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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CARMELA CISNEROS, individually,
and on behalf of all others similarly
situated,

Plaintiff,

v.

CENTENE CORPORATION, a Delaware
corporation; HEALTH NET FEDERAL
SERVICES, LLC, a Delaware
corporation; MICHAELINE FLOWER,
an individual; and DOES 2 through 25,
inclusive,

Defendants.

Case No.: 3:19-cv-01010-L-MSB

**ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND [ECF No. 8]**

Pending before the Court is Plaintiff Carmela Cisneros’s (“Plaintiff”) Motion to Remand [ECF No. 8]. The Court decides this matter on the papers submitted and without oral argument. *See* Civ. L. R. 7.1(d)(1). For the reasons stated below, the Court **GRANTS** Plaintiff’s motion.

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1 **I. BACKGROUND**

2 From July 25, 2006, through March 7, 2018, Plaintiff was employed by Centene
3 Corporation (“Centene”) and Health Net Federal Services, LLC (“Health Net”) as a
4 Clerical Specialist in San Diego County. ECF No. 1-3, Ex. C at 36 ¶ 8.

5 On January 30, 2019, Plaintiff’s filed a complaint against Centene and Michaeline
6 Flower (“Flower”) in the Superior Court of California, County of San Diego, alleging
7 various claims relating from her termination of employment. *See* ECF No. 1-3, Exhibit A.
8 The complaint sought damages on the following bases: (1) associational disability
9 discrimination under the Fair Employment and Housing Act (“FEHA”), (2) failure to
10 engage in a good faith interactive process under FEHA, (3) failure to accommodate under
11 FEHA, (4) retaliation under FEHA, (5) unlawful workplace language policy under Cal.
12 Gov. Code § 12951, (6) national origin discrimination based on associational disability
13 under Cal. Gov. Code § 12900, (7) failure to take all reasonable steps to discrimination,
14 harassment and/or retaliation, (8) violation of the California Family Rights Act (“CFRA”),
15 (9) retaliation under CFRA, (10) wrongful termination against public policy, and (11)
16 defamation. *See id.* On March 25, 2019, Plaintiff amended that complaint and filed her
17 First Amended Complaint (“Complaint”) against Centene, Flower, and newly-added
18 defendant Health Net. *See* ECF No. 1-3, Ex. C. Plaintiff alleges that, in March 2018, she
19 took leave to care for her husband who suffered a shoulder injury. ECF No. 1-3, Ex. C at
20 36 ¶ 11. Upon returning from leave, she was terminated for falsifying medical documents
21 related to her husband’s injury. *Id.* at ¶ 12. Plaintiff claims she was terminated in
22 retaliation for taking leave to care for her injured husband. *Id.* at ¶¶ 94-101. Plaintiff alleges
23 the same eleven causes of action related to her termination of employment. *See id.*

1 On April 30, 2019, Health Net deposed Plaintiff in the related class action case.¹ *See*
2 ECF No.1 at ¶ 6. On May 30, 2019, Centene² removed the case to this Court, claiming
3 diversity jurisdiction pursuant to 28 U.S.C. §§§ 1332, 1441, 1446(b)(3). The timeliness of
4 Centene’s removal is not in dispute. Plaintiff now moves to remand.

5 **II. LEGAL STANDARD**

6 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins.*
7 *Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power authorized by
8 Constitution or a statute, which is not to be expanded by judicial decree.” *Id.* (internal
9 citations omitted). “It is to be presumed that a cause lies outside this limited jurisdiction
10 and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Id.*
11 (internal citations omitted); *see also Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676,
12 684 (9th Cir. 2006). Consistent with the limited jurisdiction of federal courts, the removal
13 statute is strictly construed against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564,
14 566 (9th Cir. 1992); *see also Sygenta Crop Prot. v. Henson*, 537 U.S. 28, 32 (2002);
15 *O’Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1380 (9th Cir. 1988). “The strong
16 presumption against removal jurisdiction means that the defendant always has the burden
17 of establishing that removal is proper.” *Gaus*, 980 F.2d at 566; *see also Nishimoto v.*
18 *Federman-Bachrach & Assoc.*, 903 F.2d 709, 712 n.3 (9th Cir. 1990); *O’Halloran*, 856
19 F.2d at 1380. “Federal jurisdiction must be rejected if there is any doubt as to the right of
20 removal in the first instance.” *Gaus*, 980 F.2d at 566.

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24 ¹ On September 21, 2018, Plaintiff filed a class action complaint in the Superior Court of California,
25 County of San Diego, alleging violations of state wage and hour laws against Centene and Health Net.
26 *See Carmela Cisneros v. Centene Corporation et al.*, Case No. 3:18-cv-02489-L-JLB at ECF No. 1-2 at
27 4. On October 29, 2018, Centene and Health Net removed the case to this Court, where it is now pending.
See id.

28 ² According to Centene’s Notice of Removal, Centene is “the only defendant that has been served in this
action.” ECF No. 1 at ¶ 5. As such, Centene is the removing party in this case.

1 Diversity jurisdiction requires (1) complete diversity of citizenship between the
2 parties and (2) an amount in controversy exceeding \$75,000. 28 U.S.C. § 1332. Diversity
3 jurisdiction does not exist if any defendant is of the same citizenship as any plaintiff. 28
4 U.S.C. § 1332; *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). Furthermore, removal
5 on diversity grounds is improper if any defendant is a citizen of the forum state. 28 U.S.C.
6 § 1441(b)(2). A court may disregard the citizenship of any fraudulently joined defendants.
7 *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). “Joinder of a non-
8 diverse defendant is deemed fraudulent . . . if the plaintiff fails to state a cause of action
9 against a resident defendant, and the failure is obvious according to the settled rules of the
10 state.” *Id.* (internal citations and quotation marks omitted). A defendant bears the burden
11 of proving fraudulent joinder by clear and convincing evidence. *Hamilton Materials, Inc.*
12 *v. Dow Chemical Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007).

13 **III. DISCUSSION**

14 Plaintiff contends there are two reasons the case must be remanded to state court.
15 First, Plaintiff contends that Flower is not a sham defendant; thus, there is not complete
16 diversity among the parties. ECF No. 8 at 9-14. Second, Plaintiff contends the amount in
17 controversy does not exceed \$75,000. *Id.* at 7-9.

18 **Sham Defendant**

19 Plaintiff alleges two claims against Flower: (1) retaliation in violation of the CFRA
20 and (2) defamation under California law. *See* ECF No. 1, Ex. C. Centene asserts Flower
21 was fraudulently joined in the action and that her citizenship should be disregarded in
22 evaluating whether complete diversity exists. ECF No. 1 at 6-10.

23 **A. CFRA Claim**

24 Centene contends that the CFRA does not allow for “individual liability for
25 retaliation.” ECF No. 1 at ¶ 20 (citing *Nazir v. United Airlines*, 178 Cal.App.4th 243, 287
26 (2009)). Alternatively, Plaintiff contends that the CFRA’s liability extends to individuals
27 because the Fair Employment and Housing Act (“FEHA”) incorporates most of the federal
28 Family and Medical Leave Act (“FMLA”) regulations into the CFRA. *See* ECF No. 8 at

1 12-13. However, the FMLA defines “employer” a “any person . . . who employs 50 or
2 more employees” and includes “any person who acts, directly or indirectly, in the interest
3 of an employer to any of the employer’s employees.” *See* 29 U.S.C. § 2611. Although
4 Plaintiff asserts that 2 Cal. Code Regs § 7297.7 unmistakably confirms that CFRA
5 retaliation liability extends to individuals, the regulation does not address the issue of
6 whether the supervisor of an employer may be held individually liable. Moreover, under
7 *Nazir*, 178 Cal.App.4th at 287, there is “not individual liability for retaliation [under
8 CFRA].” In light of settled California law on this issue, Plaintiff cannot establish a CFRA
9 retaliation claim against Flower, in Flower’s individual supervisor capacity.

10 **B. Defamation Claim**

11 Centene contends that, as a result of Plaintiff’s deposition testimony in the Class
12 Case, Plaintiff cannot establish that Flower defamed her. ECF No. 1 at ¶ 21. “To prove
13 defamation, a plaintiff must establish ‘(a) a publication that is (b) false, (c) defamatory, and
14 (d) unprivileged, and that (e) has a natural tendency to injure or that causes special
15 damage.’” *Abir Cohen Treyzon Salo, LLP v. Lahiji*, 2019 WL 4877286, at *4 (Cal. Dist.
16 Ct. App. October 3, 2019) (internal quotation marks omitted) (citing *Taus v. Loftus*, 40
17 Cal.4th 683, 720 (2007); Cal. Civ. Code §§ 44, 45, 45a). It is imperative that the plaintiff
18 establish that the person sued is the one legally responsible for the defamatory statement.
19 *Id.* (citing *Westside Estate Agency, Inc. v. Randall*, 6 Cal.App.5th 317, 329 (2016)). “In
20 deciding whether a cause of action is stated we have declared that we will look only to a
21 plaintiff’s pleadings to determine removability.” *Ritchey v. Upjohn Drug Co.*, 139 F.3d
22 1313, 1318 (9th Cir. 1998) (internal quotations and citation omitted). However, where
23 fraudulent joinder is an issue, “[t]he defendant seeking removal to federal court is entitled
24 to present the facts showing the joinder to be fraudulent.” *McCabe v. General Foods Corp.*,
25 811 F.2d 1336, 1339 (9th Cir. 1987).

26 Centene wholly relies on its Notice of Removal assertions as its proof that Plaintiff
27 fraudulently joined Flower in her defamation claim. ECF No. 10 at 8 fn.1. In its Notice
28 of Removal, Centene contends that Plaintiff has no viable defamation claim against Flower

1 because she does not have personal knowledge that Flower publicized the reasons for
2 Plaintiff's termination. ECF No. 1 at 9. Centene provides the following testimony from
3 Plaintiff's deposition:

4 Q. How about Ms. Flowers? [sic] Did she tell anybody why your employment
5 was terminated?

6 A. I have no idea.

7 *Id.*

8 Centene contends, as a result of this response, that "Plaintiff cannot possibly
9 maintain a defamation claim against Flower because Plaintiff is unable to attribute the
10 supposed defamatory statements to Flower." See ECF No. 1 at 8. This Court disagrees.
11 Plaintiff's admission that she lacks personal knowledge of Flower's publication of the
12 alleged defamatory statements is insufficient to show that Plaintiff cannot establish a
13 defamation cause of action against Flower. Notably, the parties have yet to engage in
14 discovery from which evidence that Flower publicized defamatory statement(s) could be
15 revealed.

16 Moreover, while Centene asserts that Plaintiff fraudulently alleged she needed leave
17 to care for her husband due to her deposition testimony that she has not been married since
18 1980, Centene fails to provide any argument regarding how Plaintiff's deposition
19 testimony about her marital status prohibits her from bringing a defamation claim against
20 Flower. See ECF Nos. 1 at 9, 1-3 at 121-24. The Court could infer that Centene believes
21 they have a complete defense of truth because, if Plaintiff was not married, the leave
22 paperwork she filed was in fact falsified. *Smith v. Maldonado* 85 Cal.Rptr.2d 397, 403
23 (Cal. Ct. App. 1999). On the other hand, the deposition testimony also reveals that Plaintiff
24 and her husband, Pablo Gonzalez, were never legally divorced. Nonetheless, an inference
25 will not satisfy the clear and convincing evidence standard. See *Christian Research Inst.*
26 *V. Alnor*, 55 Cal.Rptr.3d 600, 611-612, 615 (Cal. Ct. App. 2007). Plaintiff's failure to
27 oppose Centene's defamation contentions have no bearing on the Court's analysis as the
28 burden remains with Centene to prove removal was proper. As such, the Court finds that

1 Centene has not proved by clear and convincing evidence that Flower was fraudulently
2 joined to the defamation claim to destroy diversity.

3 Accordingly, it is not clear and obvious that Plaintiff cannot establish a cause of
4 action against Flower either for defamation. For that reason, the Court finds that Flower is
5 not a sham defendant. Thus, Flower shall remain as a party in this action and complete
6 diversity does not exist here. For that reason, the Court finds that complete diversity is
7 destroyed and federal subject matter jurisdiction is lacking. "If at any time before final
8 judgment it appears that the district court lacks subject matter jurisdiction, the case shall
9 be remanded." 28 U.S.C. § 1447(c).

10 **Sanctions**

11 Plaintiff requests the court order for Centene to pay costs and attorney fees incurred
12 by Plaintiff as a result of the removal pursuant to 28 U.S.C. § 1447(c). ECF No. 8 at 14-
13 15. The court declines to make such an award because the removal was not frivolous or
14 filed for an improper purpose.

15 **IV. CONCLUSION**

16 For the reasons stated above, Plaintiff's motion to remand [ECF No.8] is
17 GRANTED. Therefore, this action shall be remanded to the Superior Court of the State of
18 California, County of San Diego.

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20 **IT IS SO ORDERED.**

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22 Dated: November 7, 2019

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25 Hon. M. James Lorenz
26 United States District Judge
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