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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KRISTI PORTER,

Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE
COMPANY, an Ohio corporation,
GREGORY S. EVERETT, an
individual, and Does 1
through 20, inclusive,

Defendants.

No. 2:16-cv-1933-JAM-AC

**ORDER DENYING PLAINTIFF'S MOTION
TO REMAND AND GRANTING
DEFENDANTS' MOTION TO DISMISS**

Plaintiff Kristi Porter ("Porter") claims Defendants
Nationwide Mutual Insurance Company ("Nationwide") and Gregory
Everett ("Everett") were not on her side when she was fired in
2016. Porter filed suit against Nationwide and Everett in state
court and Defendants removed the case to federal court. ECF No.
1-2. Porter now moves to remand. ECF No. 14. Defendants move
to dismiss Porter's defamation claim. ECF No. 16. For the
reasons set forth below, the Court DENIES Plaintiff's motion to
remand and GRANTS Defendants' motion to dismiss with leave to

1 amend.¹

2
3 I. FACTUAL AND PROCEDURAL BACKGROUND

4 Kristi Porter worked as an adjuster for Nationwide from
5 December 2006 to February 2016. Compl. ¶¶ 1, 11. Defendant
6 Everett began supervising Porter in March 2013. Compl. ¶ 12.
7 According to Porter, Everett "favored the male employees" and
8 "assigned Plaintiff and the other female adjuster greater work
9 loads . . . [and] more difficult territories." Compl. ¶ 12.
10 Porter complained to Everett and Nationwide's human resources
11 department about the unequal treatment. Compl. ¶¶ 12, 14. In
12 July 2014, Everett gave Porter an "unjustified poor performance
13 review." Compl. ¶ 12. Everett also "gave Plaintiff a written
14 warning about supposed performance issues" and "accused Plaintiff
15 of conduct that was untrue such as working overtime when she was
16 not and mishandling a claim." Compl. ¶ 13.

17 Porter took medical leave from April to June 2015. Compl.
18 ¶ 17. On July 31, 2015, Nationwide gave Porter a "30-day final
19 notice" that it would fire Porter "if her performance did not
20 improve." Compl. ¶ 19. In August 2015, Everett gave Porter her
21 mid-year performance evaluation, which "contained the same
22 inaccuracies and misrepresentations as the previous reviews."
23 Compl. ¶ 20. These events distressed Porter and exacerbated her
24 medical condition. Compl. ¶ 21. Porter's doctor put her on

25
26

¹ This motion was determined to be suitable for decision without
27 oral argument. E.D. Cal. L.R. 230(g). The hearing was
28 scheduled for February 7, 2016. In deciding the motion to
dismiss, the Court takes as true all well pleaded facts in the
Complaint.

1 medical leave beginning October 8, 2015. Id.

2 Nationwide told Porter her leave would expire on November 6,
3 2015, but then Nationwide extended her leave. Compl. ¶ 22. In
4 February 2016, Porter told Nationwide she could return to work on
5 March 7, 2016. Compl. ¶ 23. On February 25, 2016 Defendants
6 told Porter they had filled her position and "her employment was
7 terminated because her medical leave was exhausted." Compl.
8 ¶ 24. Defendants also "informed Plaintiff that, because she had
9 been given a final 30-day notice prior to her medical leave, she
10 was not eligible for re-hire." Id. Nationwide "refused to
11 investigate [Porter's] complaints about the inaccurate and
12 unwarranted performance reviews and the final 30-day notice."
13 Id.

14 Porter alleges ten California state law causes of action:
15 (1) gender discrimination, (2) disability/medical condition
16 discrimination, (3) failure to engage in the interactive process,
17 (4) failure to accommodate, (5) retaliation for requesting
18 accommodation, (6) retaliation for filing the complaint,
19 (7) failure to prevent discrimination, (8) retaliation for
20 exercising her right under the California Family Rights Act,
21 (9) wrongful termination, and (10) defamation. Compl. at 8-17.
22 Porter brings the first nine claims against Nationwide and the
23 tenth claim against Nationwide and Everett. Id.

24 Defendants removed the case based on diversity jurisdiction.
25 Notice of Removal at 2. Porter and Everett are citizens of
26 California. Compl. ¶¶ 1, 3. Nationwide is incorporated and has
27 its principal place of business in Ohio. Compl. ¶ 2; Schuler
28 Decl. ¶¶ 4, 5, ECF No. 1-3. Defendants argue that the Court

1 should disregard Everett's citizenship because Porter does not
2 state a cause of action against Everett. Notice of Removal at 6.
3 Defendants also move to dismiss Plaintiff's defamation claim
4 against Nationwide. Mot. to Dismiss at 1.

6 II. REQUEST FOR JUDICIAL NOTICE

7 Defendants request the Court take judicial notice of the
8 following exhibits attached to Everett's declaration:

- 9 • Exhibit A-Porter's performance evaluation for 2014
- 10 • Exhibit B-the written notice Nationwide issued to Porter
11 on 12/11/14
- 12 • Exhibit C-Porter's mid-year performance evaluation for
13 2015
- 14 • Exhibit D-the final written notice Nationwide issued to
15 Porter in July 2015.

16 10/20/2016 Request for Judicial Notice ("RJN") at 1-2, ECF No.
17 16-2.

18 Defendants argue the Court should take judicial notice of
19 these documents because Porter incorporated the documents in her
20 complaint. Id. at 3-4.

21 "On a motion to dismiss, [a court] may consider materials
22 incorporated into the complaint or matters of public record."
23 Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir.
24 2010). A plaintiff incorporates materials into her complaint
25 when she "relies upon a document or [alleges] the contents of the
26 document[,] . . . the document's authenticity is not in
27 question[,] and there are no disputed issues as to the document's
28 relevance." Id.

1 Porter refers to each of the exhibits attached to Everett's
2 declaration in her complaint. See Compl. ¶ 12 (performance
3 review Everett gave to Porter in July 2014, corresponding to
4 Exhibit A); Compl. ¶ 13 ("written warning about supposed
5 performance issues," corresponding to Exhibit B); Compl. ¶ 20
6 ("mid-year performance evaluation," corresponding to Exhibit C);
7 Compl. ¶ 19 ("30-day final notice," corresponding to Exhibit D").
8 Porter alleges the contents of the documents in her complaint,
9 and she does not contest their authenticity or relevance. The
10 Court therefore takes judicial notice of Exhibits A through D to
11 Everett's declaration.

12 Defendants also ask the Court to consider Everett's
13 declaration and Exhibits A through D in deciding Porter's motion
14 to remand. Opp'n to Mot. to Remand at 3. A court may "pierc[e]
15 the pleadings and consider[] summary judgment-type evidence such
16 as affidavits and deposition testimony" in deciding fraudulent
17 joinder. Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068
18 (9th Cir. 2001). The Court therefore will consider Everett's
19 declaration and its attachments in deciding the motion to remand.
20

21 III. OPINION

22 A. Legal Standard

23 Generally, a defendant may remove a state civil action to
24 federal court only if the plaintiff could have filed the case in
25 federal court originally. See 28 U.S.C. § 1441. The Ninth
26 Circuit "strictly construe[s] the removal statute against
27 removal jurisdiction." Gaus v. Miles, Inc., 980 F.2d 564, 566
28 (9th Cir. 1992). Thus, a federal district court must reject

1 removal jurisdiction if it has "any doubt as to the right of
2 removal in the first instance." Id. "The 'strong presumption'
3 against removal jurisdiction means that the defendant always has
4 the burden of establishing that removal is proper." Id.

5 An out-of-state defendant may remove a case based on
6 diversity jurisdiction. 28 U.S.C. § 1441(b). To establish
7 diversity jurisdiction, the removing defendant must show
8 complete diversity exists among the parties and the amount in
9 controversy exceeds \$75,000.² Id. § 1332. "Section 1332
10 requires complete diversity of citizenship; each of the
11 plaintiffs must be a citizen of a different state than each of
12 the defendants." Morris, 236 F. 3d at 1067.

13 An exception to the complete diversity requirement applies
14 if the removing defendant can show that the plaintiff has
15 "fraudulently joined" a non-diverse defendant to thwart removal.
16 Id. "Joinder of a non-diverse defendant is deemed fraudulent,"
17 and the Court must ignore "the defendant's presence in the
18 lawsuit . . . 'if the plaintiff fails to state a cause of action
19 against a resident defendant, and the failure is obvious
20 according to the settled rules of the state.'" Id. (quoting
21 McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir.
22 1987)). A defendant asserting removal jurisdiction based on
23 fraudulent joinder must show the plaintiff cannot possibly state
24 a claim in state court against the alleged "sham defendant."
25 Gomez v. Rehab., 2016 WL 370692, at *2 (C.D. Cal. Jan. 29,
26 2016).

27 ² Porter does not contest Defendants' claim that the amount in
28 controversy exceeds \$75,000.

1 B. Analysis

2 Defamation includes both libel and slander. Noel v. River
3 Hills Wilsons, Inc., 113 Cal. App. 4th 1363, 1368 (2003).

4 Defamation has five elements: "(a) a publication that is
5 (b) false, (c) defamatory, and (d) unprivileged, and that (e) has
6 a natural tendency to injure or that causes special damage."

7 Taus v. Loftus, 40 Cal. 4th 683, 720 (2007). The "publication"
8 element requires a plaintiff to show the defendant conveyed the
9 allegedly defamatory information to a third party. Schmidt v.

10 Levi Strauss & Co., 2008 WL 4450331, at *1 (N.D. Cal. Sept. 30,
11 2008) (citing Live Oak Publ'g Co. v. Cohagan, 234 Cal. App. 3d
12 1277, 1284 (1991)). Additionally, "the alleged defamatory

13 statements must be false and therefore also statements of fact,
14 not merely expressions of opinion." Charlson v. DHR Int'l Inc.,
15 2014 WL 4808851, at *5 (N.D. Cal. Sept. 26, 2014). "[A]lthough a

16 plaintiff need not plead the allegedly defamatory statement
17 verbatim" she must "specifically identif[y] and . . . plead the
18 substance of the statement." Jacobson v. Schwarzenegger, 357 F.

19 Supp. 2d 1198, 1216 (C.D. Cal. 2004).

20 Defendants argue Porter fails to state a defamation claim
21 against either Everett or Nationwide for the following reasons:

22 (1) Porter "fails to state the content of what was actually said,
23 which Defendant said what, to whom any statement was specifically
24 made, whether the alleged communication was transmitted orally or
25 in writing . . . [or] when the statement was published";

26 (2) Porter has not shown that Everett made any publication to a
27 third party; (3) Porter has not shown that the allegedly
28 defamatory information was unprivileged; and (4) Porter cannot

1 show that Everett made any false statement of fact, rather than a
2 statement of opinion. Mot. to Dismiss at 4, 9-11, 15. Each of
3 these reasons will be discussed more fully below.

4 1. Failure to Plead Defamatory Statements With
5 Specificity

6 Defendants argue that Porter cannot possibly state a claim
7 "against either Defendant (but especially Everett), as Plaintiff
8 has not alleged any actual facts, such as the content of any
9 statement, that either Defendant published any written or oral
10 unprivileged, defamatory statement of fact." Opp'n to Mot. to
11 Remand at 4. Defendants also argue Porter's complaint does not
12 contain "the actual who, what, where, and when necessary to
13 establish a claim for defamation, much less circumstances which
14 particularly show that Nationwide or Everett acted with actual
15 malice so as to overcome the managerial privilege under
16 California Civil Code § 47(c)." Id.

17 Porter does not adequately respond to this argument in her
18 motion to remand or in her opposition to the motion to dismiss.
19 She fails to specifically identify the allegedly defamatory
20 statements. Instead, Porter argues she clearly states a
21 defamation claim because "[f]alse statements affecting a person's
22 occupational reputation amount to defamation *per se*." Mot. to
23 Remand at 2. Plaintiff cites to California Civil Code section
24 46(3), which states

25 Slander is a false and unprivileged publication,
26 orally uttered . . . which . . . [t]ends directly to
27 injure him in respect to his office, profession,
28 trade or business, either by imputing to him general
disqualification in those respects which the office
or other occupation peculiarly requires, or by
imputing something with reference to his office,

1 profession, trade, or business that has a natural
2 tendency to lessen its profits.

3 Cal. Civ. Code § 46(3).

4 Porter's defamation *per se* argument is unpersuasive.
5 Section 46(3) still requires Porter to show an "unprivileged
6 publication," which Porter has failed to do. Cal. Civ. Code
7 § 46(3). Porter also cites to Washer v. Bank of America, 21 Cal.
8 2d 822, 827 (1943) to support her defamation *per se* argument.
9 Mot. to Remand at 2. But in Washer, the defendant made the
10 slanderous statement to newspaper reporters. Washer, 21 Cal. 2d
11 at 825. Here, Porter does not provide facts or argument to
12 support a claim that Everett made any allegedly defamatory
13 statements to anyone other than Porter.

14 In her opposition to the motion to dismiss, Porter relies on
15 several cases to argue she sufficiently states the substance of
16 Everett's allegedly defamatory statements. Opp'n to Mot. to
17 Dismiss at 3-4. These cases, however, as Defendants' note, came
18 before the higher pleading standard Twombly and Iqbal imposed on
19 federal court plaintiffs. Reply ISO Mot. to Dismiss at 1-2.

20 Porter fails to identify the specific contents of any
21 allegedly defamatory communication and none of the cases she
22 relies on convinces the Court otherwise.

23 2. "Publication" Element

24 Porter alleges Defendants told at least four Nationwide
25 employees "and subsequent potential employers, expressly or by
26 implication, that Plaintiff was incompetent, that she violated
27 company policies, [and] that she lacked job knowledge and that
28 she performed her job poorly." Compl. ¶ 85. Defendants argue

1 these allegations "do not show that Everett or Nationwide
2 published any false statement to a third party." Notice of
3 Removal at 7. Defendants argue Porter's allegations show only
4 that Everett gave Porter a 30-day-notice and an unfavorable mid-
5 year review and that Porter complained to the HR department about
6 these documents. Id. Defendants specifically contend that "each
7 allegation confirms that Everett communicated performance reviews
8 directly to Plaintiff, and following the review, Plaintiff
9 communicated to Nationwide." Id. at 8.

10 Porter does not identify any portions of her Complaint that
11 contain well-pleaded facts regarding publication to a third
12 party. Porter only argues that "internal publications by
13 employer's agents are actionable" as defamation. Mot. to Remand
14 at 4. Porter cites to cases where publication was "completely
15 internal" and "published and received solely by other employees."
16 Mot. to Remand at 4. But Porter misses the crux of Defendants'
17 argument. Defendants do not challenge that internal publications
18 by employers can give rise to actionable defamation. Instead,
19 they argue Porter fails to allege facts to show Everett ever made
20 an "internal publication" to anyone besides Porter.

21 Porter also argues she had to "republish" the allegedly
22 defamatory statements to Nationwide's HR department. Opp'n to
23 Mot. to Dismiss at 3. The case upon which Porter relies,
24 however, is distinguishable in that the plaintiff "republished"
25 the defamatory information not internally, but to other potential
26 employers. Bowen v. M. Caratan, Inc., 142 F. Supp. 3d 1007, 1035
27 (E.D. Cal. 2015). Porter does not cite any case to support her
28 argument that republishing information to an employer's internal

1 department establishes publication to a third party. The Court
2 finds that Porter has failed to sufficiently plead the
3 "publication to a third party" element of her defamation claim.

4 3. "Unprivileged" Element

5 Defendants argue that Porter cannot show Everett made any
6 "unprivileged" statements because "communications by an employer
7 relating to the conduct or termination of a current or former
8 employee that are made in a commercial setting are subject to a
9 qualified privilege under California Civil Code section 47(c)."

10 Notice of Removal at 9.

11 "Cal. Civ. Code § 47(c) extends a conditional privilege
12 against defamation claims to communication made without malice on
13 a subject of mutual interest." London v. Sears, Roebuck & Co.,
14 619 F. Supp. 2d 854, 864 (N.D. Cal. 2009). "Courts have
15 consistently interpreted section 47, subdivision(c) to apply in
16 the employment context." Noel, 113 Cal. App. 4th at 1369. "To
17 state a claim for defamation where a qualified privilege applies,
18 a complaint 'must contain affirmative allegations of malice in
19 fact.'" Jones v. Lehigh Sw. Cement Co., 2012 WL 2934530, at *5
20 (E.D. Cal. Jul. 18, 2012) (quoting Lundquist v. Reusser, 7 Cal.
21 4th 1193 (1994)). Furthermore, a plaintiff must show "actual
22 malice" to defeat a qualified privilege. Noel, 113 Cal. App. 4th
23 at 1370. A plaintiff can show "actual malice" with allegations
24 "that the publication was motivated by hatred or ill will towards
25 the plaintiff or by a showing that the defendant lacked
26 reasonable grounds for belief in the truth of the publication."

27 Id.

28 Defendants argue "[a]lthough Plaintiff contends in Paragraph

1 91 of her Complaint that the factual allegations contained in
2 Paragraph 12 through 24 were done with malice, these paragraphs
3 fail to specifically identify any statement of circumstances,
4 occurrences, and events sufficient under Twombly or Iqbal, that
5 would show actual malice." Notice of Removal at 9-10.

6 Porter argues Defendants bear the burden to prove absence of
7 malice. Mot. to Remand at 5. But Porter, again, does not
8 support her argument with case law. Defendants correctly argue
9 that Porter "misstates the burden." Opp'n to Mot. to Remand at
10 10. A plaintiff "must allege facts to support each of the . . .
11 elements of a defamation claim, including actual malice to
12 overcome [the] presumed qualified privilege." Jones, 2012 WL
13 2934530, at *6. Porter does not allege *facts* to establish
14 Everett acted with actual malice. No facts in the complaint show
15 that Everett was "motivated by hatred or ill will" or "lacked
16 reasonable grounds for belief in the truth of the publication."
17 See Noel, 113 Cal. App. 4th at 1370.

18 Porter next argues that a plaintiff can prove malice in many
19 ways. Mot. to Remand at 5. Porter lists several ways that
20 plaintiffs in *other cases* have shown malice. Mot. to Remand at
21 5-7. Porter still, however, fails to point to facts *in her*
22 *complaint* showing Everett made a defamatory statement with
23 malice.

24 Defendants argue "[w]hile [Porter] pleads generally that
25 Defendant Everett did not like her compared to male colleagues,
26 she does not link that dislike to any actual defamatory
27 statement." Opp'n to Mot. to Remand at 11. Defendants also
28 argue that "the defamation cases cited by Plaintiff demonstrating

1 how one can prove malice are not applicable because they are not
2 cases where the sufficiency of the Complaint was at issue in a
3 case where a former employee sued a former employer pertaining to
4 performance evaluations." Id. Rather, Defendants argue, "the
5 cases cited by Plaintiff pertain primarily to allegedly
6 defamatory publications in newspapers or regarding public figures
7 at the summary judgment or post-trial stage of litigation." Id.
8 at 11-12.

9 The Court concludes that Porter has not sufficiently pleads
10 the "unprivileged" element of a defamation claim. Specifically,
11 she has not pled facts showing that Everett acted with malice,
12 and so she cannot overcome the privilege afforded by section
13 47(c).

14 4. "False" Element

15 "A publication must contain a false statement of *fact* to
16 give rise to liability for defamation." Jensen v. Hewlett-
17 Packard Co., 14 Cal. App. 4th 958, 970 (1993) (emphasis in
18 original). Furthermore, "an employer's statement accusing an
19 employee of 'poor performance' is 'clearly a statement of
20 opinion,' and is not defamatory." Rodriguez v. Old Dominion
21 Freight Line, Inc., 2013 WL 6184432, at *9 (C.D. Cal. Nov. 27,
22 2013) (citing Gould v. Md. Sound Indus., Inc., 31 Cal. App. 4th
23 1137, 1153-54 (1995)).

24 Defendants argue that "the alleged defamatory statements
25 concerning Plaintiff's performance [are] mere opinions of
26 Everett, not facts." Notice of Removal at 11. Porter,
27 conversely, argues that the documents Defendants submitted
28 contain "statements of fact—not opinion." Reply ISO Mot. to

1 Remand. However, Porter still fails to identify which specific
2 factual statements in the documents are defamatory and in the
3 absence of such specificity, this claim cannot survive.

4 In sum, on the basis of the above four arguments submitted
5 by Defendants with respect to Porter's defamation claim, the
6 Court finds that Porter has not pled sufficient facts to
7 establish that Everett or Nationwide defamed her. The Court
8 therefore dismisses this claim against Nationwide and Everett
9 without prejudice. Porter's Motion to Remand must be denied
10 since Porter and Nationwide (the remaining two parties) are
11 citizens of different states and Nationwide has shown, without
12 challenge from Porter, the amount in controversy exceeds \$75,000.
13 The Court therefore has diversity jurisdiction.

14 C. Plaintiff's Motion for Attorney's Fees

15 Porter argues "the Court should award attorney's fees and
16 costs because Defendants and their attorneys had no reasonable
17 basis for removing this matter." Mot. to Remand at 7.
18 Defendants have shown a reasonable—and in fact, successful—basis
19 for removal jurisdiction. The Court denies Porter's motion for
20 attorney's fees.

21 D. Leave to Amend

22 Defendants argue the Court should not allow Porter to amend
23 her complaint because Porter's "Motion for Remand and her
24 counsel's declaration do not allude to any additional facts or
25 provide any hint" that Porter can sufficiently allege a
26 defamation claim. Opp'n to Mot. to Remand at 14.

27 A court should freely grant leave to amend "unless amendment
28 would be futile." Cook, Perkiss & Liehe, Inc. v. N. Cal.

1 Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990).
2 Amendment is not futile if a plaintiff can "cure the defect
3 requiring dismissal 'without contradicting any of the allegations
4 of [the] original complaint.'" Plascencia v. Lending 1st Mortg.,
5 583 F. Supp. 2d 1090, 1095 (N.D. Cal. 2008) (quoting Reddy v.
6 Litton Indus., Inc., 912 F. 2d 291, 296 (9th Cir. 1990)).

7 Plaintiff has failed to plead the alleged defamatory
8 statements with specificity and has failed to plead facts showing
9 that any statements were unprivileged and published to a third
10 party. But nothing in the complaint expressly contradicts the
11 existence of such facts. The Court grants Porter leave to amend
12 her defamation claim.

13
14 IV. ORDER

15 For the reasons set forth above, the Court DENIES
16 Plaintiff's motion to remand and GRANTS Defendants' motion to
17 dismiss without prejudice. If Plaintiff chooses to amend, she
18 must file her amended complaint within twenty days of the date of
19 this Order. Defendants must file their responsive pleadings
20 within twenty days thereafter. If Plaintiff chooses not to amend
21 her complaint, the case will proceed against Nationwide only on
22 the remaining claims and Nationwide must file its Answer within
23 thirty days from the date of this Order.

24 IT IS SO ORDERED.

25 Dated: February 27, 2017

26
27 
28 JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE