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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 REGULO RAMIREZ,
12 Plaintiff,
13 v.
14 HOME DEPOT U.S.A., INC. and ALMA
15 ALVARADO,
16 Defendants.

Case No.: 3:17-CV-2341 CAB MDD

**ORDER GRANTING MOTION TO
REMAND**

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18 Plaintiff claims that he was injured by a forklift being operated negligently by a
19 Home Depot employee in the parking lot of Home Depot store located in Encinitas,
20 California. He initially filed this lawsuit in San Diego County Superior Court, naming only
21 Home Depot as a defendant. Before serving Home Depot, Plaintiff amended his complaint
22 to add defendant Alma Alvarado, whom he believes was a Home Depot manager
23 responsible for the supervision and training of the forklift driver.

24 After being served with the state court complaint, Home Depot timely filed a notice
25 of removal, arguing that this Court has diversity jurisdiction because Plaintiff and Home
26 Depot are diverse, and that Alvarado is a “sham defendant” whose citizenship should be
27 disregarded because Home Depot’s records do not show anyone named Alma Alvarado
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1 who worked at the Encinitas store on the date of the incident. Plaintiff now moves to
2 remand, arguing that Alvarado is not a sham defendant.

3 “Joinder of a non-diverse defendant is deemed fraudulent, and the defendant’s
4 presence in the lawsuit is ignored for purposes of determining diversity, “[i]f the plaintiff
5 fails to state a cause of action against a resident defendant, and the failure is obvious
6 according to the settled rules of the state.” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061,
7 1067 (9th Cir. 2001) (quoting *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th
8 Cir. 1987)). “If there is any possibility that the state law might impose liability on a resident
9 defendant under the circumstances alleged in the complaint, or in a future amended
10 complaint, the federal court cannot find that joinder of the resident defendant was
11 fraudulent, and remand is necessary.” *Revay v. Home Depot U.S.A., Inc.*, No. 2:14-CV-
12 03391-RSWL, 2015 WL 1285287, at *3 (C.D. Cal. Mar. 19, 2015) (internal quotation
13 marks omitted). “There is a presumption against finding fraudulent joinder, and defendants
14 who assert that plaintiff has fraudulently joined a party carry a heavy burden of
15 persuasion.” *Plute v. Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D. Cal.
16 2001). “Fraudulent joinder must be proven by clear and convincing evidence.” *Hamilton*
17 *Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007).

18 Here, Home Depot’s argument and evidence that Alvarado did not work for Home
19 Depot on the date of the incident does not satisfy its heavy burden. The Court is not
20 convinced that there is no possibility that Alvarado was a Home Depot manager or that
21 Plaintiff will be able to establish a cause of action in state court against Alvarado if she
22 was in fact a manager at Home Depot on the date of the incident. *See Revay*, 2015 WL
23 1285287 (rejecting Home Depot’s argument that manager of store where injury occurred
24 was a sham defendant). Moreover, even if Plaintiff mis-identified the store manager, it is
25 likely that he would be able to amend the complaint to add the actual manager, not to
26 mention the fork-lift driver, as defendants, both of whom would likely defeat diversity.
27 Accordingly, considering that removal jurisdiction is strictly construed in favor of remand,
28 Home Depot has not met its burden of demonstrating that Alvarado is a sham defendant.

1 *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (“Federal jurisdiction must be
2 rejected if there is any doubt as to the right of removal in the first instance.”).

3 Because Alvarado is not diverse from Plaintiff, Plaintiff’s motion to remand is
4 **GRANTED**, and this case is **REMANDED** to San Diego County Superior Court. Because
5 Home Depot’s arguments for removal were not objectively unreasonable, the Court
6 declines to award fees to Plaintiff. The Clerk of Court shall **CLOSE** this case.

7 It is **SO ORDERED**.

8 Dated: February 26, 2018



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10 Hon. Cathy Ann Bencivengo
11 United States District Judge
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