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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

KELBY HELMICK,

Plaintiff,

v.

**DAVE & BUSTER’S, INC.; DAVE &
BUSTER’S OF CALIFORNIA, INC.;
DAVE & BUSTER’S MANAGEMENT
CORPORATION, INC., DOES 1
through 10, inclusive,**

Defendants.

Case No.: SACV 18-00142-CJC(GJSx)

**ORDER DENYING PLAINTIFF’S
MOTION TO REMAND**

I. INTRODUCTION

Plaintiff Kelby Helmick filed this action against Defendants Dave & Buster’s, Inc. (“DBI”), Dave & Buster’s of California, Inc. (“DBOC”), Dave & Buster’s Management Corporation, Inc. (“DBMC”), and Does 1 through 10, inclusive, in Orange County

1 Superior Court on December 22, 2017. (Dkt. 1-1 [Complaint, hereinafter “Compl.”].)
2 Plaintiff asserts seven causes of action against Defendants: (1) failure to reasonably
3 accommodate disability, Cal. Gov. Code § 12940(m); (2) failure to engage in good faith
4 interactive process, Cal. Gov. Code §12940(n); (3) disability discrimination, Cal. Gov.
5 Code § 12940(a); (4) failure to prevent discrimination/retaliation, Cal. Gov. Code §
6 12940(k); (5) retaliation in violation of the Fair Employment and Housing Act
7 (“FEHA”), Cal. Gov. Code § 12940(h); (6) wrongful termination; and (7) retaliation for
8 taking leave in violation of the California Family Rights Act, Cal. Gov. Code §
9 12945.2(I). (*Id.*) Defendants removed the action to this Court on January 25, 2018, on
10 the basis of diversity jurisdiction and fraudulent joinder. (Dkt. 1 [Notice of Removal].)
11 Before the Court is Plaintiff’s motion to remand for improper removal. (Dkt. 11
12 [hereinafter “Mot.”].) For the following reasons, the motion is DENIED.¹

14 **II. BACKGROUND**

15
16 According to the Complaint, Plaintiff Kelby Helmick is a resident of Orange
17 County, California. (Compl. ¶ 3.) Plaintiff began his employment with “Dave &
18 Buster’s” on or about May 18, 2012, at the Dave & Buster’s Irvine location (“D&B
19 Irvine”). (*Id.* ¶ 11; Mot. at 2.) Plaintiff’s job duties included taking orders, serving food
20 and beverages, and training new employees. (Compl. ¶ 11.) The Complaint collectively
21 refers to all named Defendants as “D&B,” or “Dave & Buster’s,” and all alleged actions
22 refer to “D&B” as the actor. (*Id.* ¶ 7.) DBI is a Missouri corporation, (*id.* ¶ 4), DBOC is
23 a California corporation, (*id.* ¶ 5), and DBMC is a Delaware corporation, (*id.* ¶ 6). All
24 three named Defendants are authorized to do business, and do business in, Orange
25 County, California. (*Id.* ¶¶ 4–6.)

27
28 ¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate
for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set
for March 26, 2018, at 1:30 p.m. is hereby vacated and off calendar.

1 Plaintiff injured his right knee on or about March 5, 2016. (*Id.* ¶ 12.) He sought
2 treatment, and called D&B to inform a manager that he would need a few days off work.
3 (*Id.*) About a week later, Plaintiff’s orthopedic surgeon diagnosed Plaintiff with an ACL
4 tear and recommended that he undergo three to four weeks of physical therapy followed
5 by reconstructive surgery. (*Id.* ¶ 13.) Plaintiff called D&B to inform a manager of his
6 ACL tear and his need for time off work. (*Id.*) Soon after, D&B allegedly attempted to
7 send Plaintiff documents regarding his rights under the Family Medical Leave Act
8 (“FMLA”) and to confirm the dates of his medical leave, but the documents were sent to
9 an invalid address. (*Id.* ¶ 14.) The FMLA documents were returned to D&B marked
10 “UNABLE TO FORWARD” and D&B made no further effort to learn Plaintiff’s correct
11 address or contact him about the documents. (*Id.*) On or about Mach 25, 2016, Plaintiff
12 visited D&B and turned in a doctor’s note that stated he could not return to work until
13 cleared by his surgeon after surgery. (*Id.* ¶ 15.)

14
15 Plaintiff completed his physical therapy and notified D&B that his surgery was
16 scheduled for April 27, 2016, both after his doctor’s appointment on April 11, 2016, and
17 after his pre-operation appointment on April 16, 2016. (*Id.* ¶¶ 16–17.) Plaintiff had his
18 surgery as scheduled, and on or about May 4, 2016, returned for his follow up
19 appointment. (*Id.* ¶¶ 17–18.) Plaintiff received a doctor’s note indicating that he would
20 need about five months off work to recover, and then hand-delivered this note to a D&B
21 manager a few days later. (*Id.* ¶ 18.) On or about May 26, 2016, Plaintiff’s doctor
22 indicated that he was recovering well, and the next day Plaintiff called D&B and
23 informed a manager he would likely need less than five months off work to recover. (*Id.*
24 ¶ 19.) On or about June 16, 2016, D&B allegedly sent Plaintiff a letter requesting a
25 response by June 23, 2016, to discuss Plaintiff’s return to work. (*Id.* ¶ 20.) Plaintiff
26 never received the letter, as it was sent to an invalid address, and D&B made no effort to
27 learn Plaintiff’s correct address. (*Id.*) On or about July 15, 2016, D&B allegedly sent
28 Plaintiff another letter stating that Plaintiff had not returned to work or called to update

1 D&B on his status. (*Id.* ¶ 21.) Once again, the letter was sent to an invalid address and
2 Plaintiff did not receive it. (*Id.*)

3
4 On July 19, 2016, Plaintiff’s doctor provided him with a release to return to work.
5 (*Id.* ¶ 22.) On or about July 21, 2016, April Fletcher, DBI’s Human Resources
6 representative, left Plaintiff a voicemail, indicating that D&B had sent Plaintiff a letter
7 and his final pay, that the letter was returned to her, and that she nor D&B Irvine had
8 been able to reach Plaintiff. (*Id.* ¶ 23; Mot. at 4.) She requested an updated address and
9 asked Plaintiff to call her back. (Compl. ¶ 23.) Plaintiff then went to D&B and tried to
10 submit his doctor’s release, but D&B confirmed Plaintiff’s termination and refused to
11 accept the release. (*Id.* ¶ 24.) D&B told Plaintiff he needed to speak with Ms. Fletcher,
12 (*id.*), so he called her and explained that he was unaware that D&B was trying to reach
13 him except for her recent voicemail, (*id.* ¶ 25). He explained that he had turned in his
14 previous doctor’s notes to D&B managers, kept them updated, and was now released to
15 work. (*Id.*) Ms. Fletcher, “apparently knowing since April 1, 2016, that [Plaintiff] had
16 not received the March 21, 2016 and June 23, 2015 letters she had sent, told him his only
17 option was to reapply for his job.” (*Id.*)

18
19 Plaintiff called D&B to find out why his doctor’s notes had not been given to Ms.
20 Fletcher, but he was told by a manger that it was “out of [their] hands,” and that he would
21 need to reapply. (*Id.* ¶ 26.) Plaintiff reapplied for his position at D&B on July 29, 2016,
22 but did not hear back about his application. (*Id.* ¶¶ 27–28.) On or about August 1, 2016,
23 Plaintiff called D&B to ask about his job application, and was told by Suzanne Greb that
24 she would “look into it,” but never heard back from anyone regarding his application.
25 (*Id.* ¶ 28.)

26
27 Plaintiff filed this action in Orange County Superior Court on December 22, 2017.
28 (*Id.*) Although Plaintiff and DBOC are both California residents, Defendants removed

1 the action on the grounds that DBOC was a sham defendant named specifically for the
2 purpose of evading federal jurisdiction. (*Id.*; *see generally* Dkt. 17 [Defendants’
3 Opposition, hereinafter “Opp.”].) Plaintiff then filed the present motion to remand the
4 case, contesting Defendants’ characterization of DBOC as a sham defendant. (Mot.)
5

6 Defendants, through the declaration of DBMC’s corporate paralegal, state that
7 DBOC’s function is to act as the Dave & Buster’s designated entity for operations,
8 licensing, leasing property, and the payment of taxes in California. (Dkt. 17-1
9 [Declaration of Jill Valachovic, hereinafter “Valachovic Decl.”] ¶ 5.) DBOC holds the
10 liquor licenses for Dave & Buster’s locations in California, including D&B Irvine. (*Id.*)
11 At all times during Plaintiff’s employment, DBOC did not have any employees, (*id.* ¶ 4),
12 and delegated management of D&B Irvine to DBMC, (*id.* ¶ 6). DBMC is the employer
13 of all employees working at D&B locations nationwide. (*Id.* ¶ 3.) DBMC retains the
14 right to control employee conduct at D&B Irvine, and ensures that all employees comply
15 with DBOC’s obligations under all applicable laws, such as liquor licensing. (*Id.* ¶ 6.)
16 At all times during Plaintiff’s employment, DBMC assumed responsibility for all payroll
17 functions, human resources administration, and oversight of the day-to-day functions at
18 D&B Irvine. (*Id.*) Defendants have provided Plaintiff’s paystubs from 2016 and
19 redacted W-2’s from 2012 until 2016, all of which were issued by DBMC. (*Id.* ¶¶ 7–8,
20 Exs. A, B.)
21

22 Plaintiff provides evidence that DBOC’s liquor license for D&B Irvine shows that
23 “business name” of DBOC is “Dave & Buster’s.” (Dkt. 12 [Plaintiff’s Request for
24 Judicial Notice, hereinafter “RJN”] Exs. F, G.)² Dave & Buster’s Entertainment, Inc., the
25

26 ² Plaintiff’s request for judicial notice, (RJN), is GRANTED as to Exhibits F, G, I, J, K, and L. Rule
27 201(b) of the Federal Rules of Evidence authorizes courts to take judicial notice of facts that are “not
28 subject to reasonable dispute” and that “can be accurately and readily determined from sources whose
accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). The Ninth Circuit has taken judicial
notice of documents such as “records and reports of administrating bodies,” *Interstate Natural Gas Co.*
v. So. Cal. Gas Co., 209 F.2d 380, 385 (9th Cir. 1953), and these exhibits are part of the public record of

1 parent company of DBOC, stated in its Form 10-K filings with the SEC in 2016 and 2017
2 that “Alcoholic beverage control regulations relate to numerous aspects of the daily
3 operations of each store, including minimum age of patrons and employees, hours of
4 operation, advertising, wholesale purchasing, inventory control and handling and storage
5 and dispensing of alcoholic beverages.” (*Id.* Ex. J at 3.)³ DBOC appeared in proceedings
6 before the California Department of Alcoholic Beverage control regarding “its bartender”
7 in 2015. (*Id.* Ex. K.) DBMC and DBOC also have the same officers and addresses on
8 file with the California Secretary of State. (*Id.* Ex. I.) Many of the documents in
9 Plaintiff’s personnel file only refer to “Dave and Buster’s” and do not mention any
10 specific Defendant entity, nor is there any reference to DBMC. (*See* Dkt. 13 Ex. B.)
11

12 **III. LEGAL STANDARD**

13

14 Federal district courts have diversity jurisdiction over suits for more than \$75,000
15 where the citizenship of each plaintiff is different from that of each defendant. 28 U.S.C.
16 § 1332(a). In assessing whether there is proper subject matter jurisdiction, courts
17 disregard the citizenship of a defendant that has been fraudulently joined. *Morris v.*
18 *Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). “Joinder is fraudulent if the
19 plaintiff fails to state a cause of action against a resident defendant, and the failure is
20 obvious according to the settled rules of the state.” *Hunter v. Philip Morris USA*, 582
21 F.3d 1039, 1043 (9th Cir. 2009) (quotation omitted). Conversely, “if there is any
22 possibility that the state law might impose liability on a resident defendant under the
23 circumstances alleged in the complaint, the federal court cannot find that joinder of the
24

25 the California Department of Alcoholic Beverage Control, California Secretary of State, and the
26 Securities and Exchange Commission.

27 ³ Plaintiff states that his personnel file indicates that DBI was his employer with DBMC, which he
28 argues contradicts a declaration provided with Defendants’ Notice of Removal that stated DBMC was
Plaintiff’s exclusive employer. (Mot. at 4–5; Dkt. 4 ¶ 5.) However, that same declaration clarifies that
DBI is DBMC’s parent company, (Dkt. 4 ¶ 2), meaning that DBMC could be Plaintiff’s exclusive
employer, and its parent company’s information could appear on some of its documents.

1 resident defendant was fraudulent, and remand is necessary.” *Id.* at 1044. Fraudulent
2 joinder must be proven by “clear and convincing evidence,” *Hamilton Materials, Inc. v.*
3 *Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007), and a defendant may present
4 additional facts to show that the joinder is fraudulent, *McCabe v. Gen. Foods Corp.*, 811
5 F.2d 1336, 1339 (9th Cir. 1987). *See Morris*, 236 F.3d at 1068 (approving of “piercing
6 the pleadings” and considering summary judgment-type evidence such as affidavits and
7 deposition testimony when fraudulent joinder is alleged).

8
9 However, in determining whether a defendant was fraudulently joined, all disputed
10 questions of fact and all ambiguities in the controlling state law must be resolved in favor
11 of remand to state court. *Hunter*, 582 F.3d at 104 at 1042. “There is a presumption
12 against finding fraudulent joinder, and defendants who assert that plaintiff has
13 fraudulently joined a party carry a heavy burden of persuasion.” *Onelum v. Best Buy*
14 *Stores L.P.*, 948 F. Supp. 2d 1048, 1051 (C.D. Cal. 2013) (quoting *Plute v. Roadway*
15 *Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001)). “The defendant must
16 demonstrate that plaintiff has no possibility of establishing a cause of action in state court
17 against the sham defendant.” *Racier v. Sun Life Assurance Co. of Can.*, 941 F. Supp. 2d
18 1191, 1194 (N.D. Cal. 2013). Accordingly, if a “non-fanciful possibility” that Plaintiff
19 can state a viable state law claim exists, the Court must remand this action. *Macey v.*
20 *Allstate Property and Cas. Ins. Co.*, 220 F. Supp. 2d 1116, 1117 (N.D. Cal. 2002); *see,*
21 *e.g., Doe v. Medalist Holdings, L.L.C.*, No. EDCV171264MWFFFMX, 2017 WL
22 3836041, at *2 (C.D. Cal. Sept. 1, 2017).

23 24 **IV. DISCUSSION**

25
26 Defendants assert that DBOC was added as a sham defendant in this case to avoid
27 federal jurisdiction, and was not Plaintiff’s employer. Defendant argues that all of the
28 evidence in the record makes it clear, under the *Vernon* factors, that DBMC was

1 Plaintiff's employer, and Plaintiff has made no plausible argument that DBOC was also
2 Plaintiff's employer. Plaintiff argues that DBOC has a right to control the employees and
3 operations at D&B Irvine because it holds the liquor license for the premises, and
4 therefore was Plaintiff's employer or joint-employer.

5
6 Five of Plaintiff's claims are brought under FEHA, which "prohibits only 'an
7 employer' from engaging in improper discrimination" and "the aggrieved plaintiff must
8 be an employee." *Vernon v. State*, 116 Cal. App. 4th 114, 123–24 (2004) (citing Cal.
9 Gov. Code § 12940(a).) To determine the existence of an employer/employee
10 relationship, the Court must consider the "'totality of circumstances' that reflect upon the
11 nature of the work relationship of the parties, with emphasis upon the extent to which the
12 defendant *controls* the plaintiff's performance of employment duties." *Id.* at 124
13 (emphasis added). "[T]he precise contours of an employment relationship can only be
14 established by a careful factual inquiry." *Id.* at 125 (quoting *Graves v. Lowery*, 117 F.3d
15 723, 729 (3d Cir. 1997)).

16
17 Factors to be taken into account in assessing the relationship of the parties
18 include payment of salary or other employment benefits and Social Security
19 taxes, the ownership of the equipment necessary to performance of the job,
20 the location where the work is performed, the obligation of the defendant to
21 train the employee, the authority of the defendant to hire, transfer, promote,
22 discipline or discharge the employee, the authority to establish work
23 schedules and assignments, the defendant's discretion to determine the
24 amount of compensation earned by the employee, the skill required of the
25 work performed and the extent to which it is done under the direction of a
26 supervisor, whether the work is part of the defendant's regular business
27 operations, the skill required in the particular occupation, the duration of the
28 relationship of the parties, and the duration of the plaintiff's employment.

26 *Id.* "Of these factors, the extent of the defendant's right to control the means and manner
27 of the workers' performance is the most important." *Id.* at 126 (citations omitted);
28 *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474, 499 (2014) (Courts in FEHA cases

1 have emphasized “the control exercised by the employer over the employee’s
2 performance of employment duties,” and this standard requires “a comprehensive and
3 immediate level of ‘day-to-day’ authority” over matters such as hiring, firing, direction,
4 supervision, and discipline of the employee.).⁴

5
6 Plaintiff argues that by virtue of DBOC holding the liquor license for D&B Irvine,
7 it retained substantial control over Plaintiff’s employment and “could not comply with its
8 obligations under law without controlling Plaintiff’s employment in substantial regard.”
9 (Mot. at 9–11.) However, “the rule is that, ‘[t]he licensee, if he elects to operate his
10 business through employees must be responsible to the licensing authority for their
11 conduct *in the exercise of his license . . .*” *Garcia v. Martin*, 192 Cal.App.2d 786, 790
12 (1961) (emphasis added) (quoting *Mantzoros v. State Bd. of Equalization*, 87 Cal.App.2d
13 140, 144 (1948)). “[T]he rule making a liquor licensee vicariously liable for the acts of
14 employees *applies to the misuse of the liquor license, not to the violation of law in*
15 *general.*” *Joe Hand Promotions, Inc. v. McInnis*, No. 10-CV-01614-LHK, 2011 WL
16 1740109, at *9 (N.D. Cal. May 5, 2011) (holding that “[e]ven though there exists some
17 tangential relationship between an establishment’s liquor license and broadcasts shown in
18 that establishment, the unlawful showing of a broadcast is not an exercise of a liquor
19 license” and thus “a liquor licensee should [not] be per se liable for the unlawful showing
20 of a broadcast at the establishment listed on the liquor license”) (emphasis added). The
21 fact that DBOC had a right to control the manner in which alcohol was served, and
22 related issues, is not a broad right to control that includes personnel decisions regarding
23 Plaintiff’s medical leave and termination. The decisions at issue in this case are unrelated
24 to D&B Irvine’s compliance with California liquor laws, thus the fact that DBOC holds

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26
27 ⁴ Plaintiff’s emphasis on the employer’s “right to control the manner and means” of the employee’s
28 services is misplaced, as this standard is applied in cases regarding the determination of whether a party
is an employee or independent contractor. (Mot. at 7 [citing *Ayala v. Antelope Valley Newspapers, Inc.*,
59 Cal. 4th 522, 531 (2014)].)

1 D&B Irvine’s liquor license does not give rise to a plausible claim that DBOC
2 discriminated against Plaintiff in the personnel decisions alleged.

3
4 Plaintiff has also made no allegations nor provided any evidence that DBOC in fact
5 exercised any control over either D&B Irvine or, most importantly, personnel decisions
6 about Plaintiff. Plaintiff does not refute Defendants’ evidence that DBMC retains the
7 right to control employee conduct at D&B Irvine, and ensures that all employees comply
8 with DBOC’s obligations under all applicable laws, such as liquor licensing.⁵
9 Additionally, “[t]he absence of any direct or indirect remuneration from [DBOC] to
10 [Plaintiff], while not controlling, is at least strong evidence that an employment
11 relationship did not exist.” *Vernon*, 116 Cal. App. 4th at 126. “[T]he control an
12 organization asserts must be *significant*, and there must be a sufficient indicia of an
13 interrelationship to justify the belief on the part of an aggrieved employee that the alleged
14 co-employer is *jointly responsible for the acts* of the immediate employer.” *Id.* (internal
15 quotations and citations omitted) (emphasis added). While Plaintiff’s allegations
16 establish that DBOC, DBMC, and DBI are affiliated corporate entities, these allegations
17 are insufficient to plausibly conclude that DBOC is jointly responsible for the alleged
18 acts of DBMC and DBI regarding Plaintiff’s medical leave and termination.⁶ *Compare*

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20 _____
21 ⁵Indeed, pursuant to the Department of Alcoholic Beverage Control regulations, “[a] person to whom a
22 licensee has delegated discretionary powers to organize, direct, carry on or control the operations of a
23 licensed business shall be deemed the manager thereof for purposes of applying Section 23788.5 of the
24 Alcoholic Beverage Control Act.” 4 Cal. Code Regs. § 57.5. Plaintiff argues that DBOC was required
25 to provide a formal application and complete a qualification process to permit DBMC to manage D&B
26 Irvine, but that his public records act request for such documents revealed that such documents do not
27 exist. (Dkt. 18 at 8.) However, whether DBMC was qualified as manager for purposes of California
28 liquor law is unrelated to whether it had a right to control personnel decisions regarding Plaintiff’s
medical leave.

⁶ Plaintiff also argues that DBOC’s has made representations that it is Plaintiff’s employer by being the
entity doing business as “Dave & Buster’s” in Irvine, and by “appear[ing] to accept that it employs those
who serve alcohol in carrying out its business, and that it is responsible for controlling such individuals”
based on proceedings in July 2015 before the California Alcoholic Beverage Control Appeals Board.
(*Id.* at 9, 12.) However, Plaintiff’s inferences drawn from these two “representations” do not establish
that DBOC had any connection to alleged decisions regarding Plaintiff’s medical leave or termination,
and merely support the conclusion that DBOC is an affiliated entity to DBI and DBMC.

1 *Jankins v. Wells Fargo Bank, N.A.*, No. CV1700887BROAJW, 2017 WL 1181562, at *5
2 (C.D. Cal. Mar. 29, 2017) (holding that the plaintiff had plausibly stated a claim against
3 the defendant as his employer because the plaintiff was subject to the policies and rules
4 of the defendant in his day-to-day operations, and his performance was evaluated based
5 on those policies) *with Vasquez v. Wells Fargo Bank, Nat’l Ass’n*, 77 F. Supp. 3d 911,
6 923 (N.D. Cal. 2015) (holding that plaintiff had not plausibly alleged the defendant was
7 his employer where the plaintiff did not dispute that the defendant was “simply a holding
8 company that owns shares” in the plaintiff’s corporate employer, and merely alleged the
9 two entities were “engaged in a joint enterprise”).

10
11 The dearth of allegations about DBOC’s relationship to the personnel decisions at
12 issue in this case stands in stark contrast to the specific and concrete evidence of DBI and
13 DBMC’s roles in these decisions. DBI made all the relevant communications, both
14 successful and attempted, with Plaintiff regarding his taking of medical leave and his
15 termination. DBMC is Plaintiff’s presumptive employer, as it issued Plaintiff’s paystubs
16 and W-2 forms. Under FEHA, “there is a rebuttable presumption that ‘employer,’ as
17 defined by subdivision (d) of Section 12926, includes any person or entity identified as
18 the employer on the employee’s Federal Form W-2 (Wage and Tax Statement).” Cal.
19 Gov. Code § 12928; *DelGiaccio v. Cox Commc’ns, Inc.*, No. SACV 14-0200 DOC, 2015
20 WL 1535260, at *8 (C.D. Cal. Apr. 6, 2015). Beyond mere speculation, Plaintiff has not
21 refuted Defendants’ evidence that DBMC oversaw the day-to-day functions of employees
22 at D&B Irvine, like Plaintiff, and DBMC employees were the “sole-decision-makers with
23 respect to scheduling, hiring, firing, and disciplinary actions” at D&B Irvine.

24
25 Simply put, Defendants have met their heavy burden of demonstrating that
26 Plaintiff fraudulently joined DBOC as a defendant and that their removal of this action
27 was proper. Plaintiff has not raised any fact to plausibly support a cause of action against
28 DBOC. Defendants have provided clear and convincing evidence that DBOC was not

1 Plaintiff's employer and was not in control of personnel decisions about Plaintiff's
2 medical leave and termination. Therefore, Plaintiff cannot possibly assert his claims
3 against DBOC at this time.
4

5 In his reply, Plaintiff accuses the Defendants of making false representations in
6 their Notice of Removal and Opposition brief regarding various facts about DBI, DBMC,
7 and DBOC. (*See generally* Dkt. 18.) While these allegations are troubling, only one
8 relates to DBOC's possible connection or involvement with the personnel decisions at
9 issue. Defendants have submitted, by declaration, that DBOC did not have any
10 employees during Plaintiff's employment, and does not have any employees now.
11 (Valachovic Decl. ¶ 4.) Plaintiff asserts this is false, and has submitted evidence of a
12 declaration from an unrelated court case in 2007 wherein Darin Bybee declared that he
13 was the Regional Operations Director for DBOC, and that DBOC owns and operates
14 restaurants throughout the United States, including California, where it employs hourly
15 workers. (Dkt. 29-1 Ex. A.)⁷ But the fact that DBOC, at a time prior to Plaintiff's
16 employment at D&B Irvine, had employees does not render false Ms. Valachovic's
17 statement that DBOC did not have employees during Plaintiff's employment or at the
18 present time. Ultimately, the fact DBOC once had employees has no bearing on whether
19 Plaintiff has plausibly alleged that DBOC was connected to the alleged decisions
20 regarding his medical leave and termination.
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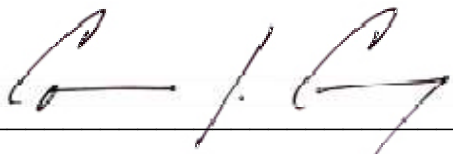
23 ⁷ Plaintiff's request for judicial notice, (Dkt. 19), is GRANTED as to Exhibit A. Rule 201(b) of the
24 Federal Rules of Evidence authorizes courts to take judicial notice of facts that are "not subject to
25 reasonable dispute" and that "can be accurately and readily determined from sources whose accuracy
26 cannot reasonably be questioned." Fed. R. Evid. 201(b). Federal courts "may take notice of
27 proceedings in other courts, both within and without the federal judicial system, if those proceedings
28 have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citation omitted); *see also Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971) (court took judicial notice of proceedings and filings in other courts, including a decision of the California Supreme Court issued while the parties' appeal in the federal case was pending).

1 Plaintiff also requests an award of attorneys' fees and costs for filing this motion to
2 remand. (Mot. at 12–13.) However, “absent unusual circumstances, attorney’s fees
3 should not be awarded when the removing party has an objectively reasonable basis for
4 removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). Because the
5 Court finds that DBOC is a sham defendant, the Court finds Defendants had an
6 objectively reasonable basis for removal. Thus, the Court DENIES Plaintiff’s request for
7 attorneys’ fees and costs.

8
9 **V. CONCLUSION**

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11 For the foregoing reasons, Plaintiff’s motion to remand is DENIED.

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14 DATED: March 14, 2018

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18 CORMAC J. CARNEY
19 UNITED STATES DISTRICT JUDGE
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