

FILED

NOV 23 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL NOLL; STEVEN MCCLURE;
MARK SUTHERLAND,

Plaintiffs - Appellees,

v.

TRAVELCENTERS OF AMERICA LLC,

Defendant - Appellant.

No. 10-56511

D.C. No. 5:10-cv-00589-JHN-
AJW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Jacqueline H. Nguyen, District Judge, Presiding

Argued and Submitted November 3, 2010
Pasadena, California

Before: GOODWIN and RAWLINSON, Circuit Judges, and ZOUHARY, District
Judge.**

In this case involving the Class Action Fairness Act (CAFA), Appellant
TravelCenters of America (TA) challenges the district court's grant of Appellee

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The Honorable Jack Zouhary, U.S. District Judge for the Northern
District of Ohio, sitting by designation.

Paul Noll's (Noll) motion to remand Noll's class action suit to state court. We affirm.

The district court properly held that TA's notice of removal was untimely, as Noll's original complaint "reveal[ed] a basis for removal." *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 694 (9th Cir. 2005). Noll's complaint alleged that TA misclassified salaried store employees as exempt managerial/executive employees for overtime compensation. Despite sufficient notice of the putative class, TA failed to timely remove the action to federal court as required by CAFA. *See id.*

Because we hold that TA's notice of removal was untimely based on the original complaint's allegations, we need not and do not address TA's challenge to the district court's application of the revival exception to removal or the district court's alternative basis for remanding Noll's action to state court premised on TA's failure to demonstrate the requisite amount in controversy.

AFFIRMED.

FILED

Noll v. Travel Centers of America, LLC, Case No. 10–56511
Goodwin, Circuit Judge, concurring:

NOV 23 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I concur in the result but disagree with the grounds set forth by the majority.

The original complaint filed in this case did not state an amount sought in damages, and therefore failed to clearly indicate the amount in controversy. Accordingly, the first thirty-day period for removal under 28 U.S.C. § 1446(b) was not triggered because the \$5 million jurisdictional threshold under 28 U.S.C. § 1332(d) was not established on the face of the initial pleading. *See Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 694–96 (9th Cir. 2005) (“The first thirty-day period for removal in 28 U.S.C. § 1446(b) only applies if the case stated by the initial pleading is removable on its face.”); *Carvalho v. Equifax Info. Servs., LLC*, 615 F.3d 1217, 1225 (9th Cir. 2010) (“Because the face of the initial pleading--Carvalho’s superior court complaint--lacked any indication of the amount in controversy, it did not trigger this first thirty-day removal period.”). Defendant’s understanding of the scope of the class at the time of the initial pleading is irrelevant to this analysis because they had no independent duty to calculate the amount in controversy during this first thirty-day period. *See Harris*, 425 F.3d at 694 (“[N]otice of removability under [the first paragraph of] § 1446(b) is determined through examination of the four corners of the applicable pleadings, not through subjective knowledge or a duty to make further inquiry.”).

Indeed, a notice of removal cannot be untimely if it first fails to establish “that the case is one which is or has become removable” by proving that federal jurisdiction is present. 28 U.S.C. § 1446(b). Accordingly, the district court should not have started with an analysis of procedural error. Regardless, the district court did not err in finding that defendant’s calculation of the amount in controversy was too speculative to support federal jurisdiction. Defendant’s calculations relied upon assumed classwide rates of unpaid overtime and missed meal periods that were not supported by allegations in either complaint. *See Lowdermilk v. United States Bank Nat’l Assoc.*, 479 F.3d 994, 1002 (9th Cir. 2007) (“[W]e cannot base our jurisdiction on Defendant’s speculation and conjecture.”); *see also Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (“We strictly construe the removal statute against removal jurisdiction. Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.”) (internal citations omitted); *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006) (“We . . . hold that under CAFA the burden of establishing removal jurisdiction remains, as before, on the proponent of federal jurisdiction”). Accordingly, remand is appropriate here because defendant has failed to meet its burden to establish federal jurisdiction, not because of a procedural defect related to the timing of its notice of removal.

Even if the court were to accept defendant’s calculation of the amount in controversy and find jurisdiction present, remand would still be appropriate because

the notice of removal would then have been untimely under § 1446(b)'s second thirty-day period for removal. *See* 28 U.S.C. § 1446(b) (“If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable”). While neither the initial or amended complaint indicate an amount of unpaid overtime or number missed meal periods for the class as a whole, Noll testified as to his personal rates of unpaid overtime and missed meal periods on June 2, 2009. ER 202, 225–29. To support removal, Defendant relied upon this testimony to estimate the amount in controversy for the entire class. ER 225–29.

Like the district court and the majority, I do not find that the class definition in the original complaint was insufficient to identify that the class included all salaried employees working at defendant's travelcenters in California. Therefore, if we were to accept defendant's classwide calculation of the amount in controversy based on Noll's testimony, defendant's notice of removal in April 2010 would have been untimely under § 1446(b) because it was filed roughly ten months after Noll's deposition. *See Carvalho*, 615 F.3d at 1226 (finding deposition testimony of class representative as to damages sought per class member triggered second thirty-day removal period under § 1446(b) where defendant could multiply stated damages by the number of class members).

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings (December 2009)

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [under *Forms*](#).
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [under *Forms*](#).

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [under *Forms*](#) or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

| Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1 | REQUESTED Each Column Must Be Completed | | | | ALLOWED To Be Completed by the Clerk | | | | |
|--|--|----------------------|-------------------------|-------------------------|---|----------------------|-------------------------|-------------------------|-------------------------|
| | No. of Docs. | Pages per Doc. | Cost per Page* | TOTAL COST | No. of Docs. | Pages per Doc. | Cost per Page* | TOTAL COST | |
| Excerpt of Record | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | |
| Opening Brief | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | |
| Answering Brief | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | |
| Reply Brief | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | |
| Other** | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | |
| TOTAL: | | | | \$ <input type="text"/> | TOTAL: | | | | \$ <input type="text"/> |

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk