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

JAVIER TENORIO PLATA, an individual;
DELORES GALVEZ MONTES, an individual;
ALFONSO VICTOR INCLAN COSTA, an individual;
GERMAN VASQUEZ FIGUEROA, an individual;
MICHELL ARIANNE CURTO GONGORA, an individual;
CARLOS ACEVEDO MENDOZA, an individual;
LUIS DELGADO PICASSO, an individual;
RUBEN ARMAND ROBLES DIAZ, an individual;
GRACIELA HERRERA RODRIGUEZ, an individual;
MARIA DE LOS ANGELES SANDOVAL, an individual;
REINALDO RODRIGUEZ VELASQUEZ, an individual;
BRAULIO ALBERTO DELGADO BRASIA, an individual;
FRANCISCA GASTELUM ARAGON, an individual;
MARIA DE LA VILLANET SANCHEZ GUZMAN, an individual;
YADIRA CAMBREROS PINEDA, an individual;
REBECCA GUTEIRREZ JUAREZ, an individual; and
MARTHA HUIZAR N., an individual,

Plaintiffs,

vs.

DARBUN ENTERPRISES, INC., a California corporation;
OEM SOLUTIONS, LLC, a California limited liability company;
and DOES 1through 10, inclusive

Defendants.

CASE NO. 09-CV-0044-IEG (CAB)

ORDER:

(1) DENYING PLAINTIFFS' MOTION TO VOLUNTARILY DISMISS THE ACTION WITHOUT PREJUDICE (Doc. No. 100); and

(2) DISMISSING THE ACTION FOR LACK OF SUBJECT MATTER JURISDICTION.

1 Presently before the Court is Plaintiffs' motion to voluntarily dismiss the action without
2 prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. (Doc. No. 100.)

3 Defendant Darbun Enterprises, Inc. filed an opposition and a supplemental opposition.
4 Plaintiffs have not filed a reply. The motion is suitable for disposition without oral argument pursuant
5 to Local Civil Rule 7.1(d)(1). For the reasons stated herein, the Court DENIES Plaintiffs' motion to
6 voluntarily dismiss without prejudice and DISMISSES the action for lack of subject matter
7 jurisdiction.

8 **FACTUAL BACKGROUND**

9 This matter involves the enforcement of a foreign judgment. Plaintiffs are eighteen individuals
10 who were employed by Soluciones Tecnologicas de Mexico, S.A. de C.V. ("STM"). On May 31,
11 2000, Plaintiffs commenced an action for unpaid wages against STM and Defendants OEM Solutions,
12 LLC and Darbun Enterprises, Inc. before the Number One Special Local and Conciliation and
13 Arbitrage Local Authority of the City of Tijuana, Baja California, Mexico (the "Labor Relations
14 Board"). On September 5, 2003, the Labor Relations Board handed down its judgment in favor of
15 Plaintiffs.

16 **PROCEDURAL HISTORY**

17 **I. Plaintiffs' Complaint and First Amended Complaint**

18 On January 12, 2009, Plaintiffs commenced this action for recognition of the Mexican
19 judgment pursuant to the Uniform Foreign-Country Money Judgments Recognition Act, California
20 Code of Civil Procedure § 1713 et seq. Plaintiffs allege subject matter jurisdiction based on diversity
21 jurisdiction, and that each of the eighteen plaintiffs resides in Tijuana, Baja California, Mexico. (Doc.
22 No. 1.) Plaintiffs' Complaint names Defendants Darbun Enterprises ("Defendant") and OEM
23 Solutions, LLC,¹ both California companies. Defendant filed an answer and counterclaim to void the
24 foreign judgment and for fraud. (Doc. No. 16.)

25 On April 30, 2009, Plaintiffs filed a motion for writ of attachment requesting that the Court
26 attach Defendant's assets. (Doc. No. 18.) On June 10, 2009, pursuant to an argument raised in
27

28 ¹Plaintiff never served the Complaint or First Amended Complaint on Defendant OEM Solutions, LLC.

1 Defendant's opposition, the Court issued an order to show cause why the case should not be dismissed
2 for lack of subject matter jurisdiction.² (Doc. No. 51.) The Court explained that Plaintiffs'
3 jurisdictional allegations were deficient because they were premised on Plaintiffs' residency, and not
4 citizenship.

5 On June 29, 2009, the Court *sua sponte* granted Plaintiffs leave to amend the Complaint to cure
6 the jurisdictional defects. (Doc. No. 58.) Subsequently, Plaintiffs filed a First Amended Complaint
7 ("FAC") on July 9, 2009.³ (Doc. No. 61.) Plaintiffs' FAC alleges each plaintiff "is a citizen of
8 Mexico and domiciled in Tijuana, Baja California, Mexico as of the commencement of this action."
9 (FAC ¶¶ 2-19.) On September 23, 2009, the Court denied Plaintiffs' motion for writ of attachment
10 because Plaintiffs failed to show that they were more likely than not to meet their burden of proving
11 that the Mexican judgment is not a penalty. (Doc. No. 82.)

12 II. Jurisdictional Discovery

13 Defendant served discovery on Plaintiffs designed to discover whether any plaintiff was a
14 permanent resident alien domiciled in California and for the production of documents relevant to the
15 issue of whether the judgment constitutes a penalty. Due to Plaintiffs' failure to respond, Defendant
16 filed a motion to compel on January 19, 2010. (Doc. No. 96.)

17 On February 12, 2010, the date of the hearing on Defendant's motion to compel, Plaintiffs filed
18 the instant motion to voluntarily dismiss this case without prejudice. (Doc. No. 100.) Plaintiffs state
19 that "Plaintiffs' counsel now believes in good faith that diversity jurisdiction over this case is
20 potentially lacking":

21 It has come to counsel for Plaintiffs' attention on or about Friday, February 5, 2010

22
23 ²There were also three other motions pending at the time: Plaintiffs' motion to dismiss
24 counterclaim (Doc. No. 20), Defendant's motion for order for Plaintiffs to furnish security for payment
of costs (Doc. No. 22), and Defendant's motion to stay case (Doc. No. 23). The Court later granted
Plaintiffs' motion, and denied Defendant's motions. (Doc. No. 82.)

25 ³ Plaintiffs initially filed an amended complaint on July 8, 2009, then re-filed the amended
26 complaint on July 9, 2009 (Doc. Nos. 60 & 61) in response to the Court's request that the caption of
27 the amended complaint reflect that it was Plaintiffs' "First Amended Complaint." The re-filed
28 amended complaint still failed to indicate it was Plaintiffs' first amended complaint. As such,
Plaintiffs filed an "Amended Document to Correct Caption" on July 20, 2009, indicating the re-filed
amended complaint's caption should read "First Amended Complaint." (Doc. No. 73.) The Court
therefore construes the re-filed amended complaint (Doc. No. 61) as the operative "First Amended
Complaint" in this case.

1 that there is a potential issue regarding this Court's subject matter jurisdiction, in that
2 it is arguable that one plaintiff's domicile can be construed as being in San Diego,
3 California. Although it is by no means conclusive, in that this plaintiff still maintains
4 a residence in Tijuana, Mexico and still has a valid voter registration card in Tijuana,
5 Mexico that has previously been introduced as evidence in this case, that plaintiff has
6 not only maintained a residence in San Diego as of the date of the filing of this
7 action, but has also applied for United States citizenship.

8 (Pls.'s Mot. to Dismiss ¶¶ 1, 3.)

9 On February 12, 2010, Magistrate Judge Cathy Ann Bencivengo issued an order granting the
10 motion to compel, remarking that a number of the unanswered discovery requests would have
11 provided necessary information about the plaintiff's domicile months ago. (Doc. No. 103.)
12 Magistrate Judge Bencivengo ordered that, no later than February 19, 2010, Plaintiffs were to provide
13 Defendant with: (1) declarations under penalty of perjury from any and all Plaintiffs who claim
14 residence or domicile in California with the supporting facts that provide the basis of Plaintiffs'
15 conclusion that diversity was lacking at the time this action was removed to federal court; and (2)
16 statements under penalty of perjury for all remaining Plaintiffs confirming that their residence or
17 domicile at the time of removal did not defeat diversity jurisdiction. (Doc. No. 103.)

18 On February 16, 2010, Defendant filed an opposition to Plaintiffs' motion to voluntarily
19 dismiss without prejudice, arguing that it is entitled to an appropriate amount of time to determine if
20 dismissal is warranted for lack of subject matter jurisdiction. (Doc. No. 102.)

21 On February 24, 2010, five days late, Plaintiffs filed a declaration from Plaintiff Delores
22 Galvez Montes ("Montes"), in which Montes states that she is a Mexican citizen, has maintained a
23 residence in San Diego for the past four or five years, has a "green card," is planning on applying for
24 U.S. citizenship, and intends to stay in San Diego permanently. (Declaration of Delores Galvex
25 Montes ("Montes Decl.") ¶¶ 2, 4-5) (Doc. No. 108.) Montes also states that she owns a house in
26 Tijuana, which she and her family "occasionally reside in on weekends." (Montes Decl. ¶ 3.) As to
27 the remaining seventeen plaintiffs, Plaintiffs' counsel provided a group affidavit denying permanent
28 resident alien status. (Declaration of Bruce Sherman in Supp. of Def.'s Opp'n to Pl.'s Mot. ("Sherman
Decl."), Ex. 1) The affidavit, however, is missing a signature from Plaintiff Luis Delgado Picasso.
According to Defendant, Plaintiffs' counsel has not responded to emails regarding the missing
signature. (Sherman Decl., Ex. 2.)

1 On February 26, 2010, Magistrate Judge Bencivengo issued an order finding that Montes'
2 declaration was inadequate because it was ambiguous as to precisely when Montes obtained her
3 permanent resident alien status. (Doc. No. 110.) Accordingly, Magistrate Judge Bencivengo ordered
4 Plaintiffs' counsel to provide a true and correct copy of Montes' legal permanent resident alien
5 documentation, and to provide statements under penalty of perjury from the remaining plaintiffs
6 acknowledging their residence status. (Doc. No. 110.)

7 At the status conference on March 19, 2010, the parties represented that they were prepared
8 to go forward with Plaintiffs' motion to voluntarily dismiss without prejudice, and Magistrate Judge
9 Bencivengo set a supplemental briefing schedule. (Doc. No. 114.) Defendant filed a supplemental
10 opposition and accompanying declarations. Plaintiffs have not filed a reply.

11 **DISCUSSION**

12 Plaintiffs move the Court to grant their motion for voluntary dismissal without prejudice
13 pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, on the ground that Plaintiffs'
14 counsel now believes that diversity jurisdiction is lacking.⁴ Defendant, on the other hand, argues
15 that the Court should dismiss the action for lack of subject matter jurisdiction.⁵ Because the
16 evidence before the Court clearly shows that diversity jurisdiction is lacking, the Court finds it
17 appropriate to dismiss for lack of subject matter jurisdiction.

18 Plaintiffs' original Complaint and FAC allege subject matter jurisdiction based on diversity
19 jurisdiction. The diversity jurisdiction statute, 28 U.S.C. § 1332, provides: "The district courts
20 shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum
21 or value of \$ 75,000, exclusive of interest and costs, and is between . . . citizens of a State and
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23 ⁴A plaintiff may voluntarily dismiss an action without a court order if the plaintiff files a notice
24 of dismissal before the opposing party serves either an answer or a motion for summary judgment, or
25 files a stipulation of dismissal signed by all parties who have appeared. Fed. R. Civ. P. 41(a)(1)(A).
26 Otherwise, an action may be dismissed at the plaintiff's request only by court order, on terms that the
27 court considers proper. Fed. R. Civ. P. 41(a)(2). "A motion for voluntary dismissal under Rule
28 41(a)(2) is addressed to the district court's sound discretion and the court's order will not be disturbed
unless the court has abused its discretion." Stevedoring Services of America v. Armilla Intern. B.V.,
889 F.2d 919, 921 (9th Cir. 1989).

⁵Alternatively, Defendant argues that if the Court allows voluntary dismissal without prejudice,
the dismissal should be conditioned on payment of Defendant's costs and attorney's fees for
unnecessary expense caused by the litigation.

1 citizens or subjects of a foreign state” 28 U.S.C. § 1332 (2009). In a diversity case, all
2 plaintiffs must be of different citizenship than all defendants. Strawbridge v. Curtis, 7 U.S. 267
3 (1806). Where a party is an alien admitted to the United States for permanent residence, the alien
4 shall be deemed a citizen of the State in which such alien is domiciled. 28 U.S.C. § 1332(a). “A
5 person’s domicile is her permanent home, where she resides with the intention to remain or to
6 which she intends to return.” Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001).

7 This action was commenced fifteen months ago, and the parties have completed
8 jurisdictional discovery. The evidence shows that complete diversity is lacking, because Montes,
9 a permanent resident alien, was domiciled in California on January 12, 2009, when Plaintiffs
10 commenced this action. According to Montes’ statements in her declaration, under penalty of
11 perjury, she maintains a residence in San Diego, California, has obtained a green card and worked
12 in the United States for the last two or three years, and intends to stay in San Diego permanently.
13 (Montes Decl. ¶ 5.) Defendant attaches to its supplemental opposition Montes’ March 18, 2010
14 deposition, in which she confirms that she has had permanent resident status in the United States
15 since June of 2005, and has lived in San Diego continuously since 2004. (Sherman Decl., Ex. 4 at
16 13:6-20, 39:20-22.) Plaintiffs’ counsel states that this is not conclusive because Montes still
17 maintains a residence in Tijuana, Mexico, which she and her family “occasionally reside in on
18 weekends.” (Montes Decl. ¶¶ 2-3.) However, at her deposition, Montes states unequivocally that
19 for the past five years she has had tenants in the house in Tijuana and has not lived there.
20 (Sherman Decl., Ex. 3 at 41:10-25.) Plaintiffs have not filed a reply.

21 It is apparent from the documents submitted by the parties that California is Montes’
22 permanent home and where she resides with the intention to remain. See Kanter, 265 F.3d at 857.
23 Because one of the Plaintiffs was domiciled in California at the time Plaintiffs commenced this
24 action, complete diversity is lacking.

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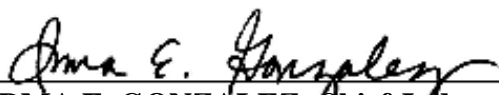
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CONCLUSION

The Court *sua sponte* DISMISSES the action for lack of subject matter jurisdiction.
Accordingly, Plaintiffs' motion to voluntarily dismiss the action without prejudice is DENIED.

IT IS SO ORDERED.

DATED: May 6, 2010



IRMA E. GONZALEZ, Chief Judge
United States District Court