

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

McMillon v. O'Reilly Auto Enterprises, LLC

McMillon · No. 3:25-cv-01357-CAB-SBC · Decided October 3, 2025

SUMMARY

The Southern District of California grants Noah McMillon’s motion to remand a representative California Private Attorneys General Act action against O’Reilly Auto Enterprises, LLC. The court holds that Defendant failed to establish by a preponderance of the evidence that the amount in controversy exceeded \$75,000, applying pro rata treatment to PAGA penalties and attorney fees, and declines to award removal-related attorney fees.

CASE DETAILS

COURT	United States District Court for the Southern District of California
WRITING FOR THE COURT	Cathy Ann Bencivengo
JURISDICTION	United States District Court for the Southern District of California
DECIDED	October 3, 2025
DOCKET	3:25-cv-01357-CAB-SBC
DISPOSITION	remanded
PROCEDURAL POSTURE	Plaintiff moved to remand a California Private Attorneys General Act representative action removed by Defendant on diversity-jurisdiction grounds.
STANDARD OF REVIEW	The removing defendant bears the burden of establishing federal subject matter jurisdiction by a preponderance of the evidence. When the amount in controversy is contested, the court examines the complaint and may consider summary-judgment-type evidence; the defendant's calculations may not rest on unreasonable or speculative assumptions.
PRECEDENTIAL VALUE	unpublished district-court opinion
PARTIES	O’Reilly Auto Enterprises, LLC v. Noah McMillon

TOPICS

- subject matter jurisdiction
- civil procedure
- wage and hour
- flsa
- attorney fees

PRACTICE AREAS

civil procedure

employment law

wage and hour

remedies

QUESTIONS PRESENTED

1. Whether Defendant established by a preponderance of the evidence that the amount in controversy exceeded \$75,000 for purposes of diversity jurisdiction.
2. Whether PAGA civil penalties and attorney fees attributable to other aggrieved employees or the Labor and Workforce Development Agency could be aggregated with Plaintiff's individual share to satisfy the amount-in-controversy requirement.
3. Whether *Viking River Cruises, Inc. v. Moriana* required the court to treat Plaintiff's individual PAGA claim and associated attorney fees as independently recoverable for amount-in-controversy purposes.
4. Whether Plaintiff was entitled to attorney fees and costs incurred in obtaining remand.

HOLDINGS

1. Defendant failed to establish by a preponderance of the evidence that the amount in controversy exceeded \$75,000 because only Plaintiff's pro rata share of the PAGA penalties and attorney fees could be considered, and the resulting amount was well below the jurisdictional threshold.
2. The 65% share of PAGA penalties payable to the Labor and Workforce Development Agency should not be aggregated with Plaintiff's share when calculating the amount in controversy.
3. *Viking River Cruises, Inc. v. Moriana* does not require aggregation of Plaintiff's individual PAGA penalties or attorney fees in this remand proceeding.
4. Plaintiff was not entitled to attorney fees and costs incurred in seeking remand because Defendant had an objectively reasonable, colorable basis for removal.

KEY QUOTATIONS

“The Ninth Circuit has clearly held that only the PAGA penalties attributable to a plaintiff may be considered in calculating the amount in controversy.” (at 7)

“The Court finds that only Plaintiff’s pro rata share of attorney fees should be considered for purposes of determining the amount in controversy.” (at 12)

*“The Court holds that *Viking River* does not apply, and the Court must first rule on the question of subject matter jurisdiction.”* (at 13)

“For the foregoing reasons, the Court holds Defendant has not met its burden of establishing by a preponderance of evidence in this case that the amount in controversy meets the \$75,000 jurisdictional requirement.” (at 14)

FACTUAL BACKGROUND

Plaintiff worked as an hourly store manager for Defendant in California from approximately July 2021 through November 2024. He alleged that Defendant required him and other nonexempt employees to work off the clock,

failed to pay minimum and overtime wages and certain wage premiums, issued inaccurate wage statements, and failed to reimburse business expenses. Plaintiff brought the action under PAGA on behalf of himself and other aggrieved California employees and the State of California.

PROCEDURAL HISTORY

Plaintiff filed a representative PAGA action in the Superior Court of California, County of San Diego. Defendant removed the action under 28 U.S.C. §§ 1332(a), 1441, and 1446, asserting complete diversity and an amount in controversy exceeding \$75,000. Plaintiff moved to remand, and the district court granted the motion, remanding the action to state court and denying Plaintiff's request for removal-related attorney fees.

DISPOSITION

remanded

REMAND INSTRUCTIONS

The action is remanded to the Superior Court of California, County of San Diego. Plaintiff's request for attorney fees and costs associated with the remand motion is denied.

CASES CITED

- Baumann v. Chase Investment Services Corp., 747 F.3d 1117, 1119 (9th Cir. 2014)
- Urbino v. Orkin Services of California, Inc., 726 F.3d 1118, 1121–22 (9th Cir. 2013)
- Becerra-Zamora v. Gruma Corp., No. 24-CV-01076-WHO, 2024 WL 3338353, at *2 (N.D. Cal. July 8, 2024)
- Gunther v. Alaska Airlines, Inc., 72 Cal. App. 5th 334, 357 (Ct. App. 2021)
- Smith v. Mail Boxes, Etc., 191 F. Supp. 2d 1155, 1158 (E.D. Cal. 2002)
- Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987)
- Magnum Property Investments, LLC v. Pfeiffer, No. 18-CV-02855, 2019 WL 459194, at *2 (S.D. Cal. Feb. 6, 2019)
- Anderson v. Starbucks Corp., 556 F. Supp. 3d 1132, 1135 (N.D. Cal. 2021)
- Ibarra v. Manheim Investments, Inc., 775 F.3d 1193, 1197 (9th Cir. 2015)
- Singer v. State Farm Mutual Automobile Insurance Co., 116 F.3d 373, 377 (9th Cir. 1997)
- Martinez v. Sunnova Energy Corp., No. 2:24-cv-06346, 2025 WL 732350, at *5 (C.D. Cal. Mar. 7, 2025)
- Coffin v. Magellan HRSC, Inc., No. 19-CV-2047-BAS-NLS, 2020 WL 773255, at *5–6 (S.D. Cal. Feb. 18, 2020)
- Ruiz v. Snyder's-Lance, Inc., No. 24-CV-04053-RFL, 2024 WL 4295280, at *2 (N.D. Cal. Sept. 24, 2024)
- Sloan v. IHG Management (Maryland) LLC, No. CV 19-21-DMG (JCX), 2019 WL 1111191, at *2 (C.D. Cal. Mar. 11, 2019)
- Canela v. Costco Wholesale Corp., 971 F.3d 845, 848, 850 (9th Cir. 2020)
- Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 640, 654–55 (2022)

- Butt v. 9W Halo West Opco, L.P., No. 2:22-CV-02012 WBS AC, 2023 WL 196472, at *3 (E.D. Cal. Jan. 17, 2023)
- Bell v. DeVry University, Inc., No. 25-CV-595-RSH-BLM, 2025 WL 1453842, at *4 (S.D. Cal. May 21, 2025)
- Fritsch v. Swift Transportation Co. of Arizona, LLC, 899 F.3d 785, 796 (9th Cir. 2018)
- Higginbotham v. South East Employee Leasing Services, Inc., No. 2:20-cv-00575-KJM-DB, 2020 WL 5535421 (E.D. Cal. Sept. 15, 2020)
- Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005)
- Lopez v. FedEx Office and Print Services, Inc., 3:23-cv-02155-JO-SBC (S.D. Cal. Jan. 31, 2024)

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF
CALIFORNIA 10 11 NOAH MCMILLON, on behalf of all Case No.: 3:25-cv-01357-CAB-SBC
others similarly situated and the State of 12 California under the Private Attorneys ORDER
REMANDING ACTION TO 13 General Act, STATE COURT 14 Plaintiff, [Doc. No. 8] 15 v. 16
O'REILLY AUTO ENTERPRISES, LLC and DOES 1 through 50, inclusive, 17 Defendants.

18 19 20 On April 3, 2025, Plaintiff Noah McMillon ("Plaintiff") brought a representative 21
California Private Attorneys General Act ("PAGA") action, Cal. Lab. Code § 2698 et seq., 22
against Defendant O'Reilly Auto Enterprises, LLC ("Defendant") and Does 1–50. [Doc. 23 Nos.
1–2.]

On May 28, 2025, Defendant filed a Notice of Removal to remove the action 24 to this Court.
[Doc. No. 1 ("NOR").] On June 20, 2025, Plaintiff filed a motion to remand 25 to state court.
[Doc. No. 8.] Pursuant to CivLR 7.1(d)(1), the Court finds the motion 26 appropriate for
resolution without oral argument.

For the reasons below, the Court 27 GRANTS Plaintiff's motion to remand. 28 1 I.
BACKGROUND 2 A. PAGA 3 "PAGA authorizes aggrieved employees, acting as private
attorneys general, to 4 recover civil penalties from their employers for violations of the Labor
Code." Baumann 5 v. Chase Inv. Servs. Corp., 747 F.3d 1117, 1119 (9th Cir. 2014). "Though
[California's] 6 Labor and Workforce Development Agency ("LWDA") retain[s] primacy over
private 7 enforcement efforts, under PAGA, if the LWDA declines to investigate or issue a citation
8 for an alleged labor code violation, an aggrieved employee may commence a civil action 9 on
behalf of himself or herself and other current or former employees against his or her 10 employer."
Urbino v. Orkin Servs. of Cal., Inc., 726 F.3d 1118, 1121 (9th Cir.

2013) 11 (internal quotation marks omitted); see Cal. Lab. Code § 2699(a). 12 If the representative
plaintiff prevails, the aggrieved employees are statutorily 13 entitled to 35% of the civil penalties
recovered, while the LWDA is entitled to 65%. Cal. 14 Lab. Code § 2699(m) (as amended in
2024). "Under PAGA, employees may also seek 15 \$100 for each initial violation per pay period

and \$200 for each subsequent violation.” 16 *Becerra-Zamora v. Gruma Corp.*, No. 24-CV-01076-WHO, 2024 WL 3338353, at *2 17 (N.D.

Cal. July 8, 2024) (citing Cal. Lab. Code § 2699(f)(2)). Under California Labor 18 Code § 2699, “[a]ny employee who prevails” in a PAGA action “shall be entitled to an 19 award of reasonable attorney’s fees and costs[.]” Cal. Lab. Code § 2699 (k)(1); see 20 *Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 357 (Ct. App. 2021). 21 B. Plaintiff’s Allegations 22 Plaintiff worked as a store manager for Defendant from about July 2021 to 23 November 2024.

[Doc. No. 1-2 (“Compl.”) ¶ 12.] Defendant paid Plaintiff on an hourly 24 basis. [Id. at ¶ 19.] Here, the “aggrieved employees” include Plaintiff and all “current 25 and former non-exempt employees who worked for Defendants in the State of California 26 during [the] one-year period preceding the date of the [Labor Code Section 2699.3] notice 27 through the current date and the date of trial in any pending action (... the “PAGA 28 Period”).” [Compl. at 16.]

Defendant allegedly failed to pay Plaintiff and the aggrieved 1 employees at the lawful minimum wage rate for all hours worked, resulting in unpaid 2 minimum wages. [Id. at ¶ 20.] Specifically, Defendant allegedly required Plaintiff and 3 the aggrieved employees to complete work off-the-clock, without compensation. [Id.] 4 Plaintiff alleges Defendant failed to pay Plaintiff and the aggrieved employees overtime 5 wages and the lawful rate of pay for overtime hours worked, resulting in unpaid overtime 6 wages.

[Id. at ¶ 22.] Plaintiff also alleges that Defendant failed to compensate Plaintiff 7 and other aggrieved employees for sick leave, vacation wages, meal period premiums, and 8 rest period premiums. [Id. at ¶¶ 25–32.] Resultingly, Defendant allegedly failed to 9 provide Plaintiff and other aggrieved employees with accurate wage statements. [Id. at ¶¶ 10 36–39.]

Finally, Plaintiff claims that he and other aggrieved employees incurred 11 unreimbursed costs due to being required to use their personal tools and cell phones at 12 work. [Id. at ¶¶ 33–34.] 13 C. Procedural Background 14 Plaintiff initiated the instant representative PAGA action in San Diego Superior 15 Court. [See generally Compl.]

The complaint asserts a single claim under PAGA and 16 alleges violations of the California Labor Code for: (1) Unpaid Hours Worked/Minimum 17 Wage (Labor Code §§ 1194, 1197, 1198; Industrial Welfare Commission (“IWC”) Wage 18 Orders); (2) Unpaid Overtime (Violation of Labor Code §§ 510, 1194, 1198; IWC Wage 19 Orders); (3) Unpaid Paid Sick Leave (Violation of Labor Code §§ 246 through 248.7); (4) 20 Unpaid Vacation Wages (Violation of Labor Code § 227.3); (5) Unpaid Meal Period 21 Premium Wages (Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders); (6) 22 Unpaid Rest Period Premium Wages (Violation of Labor Code §§ 226.7, 516, 1198; IWC 23 Wage Orders); (7) Untimely Payment of Wages During Employment (Violation of Labor 24 Code §§ 204, 204b, 210); (8) Untimely Payment of Wages Upon

Separation of 25 Employment (Violation of Labor Code §§ 201, 202, 203, 256); (9) Non-Compliant Wage 26 Statements (Violation of Labor Code §§ 226, 226.3); (10) Unreimbursed Employee 27 Expenses (Violation of Labor Code §§ 2802, 2804); (11) Failure to Maintain Accurate 28 Records (Violation of Labor Code § 1174; IWC Wage Orders).

[Compl. ¶ 52.] 1 Defendant filed the NOR pursuant to 28 U.S.C. §§ 1332(a), 1441, and 1446. 2 [NOR.] Defendant claims diversity jurisdiction due to diversity of citizenship, and an 3 amount in controversy exceeding \$75,000. [Id. at ¶¶ 12–16.] Plaintiff contests that the 4 amount in controversy does not exceed \$75,000. [Doc. No. 8 at 2.] 5 II. LEGAL STANDARD 6 A defendant may remove a civil action brought in state court if the action “might 7 have been brought originally in federal court[.]” *Smith v. Mail Boxes, Etc.*, 191 F. Supp. 8 2d 1155, 1158 (E.D.

Cal. 2002) (citing 28 U.S.C. § 1441). Thus, a case brought in state 9 court that could have been brought in federal court based on diversity of citizenship is 10 removable. See *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); 28 U.S.C. § 11 1441(b). “Removal on the basis of diversity jurisdiction requires that the parties be 12 completely diverse and that the amount in controversy exceed \$75,000.” *Magnum Prop.*

13 *Invs., LLC v. Pfeiffer*, No. 18-CV-02855, 2019 WL 459194, at *2 (S.D. Cal. Feb. 6, 2019); 14 28 U.S.C. § 1332(a)(1). Generally speaking, “a strong presumption against removal 15 applies in the typical diversity case.” *Anderson v. Starbucks Corp.*, 556 F. Supp. 3d 1132, 16 1135 (N.D. Cal. 2020). 17 When the amount in controversy is contested, “courts first look to the complaint.” 18 *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir.

2015). If the complaint does 19 not state an amount in controversy, the defendant seeking removal bears the burden to 20 show by a preponderance of the evidence that the amount in controversy requirement is 21 met. *Id.* The parties may submit ““summary-judgment-type evidence relevant to the 22 amount in controversy at the time of removal,”” such as affidavits or declarations.

Id. 23 (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997)). 24 Although a defendant may rely on good faith calculations to satisfy its burden, those 25 calculations must not be based on unreasonable or speculative assumptions. *Id.* 26 III. DISCUSSION 27 In the NOR, Defendant argues that by relying on Plaintiff’s allegations and 28 reasonable assumptions based on the allegations, the amount in controversy exceeds 1 \$75,000.

[NOR at ¶¶ 17–20.] Defendant reaches this amount by either adding \$4,600 in 2 individual penalties for the named plaintiff plus more than \$75,000 in attorney fees for 3 Plaintiff’s individual claims alone), [Id. at ¶¶ 17–20], or, in the alternative, an amount in 4 controversy exceeding \$75,000 in the aggregate amount of PAGA penalties and fees, [Id. 5 at ¶¶ 33–48].

6 Plaintiff responds that Defendant improperly attributes (1) attorney fees to the 7 named plaintiff alone, (2) LWDA’s penalties exclusively to the named plaintiff, and (3) 8 improperly calculates

other damages. [Doc. No. 8-1 at 7–8.] Specifically, the parties disagree about the amount in controversy for two broad categories of damages: (1) penalties owed to Plaintiff and the aggrieved employees during the relevant PAGA Period and (2) future attorney fees.

The Court will address each in turn. A. Amount in Controversy i. Penalties Under Labor Code § 2699(f)(2)(A) When calculating the amount in controversy, Defendant aggregates the total PAGA penalties payable to all aggrieved employees. [NOR at 14–15.] Defendant argues that under *Viking River*, Plaintiff has an “individual claim” that must be analyzed for purposes of the amount in controversy analysis.

See *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 654–55 (2022). Defendant states that because the “individual claim” component of the PAGA claim must be adjudicated before the “representative claim,” the Court should analyze Plaintiff’s PAGA claim as if it were an individual action. [NOR at 7–8.] Defendant assumes Plaintiff suffered at least one Labor Code violation per pay period, entitling him to a maximum of \$4,600 in penalties for his “individual” claims (\$200 enhanced penalty x pay periods).

[NOR ¶ 27.] Regarding the total PAGA penalties, Defendant argues there are 34 pay periods at issue (Defendant employed Plaintiff for 26 pay periods during the statutory period plus 8 pay periods since removal). Defendant states that Plaintiff worked for Defendant 23 pay periods when calculating Plaintiff’s [Id. ¶ 47.] Defendant calculates the total California Labor Code § 2699(f)(2)(A) damages at \$17 million (5,000 employees x 34 pay periods at issue x \$100 standard penalty).

[Id. 3 at 13–14.] Plaintiff argues that Defendant made two errors in calculating the PAGA penalties for amount in controversy purposes. First, that Defendant incorrectly relied on maximum violation rates without supporting evidence or basis for the underlying assumptions. [Doc. 7 No. 8-1 at 6.]

Second, that Defendant failed to abide by the Ninth Circuit’s anti-aggregation rule with respect to the 65% of PAGA penalties payable to the LWDA. [Id. 9 at 13–15.] The Ninth Circuit has clearly held that only the PAGA penalties attributable to a plaintiff may be considered in calculating the amount in controversy. See *Urbino*, 726 F.3d at 1122 (“There is no dispute that Urbino’s individual potential recovery would not meet the \$75,000 threshold.

Rather, the issue is whether the penalties recoverable on behalf of all aggrieved employees may be considered.... [Here,] diversity jurisdiction does not lie because their claims cannot be aggregated.” (emphasis in original)).

The Court elects to follow the majority of our sister courts in applying the anti-aggregation rule described in *Urbino*. See, e.g., *Martinez v. Sunnova Energy Corp.*, No. 2:24-cv- 18 06346,

2025 WL 732350, at *5 (C.D. Cal. Mar. 7, 2025) (“[C]ourts have generally considered only the plaintiff’s stake in the share of penalties recovered by aggrieved employees.”).

The Court agrees with Plaintiff and will proceed by using a pro-rata amount of PAGA penalties in the amount in controversy calculation. The reason that Defendant uses different numbers of pay periods. Nonetheless, the Court proceeds with the same numbers Defendant used in its sample calculations of individual and total PAGA penalties. In the NOR, Defendant used the \$200 enhanced penalty figure when calculating Plaintiff’s individual PAGA penalties and the \$100 standard penalty when calculating the total PAGA penalties.

Because Defendant used the \$100 standard penalty when calculating the total PAGA penalties, the Court Next, Plaintiff claims that under the PAGA amendment, which took effect on June 21, 2024, the total PAGA penalties may be reduced by 65% under the anti-aggregation principles because 65% of those damages belong to the LWDA. [See Doc. No. 8-1 at 13– 4 15].

According to Plaintiff, 65% of the estimated \$17,000,000 in PAGA penalties by the Defendant would go to the state of California, not the named Plaintiff. [Doc. No. 11 at 8.] District courts in the Ninth Circuit are split on whether Urbino requires disaggregating the LWDA’s portion of the penalties from the individual plaintiff’s in calculating the amount in controversy.

Compare, e.g., *Coffin v. Magellan HRSC, Inc.*, No. 19-CV-2047-BAS-NLS, 2020 WL 773255, at *5–6 (S.D. Cal. Feb. 18, 2020) (holding that the LWDA’s 75% share should not be aggregated with an individual plaintiff’s 25% share), with *Ruiz v. Snyder’s-Lance, Inc.*, No. 24-CV-04053-RFL, 2024 WL 4295280, at *2 (N.D. Cal. Sept. 24, 2024) (holding that the LWDA’s 75% share can be aggregated with an individual plaintiff for purposes of satisfying the amount in controversy).

We agree with *Coffin* that the 65% share of any PAGA recovery to be paid to the LWDA should not be aggregated under Urbino. *Coffin*, 2020 WL 773255, at *5 (“[M]ost courts only consider the plaintiff’s portion of the 25% that aggrieved employees may recover in calculating the amount in controversy.”) The Court finds *Sloan v. IHG Management* persuasive, where the district court found “no logical reason for courts to refuse to consider one portion of an award that the plaintiff will not recover (the other aggrieved employees’ shares), but take into account another portion that the plaintiff will not recover (LWDA’s share).” *Sloan v. IHG Mgmt.*

(Maryland) LLC, No. CV 19-21-DMG (JCX), 2019 WL 1111191, at *2 (C.D. Cal. Mar. 11, 2019). Further, the Court agrees with *Sloan*’s reasoning that “[i]ncluding LWDA’s share in the calculation would come into tension with Urbino’s language that California is not a ‘citizen’ for diversity purposes.” *Id.* The 2024 PAGA Amendment changed the LWDA’s percentage from 75% to 65%.

Therefore, older 28 1 Resultingly, a maximum of 35% of Defendant's estimate may be attributed to the amount 2 in controversy requirement. 3 Assuming Defendant's \$17,000,000 in total PAGA penalties, Plaintiff argues that 4 $\$17,000,000 \times 0.65$ totals \$11,050,000 payable to the LWDA. [Doc. 11 at 8] The 5 remaining \$5,950,000 would be the total amount payable to the employees.

[Id.] This 6 amount, divided by Defendant's 5,000 estimated aggrieved employees, brings the 7 California Labor Code Section 2699(f)(2)(A) penalties to \$1,190 attributable to the named 8 Plaintiff. [Id. at 8-9.] The Court rejects Defendant's estimate of \$17 million in PAGA 9 penalties and proceeds with Plaintiff's \$1,190 estimate. 10 ii. Attorney Fees 11 Plaintiff argues that Defendant's assessment of \$75,000⁴ in attorney fees disregards, 12 inter alia, Canela, a Ninth Circuit case that requires a pro rata distribution of fees to the 13 group of employees at issue in a PAGA representative action, based on the total amount 14 in controversy.

[Doc. No. 8-1 at 5]; Canela v. Costco Wholesale Corp., 971 F.3d 845, 850 15 (9th Cir. 2020). In Canela, the plaintiff worked as a greeter and exit checker at two 16 warehouses in California. 971 F.3d at 848. The plaintiff brought a PAGA claim alleging 17 that the defendant did not provide her and other aggrieved employees with suitable seating. 18 Id. In its notice of removal, the defendant contended the action would encompass 968 19 employees collectively seeking millions of dollars in civil penalties and attorney fees.

Id. 20 at 850. Citing Urbino, the Ninth Circuit held that the district court lacked diversity 21 jurisdiction at the time of removal because plaintiff's "pro-rata share of civil penalties, 22 including attorney[] fees, totaled \$6,600 at the time of removal, and the claims of other 23 member service employees may not be aggregated[.]" Canela, 971 F.3d at 850 (emphasis 24 in original) (citing Urbino, 726 F.3d at 1122).

25 26 4 Defendant does not provide an exact estimate of attorney fees for amount in controversy purposes. 27 Defendant states that it is a near certainty that Plaintiff's counsel will incur at least \$75,000 to pursue this PAGA claim. [NOR ¶ 52.]

Therefore, the Court proceeds with \$75,000 as Defendant's stated 28 1 Plaintiff argues that when using a pro rata distribution of attorney fees and the 2 numbers in Defendant's NOR and supporting papers, the attorney fees fall well below the 3 \$75,000 amount in controversy requirement. [Doc. No. 8-1 at 9–10.] Based on the NOR, 4 Defendant employed over 5,000 employees during the relevant PAGA Period, while the 5 number of separated employees is unknown during that time.

[NOR at 13.] Plaintiff 6 assumes that there are about 5,000 employees at issue who worked during the relevant 7 PAGA Period. [Doc. No. 8-1 at 11.] Dividing the \$75,000 identified by Defendant as the 8 attorney fees at issue by 5,000 employees reduces Plaintiff's share of those fees to just 9 \$15. 10 Plaintiff further argues that if a pro rata distribution was applied, Defendant's 11 \$75,000 in

attorney fees attributed to the named plaintiff alone would total an absurd 12 amount of \$375,000,000 in attorney fees (\$75,000 x 5,000 employees).

[Id. at 11–12.] 13 Finally, Plaintiff argues that “Defendant fails to prove the \$75,000 amount by a 14 preponderance of evidence, as required under *Fritsch v. Swift Transp. Co. of Ariz., LLC*, 15 899 F.3d 785, 796 (9th Cir. 2018).” [Id. at 12.] 16 Defendant argues that Plaintiff’s “individual claim” must be adjudicated before the 17 representative component of Plaintiff’s claim can be determined.

[NOR at 7.] Defendant 18 argues that the Court should allocate the \$75,000 in attorney fees to Plaintiff solely in light 19 of recent changes to PAGA. [Id. at 12.] Specifically, Defendant argues that under *Viking 20 River* and new updates to the California Labor Code § 2699(a), Plaintiff must prove he 21 has suffered every alleged Labor Code violation before he has any standing to assert the 22 “representative claim,” necessarily requiring adjudication of Plaintiff’s “individual” claim 23 prior to the consideration of any representative allegations.

[Id. at 7.] Defendant cites 24 individual wage-and-hour cases that resulted in attorney’ fee awards above \$75,000. [Id. 25 at 8–9.] 26 The Court finds that only Plaintiff’s pro rata share of attorney fees should be 27 considered for purposes of determining the amount in controversy.

The Ninth Circuit was 28 clear in *Canela* that attorney fees for a PAGA civil penalties action could not be 1 aggregated to satisfy the amount in controversy requirement. *Canela*, 971 F.3d at 850. 2 Defendant cites no controlling or persuasive authority that *Viking River* overruled *Canela*. 3 Although the Supreme Court decided *Viking River* in 2022, multiple courts in the Ninth 4 Circuit have since prohibited the aggregation of attorney fees in PAGA actions when 5 determining whether the amount in controversy has been met.

See *Butt v. 9W Halo W. 6 Opco, L.P.*, No. 2:22-CV-02012 WBS AC, 2023 WL 196472, at *3 (E.D. Cal. Jan. 17, 7 2023) (“Only plaintiff’s pro rata share of attorneys’ fees is appropriately considered.”); 8 *Bell v. DeVry Univ., Inc.*, No. 25-CV-595-RSH-BLM, 2025 WL 1453842, at *4 (S.D. Cal. 9 May 21, 2025) (collecting cases). While *Viking River* held that PAGA claims can be split 10 into individual claims when preempted by the Federal Arbitration Act, 596 U.S. at 640, 11 there is no arbitration agreement at issue here.

In *Viking*, the defendant moved to compel 12 arbitration, *Id.* at 639, whereas here, Plaintiff moves to remand. The Court holds that 13 *Viking River* does not apply, and the Court must first rule on the question of subject matter 14 jurisdiction. 15 Adding \$1,190 in PAGA penalties and \$15 in attorney fees together leaves the 16 Court’s estimated amount in controversy well below the \$75,000 threshold.⁵ For the 17 foregoing reasons, the Court holds Defendant has not met its burden of establishing by a 18 preponderance of evidence in this case that the amount in controversy meets the \$75,000 19 jurisdictional requirement.

20 B. Diversity of Citizenship 21 Because Defendant failed to establish the required amount in controversy, the Court 22 declines to address the issue of diversity of citizenship. 23 // 24 25 26 5 Plaintiff also argues that the Court should further reduce Defendant's estimate of PAGA civil penalties because Defendant uses a 100% violation rate for all 5,000 employees.

[Doc. No. 8-1 at 15–16.] The 27 Court need not address this argument because the amount in controversy falls well below the \$75,000 threshold. 28 | C. Attorney Fees for the Removal Action 2 Plaintiff requests an order from the Court stating that Plaintiff would be entitled to 3 attorney fees and costs based on what amounts to a frivolous filing. [Doc. No. 11 at 11.]

4 || Plaintiff cites Higginbotham, where the defendant removed the case and asked the court > || to attribute fees to the named plaintiff alone to get over the \$75,000 diversity jurisdiction 6 hurdle, without doing the pro rata analysis required by Urbino, Canela, and Gibson. [Id. 7 16.]; see Higginbotham v. South East Emp. Leasing Serv., Inc., No. 2:20-cv-00575- 8 KJM-DB, 2020 WL 5535421 (E.D.

Cal. Sept. 15, 2020). Notably, the district court in? Higginbotham did not award attorney fees. /d. at 5. Plaintiff argues that attorney fees are 10 || nonetheless warranted to prevent future improper removal motions. [Doc. No. 11 at 11.]

Although Defendant's counsel recently failed to advance similar arguments"" in this 12 Court, [see Lopez v. FedEx Office and Print Services, Inc., 3:23-cv-02155-JO-SBC, (S.D. Cal. Jan 31, 2024) at Doc. Nos. 15, 19], the Court declines to award attorney fees for this 14 |lremand motion.

The Supreme Court has established the standard for obtaining attorney fees under the removal statute as whether "the removing party lacked an objectively 16 || reasonable basis for seeking removal." Martin v. Franklin Capital Corp., 546 U.S. 132, 17 1141 (2005). Considering the relative novelty of Viking River and updates to the California 18 || Labor Code, the Court finds that Defendant had a colorable argument.

19 IV. CONCLUSION 20 Because Defendant fails to establish the required amount in controversy for diversity 21 || jurisdiction, the Court GRANTS Plaintiff's motion to remand and REMANDS this action 22 |!to the Superior Court of California, County of San Diego.

The Court DENIES □□□□□□□□□□ 23 || motion for attorney fees. 24 It is SO ORDERED. 25 Dated: October 3, 2025 26 Hon. Cathy Ann Bencivengo 27 United States District Judge 28 14