its executive and administrative functions housed in its headquarters in New Jersey. (Pontoski Decl. ¶ 3; Supp. Pontoski Decl. ¶ 3, Dkt. No. 19-3.) As stated above, Plaintiffs are citizens of California, and therefore, even under either analysis, there is minimal diversity between the parties.

[2] Plaintiffs object to Michel's declaration that she lacks the personal knowledge and competency to testify on specific matters under Federal Rule of Evidence ("FRE") 602. (Dkt. No. 17-1.) FRE 602 provides "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Michel declares she reviews NDC's employment data as part of her job and reviewed data and records pertaining to the putative class in Plaintiffs' Complaint. (Michel Decl. ¶ 2.) The Court finds she has personal knowledge of NDC's employment records to support the statements in her declarations. Plaintiffs' objection is OVERRULED.

time non-exempt employees that work in California "at any given time," and since May 3, 2014, over 1,227 non-exempt California employees have been separated from Defendant. (Id. ¶¶ 4, 6.) Michel also declares the average hourly compensation of NDC's non-exempt California employees from May 3, 2013 to July 2017 was $13.71. (Id. ¶ 7.)

1. Wage Statement Claim

Under California Labor Code § 226, employers are required to furnish their employees an "accurate itemized statement in writing" of their wages. Cal. Lab. Code § 226. The statutory penalty for failing to furnish the wage statement is $50 for each pay period in which a violation occurs, up to $4,000. Cal. Lab. Code § 226. Defendant argues that in Plaintiffs' Complaint, they have alleged a 100% violation rate such that every class member would be entitled to wage statement penalties. (NOR ¶24.) Therefore, since Defendant has had 40 pay periods since May 3, 2016, Defendant calculates Plaintiffs' statutory penalties under their sixth cause of action to be $3,088,000.[3] (NOR ¶ 26.) Plaintiffs' main argument is that the assumed 100% violation rate is without evidentiary support. (Mot. at 11.)

The Complaint alleges Defendant "knowingly and intentionally failed to provide timely, accurate itemized wage statements" to the putative class members. (Compl. ¶ 64.) Additionally, Plaintiffs claim "[d]uring all relevant time periods," Defendant failed to provide the putative class members who worked more than five consecutive hours with a meal break, and Defendant "failed to implement a policy or practice" to allow the putative class to receive rest periods. (Compl. ¶¶ 49, 55.) Plaintiffs also allege numerous instances from October 2013 to June 2016 where their wage statements failed to accurately clock the minutes they worked. (Compl. ¶ 20.) Finally, Plaintiffs allege that due to NDC's "rounding policy" employees were required to clock in "at least seven minutes" before their scheduled time and clock out at "least seven minutes" after their scheduled shift but were not paid for this time. (Id.) Defendant argues these statements, among others, demonstrate Plaintiffs allege a 100% violation rate, allowing it to estimate each employee would have had a wage statement violation in each pay period. (Opp'n at 12.)

In Ibarra, the Ninth Circuit held that alleging a "pattern and practice" of doing something "does not necessarily mean always doing something." 775 F.3d at 1198-199. The court held the plaintiff's allegation the defendant maintained "an institutionalized unwritten policy" also did not mean such violations occurred in each and every shift. Id. at 1199. Plaintiffs' statements regarding the absence of the rest/meal periods are insufficient to establish a 100% violation rate. While Defendant may not have allowed the potential class members breaks as required, there is no indication of the frequency of the violations. Nevertheless, the Court finds Defendant's violation rate assumption reasonable based on the language of the complaint regarding the rounding policy. Plaintiffs allege each shift resulted in time for which they were not compensated. Plaintiffs cannot now doubt the assumption that each pay period resulted in an inaccurate wage statement. See Salcido v. Evolution Fresh, Inc., 2016 WL 79381, at *7 (C.D.

[3] Calculated as 1,544 full time employees x 40 pay periods x $50/pay period.

Cal. Jan 6, 2016) (finding defendant established the wage statement penalties by a preponderance of the evidence using a 100% violation rate for the putative class members where the plaintiff's complaint and deposition alleged "a uniform policy and systematic scheme of wage abuse" and off-the-clock work on a daily basis).

The Court finds Defendant's assertion of the number of employees "at any given time" too speculative to result in a reasonable estimate. In its Opposition, Defendant attempts to remedy this deficiency by averring the number of wage statements it issued to the putative class members and claiming the number of pay periods is 43, placing $2,832,550 in controversy. (Opp'n at 13.) Nonetheless, Defendant does not clarify the number of employees who worked during the relevant time period and the Court cannot guess from the number of wage statements. However, Plaintiff does not contest Defendant's calculation in its Opposition. Therefore, the Court finds Defendant has established by a preponderance of evidence that $2,832,550 is in controversy regarding wage statement claims.

2. Waiting-Time Penalties Claim

Under California Labor Code § 203, the statutory penalty is one day's wages for each day an employee who has separated from their employer is not paid all wages owed, up to a total of thirty days of wages. Cal. Lab. Code § 203. Defendant asserts Plaintiffs' Complaint alleges a 100% violation rate, therefore each putative class member is entitled to compensation. (NOR ¶ 27.) Consequently, Defendant calculates Plaintiffs' statutory penalties under their seventh cause of action to be $4,037,320.80.[4] (NOR ¶ 29.) Plaintiffs dispute the reasonableness of the assumptions that the employees worked eight hours per day, the hourly rate of those workers, or the amount of days the wages went unpaid after separation. (Mot. at 12-13.)

Plaintiffs allege, "Defendant willfully refused and/or failed to promptly compensate Plaintiffs and Plaintiff Class for all wages owed." (Compl. ¶ 73.) Plaintiff also alleges Defendant scheduled the employees in a way that caused them "to work in excess of eight hours per day and/or forty hours per week." (Id. ¶ 43.) Nevertheless, the Court agrees the Michel declaration does not provide support for Defendant's assumption the putative class members worked eight hours per day. Michel does not provide any information regarding the average length of workday the putative class members worked during the relevant time period. Cf. Quintana v. Claire's Stores, Inc., 2013 WL 1736671, at *6 (N.D. Cal. Apr. 22, 2013) (finding defendants' calculation for waiting-time penalties reasonable where defendants proffered a declaration that the putative class members were "regularly scheduled to work eight hour days," and defendant estimated the minimum penalties using a 7-hour work day). In addition, Michel avers only the hourly compensation for NDC's non-exempt California employees, a group broader than the putative class. Even if the assumption that each potential class member suffered a 30-day violation penalty is reasonable, the Court cannot credit Defendant's calculation of the waiting-time penalties as reasonably estimated.

[4] Calculated as 1,227 separated class members x $13.71/hour x 8 hours/day x 30 days.

In its Opposition, Defendant provides new declarations and calculations to assert at least $3,510,012.80[5] is in controversy for waiting-time penalties. (Opp'n at 15-16.) Relying on these new declarations, Defendant asserts NDC has a policy of requiring each full-time employee to work a minimum of 30 hours per week. (Ritondaro Decl. ¶ 3, Dkt. No. 19-4.) In addition, Defendant proffers a declaration and exhibit detailing the hourly pay rate of full-time employees separated from NDC since May 3, 2014. (Behrens Decl., Ex. A, Dkt. No. 19-1.)[6] According to Exhibit A, there were 2,163 employees separated from NDC in the relevant time period. (Id.) As Plaintiffs highlight, this new figure is vastly different from Defendant's previous declaration asserting 1,227 California employees were separated from Defendant in the relevant time period. (Michel Decl. ¶ 6.) Moreover, the Michel declaration does not identify whether the 1,227 California separated employees were full-time or part-time workers, whereas the Behrens declaration asserts Exhibit A, identifying 2,163 separated employees, is a report of only the full-time California employees separated. (Behrens Decl. ¶ 3.)

Exhibit A also contains the hourly rate for each employee multiplied by 7.5 hours/day or 4.3 hours/day times 30 days. Due to NDC's averred policy of requiring a minimum of 30 hours per week, the Court finds the assumption the potential class members worked 30 hours per seven days more reasonable than working 30 hours per four days. However, due to the contradictory figures offered by Defendant as to the number of putative class members separated from NDC, the Court cannot credit Defendant's calculations as to the total amount in controversy for the waiting-time penalties.

Plaintiffs do not offer any of their own evidence to challenge that of Defendants. Instead, Plaintiffs make their own unsupported assumptions and attempt to pick and choose different figures in Defendant's calculations to create their own estimate of $1,337,588.73 in controversy.

---

[5] Calculated as each of the 2,163 employees x (individual hourly rates) x 4.3 hours/day x 30 days.

[6] Plaintiffs object to Exhibit A attached to the declaration of Jeremy Behrens on the grounds that he lacks personal knowledge of the subject matter, and the exhibit is a non-original writing offered to prove the truth of its contents in violation of FRE 1002. (Dkt. No. 24.) FRE 1002 ordinarily requires the proponent, when attempting to prove the content of a document or writing to produce the original. Fed. R. Evid. 1002. FRE 1006 provides an exception to this rule and permits the admission of summaries of voluminous writings. Fed. R. Evid. 1006. Exhibit A includes a chart of data from NDC's personnel records database, along with calculations conducted by Defendant. FRE 1006 requires the proponent establish the underlying documents are admissible for evidence. United States v. Johnson, 594 F.2d 1253, 1256 (9th Cir. 1979). Here, the underlying records are admissible as business records under FRE 803(6). The personnel records were kept in the course of NDC's regularly conducted business activity, and Behrens, a Human Resources analyst, was qualified to testify as to this information. See United States v. Smith, 609 F.2d 1294, 1302 (9th Cir. 1979) ("The witness must only be in a position to attest to [the evidence's] authenticity.") (citation and internal quotations omitted). Accordingly, Plaintiffs' objection is OVERRULED.

(Reply at 5.) The Court finds particularly troubling Plaintiffs' attempt to use the numbers in the Michel declaration after objecting to it in its entirety. In Ibarra, the Ninth Circuit held that although the defendant's assumption about alleged labor law violations were "not grounded in real evidence," the plaintiff's lack of evidence to assert an alternative violation rate mandated remand to allow "both sides to submit proof related to the disputed amount in controversy." 775 F.3d at 1199 (citing Dart, 135 S.Ct. at 553-54). Plaintiffs' efforts, relying on Defendant's figures they dispute, are wholly insufficient to establish their claimed amount in controversy. See id. ("[A] damages assessment may require a chain of reasoning that includes assumptions. When that is so, those assumptions cannot be pulled from thin air but needs some reasonable ground underlying them.") Therefore, the Court finds neither party has established by a preponderance of evidence any amount in controversy for the waiting-time penalties.

3. Attorneys' Fees

In Defendant's Opposition, he asserts a benchmark of 25% of the amount recoverable should be added to the amount in controversy as attorneys' fees. (Opp'n at 16.) This Court takes the position that when calculating attorneys' fees to establish jurisdiction, "the only fees that can be considered are those incurred as of the date of removal." See Faulkner v. Astro-Med, Inc., 1999 WL 820198, at *9 (N.D. Cal. Oct. 4, 1999) (citing Miranti v. Lee, 3 F.3d 925, 928 (5th Cir. 1993)).

Defendant calculates Plaintiffs' attorneys' fees through trial to be 25% of the total estimated damages, approximately $1,585,640.70. (Opp'n at 18.) However, this Court calculates attorneys' fees through the time of removal. Along with their Reply, Plaintiffs filed a declaration attesting their attorneys' fees through the time of removal to be $51,380. (Mahoney Decl. ¶ 3, Dkt. No. 23-1.) Therefore, the Court finds the amount in controversy for attorneys' fees established by a preponderance of the evidence is $51,380.

4. Total

In sum, the Court finds the established amount in controversy is approximately $2,883,930.[7] This amount is below the CAFA jurisdictional requirement of exceeding $5 million. While Defendant chose only to offer sums for two of Plaintiffs' nine claims, the Court cannot assume without any evidence Plaintiffs' other seven claims involve amounts in controversy sufficient to meet or exceed the jurisdictional threshold.

IV. CONCLUSION

The established amount in controversy, $2,883,930, does not exceed the jurisdictional minimum. Accordingly, the Court does not have subject matter jurisdiction over Plaintiffs' claims. The Court GRANTS Plaintiffs' Motion and REMANDS the action to state court.
IT IS SO ORDERED.

---

[7] Calculated as $2,832,550 in wage statement claims and $51,380 in attorney's fees.