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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

DONA DICKSON,

Plaintiff,

v.

WALMART, INC.,

Defendant.

Case No. 2:23-cv-01386-MMD-NJK

ORDER

I. SUMMARY

In this removed action, Plaintiff Dona Dickson filed a motion to remand (“Motion”), contending that removal was improper because Defendant Walmart has not established complete diversity of citizenship.¹ (ECF No. 7.) Because Plaintiff has adequately alleged that “Doe Employee(s)” and “Doe Manager(s)” are real defendants who reside in Nevada and that their identities are in Walmart’s possession and control, the Court finds that Walmart has not met its burden to establish that removal is proper. The Court will thus grant Plaintiff’s Motion.

II. BACKGROUND

On July 17, 2023, Plaintiff Dickson filed her complaint in the Eighth Judicial District Court of Clark County, Nevada, bringing claims for negligence, premises liability, and negligent hiring, training, retention and supervision. (ECF No. 1-2 (“Complaint”).) Dickson seeks damages from Walmart, Doe Employees I-V and Doe Managers V-X. (*Id.* at 5-10.) Her Complaint also lists Does X-XX and Roe Corporations I-XX as Defendants. (*Id.* at 1.) Plaintiff alleges that on July 18, 2021, she slipped on an unknown liquid substance as a business invitee in Walmart Store No. 3350 in Las Vegas, severely injuring her knee. (*Id.* at 4-5.) She further alleges that Defendant Employees and Managers, acting in the scope

¹Walmart opposed the Motion (ECF No. 8), and Plaintiff replied (ECF No. 9).

1 of their employment, negligently created or contributed to dangerous conditions on the
2 premises directly or in their supervisory capacities. (*Id.* at 4-6.)

3 Plaintiff is a citizen of Nevada, and Walmart is a corporate citizen of Delaware and
4 Arkansas. (ECF Nos. 1-2 at 2, 6 at 2.) Plaintiff asserts that Doe Employees and Managers
5 “are, and at all relevant times herein were, residents of the County of Clark, State of
6 Nevada.” (ECF No. 1-2 at 2.)

7 On September 7, 2023—within 30 days of the date on which Plaintiff filed a request
8 from exemption from arbitration putting Walmart on notice that alleged damages
9 exceeded \$75,000—Walmart removed on the basis of diversity jurisdiction. (ECF Nos. 1,
10 6.) Plaintiff moved to remand on the ground that Doe Employees and Managers are
11 residents of Clark County, Nevada, and thus that Walmart has not met its burden to
12 establish complete diversity of citizenship. (ECF No. 7.)

13 **III. DISCUSSION**

14 The party asserting federal subject matter jurisdiction based on diversity of
15 citizenship must show (1) complete diversity of citizenship among opposing parties and
16 (2) an amount in controversy exceeding \$75,000. *See* 28 U.S.C. § 1332(a). Removal
17 based on diversity is subject to the forum defendant rule: “[a] civil action otherwise
18 removable solely on the basis of the jurisdiction under section 1332(a) of this title may not
19 be removed if any of the parties in interest properly joined and served as defendants is a
20 citizen of the [s]tate in which such action is brought.” 28 U.S.C. § 1441(b)(2). Courts
21 strictly construe the removal statute against removal jurisdiction, and “[f]ederal jurisdiction
22 must be rejected if there is any doubt as to the right of removal in the first instance.” *Gaus*
23 *v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The party seeking removal bears the
24 burden of establishing that removal is proper. *See California ex rel. Lockyer v. Dynegy,*
25 *Inc.*, 375 F.3d 831, 838 (9th Cir. 2004).

26 Here, the parties do not dispute that Plaintiff meets the amount in controversy
27 requirement, nor that Dickson and Walmart are diverse from one another. (ECF No. 8 at
28 3.) They contest only whether there is complete diversity among parties given the

1 inclusion of Doe Defendants in the Complaint. (*Id.*) Plaintiff argues that Doe Managers
2 and Employees defeat diversity and destroy federal subject matter jurisdiction because
3 upon information and belief, they are residents of Clark County, Nevada. (ECF No. 7 at
4 3.) Plaintiff emphasizes that Doe Defendants' citizenship is all-but certain because they
5 worked in Las Vegas at the time of her injury. (*Id.* at 7-10.) Moreover, Walmart presumably
6 has access to their names and addresses, and Plaintiff argues she will inevitably obtain
7 this information during discovery. (*Id.* at 3-4.) Walmart argues in response that (1) the
8 plain language of 28 U.S.C. § 1441(b)(1) mandates that the Court disregard the
9 citizenship of Doe Employees and Managers, and (2) even if Plaintiff eventually identifies
10 Doe Employees and Managers, they should not be named as parties in this suit because
11 any alleged misconduct occurred in the scope of employment and only Walmart's liability
12 is at issue under a theory of respondeat superior. (ECF No. 8 at 3, 5.) The Court considers
13 each argument.

14 **A. Fictitious Defendants in Section 1441 Removal Actions**

15 As amended by the Judicial Improvements and Access to Justice Act in 1988, 28
16 U.S.C. § 1441(b)(1) provides that "[i]n determining whether a civil action is removable on
17 the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants
18 sued under fictitious names shall be disregarded." While Walmart argues that the plain
19 language of the statute resolves the question and prohibits all further consideration of
20 Doe Defendants' alleged Nevada citizenship, the issue of how to determine whether a
21 defendant is truly "fictitious" is a live one among district courts. (ECF Nos. 7 at 7-10, 8 at
22 4.) The question "'remains convoluted and unsettled,' due in large part to exceptions
23 created by the Ninth Circuit." *Johnson v. Starbucks Corp.*, 475 F. Supp. 3d 1080, 1083
24 (C.D. Cal. 2020) (quoting *Goldsmith v. CVS Pharmacy, Inc.*, No. CV 20-00750-AB (JCX),
25 2020 WL 1650750, at *4 (C.D. Cal. Apr. 3, 2020)).

26 Many courts in this Circuit differentiate between purely "fictitious" Doe defendants,
27 whose citizenship must be disregarded, and "real" Doe defendants whose identities are
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1 ascertainable.² “While some courts find the language of § 1441 preclusive . . . others find
2 a distinction exists between ‘fictitious’ and real party Does that requires greater scrutiny.”
3 *Johnson*, 475 F. Supp. 3d at 1083 (citing *Goldsmith*, 2020 WL 1650750, at *4); *Gardiner*
4 *Family*, 147 F. Supp. 3d at 1036. Courts in the latter category assess whether the
5 “[p]laintiffs’ description of Doe defendants or their activities is specific enough as to
6 suggest their identity, citizenship, or relationship to the action.” *Gardiner Family*, 147 F.
7 Supp. 3d at 1036. See also *Robinson v. Lowe’s Home Centers, LLC*, No. 1:15-CV-1321-
8 LJO-SMS, 2015 WL 13236883, at *3 (E.D. Cal. Nov. 13, 2015); *Johnson*, 475 F. Supp.
9 3d at 1084; *Sandoval v. Republic Servs., Inc.*, No. 218 CV 01224-ODW (KSX), 2018 WL
10 1989528, at *3-4 (C.D. Cal. Apr. 24, 2018).

11 Courts have also more readily considered Doe defendants’ citizenship when such
12 defendants are under a named defendant’s control—including when they are employees
13 of a named defendant. “[W]hen a plaintiff’s allegations give a definite clue about the
14 identity of the fictitious defendant by specifically referring to an individual who *acted as*
15 *the company’s agent*, the court should consider the citizenship of the [fictitious]
16 defendant.” *Collins v. Garfield Beach CVS, LLC*, Case No. CV 17-3375 FMO (GJSx),
17 2017 WL 2734708, at *2 (C.D. Cal June 26, 2017) (quoting *Brown v. TranSouth Fin.*
18 *Corp.*, 897 F. Supp. 1398, 1401 (M.D. Ala. 1995)) (emphasis added). More broadly, courts
19 have considered Doe citizenship when a named defendant knew or should have known
20 the fictitious defendant’s identity. See *id.* See also *Martenev v. Eastman Outdoors, Inc.*,
21 No. 2:14-cv-351-JCM-PAL, 2014 WL 4231366, at *3 (D. Nev. Aug. 26, 2014) (citing
22 *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1175-76 (9th Cir. 1969)) (finding that a
23 defendant could not ignore an unserved non-diverse co-defendant in seeking to remove
24 a case to federal court based on diversity); Charles A. Wright & Arthur R. Miller, Removal

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26 ²Walmart argues that considering Doe citizenship “ignore[s] the express mandate
27 of the Ninth Circuit Court of Appeals set forth in *Bryant III*.” (ECF No. 8 at 3.) See *Bryant*
28 *v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir.1989). However, in practice the Ninth Circuit’s
mandate is far from clear. In *Bryant III*, “[t]he Ninth Circuit abrogated it’s overruling [in
Bryant II] of all the cases creating exceptions to the general rule on Doe pleading” and
thus, “various exceptions live on.” *Gardiner Family, LLC v. Crimson Resource*
Management Corp., 147 F. Supp. 3d 1029, 1035 (E.D. Cal. 2015)).

1 Based on Diversity of Citizenship and Alienage Jurisdiction, 14C Federal Practice &
2 Procedure § 3723 (summarizing relevant case law and noting that “if the defendants are
3 better equipped than are plaintiffs to ascertain the Doe defendants' citizenship, or if the
4 Doe defendant is an agent of a company, a few federal courts have permitted the actual
5 identity of a non-diverse Doe defendant to destroy diversity jurisdiction upon removal”).

6 In sum, not all unnamed defendants are equally “fictitious” for citizenship purposes
7 under Section 1441. When a plaintiff identifies a Doe defendant with sufficient detail to
8 strongly suggest that they are in fact a “real” defendant possessing diversity-destroying
9 citizenship—and the identity of a diversity-destroying defendant is in the exclusive
10 possession and control of a named defendant—principles of fairness and judicial
11 efficiency counsel against allowing a named defendant to litigate in federal court pending
12 discovery. See *Collins*, 2017 WL 2734708, at *2; *Marteney*, 2014 WL 4231366, at *3.

13 Here, Doe Employees and Doe Managers are or were agents of a Las Vegas
14 Walmart, living in Nevada at the time Plaintiff was injured. (ECF No. 1-2 at 2-5.) It is
15 almost certain that one or more of the Doe Defendants in question were citizens of
16 Nevada at the time the Complaint was filed or when the action was removed. See *Strotek*
17 *Corp. v. Air Transp. Ass'n of Am.*, 300 F.3d 1129, 1131 (9th Cir. 2002) (emphasizing that
18 complete diversity among the parties must exist both when the complaint is filed and when
19 the action is removed). The Court is also satisfied that Plaintiff identifies at least some
20 Doe Defendants with enough specificity to give “definite clues” as to their “relationship to
21 the action.” See *Collins*, 2017 WL 2734708, at *2. Plaintiff identifies the exact day her
22 injury occurred and identifies the Doe Employees and Managers as those responsible for
23 creating dangerous conditions through mopping, sweeping, and other cleaning activities
24 and supervision related to that day. (ECF No. 1-2 at 2-5.) And cleaning schedules,
25 records, and employee name and address information is in Walmart’s possession and
26 control. As a result, the Court agrees with Plaintiff that it wastes judicial resources “to
27 allow removal simply because Defendant has yet to provide [information] about their own
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1 employees in order to permit service upon said employees, and, in the process, destroy
2 diversity jurisdiction.” (ECF No. 7 at 10.)

3 Plaintiff’s Doe allegations can be distinguished from the allegations in numerous
4 cases leading sister courts to disregard Doe citizenship. See *Conerly v. Liberty Mut. Ins.*
5 *Co.*, No. 2:23-CV-515-GMN-EJY, 2023 WL 4494422, at *2-3 (D. Nev. June 29, 2023)
6 (finding that there was no “definite clue” about Doe identities where plaintiff only generally
7 alleged their relationship to defendant insurance company and attempted to shoehorn
8 new factual allegations about Doe involvement into a first amended complaint); *Johnson*
9 *v. Walmart, Inc.*, No. 2:21-CV-08662-ODW (GJSx), 2022 WL 2355185, at *2-3 (C.D. Cal.
10 June 30, 2022) (finding that identification of a manager was inadequately specific, but
11 highlighting that Plaintiff “has been unable to supplement [Doe defendant’s] identity, even
12 after conducting discovery”); *Gardiner Family*, 147 F. Supp. 3d at 1036 (finding that “Does
13 1 through 50” were fictitious when the complaint gave no details about possible identity
14 and no “other information from which the [c]ourt could glean this information”); *Robinson*,
15 2015 WL 13236883, at *4 (disregarding Doe citizenship in a similar case involving a
16 plaintiff’s fall in a store, but noting that “[t]he analysis would be different if . . . Plaintiff had
17 alleged that the Doe Defendants were California citizens, or provided some information
18 about their involvement in the case”).³ Resolving all ambiguity in favor of remand, the
19 Court finds that Doe Managers and Employees are not purely fictitious, and are
20 sufficiently identifiable to justify consideration of their Nevada citizenship.

21 **B. Independent Doe Employee and Manager Liability**

22 Walmart argues that “[e]ven if Plaintiff could eventually name the currently fictitious
23 defendant to include Walmart DOE Managers and DOE Employees, the allegations
24 against [them] should not be valid because Defendants were working in this course and
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26 ³The Court acknowledges that some sister courts have disregarded Doe
27 citizenship even when more details are known about Does—including their first names—
28 than are available here. See, e.g., *Green v. Doe*, No. 1:22-CV-0435 JLT EPG, 2023 WL
4074775, at *5 (E.D. Cal. June 20, 2023) (finding in a similar case involving a fall in
Walmart that “when plaintiff does not know the ‘full identity’ of a defendant, such a person
may be deemed a fictitious defendant”). Even balancing these cases, the Court finds that
the high burden applied to parties seeking removal weighs in favor of remand.

1 scope of their employment at the time of the subject incident” and “Plaintiff may only
2 continue to pursue her claims against Walmart under *respondeat superior*.” (ECF No. 8
3 at 5.) Plaintiff maintains that she has adequately pled a specific and independent
4 negligence cause of action against individual Doe Defendants. (ECF No. 7 at 7.) Again
5 resolving ambiguity in favor of remand, the Court agrees with Plaintiff that a state court
6 could reasonably find that valid negligence causes of action exist against resident
7 employee and manager defendants.

8 Where “there is a possibility that a state court would find that the complaint states
9 a cause of action against any of the resident defendants, the federal court must find that
10 the joinder was proper and remand the case to the state court.” *Hunter v. Philip Morris*
11 *USA*, 582 F.3d 1039, 1046 (9th Cir. 2009) (quoting *Tillman v. R.J. Reynolds Tobacco*,
12 340 F.3d 1277, 1279 (11th Cir.2003) (per curiam)). A Nevada negligence claim “requires
13 that the plaintiff satisfy four elements: (1) an existing duty of care, (2) breach, (3) legal
14 causation, and (4) damages.” *Turner v. Mandalay Sports Entertainment, LLC*, 180 P.3d
15 1172, 1175 (Nev. 2008).

16 Walmart fails to cite binding authority to support its position that Plaintiff cannot
17 state an independent negligence claim against Doe agents because “[i]f an employee is
18 found to be within the scope of their employment, they owe no individual duty to the
19 Plaintiff.” (ECF No. 8 at 5.) While generally agents are not liable when they breach a duty
20 owed *only* to a principal, employees may be liable for individual torts when they breach
21 an independent duty—even if the conduct occurred during the scope of employment. See
22 *Lieberman v. Wal-Mart Stores, Inc.*, No. 2:12-CV-1650-JCM-PAL, 2013 WL 596098, at
23 *3 (D. Nev. Feb. 15, 2013) (quoting *Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d
24 752, 765 (7th Cir. 2009)) (“Whether the employer is held vicariously liable for the agent’s
25 conduct . . . does not affect the agent’s independent tort liability”). Walmart relies on *Aleck*
26 *v. ZB Nat’l Ass’n*, 485 P.3d 210, (Nev. 2021), to support its position. But in *Aleck*, the
27 Nevada Supreme Court *limited* the extent to which corporate liability precludes individual
28 liability, finding that bank tellers could owe independent duties to customers who were

1 known primary parties while also declining to broadly limit tort liability for actions
2 undertaken in the scope of employment. See *id.* See also *Sanchez v. Wal-Mart Stores,*
3 *Inc.*, 221 P.3d 1276, 1281 (Nev. 2009) (“[I]n the context of professional relationships, the
4 duty element of negligence [can] be established in one of two ways: (1) a plaintiff having
5 a direct relationship with the defendant, or (2) by establishing that the plaintiff is a known
6 or identifiable third party to whom the defendant owes a legal duty.”); *Whitmore v.*
7 *Statguard, LLC*, No. 09-CV-01414-REB-MEH, 2009 WL 5216941, at *3 (D. Colo. Dec. 30,
8 2009) (finding that agents were not nominal parties because neither the doctrine of
9 respondeat superior nor the legal fiction of corporate existence barred the potential for
10 individual liability, even where an individual was acting as a representative of a
11 corporation that could also be held vicariously liable).

12 Here, the Court is satisfied that a Nevada court may reasonably find that Plaintiff
13 has pled a specific and independent negligence claim against Doe Employees and
14 Managers.⁴ Plaintiff alleges in her Complaint that Doe Defendants owed an individual
15 duty to not contribute to dangerous conditions, that they breached this duty through their
16 actions with regard to hazards on the premises, and that this breach directly and
17 proximately caused Dickson’s injury and damages: “Defendants are jointly and severally
18 liable for causing . . . the creation of the subject dangerous condition . . . a foreign
19 substance on Defendants’ floor, and for causing and/or contributing to Plaintiff’s injuries,
20 treatment, and damages” (ECF No. 1-2 at 4.) A state court could further determine
21 that Plaintiff, as a customer, is a known and identifiable third party owed a duty. See
22 *Aleck*, 485 P.3d. While the Court acknowledges that some of Plaintiff’s allegations against

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25 ⁴Walmart may imply—although it does not directly argue—that Doe Employees
26 and Managers should be disregarded because Walmart is better positioned to satisfy a
27 judgment and thus to afford complete relief. While this may be true, it is not a sufficiently
28 compelling reason to disregard Defendant citizenship here. See, e.g., *Frontier Airlines,*
Inc. v. United Air Lines, Inc., 758 F. Supp. 1399 (D. Colo. 1989) (finding that a district
court could not disregard a properly joined regional manager defendant simply because
a nonresident corporate defendant had the capital reserves to satisfy the judgment).

1 Does are comparatively sparse,⁵ it finds that Walmart has failed to meet its high burden
2 to overcome the strong presumption against removal. See *Gaus*, 980 F.2d at 566-67.

3 **IV. CONCLUSION**

4 The Court notes that the parties made several arguments and cited to several
5 cases not discussed above. The Court has reviewed these arguments and cases and
6 determines that they do not warrant discussion as they do not affect the outcome of the
7 motion before the Court.

8 It is therefore ordered that Plaintiff's motion for remand (ECF No. 7) is granted.

9 It is further ordered that this case is remanded and the Clerk of Court is directed
10 to close the case.

11 DATED THIS 21st Day of December 2023.

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MIRANDA M. DU
15 CHIEF UNITED STATES DISTRICT JUDGE

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⁵Plaintiff brings a claim for negligent hiring, retention, and supervision of
26 employees. Under Nevada law, a plaintiff asserting this claim must establish that: "(1)
27 defendant owed a duty of care to the plaintiff; (2) defendant breached that duty by hiring,
28 retaining, or supervising an employee even though defendant knew, or should have
known, of the employee's dangerous propensities; (3) the breach was the cause of
plaintiff's injuries; and (4) damages." *Peterson v. Miranda*, 57 F. Supp. 3d 1271, 1280 (D.
Nev. 2014) (applying Nevada law). The Complaint contains sparse facts to demonstrate
that supervisors knew of employees' "dangerous" propensities.