No. 18-55746

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GRANT FRITSCH,
Plaintiff-Respondent,
v.
SWIFT TRANSPORTATION COMPANY OF ARIZONA, LLC,
Defendant-Petitioner

On Appeal from the United States District Court
Central District of California, No. 5:17-cv-02226-JGB-SP
The Honorable Jesus G. Bernal

RESPONDENT'S BRIEF

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

III. JURISDICTIONAL STATEMENT

The only jurisdictional basis alleged here is the Class Action Fairness Act, 28 U.S.C. § 1332(d) ("CAFA"). The parties dispute whether the district court had jurisdiction under CAFA; the dispute concerns the issue of whether the amount in controversy exceeds $5 million, exclusive of costs and interest.

The order appealed here – an order of the district court granting a motion to remand a class action to the State court from which it was removed – is appealable and this Court would have jurisdiction to accept such an appeal under 28 U.S.C. § 1453(c).

The appealed order was entered on December 7, 2017. Defendant-Petitioner Swift Transportation Co. of Arizona, LLC ("Swift") filed a petition for permission to appeal the order pursuant to 28 U.S.C. § 1453(c) (the "Petition") on December 13, 2017, within the 10-day filing deadline set by 28 U.S.C. § 1453(c)(1). The Court granted the Petition on June 11, 2018.

Although the order granting a motion to remand is appealable and this Court has jurisdiction to accept the appeal, Plaintiff-Respondent Grant Fritsch ("Fritsch") contends that the Court does not have jurisdiction to hear this appeal because Swift, subsequent to the Court granting the Petition, removed the class action from the State court to the district court *again*, thereby mooting the issues presented in this appeal.

IV. ISSUES PRESENTED

1. Whether the Court should dismiss the appeal of an order granting a motion to remand for lack of jurisdiction, when the defendant-petitioner, subsequent to the granting of the Petition, removed the underlying state court action back to the district court.

2. Whether future attorneys' fees should be considered in calculating the amount in controversy for removal under CAFA despite the speculative nature of estimating future attorneys' fees.

3. Whether, if future attorneys' fees may be considered in calculating the amount in controversy for removal under CAFA, the district court may estimate attorneys' fees to be 25 percent of the aggregate value of the plaintiff's claims regardless of whether attorneys' fees are available on all of those claims and despite having to speculate as to the duration of the case and the actual fees to be incurred.

4. Whether Swift met its burden of proving by a preponderance of the evidence that the amount in controversy exceeded the jurisdictional minimum of $5 million.

V. PERTINENT STATUTORY PROVISIONS

Fritch quotes verbatim the following pertinent statutory provisions as required by Circuit Rule 28-2.7.

A. 28 U.S.C. § 1332(d), the Class Action Fairness Act.

> (1) In this subsection--
>
> (A) the term "class" means all of the class members in a class action;
>
> (B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;
>
> (C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and
>
> (D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.
>
> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which--
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
>
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332(d)(1)-(2).

B. 28 U.S.C. § 1453, Removal of class actions.

> (a) Definitions.—
>
> In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).
>
> (b) In General.—
>
> A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.
>
> (c) Review of Remand Orders.—
>
> (1) In general.—
>
> Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

28 U.S.C. § 1453(a)-(b).

VI. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The procedural facts in this matter are not in dispute. The original class action complaint was filed by Fritsch in the San Bernardino County Superior Court on December 10, 2015; the operative Third Amended Complaint was filed in the

state court action on August 30, 2016. (Plaintiff-Respondent's Excerpts of Record ("P_ER"), at p. 066.)

On or about October 31, 2017, Swift removed this action from the San Bernardino Superior Court to the United States District Court for the Central District of California, pursuant to CAFA. (P_ER005-032.)

On November 10, 2017, Fritsch filed a motion to remand the action to state court. (P_ER028-029; 133.) On December 7, 2017, the district court found that Swift's removal was then-timely, but that the damages established by Swift totaled $4,628,575. (P_ER028-032.) The district court further found that Swift had established attorneys' fees at the time of removal of $150,000; thereby, in aggregate with the class damages, falling short of the amount-in-controversy requirement. (P_ER032.) Accordingly, the district court granted the motion to remand. (*Id.*) Swift thereafter filed its Petition for Permission to Appeal Order Granting Remand on or about December 13, 2017. (P_ER034.)

On February 1, 2018, following remand to state court, the class was certified. (P_ER145 [Order Granting Class Certification filed, 2/5/2018].)

On or about June 11, 2018, this Court granted Swift's petition to appeal the remand order. (P_ER092-93.)

While Fritsch's state court motion for judgment on the pleadings was pending, on or about June 18, 2018, Swift filed a new removal notice. (P_ER095-

128.) The newly removed case is entitled *Grant Fritsch v. Swift Transportation Co. of Arizona, LLC*, Central District of California, number 5:18-cv-01306. (*Id.*)

Despite the filing a new, second removal of the action, this appeal by Swift continues.

VII. SUMMARY OF ARGUMENT

This appeal is moot. Subsequent to the granting of the Petition, Swift removed the case *again* from State court to the Central District of California. Given that the case is now in the federal forum, which is the same relief sought by this appeal, the issues presented by the appeal are moot and the appeal must be dismissed.

If the appeal is not dismissed, Fritch urges the Court to find that future attorneys' fees are not to be included in the amount in controversy analysis for CAFA jurisdiction, because the amount of such fees is impossible to estimate with any accuracy. Adopting a rule whereby future attorneys' fees must be included in the amount in controversy for CAFA jurisdiction purposes would contravene longstanding authority that the amount in controversy cannot be established by speculation or conjecture.

Likewise, while estimating future attorneys' fees to be 25 percent of the value of the plaintiff's underlying claims may be appealing for its simplicity, this approach is not supported by law, is no less speculative than forecasting future

attorneys' fees, and, as is the case here, would result in the inclusion of attorneys' fees that are not available for some of the plaintiff's claims.

The Ninth Circuit's recent decision in *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 414-15 (9th Cir. 2018) ("*Chavez*") does not alter the legal landscape with respect to whether future attorneys' fees must be included in the amount in controversy. *Chavez* is distinguishable because in her complaint the plaintiff sought relief for front-pay damages, and the Court held that such damages must be included in the amount in controversy. Here, Fritsch does not seek front-pay damages, and the issue of whether future attorneys' fees must be included in the amount in controversy was not addressed in *Chavez*.

Finally, assuming future attorneys' fees should be included in the amount in controversy, Swift did not meet its burden of proving by a preponderance of the evidence that the attorneys' fees Fritsch would incur would cause the total amount in controversy to exceed the jurisdictional minimum of $5 million.

VIII. ARGUMENT

A. Standard of review.

This Court reviews the district court's remand order *de novo*. *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 679 (9th Cir. 2006) ("*Abrego*"). The factual findings of the district court, however, are reviewed for clear error. *Rea v. Michaels Stores Inc.*, 742 F.3d 1234, 1237 (9th Cir. 2014) (per curiam) ("*Rea*");

Fed. Rule Civ. Proc. 52(a)(6).

B. The appeal is moot because Swift has subsequently removed the instant action back to the district court.

"Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 548 (9th Cir. 1998); *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). "If there is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction." *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 520-21 (9th Cir. 1999).

The remedy that Swift seeks on appeal is a reversal of the order remanding the action to state court; in other words, Swift wants the state court action back in the district court. However, after this Court granted Swift's petition for permission to appeal the remand order, Swift removed the state court action back to district court. (*See* P_ER095-128); Plaintiff-Respondent's Motion to Take Judicial Notice, Exs. 1 & 2). As a result, Swift has achieved its desired result of having the action heard in the federal forum. This Court is left powerless to award the desired relief. Consequently, the appeal is moot and must be dismissed for lack of jurisdiction.

Additionally, the appeal is now moot because Swift necessarily has admitted that the posture of the case has changed so much since the Remand Order that it is substantially a new case. Successive removals are improper "[a]bsent a showing

that the posture of the case has so changed that it is substantially a new case." *Leon v. Gordon Trucking, Inc.*, 76 F. Supp. 3d 1055, 1063 (C.D. Cal. 2014) ("*Leon*") (quoting *One Sylvan Rd. N. Associates v. Lark Int'l, Ltd.*, 889 F. Supp. 60, 65 (D. Conn. 1995)). Indeed, "absent new and different grounds for removal based on newly discovered facts or law, a defendant who improperly removes a case after a federal court previously remanded it risks being sanctioned under Federal Rule of Civil Procedure 11." *Leon* at 1063 (quoting *Fed. Home Loan Mortgage Corp. v. Pulido*, No. CV 12-04525 LB, 2012 WL 5199441, *2 (N.D. Cal. Oct. 20, 2012)). Because successive removals are improper absent a showing that the posture of the case has so changed that it is "substantially a new case," *Leon* at 1063, by filing a successive removal governed by Rule 11, Swift has tacitly admitted that the posture of the case has changed to this degree. If, therefore, the posture of the case has changed such that it is substantially a new case, the instant appeal, which deals with the posture of the case prior to the successive removal, must be moot. In unilaterally deciding to remove the case after filing the Petition, Swift has mooted its own appeal.

C. Legal standard for removal under CAFA.

"CAFA vests a district court with original jurisdiction over 'a class action' where: (1) there are one-hundred or more putative class members; (2) at least one class member is a citizen of a state different from the state of any defendant; and

(3) the aggregated amount in controversy exceeds $5 million, exclusive of costs and interest." *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011) ("*Chimei*") (quoting 28 U.S.C. § 1332(d)(2), 5(B), (6)).

CAFA's amount in controversy is determined at the time of filing. *Std. Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013) ("*Std. Fire Ins.*") ("For jurisdictional purposes, our inquiry is limited to examining the case 'as of the time it was filed in state court,' [citation]."). "[T]he amount in controversy is determined by the complaint operative at the time of removal and encompasses all relief a court may grant on that complaint if the plaintiff is victorious." *Chavez*, 888 F.3d at 414-15.

"[T]he amount in controversy is simply an estimate of the total amount in dispute, not a prospective assessment of defendant's liability." *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395, 400 (9th Cir. 2010). "[T]he [CAFA] statute tells the District Court to determine whether it has jurisdiction by adding up the value of the claim of each person who falls within the ... proposed class and determin[ing] whether the resulting sum exceeds $5 million." *Standard Fire Ins. Co.*, 568 U.S. at 592. Attorneys' fees are properly included in the calculation. *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 1000 (9th Cir. 2007) ("*Lowdermilk*"), *overruled on other grounds as recognized by Rodriguez v. AT&T Mobility Serv. LLC*, 728 F.3d 975, 976-77 (9th Cir. 2013).

"[T]he general principles of removal jurisdiction apply in CAFA cases." *Chimei*, 659 F.3d at 847. The burden of establishing federal jurisdiction is on the party seeking removal. *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004). This burden "remains, [under CAFA], on the proponent of federal jurisdiction." *Abrego*, 443 F.3d at 685. The defendant must establish, under a preponderance of the evidence standard, "that the potential damages could exceed the jurisdictional amount." *Rea*, 742 F.3d at 1239 (internal quotation marks and citation omitted); *Abrego*, 443 F.3d at 683. The "preponderance of the evidence" standard requires the trier of fact to decide whether the existence of a fact is more probable than its nonexistence. *Concrete Pipes & Prods. of Calif., Inc. v. Construction Laborers Pension Trust for Southern Calif.*, 508 US 602, 622 (1993).

There is a "strong presumption" against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Doubts as to removability are resolved in favor of remanding the case to state court. *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003). A court cannot base a finding of jurisdiction on a defendant's speculation and conjecture. *Lowdermilk*, 479 F.3d at 1002. "Rather, a defendant must set forth the underlying facts supporting its assertion that the amount in controversy exceeds the statutory minimum." *Fong v. Regis Corp.*, No. C 13–04497 RS, 2014 WL 26996, at *2 (N.D. Cal. Jan. 2, 2014).

D. Inclusion of attorneys' fees in amount in controversy.

Fritch does not dispute that attorneys' fees may be factored into an amount in controversy determination where they are available pursuant to the statute or statutes underlying the plaintiff's claims. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998) ("*Galt*"). Fritsch disagrees, however, with the contention that *future* attorneys' fees must be included in the amount in controversy, because there is no way of knowing the amount of attorneys' fees that might be incurred, let alone awarded, in a class action. Moreover, adopting a rule whereby a district court must apply an extra 25 percent on top of all other damages potentially recoverable in a class action defies logic, because that 25-percent figure is a benchmark of fees to be awarded *out* of a common fund, not on top of one. Adopting the 25-percent rule in a CAFA case would also run afoul of the general principles of removal jurisdiction, where the amount in controversy must not be speculative and the removing party must prove the amount in controversy by a preponderance of the evidence.

i. Only those fees incurred at the time of removal should be included in the amount in controversy, because the amount of future attorneys' fees is too speculative.

The Ninth Circuit has not directly addressed the issue of whether future attorneys' fees must be included in the amount in controversy. *See Gonzales v.*

CarMax Auto Superstores, LLC, 840 F.3d 644, 649, fn.2 (9th Cir. 2016) ("It remains an open question whether attorneys' fees that are anticipated but unaccrued at the time of removal or filing in federal court, such as those at issue in this case, may be included in the amount-in-controversy.").

Swift cites *Garibay v. Archstone Communities LLC*, 539 F. App'x 763, 764 (9th Cir. 2013) ("*Garibay*") for the proposition that the Ninth Circuit has resolved this issue, but *Garibay* is an unpublished decision that, while it may be citable pursuant to Federal Rule of Appellate Procedure 32.1, is not precedential under Circuit Rule 36-3(a). Moreover, contrary to Swift's assertions, *Garibay* did not squarely answer the question. *Garibay* affirmed the district court's order to remand the case to State court on the basis that the removing defendant failed to meet its burden of proving by a preponderance of the evidence that the amount in controversy exceeded even $4 million. *Garibay*, 539 F. App'x at 764. The *Garibay* court noted that, even if it applied future attorneys' fees of 25 percent of the underlying amount upon which those fees would be based to the amount in controversy, the total amount in controversy would still not meet the required $5 million minimum for CAFA jurisdiction. *Id.* Hence, *Garibay* largely avoided the question of whether to include future attorneys' fees in the amount in controversy, and in no way can the dicta quoted by Swift constitute a rule whereby future attorneys' fees must be included in the amount in controversy or how to calculate

such future fees.

The best approach to including attorneys' fees in the amount in controversy is to include those fees incurred as of the time of removal. This is the rule applied by the Seventh Circuit. "Only attorneys' fees incurred up to the time of removal could be included in the amount in controversy." *ABM Sec. Servs., Inc. v. Davis*, 646 F.3d 475, 479 (7th Cir. 2011) (applying rule in CAFA removal appeal) (citing *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 512 (7th Cir. 2006).

Many courts within this Circuit have followed this same approach. *See Fortescue v. Ecolab Inc.*, No. CV 14-0253 FMO (RZx), 2014 WL 296755, at *3 (C.D. Cal. Jan. 28, 2014); *Francisco v. Emeritus Corp.*, No. CV 17-02871-BRO (SSx), 2017 WL 2541401, at *10 (C.D. Cal. June 12, 2017); *Palomino v. Safeway Ins. Co.*, No. CV-11-01305-PHX-NVW, 2011 WL 3439130, at *2 (D. Ariz. Aug. 5, 2011); *Bennett v. Alaska Airlines, Inc.*, No. CV 14-2804 FMO (RZx), 2014 WL 1715811, at *3 (C.D. Cal. Apr. 30, 2014); *MIC Philberts Investments v. Am. Cas. Co. of Reading, Pa.*, No. 1:12-CV-0131 AWI-BAM, 2012 WL 2118239, at *5 (E.D. Cal. June 11, 2012) ("While the Ninth Circuit Court of Appeals has not yet spoken on the issue, the Court notes that it appears that a nascent consensus may be emerging among the district courts of this Circuit, finding that attorneys' fees not yet incurred may not be included in the amount in controversy calculation."); *Conrad Assocs. v. Hartford Accident & Indem. Co.*, 994 F. Supp. 1196, 1200 (N.D.

Cal. 1998); *Pegram v. Jamgotchian*, No. 3:12-CV-50- RCJ-VPC, 2012 WL 3929789, at *7 (D. Nev. Sept. 7, 2012); *Reames v. AB Car Rental Serv., Inc*., 899 F. Supp. 2d 1012, 1020-21 (D. Or. Mar. 8, 2012).

These holdings comport with the Seventh Circuit's rationale for excluding attorneys' fees from the amount in controversy as set forth in *Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 958 (7th Cir. 1998) ("*Gardynski-Leschuck*"). *Gardynski-Leschuck* involved the question of whether the value of the plaintiff's claims met the then-jurisdictional minimum of $50,000. *Id.* at 956-57. The court found that the plaintiff's damages "could be as high as $22,000," but the plaintiff insisted that her attorneys' fees to date were over $28,000, and she argued that the inclusion of her attorneys' fees pushed the aggregate value of her claims past $50,000. *Id.* 958-959. But the *Gardynski-Leschuck* court refused to include the value of the plaintiff's attorneys' fees in the amount in controversy for a number of reasons. First, the court relied on *St. Paul Mercury Indem. Co. v. Red Cab Co*., 303 U.S. 283 (1938) ("*St. Paul Mercury*") for the hornbook proposition that "[j]urisdiction depends on the state of affairs when the case begins; what happens later is irrelevant." *Gardynski-Leschuck* at 958 (citing *St. Paul Mercury*, 303 U.S. at 289-90). The court noted:

> According to Gardynski-Leschuck's table, attorneys' fees have just recently put her over the $50,000 threshold—perhaps the cost of preparing the post-argument brief on jurisdiction was the critical event. It would be neither

> sensible nor consistent with *St. Paul Mercury* to say that there was no federal jurisdiction on the date the complaint was filed, the trial held, or the judgment entered in the district court, but that the appeal enabled counsel to run up the tab and create a jurisdictional basis for further proceedings.

Gardynski-Leschuck at 958. The *Gardynski-Leschuck* court concluded, "Unless the amount in controversy was present on the date the case began, the suit must be dismissed for want of jurisdiction." *Id.*

The *Gardynski-Leschuck* court articulated a second reason why the plaintiff's attorneys' fees should not be applied to the amount in controversy: attorneys' fees should not be included because they are speculative and may be avoided. *Id.* at 959. Attorneys' fees are not "in controversy" between the parties because a "calculation [of attorneys' fees] includes the value of legal services that have not been and may never be incurred. Unlike future income lost to injury, legal fees are avoidable." *Id.* The court illustrated its point:

> Suppose that the day after Gardynski-Leschuck filed her complaint Ford had tendered $22,011.99 (the total of [her damages, exclusive of fees]) in satisfaction of her demands. Gardynski-Leschuck could not have turned it down on the ground that Ford left out $28,020 in attorneys' fees, for those fees had not then been incurred. [Citations.] A plaintiff who receives everything she asks for in the complaint has no remaining dispute with the defendant, and in this case "everything" was $22,011.99 plus any recoverable legal expenses Gardynski-Leschuck had incurred already.

Id. The *Gardynski-Leschuck* court concluded: "For the same reason, legal

expenses that lie in the future and can be avoided by the defendant's prompt satisfaction of the plaintiff's demand are not an amount 'in controversy' when the suit is filed." *Id.*

Although *Gardynski-Leschuck* is not binding authority in the Ninth Circuit, the very same logic applies here. At the time of removal, the district court held that the value of Fritch's claims, exclusive of fees, was $4,628,575. (P_ER031.) Fritch's attorneys' fees to the date of removal were $150,000. (*Id.*) So, on the date of removal, Swift could have offered Fritsch (and the class) $4,778,575 in complete satisfaction of all of their claims and the attorneys' fees available to Fritsch by law. By doing so, Swift could have avoided any future attorneys' fees. Hence, at the time of removal, the total amount in controversy (i.e., what Swift could have paid to make Fritsch and the class whole) was below the $5 million threshold.

Adopting a rule whereby only the attorneys' fees incurred as of the date of removal may be included in the amount in controversy would avoid the pitfalls identified in *Gardynski-Leschuck*. It is impossible to know from the outset of a case how much a plaintiff may incur in legal fees. Perhaps a defendant resolves the case promptly, thereby avoiding a run-up in fees. Perhaps on the other hand the litigation "drones on" as in *Jarndyce v. Jarndyce*, where "a little plaintiff or defendant, who was promised a new rocking-horse when *Jarndyce and Jarndyce*

should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world." Charles Dickens, *Bleak House* (1853); *see Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 393(1973) (noting that a case where one party had incurred "56,000 hours of lawyering at a cost of $7,500,000" was a modern-day *Jarndyce v. Jarndyce*). Expecting a district court to anticipate legal fees that may be incurred in the future is an insurmountable burden. At best, the court's estimate of attorneys' fees would be speculative and violate the proposition that a court "cannot base [its] jurisdiction on ... speculation and conjecture." *Lowdermilk*, 479 F.3d at 1002.

Further complicating the issue is the fact that the removing defendant has the burden of proving the amount in controversy under a preponderance of the evidence standard. To do this with respect to future attorneys' fees would be very burdensome on a defendant. Attorneys' fees are typically calculated by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). So a removing defendant need to prove by a preponderance of the evidence just how many hours will be necessarily incurred by plaintiff's counsel in prosecuting a case. The removing defendant would also have to prove by a preponderance of the evidence the reasonable hourly rates of the plaintiff's counsel, not to mention an estimate of how many hours each different counsel would likely record throughout

the case. So, for example, if the plaintiff had three counsel, each with varying years of experience, in order to meet the preponderance of the evidence standard, the removing defendant would have to estimate how many hours and at what rates each of those three attorneys would record through the conclusion of the case. Any such prognostications by the removing defendant must be speculative, at best.

A rule that only those fees incurred at the time of removal be included in the amount in controversy is much more straightforward and avoids speculation and conjecture. It is also in line with the principle that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). For these reasons, the Court should therefore hold that future attorneys' fees cannot be included in the amount of controversy.

ii. The 25-percent benchmark figure pertains to reasonable attorneys' fees awarded as a portion of the common fund, not as future fees to be incurred over the course of the action.

Fritsch agrees that 25 percent is the "benchmark" that district courts should award for fees in common fund cases. *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995). But this benchmark figure has nothing to do with the amount in controversy for CAFA jurisdiction purposes. The benchmark exists for the purpose of evaluating the reasonableness of common fund fee awards, not for evaluating the anticipated future attorneys' fees in class action cases. *See Six (6)*

Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) ("...25 percent of the fund [is] the 'benchmark' award that should be given in common fund cases. The benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.").

Using the benchmark to estimate the amount of future attorneys' fees that may be incurred in a class action case would be a misapplication of its principles, because the 25-percent benchmark refers to attorneys' fees that are to be awarded *out of* a common fund, not on top of a class recovery. In common fund cases, attorneys' fees are deducted from the class members' aggregate recovery. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee ***from the fund*** as a whole.") (emphasis added); *see also Six (6) Mexican Workers*, 904 F.2d at 1311.

To illustrate, the district court here found that the amount in controversy, including $150,000 in fees, was $4,778,575. If, as in the illustration above, Swift were to settle with Fritsch and the class for the entire amount in controversy, the settlement amount of $4,778,575 would constitute the common fund. Assuming the district court were to award Fritsch's counsel their fees equal to the benchmark

of 25 percent of the common fund, the fees would be approximately $1,194,645. Those fees would be ***deducted*** from the common fund, a deduction shared equally by the class members, and are not in addition to the common fund.

Because attorneys' fees in common fund cases are not paid by the defendant, and are instead paid as a percentage of the common fund, the attorneys' fees do not increase the amount in controversy. *Leonard v. Enter. Rent a Car*, 279 F.3d 967, 973-74 (11th Cir. 2002); *see also* Wright, Miller & Kane, *Federal Practice and Procedure* § 3712 (4th ed. 2011) (noting that attorneys' fees in a common fund case are "not a damage element or part of the amount in controversy."). Thus, extending the 25-percent benchmark figure to calculate reasonable attorneys' fees for CAFA jurisdiction purposes would be a misapplication of the benchmark principles.

iii. The 25-percent benchmark figure is no less speculative than any other estimate of future attorneys' fees.

While use of the 25-percent benchmark figure to estimate future attorneys' fees may be appealing for its simplicity and ease of application, it is no less speculative than any other estimate of future attorneys' fees. Again, if on the date of removal Swift were to have paid Fritsch 100 cents on the dollar for his underlying claims and all of the $150,000 his counsel had incurred as of that date, there is no way that Fritsch's future attorneys' fees would have equaled 25 percent

over and above the value of his underlying claims. Indeed, courts in the Ninth Circuit under similar circumstances would find it appropriate to reduce Fritsch's fee award to below the 25-percent benchmark. *See Campos v. Ecolab Inc.*, No. 16-cv-05192-PJH (N.D. Cal. Aug. 2, 2017) (fee award of 20% of $5,950,000 common fund when case settled early in the litigation). Conversely, a 25-percent fee award may be unreasonably low if the litigation were to last many years. *Valentine v. NebuAd Inc.*, No. C 08-05113 TEH (LB), 2011 WL 13244509, at *2-3 (N.D. Cal. Nov. 21, 2011) (fee award of 30% of $2,409,509.74 common fund justified considering actual fees incurred). Thus, to say from the outset of a case that fees will be 25 percent of the underlying claims is nothing more than speculation, and speculation cannot be used to prove the amount in controversy.

iv. The presumption that future fees equal to 25 percent of the value of all claims is not reasonable given that attorneys' fees are only available on some of Plaintiff's claims.

In ordinary diversity cases, "when there is no direct legal authority for an attorneys' fee, a request for a fee cannot be included in ... the jurisdictional amount," but "where an underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy." *Galt*, 142 F.3d at 1155-56; *Chimei*, 659 F.3d at 847 ("[T]he general principles of removal jurisdiction apply in CAFA cases.").

Here, Fritsch's operative complaint (the Third Amended Complaint or "TAC" filed in the state court on August 30, 2016) includes the following causes of action styled as follows: (1) the failure to pay wages, (2) failure to provide accurate itemized wage statements in violation of Labor Code section 226 (3) unfair competition/violation of California Business and Professions Code section 17200 *et seq.*, and (4) violation of the Labor Code Private Attorneys General Act ("PAGA"), Labor Code section 2698 *et seq.* (P_ER066.) Fritsch's first cause of action for the failure to pay wages is broken down into sub-claims for regular, overtime, and doubletime wages, for meal period premiums, and for waiting-time penalties under Labor Code section 203. (P_ER066-71.)

An award of attorneys' fees is not available on each of Fritsch's claims and sub-claims. Attorneys' fees are available under Fritsch's claims for unpaid regular, overtime, and doubletime wages pursuant to Labor Code section 1194. *Harrington v. Payroll Entertainment Services, Inc.*, 160 Cal. App. 4th 589, 593-594 (2008) (an employee who recovers unpaid overtime is entitled to attorney fees under section 1194 "as a matter of right"). Fees are available under his claim for waiting-time penalties under Labor Code section 203 to the extent they are predicated on Swift's failure to pay regular, overtime, or doubletime wages. *Kirby v. Immoos Fire Prot., Inc.*, 53 Cal. 4th 1244, 1254-55, 1256 (2012) ("*Kirby*"). Fees are available under his claim for penalties for deficient itemized wages statements pursuant to Labor

Code section 226. Lab. Code § 226(e) (employee suffering injury from an employer's failure to comply with wage statement law "is entitled to an award of costs and reasonable attorneys' fees").

On the other hand, fees are *not* available for the rest of Plaintiff's claims. *See Kirby*, 53 Cal. 4th at 1254-55, 1259 (2012) (attorneys' fees under Labor Code sections 218.5 and 1194 not available in claims for meal period premiums); *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 179 (1999) (attorneys' fees unavailable in unfair competition action brought under Business and Professions Code section 17200); *Ling v. P.F. Chang's China Bistro, Inc.*, 245 Cal. App. 4th 1242, 1261 (2016), review denied (July 13, 2016) (attorneys' fees unavailable under section 218.5 in action for Labor Code section 203 waiting-time penalty based on underlying failure to pay meal period premiums). Fees are available for Fritsch's claim for PAGA penalties, Lab. Code § 2699(g)(1), but a PAGA action is not a "class action" over which a federal court may have original jurisdiction under CAFA, *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1124 (9th Cir. 2014), so the fees Fritsch may incur in pursuing his PAGA claim cannot be included in the amount in controversy under 28 U.S.C. § 1332(d). *Rodriguez v. US Bank Nat'l Ass'n*, No. 2:16-CV-05590-CAS-RAOx, 2016 WL 5419403, at *7 (C.D. Cal. Sept. 26, 2016).

Because attorneys' fees are available for only *some* of Fritsch's claims,

applying an across-the-board 25-percent fee for amount in controversy purposes would be improper. For example, Swift argues that the amount in controversy must include 25 percent of the $948,192, the value it placed on Fritch's underlying meal period claim. Given that fees are not available for a meal period claim, and fees are only to be included in the amount in controversy where an underlying statute authorizes an award of attorneys' fees, *Galt*, 142 F.3d at 1155-56, it would be error to add an extra 25 percent for fees on the meal period claims to the amount in controversy. Thus, establishing a rule whereby a removing defendant could add an across-the-board 25-percent for attorneys' fees when evaluating the amount in controversy in CAFA cases, even when attorneys' fees are not available on some of the plaintiff's claims, could end up in the overvaluing of attorneys' fees calculations and the resulting CAFA jurisdiction of cases that should not be in a federal forum.

v. The *Chavez* case does not undermine the District Court's ruling.

Swift argues here (as well as in its June 18, 2018, second removal of the case) that the Ninth Circuit's holding in *Chavez*, 888 F.3d 413, compels a different outcome than the District Court's remand order. (*See, e.g.,* P_ER096, 102.) In *Chavez,* this Court held in a diversity case that "the amount in controversy includes all relief claimed at the time of removal to which the plaintiff would be entitled if she prevails." *Chavez,* 888 F.3d at 418. The *Chavez* plaintiff's complaint at the

time of removal claimed wrongful termination resulting in lost future wages, and thus, the Ninth Circuit concluded, those future wages were to be included in the "amount in controversy." *Id.*

The *Chavez* case does little to move the needle here. In this wage-and-hour matter, Plaintiff and the Certified Class seek wages, interest, and penalties arising under California wage-and-hour laws. There is no claim for future wage loss here, as there was in *Chavez.*

Also, while Fritsch addresses the inapplicability of hypothetical common-fund attorneys' fees above, *Chavez* did not explicitly address the issue of potential/future attorneys' fees that might be incurred or awarded as part of a common fund, were a class action matter to proceed to trial.

In summary, while *Chavez* is admittedly a recent decision, it is not material to this Court's analysis of the remand order in this matter.

vi. Assuming future attorneys' fees may be included in the amount in controversy, Swift did not meet its burden of proving the amount of future attorneys' fees.

Swift has not shown, by a preponderance of the evidence, or any evidence, that the inclusion of attorneys' fees would cause the amount in controversy to reach the statutory threshold. *See Walton v. AT&T Mobility*, No. 2:11-cv-01988-JHN-JC, 2011 WL 2784290, at *2 (C.D. Cal. 2011) (declining to reach the issue of

whether future attorneys' fees could be considered in the amount in controversy because the defendant "did not provide any factual basis for determining how much attorneys' fees have been incurred thus far and will be incurred in the future[, and] [b]ald assertions are simply not enough.").

Notwithstanding, even if future fees were permitted to be tabulated by the Court, Swift merely speculates as to the attorneys' fees yet-to-be-awarded herein by calculating a (hypothetical) percentage of a (hypothetical) common fund in a (still hypothetical) settlement. (P_ER022, 27-32; *see also* C.D. Cal. Case No. 5:17-cv-02226-JGB-SP, Dkt. Nos 19 through 19-3 (Swift Opposition to Remand Motion) (bare assertion of "25% benchmark" applied to all of Plaintiff's claims, regardless of existence of fee-shifting statute, does not constitute a preponderance of evidence).) It is truly conjecture upon speculation, based on a guess.

The only fees that Swift *may* have proved by a preponderance of evidence are the $150,000 that Frisch incurred at the time of removal. (P_ER086.) Only those fees should have been included in the amount in controversy.

IX. CONCLUSION

For the reasons set forth above, this Court should dismiss Swift's appeal of the district court's remand order as moot.

In the alternative, this Court should affirm the order granting Fritsch's

motion to remand.

Dated: June 21, 2018

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Dated: June 21, 2018

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X. STATEMENT OF RELATED CASES

In accordance with Circuit Rule 28-2.6, Fritsch knows of no other cases in this Court that are related to the instant case.

Dated: June 21, 2018

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XI. CERTIFICATE OF COMPLIANCE

I certify, pursuant to *Fed. R. App. P.* 32(a)(7)(B), that the foregoing brief complies with the type-volume limitation because it contains 6,483 words, excluding the parts of the brief exempted by *Fed. R. App. P. 32* (a)(7)(B)(iii). The foregoing brief is proportionally spaced and has a typeface of 14 points and complies with the typeface requirement of *Fed. R. App. P.* 32(a)(5) and the type style requirements of *Fed. R. App. P.* 32(a)(6).

Dated: June 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed, in Case No. No. 18-55746, the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 21, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 21, 2018

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 18-55746

I, Michael A. Strauss, certify that this brief is identical to the version submitted electronically on [date] June 21, 2018.

Date June 22, 2018

Signature s/ Michael A. Strauss

(either manual signature or "s/" plus typed name is acceptable)