

1 **I. BACKGROUND**

2 This lawsuit arises out of personal injuries suffered by Plaintiff Rocky Trevino
3 when he was hit in the back of the head by an unsecured umbrella in a Costco food court.
4 (*Compl.* ¶ 9.¹)

5 On February 9, 2021, Plaintiffs commenced this action in the San Diego Superior
6 Court. (*See id.*) Plaintiffs’ Complaint against Costco and Does 1–100 asserted three
7 claims for relief: (1) premises liability, (2) negligence, and (3) negligent infliction of
8 emotional distress. (*Id.* ¶¶ 12-30.)

9 On May 18, 2021, Costco timely removed the action on the basis of diversity
10 jurisdiction. (*Notice of Removal* [Doc. 1-1].) In support, Costco stated that it is a
11 Washington corporation with its principal place of business in Washington and Plaintiffs
12 are citizens of California. (*Id.* ¶ 4.)

13 Plaintiffs now seek to amend the Complaint to include additional factual
14 allegations and name two new defendants: “Front End Supervisor” Blake Marnell and
15 “Assistant General Manager” Melissa Diaz. (*P&A* [Doc. 9-1] 3:12-23.) Because Mr.
16 Marnell and Ms. Diaz are citizens of California, their addition to the action would divest
17 this Court of diversity jurisdiction. (*Id.* 9:11-13.)

18
19 **II. LEGAL STANDARD**

20 28 U.S.C. § 1447(e) states: “If after removal the plaintiff seeks to join additional
21 defendants whose joinder would destroy subject matter jurisdiction, the court may deny
22 joinder, or permit joinder and remand the action to state court.” 28 U.S.C. § 1447(e).
23 Congress added subsection (e) to allow remand if a plaintiff pursues joinder of a
24 diversity-destroying defendant after removal. H.R. Rep. No. 100–889, at 72. Permitting
25 joinder under § 1447(e) lies in the discretion of the Court. Newcombe v. Adolf Coors

26
27
28

¹ A copy of the Complaint is attached to the Notice of Removal [Doc. 1] as Exhibit A [Doc. 1-2].

1 Co., 157 F.3d 686, 691 (9th Cir. 1998). A court should consider the following factors
2 when weighing whether to permit joinder: (1) whether the new defendant is required for
3 just adjudication and would be joined under Federal Rule of Civil Procedure 19(a); (2)
4 whether the statute of limitations would bar an action against the new defendant in state
5 court; (3) whether there has been an unexplained delay, or the joinder request is untimely;
6 (4) whether the plaintiff intends joinder solely to defeat diversity jurisdiction; (5) whether
7 the claims against the prospective defendant appear valid; and (6) whether the plaintiff
8 will be prejudiced by denial of joinder. IBC Aviation Servs., Inc. v. Compania Mexicana
9 de Aviacion, S.A. de C.V., 125 F. Supp. 2d 1008, 1011 (N.D. Cal. 2000) (citing Palestini
10 v. Gen. Dynamics Corp., 193 F.R.D. 654, 658 (S.D. Cal. 2000)). Any of the factors
11 might prove decisive, and none is a required condition for joinder. Vasquez v. Wells
12 Fargo Bank, Nat'l Ass'n, 77 F. Supp. 3d 911, 921 (N.D. Cal. 2015). The case should be
13 remanded if the court permits joinder of a non-diverse defendant. See 28 U.S.C. §
14 1447(c).

16 **III. DISCUSSION**

17 Plaintiffs argue the six factors set forth above weigh in favor of allowing joinder.
18 (*P&A* 7:12-8:17.) The Court agrees.

19 First, Rule 19(a) requires joinder of persons whose absence would preclude
20 complete relief, impede their ability to protect their interests, or subject a party to the
21 danger of inconsistent obligations. Fed. R. Civ. P. 19(a). “This standard is met when
22 failure to join will lead to separate and redundant actions.” IBC, 125 F. Supp. 2d at 1012
23 (citing CP Nat'l Corp. v. Bonneville Power Admin., 928 F.2d 905, 912 (9th Cir. 1991)).
24 Amendment under section 1447(e) “is a less restrictive standard than joinder under [Rule]
25 19,” but the standard is not met where the defendant is only tangentially related to the
26 cause of action. Id.

27 Plaintiffs contend Mr. Marnell and Ms. Diaz “are liable for their negligent
28

1 training and supervision of Costco employees, and for failing to inspect or correct the
2 unsafe and dangerous condition.” (P&A 7:21-23.) Costco’s argument is aimed almost
3 entirely at this first factor. It argues that Mr. Marnell and Ms. Diaz are not necessary
4 parties because complete relief could be afforded to Plaintiffs without them. (*Opp’n*
5 [Doc. 12] 4:13-14.) Specifically, Costco maintains that the doctrine of respondeat
6 superior imputes the liability of these employees to Costco and, as a publicly traded
7 company, it is required to defend Mr. Marnell and Ms. Diaz. (*Id.* 4:7-15.) The Court is
8 not persuaded, however, and finds that Plaintiffs sufficiently allege that Mr. Marnell and
9 Ms. Diaz bear more than a tangential relationship to Plaintiffs’ cause of action for
10 negligence. Indeed, “[t]he fact that Costco may be both directly liable for its negligence
11 and vicariously liable for the negligence of [its employee] supports Plaintiff’s argument
12 that [the employee] is a necessary party to this action, and not merely tangentially
13 related.” Franco v. Costco Wholesale Corp., 2018 WL 6333674, at *2 (C.D. Cal. Oct.
14 30, 2018). Accordingly, this factor weighs in favor of joinder.

15 Second, the statute of limitations for an injury to “an individual caused by the
16 wrongful act or neglect of another” is two years. Cal. Civ. Proc. Code § 335.1.
17 The two-year period for Plaintiffs to pursue a claim against Mr. Marnell and Ms. Diaz
18 expired on February 17, 2021. (P&A 7:23-8:2.) This factor also weighs in favor of
19 joinder.

20 Third, courts consider the delay between removal from state court and a motion to
21 amend when determining whether to allow joinder of a non-diverse party. See, e.g.,
22 Lopez v. Gen. Motors Corp., 697 F.2d 1328, 1332 (9th Cir. 1983) (denying amendment
23 to add defendant that was filed more than six months after removal and only days before
24 consideration of a motion for summary judgment); IBC, 125 F. Supp. 2d at 1012.
25 Plaintiffs allege they only became aware of Mr. Marnell and Ms. Diaz after being served
26 with Costco’s Rule 26 disclosures. (P&A 8:8-11.) Plaintiffs filed the instant motion to
27 amend the Complaint on July 14, 2021, only one month after the Rule 26(f) report was
28 filed on June 8, 2021. The motion is timely, which counsels in favor of joinder.

1 Fourth, the motive behind seeking joinder of a non-diverse defendant is relevant as
2 to whether to grant leave to amend. Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d
3 1371, 1376 (9th Cir. 1980). Costco argues Plaintiffs seek to add Mr. Marnell and Ms.
4 Diaz solely to destroy the federal court’s diversity jurisdiction, requiring a remand to
5 state court. (*Opp’n* 4:16-17.) However, “[s]uspicion of diversity destroying amendments
6 is not as important now that § 1447(e) gives courts more flexibility in dealing with the
7 addition of such defendants.” IBC, 125 F.Supp.2d at 1012 (citation omitted). Because of
8 this, courts often consider whether the plaintiff is trying to delay proceedings
9 unreasonably. See Righetti v. Shell Oil Co., 711 F. Supp. 531, 534 (N.D. Cal. 1989).
10 The Court declines to impute a motive to unreasonably delay proceedings here, as the
11 case is still in the early stages and Plaintiffs have quickly moved to remand. Considering
12 Mr. Marnell and Ms. Diaz’s alleged participation in the incident, Plaintiffs’ desire to add
13 them as defendants is reasonable. This factor weighs in favor of granting joinder.

14 Fifth, “courts consider whether the claim sought to be added seems meritorious,”
15 which is not the same as the standard in either a motion to dismiss or a motion for
16 summary judgment. IBC, 125 F. Supp. 2d at 1012. As discussed above, Plaintiffs’
17 claims against Mr. Marnell and Ms. Diaz appear facially valid. Accordingly, this factor
18 weighs in favor of joinder.

19 Finally, Costco does not contest that denial of joinder will prejudice Plaintiffs.
20 Denying the amendment would force Plaintiffs to pursue redundant litigation in another
21 forum or forego their potential claims against Mr. Marnell and Ms. Diaz. At the same
22 time, little prejudice to Costco would result from permitting joinder, as the case is still in
23 the early stages of litigation.

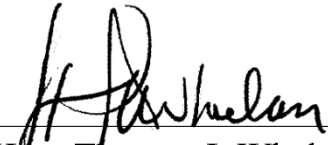
24 25 **IV. CONCLUSION & ORDER**

26 Having considered the relevant factors, Plaintiffs’ motion for leave to amend is
27 **GRANTED** [Doc. 9]. Because the amendment destroys diversity jurisdiction by naming
28

1 Mr. Marnell and Ms. Diaz as defendants, remand is warranted. Accordingly, this Court
2 **REMANDS** the action to the Superior Court of California, County of San Diego.

3
4 **IT IS SO ORDERED.**

5 Dated: October 27, 2021

6 
7 _____
8 Hon. Thomas J. Whelan
9 United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28