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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER KRIVANEK,  
Plaintiff,  
v.  
HUNTSWORTH GROUP LLC, et al.,  
Defendants.

Case No. 15-cv-02466-HSG

**ORDER GRANTING PLAINTIFF'S  
MOTION TO REMAND AND DENYING  
DEFENDANTS' MOTION FOR  
JUDGMENT ON THE PLEADINGS**

Re: Dkt. Nos. 13, 15, 21

Pending before the Court are Plaintiff Jennifer Krivanek's motion to remand and Defendants Grayling Communications Inc., Atomic Communications LLC, Huntsworth Group LLC, and Alison Schwartz's motion for judgment on the pleadings. For the reasons articulated below, Plaintiff's motion is GRANTED and Defendants' motion is DENIED WITHOUT PREJUDICE.

**I. BACKGROUND**

Plaintiff filed this action in San Francisco County Superior Court on April 3, 2015. Dkt. No. 1, Ex. A. On April 22, 2015, Plaintiff filed her first amended complaint ("FAC"). Dkt. No. 1, Ex. B. For the purposes of determining diversity jurisdiction, Plaintiff and Defendant Schwartz are both citizens of California, while Defendants Grayling Communications Inc., Atomic Communications LLC, and Huntsworth Group LLC are not citizens of California. See FAC ¶ 4; Dkt. No. 1 ¶¶ 7-17.

In the FAC, Plaintiff alleges a variety of claims relating to her employment termination. At the time of her termination, Plaintiff allegedly served as the "U.S. Head of Human Resources" at Defendant Grayling Communications Inc. FAC ¶ 10. Of most relevance to the pending motions are Plaintiff's seventh cause of action for defamation and eighth cause of action for

1 intentional infliction of emotional distress, FAC ¶¶ 57-77, which are the only claims asserted  
2 against Defendant Schwartz. In support of her claim for defamation, Plaintiff alleges the  
3 following:

4 In or around May 2014, GRAYLING hired SCHWARTZ as  
5 managing director of its San Francisco office. . . . KRIVANEK  
6 became aware that SCHWARTZ was making false, negative  
7 comments about her to other GRAYLING employees both verbally  
8 and in writing. SCHWARTZ repeatedly falsely accused  
9 KRIVANEK of not performing her job duties in a competent  
10 manner and suggested that KRIVANEK was not competent to  
11 perform her job duties. SCHWARTZ also falsely accused  
12 KRIVANEK of engaging in unprofessional conduct in the  
13 workplace with third parties. SCHWARTZ further falsely accused  
14 KRIVANEK of bullying and beating up her subordinate employees.  
15 . . . SCHWARTZ also sent KRIVANEK a series of emails  
16 containing harsh criticism and accusations. In one string of emails,  
17 she accused KRIVANEK of neglecting to follow up on an  
18 ergonomics evaluation that had been done the previous year, even  
19 though many of the issues that were the subject of the evaluation  
20 had become moot as a result of the merger. SCHWARTZ continued  
21 to criticize KRIVANEK in the presence of other employees and  
22 GRAYLING management, saying things like “the company is shit  
23 because of HR.”

24 FAC ¶¶ 12-14.

25 Plaintiff further alleges that the above allegations describe a series of “defamatory  
26 publications [that] consisted of oral and written, knowingly false and unprivileged  
27 communications, tending directly to injury Plaintiff and Plaintiff’s personal, business, and  
28 professional reputation.” *Id.* ¶ 61. Moreover, Plaintiff alleges that Defendants made the asserted  
defamatory publications “maliciously . . . with the wrongful intention of injuring Plaintiff, for an  
improper and evil motive amounting to malice.” *Id.* ¶ 70.

In support of her claim for intentional infliction of emotional distress, Plaintiff alleges that  
“[t]hrough the outrageous conduct described above, Defendants acted with the intent to cause, and  
with reckless disregard for the probability of causing Plaintiff to suffer severe emotional distress.”  
*Id.* ¶ 74.

## II. DISCUSSION

In the present motions, Plaintiff contends that this Court has no jurisdiction to rule on  
Defendants’ motion because the requirements of diversity jurisdiction are not satisfied, and that

1 the action must therefore be remanded to state court. Defendants argue that remand is  
2 inappropriate because Defendant Schwartz was fraudulently joined in order to defeat diversity  
3 jurisdiction.

4 **A. Motion to Remand**

5 **1. Legal Standard**

6 “Except as otherwise expressly provided by Act of Congress, any civil action brought in a  
7 State court of which the district courts of the United States have original jurisdiction, may be  
8 removed” to federal court. 28 U.S.C. § 1441(a). The Ninth Circuit has held that “[f]ederal  
9 jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.”  
10 *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Because of this “strong presumption  
11 against removal jurisdiction,” a defendant “always has the burden of establishing that removal is  
12 proper.” *Id.* (internal quotation marks omitted).

13 28 U.S.C. § 1332(a)(1) provides federal jurisdiction over cases in which there is complete  
14 diversity of citizenship between the parties and the amount in controversy exceeds \$75,000. An  
15 exception to the requirement of complete diversity exists where a non-diverse defendant has been  
16 “fraudulently joined.” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).  
17 “Joinder of a non-diverse defendant is deemed fraudulent, and the defendant’s presence in the  
18 lawsuit is ignored for purposes of determining diversity, if the 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.” *Id.* (internal quotation marks omitted). There is a presumption against finding fraudulent  
21 joinder, and defendants “carry a heavy burden of persuasion” in order to prevail. *Plute v.*  
22 *Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001). When resolving  
23 claims of fraudulent joinder, the Court may consider evidence outside of the pleadings. *See*  
24 *Morris*, 236 F.3d at 1068.

25 District courts in this circuit have further elaborated upon the standard for fraudulent  
26 joinder. Specifically, “a district court assessing fraudulent joinder examines whether there is any  
27 possibility that plaintiff will be able to establish a cause of action against the allegedly non-diverse  
28 party.” *Calero v. Unisys Corp.*, 271 F. Supp. 2d 1172, 1176 (N.D. Cal. 2003). Moreover, “[a]ll

1 doubts concerning the sufficiency of a cause of action because of inartful, ambiguous or  
2 technically defective pleading must be resolved in favor of remand, and a lack of clear precedent  
3 does not render the joinder fraudulent.” *Archuleta v. Am. Airlines, Inc.*, No. 00-cv-01286-MMM,  
4 2000 WL 656808, at \*4 (C.D. Cal. 2000) (internal citations omitted). In sum, “[a] defendant will  
5 be deemed fraudulently joined only if, after all disputed questions of fact and all ambiguities in the  
6 controlling state law are resolved in plaintiff’s favor, plaintiff could not recover against the non-  
7 diverse party.” *Calero*, 271 F. Supp. 2d at 1176 (internal quotation marks omitted).

## 8 **2. Fraudulent Misjoinder**

9 Defendants first contend that Defendant Schwartz was fraudulently “misjoined” because  
10 she “had **nothing** to do with the decision to terminate Plaintiff’s employment.” Dkt. No. 18 (“Def.  
11 Opp.”) at 1 (emphasis in original). The Ninth Circuit has not recognized the theory of “fraudulent  
12 misjoinder,” and the Court declines to apply it here. *See Brazina v. Paul Revere Life Ins. Co.*, 271  
13 F. Supp. 2d 1163, 1172 (N.D. Cal. 2003) (“Defendants seem to be relying on the theory that  
14 emerged from *Tapscott v. MS Dealer Service Corp.*, in which the Eleventh Circuit ruled that  
15 claims could be considered fraudulently joined when they are misjoined. . . . The Ninth Circuit has  
16 not found occasion to address *Tapscott*, and no other circuit has adopted its rationale.”); *Osborn v.*  
17 *Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004) (declining to apply fraudulent  
18 misjoinder theory and concluding “that the better rule would require [Defendant] to resolve the  
19 claimed misjoinder in state court, and then, if that court severed the case and diversity then  
20 existed, it could seek removal of the cause to federal court”).<sup>1</sup>

## 21 **3. Fraudulent Joinder**

22 Defendants do not dispute that Defendant Schwartz and Plaintiff are both citizens of  
23 California for jurisdictional purposes. As a result, there is not complete diversity between the  
24 parties. However, Defendants contend that the fraudulent joinder exception to complete diversity  
25 is satisfied here with respect to Plaintiff’s claims against Defendant Schwartz for defamation and  
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27 <sup>1</sup> The Court further notes that, based on the allegations in the complaint, Defendant Schwartz’s  
28 allegedly defamatory statements occasioned Plaintiff’s medical leave, on which her termination  
was ultimately based, and therefore appear directly related to Plaintiff’s unlawful termination  
claim. *See* FAC ¶¶ 14-19.

1 intentional infliction of emotional distress.

2 **i. Defamation**

3 To state a claim for defamation under California law, a plaintiff must allege “(a) a  
4 publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural  
5 tendency to injure or that causes special damage.” *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007). A  
6 false publication is one that expresses provable facts, not merely opinions. *See Gregory v.*  
7 *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 604 (1976).

8 “Defamation is effected by either . . . libel [or] slander.” Cal. Civ. Code § 44. “Libel is a  
9 false and unprivileged publication by writing, printing, picture, effigy, or other fixed  
10 representation . . . , which exposes any person to hatred, contempt, ridicule, or obloquy, . . . or  
11 which has a tendency to injure him in his occupation.” *Id.* § 45. “Slander is a false and  
12 unprivileged publication, orally uttered, . . . which,” among other things, “[t]ends directly to injure  
13 [a person] in respect to his office, profession, trade or business.” *Id.* § 46.

14 In an action for libel, “[t]he general rule is that the words constituting an alleged libel must  
15 be specifically identified, if not pleaded verbatim, in the complaint.” *Kahn v. Bower*, 232 Cal.  
16 App. 3d 1599, 1612 n.5 (1991). But in an action for slander “it may be sufficient for the plaintiff  
17 to simply allege the substance of the statement.” *Charlson v. DHR Int’l Inc.*, No. 14-cv-03041-  
18 PJH, 2014 WL 4808851, at \*6 (N.D. Cal. Sept. 26, 2014).

19 Defendants argue that all of the statements allegedly made by Defendant Schwartz are  
20 privileged and therefore cannot be defamatory. California Civil Code § 47(c) creates a qualified  
21 privilege for a publication that is made:

22 In a communication, without malice, to a person interested therein,  
23 (1) by one who is also interested, or (2) by one who stands in such a  
24 relation to the person interested as to afford a reasonable ground for  
25 supposing the motive for the communication to be innocent, or (3)  
26 who is requested by the person to give the information. This  
27 subdivision applies to and includes a communication concerning the  
28 job performance or qualifications of an applicant for employment,  
based upon credible evidence, made without malice, by a current or  
former employer of the applicant to, and upon request of, one whom  
the employer reasonably believes is a prospective employer of the  
applicant.

The privilege applies “to communications by one employee of the defendant to another

1 employee of the defendant where the statement is made without malice.” *Abiola v. ESA Mgmt.,*  
2 *LLC*, No. 13-cv-03496-JCS, 2014 WL 988928, at \*9 (N.D. Cal. Mar. 3, 2014).

3 Plaintiff argues that the allegedly defamatory publications were made with malice and are  
4 therefore unprivileged.<sup>2</sup> *See* Cal. Civ. Code § 47(c). While Defendants agree with the general  
5 principle that allegations of malice defeat the privilege, Defendants argue that Plaintiff has not  
6 sufficiently alleged malice in the FAC. Defendants further assert that there are a number of other  
7 technical problems with the pleading of Plaintiff’s defamation claim against Defendant Schwartz,  
8 namely: (1) failure to allege who made or heard the alleged statements; (2) failure to allege when  
9 the alleged statements were made; and (3) failure to adequately allege the substance of the alleged  
10 statements. Defendants also argue that the only specifically alleged statement in the FAC is not  
11 provably false.

12 While the Court agrees that Defendant Schwartz’s statement that “the company is shit  
13 because of HR,” FAC ¶ 14, is likely not provably false because it is an opinion incapable of  
14 objective measurement, the Court finds that Defendants have not carried their burden to  
15 demonstrate that there is *no possibility* that Plaintiff will be able to establish a cause of action for  
16 defamation against Defendant Schwartz. Defendants’ arguments go to “inartful, ambiguous, or  
17 technically defective pleading” and therefore are not sufficient to show fraudulent joinder.  
18 *Archuleta*, 2000 WL 656808, at \*4. These pleading problems are better dealt with by the state  
19 court on remand. Should the claims against non-diverse Defendant Schwartz thereafter be  
20 dismissed, Defendants may again seek to remove the case to this Court pursuant to 28 U.S.C.  
21 § 1332(a)(1).

22 **ii. Intentional Infliction of Emotional Distress**

23 The parties agree that Plaintiff’s claim for intentional infliction of emotional distress  
24 against Defendant Schwartz is entirely derivative of her defamation claim. *See* Dkt. No. 15 (“Pl.

25 \_\_\_\_\_  
26 <sup>2</sup> Plaintiff also argues that the allegedly defamatory statements “are not privileged because they  
27 were not reasonably calculated to further a common interest.” Dkt. No. 20 (“Pl. Reply”) at 1.  
28 However, because Plaintiff raises this argument for the first time in her reply brief, the Court does  
not consider it. *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003) (“[W]e decline  
to consider new issues raised for the first time in a reply brief.”). Accordingly, Defendants’  
motion for leave to file a sur-reply is DENIED AS MOOT. *See* Dkt. No. 21.

1 Mot.”) at 12-13; Def. Opp. at 13. Accordingly, the Court finds that this claim is also not  
2 fraudulently joined for the same reasons articulated above in relation to Plaintiff’s defamation  
3 claim.

4 **4. Costs**

5 Plaintiff requests an award of costs, including attorney’s fees, if the Court grants her  
6 motion to remand. Under the applicable statute, “[a]n order remanding the case may require  
7 payment of just costs and any actual expenses, including attorney fees, incurred as a result of the  
8 removal.” 28 U.S.C. § 1447(c). A district court has broad discretion under this provision. *See*  
9 *Moore v. Permanente Med. Grp., Inc.*, 981 F.2d 443, 447 (9th Cir. 1992).

10 The Court finds that an award of costs and fees is not warranted in this case, given that the  
11 removal was based on a reasonable and supported interpretation of unsettled California law.  
12 Therefore, Plaintiff’s request for costs and fees is DENIED.

13 **B. Motion For Judgment On The Pleadings**

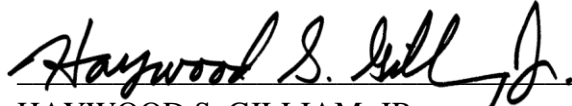
14 As described above, Defendant Schwartz was not fraudulently joined. Therefore, because  
15 complete diversity is lacking, this Court does not have subject matter jurisdiction over this action.  
16 Accordingly, the Court lacks jurisdiction to resolve Defendants’ motion for judgment on the  
17 pleadings and denies the motion without prejudice.

18 **III. CONCLUSION**

19 For the foregoing reasons, the court hereby GRANTS Plaintiff’s motion to remand and  
20 DENIES WITHOUT PREJUDICE Defendants’ motion for judgment on the pleadings. It is  
21 ORDERED that this case is remanded under 28 U.S.C. § 1447(c) to the Superior Court of the City  
22 and County of San Francisco. The Clerk of this Court shall transmit forthwith a certified copy of  
23 this order to the Clerk of the Superior Court and close this case displaying all pending motions as  
24 resolved.

25 **IT IS SO ORDERED.**

26 Dated: September 9, 2015

27   
28 HAYWOOD S. GILLIAM, JR.  
United States District Judge