

**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

OPINION

McMillon v. O'Reilly Auto Enterprises, LLC

PER CURIAM.

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 9 disagree about the amount in controversy for two broad categories of damages: (1) 10 penalties owed to Plaintiff and the aggrieved employees during the relevant PAGA Period 11 and (2) future attorney fees. The Court will address each in turn. 12 A. Amount in Controversy 13 i. Penalties Under Labor Code § 2699(f)(2)(A) 14 When calculating

the amount in controversy, Defendant aggregates the total PAGA 15 penalties payable to all aggrieved employees. [NOR at 14–15.] Defendant argues that 16 under Viking River, Plaintiff has an “individual claim” that must be analyzed for purposes 17 of the amount in controversy analysis. See *Viking River Cruises, Inc. v. Moriana*, 596 18 U.S. 639, 654–55 (2022). Defendant states that because the “individual claim” component 19 of the PAGA claim must be adjudicated before the “representative claim,” the Court 20 should analyze Plaintiff’s PAGA claim as if it were an individual action. [NOR at 7–8.] 21 Defendant assumes Plaintiff suffered at least one Labor Code violation per pay 22 period, entitling him to a maximum of \$4,600 in penalties for his “individual” claims 23 (\$200 enhanced penalty x 23 pay periods). [NOR ¶ 27.] Regarding the total PAGA 24 penalties, Defendant argues there are 34 pay periods at issue (Defendant employed 25 Plaintiff for 26 pay periods¹ during the statutory period plus 8 pay periods since removal). 26 27 1 Defendant states that Plaintiff worked for Defendant 23 pay periods when calculating Plaintiff’s 28 1 [Id. ¶ 47.] Defendant calculates the total California Labor Code § 2699(f)(2)(A) damages 2 at \$17 million (5,000 employees x 34 pay periods at issue x \$100 standard penalty²). [Id. 3 at 13–14.] 4 Plaintiff argues that Defendant made two errors in calculating the PAGA penalties 5 for amount in controversy purposes. First, that Defendant incorrectly relied on maximum 6 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- 8 aggregation rule with respect to the 65% of PAGA penalties payable to the LWDA. [Id. 9 at 13–15.] 10 The Ninth Circuit has clearly held that only the PAGA penalties attributable to a 11 plaintiff may be considered in calculating the amount in controversy. See *Urbino*, 726 12 F.3d at 1122 (“There is no dispute that Urbino’s individual potential recovery would not 13 meet the \$75,000 threshold. Rather, the issue is whether the penalties recoverable on 14 behalf of all aggrieved employees may be considered . . . [Here,] diversity jurisdiction 15 does not lie because their claims cannot be aggregated.” (emphasis in original)). The 16 Court elects to follow the majority of our sister courts in applying the anti-aggregation 17 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 19 considered only the plaintiff’s stake in the share of penalties recovered by aggrieved 20 employees.”). The Court agrees with Plaintiff and will proceed by using a pro-rata amount 21 of PAGA penalties in the amount in controversy calculation. 22 23 24 25 of 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 26 penalties. 2 In the NOR, Defendant used the \$200 enhanced penalty figure when calculating Plaintiff’s individual 27 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 28 1 Next, Plaintiff claims that under the PAGA amendment, which took effect on June 2 19, 2024, the total PAGA penalties may be reduced by 65% under the anti-aggregation 3 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.] 6 District courts in the Ninth Circuit are split on whether Urbino requires 7 disaggregating the LWDA's portion of the penalties from the individual plaintiff's in 8 calculating the amount in controversy. Compare, e.g., *Coffin v. Magellan HRSC, Inc.*, 9 No. 19-CV-2047-BAS-NLS, 2020 WL 773255, at *5–6 (S.D. Cal. Feb. 18, 2020) (holding 10 that the LWDA's 75% share³ should not be aggregated with an individual plaintiff's 25% 11 share), with *Ruiz v. Snyder's-Lance, Inc.*, No. 24-CV-04053-RFL, 2024 WL 4295280, at 12 *2 (N.D. Cal. Sept. 24, 2024) (holding that the LWDA's 75% share can be aggregated 13 with an individual plaintiff for purposes of satisfying the amount in controversy). We 14 agree with *Coffin* that the 65% share of any PAGA recovery to be paid to the LWDA 15 should not be aggregated under *Urbino*. *Coffin*, 2020 WL 773255, at *5 (“[M]ost courts 16 only consider the plaintiff's portion of the 25% that aggrieved employees may recover in 17 calculating the amount in controversy.”) The Court finds *Sloan v. IHG Management* 18 persuasive, where the district court found “no logical reason for courts to refuse to 19 consider one portion of an award that the plaintiff will not recover (the other aggrieved 20 employees' shares), but take into account another portion that the plaintiff will not recover 21 (LWDA's share).” *Sloan v. IHG Mgmt. (Maryland) LLC*, No. CV 19-21-DMG (JCX), 22 2019 WL 1111191, at *2 (C.D. Cal. Mar. 11, 2019). Further, the Court agrees with *Sloan's* 23 reasoning that “[i]ncluding LWDA's share in the calculation would come into tension with 24 *Urbino's* language that California is not a ‘citizen’ for diversity purposes.” *Id.* 25 26 27

3 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 jurisdiction at the time of removal because plaintiff's "pro-rata share of civil penalties, including attorney fees, totaled \$6,600 at the time of removal, and the claims of other member service employees may not be aggregated[.]" *Canela*, 971 F.3d at 850 (emphasis in original) (citing *Urbino*, 726 F.3d at 1122). Defendant does not provide an exact estimate of attorney fees for amount in controversy purposes. 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. Plaintiff argues that when using a pro rata distribution of attorney fees and the numbers in Defendant's NOR and supporting papers, the attorney fees fall well below the \$75,000 amount in controversy requirement. [Doc. No. 8-1 at 9–10.] Based on the NOR, Defendant employed over 5,000 employees during the relevant PAGA Period, while the number of separated employees is unknown during that time. [NOR at 13.] Plaintiff assumes that there are about 5,000 employees at issue who worked during the relevant PAGA Period. [Doc. No. 8-1 at 11.] Dividing the \$75,000 identified by Defendant as the attorney fees at issue by 5,000 employees reduces Plaintiff's share of those fees to just \$15. Plaintiff further argues that if a pro rata distribution was applied, Defendant's \$75,000 in attorney fees attributed to the named plaintiff alone would total an absurd amount of \$375,000,000 in attorney fees (\$75,000 x 5,000 employees). [Id. at 11–12.] Finally, Plaintiff argues that "Defendant fails to prove the \$75,000 amount by a preponderance of evidence, as required under *Fritsch v. Swift Transp. Co. of Ariz., LLC*, 899 F.3d 785, 796 (9th Cir. 2018)." [Id. at 12.] Defendant argues that Plaintiff's "individual claim" must be adjudicated before the representative component of Plaintiff's claim can be determined. [NOR at 7.] Defendant argues that the Court should allocate the \$75,000 in attorney fees to Plaintiff solely in light of recent changes to PAGA. [Id. at 12.] Specifically, Defendant argues that under *Viking River* and new updates to the California Labor Code § 2699(a), Plaintiff must prove he has suffered every alleged Labor Code violation before he has any standing to assert the "representative claim," necessarily requiring adjudication of Plaintiff's "individual" claim prior to the consideration of any representative allegations. [Id. at 7.] Defendant cites individual wage-and-hour cases that resulted in attorney' fee awards above \$75,000. [Id. 25 at 8–9.] The Court finds that only Plaintiff's pro rata share of attorney fees should be considered for purposes of determining the amount in controversy. The Ninth Circuit was clear in *Canela* that attorney fees for a PAGA civil penalties action could not be aggregated to satisfy the amount in controversy requirement. *Canela*, 971 F.3d at 850. Defendant cites no controlling or persuasive authority that *Viking River* overruled *Canela*. Although the Supreme Court decided *Viking River* in 2022, multiple courts in the Ninth Circuit have since prohibited the aggregation of attorney fees in PAGA actions when determining whether the amount in controversy has been met. See *Butt v. 9W Halo W. Opco, L.P.*, No. 2:22-CV-02012 WBS AC, 2023 WL 196472, at *3 (E.D. Cal. Jan. 17, 2023) ("Only plaintiff's pro rata share of attorneys' fees is appropriately considered."); *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 |remand 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

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