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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 JAY ANCONA,

12 Plaintiff,

13 v.

14 LOWE'S HOME CENTERS, LLC, and  
15 MIKE SMITH,

16 Defendants.  
17

Case No. 20-cv-1462-MMA (JLB)

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

[Doc. No. 7]

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19 On July 29, 2020, Defendant Lowe's Home Centers, LLC ("Lowe's") filed a  
20 notice of removal from the Superior Court of California, County of San Diego, to the  
21 United States District Court for the Southern District of California pursuant to 28 U.S.C.  
22 § 1441 and on the basis of diversity jurisdiction under 28 U.S.C. § 1332. *See* Doc. No.  
23 1.<sup>1</sup> Defendant Mike Smith ("Smith") moves to dismiss, pursuant to Federal Rule of Civil  
24 Procedure 12(b)(6), Plaintiff Jay Ancona's ("Plaintiff") "Fourth Cause of Action for  
25 harassment against him, with prejudice." Doc. No. 6 at 2. Smith argues that dismissal is  
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28 <sup>1</sup> Citations to electronically filed documents refer to the pagination assigned by the CM/ECF system.

1 proper because Plaintiff fraudulently joined Smith in this action. *See id.* Plaintiff moves  
2 to remand the action back to state court pursuant to 28 U.S.C. § 1447 based on this  
3 Court’s lack of diversity jurisdiction. *See* Doc. No. 7 at 2. Plaintiff and Smith oppose  
4 each other’s motions, and each have filed replies. *See* Doc. Nos. 8, 9, 12, 13. The Court  
5 found the matters suitable for determination on the papers and without oral argument  
6 pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7.1.d.1. *See* Doc.  
7 No. 15. For the reasons set forth below, the Court **GRANTS** Plaintiff’s motion to  
8 remand.

### 9 **I. BACKGROUND**

10 Plaintiff’s action arises from an employment dispute, and Plaintiff alleges that  
11 Lowe’s and Smith (collectively, “Defendants”) harassed, discriminated, and retaliated  
12 against Plaintiff to the point where Plaintiff eventually resigned. *See generally* Doc. No.  
13 1-4 (“Compl.”) ¶¶ 15–32.

14 In June 2014, Plaintiff began working for Lowe’s as a customer service sales  
15 associate. *See id.* ¶¶ 15, 17. According to the Complaint, “Plaintiff suffers from several  
16 disabilities . . . including a severe heart condition, that limit his ability to engage in  
17 strenuous or prolonged physical activities.” *Id.* ¶ 15. In February 2019, Plaintiff’s  
18 “permanent disability” accommodations were canceled without explanation; according to  
19 Plaintiff, such accommodations had been granted for “years.” *Id.* ¶ 18. In March 2019,  
20 Smith began working as a store manager at the same Lowe’s location as Plaintiff. *See id.*  
21 ¶ 18.

22 Despite Plaintiff’s request for accommodation, Defendants began ordering Plaintiff  
23 “to unload, stock and shelve toilets, bathroom sinks[,] and other heavy items.” *Id.* ¶ 18.  
24 At the end of March 2019, Plaintiff’s doctor placed Plaintiff on work leave for  
25 approximately fourteen days as a result of Plaintiff experiencing “extreme fatigue,  
26 dizziness[,] and vertigo.” *Id.* ¶ 18.

27 When Plaintiff returned to work on April 8, 2019, Plaintiff was reassigned to work  
28 as a cashier in the lawn and garden department. *Id.* ¶ 19. On April 18, 2019, Smith

1 presented Plaintiff with a workplace accommodation form that stated Plaintiff was being  
2 reassigned to work outside as a cashier in the lawn and garden department with reduced  
3 pay and hours. *Id.* ¶ 20. The form contained an option for Plaintiff to decline the  
4 reassignment. *Id.* ¶ 20. Plaintiff informed Smith of his inclination to decline the  
5 reassignment; Smith responded “[i]f you do, you won’t have a job.” *Id.* ¶ 20. With  
6 reservation, Plaintiff signed the form, accepting reassignment, and commented on the  
7 form that “his acceptance would be contingent upon a reevaluation to be restored to his  
8 original position and pay.” *Id.* ¶ 20. Plaintiff reported the meeting with Smith to the  
9 assistant operations manager, who explained that the meeting was “‘supposed to be a  
10 negotiation,’ not an ultimatum.” *Id.* ¶ 21.

11 Weeks and months following the meeting, Plaintiff was unsuccessful in attempting  
12 to meet with Smith regarding Plaintiff’s workplace assignment and disability  
13 accommodation. *Id.* ¶ 22. Plaintiff also requested a copy of the workplace  
14 accommodation form Plaintiff had signed during the meeting with Smith. *Id.* ¶ 23.  
15 Smith declined this request, stating the form was Lowe’s property. *Id.* Plaintiff  
16 eventually received a copy of the accommodation letter from a store administration  
17 staffer. *Id.* ¶ 24.

18 On approximately April 23, 2019, Defendants sent Plaintiff a termination letter;  
19 Plaintiff contacted the human resources department, which explained the letter was a  
20 “store level error.” *Id.* ¶ 24. Plaintiff alleges that “Defendants were out to get rid of him,  
21 and that the termination letter was in fact just another retaliatory action taken at the store  
22 level in an effort to have [human resources] terminate Plaintiff or discourage him enough  
23 to resign.” *Id.* ¶ 24. Plaintiff avers that he resigned in September 2019 after facing  
24 discrimination, harassment, and retaliation. *Id.* ¶ 25.

1 Plaintiff filed an unlimited civil action in San Diego Superior Court, alleging  
2 eleven causes of action. *See id.* ¶¶ 33–103.<sup>2</sup> Defendants then removed the action to this  
3 Court, asserting diversity jurisdiction. *See* Doc. No. 1. Plaintiff now moves to remand  
4 the case back to state court based on lack of diversity jurisdiction. *See* Doc. No. 7.

## 5 **II. LEGAL STANDARD**

6 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins.*  
7 *Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power authorized by  
8 Constitution and statute.” *Id.* at 377. “A federal court is presumed to lack jurisdiction in  
9 a particular case unless the contrary affirmatively appears.” *Stock West, Inc. v.*  
10 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). The party seeking federal  
11 jurisdiction bears the burden to establish jurisdiction. *Kokkonen*, 511 U.S. at 377 (citing  
12 *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182–83 (1936)).

13 Pursuant to 28 U.S.C. § 1332(a)(1), a federal district court has jurisdiction over “all  
14 civil actions where the matter in controversy exceeds the sum or value of \$75,000,  
15 exclusive of interest and costs,” and the dispute is between citizens of different states. 28  
16 U.S.C. § 1332(a)(1). The Supreme Court has interpreted § 1332 to require “complete  
17 diversity of citizenship,” meaning each plaintiff must be diverse from each defendant.  
18 *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996).

19 Additionally, 28 U.S.C. § 1441(a) provides for removal of a civil action from state  
20 to federal court if the case could have originated in federal court. If a matter is removable  
21 solely on the basis of diversity jurisdiction pursuant to § 1332, the action may not be  
22 removed if any properly joined and served defendant is a citizen of the forum state. *See*  
23 28 U.S.C. § 1441(b)(2). The removal statute is construed strictly against removal, and  
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27 <sup>2</sup> Plaintiff alleges all eleven claims against Defendant Lowe’s. *See* Compl. ¶¶ 33–103. However,  
28 Plaintiff alleges only a single claim against Defendant Smith for harassment in violation of the Fair  
Employment and Housing Act (“FEHA”). *See id.* ¶¶ 56–63.

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

### 3 **III. DISCUSSION**

4 Plaintiff argues that remand is necessary because Plaintiff and Defendant Smith are  
5 not completely diverse. *See* Doc. No. 7 at 7. Specifically, Plaintiff asserts that Plaintiff  
6 and Smith are both residents of California, which thus destroys complete diversity. *See*  
7 Doc. No. 7 at 7. Neither party appears to dispute that Plaintiff and Smith are both  
8 citizens of California for diversity jurisdiction purposes. *See* Doc. No. 1 at 3, 7; Doc. 1-2  
9 ¶¶ 3, 6; Compl. ¶¶ 1, 4; Doc. No. 7 at 4, 7. However, in the notice of removal,  
10 Defendants state the citizenship of Smith should be disregarded for purposes of  
11 determining whether jurisdiction exists because Plaintiff’s joinder of Smith was  
12 fraudulent. *See* Doc. No. 1 at 3–6. Thus, the primary issue before the Court is whether  
13 Plaintiff’s joinder of Smith was fraudulent.

#### 14 **A. Whether Smith Was Fraudulently Joined**

15 In Plaintiff’s fourth cause of action, he asserts that Lowe’s and Smith harassed  
16 Plaintiff in violation of FEHA. *See* Compl. ¶¶ at 56–63. Defendants argue that  
17 Plaintiff’s joinder of Smith is fraudulent. *See* Doc. No. 8 at 13. According to  
18 Defendants, Plaintiff’s harassment claim fails as a matter of law because Plaintiff’s  
19 allegations against Smith concern his personnel management activities as a supervisor.  
20 *See id.*

21 “In determining whether there is complete diversity, district courts may disregard  
22 the citizenship of a non-diverse defendant who has been fraudulently joined.” *GranCare,*  
23 *LLC v. Thrower*, 889 F.3d 543, 549 (9th Cir. 2018) (citing *Chesapeake & Ohio Ry. Co. v.*  
24 *Cockerell*, 232 U.S. 146, 152 (1914)). The fraudulent joinder analysis is a “jurisdictional  
25 inquiry,” not an adjudication on the merits. *Id.* In *GranCare*, the court drew attention to  
26 the difference between the standard for a Rule 12(b)(6) motion and fraudulent joinder.  
27 *See id.* The court explained, “the test for fraudulent joinder and for failure to state a  
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1 claim under Rule 12(b)(6) are not equivalent. A claim against a defendant may fail  
2 under Rule 12(b)(6), but that defendant has not necessarily been fraudulently joined.” *Id.*

3 A federal court must find joinder proper and remand the case to state court “if there  
4 is a *possibility* that a state court would find that the complaint states a cause of action  
5 against any of the resident defendants.” *Id.* at 548 (emphasis added) (quoting *Hunter v.*  
6 *Philip Morris USA*, 582 F.3d 1039, 1046 (9th Cir. 2009)). Furthermore, “[f]raudulent  
7 joinder must be proven by clear and convincing evidence.” *Hamilton Materials, Inc. v.*  
8 *Dow Chemical Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). “[T]he district court must  
9 consider . . . whether a deficiency in the complaint can possibly be cured by granting the  
10 plaintiff leave to amend.” *GranCare*, 889 F.3d at 550. This standard reflects that a  
11 defendant claiming fraudulent joinder “bears a ‘heavy burden’ since there is a ‘general  
12 presumption against [finding] fraudulent joinder.’” *Id.* at 548 (quoting *Hunter*, 582 F.3d  
13 at 1044).

14 Courts have previously upheld rulings of fraudulent joinder “where a defendant  
15 presents extraordinarily strong evidence or arguments that a plaintiff could not possibly  
16 prevail on her claims against the allegedly fraudulently joined defendant.” *Id.* at 548; *see*  
17 *also McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) (upholding a  
18 ruling of fraudulent joinder where defendant’s conduct was privileged under state law).  
19 Courts have also “declined to uphold fraudulent joinder rulings where a defendant raises  
20 a defense that requires a searching inquiry into the merits of the plaintiff’s case, even if  
21 that defense, if successful, would prove fatal.” *Id.* at 548–49.

22 Turning to Plaintiff’s FEHA claim against Smith, the harassment of an employee  
23 because of a disability is prohibited. *See* Cal. Gov. Code § 12940(j)(1) (“[I]t is unlawful  
24 . . . for an employer . . . or any other person, because of . . . physical disability . . . to  
25 harass an employee.”). “[H]arassment focuses on situations in which the social  
26 environment of the workplace becomes intolerable because the harassment (whether  
27 verbal, physical, or visual) communicates an offensive message to the harassed  
28 employee.” *Roby v. McKesson Corp.*, 219 P.3d 749, 761 (Cal. 2009) (emphasis omitted).

1 In regard to the liability of supervisors for harassment, the California Supreme  
2 Court explained, “harassment consists of a type of conduct not necessary for performance  
3 of a supervisory job. Instead, harassment consists of conduct outside the scope of  
4 necessary job performance, conduct presumably engaged in for personal gratification,  
5 because of meanness . . . .” *Reno v. Baird*, 957 P.2d 1333, 1336 (Cal. 1998).

6 Furthermore, “commonly necessary personnel management actions such as hiring and  
7 firing, job or project assignments . . . do not come within the meaning of harassment.”

8 *Id.* at 1336. However, the California Supreme Court explained that supervisors’  
9 personnel-related actions can be the evidentiary basis of a harassment cause of action  
10 when such actions have the “secondary effect of communicating a hostile message.”  
11 *Roby*, 219 P.3d at 763. “This occurs when the actions establish a widespread pattern of  
12 bias.” *Id.* (citing *Miller v. Department of Corrections*, 115 P.3d 77, 90 (Cal. 2005)).

13 The Court now turns to analyzing whether Plaintiff fraudulently joined Smith by  
14 alleging a FEHA harassment claim against him.

15 As an initial matter, it appears that Smith’s alleged conduct concerns “commonly  
16 necessary personnel management actions.” *Roby*, 219 P.3d at 757 (quoting *Reno*, 957  
17 P.2d at 1336); *compare* Compl. ¶¶ 20, 23, 25 (alleging that Plaintiff was reassigned to  
18 work in a different department, Plaintiff’s pay and hours were reduced, and Smith denied  
19 Plaintiff’s request for his workplace accommodation form), *with Janken v. GM Hughes*  
20 *Electronics*, 53 Cal. Rptr. 2d 741, 746 (Ct. App. 1996) (“We conclude, therefore, that the  
21 Legislature intended that commonly necessary personnel management actions such as  
22 hiring and firing, job or project assignments, office or work station assignments,  
23 promotion or demotion, performance evaluations, the provision of support, the  
24 assignment or non-assignment of supervisory functions, deciding who will and who will  
25 not attend meetings, deciding who will be laid off, and the like, do not come within the  
26 meaning of harassment.”).

27 However, this does not eliminate the possibility that a state court could possibly  
28 find that Plaintiff states a cause of action against Smith. Necessary personnel

1 management actions can be evidence for a harassment claim when those actions have the  
2 “secondary effect of communicating a hostile message.” *Roby*, 219 P.3d at 763.  
3 Although Defendants argue that Plaintiff fails to allege that Smith’s conduct had “a  
4 secondary effect of communicating a hostile message,” Doc. No. 8 at 12 (quoting *Roby*,  
5 219 P.3d at 763), the Court finds Defendants’ argument unavailing. Indeed, Plaintiff’s  
6 Complaint does not explicitly allege Smith’s personnel management actions had the  
7 secondary effect of communicating a hostile message. However, the Ninth Circuit has  
8 previously stated that “[a] merely defective statement of the plaintiff’s action does not  
9 warrant removal.” *Albi v. Street & Smith Publications*, 140 F.2d 310, 312 (9th Cir. 1944)  
10 (footnote omitted); *see also GranCare*, 889 F.3d at 552 (explaining that arguments  
11 challenging the “sufficiency of the complaint, rather than to the possible viability” of the  
12 plaintiff’s complaint, do not establish fraudulent joinder). Similarly, other district courts  
13 have concluded that showing a complaint is insufficiently pleaded does not clearly prove  
14 that there is no possibility the plaintiff will be able to establish a cause of action. *See*  
15 *Amarant v. Home Depot U.S.A., Inc.*, No., 1:13-cv-00245-LJO-SKO, 2013 WL 3146809,  
16 at \*4 (E.D. Cal. June 18, 2013) (“[T]hat a claim against the in-state defendant is  
17 insufficiently pled does not prove clearly and convincingly that there is absolutely no  
18 possibility that the plaintiff will be able to establish a cause of action.”). Defendants fail  
19 to prove, with clear and convincing evidence, that it would be impossible for Plaintiff to  
20 state a cause of action for harassment against Smith.

21 Therefore, even if Plaintiff has failed to sufficiently allege a claim of harassment  
22 against Smith under a Rule 12(b)(6) standard, Defendants have failed to meet their  
23 burden of showing that that there is no possibility Plaintiff could amend his Complaint to  
24 do so. The Ninth Circuit has made it clear that before finding fraudulent joinder, “the  
25 district court must consider . . . whether a deficiency in the complaint can possibly be  
26 cured by granting the plaintiff leave to amend.” *GranCare*, 889 F.3d at 550. Indeed,  
27 several district courts have granted a motion to remand in cases similar to Plaintiff’s. *See*  
28 *Saavedra v. La-Z-Boy, Inc.*, No. EDCV 19-2415 PSG (SPx), 2020 WL 1030901, at \*4



1 (C.D. Cal. Mar. 3, 2020) (granting the plaintiff’s motion to remand where the defendants  
2 failed to show that there is no possibility that the plaintiff could amend the complaint to  
3 sufficiently allege a claim of hostile work environment); *Burris v. AT&T Wireless, Inc.*,  
4 No. C 06-02904 JSW, 2006 WL 2038040 at \*2 (N.D. Cal. July 19, 2006) (granting the  
5 plaintiff’s motion to remand even though the complaint was insufficiently pleaded  
6 because defendant failed to demonstrate that the plaintiff would not be afforded leave to  
7 amend).

8 Accordingly, the Court finds that Defendants have failed to meet their heavy  
9 burden of showing that there is no possibility that Plaintiff could cure his pleading  
10 deficiencies through amendment to state a claim against Smith. *See GranCare*, 889 F.3d  
11 at 548 (quoting *Hunter*, 582 F.3d at 1046); *Saavedra*, 2020 WL 1030901, at \*4;  
12 *Woodrum v. Automatic Data Processing Inc.*, No. SA CV 17-2264-DOC (ASx), 2018  
13 WL 2150945, at \*6–7 (C.D. Cal. May 9, 2018).

#### 14 **B. Whether Complete Diversity Exists**

15 The citizenships of the respective parties for purposes of diversity jurisdiction do  
16 not appear to be in dispute. *See* Doc. No. 1 at 3, 7; Doc. No. 1-2 ¶¶ 3, 6; Compl. ¶¶ 1, 4;  
17 Doc No. 7 at 4, 7. Plaintiff is an individual residing in San Diego County, California.  
18 *See* Doc. No. 1-1 at 1; Doc. No. 1-2 ¶ 3; Compl. ¶ 1. Lowe’s is a citizen of North  
19 Carolina for purposes of diversity jurisdiction. *See* Doc. No. 1 at 7; Doc. No. 1-2 ¶ 7;  
20 Doc No. 7 at 4, 7. Smith is an individual residing in California. *See* Doc. No. 1 at 3;  
21 Doc. No. 1-2 ¶ 6; Compl. ¶ 4; Doc. No. 7 at 4, 7.

22 Given that Smith was not fraudulently joined, Smith’s citizenship will not be  
23 disregarded for purposes of diversity jurisdiction. *See GranCare*, 889 F.3d at 549 (citing  
24 *Chesapeake & Ohio Ry. Co.*, 232 U.S. at 152). Accordingly, the court finds that complete  
25 diversity does not exist between Plaintiff and Defendant Smith because both are citizens  
26 of California. Because the action could not have originated in federal court under  
27 diversity jurisdiction, removal was improper. *See* 28 U.S.C. § 1441(a)–(b).

#### 28 **C. Whether Plaintiff Is Entitled to an Attorneys’ Fees Award**

1 Plaintiff requests the Court to award Plaintiff with the attorneys' fees and costs  
2 associated with bringing the motion to remand. *See* Doc. No. 7 at 10; *see also* Doc. No.  
3 13 at 8. Plaintiff argues that Lowe's removal was frivolous because Lowe's knew  
4 complete diversity did not exist and still removed this case. *See* Doc. No. 7 at 10.  
5 Lowe's responds that Defendants "had a solid basis for concluding that federal court  
6 jurisdiction existed." Doc. No. 8 at 15.

7 According to 28 U.S.C. § 1447(c), "[a]n order remanding the case may require  
8 payment of just costs and any actual expenses, including attorney fees, incurred as a  
9 result of the removal." The standard for awarding fees is based on the "reasonableness of  
10 the removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). The Court  
11 explained, "courts may award attorney's fees under § 1447(c) only where the removing  
12 party lacked an objectively reasonable basis for seeking removal." *Id.*

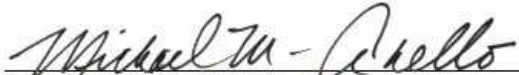
13 The Court finds that removal was not objectively unreasonable; rather, Lowe's  
14 merely failed to meet the exceptionally heavy burden to establish fraudulent joinder.  
15 Accordingly, the Court **DENIES** Plaintiff's request for attorneys' fees and costs. *See*  
16 *Saavedra*, 2020 WL 1030901, at \*5.

#### 17 **IV. CONCLUSION**

18 For the foregoing reasons, the Court **GRANTS** Plaintiff's motion to remand and  
19 **REMANDS** this case back to the Superior Court of California, County of San Diego.  
20 The Court **DENIES** Plaintiff's request for attorneys' fees and costs. The Court  
21 **DIRECTS** the Clerk of Court to close the case and terminate any pending motions,  
22 deadlines, or hearings.

23 **IT IS SO ORDERED.**

24  
25 Dated: September 23, 2020

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28 HON. MICHAEL M. ANELLO  
United States District Judge