

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 HAISAM NIJEM,

5 Plaintiff,

6 v.

7 U.S. BANCORP dba U.S. BANK, a
8 Delaware Corporation; U.S. BANK
9 NATIONAL ASSOCIATION; CHRIS
10 DELEGANS, an individual; and DOES
11 1-50,

12 Defendants.

No. C 11-04042 CW

ORDER DENYING
WITHOUT PREJUDICE
PLAINTIFF'S MOTION
TO REMAND AND
DENYING
PLAINTIFF'S
REQUEST FOR
ATTORNEYS' FEES
(Docket No. 10)

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14 This case is a wrongful termination lawsuit. After Plaintiff
15 Haisam Nijem brought suit in Alameda County Superior Court,
16 Defendants U.S. Bancorp, doing business as U.S. Bank; U.S. Bank
17 National Association; and Chris Delegans removed the action to
18 this Court. Plaintiff seeks an order remanding the case to state
19 court. Docket No. 10. Defendants oppose the motion. Having
20 considered the parties' submissions, the Court DENIES without
21 prejudice the motion to remand and DENIES Plaintiff's request for
22 attorneys' fees.

23 BACKGROUND

24 Plaintiff's complaint refers to U.S. Bancorp, doing business
25 as U.S. Bank, and U.S. Bank National Association, collectively, as
26 his employer. According to the allegations, Plaintiff worked for
27 his employer as a mortgage loan officer from October 8, 2007
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1 through January 12, 2011, based at a branch office in Fremont,
2 California. Plaintiff was born in Lebanon and is of Palestinian
3 descent. He claims that his employer discriminated against him
4 based on his race and national origin and retaliated against him,
5 in violation of the California Fair Employment and Housing Act,
6 Cal. Govt. Code § 12900, et seq., and other provisions of
7 California law. Plaintiff further alleges a tort cause of action
8 against his employer and individual defendant Delegans for assault
9 and battery.
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11 With respect to the assault and battery claim, Plaintiff
12 alleges the following. On or about Thursday, September 2, 2010,
13 Plaintiff was called into a meeting with his District Manager,
14 Helen Anderson, and Delegans, who had just recently obtained the
15 position of Regional Manager. First Amended Complaint at ¶ 16.
16 This meeting was Plaintiff's first occasion to meet Delegans. Id.
17 Delegans "began the meeting by stating directly to Plaintiff, 'If
18 you had not noticed, you don't look like us.'" Id. Plaintiff was
19 shocked as he was in compliance with the company dress code for
20 persons in his position. Id. Delegans continued, stating that
21 the employer "was trying to give the customer a great experience,
22 and if a customer came in and saw Plaintiff, their experience
23 would be 'ruined.'" Id. After making several other "offensive
24 and unfounded comments" to Plaintiff, as the meeting came to a
25 close, Delegans "without Plaintiff's permission . . . touched
26 Plaintiff several times on his back." Id. at ¶ 16-17. Plaintiff
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1 further claims that his "[e]mployer, through Defendant Delegans,
2 intended to cause or to place Plaintiff in apprehension of an
3 offensive contact with Plaintiff's person, and in fact placed
4 Plaintiff in great apprehension of an offensive contact with his
5 person." Id. at ¶ 79. In addition, the "employer, through
6 Defendant Delegans, intended to make a contact with Plaintiff's
7 person and in fact made such a contact." Id. at ¶ 80. Plaintiff
8 claims that his employer and Delegans' "conduct in this regard was
9 willful, wanton, malicious, oppressive and in violation of
10 Plaintiff's rights . . ." Id. at ¶ 84.

12 LEGAL STANDARD

13 A defendant may remove a civil action filed in state court to
14 federal district court so long as the district court could have
15 exercised original jurisdiction over the matter. 28 U.S.C.
16 § 1441(a). "The 'strong presumption' against removal jurisdiction
17 means that the defendant always has the burden of establishing
18 that removal is proper." Gaus v. Miles, Inc., 980 F.2d 564, 566
19 (9th Cir. 1992). Federal jurisdiction "must be rejected if there
20 is any doubt as to the right of removal in the first instance."
21 Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996) (citations
22 omitted).

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24 District courts have original jurisdiction over all civil
25 actions "where the matter in controversy exceeds the sum or value
26 of \$75,000, exclusive of interest and costs, and is between . . .
27 citizens of different States." 28 U.S.C. § 1332(a). When federal
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1 subject matter jurisdiction is predicated on diversity of
2 citizenship, complete diversity must exist between the opposing
3 parties. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-
4 74 (1978).

5 A non-diverse party named in a complaint can be disregarded
6 for purposes of determining whether diversity jurisdiction exists
7 if a district court determines that the party's inclusion in the
8 action is a "sham" or "fraudulent." McCabe v. General Foods
9 Corp., 811 F.2d 1336, 1339 (9th Cir. 1987). "If the plaintiff
10 fails to state a cause of action against a resident defendant, and
11 the failure is obvious according to the settled rules of the
12 state, the joinder of the resident defendant is fraudulent." Id.
13 The defendant need not show that the joinder of the non-diverse
14 party was for the purpose of preventing removal. The defendant
15 need only demonstrate that there is no possibility that the
16 plaintiff will be able to establish a cause of action in state
17 court against the alleged sham defendant. Id.; Ritchey v. Upjohn
18 Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998). However, there is
19 a presumption against finding fraudulent joinder and defendants
20 who assert it have a heavy burden of persuasion. Emrich v. Touche
21 Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1988). Fraudulent
22 joinder claims may be resolved by piercing the pleadings and
23 considering evidence such as affidavits and deposition testimony.
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27 See Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068 (9th
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1 Cir. 2001) (citing Cavallini v. State Farm Mutual Auto Ins. Co.,
2 44 F.3d 256, 263 (5th Cir. 1995))

3 DISCUSSION

4 Defendants assert that Delegans is a sham defendant.
5 Defendants contend that Plaintiff lacks any viable cause of action
6 against Delegans because the allegations of assault and battery
7 are preempted by California's workers' compensation law, which
8 generally provides the exclusive remedy against fellow employees
9 who, while acting within the scope of employment, cause a
10 plaintiff injury. Defendants further argue that Plaintiff has
11 failed to plead the statutory exception to the exclusivity of
12 workers' compensation remedies under Labor Code section
13 3601(a)(1). This provision states that an employee has, in
14 addition to the right to compensation against the employer, a
15 right to bring an action at law for damages against an employee
16 when the injury "is proximately caused by the willful and
17 unprovoked physical act of aggression of the other employee."
18 Cal. Labor Code § 3601(a)(1).
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21 Plaintiff argues first that Hunter v. Phillip Morris, 582
22 F.3d 1039 (9th Cir. 2009), forecloses Defendants' argument. In
23 Hunter, the Ninth Circuit reversed a district court's fraudulent
24 joinder ruling in an action in which a plaintiff brought a
25 wrongful death suit against a cigarette manufacturer, its parent
26 company and an Alaska corporation that sold cigarettes in that
27 state. The district court found that federal law preempted the
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1 plaintiff's state product liability claim against the non-diverse
2 defendant, the Alaska corporation, and, therefore, the Alaska
3 corporation was fraudulently joined and the district court
4 retained diversity jurisdiction. Id. at 1043-44. The Ninth
5 Circuit reversed the district court, stating, "When a defendant
6 asserts that the plaintiff's claim is impliedly preempted by
7 federal law, it cannot be said that the plaintiff's failure to
8 state a claim against the resident defendant is 'obvious according
9 to the settled rules of the state.'" Id. at 1045. Because "the
10 preemption question requires an inquiry into the merits of the
11 plaintiff's claims against all defendants and an analysis of
12 federal law. . . the defendant has failed to overcome the 'strong
13 presumption against removal jurisdiction.'" Id. Hunter is
14 inapposite, with respect to the present case, because Defendants'
15 argument is not one of federal preemption. Rather, Defendants
16 contend that Plaintiff has failed to state a claim against
17 Delegans because the claim is precluded by California's workers'
18 compensation law.

21 The Ninth Circuit in Ritchey v. Upjohn Drug. Co., 139 F.3d
22 1313, 1319 (9th Cir. 1998), also grappled with a defendant's
23 contention that a sham defendant had been alleged to destroy
24 diversity jurisdiction. The court noted that, where the complaint
25 does not otherwise include a federal cause of action, the defense
26 of federal preemption must generally be raised in state court,
27 relying on well established law that a defense based on federal
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1 law does not give rise to federal jurisdiction. Id. Thus,
2 Ritchey's reasoning supports the conclusion that the present case
3 is distinguishable from Hunter.

4 Ninth Circuit cases demonstrate that the court may determine
5 whether a defendant is fraudulently named by evaluating, under
6 state law, whether a claim can be proved against the non-diverse
7 defendant. In McCabe, the court, weighing allegations in the
8 plaintiff's complaint, as well as evidence submitted by
9 declaration, held that two managers were fraudulently named as
10 individual defendants because their allegedly wrongful conduct was
11 privileged under California law, precluding the plaintiff's
12 wrongful discharge claims. Id. at 1339. The McCabe plaintiff's
13 claim for negligent infliction of emotional distress failed
14 because the plaintiff conceded that the claim flowed from his
15 cause of action for interference with a contractual relationship,
16 but the interference with contract claim was defective. Id.
17 Similarly, the claim for intentional infliction of emotional
18 distress was not viable because it lacked the requisite
19 allegations and evidence of outrageousness. Id.

22 In Kruso v. Int'l Telephone & Telegraph Corp., 872 F.2d 1416
23 (9th Cir. 1989), the Ninth Circuit affirmed the dismissal of
24 claims against two sham defendants and the refusal to remand the
25 action to state court, based on its determination that the
26 plaintiffs could not prevail on their claims against the non-
27 diverse defendants because the plaintiffs were not party to the
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1 agreement underlying the claims alleged against the non-diverse
2 defendants.

3 Defendants are correct with respect to two points. First, to
4 circumvent preemption by California's workers' compensation law,
5 Plaintiff must plead an injury that "is proximately caused by the
6 willful and unprovoked physical act of aggression of the other
7 employee," Cal. Labor Code § 3601(a)(1), such that Delegans'
8 conduct occurred outside the scope of his employment. Defendants
9 are also correct that the present allegations describe an incident
10 less egregious than that at issue in Jones v. Department of
11 Corrections and Rehabilitation, 152 Cal. App. 4th 1367 (2007),
12 where the court held that the workers' compensation exclusivity
13 rule precluded the plaintiff's assault and battery claim. Jones
14 held that undisputed evidence that a defendant co-worker grabbed
15 the plaintiff's arm and started "banging her body around and
16 stuff" during an altercation over a wheelbarrow was insufficiently
17 severe to demonstrate that the conduct occurred outside the scope
18 of the defendant's employment. Id. at 1383-84. Jones arrived at
19 this conclusion by comparing the incident to a case in which the
20 California Supreme Court found that an employee's act of throwing
21 a hammer at a coworker was within the scope of employment for
22 purposes of determining the employee's immunity from liability
23 under section 3601(a)(1). Id. at 1384 (citing Torres v.
24 Parkhouse, 26 Cal. 4th 995, 1008 (2001)).
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1 Here, the parties have argued the motion solely on the basis
2 of the complaint. Plaintiff alleges that Delegans touched him on
3 his back several times without his permission. The touching
4 occurred in the context of a conversation in which Delegans
5 allegedly made several offensive, discriminatory statements
6 directed at Plaintiff because of his race and national original.
7 In his briefing Plaintiff represents that Delegans hit him several
8 times on the back. Although Plaintiff insufficiently alleges that
9 Delegans engaged in a willful and unprovoked physical act of
10 aggression against Plaintiff, he may be able to do so in an
11 amended complaint. See Vincent v. First Republic Bank Inc., 2010
12 WL 1980223, *4-5 (N.D. Cal.) (granting plaintiff's motion to
13 remand, holding that although plaintiff's complaint may fall short
14 of alleging outrageous conduct, with respect to the claim for
15 intentional infliction of emotional distress, the court could not
16 conclude that plaintiff had absolutely no possibility of stating a
17 claim, if permitted the opportunity to amend.) The applicable
18 standard to determine whether a defendant has been fraudulently
19 joined turns on whether there is any possibility that Plaintiff
20 could allege a viable claim against the non-diverse defendant.
21 Given Defendants' heavy burden of persuasion and the presumption
22 against finding fraudulent joinder, as well as Plaintiff's
23 insufficient allegations of assault and battery, Plaintiff's
24 motion to remand is denied without prejudice.
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CONCLUSION

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2 Plaintiff's motion to remand this action is DENIED without
3 prejudice. Docket No. 10. Within a week of the date of this
4 order, Plaintiff may file an amended complaint with further
5 allegations regarding his assault and battery claim against Mr.
6 Delegans to remedy the deficiencies identified in this order, if
7 he can do so truthfully. If Plaintiff does so, Plaintiff may, at
8 that time, renew his motion to remand the case to Alameda County
9 Superior Court. He need not notice the motion for hearing or file
10 additional argument. Defendants may file an opposition to the
11 motion to remand, addressed to the amended complaint, seven days
12 later. Plaintiff may file a brief reply within four days after
13 that. The motion will be decided on the papers. Unless the
14 matter has been remanded by that time, a case management
15 conference will be held as scheduled on November 29, 2011 at 2:00
16 pm.

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19 Plaintiff's request for attorneys' fees, pursuant to Title 28
20 U.S.C. § 1447, is DENIED.

21 IT IS SO ORDERED.

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23 Dated: October 26, 2011



CLAUDIA WILKEN
United States District Judge