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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALEXANDER HERNANDEZ,

Plaintiff,

v.

CONAGRA FOODS PACKAGED
FOODS, a limited liability company;
JESUS BANDEROS, an individual; and
DOES 1 through 10 inclusive,

Defendants.

No. 1:19-cv-00065-DAD-EPG

ORDER DENYING PLAINTIFF’S MOTION
TO REMAND

(Doc. No. 8)

This matter came before the court on April 2, 2019 for hearing on plaintiff’s motion to remand. (Doc. No. 8.) Attorney Christina Begakis appeared telephonically on behalf of plaintiff Alexander Hernandez. Attorney Kate Juvinal appeared telephonically on behalf of defendants ConAgra Foods Packaged Foods (“ConAgra Foods”) and Jesus Landeros (erroneously sued herein as “Jesus Banderos”). Having considered the parties’ briefs and oral arguments and for the reasons set forth below, the court will deny plaintiff’s motion to remand.

BACKGROUND

Plaintiff’s complaint alleges as follows. Plaintiff began his employment with ConAgra Foods in July 2007. (Doc. No. 1-2, Ex. B at ¶ 5.) While employed with ConAgra Foods, plaintiff had a disability and/or medical condition of which defendants were aware. (*Id.* at ¶ 7.) In July

1 2017, plaintiff took medical leave as an accommodation for his disability. (*Id.* at ¶ 11.) In
2 response to plaintiff taking medical leave, defendants made defamatory statements that plaintiff
3 was a poor performer, unable to do his job, and deserved to be terminated. (*Id.* at ¶ 12.)
4 Defendants further discriminated against and retaliated against plaintiff on or about July 19, 2017,
5 when defendants terminated plaintiff for taking medical leave. (*Id.* at ¶ 13.) As a result of
6 defendants’ conduct, plaintiff has suffered emotional and economic injuries. (*Id.* at ¶¶ 14, 16.)

7 Plaintiff filed this action in Los Angeles County Superior Court on March 9, 2018 against
8 ConAgra Foods and Landeros, bringing six state causes of action: (1) disability discrimination;
9 (2) failure to accommodate; (3) failure to engage in the interactive process; (4) retaliation in
10 violation of the Fair Employment and Housing Act; (5) retaliation in violation of the California
11 Family Rights Act; and (6) defamation. (Doc. No. 1-2, Ex. B.) The defamation claim is the only
12 claim brought against defendant Landeros. (*Id.*)

13 On May 1, 2018, the Los Angeles County Superior Court approved the parties’ stipulation
14 to transfer the action to the Stanislaus County Superior Court, the proper venue for the action.
15 (Doc. No. 1 at ¶ 4.)

16 On January 14, 2019, defendants removed the action to this court on the grounds that
17 defendant Landeros is a fraudulently joined “sham defendant,” and that diversity jurisdiction
18 exists because plaintiff and ConAgra Foods are citizens of different states and there is at least
19 \$75,000 in controversy. (*Id.* at ¶¶ 16–43.) Plaintiff moved to remand the case to state court on
20 February 13, 2019. (Doc. No. 8.) Plaintiff contends that defendant Landeros is not a sham
21 defendant and that defendants have not shown that his defamation claim against Landeros fails.
22 Plaintiff thus argues that remand is appropriate because Landeros’s California citizenship defeats
23 complete diversity. On March 19, 2019, defendants filed an opposition to plaintiff’s motion to
24 remand. (Doc. No. 14.) On March 26, 2019, plaintiff filed a reply in support of his motion to
25 remand. (Doc. No. 15.)

26 LEGAL STANDARD

27 A suit filed in state court may be removed to federal court if the federal court would have
28 had original jurisdiction over the suit. 28 U.S.C. § 1441(a). Removal is proper when a case

1 originally filed in state court presents a federal question or where there is diversity of citizenship
2 among the parties and the amount in controversy exceeds \$75,000. *See* 28 U.S.C. §§ 1331,
3 1332(a).

4 Section 1447(c) of Title 28 of the United States Code provides that “[i]f at any time before
5 final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be
6 remanded.” “The removal statute is strictly construed against removal jurisdiction, and the
7 burden of establishing federal jurisdiction falls to the party invoking the statute.” *Cal. ex rel.*
8 *Lockyer v. Dynege, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (citation omitted); *see also Provincial*
9 *Gov’t of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009) (“The defendant
10 bears the burden of establishing that removal is proper.”). If there is any doubt as to the right of
11 removal, a federal court must reject jurisdiction and remand the case to state court. *Matheson v.*
12 *Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003); *see also Valdez v. Allstate*
13 *Ins. Co.*, 372 F.3d 1115, 1118 (9th Cir. 2004).

14 An action may be removed to federal court on the basis of diversity jurisdiction only
15 where there is complete diversity of citizenship. *Hunter v. Phillip Morris USA*, 582 F.3d 1039,
16 1043 (9th Cir. 2009). However, the Ninth Circuit has recognized an exception to the complete
17 diversity requirement where a non-diverse defendant has been “fraudulently joined.” *Morris v.*
18 *Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). If a plaintiff “fails to state a cause of
19 action against a resident defendant, and the failure is obvious according to the settled rules of the
20 state, the joinder of the resident defendant is fraudulent.” *McCabe v. Gen. Foods Corp.*, 811
21 F.2d 1336, 1339 (9th Cir. 1987); *see also Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d
22 1203, 1206 (9th Cir. 2007). If the court finds that the joinder of the non-diverse defendant is
23 fraudulent, that defendant’s citizenship is ignored for the purposes of determining diversity. *See,*
24 *e.g., Morris*, 236 F.3d at 1067.

25 There is a general presumption against fraudulent joinder, *Hamilton Materials, Inc.*, 494
26 F.3d at 1206, and the burden on the defendant opposing remand on the basis of an alleged
27 fraudulent joinder is a “heavy one.” *Davis v. Prentiss Props. Ltd.*, 66 F. Supp. 2d 1112, 1113
28 (C.D. Cal. 1999). “Fraudulent joinder must be proven by clear and convincing evidence,” and

1 district courts must resolve all disputed questions of fact in favor of the plaintiff. *Hamilton*
2 *Materials, Inc.*, 494 F.3d at 1206; *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 807
3 (N.D. Cal. 1998). A claim of fraudulent joinder should be denied if there is any possibility that
4 the plaintiff may prevail on the cause of action against the in-state defendant. *See Plute v.*
5 *Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001); *see also Lieberman v.*
6 *Meshkin, Mazandarani*, No. C-96-3344 SI, 1996 WL 732506, at *3 (N.D. Cal. Dec. 11, 1996)
7 (“The standard is not whether plaintiffs will actually or even probably prevail on the merits, but
8 whether there is a possibility that they may do so.”). In resolving a claim of fraudulent joinder,
9 the court may look beyond the pleadings and consider evidence similar to that offered in
10 summary judgment proceedings, such as affidavits and deposition testimony. *Morris*, 236 F.3d at
11 1068 (citing *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 263 (5th Cir. 1995)).
12 Remand must be granted unless the defendant establishes that plaintiff could not amend her
13 pleadings to cure the purported deficiency. *Padilla v. AT&T Corp.*, 697 F. Supp. 2d 1156, 1159
14 (C.D. Cal. 2009).

15 ANALYSIS

16 Plaintiff brings a single cause of action against defendant Landeros for defamation,
17 alleging that the defendants sued herein made false and defamatory statements to third parties and
18 to the community consisting of statements including, but not limited to, “express and implied[]
19 accusations that Plaintiff committed time card theft, was a poor performer, and thus unable to
20 perform the duties of his position. These and similar statements by Defendants, and each of them,
21 expressly and impliedly asserted that Plaintiff was incompetent and a poor employee and not
22 deserving of gainful employment.” (Doc. No. 1-2, Ex. B at ¶ 62.)

23 Under California law, a claim for defamation requires plaintiff to show that defendant
24 made “(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a
25 natural tendency to injure or that causes special damage.” *Taus v. Loftus*, 40 Cal. 4th 683, 720
26 (2007).

27 In their notice of removal, defendants contend that Landeros was fraudulently joined, and
28 his citizenship must be disregarded, because plaintiff cannot maintain a defamation cause of

1 action against him. (Doc. No. 1 at ¶¶ 16–27.) Defendants contend that plaintiff admitted during
2 his deposition that Landeros did not make any false statements of fact:

3 Q: And to your knowledge, Mr. Landeros never made a
4 statement that you committed time theft; correct?

5 A: Yes.

6 Q: And to your knowledge, Mr. Landeros never made a
7 statement that you were a poor performer; correct?

8 A: Yes.

9 Q: And to your knowledge, Mr. Landeros never made a
10 statement that you were unable to do your job; correct?

11 A: Yes.

12 ...

13 Q: To your knowledge, Mr. Landeros never made a statement
14 that you deserved to be terminated; correct?

15 A: Yes.

16 Q: And to your knowledge, Mr. Landeros never made a
17 statement that you deserved to no longer hold employment;
18 correct?

19 A: Yes.

20 (*Id.* at ¶ 26; Doc. No. 1-2, Ex. M at 77:24–78:10, 78:13–19.) At his deposition, plaintiff was also
21 asked more broadly whether either defendant made statements to support plaintiff’s defamation
22 claim:

23 Q: Are you alleging that [defendants] made any statements about
24 you to support your defamation claim?

25 A: No, no.

26 (Doc. No. 1 at ¶ 25; Doc. No. 1-2, Ex. M at 74:19–23.) Thus, based on plaintiff’s own
27 admissions, defendants assert that there is no possibility that the state court would recognize a
28 valid cause of action against Landeros for defamation.

In his motion to remand, plaintiff argues that this deposition testimony is insufficient to
show that plaintiff has no possibility of prevailing on the merits of his defamation claim. (Doc.
No. 8 at 9.) Plaintiff points to the language in his complaint stating that the false and defamatory

1 statements “included, **but were not limited to**, express **and implied**[] accusations that Plaintiff . .
2 . was a poor performer, and thus unable to perform the duties of his position.” (*Id.*) Plaintiff
3 contends that the “five limited questions” asked of him at his deposition were “extremely limited
4 in scope.” (*Id.* at 9, 11.) Plaintiff asserts that defendants neglected to explore other possibilities,
5 such as: “Has Mr. Landeros ever acted in a way as to indicate that [Plaintiff] is a poor performer,
6 has Mr. Landeros ever written anything suggesting [Plaintiff] were [sic] a poor performer, etc.”
7 (*Id.* at 9, 11.)

8 Plaintiff’s arguments in support of remand are unavailing for a number of reasons. This
9 action was originally filed over one year ago and the parties have engaged in both written and
10 deposition discovery. To the extent that plaintiff now suggests that he has other allegations
11 regarding defamation not specifically alleged in the complaint, plaintiff fails to present any
12 evidence by way of declaration or otherwise to refute his own deposition testimony. Plaintiff’s
13 counsel did not cross-examine or rehabilitate plaintiff at his deposition to provide any additional
14 defamation allegations (Doc. No. 14-1 at ¶ 5), plaintiff did not amend his deposition testimony
15 (*id.* at ¶ 6), and plaintiff has not sought to amend his complaint. Defendant Landeros has also
16 submitted a sworn declaration in support of defendants’ opposition to the motion to remand,
17 declaring that he never made any statements expressly stating or implying that plaintiff was a
18 poor performer, deserved to be terminated, or had committed any crime, theft, or violation of
19 ConAgra Foods’ policies. (Doc. No. 14-3 at ¶¶ 5–7.) Given plaintiff’s unrefuted deposition
20 testimony and the procedural posture of this case, plaintiff’s defamation claim appears fanciful.
21 *See Macey v. Allstate Prop. & Cas. Ins. Co.*, 220 F. Supp. 2d 1116, 1117 (N.D. Cal. 2002) (noting
22 that the court must remand if there is a “non-fanciful possibility that plaintiff can state a claim
23 under California law against the non-diverse defendants”).

24 Moreover, plaintiff’s objection that counsel for defendants did not ask if Landeros ever
25 *acted* in a way to indicate that plaintiff was a poor performer, and did not ask if Landeros ever
26 wrote anything *suggesting* plaintiff was a poor performer, is beside the point. Not just any act
27 will suffice to support a defamation claim: the “publication” element requires that the defendant
28 conveyed, either verbally or in writing, the allegedly defamatory information to a third party.

1 *Ringler Assocs. Inc. v. Md. Cas. Co.*, 80 Cal. App. 4th 1165, 1179 (2000) (“Publication, which
2 may be written or oral, is defined as a communication to some third person who understands both
3 the defamatory meaning of the statement and its application to the person to whom reference is
4 made.”). In addition, the alleged defamatory information must be false, and therefore a statement
5 of fact, not merely an expression of opinion. *Id.* at 1181 (“It is an essential element of defamation
6 that the publication be of a false statement of *fact* rather than opinion.”). Thus, even if the court
7 were to consider whether Landeros ever “acted in a way” to suggest that plaintiff was a poor
8 performer—of which, as noted above, plaintiff has failed to produce any evidence—plaintiff’s
9 claim would still fail to satisfy the publication and falsity prongs of a defamation claim.

10 Plaintiff’s reliance on the decision in *Umamoto v. Insphere Insurance Solutions, Inc.* is
11 also misplaced. In *Umamoto*, there was no dispute that a defamatory statement had been made—
12 the dispute focused primarily on whether defendant Feeny was the originator of, or was otherwise
13 responsible for, the defamatory statement. No. 13-CV-0475-LHK, 2013 WL 2084475, at *4–5
14 (N.D. Cal. May 14, 2013). The court concluded that there was a non-fanciful possibility that
15 Feeny was responsible for the statement because it was possible that Feeny was directly involved
16 in plaintiff’s termination, and defendants had offered no evidence that Feeny was not responsible
17 for the statement. *Id.* at *5. These facts are plainly distinct from those presented here, where
18 plaintiff has admitted under oath that Landeros did not make any of the defamatory statements
19 alleged in the complaint. *See Morris*, 236 F.3d at 1068 (holding that removal was proper because
20 it was “abundantly obvious” that plaintiff could not prevail on her negligent misrepresentation
21 claim against non-diverse travel agency, where plaintiff’s affidavit admitted that she had never
22 discussed the care or safety of the cruise line with the travel agency, which was the underlying
23 basis of her claim); *Chhabra v. Devry Univ., Inc.*, No. CV 15-03857 DDP (FFMx), 2016 WL
24 406961, at *1–2 (C.D. Cal. Feb. 2, 2016) (ordering plaintiff to show cause why individual
25 defendants were not fraudulently joined, and ultimately denying plaintiff’s motion to remand,
26 where plaintiff had admitted in his deposition that he had no facts to support his claims for
27 defamation and infliction of emotional distress).

28 //

1 Even drawing all reasonable inferences from the record in plaintiff's favor, there is no
2 reasonable basis for predicting that California law might impose liability on defendant Landeros
3 for defamation. Because the evidence before the court of fraudulent joinder is clear and
4 convincing, plaintiff's motion to remand will be denied.

5 Finally, plaintiff requests attorneys' fees and costs in the amount of \$3,700 incurred as a
6 result of removal. (Doc. No. 8 at 12.) It is the case that district courts are given discretion by
7 statute to award such fees if the matter is remanded. 28 U.S.C. § 1447(c) ("An order remanding
8 the case may require payment of just costs and any actual expenses, including attorney fees,
9 incurred as a result of the removal."). However, because the court is denying plaintiff's motion to
10 remand, § 1447(c) is inapplicable. Plaintiff's request for attorneys' fees will also be denied.

11 CONCLUSION

12 For the reasons set forth above, the court finds that defendant Landeros was fraudulently
13 joined in the instant action. Disregarding Landeros's citizenship results in complete diversity in
14 this case, and as such, the court has subject matter jurisdiction. Plaintiff's motion to remand
15 (Doc. No. 8) is therefore denied.

16 IT IS SO ORDERED.

17 Dated: April 3, 2019

18 
UNITED STATES DISTRICT JUDGE