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United States District Court  
Central District of California

CINDY OSUNA,

Plaintiff,

v.

TARGET CORPORATION et al.,

Defendants.

Case № 2:22-cv-07960-ODW (PVCx)

**ORDER DENYING MOTION TO  
REMAND [10]**

**I. INTRODUCTION**

On November 1, 2022, Defendant Target Corporation removed this slip-and-fall case to federal court based on diversity jurisdiction. (Notice of Removal (“NOR”), ECF No. 1.) Plaintiff Cindy Osuna now moves to remand. (Mot. Remand (“Motion” or “Mot.”), ECF No. 10.) The Motion is fully briefed. (Opp’n, ECF No. 11; Reply, ECF No. 13.) For the following reasons, the Court **DENIES** the Motion.<sup>1</sup>

**II. BACKGROUND**

Osuna alleges that, on October 5, 2020, she slipped and fell on blackberries at a Target store in West Covina, California (“Subject Store”). (NOR Ex. A (“Compl.”))

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<sup>1</sup> Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

1 ¶¶ 4, 12, ECF No. 1.<sup>2</sup>) As a result, she experienced pain and sustained physical  
2 injuries requiring medical treatment. (*Id.* ¶¶ 11, 14–15, 22.)

3 Defendant David Rico is a current Target employee at the Subject Store, but he  
4 did not begin working there until April 18, 2022, more than a year and a half after  
5 Osuna’s fall. (*See* NOR Ex. G (Decl. David Rico (“Rico Decl.”)) ¶ 3.) On the date of  
6 Osuna’s fall, Rico was employed at a different Target store located in Alhambra,  
7 California. (*Id.* ¶ 4.)

8 On June 22, 2022, Osuna initiated a civil action in Los Angeles Superior Court,  
9 asserting two causes of action for negligence and premises liability against Target and  
10 Rico. (Compl. ¶¶ 8–22.) On November 1, 2022, Target removed the case to federal  
11 court, based on discovery responses dated October 7, 2022, in which Osuna claims  
12 medical special damages in excess of \$248,323.66. (NOR ¶ 5; *see also* NOR Ex. D  
13 (“Disc. Resps.”).) Osuna now moves to remand. (Mot.)

### 14 III. LEGAL STANDARD

15 Federal courts are courts of limited jurisdiction, having subject-matter  
16 jurisdiction only over matters authorized by the Constitution and Congress. U.S.  
17 Const. art. III, § 2, cl. 1; *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,  
18 377 (1994). A suit filed in a state court may be removed to federal court if the federal  
19 court would have had original jurisdiction over the suit. 28 U.S.C. § 1441(a). Federal  
20 courts have original jurisdiction where an action presents a federal question under  
21 28 U.S.C. § 1331, or diversity of citizenship under 28 U.S.C. § 1332. Accordingly, a  
22 defendant may remove a case from state court to federal court pursuant to the federal  
23 removal statute, 28 U.S.C. § 1441, on the basis of federal question or diversity  
24 jurisdiction. Diversity jurisdiction requires complete diversity of citizenship among  
25 the adverse parties and an amount in controversy exceeding \$75,000, exclusive of  
26 interest and costs. 28 U.S.C. § 1332(a).

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<sup>2</sup> All exhibits to the Notice of Removal are found at ECF No. 1.

1 Courts strictly construe the removal statute against removal jurisdiction, and  
2 “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal  
3 in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The  
4 party seeking removal bears the burden of establishing federal jurisdiction. *Id.*

#### 5 IV. DISCUSSION

6 Osuna moves to remand on four bases. First, Osuna argues that Target failed to  
7 timely remove the case. (Mot. 4–5.) Second, Osuna asserts that the Court lacks  
8 subject matter jurisdiction because Osuna and Rico both reside in California,  
9 destroying complete diversity. (*Id.* at 5–6.) Third, Osuna argues that removal is  
10 procedurally defective because Rico did not join in the removal. (*Id.* at 6.) Finally,  
11 Osuna argues that remand is inevitable because Osuna may later identify and move to  
12 join additional defendants who are California residents, destroying complete diversity.  
13 (*Id.* at 6–7.) The Court addresses each argument in turn.

#### 14 A. Timeliness of Removal

15 Osuna argues that Target’s removal was untimely because Target failed to  
16 remove within thirty days of being served with the Complaint. (*Id.* at 4–5.)

17 Under 28 U.S.C. § 1446(b)(3), a defendant must file a notice of removal within  
18 thirty days of receipt “of a copy of an amended pleading, motion, order or *other paper*  
19 from which it may first be ascertained that the case is one which is or has become  
20 removable.” 28 U.S.C. § 1446(b)(3) (emphasis added). “Courts have found that a  
21 defendant may remove under the ‘other paper’ provision of section 1446(b) based on a  
22 plaintiff’s discovery responses or deposition testimony.” *Steiner v. Horizon Moving*  
23 *Sys. Inc.*, 568 F. Supp. 2d 1084, 1087 (C.D. Cal. 2008) (finding defendant timely  
24 removed case within thirty days of plaintiff’s deposition).

25 Defendants argue that Target’s Notice of Removal was timely because Target  
26 filed it within thirty days of receiving Osuna’s discovery responses, which first made  
27 Defendants aware that the amount in controversy exceeds \$75,000. (Opp’n 2–3.) In  
28 Osuna’s discovery responses, dated October 7, 2022, Osuna alleges medical special

1 damages in excess of \$248,323.66. (NOR ¶ 5; *see also* Disc. Resps.) Target filed the  
2 Notice of Removal on November 1, 2022, which is within thirty days of receiving  
3 Osuna’s discovery responses. (*See* NOR; Disc. Resps.) Accordingly, Target timely  
4 removed this action.

5 Osuna argues that the Complaint includes allegations that she suffered severe  
6 and permanent injuries resulting from her fall, which provided sufficient notice that  
7 the amount in controversy exceeds \$75,000. (Mot. 4–5; Reply 2–3.) However, a case  
8 does not become removable merely because the initial pleading “provides a ‘clue’ as  
9 to removability.” *Ackerberg v. Citicorp USA, Inc.*, 887 F. Supp. 2d 934, 939 (N.D.  
10 Cal. 2012) (quoting *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 696 (9th Cir.  
11 2005)). Here, Osuna’s allegations in the Complaint are conclusory and do not include  
12 any specific damages amount. (*See generally* Compl.) Indeed, Osuna fails to allege  
13 any details concerning her injuries or the physical effects of such injuries. (*Id.*) At  
14 best, Osuna’s Complaint provides only a “clue” that the amount in controversy could  
15 exceed \$75,000. *Harris*, 425 F.3d at 696. This is insufficient to trigger the thirty-day  
16 removal period.

17 **B. Complete Diversity**

18 The parties do not dispute that (1) Osuna is a resident of California, (2) Target is  
19 a citizen of Minnesota, and (3) Rico is resident of California. (NOR ¶ 9; Compl. ¶¶ 1,  
20 3.) The parties’ dispute is limited to whether Rico was fraudulently joined such that  
21 the Court should ignore his citizenship for the purposes of its diversity jurisdiction  
22 analysis. (Mot. 5–6; Opp’n 3–5.)

23 “In determining whether there is complete diversity, district courts may  
24 disregard the citizenship of a non-diverse defendant who has been fraudulently  
25 joined.” *Grancare, LLC v. Thrower ex rel. Mills*, 889 F.3d 543, 548 (9th Cir. 2018)  
26 (citing *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152 (1914)). The Ninth  
27 Circuit has described two ways to establish fraudulent joinder: “(1) actual fraud in the  
28 pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of

1 action against the non-diverse party in state court.” *Id.* (quoting *Hunter v. Philip*  
2 *Morris USA*, 582 F.3d 1039, 1044 (9th Cir. 2009)). “Fraudulent joinder is established  
3 the second way if a defendant shows that an ‘individual[] joined in the action cannot  
4 be liable on any theory.’” *Id.* (alteration in original) (quoting *Ritchey v. Upjohn Drug*  
5 *Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998)). A defendant is not fraudulently joined,  
6 however, where “a deficiency in the complaint can possibly be cured by granting the  
7 plaintiff leave to amend.” *Id.* at 550.

8 “Fraudulent joinder must be proven by clear and convincing evidence.”  
9 *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007).  
10 Furthermore, “[f]raudulent joinder claims may be resolved by ‘piercing the pleadings’  
11 and considering summary judgment-type evidence such as affidavits and deposition  
12 testimony.” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1068 (9th Cir. 2001)  
13 (quoting *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 263 (5th Cir.  
14 1995)).

15 Here, Osuna asserts causes of action for negligence and premises liability  
16 against Target and Rico. (Compl. ¶¶ 8–22.) Under California law, “[t]he elements of  
17 a negligence claim and a premises liability claim are the same: a legal duty of care,  
18 breach of that duty, and proximate cause resulting in injury.” *Hernandez v. Jensen*,  
19 61 Cal. App. 5th 1056, 1064 (2021). “As in a general negligence cause of action, a  
20 plaintiff bringing an action for premises liability based on a negligence theory must  
21 plead and prove that the defendant breached a duty of care owed to the plaintiff that  
22 proximately caused injury and damages.” *Annocki v. Peterson Enters., LLC*, 232 Cal.  
23 App. 4th 32, 37 (2014) (citing *Paz v. State*, 22 Cal. 4th 550, 559 (2000)).

24 Osuna’s claims are premised on allegations that Target and Rico “owned,  
25 leased, operated, maintained, designed, installed, built, managed, supervised,  
26 inspected and/or controlled the [Subject Store] such that unsafe and dangerous  
27 conditions were created or caused to exist,” which led to Osuna’s fall. (Compl. ¶¶ 11,  
28 17.) However, Target submits a declaration from Rico stating that on October 5, 2020,

1 the date of Osuna’s fall, he “was not employed or working at the Subject Store.”  
2 (Rico Decl. ¶¶ 2–4.) Rather, on October 5, 2020, Rico was employed as a manager at  
3 a different Target store and did not begin working at the Subject Store until more than  
4 a year and a half later, on April 18, 2022. (*Id.*; *see also* Opp’n 4.) Thus, Rico had no  
5 control over the premises where Osuna’s alleged fall occurred and owed no duty of  
6 care to Osuna in relation to the Subject Store. Target accordingly meets its burden of  
7 establishing that Rico cannot be liable for Osuna’s fall under any theory. *See*  
8 *Grancare*, 889 F.3d at 548.

9 Osuna argues Rico’s declaration is insufficient to establish fraudulent joinder.  
10 (Mot. 5–6; Reply 3–5.) In particular, Osuna argues that Rico’s declaration “does not  
11 even state that he was not present at the [Subject Store] on the date of the incident,  
12 that he had no involvement in the safety of the [S]ubject [S]tore, or that he was not  
13 involved in Target’s safety policies and procedures.” (Mot. 6.) This is unpersuasive.  
14 Rico’s declaration is clear that he “was not employed or working at the Subject Store”  
15 on the day of Osuna’s fall and that he did not begin working there until more than a  
16 year and a half later. (Rico Decl. ¶¶ 2–4.) Thus, Rico had no control over the Subject  
17 Store and no duty to maintain the Subject Store on the date of Osuna’s fall.

18 Accordingly, Target establishes that Rico was fraudulently joined and his  
19 citizenship does not destroy the complete diversity between Target and Osuna. In  
20 addition, because Rico was fraudulently joined, the Court **DISMISSES** Osuna’s  
21 claims against Rico. *See Isaacs v. Broido*, 358 F. App’x 874, 876–77 (9th Cir. 2009)  
22 (remanding case to district court “with instructions to amend its order denying remand  
23 to include a sua sponte judgment of dismissal against the fraudulently joined  
24 defendants”).

### 25 **C. Joinder in Removal**

26 Osuna argues that “[t]he removal here is procedurally defective because it has  
27 not been joined by Defendant Rico even though he has been served.” (Mot. 6.)  
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1           When a civil action is removed solely under section 1441(a), as it was here, “all  
2 defendants who have been properly joined and served must join in or consent to the  
3 removal of the action.” 28 U.S.C. § 1446(b)(2)(A). Because Rico was fraudulently  
4 joined, *see supra* Part IV.B, his consent to the removal of this action is not required.  
5 *See* 28 U.S.C. § 1446(b)(2)(A). Nonetheless, Defendants argue that Rico consented to  
6 the removal by providing a declaration in support of the removal. (Opp’n 5.)  
7 Defendants also point out that Rico and Target are represented by the same counsel,  
8 who filed the Notice of Removal. (*See* Decl. Eugene J. Egan ISO Opp’n (“Egan  
9 Decl.”) ¶¶ 1, 3, ECF No. 11; *see also* NOR.) The Court finds that by filing, through  
10 counsel, a declaration in support of Target’s Notice of Removal, Rico sufficiently  
11 manifested consent to the removal. *Cf. Hernandez v. Six Flags Magic Mountain, Inc.*,  
12 688 F. Supp. 560, 563 (C.D. Cal. 1988) (finding defendant manifested consent to  
13 removal by answering the complaint in federal court within the 30 day period).  
14 Moreover, Osuna does not rebut this argument in her Reply and, therefore, she  
15 concedes it. *See Did Bldg. Servs., Inc. v. N.L.R.B.*, 915 F.2d 490, 493 n.2 (9th Cir.  
16 1990) (holding petitioner conceded point by failing to rebut it in reply brief).

17 **D. Inevitability of Remand**

18           Finally, Osuna argues that remand is inevitable because Osuna may later seek  
19 leave to amend her pleadings to add additional employees as defendants, which, if  
20 permitted, would destroy complete diversity because any employees of the Subject  
21 Store would presumably be California residents. (Mot. 6–7; Reply 5.) This argument  
22 is speculative, premature, and does not provide any basis for remand at this time.

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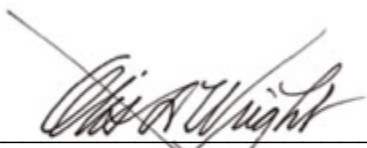
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**V. CONCLUSION**

For the reasons discussed above, the Court **DENIES** Osuna's Motion to Remand and **DISMISSES** Osuna's claims against Rico. (ECF No. 10.)

**IT IS SO ORDERED.**

February 6, 2023



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**OTIS D. WRIGHT, II**  
**UNITED STATES DISTRICT JUDGE**