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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JOHN NGUYEN,  
Plaintiff,  
v.  
ERICSSON, INC., et al.,  
Defendants.

Case No. [5:17-cv-06453-EJD](#)

**ORDER DENYING PLAINTIFF'S  
MOTION TO REMAND**

Re: Dkt. No. 19

I. INTRODUCTION

In September 2017, Plaintiff John Nguyen (“Plaintiff”), individually and on behalf of all others similarly situated, filed a class action complaint in Santa Clara Superior Court against Defendants Ericsson, Inc. (“Ericsson”), 4G Project People, Inc. (“4G”), Networkers, Inc. (“Networkers”)<sup>1</sup>, and Michael Wilcox (collectively “Defendants”) claiming violations of California wage and hour laws, including failure to pay all wages owed, failure to pay overtime, failure to provide rest and meal breaks, failure to provide accurate wage stubs, and failure to provide employee files upon request. Dkt. No. 1, Ex. A, p. 6-13. Defendant 4G removed the action to this Court under the provisions of 28 U.S.C. § 1332(a) and pursuant to 28 U.S.C. § 1441(a). Dkt. No. 1, p. 2.

Plaintiff moves to remand the putative class action to Superior Court of Santa Clara pursuant to 28 U.S.C. § 1447(c) on the basis that Defendant 4G has failed to show the requisite

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<sup>1</sup> On May 30, 2018, Plaintiff voluntarily dismissed Defendant Networkers, Inc. Dkt. No. 38. Case No.: [5:17-cv-06453-EJD](#)

1 subject matter jurisdiction over the claims. Dkt. No. 19, p. 2. The Court finds it appropriate to  
2 take the motion under submission for decision without oral argument pursuant to Civil Local Rule  
3 7-1(b). For the reasons set forth below, the motion is denied.

## 4 II. BACKGROUND

5 Plaintiff filed an amended complaint which includes the following allegations. Plaintiff  
6 was a field engineer who performed maintenance and repair work on communication towers  
7 owned by Defendant Ericsson for four years preceding the filing date of the initial complaint. Dkt.  
8 No. 34, p. 3. Defendant Ericsson contracted with Defendants 4G and Networkers to provide  
9 workers, including Plaintiff and others similarly situated, to work on the towers. Id. Plaintiff  
10 reported to Defendant Wilcox who was employed by Defendant Ericsson. Id. Plaintiff's daily  
11 duties consisted of receiving assignments, driving to an Ericsson facility in Hayward, California to  
12 pick up equipment for his assignment, driving to the job sites where work needed to be conducted,  
13 doing the assigned work, and driving back to the Ericsson equipment facility to drop off unused  
14 materials and equipment. Id. Plaintiff claims he was paid an allotted amount rather than per every  
15 hour worked; he was not compensated for time driving to job sites; he was not reimbursed for  
16 lodging when he stayed overnight for jobs that were too far away for him to drive back without  
17 rest, or for tows when his truck had issues; he was not given accurate wage statements; his  
18 assigned schedule made it unfeasible for him to take proper meal and rest breaks; he was not  
19 compensated for any jobs he did not finish; and he was denied lawful access to his employment  
20 records. Id. at 4-5.

21 Plaintiff now moves to remand, asserting lack of subject matter jurisdiction pursuant to 28  
22 U.S.C. § 1447(c). Dkt. No. 19, p. 1-3. Plaintiff contends that there is not complete diversity  
23 because Defendant Michael Wilcox and Plaintiff are both residents of California, and that 4G has  
24 not shown that the amount in controversy exceeds \$75,000. Id.

## 25 III. STANDARDS

26 Title 28 U.S.C. § 1441(a) states: "Except as otherwise expressly provided by Act of  
27 Congress, any civil action brought in a State court of which the district courts of the United States

28 Case No.: [5:17-cv-06453-EJD](#)  
ORDER DENYING PLAINTIFF'S MOTION TO REMAND

1 have original jurisdiction, may be removed by the defendant or the defendants, to the district court  
2 of the United States for the district and division embracing the place where such action is  
3 pending.” Title 28 U.S.C. § 1332(a) allows for original federal jurisdiction when (1) it is  
4 regarding a civil action, (2) when the plaintiff is a citizen of a different state than all defendants,  
5 and (3) when the amount in controversy exceeds \$75,000, exclusive of interests and costs. After  
6 removal, a case can be remanded for lack of subject matter jurisdiction or for a defect in removal  
7 procedure. 28 U.S.C. § 1447(c). When a case has been removed by a defendant, the defendant  
8 has the burden of proving by a preponderance of the evidence that there is subject matter  
9 jurisdiction. Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992).

10 In assessing diversity of citizenship, a plaintiff has to be a citizen of a different state than  
11 every defendant, but fraudulently joined defendants are not considered and will not defeat  
12 removal. Ritchey v. Upjohn, Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998). A defendant is  
13 considered to be fraudulently joined, or a sham defendant, when the plaintiff fails to state a viable  
14 cause of action against the alleged sham defendant and when a defendant shows that there is not  
15 any possibility the alleged sham defendant could be held liable for any claim. Id. The amount in  
16 controversy is calculated by assuming the allegations of the complaint are true and assuming a  
17 jury will find for the plaintiff on all claims. Kenneth Rothschild Trust v. Morgan Stanley Dean  
18 Witter, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002).

#### 19 IV. DISCUSSION

20 Defendant 4G claims that the case was properly removed to federal court on the basis of  
21 diversity jurisdiction. First, Defendant 4G contends that Defendant Michael Wilcox is a sham  
22 defendant who cannot be held personally liable for the alleged wage and hour violations. Dkt. No.  
23 35, p. 1. Second, Defendant 4G contends that the amount in controversy is “more likely than not”  
24 over \$75,000. Id.

##### 25 A. Diversity of Citizenship

26 A person can only be liable for violations of California Labor Code, and therefore can only  
27 have a viable California Labor Code claim brought against him or her, if the person is an “owner,

1 director, officer or managing agent of the employer.” Cal. Lab. Code § 558.1(b). Here, Plaintiff  
2 seeks to hold Wilcox liable as a “managing agent.” Dkt. No. 19, p. 7.

3 As a preliminary matter, the allegations in the complaint fail to establish that Wilcox was a  
4 “managing agent of the employer,” as required by California Labor Code section 558.1(b).  
5 Plaintiff alleges that at the time he reported to Wilcox, Plaintiff was employed by Networkers or  
6 4G, and that these companies contracted to provide workers to Ericsson. Dkt. No. 34, p. 3-4.  
7 Wilcox was employed by Ericsson, not Networkers or 4G. Id. at 3. Plaintiff does not allege that  
8 Wilcox was the managing agent of Networkers or 4G. On this basis alone, there is no possibility  
9 that Wilcox can be held liable under California Labor Code section 558.1(b).

10 Even assuming for the sake of argument that Wilcox could be characterized as acting on  
11 behalf of Plaintiff’s employer, there is no possibility that Wilcox is liable as a “managing agent”  
12 under California Labor Code section 558.1(b). The term “managing agent” is statutorily defined  
13 to have “the same meaning as in subdivision (b) of Section 3294 of the Civil Code.” Id. In White  
14 v. Ultramar, Inc., 981 P.2d 944, 947 (Cal. 1999), the California Supreme Court held that for  
15 purposes of Civil Code section 3294, “the Legislature intended the term ‘managing agent’ to  
16 include only those corporate employees who exercise substantial independent authority and  
17 judgment in their corporate decisionmaking so that their decisions ultimately determine corporate  
18 policy.” Thus, a “managing agent” is “more than a mere supervisory employee.” Id. at 951.

19 Plaintiff contends that Wilcox is a managing agent based on a job description for  
20 “Implementation Manager” posted on Ericsson’s website and because “he reported to Wilcox,”  
21 Wilcox gave Plaintiff his “daily assignments,” and Wilcox “reviewed all work hours submitted for  
22 compensation and all requests for reimbursement.” Dkt. No. 19, p. 8; Dkt. No. 34, p. 3-4.  
23 Defendant 4G objects to the admissibility of the website job listing, asserting that the listing lacks  
24 authentication, violates the Best Evidence Rule (Fed. R. Evid. 1002), and is no longer accessible.  
25 Dkt. No. 36, p. 1-2. Defendant 4G’s objections are well taken. Plaintiff has not produced any  
26 evidence of who published, controlled or maintained the website. Without this foundational  
27 information, there is no way to verify the accuracy of the job description posted on the website.

1 Therefore, the Court will not consider the website job listing and instead evaluates only whether  
2 the allegations in the amended complaint create any reasonable possibility of a claim against  
3 Wilcox. See Williams v. Wyndham Vacation Ownership, No. 13-5088 WHO, 2014 WL 457835,  
4 at \*3 (N.D. Cal. 2014) (citing Good v. Prudential Ins. Co. of America, 5 F. Supp. 2d 804, 807  
5 (N.D. Cal. 1998)).

6 In Taylor v. Trees, Inc., 58 F. Supp. 3d 1092, 1106-07 (E.D. Cal. 2014), the court analyzed  
7 whether tasks similar to those performed by Wilcox are sufficient to create liability against a  
8 “managing agent” under California Civil Code section 3294(b). The plaintiff was hired by  
9 defendant, a nation-wide company, to perform line clearance tree trimming and vegetation control  
10 for various utility companies and government districts, and sought to hold his foreman personally  
11 liable as a “managing agent.” Id. at 1098, 1106. The foreman managed no more than thirty-four  
12 people and two locations in Fresno on a day-to-day basis. Id. at 1106. The Taylor court  
13 concluded that this evidence was insufficient to establish liability because the supervisor did not  
14 manage a “substantial portion” of defendant’s business. Id. The Taylor court also found that the  
15 foreman did not have “broad or unlimited authority.” Id. at 1107. The Court held that “because  
16 the evidence does not indicate that [the foreman] had substantial discretionary authority over  
17 significant aspects of [defendant’s] business, or that [the supervisor’s] decisions created corporate  
18 policy, [the supervisor] was not a ‘managing agent.’” Id.

19 As in Taylor, Plaintiff claims that Wilcox oversaw the location where Plaintiff worked and  
20 supervised the daily work of employees. Dkt. No. 34, p. 3. These allegations fail to show that  
21 Wilcox had substantial discretionary authority over a significant aspect of Ericsson’s business or  
22 that Wilcox had “broad and unlimited authority.” Nor are there allegations from which to infer  
23 that Wilcox’s decisions created corporate policy. Therefore, Wilcox is a sham defendant and his  
24 citizenship will be disregarded for purposes of determining diversity jurisdiction.

25 Plaintiff is a citizen of California and Defendants 4G, Networks, and Ericsson are citizens  
26 of Texas. Dkt. No. 34, p. 2. Diversity of citizenship has been satisfied.

27

1           **B. Amount in Controversy**

2           Plaintiff contends that Defendant 4G has not shown that the amount in controversy exceeds  
3 \$75,000. When a plaintiff does not plead a particular amount in controversy, the removing party  
4 needs to prove that it is “more likely than not” that the amount in controversy exceeds \$75,000.  
5 Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996). In meeting this burden,  
6 defendants need not concede liability. Parker v. Dean Transp., Inc., No. CV 13-2621-BRO, 2013  
7 WL 12091841, at \*7 (C.D. Cal. June 26, 2013). “To require Defendants to provide more detailed  
8 evidence of how many [workers] missed breaks or how often would essentially require Defendants  
9 to admit some amount of liability before they have had an opportunity to defend against Plaintiff’s  
10 claims. The Ninth Circuit has made clear that this is not required.” Id. Defendants may include  
11 attorney fees in calculating the amount in controversy “where an underlying statute authorizes an  
12 award of attorneys’ fees, either with mandatory or discretionary language.” Galt G/S v. JSS  
13 Scandinavia, 142 F.3d 1150, 1155-56 (9th Cir. 1998). In the present case, California Labor Code  
14 sections 1194(a) and 226(e) authorize an award of attorney fees if Plaintiff prevails, and therefore  
15 attorney fees may be included in the amount in controversy. Id. at 1156. Attorney fees are  
16 assessed by considering a reasonable hourly rate. Winterrowd v. Am. Gen. Annuity, Ins. Co., 556  
17 F.3d 815, 826-27 (9th Cir. 2009). In the San Francisco Bay Area as of 2013, “reasonable market  
18 rates in labor and employment cases are \$675 per hour for partners, between \$300 and \$400 per  
19 hour for associates, and between \$180 and \$225 per hour for law clerks and paralegals.” Zoom  
20 Elec., Inc. v. Int’l Bhd. of Elec. Workers, Local 595, No. C 11-1699 CW, 2013 WL 2297037, at  
21 \*4 (N.D. Cal. May 24, 2013).

22           Defendant 4G estimates that Plaintiff placed at least \$58,690 in controversy, exclusive of  
23 attorney fees. Dkt. No. 1, p. 8. Defendant 4G made calculations for the four-year-period Plaintiff  
24 claims based on one missed meal per workday, one missed break per workday, one hour of  
25 overtime per week in the given period, and associated penalties. Dkt. No. 35, p. 5-7. This  
26 calculation is comparable to the amount in controversy calculations that were accepted by the  
27 court in Giannini v. Northwestern Mutual Life Ins. Co., No. C 12-77 CW, 2012 WL1535196, at \*3

1 (N.D. Cal. Apr. 30, 2012) when evaluating jurisdiction under the Class Action Fairness Act of  
2 2005. Dkt. No. 35, p. 5-7. Defendant 4G’s calculation in this case is reasonable given the scope  
3 of Plaintiff’s claims. Defendant 4G is not required to provide more detailed evidence. Giannini v.  
4 Northwestern Mutual Life Ins. Co., 2012 WL1535196, at \*3.

5 Defendant 4G also included \$30,000 in attorney fees in calculating the amount in  
6 controversy. Dkt. No. 1, p. 23. This estimate is based on a rate of \$300 per hour, which is more  
7 conservative than the rates applied in Zoom, multiplied by 100, which is a conservative estimate  
8 of anticipated attorney hours considering the scope and complexity of Plaintiff’s claims. Dkt. No.  
9 35, p. 8.

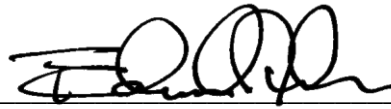
10 Defendant 4G has established that the amount in controversy is “more likely than not” over  
11 \$75,000, and Plaintiff has not disputed 4G’s calculations. Therefore, the Court finds that the  
12 amount in controversy necessary for subject matter jurisdiction has been satisfied.

13 V. CONCLUSION

14 For the reasons set forth above, Plaintiff’s Motion to Remand is denied.

15 **IT IS SO ORDERED.**

16 Dated: June 11, 2018



17  
18 EDWARD J. DAVILA  
United States District Judge