

FILED

NOT FOR PUBLICATION

FEB 24 2011

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

DEBRA M. JOHNSON, on behalf of  
herself and all others similarly situated,

Plaintiff - Appellant,

v.

U.S. VISION, INC., a Delaware  
corporation and USV OPTICAL, INC., a  
Texas corporation,

Defendants - Appellees.

No. 11-55020

D.C. No. 3:10-cv-00690-BEN-  
CAB

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Roger T. Benitez, District Judge, Presiding

Argued and Submitted February 9, 2011  
Pasadena, California

Before: D.W. NELSON, REINHARDT, and N.R. SMITH, Circuit Judges.

Debra Johnson, as a potential class representative, appeals the district court's order denying her motion to remand this case to state court. She claims Defendants failed to demonstrate the necessary jurisdictional amount in

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

controversy under the Class Action Fairness Act of 2005. We have jurisdiction pursuant to 28 U.S.C. § 1453(c)(1) and we REVERSE and REMAND.

In order to demonstrate the necessary jurisdictional amount in controversy, Defendants must prove to a “legal certainty” that the amount in controversy in this case exceeds \$5,000,000. *See Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 999 (9th Cir. 2007). “The ‘legal certainty’ standard sets a high bar for the party seeking removal, but it is not insurmountable.” *Id.* at 1000. While the “legal certainty” standard is difficult to define, at a minimum, Defendants must produce enough evidence to allow a court “to estimate with [some] certainty the actual amount in controversy.” *Id.* at 1001. The Defendants failed to meet this standard.

As in *Lowdermilk*, Defendants provided “some evidence that the Plaintiff’s actual claims necessarily exceed \$5,000,000.” *See id.* at 998. However, they produced very little or no evidence that would allow for an accurate approximation of the amount in controversy. Defendants produced evidence giving only a snapshot of a potential workday for optechs and a potential workweek for managers. Defendants also frequently “assume[] that all class members would be entitled to maximum damages under [California] law” and provide no evidence to support their assumptions in violation of *Lowdermilk*. 479 F.3d at 1001. Even where Defendants do not assume maximum damages, they do not provide

sufficient evidence to meet their burden of proving the amount in controversy to a legal certainty. Specifically, Defendants have provided no evidence regarding (1) the number of days per year worked by optechs, (2) the number of vacation days lost by employees due to the “use it or lose it policy,” (3) how many employees’ shifts exceeded five hours in length (which would determine their eligibility for meal breaks under California law), (4) how many employees may have used check cashing services, making them eligible to sue under California Labor Code §§ 212 and 213, and (5) the average hourly pay of employees who were actually separated from their employment during the four-year period at issue.

Without such necessary evidence to support their calculations, Defendants have failed to carry their burden to demonstrate the amount in controversy exceeds \$5,000,000.

**REVERSED and REMANDED** with instructions to remand to state court.

## 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"/>	
<b>TOTAL:</b>				\$ <input type="text"/>	<b>TOTAL:</b>				\$ <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:

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(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk