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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ROBERT P. SMITH, III,

Plaintiff,

v.

CALIFORNIA DEPARTMENT  
OF CORRECTIONS  
AND REHABILITATION, et al.,

Defendants.

CASE NO. 1:09-cv-02088-OWW-SKO PC

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING THAT THIS ACTION BE  
REMANDED TO STATE COURT AND  
PLAINTIFF’S MOTION FOR SANCTIONS BE  
DENIED

(Docs. 6, 11, 13)

OBJECTIONS DUE WITHIN 30 DAYS

Plaintiff Robert P. Smith, III (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. On December 29, 2009, Plaintiff filed a motion requesting that this action be remanded back to state court. (Doc. #6.) Plaintiff argues that remand is proper due to multiple procedural defects that occurred when Defendants sought to remove this case from state court. On February 22, 2010, Plaintiff filed a motion requesting that Defendants be sanctioned for filing a nonsensical opposition to Plaintiff’s motion to remand. (Doc. #11.)

**I. Plaintiff’s Motions**

**A. Plaintiff’s Motion to Remand**

This action was removed from Kings County Superior Court on November 30, 2009, by Defendant California Department of Corrections and Rehabilitations (“CDCR”). (Doc. #1.) Defendant CDCR filed its notice of removal on November 24, 2009. The notice claims that removal is proper under 28 U.S.C. § 1441(b) because Plaintiff’s complaint alleges federal claims under 42

1 U.S.C. § 1983. Plaintiff requests remand “due to multiple procedural defects in defendants’ papers  
2 by which they successfully obtained removal of this action from the state court.” (Mot. to Remand  
3 Case To State Court Based On Multiple Procedural Defects in Defendants’ Removal Papers 1:20-22,  
4 ECF No. 6.)

5 Plaintiff complains that the notice of removal was not signed by Defendants’ attorney of  
6 record on November 24, 2009, because on that date the attorney general was representing  
7 Defendants, not Defendants’ current counsel, Beeson Terhorst, LLP. Plaintiff complains that the  
8 notice of substitution of counsel was not submitted until December 9, 2009. Plaintiff also claims  
9 that the notice of removal was not properly served on Plaintiff because it was sent to his old address  
10 at Corcoran State Prison, not his new address at Salinas Valley State Prison. Plaintiff complains that  
11 there was a delay in the receipt of the notice caused by prison officials who delayed Plaintiff’s mail.  
12 Plaintiff also contends that Defendants failed to include a “copy of all process, pleadings, and orders  
13 served upon such defendant or defendants in such action per § 1446(a).” (Mot. to Remand 3:14-16,  
14 ECF No. 6.)

15 More significantly, Plaintiff notes that Defendant CDCR failed to obtain the consent of all  
16 co-defendants prior to filing its notice of removal. Plaintiff also contends that the notice of removal  
17 was untimely because Defendant CDCR was served on May 4, 2009, not in November 2009 as  
18 Defendant contended in its notice of removal. Plaintiff argues that the original notice of removal  
19 was untimely because it was filed more than 30 days after Defendant was served with Plaintiff’s  
20 complaint. Plaintiff attached a proof of service to his motion that indicates that an officer from the  
21 Sheriff’s Office served the CDCR with Plaintiff’s complaint and a summons by leaving it with an  
22 authorized agent. The proof of service indicates that service occurred on May 5, 2009. Plaintiff  
23 admits that the other Defendants in this action were served in November 2009. However, those  
24 Defendants did not file a notice of removal.

25 Defendant CDCR filed an opposition to Plaintiff’s motion on January 12, 2010. (Doc. #7.)  
26 Defendant’s opposition argues that removal was timely because “the notice of removal was filed  
27 within thirty days of Defendant Clark’s receipt of the initial pleading.” (Def. State of California’s  
28 Et. Al., Opp’n to Mot. to Remand 1:22-23, ECF No. 7.) Defendant Clark is not a party to this action

1 and Defendant CDCR provides no explanation regarding who he or she is, or why his or her receipt  
2 of the initial pleading is relevant in determining whether remand is proper. Defendant CDCR further  
3 argues that Plaintiff “served his initial pleading on the California Attorney General’s Office . . . and  
4 not any individual Defendant.” (Opp’n 1:24-25, ECF No. 7.) Defendant contends that the Attorney  
5 General is not an authorized agent for service of process on any of the individual Defendants and  
6 Plaintiff’s first attempt at service was improper. Defendant CDCR further claims that after  
7 Plaintiff’s improper attempt at service, it received an extension of time to file a responsive pleading  
8 “until Defendant Clark could be identified, located and provided a copy of the initial pleading.”<sup>1</sup>  
9 (Opp’n 1:27-2:2, ECF No. 7.) The declaration from Michael A. Terhorst, attorney for Defendant  
10 CDCR, states that “[t]he Attorney General’s Office is not an authorized agent to accept service of  
11 process on Defendant Clark, and individual.” (Decl. of Michael A. Terhorst in Support of  
12 Defendants’ Opp’n to Objection to Removal of Action 2:2-3, ECF No. 7.)

13 Defendant further argues that Beeson Terhorst, LLP, the law firm representing Defendants,  
14 received “a request from the CDCR to represent their agency in the Petition for Writ of Mandate  
15 filed by inmate Edward Spencer.” (Opp’n 2:4-7, ECF No. 7.) It is unclear who “inmate Edward  
16 Spencer” is or to what “Petition for Writ of Mandate” Defendant is referring. An attorney from  
17 Beeson Terhorst advised CDCR that it would seek removal of “this matter”<sup>2</sup> to federal court. The  
18 removal notice was filed on November 24, 2009. Defendant contends that the notice of removal  
19 “was timely filed within 30 days of the individual defendants’ receipt of the initial pleading” because  
20 it was received on or about November 24, 2009. (Opp’n 2:12-14, ECF No. 7.)

21 Plaintiff filed a reply on January 25, 2010. (Doc. #8.) Plaintiff notes that the opposition filed  
22 by Defendant CDCR contains numerous typographical errors and references to matters that are not  
23 relevant to this action. Plaintiff also argues that Plaintiff’s motion clearly establishes that Defendants  
24 were served in May, as demonstrated by Exhibit B to Plaintiff’s motion and that Defendant CDCR

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25  
26 <sup>1</sup>The Court reiterates the fact that Defendant Clark is not a party in this action.

27 <sup>2</sup>It is unclear whether “this matter” refers to the matter currently before the Court or the mysterious matter  
28 behind the Petition for Writ of Mandate filed by inmate Edward Spencer. The declaration attached to the opposition  
refers to a Petition for Writ of Mandate filed by Robert Smith. Although Robert Smith is correctly identified as the  
Plaintiff in the matter currently before this Court, there is no “Petition for Writ of Mandate” filed in this action.

1 fails to raise any argument that rebuts that fact.

2 **B. Plaintiff's Motion for Sanctions**

3 On February 22, 2010, Plaintiff filed a motion requesting sanctions.<sup>3</sup> (Doc. #11.) Plaintiff  
4 requests that the Court sanction Defendant CDCR's counsel for filing an opposition to Plaintiff's  
5 motion to remand that was "plainly deficient and erroneous." (Pl.'s Mot. that Counsel for Defs. be  
6 Sanctioned for Filing the Opp'n and its Supporting Decl. to the Mot. for Remand 3:14-18, ECF No.  
7 11.) Plaintiff claims that Defendant CDCR filed an opposition that asserts "simply bizarre,  
8 unquestionable incorrect[sic], in fact, fantastical, justifications for the removal notice." (Mot. that  
9 Counsel for Defs. be Sanctioned 4:6-9, ECF No. 11.)

10 **II. Discussion**

11 **A. Plaintiff's Motion to Remand Should Be Granted**

12 Plaintiff argues that this action should be remanded back to state court due to procedural  
13 deficiencies in the removal process. Under 28 U.S.C. § 1447(c), Plaintiff is permitted to bring a  
14 motion to remand the case back to state court based on non-jurisdictional defects.

15 Plaintiff argues that removal was improper because not all defendants joined the notice of  
16 removal. "Removal requires the consent of all the defendants." Wisconsin v. Dept. of Corrections  
17 v. Schacht, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) (citing Chicago, R.I. & P.R. Co. v.  
18 Martin, 178 U.S. 245, 248 (1900)); Ely Valley Mines, Inc., v. Hartford, 644 F.2d 1310, 1314 (9th  
19 Cir. 1981). "All defendants must join in a removal petition with the exception of nominal parties."  
20 Hewitt v. City of Stanton, 798 F.2d 1230, 1232-33 (9th Cir. 1986) (finding removal improper  
21 because defendant who filed notice of removal failed to join co-defendant).

22 Defendant CDCR filed the removal notice in this action. Plaintiff's complaint names several  
23 other parties as defendants, including the State of California, Dr. Gerstel, Dr. Warren H. Liu, Dr.  
24 William J. McGuinness, V. O'Shaughnessy, Nola Grannis, F.N.P. N. Loadholt, C. Hall, Dr. Julian  
25 Kim, Gerri Cassesi, and Registered Nurse Jarrett. Although Defendant CDCR is not required to

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27 <sup>3</sup>Plaintiff's motion for sanctions was filed on February 22, 2010. However, Defendant's opposition to the  
28 motion was filed earlier, on February 9, 2010. It is unclear whether this is Plaintiff's second motion for sanction and  
the Court did not receive Plaintiff's first motion for sanctions, or if the motion for sanction was delayed and  
Defendant was able to file an opposition before the Court received the motion.

1 obtain the written consent of the other defendants to remove if the other defendants have not yet been  
2 served with process in the state action, see Community Bldg. Co. v. Maryland Cas. Co., 8 F.2d 678,  
3 678-679 (9th Cir. 1926), Defendant CDCR’s opposition indicates that the “individual defendants”  
4 were served before the notice of removal was filed. Defendant states that the November 24, 2009  
5 notice of removal “was timely filed within 30 days of the individual defendants’ receipt of the initial  
6 pleading.”

7 Even if CDCR was the only defendant served at the time of the notice of removal, this action  
8 should nonetheless be remanded because the notice of removal would have been untimely. Under  
9 28 U.S.C. § 1446(b), a notice of removal must be filed “within thirty days after the receipt by the  
10 defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for  
11 relief upon which such action or proceeding is based.” “In cases with multiple defendants, there is  
12 a split in authority – unresolved in this Circuit – on whether the thirty-day period to file, or join in,  
13 a notice of removal begins to run on the day of service on the first-served or last-served defendant.”  
14 United Steel, Paper & Forrestry, Rubber Mfg. Energy, Allied Indus. & Service Workers Int’l Union,  
15 AFL-CIO, CLC v. Shell Oil Company, 549 F.3d 1204, 1208 (9th Cir. 2008). This “split in  
16 authority” would not need to be resolved if Defendant CDCR was the only defendant served at the  
17 time the notice of removal was filed. In that case, there would be no dispute regarding when the time  
18 limit begins to run because the only relevant date of service would be Defendant CDCR’s date of  
19 service.

20 Plaintiff claims that Defendant CDCR was served in May 2009 and has attached a proof of  
21 service to his motion. Defendant CDCR has not disputed the authenticity of the proof of service and  
22 has not disputed the date when CDCR was properly served. If Defendant CDCR was served in May  
23 2009, the November 2009 notice of removal would have been filed long past the 30-day deadline  
24 set forth in Section 1446(b). Accordingly, the Court will recommend that this action be remanded  
25 back to state court.

26 **B. Plaintiff’s Motion for Sanctions Should Be Denied**

27 The Court finds that sanctions under Federal Rule of Civil Procedure 11 are not appropriate  
28 against Defendant’s counsel for filing its opposition to Plaintiff’s motion to remand. Although

1 Defendant's opposition is clearly deficient and contains significant typographical errors and  
2 misplaced references to matters that are not relevant to this action, the filing does not rise to the level  
3 of sanctionable conduct.

4 Plaintiff claims that even if the errors in Defendant's filings were the result of confusion and  
5 not bad faith, sanctions are still appropriate because "sanctions are being sought per Rule 11(a) and  
6 not 11(b)." (Mot. that Counsel for Defs. be Sanctioned 7:15-18, ECF No. 11.) Rule 11(a) sets forth  
7 the requirement that all pleadings, motions and other filings be signed by at least one attorney of  
8 record. Rule 11(b) prohibits misrepresentations to the Court.

9 Plaintiff's argument for sanctions for the alleged violation of Rule 11(a) is without merit.  
10 Sanctions under Rule 11 are governed by subsection (c), which contemplates sanctions for violations  
11 of subsection (b): "If . . . the court determines that Rule 11(b) has been violated, the court may  
12 impose an appropriate sanction . . ." Federal Rule of Civil Procedure 11(c). There is no provision  
13 under Rule 11 that explicitly authorizes the issuance of sanctions for violations of subsection (a).  
14 Since Plaintiff's motion seeks sanctions for a violation of Rule 11(a), Plaintiff's motion should be  
15 denied. Further, it is unclear how Defendant's counsel violated Rule 11(a) as Defendant's  
16 opposition and declaration in support of its opposition was signed in accordance with Rule 11(a).  
17 Plaintiff's arguments address the factual inaccuracies within the opposition, which is a Rule 11(b)  
18 issue, not a Rule 11(a) issue.

19 Even if the Court were to construe Plaintiff's motion as requesting sanctions for violation  
20 of Rule 11(b) despite the fact that Plaintiff explicitly states that he is seeking sanctions for the  
21 violation of Rule 11(a), there is no clear violation of Rule 11(b). "Rule 11 imposes a duty on  
22 attorneys to certify by their signature that (1) they have read the pleadings or motions they file and  
23 (2) the pleading or motion is "well-grounded in fact," has a colorable basis in law, and not filed for  
24 any improper purpose." Smith v. Ricks, 31 F.3d 1478, 1488 (9th Cir. 1994). "According to the  
25 Supreme Court, 'the central purpose of Rule 11 is to deter baseless filings in district court.'" Id.  
26 (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).

27 The Court finds that Defendant's filing does not rise to the level of sanctionable conduct.  
28 There is no indication that Defendant filed its opposition to Plaintiff's motion to remand for an

1 improper purpose. Further, the opposition cannot be characterized as “frivolous.” Although  
2 Defendant erroneously refers to persons who are not parties to this action, the errors are clearly  
3 typographical in nature. Although Defendant’s opposition is sloppy and poorly drafted, it is not  
4 sanctionable at this time.

5 **III. Conclusion and Recommendation**

6 The Court finds that remand is proper because Defendant CDCR failed to obtain the consent  
7 of all defendants prior to filing his notice of removal and the other defendants did not join the motion  
8 or otherwise expressly consent to removal. The Court further finds that sanctions are not appropriate  
9 for Defendant’s deficient opposition.

10 Accordingly, it is HEREBY RECOMMENDED that:

- 11 1. This action be REMANDED to Kings County Superior Court; and
- 12 2. Plaintiff’s motion for sanctions be DENIED.

13 These Findings and Recommendations are submitted to the United States District Judge  
14 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30)  
15 days after being served with these Findings and Recommendations, any party may file written  
16 objections with the Court and serve a copy on all parties. Such a document should be captioned  
17 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
18 shall be served and filed within ten (10) days after service of the objections. The parties are advised  
19 that failure to file objections within the specified time may waive the right to appeal the District  
20 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21  
22 IT IS SO ORDERED.

23 **Dated: August 23, 2010**

24 /s/ Sheila K. Oberto  
25 UNITED STATES MAGISTRATE JUDGE  
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