UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMBRIES PICHON,

Plaintiff,

v.

THE HERTZ CORPORATION, et al.,

Defendants.

Case No. 17-cv-02391-EMC

ORDER DENYING PLAINTIFF'S MOTION TO REMAND; GRANTING DEFENDANTS' MOTION TO DISMISS; AND FINDING DEFENDANTS' MOTION TO STRIKE MOOT

Docket Nos. 9, 13, 21

Plaintiff Ambries Pichon initiated this lawsuit against Defendants The Hertz Corporation and Steven Chua, a Hertz employee, in state court. Mr. Pichon asserted a claim for wrongful termination and related state claims. Hertz did not remove the case to federal court after Mr. Pichon filed his original complaint. Rather, it was only after Mr. Pichon filed an amended complaint, in which he changed the claims that he asserted against Mr. Chua, that Hertz removed the case to federal court. Hertz asserted that the Court has diversity jurisdiction over the case because, even though Mr. Chua is, like Mr. Pichon, a citizen of California, Mr. Chua's citizenship should be disregarded because he was fraudulently joined to the lawsuit.

Currently pending before the Court are three motions: (1) Mr. Pichon's motion to remand the case back to state court, (2) Mr. Chua's motion to dismiss, and (3) Mr. Chua's motion to strike. Having considered the parties' briefs as well as the oral argument of counsel, the Court hereby **DENIES** the motion to remand and **GRANTS** the motion to dismiss. The Court finds the motion to strike moot.

I. FACTUAL & PROCEDURAL BACKGROUND

A. Original Complaint

In his original complaint, filed in January 2017, Mr. Pichon sued both Hertz and Mr. Chua. The main factual allegations in the complaint were as follows:

- Mr. Pichon is over the age of 40. *See* Compl. ¶ 1. He was an employee of Hertz (a mechanic initially and later a supervisor and manager), and Mr. Chua was his supervisor (the general manager). *See* Compl. ¶¶ 1, 4, 10.
- During his employment with Hertz, Mr. Pichon complained about safety and security issues. Mr. Chua was not responsive to the complaints and even chastised Mr. Pichon about the complaints.[1] *See, e.g.*, Compl. ¶¶ 11-15 (discussing incidents in the summer of 2016).
- In or about May 2016, Mr. Chua entered Mr. Pichon's office and asked, "'When are you retiring?'" After Mr. Pichon answered, "'I don't know . . . I've got some more years to go,'" Mr. Chua said, "'You're going to be about the age of retirement, right?'" Compl. ¶ 16.
- On another occasion, Mr. Chua approached Mr. Pichon and asked, "'So, Amber is going to be retiring *too*?'"[2] Compl. ¶ 17.
- In or about June 2016, Mr. Pichon and some of his mechanics were outside watching the

[1] In support of his opposition to the motion to dismiss, Mr. Pichon has provided a declaration from a co-worker, in which she testifies that she heard Mr. Chua stating that he wanted to get rid of Mr. Pichon because of Mr. Pichon's complaints about safety. *See* Cole Decl. ¶ 4 ("I overheard [Mr.] Chua speaking, a few feet away from the door, 'I'm tired of hearing from [Mr. Pichon] about the awning [to protect a work area from the rain]. I don't want to spend the money. The best thing to do is get rid of him. . . . I'd rather just get rid of him . . . then I don't have to buy the awning."). Hertz has moved to strike the Cole declaration to the extent Mr. Pichon relies on it in opposition to the motion to dismiss – *i.e.*, because the declaration is beyond the four corners of the complaint. *See* Docket No. 21 (motion to strike). In response, Mr. Pichon argues that the Court should still consider the evidence as it informs whether he should be permitted to amend. The Court agrees.

[2] Mr. Pichon has also relied on the Cole declaration to support an age discrimination theory. *See* Cole Decl. ¶¶ 5-7 (testifying that Mr. Chua asked her several times when she was going to retire and that Mr. Chua repeatedly stated that the Hertz employees who move cars (the "hikers") were too old). As noted above, Hertz has moved to strike the Cole declaration while Mr. Pichon asserts that the declaration may still be considered with respect to the prospect of amendment. The Court agrees.

"hikers" moving cars. Most of the hikers were from 40 to 90 years old. Mr. Chua joined the group watching and said, "'We've got to get rid of these guys. They're too old. Look at them.'" Compl. ¶ 18.

- In August 2016, Mr. Chua informed Mr. Pichon that he was terminating Mr. Pichon's employment with Hertz. *See* Compl. ¶¶ 20- 21. The pretext for the termination was that Mr. Pichon had allowed mechanics to work on their vehicles in the shop after hours, even though it was a practice that Hertz had allowed for years. *See* Compl. ¶ 19.

Based on, *inter alia*, the above allegations, Mr. Pichon pled the following claims, all of which are asserted against both Hertz and Mr. Chua:

(1) wrongful termination in violation of public policy, *see* Compl. ¶ 24 (referring to the policy in California Labor Code § 6310 which prohibits an employer from terminating an employee because he has made a bona fide complaint of unsafe working conditions[3]);

(2) violation of California Labor Code § 6310; and

(3) age discrimination in violation of California Government Code § 12940 *et seq.*

Mr. Pichon served the original complaint on Hertz, but (apparently) not Mr. Chua. Hertz did not at that time remove the case to federal court.

B. First Amended Complaint ("FAC")

The following month, in February 2017, Mr. Pichon amended his complaint. The factual allegations largely remained the same but the claims for relief were modified. The claims asserted are now as follows:

(1) wrongful termination in violation of public policy (against Hertz only);

(2) violation of California Labor Code § 6310 (against Hertz only);

(3) age discrimination in violation of the California Fair Employment and Housing Act ("FEHA") (against Hertz only);

(4) age harassment in violation of FEHA (against both Hertz and Mr. Chua);

[3] Section 6310 provides in relevant part: "No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following: (1) Made an oral or written complaint to . . . his or her employer, or his or her representative." Cal. Lab. Code § 6310(a)(1).

(5) intentional infliction of emotional distress (against both Hertz and Mr. Chua).

Hertz knew that Mr. Pichon was going to file a FAC but (apparently) was never served with a copy of the pleading. *See* Docket No. 1 (Not. of Removal ¶ 3) (alleging that the FAC was purportedly served by certified mail but was never received). Hertz therefore contacted Mr. Pichon and he provided a copy by e-mail on March 29, 2017. Hertz answered the FAC and then, on April 26, 2017, removed the case to federal court. According to Hertz, removal was predicated on diversity jurisdiction because, even though Mr. Chua is a citizen of California (like Mr. Pichon), Mr. Chua was fraudulently joined to the case.

It appears that Mr. Pichon did not serve any complaint on Mr. Chua until May 8, 2017. *See* Docket No. 8 (proof of service).

II. MOTION TO REMAND

There are two primary motions currently pending before the Court: (1) Mr. Pichon's motion to remand and (2) Mr. Chua's motion to dismiss. The Court addresses the remand motion first because, if the Court does find that a remand is warranted, then the state court should address the merits of the motion to dismiss.

A. Timeliness of Removal

As an initial matter, Mr. Pichon argues that remand is proper because Hertz's removal was untimely. Under 28 U.S.C. § 1446, a notice of removal "shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b)(1). Mr. Pichon notes that he served the original complaint on Hertz on January 11, 2017. *See* Brown Decl. ¶ 9. Therefore, according to Mr. Pichon, Hertz should have removed the case no later than February 10, 2017. Hertz, however, did not remove until April 26, 2017.

In response, Defendants assert that the original complaint was not removable. *See* Docket No. 1 (Not. of Removal ¶ 2) ("Plaintiff served the initial Complaint on Hertz alone. Plaintiff never served that Complaint on individual defendant Steven Chua. The original Complaint was not removable."). Defendants point out that, under § 1446, "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the

defendant, through service or otherwise, of a copy of an amended pleading . . . or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3). Because Hertz did not get a copy of the amended complaint until March 29, 2017, Defendants maintain that Hertz's removal on April 26, 2017, was timely. The Court agrees.

Because Hertz removed within 30 days of receiving the FAC, the first complaint that was removable, its removal was timely. Under § 1446, "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading . . . or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3).

Mr. Pichon properly contends the removal was untimely because Hertz could have removed the original complaint. Mr. Pichon contends it was removable based on an e-mail (dated February 1, 2017) that defense counsel wrote which he stated, *inter alia*, as follows: "As I mentioned, if we can agree that Mr. Pichon will drop Mr. Chua from the Complaint – we will agree not to remove it to federal court based upon diversity of citizenship even though there will then be complete diversity between Mr. Pichon and Hertz." Brown Decl., Ex. E (e-mail dated February 1, 2017, from defense counsel). However, the e-mail does not expressly state that defense counsel believed the complaint, as pled, was removable. Nor is that belief necessarily implicit in the e-mail. The e-mail can fairly be read as simply stating that, if Mr. Chua were dropped from the complaint, Hertz could remove to federal court based on diversity, but it would not do so – even though it legally could – given Mr. Pichon's concession of dropping Mr. Chua.

In fact, Hertz had a legitimate basis for not removing the original complaint. As noted above, the original complaint contained three claims, each of which was asserted against both Hertz and Mr. Chua: (1) wrongful termination in violation of public policy; (2) violation of California Labor Code § 6310; and (3) age discrimination in violation of California Government Code § 12940 *et seq.* While there is case law holding that a supervisor *cannot* be held individually liable for (1) a claim for wrongful termination in violation of public policy or for (3) a claim for

age discrimination in violation of FEHA,[4] there is case law indicating that a supervisor *can* be held individually liable for (2) a claim for violation of California Labor Code § 6310. *See, e.g.*, *De La Torre v. Progress Rail Servs. Corp.*, No. CV 15-4526 FMO (GJSx), 2015 U.S. Dist. LEXIS 100784, at *14 (C.D. Cal. July 31, 2015) (stating that "it is not obvious under settled California law that individual liability does not exist under § 6310"); *Thompson v. GenOn Energy Servs., LLC*, No. C13-0187 TEH, 2013 U.S. Dist. LEXIS 34319, at *11-13 (N.D. Cal. Mar. 12, 2013) ("declin[ing], on a motion to remand, to divine how the California courts would handle the question of individual liability under § 6310, even if the great weight of the case law considering other labor and discrimination provisions reserves liability for the employer"; concluding that "it is [not] obvious under the settled law of California that an action cannot proceed against individual supervisors under Labor Code § 6310"); *Boone v. Carlsbad Cmty. Church*, No. 08-CV-0634 W (AJB), 2008 U.S. Dist. LEXIS 44675, at *21 (S.D. Cal. June 6, 2008) (stating that prior case law "does not foreclose individual liability under California Labor Code section 6310"). So long as there was one plausible claim against Mr. Chua, then Hertz could not argue fraudulent joinder. Only after Mr. Pichon dropped the § 6310 claim against Mr. Chua as part of the amended complaint did Hertz have a basis for asserting fraudulent joinder. *See* 16-107 Moore's Fed. Prac. – Civ. § 107.140[3][a][ii][B] (explaining that "[a] case that is not removable based on the plaintiff's initial pleading may become removable if the plaintiff takes some voluntary action that affects the jurisdictional facts" – *e.g.*, "if the plaintiff dismisses a nondiverse defendant").

Accordingly, the removal was timely. The Court now turns to the substantive issue of whether removal was proper based on the theory that Mr. Chua was fraudulently joined to the case.

[4] *See Miklosy v. Regents of Univ. of Cal.*, 44 Cal. 4th 876, 900-01 (2008) (concluding that "the common law *Tameny* cause of action for wrongful termination in violation of public policy lies only against an employer" and not an individual because "[a]n individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which an employer commits that tort") (emphasis omitted); *Reno v. Baird*, 18 Cal. 4th 640, 645-47 (1998) (holding that FEHA's provisions regarding employment discrimination applied only to employers, in contrast to provisions regarding harassment which did apply to individuals as well as employers).

B. Fraudulent Joinder

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction[] may be removed by the defendant." 28 U.S.C. § 1441(a). "Because of the 'Congressional purpose to restrict the jurisdiction of the federal courts on removal,' the [removal] statute is strictly construed, and federal jurisdiction 'must be rejected if there is any doubt as to the right of removal in the first instance.'" *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996). The defendant has the burden of establishing that removal was proper – *i.e.*, that there is subject matter jurisdiction. *See id.*

In the instant case, Hertz removed based on diversity jurisdiction. Although Mr. Pichon sued a nondiverse defendant – Mr. Chua – Hertz argued that his citizenship could be ignored because he was fraudulently joined to the case.

Typically, "[i]n a fraudulent joinder claim, a diverse defendant contends that a plaintiff joined a non-diverse defendant against whom the plaintiff has no real claim in order to defeat federal [diversity] jurisdiction." *Mullin v. GM, LLC*, No. CV 15-7668-DMG (RAOx), 2016 U.S. Dist. LEXIS 2560, at *9 n.3 (C.D. Cal. Jan. 7, 2016). That being said, technically, "fraudulent joinder" is a term of art. *See Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). In other words, there need not be a conscious effort on the part of the plaintiff to defeat diversity jurisdiction. *See Rangel v. Bridgestone Retail Operations, LLC*, 200 F. Supp. 3d 1024, 1030 (C.D. Cal. 2016) (stating that "[f]raudulent joinder is a term of art and does not implicate a plaintiff's subjective intent"). "Joinder of a non-diverse defendant is deemed fraudulent, and the defendant's presence in the lawsuit is ignored for purposes of determining diversity, 'if the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.'" *Morris*, 236 F.3d at 1067. As explained by the Seventh Circuit, "[a]lthough false allegations of jurisdictional fact may make joinder fraudulent, in most cases fraudulent joinder involves a claim against an in-state defendant that simply has no chance of success, whatever the plaintiff's motives." *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992).

Obviousness is critical to a fraudulent joinder assessment. Indeed, "the inability to make

the requisite decision in a summary manner itself points to the inability of the removing party to carry its burden." *Allen v. Boeing Co.*, 784 F.3d 625, 634 (9th Cir. 2015) (internal quotation marks omitted). If a plaintiff has a colorable claim against a nondiverse defendant, then there is no fraudulent joinder. *See Jimenez v. Witron Integrated Logistics, Inc.*, No. CV 15-00605 DSF (PLAx), 2015 U.S. Dist. LEXIS 157444, at *3 (C.D. Cal. Nov. 20, 2015) (stating that "[t]he question is whether plaintiff has a colorable claim against the alleged sham defendants, not whether the defendants can propound defenses to the cause of action"); *see also Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1333 (11th Cir. 2011) (noting that the standard for fraudulent joinder is different from the standard applicable to a 12(b)(6) motion to dismiss; the latter requires plausibility while the former only possibility).

Notably, there is a "'general presumption against fraudulent joinder.'" *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1046 (9th Cir. 2009), and "[f]raudulent joinder must be proven by clear and convincing evidence." *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). Furthermore, "'all disputed questions of fact and all ambiguities in the controlling state law are [to be] resolved in plaintiff's favor.'" *Gupta v. IBM*, No. 5:15-cv-05216-EJD, 2015 U.S. Dist. LEXIS 169088, at *5 (N.D. Cal. Dec. 16, 2015); *see also Rankankan v. JPMorgan Chase Bank, N.A.*, No. 16-cv-01694-JCS, 2016 U.S. Dist. LEXIS 81365, at *14 (N.D. Cal. June 22, 2016) (stating that "'[a]ll doubts concerning the sufficiency of a cause of action because of inartful, ambiguous or technically defective pleading must be resolved in favor of remand, and a lack of clear precedent does not render the joinder fraudulent'"); *cf. Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (stating that "a defendant must have the opportunity to show that the individuals joined in the action cannot be liable on any theory").[5]

In the instant case, only two claims are now being asserted against Mr. Chua (as stated in the FAC): (1) age harassment in violation of FEHA and (2) intentional infliction of emotional distress ("IIED"). Defendants argue, and the Court agrees, that both of these claims are obviously without merit and there is no indication that Mr. Pichon is able to amend to cure any deficiencies.

[5] In the instant case, Mr. Pichon does not argue that he should be permitted to amend again to add the § 6310 claim against Mr. Chua, which he previously dismissed.

Accordingly, the joinder of Mr. Chua is fraudulent for jurisdictional purposes.

1. Age Harassment (FEHA)

California Government Code § 12940 provides that "[i]t is an unlawful employment practice . . . [f]or an employer . . . , because of . . . age . . . , to harass an employee." Cal. Gov't Code § 12940(j)(1). In order to have a viable age harassment claim, a plaintiff must show that the "the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Landucci v. State Farm Ins. Co.*, 65 F. Supp. 3d 694, 703 (N.D. Cal. 2014). "With respect to the pervasiveness of harassment, courts have held that an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." *Lyle v. Warner Bros. Televis. Prods.*, 38 Cal. 4th 264, 283 (2006). Thus, "when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions." *Id.* at 284. In *Hughes v. Pair*, 46 Cal. 4th 1035 (2009), the California Supreme Court held that the plaintiff had failed to plead pervasive sexual harassment because "the alleged sexual harassment consisted only of comments defendant made to plaintiff during a single telephone conversation and a brief statement defendant made to plaintiff in person later that day during a social event at a museum." *Id.* at 1048.

In the instant case, Mr. Pichon does not make any real contention that the alleged age harassment was severe; rather, he takes the position that the harassment was pervasive. The problem for Mr. Pichon is that he has simply pointed to a handful of comments made by Mr. Chua – and this is so even when the Court includes the comments allegedly made by Mr. Chua as stated in the Cole declaration (that Defendants have asked the Court to strike).[6] Mr. Chua directed only two comments at Mr. Pichon; in essence, the comments merely inquired or assumed that he would retire soon. Mr. Chua did make one disparaging comment within Mr. Pichon's earshot about the age of other workers who were in an entirely different job which evidently involved some

[6] The Court finds Defendants' motion to strike moot because, even if the Court considers the Cole declaration for the purposes suggested by Mr. Pichon (*i.e.*, the prospect of amendment), Mr. Pichon would still lose on the merits.

physicality. But Mr. Pichon has failed to cite any authority to support his position that a handful of comments (particularly of the kind here) constitutes severe or pervasive harassment sufficient to create a hostile working environment. Thus, Mr. Pichon has alleged neither a plausible or possible claim of a hostile working environment based on age. Moreover, Mr. Pichon has failed to demonstrate that he could plead additional factual allegations to support either a severe or pervasive harassment theory. His submission of the Cole declaration was an attempt to give more factual support but, as noted above, even when that evidence is taken into account, that adds little, if anything, to the claim of a hostile work environment. It is obvious that, under California law, Mr. Pichon's age harassment claim is not viable.

2. IIED

"An essential element of a cause of action for intentional infliction of emotional distress is 'extreme and outrageous conduct by the defendant." *Yurick v. Superior Court*, 209 Cal. App. 3d 1116, 1123 (1989). "'Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' Mere insulting language, without more, ordinarily does not constitute outrageous conduct." *Id.* In the instant case, Mr. Pichon's claim for IIED is predicated both on Mr. Chua's alleged age-related statements/conduct and his safety-related statements/conduct. *See* FAC ¶¶ 49-52.

It is obvious that Mr. Chua's alleged age-related statements do not qualify as extreme and outrageous conduct. In *Yurick*, for example, the plaintiff asserted that her immediate supervisor knew she "was more than 40 years old and repeatedly told her at the workplace in the presence of others that anyone over 40 was senile, and that [she] was senile and a liar." *Id.* at 1119. Even so, the court concluded that this "alleged conduct, while objectively offensive and in breach of common standards of civility, was not so egregiously outside the realm of civilized conduct as to give rise to actionable infliction of emotional distress." *Id.* at 1129. Notably, the court added that its "conclusion [was] not altered by the fact that Yurick was plaintiff's superior in the workplace." *Id.* "'There is virtually unanimous agreement that . . . ordinary defendants are not liable for mere insult, indignity, annoyance, or even threats, where the case is lacking in other circumstances of aggravation.'" *Id.* at 1128. While extreme and outrageous conduct may arise "'not so much from

what is done as from abuse by the defendant of some relation or position which gives the defendant actual or apparent power to damage the plaintiff's interests,'" the plaintiff had

> provided no details of the specific employment setting in which the offending statements were made, except to note that a coworker was present. Absent the relevant context, there is no showing that Yurick abused his position as plaintiff's superior in the workplace. In fact, when asked to do so plaintiff was unable specifically to relate Yurick's alleged conduct to the employment context. Rather it appears from plaintiff's deposition testimony that Yurick's allegedly actionable remarks were only milder expressions of his customary and usual manner of communicating in the workplace.

Id. at 1129.

In *King v. AC & R Advertising*, 65 F.3d 764 (9th Cir. 1995), the Ninth Circuit reached a similar result. The defendants were the plaintiff's superiors and made various age-related comments – *e.g.*, a statement that "'You'll be seeing a lot less gray hair around here'" (made at a management committee meeting); a statement that the company "had to keep up with its clients, who were in their thirties"; repeat statements that employees were "'over the hill'" and "'long in the tooth'"; and statements such as "'Advertising is a young person's game.'" *Id.* at 769. The court stated that, even viewing this evidence in the light most favorable to the plaintiff, it could only say that the defendants' age-related comments were offensive and "perhaps discriminatory," but they were "'not so egregiously outside the realm of civilized conduct to give rise to actionable infliction of emotional distress.'" *Id.* at 770.

This leaves Mr. Pichon with an IIED claim based on Mr. Chua's safety-related statements/conduct – *e.g.*, that Mr. Chua retaliated against Mr. Pichon based on Mr. Pichon's complaints about safety. But here it is obvious that Mr. Pichon has no viable IIED claim under *Miklosy*, 44 Cal. 4th at 876; the IIED claim is subject to exclusivity of workers' compensation. In *Miklosy*, two former employees sued a university and others alleging, *inter alia*, unlawful retaliation in violation of California's Whistleblower Protection Act (Cal. Gov't Code § 8547) and IIED. The California Supreme Court found a problem with the IIED claim, explaining as follows:

> Plaintiffs allege defendants engaged in "outrageous conduct" that was intended to, and did, cause plaintiffs "severe emotional distress," giving rise to common law causes of action for intentional infliction of emotional distress. The alleged wrongful conduct, however, occurred at the worksite, in the normal course of the

> employer-employee relationship, and therefore workers' compensation is plaintiffs' exclusive remedy for any injury that may have resulted.

Id. at 902.

The Court noted that

> *Shoemaker v. Myers* is of particular relevance here because it involved termination of a whistleblower employee. We said: "To the extent plaintiff purports to allege any distinct cause of action, *not dependent upon the violation of an express statute or violation of fundamental public policy*, but rather directed at the intentional, malicious aspects of defendants' conduct … , then plaintiff has alleged no more than the plaintiff in *Cole v. Fair Oaks Fire Protection Dist.* . . . The kinds of conduct at issue (e.g., discipline or criticism) are a normal part of the employment relationship. Even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions." (*Shoemaker v. Myers*, *supra*, 52 Cal.3d at p. 25.) We reaffirmed this holding in *Livitsanos v. Superior Court*, which also involved a terminated employee: "So long as the basic conditions of compensation are otherwise satisfied (Lab. Code, § 3600), and the employer's conduct neither contravenes fundamental public policy (*Tameny* … , *supra*, 27 Cal. 3d 167) nor exceeds the risks inherent in the employment relationship (*Cole* [*v. Fair Oaks Fire Protection Dist.*], *supra*, 43 Cal. 3d 148), an employee's emotional distress injuries are subsumed under the exclusive remedy provisions of workers' compensation." (*Livitsanos v. Superior Court*, *supra*, 2 Cal.4th at p. 754.).

Id. The California Supreme Court concluded that,

> [l]ike plaintiffs here, the plaintiff in *Shoemaker* alleged whistleblower retaliation and also a *Tameny* cause of action, and although he incorporated these allegations as part of his claim of intentional infliction of emotional distress, we held workers' compensation to be his exclusive remedy and affirmed the trial court's dismissal of that cause of action. (*Shoemaker v. Myers*, *supra*, 52 Cal. 3d at p. 26.) The same holding applies here.

Id.

In the absence of a viable IIED claim – as well as a viable age harassment claim – the Court concludes that Mr. Chua was fraudulently joined to the litigation and therefore his citizenship may be ignored for purposes of assessing subject matter jurisdiction. Disregarding Mr. Chua's citizenship, the Court finds that there is a basis for subject matter jurisdiction in the instant case, namely, diversity jurisdiction. Accordingly, Mr. Pichon's motion to remand is denied.

III. MOTION TO DISMISS

Because the Court is denying the motion to remand, it must resolve the merits of the motion to dismiss. In the motion to dismiss, Mr. Chua argues that the age harassment and IIED claims should be dismissed for failure to state a claim for relief. *See* Fed. R. Civ. P. 12(b)(6).

For the reasons stated above, the Court agrees with Mr. Chua that Mr. Pichon has failed to plead viable causes of action. Moreover, for the reasons stated above, the Court sees no possibility of amendment to cure the deficiencies above. Mr. Pichon had the opportunity to identify for the Court factual allegations to support his legal theories (*i.e.*, his submission of the Cole declaration) but he adequately failed to do so. Therefore, the Court grants the motion to dismiss with prejudice. Mr. Chua is now dismissed from this litigation. Mr. Pichon may proceed to litigate his case against Hertz.

IV. CONCLUSION

For the foregoing reasons, the motion to remand is denied and the motion to dismiss is granted. The motion to strike is moot.

This order disposes of Docket Nos. 9, 13, and 21.

IT IS SO ORDERED.

Dated: July 28, 2017

EDWARD M. CHEN
United States District Judge