

1 Matthew R. Miller (SBN 194647)  
2 MILLER LAW FIRM  
3 6790 Embarcadero Lane, No. 100  
4 Carlsbad, CA 92011  
5 Telephone: (619) 261-1150

6 Email: [matt@mrmlawfirm.com](mailto:matt@mrmlawfirm.com)

7 *Attorneys for Plaintiff*

8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DAMIAN DIAZ, individually and on  
11 behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 NEXA MORTGAGE, LLC, et al.,

15 Defendants.

**Case No. 24-cv-0873- JES DDL**

**PLAINTIFF’S POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR ORDER  
REMANDING CASE TO STATE  
COURT**

Date: September 4, 2024

Time: 11:00 a.m.

Dept.: 4B

Judge: Hon. James E. Simmons Jr.

State Action Filed: August 3, 2022

FAC Filed: October 31, 2022

1<sup>st</sup> Removal Date: November 30, 2022

Remanded: July 10, 2023

2<sup>nd</sup> Removal Date: May 16, 2024

24 **I.**

25 **INTRODUCTION**

26 Nexa's nefarious and frivolous third attempt to forum-shop this case to  
27 federal court must be rejected. This Court does not have subject matter jurisdiction  
28

1 based on the Class Action Fairness Act (CAFA) as the pleadings and orders  
2 provided by Nexa in its removal papers establish unequivocally. As this Court  
3 recognizes there is no deadline for bringing a motion to remand when based on  
4 lack of federal matter jurisdiction.

5 This case is no longer a purported class action due to San Diego Superior  
6 Court Judge Maas' Order compelling non-PAGA claims to arbitration, including  
7 Plaintiff's role as a class representative for the purported class action claims  
8 alleged in the First Amended Complaint, which is the basis of Nexa's notice of  
9 removal. Without a class representative for a class action, there is no class action.

10 Judge Maas' Order was months before Nexa's bad faith removal to federal  
11 court for the second time. The remaining PAGA claims are not considered class  
12 actions for purposes of CAFA.

13 The case stems from the out-of-state employer, Nexa Mortgage, LLC's  
14 failure to pay appropriate wages to its employees in an effort to gain an advantage  
15 in the marketplace. Since the filing of the lawsuit in 2022, Nexa has instituted a  
16 strategy of delay, gamesmanship, and creating unnecessary litigation costs.

17 Nexa removed the case to federal court which then granted plaintiff's motion  
18 to remand, bringing the case back to state court. After plaintiff propounded written  
19 discovery, Nexa filed a Motion to Compel Arbitration, which was granted in part  
20 and denied in part - - sending plaintiff's individual claims to arbitration, including  
21 his claims in which he would be a class representative for a class action, while  
22 maintaining the PAGA representative claims in state court, and refusing to stay the  
23 case pending arbitration.

24 Attempting to circumvent the state court, Nexa then filed a new case in  
25 federal court, seeking to have the federal court judge assigned to its new case  
26 overturn the state court's ruling on the motion to compel arbitration. The alleged  
27 basis for its new lawsuit / appeal was entirely meritless and required warnings from  
28 plaintiff's counsel as to Rule 11 sanctions. Interestingly, Nexa later dismissed this

1 action apparently recognizing that it was probably in violation of FRCP Rule 11.

2 Consistent with its bad faith tactics, Nexa then provided discovery  
3 “responses” which consisted of nothing but boiler plate objections, and refused to  
4 consider supplementing its responses until after the federal court reached a  
5 decision in Nexa’s newly filed, yet very frivolous “appeal.”

6 On June 16, 2024 Judge Maas of the San Diego Superior Court issued a  
7 tentative ruling against Nexa compelling discovery responses without objection  
8 and awarding over \$12,000.00 in sanctions. The next day Nexa removed the case  
9 to federal court purportedly based on the removal procedures under CAFA.

10 Nexa’s actions in flouting the law and creating its own alleged law out of  
11 creative fiction, in order to prevent the disclosure of aggrieved employees and  
12 eventual justice, must be stopped.

13 Nexa’s basis for removal is based on an Amended Complaint that was filed  
14 around year before the San Diego Superior Court decided to compel Mr. Diaz’  
15 claims to arbitration. At the time of removal, Mr. Diaz was no longer a  
16 representative of a class action, and thus at the time of removal there was not a  
17 class action as required for CAFA subject matter jurisdiction. And, as Nexa now  
18 belatedly admits, California’s PAGA statute, which is the only remaining non-  
19 arbitration claim existing at the time of removal does not provide jurisdiction under  
20 CAFA.

21  
22 **II.**

23 **PROCEDURAL HISTORY**

24 On August 3, 2022, Plaintiff Damian Diaz, individually and on behalf of all  
25 others similarly situated, commenced an action against NEXA in the Superior  
26 Court of the State of California for the County of San Diego, captioned Damian  
27 Diaz v.NEXA Mortgage, LLC, Case No. 37-2022-00031816-CU-OE-NC. [ROA  
28 1]. Since the filing of the lawsuit Nexa has instituted a strategy of compelling Mr.

1 Diaz to arbitration for non-PAGA claims while stifling his efforts to litigate the  
2 PAGA action.

3 In November 2022, Defendant filed a Notice of Removal of the Superior  
4 Court case to the United States District Court for the Southern District of  
5 California on the basis of diversity jurisdiction. [ROA 7] [DOC 1, Case No. 3:22-  
6 cv-01895-BAS-DDL (transferred on March 17, 2023 to Case No. 3:22-cv-01895-  
7 JES-DDL)]

8 In December 2022, Nexa filed a Motion to Compel Arbitration in the  
9 Federal Court action. [01895- DOC 4] A few days later, Plaintiff filed a Motion to  
10 Remand. [01895- DOC 5]. On July 10, 2023, Federal Court remanded the case  
11 back to the State of California for the County of San Diego on the basis that the  
12 amount in controversy was not sufficiently met. In doing so, the Court determined  
13 Nexa’s Motion to Compel Arbitration moot. [01895- DOC 23]

14 In August 2023, Plaintiff served written discovery requests on Nexa in the  
15 state court action.

16 A Few weeks later, Nexa filed a Motion to Compel Arbitration in Superior  
17 Court. [ROA 13]. On December 8, 2023, Judge Earl H. Maas III denied in part  
18 and granted in part Nexa’s Motion to Compel Arbitration, sending Plaintiff’s  
19 individual claims to arbitration while permitting the PAGA representative claims  
20 to proceed in the Superior Court action. [ROA 35].

21 In its Ruling, the Court stated: **In sum, Plaintiff's non-PAGA and**  
22 **individual PAGA claims are hereby ordered to arbitration pursuant to the**  
23 **rules of JAMS Arbitration. The Court declines to stay Plaintiff's**  
24 **representative PAGA claims during the pendency of the arbitration and that**  
25 **claim may proceed in this Court.**” [ROA 35, page 6]

26 On January 8, 2024, Nexa filed a “Petition to Hear Appeal” in US District  
27 Court, seeking have the Federal Court Judge assigned to the case review and  
28 overturn Judge Maas’ ruling on Nexa’s Motion to Compel Arbitration. [Case No.

1 3:24-cv-00061-BEN-MMP: Doc 1]. The Petition was essentially an attempt to  
2 obtain a stay over the state court proceedings. There was no basis for this Petition  
3 under any reasonable legal theory. Nexa eventually dismissed it.

4 On January 16, 2024, Nexa provided belated responses to the written  
5 discovery requests, providing no substantive responses or documents and only  
6 boiler plate objections to every single interrogatory and request.

7 On February 27, 2024, Plaintiff filed three Motions to Compel Further  
8 Responses to the discovery requests propounded upon Nexa. [ROA 36-49]

9 On May 16, 2024, Judge Maas issued a Tentative Order on the Motions to  
10 Compel Further Responses to discovery, issuing monetary sanctions on Nexa and  
11 ruling that Nexa had waived all of its objections to the requests, including attorney-  
12 client and work product privileges. [ROA 72]

13 After the tentative ruling was published, Nexa filed a Notice of Removal on  
14 May 16, 2024. [ROA 77-80] & [US District Court Case No. 24-cv-00873-JES-  
15 DDL: DOC 1]

16  
17 III.

18 **DEFENDANT BEARS THE BURDEN OF PROVING THAT THE**  
19 **REQUISITE JURISDICTION EXISTS TO SUPPORT REMOVAL**

20 A defendant seeking removal of an action to federal court has the burden of  
21 establishing grounds for federal jurisdiction in the case. *Valdez v. Allstate Ins. Co.*,  
22 372 F.3d 1115, 1117 (9th Cir. 2004). The removing party must prove by a  
23 preponderance of the evidence the actual facts necessary to support the petition for  
24 removal, *e.g.*, the existence of diversity, the amount in controversy, or the federal  
25 nature of the claim. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S.  
26 81, 88 (9th Cir. 2014).

27 In ruling on a remand motion, the court ordinarily determines removability  
28 from the complaint as it existed at the time of removal, together with the removal

1 notice. If the complaint is unclear as to grounds for removal, it is proper to  
2 consider the entire record of the state proceedings. *Miller v. Grgurich* (9th Cir.  
3 1985) 763 F2d 372, 373; *McPhail v. Deere & Co.* (10th Cir. 2008) 529 F3d 947,  
4 956.

5 Moreover, if the remand motion challenges subject matter jurisdiction (e.g.,  
6 amount in controversy), rather than a procedural defect in removal, the court “may  
7 look to any relevant information the parties may present, up until the time of the  
8 challenge to jurisdiction.” *Bankhead v. American Suzuki Motor Corp.* (MD AL  
9 2008) 529 F.Supp.2d 1329, 1334 (emphasis added); see also *Polo v. Innoventions*  
10 *Int'l, LLC* (9th Cir. 2016) 833 F3d 1193, 1196.

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12 **IV.**

13 **THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION**  
14 **OVER THIS CASE**

15 The Court has original jurisdiction “of all civil actions arising under the  
16 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Nexa  
17 asserts subject matter jurisdiction under CAFA. In order to utilize CAFA for  
18 subject matter jurisdiction, the case must be a “class action.” 28 U.S.C. § 1332 (d)  
19 1-2.

20 CAFA defines a “class action” as “any civil action filed under Rule 23 of  
21 the Federal Rules of Civil Procedure or similar State statute or rule of judicial  
22 procedure authorizing an action to be brought by 1 or more representative persons  
23 as a class action.” 28 U.S.C. § 1332(d)(1)(B).

24 Where a party asserts that CAFA gives rise to subject matter jurisdiction for a  
25 PAGA claim, the “[r]epresentative action under California's [PAGA] [is] not a  
26 ‘class action’ within meaning of Class Action Fairness Act (CAFA), as required to  
27 allow district court to exercise original jurisdiction over PAGA action.” *Baumann*  
28 *v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122-23 (9th Cir. 2014); see also *id.*,

1 747 F.3d at 1119 (holding “CAFA provides no basis for federal jurisdiction” over a  
2 PAGA action); *Echevarria v. Aerotek, Inc.*, 814 Fed. Appx. 321, 322 (9th Cir.  
3 2020) (affirming district court's ruling that CAFA jurisdiction does not apply to  
4 Plaintiff's remaining PAGA claim once the class action claims were dismissed).

5 Here, in December 2023, Judge Maas granted Nexa’s Motion to Compel  
6 Arbitration and ruled: “**in sum, Plaintiff's non-PAGA and individual PAGA**  
7 **claims are hereby ordered to arbitration pursuant to the rules of JAMS**  
8 **Arbitration. The Court declines to stay Plaintiff's representative PAGA**  
9 **claims during the pendency of the arbitration and that claim may proceed in**  
10 **this Court.**” [ROA 35, page 6]

11 In Opposition to Plaintiff's motions to compel discovery filed in San Diego  
12 Superior Court, Nexa argued that the discovery requests were too broad because  
13 they sought documents and information that were no longer part of the case ie.  
14 class action claims. And, in making this argument, NEXA admits that the only  
15 claims left in the lawsuit is a PAGA action, which is not considered a "class  
16 action" for purposes of CAFA. This is what Nexa said:

17 *After a hearing on December 8, 2023, this Court granted Defendant’s*  
18 *motion and compelled arbitration of Plaintiff’s original eight counts (the*  
19 *“Arbitration Claims”) but retained jurisdiction over Plaintiff’s non-*  
20 *individual PAGA claims (the “PAGA Claims”). The PAGA Claims were*  
21 *not stayed pending the outcome of the arbitration. . . . Plaintiff never*  
22 *revised his discovery requests in light of the Court compelling all but the*  
23 *PAGA claims to Arbitration, seeking instead to hold Defendant to*  
24 *responding to the earlier discovery requests which were premised on*  
25 *numerous dismissed claims through the Court’s December 8, 2023 Order.*  
26 *[ROA 64, pages 2-3]*

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V.

**WITHOUT SUBJECT MATTER JURISDICTION, IS NEXA AGREEING  
TO ALLOW CLASS ACTION CLAIMS UNDER CAFA TO MOVE  
FORWARD?**

**A. If Nexa stipulates that Diaz has standing to bring the class  
action claims in Federal court, Diaz may be willing to stipulate to  
that as well.**

Nexa’s removal is based entirely on its assertion that Diaz’ class action claims are still viable and should instead be determined in Federal rather than State court. However, it is important to note that Nexa’s employment agreement with Diaz (Section VIII) states: “...notwithstanding any rules in JAMS to the contrary, employees’ claims may not be joined with the claims of any other person or Employee and there will be no allowance for Employee to pursue or participate in relief on a class or collective action basis against the Company arising out of the employment relationship or this agreement.” Clearly Nexa will be relying on this language to assert Diaz has no standing to bring class claims as soon as their forum shopping efforts have concluded. If, as represented to this Court, Nexa is stipulating that Diaz has standing to bring the class claims alleged in his Complaint, Diaz would be willing to stipulate as well that all of those claims are viable and that Nexa has waived its right to object on the basis of standing or contractual preclusion.

**B. The class claims were not pending in State court at the time of  
Nexa’s Removal.**

The plain reading of Judge Maas’ ruling on Nexa’s Motion to Compel Arbitration shows plaintiff’s class action claims were compelled to arbitration, thus

1 there was nothing left to “remove” in this regard when Nexa filed its Notice of  
2 Removal. Judge Maas’ December 7, 2023 ruling states, in pertinent part:  
3 “Plaintiff’s non-PAGA and individual PAGA claims are hereby ordered to  
4 arbitration pursuant to the rules of JAMS Arbitration. The Court declines to stay  
5 Plaintiff’s representative PAGA claims during the pendency of the arbitration and  
6 that claim may proceed in this Court.” Clearly, plaintiff’s representative PAGA  
7 claims were the only claims remaining in Judge Maas’ courtroom as of the time of  
8 Nexa’s Removal. Diaz’ non-PAGA (a.k.a. Diaz’ class claims and individual  
9 claims) as well as Diaz’s individual PAGA claims were ordered to arbitration.  
10 There were no class claims pending in Judge Maas’ courtroom that could be  
11 “removed” by Nexa.

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16 **VI.**

17 **CONCLUSION**

18 Defendant has not met its burden to prove that this action is within the  
19 jurisdiction of the Court. Plaintiff respectfully requests this Court to grant his  
20 Motion and remand the action to the San Diego County Superior Court in which it  
21 was filed.

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Dated: August 7, 2024

**MILLER LAW FIRM**

By:   /s/ Matthew R. Miller  
Matthew R. Miller  
Email: matt@mrmlawfirm.com

DAWSON & OZANNE  
BRIAN C. DAWSON  
Email: brian@dawson-ozanne.com  
Attorneys for Plaintiff Damian Diaz