



1 California law for gender discrimination, discrimination based on a medical condition,  
2 termination in violation of public policy, and intentional infliction of emotional distress.

3 On July 13, 2009, PAR removed the action to federal court. In its Notice of Removal,  
4 PAR indicated that the Court had removal jurisdiction over the action under 28 U.S.C. §  
5 1332. PAR argued that the California citizenship of ADESA California should be disregarded  
6 because ADESA California was fraudulently joined. According to declarations filed in support  
7 of the Notice of Removal, the records of ADESA California and PAR show that Plaintiff was  
8 employed by PAR, not ADESA California. (Beckman Decl. ¶ 2; Rivera Decl. ¶ 2.) DeBerry  
9 was a Regional Vice President for ADESA, Inc. (which is not named as a defendant in this  
10 action), and Guerrero was employed as a Director of National Sales for Insurance Auto  
11 Auctions, Inc. (DeBerry Decl. ¶ 1, Guerrero Decl. ¶ 1.) According to Michelle Mallon, Vice  
12 President of Legal of ADESA, Inc., and Vice President and Secretary of PAR, PAR is a  
13 subsidiary of ADESA, Inc., as is ADESA California. (Mallon Decl. ¶ 3.) Mallon states, “Par,  
14 Inc. and ADESA California, LLC operate independently of each other and do not jointly  
15 employ any employees.” (*Id.*)

16 On July 17, 2009, ADESA California filed a motion to dismiss on the ground that the  
17 Complaint does not establish that ADESA California was Plaintiff’s employer.

## 18 19 **II. DISCUSSION**

20 Removal jurisdiction in this case is dependent on PAR’s contention that ADESA  
21 California is a sham defendant. As discussed below, the Court finds that PAR has not  
22 satisfied its burden of establishing that ADESA California was fraudulently joined.

23 There is a presumption against finding fraudulent joinder, and the burden of proving  
24 fraudulent joinder is a heavy one. Plute v. Roadway Package Sys., Inc., 141 F. Supp. 2d  
25 1005, 1007 (N.D. Cal. 2001). Joinder is considered fraudulent only “[i]f the plaintiff fails to  
26 state a cause of action against a resident defendant, and the failure is obvious according to  
27 the settled rules of the state.” McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir.  
28 1987). The removing party must prove that “there is absolutely no possibility that the plaintiff

1 will be able to establish a cause of action against the in-state defendant in state court.”  
2 Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983).

3 Courts may consider affidavits or other evidence in determining whether the joinder  
4 was fraudulent. Plute, 141 F. Supp. 2d at 1008. However, all disputed questions of fact and  
5 all ambiguities in the controlling state law must be resolved in favor of the non-removing  
6 party. Dodson v. Spiliada Mar. Corp., 951 F.2d 40, 42 (5th Cir. 1992).

7 Defendants have produced evidence that Plaintiff was officially employed by PAR, not  
8 ADESA California. However, there are several theories under which a corporate entity  
9 separate from the corporate entity that officially employs the plaintiff may be deemed the  
10 plaintiff’s employer as well. Under the “integrated enterprise” test, courts consider the factors  
11 of (1) interrelations of operations; (2) common management; (3) centralized control of labor  
12 relations; and (4) common ownership or financial control, to determine whether separate  
13 corporate entities should be deemed a single employer. Laird v. Capital Cities/ABC, Inc., 68  
14 Cal. App. 4th 727, 737 (1998). Corporate entities may also be considered “joint employers”  
15 under certain circumstances.<sup>1</sup> Finally, an entity acting as an agent of the employer may be  
16 held liable as an employer under FEHA. See Troisi v. Cannon Equipment Co., 2009 WL  
17 249789 \* 7 (C.D. Cal. Jan. 30, 2009).

18 In her declaration, Michelle Mallon states, “PAR, Inc. and ADESA California, LLC  
19 operate independently of each other and do not jointly employ any employees.” (Mallon  
20 Decl. ¶ 3.) However, the Court is not willing to conclude from this bare statement that there

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21  
22 <sup>1</sup> In determining whether a defendant is a joint employer, courts consider the totality  
23 of the circumstances reflecting upon the nature of the work relationship of the parties, with  
24 emphasis on the extent to which the defendant controls the plaintiff’s performance of  
25 employment duties. Vernon v. State, 116 Cal. App. 4th 114, 124 (2004). Factors to be taken  
26 into account include “payment of salary or other employment benefits and Social Security  
27 taxes, the ownership of the equipment necessary to performance of the job, the location  
28 where the work is performed, the obligation of the defendant to train the employee, the  
authority of the defendant to hire, transfer, promote, discipline or discharge the employee,  
the authority to establish work schedules and assignments, the defendant’s discretion to  
determine the amount of compensation earned by the employee, the skill required of the  
work performed and the extent to which it is done under the direction of a supervisor,  
whether the work is part of the defendant’s regular business operations, the skill required in  
the particular occupation, the duration of the relationship of the parties, and the duration of  
the plaintiff’s employment.” Id. at 125.

1 is *no possibility* that Plaintiff can establish that ADESA California is her employer. Similarly,  
2 although Joe Mappes, in his Declaration in support of ADESA California's Reply, states that  
3 no ADESA California, LLC employees were involved in the decisions regarding Plaintiff's  
4 employment or the day-to-day conditions of her employment, the Court declines to conclude  
5 that Plaintiff will not be able to show otherwise after conducting discovery.

6 In her opposition to the motion to dismiss, Plaintiff submits evidence that her offer  
7 letter was on "ADESA" letterhead and indicated, "We are excited about this opportunity and  
8 look forward to having your talents improve ADESA." (Pl.'s Ex. B.) The address listed on  
9 the bottom of the letter is the same address listed for ADESA California, LLC, on the  
10 California Business Portal (Pl.'s Ex. C.) At least one of Plaintiff's checks was issued by  
11 "ADESA San Diego." (Pl.'s Ex. D.) The address listed on the California Business Portal for  
12 ADESA San Diego, LLC, is the same as ADESA California's. How all of the ADESA entities  
13 relate to PAR and each other cannot be determined by the Court at this time.

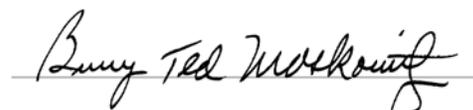
14 Based on the record before it, the Court cannot foreclose the possibility that Plaintiff  
15 will be able to show that ADESA California should be held liable as Plaintiff's employer.  
16 Therefore, the Court does not consider ADESA California to be a sham defendant, resulting  
17 in the lack of diversity of citizenship.

### 18 19 **III. CONCLUSION**

20 For the reasons discussed above, the Court finds that Defendant PAR has not carried  
21 its burden of establishing that the Court has removal jurisdiction over this action. Therefore,  
22 the Court **REMANDS** the action to the Superior Court of the State of California, San Diego  
23 County.

24 **IT IS SO ORDERED.**

25 DATED: September 4, 2009

26 

27 Honorable Barry Ted Moskowitz  
28 United States District Judge