Case: 17-56089, 02/01/2018, ID: 10747313, DktEntry: 31-1, Page 1 of 4

FILED

FEB 01 2018

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID SANCHEZ, on behalf of himself and all others similarly situated, Plaintiff-Appellee, v. AMERIFLIGHT, LLC, Defendant-Appellant.	No. 17-56089 D.C. No. 3:16-cv-02733-MMA-BGS MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Argued and Submitted November 16, 2017
San Francisco, California

Before: RAWLINSON and BYBEE, Circuit Judges, and FRIEDMAN,** District Judge.

Ameriflight, LLC (Ameriflight) is an interstate air cargo carrier with operations in more than 10 states, currently organized under Nevada law, with its

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Paul L. Friedman, United States District Judge for the District of Columbia, sitting by designation.

headquarters in Texas. In 2014, David Sanchez, a California resident and former Ameriflight cargo pilot, filed a class action suit on behalf of himself and similarly situated employees who were trained or employed by Ameriflight in California since 2010. The complaint alleged that Ameriflight improperly paid wages in violation of the California Labor Code and the California Business and Professions Code. At the time Sanchez filed suit, Ameriflight was headquartered in California.

In 2016, Ameriflight removed the action, arguing that newly produced evidence revealed that the true amount in controversy exceeded $5,000,000 and that, as of the date of removal, minimal diversity was satisfied under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(2)(A). Sanchez subsequently moved to remand the case. The district court granted Sanchez's motion, finding that, as of the time of filing, the parties were not diverse. We granted Ameriflight permission to appeal.

"We have jurisdiction to review a district court's remand order pursuant to 28 U.S.C. § 1453(c)(1). . . ." *Brinkley v. Monterey Fin. Servs., Inc.*, 873 F.3d 1118, 1121 (9th Cir. 2017) (citation omitted). "We review the construction, interpretation, or applicability of CAFA *de novo*." *Id.* (citation and internal quotation marks omitted).

1. Where parties are not diverse at the time of filing, a post-filing change in citizenship cannot cure the original defect in diversity jurisdiction. *See Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-74 (2004) ("To our knowledge, the Court has never approved a deviation from the rule articulated by Chief Justice Marshall in 1829 that '[w]here there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit.'") (quoting *Conolly v. Taylor*, 27 U.S. 556, 564 (1829)). Because CAFA is an extension of traditional diversity jurisdiction, *see, e.g.*, *Yocupicio v. PAE Grp., LLC*, 795 F.3d 1057, 1058 (9th Cir. 2015), we apply the same rule here. The operative complaint was filed in July, 2014. Ameriflight does not dispute that it was not diverse from Sanchez at that time. Ameriflight's post-filing change in citizenship did not render the parties minimally diverse under CAFA. The district court's remand order on this basis was therefore proper.

2. Ameriflight argues in the alternative that minimal diversity has been met because some members of the putative class included non-California citizens. However, Ameriflight failed to carry its burden of establishing minimal diversity with at least one putative class member. *See Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th Cir. 2007). None of the declarations relied on by Ameriflight

identify any specific putative class member that was diverse from Amerliflight as of the date the suit was commenced. *See Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015) (noting that a "defendant cannot establish removal jurisdiction by mere speculation and conjecture").

3. Finally, even if Ameriflight could satisfy the minimal diversity requirement, the amount in controversy requirement remained unmet. Ameriflight's reliance on an off-hand remark by counsel of estimated damages, later retracted and on calculations based on unsupported assumptions, was not sufficient evidence establishing the amount in controversy. *See Ibarra*, 775 F.3d at 1197.

AFFIRMED.

Case: 17-56089, 02/01/2018, ID: 10747313, DktEntry: 31-2, Page 1 of 3

FILED

FEB 01 2018

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

***Sanchez v. Ameriflight, LLC*, Case No. 17-56089**
Friedman, District Judge, concurring in part and dissenting in part:

I concur with my colleagues that the time-of-filing rule applies under the Class Action Fairness Act (CAFA) and, as a result, Ameriflight's post-filing change in citizenship did not render it diverse from the named plaintiff. I respectfully dissent, however, from the conclusion that Ameriflight has clearly failed to meet its burden to prove CAFA jurisdiction by a preponderance of the evidence. In my view, we should remand the case to the district court to consider that question of fact in the first instance.

The district court determined that Ameriflight had not alleged minimal diversity with the putative class as a basis for removal until it filed its opposition to plaintiffs' motion to remand on December 30, 2016. As a result, the court found this argument to be an untimely amendment to Ameriflight's notice of removal, filed November 3, 2016. *See* 28 U.S.C. § 1446(b); *ARCO Envtl. Remediation, LLC v. Dep't of Health & Envtl. Quality of Montana*, 213 F.3d 1108, 1117 (9th Cir. 2000). But Ameriflight did raise the issue of minimal diversity with the putative class in a timely fashion, stating in its notice of removal that "[t]his Court has original jurisdiction over the Action under CAFA because it is a civil case filed as a class action wherein at least one member (if not all) of the putative class of

plaintiffs is a citizen of a state different from Ameriflight." The district court therefore erred in rejecting as untimely Ameriflight's argument that minimal diversity existed with the putative class. *See Cohn v. Petsmart*, 281 F.3d 837, 840 n.1 (9th Cir. 2002); *Barrow Dev. Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317, 318 (9th Cir. 1969).

The majority avoids reversing the district court on this ground by addressing the merits, holding that Ameriflight failed to meet its burden in establishing minimal diversity with the putative class. I cannot agree. Because of its erroneous determination that Ameriflight's arguments were untimely, the district court only briefly addressed the merits. And in doing so, the court cited to only one of the three declarations proffered by Ameriflight — that of James Brady, a former Ameriflight employee who was not a member of the putative class. The district court failed to discuss, or even mention, the declarations of Brian Randow, President and CEO of Ameriflight, or Phillip Humphries, Vice President of Human Resources for Ameriflight, although they both suggested that a significant percentage of putative class members were diverse from Ameriflight. Unlike my colleagues, I therefore cannot conclusively say that Ameriflight failed to prove minimal diversity between it and any member of the putative class by a preponderance of the evidence. *See Kuxhausen v. BMW Fin. Servs. NA LLC*, 707

F.3d 1136, 1141 (9th Cir. 2013); *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395, 397 (9th Cir. 2010). I would remand in order to allow the district court an opportunity to more fully assess this question of fact now prematurely resolved by the majority.

Similarly, I would remand as to the amount in controversy in order to allow the district court to resolve this question of fact in the first instance. I agree that Ameriflight's reliance on an off-hand remark by counsel of estimated damages, later retracted, is likely insufficient to establish the amount in controversy by a preponderance of the evidence. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). Because the district court granted plaintiffs' motion to remand on the basis of diversity alone, however, this Court should follow its prior precedents and remand the case so that the district court may have the first opportunity to assess the amount in controversy should it determine CAFA's minimal diversity requirement has been met. *See Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197, 1199 (9th Cir. 2015).

Accordingly, I concur in part and dissent in part.

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

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 www.ca9.uscourts.gov 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 www.ca9.uscourts.gov 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 www.ca9.uscourts.gov 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 www.supremecourt.gov

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:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► 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.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

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			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *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