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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

MARY NELSON,

Plaintiff,

v.

**DIEBOLD, INC. and IRENE
HEADLAND,**

Defendants.

Case No.: SACV 15-00846-CJC(DFMx)

**ORDER DENYING PLAINTIFF'S
MOTION TO REMAND AND
GRANTING DEFENDANTS' MOTION
TO DISMISS**

I. INTRODUCTION & BACKGROUND

On April 28, 2015, Plaintiff Mary Nelson brought this action in Orange County Superior Court against Defendants Diebold, Inc. (“Diebold”) and Irene Headland (together, “Defendants”). (Dkt. No. 1 [“Notice of Removal”]; Exh. A. [“Compl.”].)

1 Between May 15, 2013 to March 13, 2015, Ms. Nelson was employed by Diebold as a
2 Senior Installation Manager. (Compl. ¶¶ 7, 9.) Although hired as an exempt employee,
3 Ms. Nelson alleges that her job duties consisted mostly of “non-exempt job duties” that
4 did not require Ms. Nelson to exercise her discretion or independent judgment. (Compl.
5 ¶ 8.) Ms. Nelson alleges that she was misclassified as an exempt employee and is entitled
6 to recover overtime compensation and statutory damages under California law. (*See*
7 Compl.) The Complaint asserts four causes of action, two of which are brought against
8 Ms. Headland—one claim under California Labor Code (“Labor Code”) sections 558 and
9 510 and one claim under California’s Unfair Competition Law (“UCL”), Cal. Bus. &
10 Prof. Code § 17200 *et seq.* (Compl. ¶¶ 19–30.)

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12 Ms. Nelson, a California citizen, filed this action in state court against Ms.
13 Headland, who is also a California citizen, and Diebold, a citizen of Ohio. (Compl. ¶¶ 1–
14 3.) On May 29, 2015, Defendants removed the action to this Court on the basis of
15 diversity jurisdiction, arguing that Ms. Headland is a “sham defendant” who was
16 fraudulently joined for the purpose of defeating diversity jurisdiction. (Notice of
17 Removal.) Before the Court are Ms. Nelson’s motion to remand, (Dkt. No. 11), and
18 Defendants’ motion to dismiss Ms. Headland, (Dkt. No. 12). For the following reasons,
19 the Court DENIES Ms. Nelson’s motion to remand and GRANTS Defendants’ motion to
20 dismiss.¹

21 22 **II. ANALYSIS**

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24 Any civil action brought in a state court but which a district court has diversity
25 jurisdiction over may be removed. 28 U.S.C. §§ 1332, 1441(a). The defendant removing
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28 ¹ Having read and considered the papers presented by the parties, the Court finds these matters
appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the
hearings set for July 27, 2015 at 1:30 p.m. are hereby vacated and off calendar.

1 the action to federal court bears the burden of establishing that the district court has
2 subject matter jurisdiction over the action, and the removal statute is strictly construed
3 against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)
4 (“Federal jurisdiction must be rejected if there is any doubt as to the right of removal in
5 the first instance.”). Diversity jurisdiction exists where the amount in controversy
6 exceeds \$75,000 and complete diversity exists among the parties. 28 U.S.C. § 1332.
7 “[O]ne exception to the requirement for complete diversity is where a non-diverse
8 defendant has been fraudulently joined.” *Hunter v. Philip Morris USA*, 582 F.3d 1039,
9 1043 (9th Cir. 2009).

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11 “Joinder is fraudulent ‘if the plaintiff fails to state a cause of action against a
12 resident defendant, and the failure is obvious according to the settled rules of the state.’ ”
13 *Hunter*, 582 F.3d at 1043 (quoting *Hamilton Materials Inc. v. Dow Chem. Corp.*, 494
14 F.3d 1203, 1206 (9th Cir. 2007)). Conversely, “if there is any possibility that the state
15 law might impose liability on a resident defendant under the circumstances alleged in the
16 complaint, the federal court cannot find that joinder of the resident defendant was
17 fraudulent, and remand is necessary.” *Id.* at 1044. Generally, a fraudulent joinder
18 analysis is properly applied only to the actual complaint removed from state court, and
19 not a subsequently filed amended complaint. *Lutizetti v. New Albertson’s Inc.*, No. CV
20 11-8650 GAF AJWX, 2012 WL 273757, at *3 (C.D. Cal. Jan. 30, 2012); *see also Smith*
21 *v. City of Picayune*, 795 F.2d 482, 485 (5th Cir. 1986) (“Generally, the right of removal is
22 determined by the pleadings as they stand when the petition for removal is filed.”). In
23 determining whether a defendant was fraudulently joined, all disputed questions of fact
24 and all ambiguities in the controlling state law must be resolved in favor of the non-
25 removing party. *Plute v. Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D.
26 Cal. 2001). The defendant may present additional facts to show that the joinder is
27 fraudulent. *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). The
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1 removing party carries a heavy burden of persuasion, as there is a presumption against
2 finding fraudulent joinder. *Id.*; see *Gaus*, 980 F.2d at 566.

3
4 Here, Defendants have met their heavy burden to show that Ms. Headland was
5 fraudulently joined. The third cause of action is brought against Ms. Headland pursuant
6 to Labor Code section 558, which provides for the imposition of civil penalties against
7 “[a]ny employer or other person acting on behalf of an employer who violates, or causes
8 to be violated, a section of this chapter or any provision regulating hours and days of
9 work in any order of the Industrial Welfare Commission” Cal. Lab. Code § 558(a).
10 The third cause of action also cites to section 510, which governs requirements for
11 overtime compensation. *See id.* § 510. A plaintiff may only bring a claim under sections
12 558 and 510 of the Labor Code via the Private Attorneys General Act (“PAGA”), Cal
13 Lab. Code § 2698 *et seq.* *Caliber Bodyworks, Inc. v. Superior Ct.*, 134 Cal. App. 4th
14 365, 370 (2005); see *Chang v. Biosuccess Biotech Co.*, No. LA CV 13-01340 JAK, 2014
15 WL 7404582, at *23 (C.D. Cal. Dec. 29, 2014) (finding that section 558 claims must be
16 brought under PAGA); see Cal. Lab. Code § 2699.5 (requiring compliance with PAGA to
17 bring a claim under section 510).

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19 As a prerequisite for bringing a PAGA claim, “an employee must first exhaust
20 certain administrative requirements . . . [as] set forth in Section 2699.3 of the Labor
21 Code.” *Chang*, 2014 WL 7404582, at *22. Specifically, the aggrieved employee must
22 first provide written notice by certified mail to the Labor and Workforce Development
23 Agency (“LWDA”) and the employer of the specific provisions alleged to be violated and
24 the facts and theories supporting the alleged violation. Cal. Lab. Code § 2699.3(a)(1).
25 This provides the LWDA time to determine whether it will pursue an investigation or not.
26 *Caliber Bodyworks*, 134 Cal. App. 4th at 376; see also Cal. Lab. Code § 2699.3(a)(2).
27 Within 30 calendar days of receipt of the notice, the LWDA must notify the employer
28 and the aggrieved employee as to whether it intends to investigate the alleged violation; if

1 the LWDA does not so intend or fails to give notice within the prescribed time period, the
2 aggrieved employee may then commence a civil action. Cal. Lab. Code § 2699.3(a)(2).

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4 Defendants have established that Ms. Headland is a sham defendant because the
5 Complaint fails to state a claim against her and this failure is obvious according to the
6 settled rules of California law. The Complaint does not plead the requisite PAGA claim
7 necessary to sustain the third cause of action against Ms. Headland.² Nor can Ms.
8 Nelson now belatedly attempt to satisfy PAGA’s notice requirements. (*See* Compl.; Dkt.
9 No. 16-1 [“Notice”].) Ms. Nelson’s counsel’s letter to the LWDA, dated July 6, 2015, is
10 deficient because it did not comply with the prescribed waiting period prior to
11 commencing the action against Ms. Headland for the alleged Labor Code violations. (*See*
12 Notice); *see Caliber Bodyworks*, 134 Cal. App. 4th at 370 (“*Before an employee may file*
13 *an action* seeking to recover civil penalties for [Labor Code] violations . . . he or she must
14 . . . provid[e] notice to the LWDA and the employer and wait[] a prescribed period of
15 time to permit the LWDA to investigate and to decide whether to cite the employer for
16 the alleged violations.” (emphasis added)).

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18 Additionally, the evidence on the record indicates that Ms. Headland did not have
19 any involvement with Ms. Nelson’s hiring, exempt classification, compensation, job
20 duties, or termination. (Dkt. No. 4, Irene Headland Decl. ISO Notice of Removal
21 [“Headland Decl.”] ¶¶ 3–6.) Indeed, Ms. Headland avers that Ms. Nelson never reported
22 to her and that Ms. Headland does not even manage any employees in the role of Senior
23 Installation Manager. (*Id.* ¶ 3.) Ms. Nelson has not submitted any evidence to the
24 contrary, and the bare allegation in the Complaint that Ms. Headland “made or
25 participated in the adverse decisions” regarding Ms. Nelson’s purported misclassification

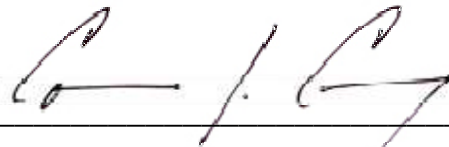
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27 ² The only other claim asserted against Ms. Headland is the UCL claim. Ms. Nelson fails to state a
28 UCL claim against Ms. Headland because it is derivative of the PAGA claim or based on sections of the
Labor Code that are either not actionable under the UCL or actionable only against a corporate
employer.

1 is insufficient to overcome the compelling showing that Defendants have made. (*See*
2 Compl. ¶ 21.) Because Ms. Nelson cannot assert a claim against Ms. Headland, the
3 Court DENIES Ms. Nelson's motion to remand on the basis that Ms. Headland, a non-
4 diverse defendant, was fraudulently joined and that this Court has diversity jurisdiction
5 over this action.³

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7 **III. CONCLUSION**

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9 Accordingly, the Court DENIES Ms. Nelson's motion to remand and GRANTS
10 Defendants' motion to dismiss. Ms. Headland is DISMISSED from the action.

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15 DATED: July 21, 2015



16
17 CORMAC J. CARNEY

18 UNITED STATES DISTRICT JUDGE

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28 ³ For the same reasons, Defendants' motion to dismiss Ms. Headland for failure to state a claim under Rule 12(b)(6) is GRANTED.