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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

KIRK KOBOS,	)	1:09cv0856 LJO DLB
	)	
	)	
Plaintiff,	)	ORDER DENYING PLAINTIFF'S
	)	MOTION TO REMAND ACTION
	)	(Document 11)
v.	)	
	)	
SCHWAN'S HOME SERVICE,	)	
INC., et al.,	)	
	)	
Defendants.	)	

On May 7, 2009, Plaintiff Kirk Kobos ("Plaintiff") filed the instant motion to remand the action to state court. The matter was heard on July 31, 2009, before the Honorable Dennis L. Beck, United States Magistrate Judge. Marina Fraigun appeared telephonically on behalf of Plaintiff. Alan Rupe appeared on behalf of Defendants Schwan's Home Service, Inc. and Steve Houselog.

**PROCEDURAL BACKGROUND**

Plaintiff filed this employment action against Schwan's Home Service, Inc. ("Schwan's"), Steve Houselog ("Houselog") and Does 1 through 50 in the Kern County Superior Court on March 10, 2009. Plaintiff alleges wrongful termination in violation of public policy ([California Government Code § 12940](#) *et seq.* and Workers Compensation Act), disability discrimination, retaliation, failure to take all reasonable steps to prevent discrimination and retaliation, violation of wage and hour law (unpaid overtime wages, failure to pay minimum

1 wages and waiting time penalties), unfair competition and intentional infliction of emotional  
2 distress.

3 Plaintiff is a resident of Kern County, California. Defendant Schwan's is a Minnesota  
4 corporation with its principal place of business in Minnesota. Defendant Houselog is a resident  
5 of California.

6 On May 14, 2009, Defendants Schwan's and Houselog removed the action to this Court  
7 based on complete diversity and fraudulent joinder. In the notice of removal, Defendants  
8 contend that Houselog was fraudulently joined to defeat diversity jurisdiction. Defendants  
9 answered the complaint on May 19, 2009.

10 Plaintiff filed the instant motion for remand on May 29, 2009, arguing that Houselog is  
11 not "fraudulently joined" and is not a "sham" defendant because Houselog harassed Plaintiff and  
12 suspended and terminated Plaintiff for engaging in protected activities. Plaintiff also requests  
13 sanctions in the form of attorney's fees totaling \$3,150.00 for defending against removal.<sup>1</sup>

14 Defendants opposed the motion on June 23, 2009. Plaintiff did not file a reply.<sup>2</sup>

### 15 **FACTUAL BACKGROUND**

16 According to the complaint, Plaintiff was employed by Schwan's as Route Manager. At  
17 the time of his hire, Schwan's allegedly told Plaintiff that he would be paid on an hourly basis,  
18 making approximately \$700 per week. On or about February 22, 2008, Plaintiff began working  
19 for Schwan's and sustained a work-related injury--a broken ankle. Plaintiff was rendered  
20 disabled and remained off work for approximately six months. During that time, Schwan's  
21 allegedly did not inform Plaintiff of his rights under the Workers Compensation Act and did not  
22 pay him for working on February 22, 2008. Complaint, p. 2.

23 On or about July 2, 2008, Defendant Houselog, the Location General Manager for  
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25 <sup>1</sup>This number is an estimate based on the declaration of Plaintiff's counsel Marina Kats Fraigun. According  
26 to counsel, her hourly rate is \$350 per hour, she spent 5 hours researching and preparing the motion to remand and  
27 expected to spend another 4 hours in drafting the reply. Fraigun Decl. ¶ 5. However, Plaintiff did not file a reply.  
At best, Plaintiff's attorney's fees total \$1750 (\$350 x 5) for preparation of the instant motion.

28 <sup>2</sup>On July 30, 2009, Plaintiff filed an amended motion to remand. The amendment includes the original  
signature of counsel on both the motion and supporting declaration. The original motion and declaration filed by  
Plaintiff's counsel did not contain a signature, electronic or otherwise.

1 Schwan's, allegedly called Plaintiff to tell him the company "wanted him back." When Plaintiff  
2 returned, Schwan's allegedly coerced him into signing a Release of Liability for his February 22,  
3 2008 accident. Plaintiff then began working 12 hours per day, 5 days a week, but was paid only  
4 \$600 per week. Plaintiff alleges that Schwan's mis-classified him as a salaried employee to  
5 avoid paying him overtime wages. Further, he was not given a route, but told to "knock on  
6 doors" and do sales. Complaint, p. 2.

7 Plaintiff purportedly re-injured his ankle while working in November 2008. He reported  
8 the injury, but Schwan's allegedly did not inform Plaintiff of his rights under the Workers  
9 Compensation Act and did not provide Plaintiff with any leave. Instead, Schwan's allegedly  
10 ordered Plaintiff to generate sales in outlying areas where no one spoke English. Defendant  
11 Schwan's also reportedly reduced Plaintiff's salary to \$300 and \$350 per week. Plaintiff alleges  
12 that Schwan's took these actions in retaliation for "being injured on the job and disabled."  
13 Complaint, p. 4. Plaintiff further alleges that Defendant Schwan's retaliated against him as  
14 follows: (1) Defendant Houselog took items off of Plaintiff's truck and blamed Plaintiff for  
15 missing items; (2) forced Plaintiff to pay for boots that he was never given; (3) failed to give  
16 Plaintiff credit for certain sales; (4) gave less qualified employees tasks that would generate more  
17 money; and (5) required Plaintiff to "clock out" and then go to the bank for Schwan's.  
18 Complaint, p. 3.

19 On or about December 8, 2008, Plaintiff was suspended for alleged insubordination. He  
20 was terminated on or about December 17, 2008. Plaintiff alleges that he was terminated because  
21 he sustained work-related injuries and was disabled. Plaintiff further alleges that he was  
22 terminated because he was entitled to workers' compensation benefits that defendants did not  
23 want to pay. Id.

24 Plaintiff asserts ten separate causes of action. Of those ten, Defendant Houselog is named  
25 only in the tenth cause of action for intentional infliction of emotional distress. Complaint, p. 21.

## 26 **DISCUSSION**

### 27 A. Removal Jurisdiction

28 \_\_\_\_\_ By statute "any civil action brought in a State court of which the district courts of the

1 United States have original jurisdiction, may be removed by the defendant or the defendants, to  
2 the district court of the United States for the district and division embracing the place where such  
3 action is pending.” [28 U.S.C. § 1441\(a\)](#). The party seeking to invoke federal jurisdiction bears  
4 the burden of establishing jurisdiction. See [Indus. Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090,](#)  
5 [1092 \(9th Cir. 1990\)](#).

6 B. Fraudulent Joinder

7 “The joinder of a nondiverse defendant is fraudulent or a ‘sham’ and does not defeat  
8 jurisdiction if the plaintiff fails to state a cause of action against the defendant, and the failure is  
9 obvious according to the settled rules of the state.” [Soo v. United Parcel Serv., Inc., 73 F.Supp.2d](#)  
10 [1126, 1128 \(N.D.Cal.1999\)](#) (citing [McCabe v. General Foods Corp., 811 F.2d 1336, 1339 \(9th](#)  
11 [Cir.1987\)](#) (“fraudulent joinder is a term of art”)); [Ritchey v. Upjohn Drug Co., 139 F.3d 1313,](#)  
12 [1318 \(9th Cir. 1998\)](#) (noting that a defendant must show that “the individuals joined in the action  
13 cannot be liable on any theory” or that the resident defendant had “no real connection with the  
14 controversy”), cert. denied, 525 U.S. 963 (1998).

15 A party is deemed to have been joined fraudulently if, “after all disputed questions of fact  
16 and all ambiguities in the controlling state law are resolved in the plaintiff's favor, the plaintiff  
17 could not possibly recover against the party whose joinder is questioned.” [Kalawe v. KFC Nat'l](#)  
18 [Management Co., 1991 WL 338566, at \\*2 \(D.Haw. 1991\)](#) (citing [Kruso v. International](#)  
19 [Telephone & Telegraph Corp., 872 F.2d 1416, 1426 \(9th Cir.1989\)](#), cert. denied, 496 U.S. 937  
20 (1990)). If a defendant claims that other defendants were fraudulently joined, the court may go  
21 beyond the pleadings to examine facts that show that the joinder is fraudulent. See [Ritchey, 139](#)  
22 [F.3d at 1318](#). “If there is a non-fanciful possibility that plaintiff can state a claim under California  
23 law against the non-diverse defendants the court must remand.” [Macey v. Allstate Property and](#)  
24 [Cas. Ins. Co., 220 F.Supp.2d 1116, 1117 \(N.D.Cal. 2002\)](#).

25 C. Analysis

26 Plaintiff contends that Defendant Houselog is not a sham defendant because he “harassed  
27 Plaintiff and suspended and terminated him in retaliation for Plaintiff’s engaging in protected  
28 activities.” Motion, pp. 6-7. To support this contention, Plaintiff includes allegations against

1 Defendant Houselog in the motion that are not included in the Complaint. Specifically, Plaintiff  
2 alleges in the motion that on or about December 8, 2008, Plaintiff was harassed by Defendant  
3 Houselog “for filing having [sic] a disability and because he sustained work-related injuries.”  
4 Motion, p. 4. Plaintiff further alleges that after work on December 8, 2008, Defendant Houselog  
5 harassed Plaintiff “because of his disability, including making him continue working off the  
6 clock, requiring that he answer specific questions for approximately an hour about his work day  
7 although he [sic] counter part was allowed to go home and was not questioned, being told to fill  
8 out documents for the next day’s route without having requisite information.” Motion, pp. 4-5.  
9 Plaintiff also alleges that Defendant Houselog suspended and then terminated Plaintiff on  
10 December 17, 2008, in retaliation for having and reporting a disability. Motion, p. 5. Plaintiff  
11 concludes that because Defendant Houselog is a California resident and is not fraudulently  
12 joined, the Court does not have diversity jurisdiction and must remand the case.

13 As noted, Plaintiff asserts a single cause of action against Defendant Houselog for  
14 intentional infliction of emotional distress. Complaint, p. 21. Defendants argue that claims of  
15 intentional infliction of emotional distress must be dismissed where there are no ultimate facts  
16 alleging unlawful behavior or extreme and outrageous conduct. “A claim of intentional infliction  
17 of emotional distress requires a plaintiff to show ‘(1) extreme and outrageous conduct by the  
18 defendant with the intention of causing, or reckless disregard of the probability of causing,  
19 emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; (3) and  
20 actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.’”  
21 [Pardi v. Kaiser Foundation Hospitals, 389 F.3d 840, 852 \(9th Cir. 2004\)](#) (quoting [Cervantez v.](#)  
22 [J.C. Penney Co.](#), 24 Cal.3d 579, 156 Cal.Rptr. 198, 595 P.2d 975, 983 (1979)). The first prong  
23 requires a showing of conduct “so outrageous in character, and so extreme in degree, as to go  
24 beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in  
25 a civilized community.” [Id. at 852](#) (quoting [Cochran v. Cochran, 65 Cal.App.4th 488, 76](#)  
26 [Cal.Rptr.2d 540, 545 \(1998\)](#)); see also [Braunling v. Contrywide Home Loans Inc., 220 F.3d](#)  
27 [1154, 1158 \(9th Cir. 2000\)](#). The Ninth Circuit adheres to the California rule that “it is not  
28 enough that the defendant has acted with an intent which is tortious or even criminal, or that he

1 has intended to inflict emotional distress, or even that his conduct has been characterized by  
2 ‘malice’ or a degree of aggravation which would entitle the plaintiff to punitive damages for  
3 another tort.” [Pardi, 389 F.3d at 852](#) (citation omitted).

4 As Defendants point out, Plaintiff’s Complaint contains only one factual allegation  
5 against Defendant Houselog; that is, “Defendant HOUSELOG took items off of plaintiff’s truck  
6 and blamed plaintiff for items missing.” Complaint, p. 3, lines 6-7. This sole allegation against  
7 Defendant Houselog does not demonstrate extreme and outrageous conduct sufficient to state a  
8 cause of action for intentional infliction of emotional distress and Defendant Houselog appears to  
9 be fraudulently joined. Although Plaintiff included additional allegations in the motion to  
10 remand, the Court does not consider those allegations and makes no determination as to whether  
11 or not they would be sufficient to state a claim against Houselog for intentional infliction of  
12 emotional distress.

13 Defendants also argue that because the alleged conduct occurred in the normal course of  
14 the employee-employer relationship any alleged emotional distress is within the exclusive  
15 purview of the workers’ compensation system. Defendants rely on [Miklosy v. Regents of Univ.  
16 of California, 44 Cal.4th 876, 902-03 \(2008\)](#) for the proposition that where alleged conduct  
17 occurred at the worksite, in the normal course of the employee-employer relationship, workers’  
18 compensation is the exclusive remedy for any alleged injuries. Defendants further assert that  
19 Houselog allegedly blaming Plaintiff for missing items is a criticism that is a part of the  
20 employment relationship and, even if the conduct is characterized as intentional, unfair or  
21 outrageous, it is covered by workers’ compensation exclusivity provisions. [Miklosy, 44 Cal.4th  
22 at 902](#). Defendants acknowledge that there are two exceptions to exclusivity: (1) where the  
23 employer’s conduct contravenes fundamental public policy or (2) where the employer’s conduct  
24 exceeds the risks inherent in the employment relationship. [Id. at 902](#). Defendants contend that  
25 neither of the exceptions applies.

26 In this instance, there is no indication that requiring an employee to account for items  
27 taken off of a truck falls outside the employer-employee relationship or that the alleged conduct  
28 is not covered by the workers’ compensation exclusivity provisions. However, it is unnecessary

1 to decide this issue because Plaintiff does not state a cause of action for intentional infliction of  
2 emotional distress against Defendant Houselog.

3 **ORDER**

4 Based on the above, Plaintiff has failed to state a cause of action against Defendant  
5 Houselog and the fraudulent joinder of this nondiverse defendant does not defeat jurisdiction.  
6 Accordingly, Plaintiff's motion to remand is DENIED. Plaintiff's corresponding request for  
7 sanctions also is DENIED.

8  
9 IT IS SO ORDERED.

10 **Dated: August 7, 2009**

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE