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4 IN THE UNITED STATES DISTRICT COURT  
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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7 KENNETH P. GRAUNSTADT JR,

No. C 10-03225 SI

8 Plaintiff,

**ORDER GRANTING MOTION TO  
AMEND COMPLAINT, GRANTING  
MOTION TO REMAND AND  
REMANDING TO CONTRA COSTA  
COUNTY SUPERIOR COURT**

9 v.

10 USS-POSCO INDUSTRIES,

11 Defendant.  
12 \_\_\_\_\_/

13 Plaintiff has filed a motion to amend the complaint and a motion to remand this action to state  
14 court. The motions are scheduled for hearing on October 7, 2010. Pursuant to Civil Local Rule 7-1(b),  
15 the Court finds this matter appropriate for resolution without oral argument, and hereby VACATES the  
16 hearing.

17 Having considered the papers submitted, and for good cause shown, the Court hereby GRANTS  
18 both plaintiff's motion to amend the complaint and plaintiff's motion to remand, and REMANDS this  
19 action to Contra Costa County Superior Court.  
20

21 **BACKGROUND**

22 Plaintiff Kenneth Graunstadt operates Delta Scrap and Salvage and Graunstadt Enterprises, a  
23 recycling facility. Compl. ¶¶ 1-2. In May 2009, plaintiff bought obsolete electrical equipment from  
24 Defendant USS-POSCO Industries ("UPI"), a steel company. *Id.* ¶¶ 9-10. Plaintiff alleges that at the  
25 time of the sale, he was not informed that the equipment contained waste oil contaminated with  
26 polychlorinated biphenyls ("PCBs"). *Id.* PCBs are toxic chemicals, and their release into the  
27 environment is prohibited by both state and federal statutes. *Id.* ¶ 9. Throughout plaintiff's interactions  
28 with UPI, UPI employee Mike Brevig was plaintiff's primary point of contact. *Id.* ¶¶ 9-10.

1 After plaintiff moved the equipment to his facilities and begin dismantling it, plaintiff's  
2 employees allegedly discovered waste oil leaking from the equipment, which contaminated plaintiff's  
3 property. *Id.* ¶ 11. Plaintiff's employees attempted to dispose of the oil by returning some to UPI and  
4 putting the rest in its on site motor oil receptacles. *Id.* ¶¶ 12-13. Fremouw Environmental Services  
5 ("Fremouw"), a waste oil recycler, picked up the oil from plaintiff and delivered it to Evergreen Oil  
6 ("Evergreen"). *Id.* ¶ 14. Evergreen, however, discovered that the oil contained PCBs in levels above  
7 the hazardous waste limits. *Id.* The oil allegedly contaminated both Fremouw and Evergreen's oil  
8 storage tanks and equipment, and plaintiff was forced to pay them damages. *Id.* ¶ 15. Furthermore,  
9 plaintiff's own facility allegedly was contaminated, incurring additional damages. *Id.* ¶ 16.

10 Plaintiff originally filed suit in Contra Costa County Superior Court, alleging six causes of  
11 action: (1) fraud/concealment, (2) negligence, (3) violation of Health and Safety Code § 25250.26, (4)  
12 violation of California Business & Professions Code § 17200, et seq., for fraudulent, unfair, and  
13 unlawful business practices, (5) trespass, and (6) nuisance. *Id.* ¶¶ 17-57. Plaintiff originally named  
14 only UPI and its two parent companies, United States Steel Corporation and Pohang Steel America  
15 Corporation,<sup>1</sup> as defendants. On July 23, 2010, UPI removed the case to federal court, predicating  
16 jurisdiction on diversity of citizenship. The grounds for removal were uncontested.

17 The instant motion seeks to amend the complaint, joining California resident Brevig as a  
18 defendant to the fraud cause of action. As joinder of Brevig would destroy diversity jurisdiction,  
19 plaintiff has also moved to remand this case to Contra Costa County Superior Court pursuant to 28  
20 U.S.C. § 1447(e).

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22 **LEGAL STANDARD**

23 If a plaintiff wishes to join additional defendants whose joinder would destroy federal diversity  
24 jurisdiction after removal from state court, the court may deny joinder, or permit joinder and remand  
25 to state court. 28 U.S.C. § 1447(e). "Congress added subsection (e) to § 1447 with the express purpose  
26 of taking advantage of the opportunity opened by removal from a state court to permit remand if a  
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<sup>1</sup>Plaintiff voluntarily dismissed these two parent companies on June 23, 2010.

1 plaintiff seeks to join a diversity-destroying defendant after removal.” *IBC Aviation Servs., Inc. v.*  
2 *Compañia Mexicana de Aviacion, S.A. de C.V.*, 125 F. Supp. 2d 1008, 1011 (N.D. Cal. 2000) (citing  
3 H.R. Rep. No. 100-889, at 72-73). Whether to permit joinder under § 1447(e) remains an issue of sound  
4 discretion for the court. *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998); *IBC*, 125 F.  
5 Supp. 2d at 1011; *Clinco v. Roberts*, 41 F. Supp. 2d 1080, 1082 (C.D. Cal. 1999). Generally, however,  
6 when weighing whether to permit joinder, a court should consider: (1) whether the party plaintiff seeks  
7 to join is required for just adjudication and would be joined under Federal Rule of Civil Procedure 19(a);  
8 (2) whether the statute of limitations would bar an action against defendant in state court; (3) whether  
9 the joinder is untimely, or there has been an unexplained delay in its request; (4) whether joinder is  
10 intended solely to destroy diversity jurisdiction, (5) whether the claim against the defendant appears  
11 valid, and (6) whether denial of joinder will prejudice the plaintiff. *IBC*, 125 F. Supp. 2d at 1011 (citing  
12 *Palestini*, 193 F.R.D. 654, 658 (S.D. Cal. 2000)). Any of the factors might prove decisive, and none is  
13 an absolutely necessary condition for joinder.

## 14 15 DISCUSSION

16 Defendant contends that joinder of Brevig should not be permitted under § 1447(e), primarily  
17 because plaintiff seeks to join Brevig solely for the improper purpose of defeating diversity jurisdiction.  
18 The factors relevant to determining whether joinder of a non-diverse defendant should be permitted are  
19 considered below.

### 20 21 I. Federal Rule of Civil Procedure 19(a)

22 Plaintiff does not address whether Brevig is a necessary party under Federal Rule of Civil  
23 Procedure 19(a).<sup>2</sup> Defendant argues that Brevig is not a necessary party because the case can proceed  
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25 <sup>2</sup>Plaintiff’s motion incorrectly argued that Rule 15, regarding amending a complaint as a matter  
26 of course, governs this case. As a result, he did not fully analyze the case under the § 1447(e) factors.  
27 As defendant correctly points out, however, joinder of diversity-destroying defendants is governed by  
28 § 1447(e), rather than Rule 15. *See* 28 U.S.C. § 1447(e) (“If after removal the plaintiff seeks to join  
additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny  
joinder, or permit joinder and remand the action to the State court.”); *Trotman v. United Parcel Serv.*,  
No. C-96-1168-VRW, 1996 WL 428333, at \*1 (N.D. Cal. July 16, 1996).

1 without Brevig, as his presence will not affect the merits of the case. Defendant also argues that because  
2 UPI acknowledges that it is responsible for Brevig's actions under respondeat superior, even if Brevig  
3 is not joined, the parties will not be subjected to inconsistent obligations nor will the Court's ability to  
4 accord complete relief be impaired.

5         When deciding whether to permit joinder of a non-diverse defendant, courts generally first  
6 consider whether the defendant would be joined under Rule 19(a). *IBC*, 125 F. Supp. 2d at 1011. Rule  
7 19(a), which governs the joinder of necessary parties, requires joinder of persons whose absence would  
8 preclude the grant of complete relief, impede their ability to protect their interests, or subject a party to  
9 the risk of incurring inconsistent obligations. Fed. R. Civ. P. 19(a); *IBC*, 125 F. Supp. 2d at 1011. A  
10 necessary party is one having an interest in the controversy, and who ought to be made a party to the  
11 action to enable the court to do complete justice and adjust the rights of the parties accordingly. *IBC*,  
12 125 F. Supp. 2d at 1011. "This standard [for the joinder of necessary parties] is met when failure to join  
13 will lead to separate and redundant actions [in different forums]." *Id.* (citing *CP Nat'l Corp. v.*  
14 *Bonneville Power Admin.*, 928 F.2d 905, 912 (9th Cir. 1991)). However, although joinder under  
15 § 1447(e) employs a Rule 19 analysis, joinder under § 1447(e) is in fact more permissive than joinder  
16 under Rule 19. *Id.* at 1011-12. Courts permit joinder of non-diverse defendants under § 1447(e) where  
17 the proposed defendants are closely related to the cause of action or where their absence would prevent  
18 the grant of complete relief between the parties. *Id.* at 1012 (citing *Red Buttons v. Nat'l Broad. Co.*, 858  
19 F. Supp. 1025, 1027 (C.D. Cal. 1994)).

20         In this case, plaintiff seeks to join the very employee, Brevig, whose conduct allegedly made UPI  
21 liable for fraud. If the facts alleged are true, UPI cannot be found liable for fraud without first finding  
22 that Brevig intentionally did not disclose that the equipment contained oil contaminated with PCBs,  
23 Brevig knew that the equipment did in fact contain oil contaminated with PCBs, Brevig intended to  
24 deceive plaintiff with this concealment, plaintiff reasonably relied on this misrepresentation, and  
25 plaintiff has suffered damages as a result. The factual nexus is so great, that denying joinder and forcing  
26 plaintiff to seek redress against Brevig in state court would lead to redundant litigation and potentially  
27 inconsistent results and obligations. The fraud claim against Brevig is closely related to that pending  
28 against UPI, and accordingly counsels in favor of joinder.

1 **II. Statute of Limitations**

2 As plaintiff acknowledges, the statute of limitations does not bar him from filing suit in state  
3 court. The events giving rise to plaintiff's cause of action against Brevig took place from April to June,  
4 2009, and there is a three-year statute of limitations for causes of action based on fraud. Cal. Civ. Proc.  
5 Code § 338(d).

6 Generally, if a statute of limitations does not bar a plaintiff from filing suit in state court, a  
7 federal court may be less inclined to permit joinder of a non-diverse defendant because he could still  
8 theoretically seek relief from state court. *See Clinco*, 41 F. Supp. 2d at 1083. But where, as here,  
9 requiring a plaintiff to litigate essentially identical issues turning on the same facts in two forums would  
10 waste judicial resources and invite the risk of inconsistent results, the fact that a statute of limitations  
11 has not yet tolled should not prevent joinder. *See, e.g., IBC*, 125 F. Supp. 2d at 1012. Accordingly, this  
12 factor does not count significantly against Plaintiff.

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14 **III. Untimely Joinder**

15 Courts generally consider the delay between removal from state court and a plaintiff's motion  
16 to amend in determining whether to permit joinder of a non-diverse defendant. *See, e.g., Lopez v. Gen.*  
17 *Motors Corp.*, 697 F.2d 1328, 1332 (9th Cir. 1983) (denying motion to amend complaint and join non-  
18 diverse defendant that was filed more than six months after removal and just days before the court's  
19 consideration of a summary judgment motion); *IBC*, 125 F. Supp. 2d at 1012. Courts also consider the  
20 procedural posture of the case. *See Righetti v. Shell Oil Co.*, 711 F. Supp. 531, 534 (N.D. Cal. 1989).  
21 For a motion to amend to be granted, it is important that the litigation has not yet made considerable  
22 progress. *See id.*

23 The Court finds that there has not been undue delay in joining Brevig. Plaintiff filed the instant  
24 motion to amend the complaint and motion to remand on August 12, 2010, less than one month after  
25 the case was removed to federal court on July 23, 2010. No discovery has taken place, no other motions  
26 have been filed by either party, and the first case management conference has not yet occurred. The  
27 motion is timely, which counsels in favor of joinder.

1 **IV. Motive for Joinder**

2 Defendant argues that Brevig should not be joined because plaintiff's sole motivation in  
3 attempting to join him is to defeat the federal court's diversity jurisdiction, so that the case will be  
4 remanded to state court. In support of this assertion, defendant points to the fact that plaintiff knew of  
5 Brevig's involvement in the case from the beginning of the dispute, but did not attempt to join Brevig  
6 as a defendant until UPI removed the case to federal court. Defendant also points to plaintiff's failure  
7 to offer an alternative explanation as to why he did not name Brevig as a defendant in the original  
8 complaint. Plaintiff responds that motive for joinder is a minor consideration among many in a court's  
9 decision to join a non-diverse party.

10 The motive of a plaintiff in seeking joinder of a non-diverse defendant is relevant to a court's  
11 decision as to whether to grant leave to amend his original complaint. *Desert Empire Bank v. Ins. Co.*  
12 *of N. Am.*, 623 F.2d 1371, 1376 (9th Cir. 1980) (superseded by 28 U.S.C. § 1447(e) (1996)); *IBC*, 125  
13 F. Supp. 2d at 1012. The joinder of non-diverse defendants for the sole purpose of divesting a federal  
14 court of diversity jurisdiction is improper, and courts should closely scrutinize such motives. *Desert*  
15 *Empire Bank*, 623 F.2d at 1376. On the other hand, "[s]uspicion of diversity destroying amendments  
16 is not as important now that § 1447(e) gives courts more flexibility in dealing with the addition of such  
17 defendants." *IBC*, 125 F. Supp. 2d at 1012 (citation omitted). Because of this, "when considering  
18 motive, courts often consider whether plaintiff is attempting unreasonably to delay proceedings." *Gunn*  
19 *v. Wild*, No. C-01-4320 VRW, 2002 WL 356642, at \*5 (N.D. Cal. Feb. 26, 2002) (citation omitted).

20 Because of the early stage of litigation in the present case, plaintiff is not attempting  
21 unreasonably to delay proceedings. There are no decisive motions pending before the Court, and the  
22 first case management conference has not yet occurred. Furthermore, plaintiff seeks to join an employee  
23 of UPI who is allegedly the source of UPI's liability for fraud. On the whole, this factor weighs in favor  
24 of allowing joinder of Brevig.

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26 **V. Validity of Claims**

27 If a plaintiff seeking joinder states meritorious claims against a non-diverse defendant, joinder  
28 is favored. *See, e.g., IBC*, 125 F. Supp. 2d at 1012; *Clinco*, 41 F. Supp. 2d at 1083; *Goodman v.*

1 *Travelers Ins. Co.*, 561 F. Supp. 1111, 1113-14 (N.D. Cal. 1983). Plaintiff seeks leave to amend his  
2 complaint to assert a claim for fraud against Brevig. Under California law, the elements of a fraud claim  
3 are: “(a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of  
4 falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e)  
5 resulting damage.” *Agric. Ins. Co. v. Superior Court*, 82 Cal. Rptr. 2d 594, 603 (Cal. Ct. App. 1999)  
6 (citation omitted).

7 Defendant does not dispute that plaintiff has asserted a valid fraud claim against Brevig. In his  
8 proposed first amended complaint, plaintiff alleges that Brevig intentionally did not disclose that the  
9 equipment contained waste oil contaminated with PCBs, Brevig knew that the equipment did in fact  
10 contain contaminated oil, Brevig intended to deceive plaintiff with this misrepresentation, plaintiff  
11 reasonably relied on this misrepresentation, and plaintiff has suffered damages as a result. Plaintiff has  
12 thus provided information sufficient to state a valid, potentially meritorious fraud claim against Brevig.  
13 Given the fact that UPI’s potential liability for fraud is derivative from its agent’s, this counsels heavily  
14 in favor of allowing joinder.

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16 **VI. Prejudice to Plaintiff**

17 Finally, a court must consider whether significant prejudice to plaintiff would result from the  
18 denial of joinder. Significant prejudice to plaintiff results where claims against proposed non-diverse  
19 defendants are so intimately connected to those against an original defendant that denial of joinder  
20 would force a plaintiff to choose whether to pursue redundant litigation in another forum at the risk of  
21 inconsistent results or forego its valid claims. *See IBC*, 125 F. Supp. 2d at 1013. The prospect of such  
22 prejudice befalling a plaintiff should weigh in favor of joinder. *Id.*

23 Plaintiff would suffer significant prejudice if joinder of Brevig were denied. Denying plaintiff’s  
24 motion would force him to forego his valid claim against Brevig, or begin wasteful and redundant  
25 litigation on the same issues in state court at the risk of inconsistent results. At the same time, little  
26 prejudice to defendant would result from permitting joinder. As discussed above, the parties have not  
27 begun conducting discovery, the first case management conference has not yet occurred, and no other  
28 motions are currently pending before the court. The prejudice to plaintiff which would result if the

1 Court denied his motion therefore exceeds any that might fall to defendant if the Court granted the  
2 motion. For this reason, this factor counsels in favor of joining Brevig.

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4 **VII. Balancing of the Six Factors**

5 Weighing the six factors collectively, the Court finds that permitting the joinder of Brevig is  
6 warranted. Although the statute of limitations has not tolled, the other five factors weigh in favor of  
7 joinder. Brevig is a necessary party to the litigation, and joinder would thus conserve judicial resources  
8 and avoid the risk of inconsistent results in different forums. Plaintiff's motion to amend the complaint  
9 was not unreasonably delayed or untimely. Plaintiff does not have an improper purpose for joining  
10 Brevig, as plaintiff is not attempting to unreasonably delay proceedings. In addition, as there appears  
11 to be potential evidence of Brevig's alleged fraud, plaintiff has a valid claim against Brevig. Finally,  
12 defendant would not be significantly prejudiced by joinder and remand to state court. The Court finds  
13 that Brevig should be joined as a defendant.

14

15 **CONCLUSION**

16 For the foregoing reasons and for good cause shown, the Court hereby GRANTS plaintiff's  
17 motion to amend the complaint (Docket No. 8), and accordingly REMANDS to the Contra Costa County  
18 Superior Court (Docket No. 9).


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20 **IT IS SO ORDERED.**

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22 Dated: October 5, 2010

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SUSAN ILLSTON  
United States District Judge

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