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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JENNIFER COLLEY and CURTIS COLLEY, and the marital community composed thereof; and COLLEY MANAGEMENT, INC., a Washington Corporation;

Plaintiffs,

v.

JAMES McCULLAR and CAROLYN McCULLAR, and the marital community composed thereof; and KYLE ROWTON AND DARLA ROWTON, and the marital community composed thereof;

Defendants.

NO: 2:15-CV-0170-TOR

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

BEFORE THE COURT are Defendants' Motion and Memorandum of Law in Support of Abstention or Stay of Proceedings (ECF No. 14) and Motion and Memorandum of Law in Support of Dismissal for Lack of Jurisdiction (ECF No. 27). These matters were submitted for consideration without oral argument. This

1 Court—having reviewed the completed briefing, records, and files therein—is fully  
2 informed.

### 3 **BACKGROUND**

4 Plaintiffs commenced this action on July 9, 2015. ECF No. 1. On November  
5 12, 2015, this Court, finding the Complaint failed to adequately assert diversity  
6 jurisdiction, ordered Plaintiffs to show cause why this case should not be dismissed  
7 for lack of subject matter jurisdiction. ECF No. 17. Plaintiffs filed their Amended  
8 Complaint on November 18, 2015, alleging complete diversity of all the parties.  
9 ECF No. 21.

10 In the instant motions before the Court, Defendants seek to dismiss this  
11 action for lack of jurisdiction. ECF No. 27. Alternatively, Defendants move this  
12 Court to abstain from exercising jurisdiction because of a concurrent state court  
13 proceeding. ECF No. 14.

14 For the following reasons, this Court finds it lacks jurisdiction over this suit  
15 and dismisses it on that basis.

### 16 **FACTS**

17 The crux of the parties' jurisdictional dispute concerns the domicile of  
18 Defendants James and Carolyn McCullar: Defendants maintain the McCullars are  
19 domiciled in Washington and have been since 2004; Plaintiffs contend the  
20 McCullars changed their domicile to Arizona before this suit commenced.

1 James McCullar moved to Washington in 1966 and remained here until  
2 1991. ECF No. 28 ¶ 3. Between 1991 and 2004, Mr. McCullar lived in Oregon as a  
3 result of his job transfer. *Id.* In 2004, upon Mr. McCullar's retirement, the  
4 McCullars moved to Soap Lake, Washington. *Id.* Mr. McCullar was served with a  
5 copy of the Summons and Complaint in this action on July 16, 2015, at his  
6 residence in Soap Lake, Washington. *Id.* ¶ 5. And, in response to an inquiry from  
7 the process service, Mr. McCullar represented that the Soap Lake address was his  
8 residence and usual place of abode. *Id.*

9 The McCullars purchased a second home in Arizona in 2014. *Id.* ¶ 4. They  
10 have spent a significant amount of time in Arizona, primarily during the colder  
11 months of the year. *Id.* Indeed, in their state court complaint, filed by the  
12 McCullars on May 15, 2015, they stated that they were currently residents of  
13 Mojave County, Arizona, ECF No. 33-1 at 3, and there is some evidence that they  
14 have considered becoming primary residents of that state, ECF Nos. 32 ¶ 3; 32-1.  
15 However, also in the spring of 2015, the McCullars filed a nonresident tax return in  
16 Arizona. ECF No. 28 ¶ 3.

## 17 DISCUSSION

### 18 A. Standard of Review

19 When addressing a motion to dismiss for lack of subject matter jurisdiction,  
20 the court is not bound by the plaintiff's factual allegations. Pursuant to Rule

1 12(b)(1), the Court “may ‘hear evidence regarding jurisdiction’ and ‘resolv[e]  
2 factual disputes where necessary.’” *Robinson v. United States*, 586 F.3d 683, 685  
3 (9th Cir. 2009) (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.  
4 1983)). A Rule 12(b)(1) motion may be either facial, where the court’s inquiry is  
5 limited to the allegations in the complaint; or factual, where the court may look  
6 beyond the complaint to consider extrinsic evidence. *Safe Air for Everyone v.*  
7 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “If the moving party ‘converts the  
8 motion to dismiss into a factual motion by presenting affidavits or other evidence  
9 properly brought before the court, the party opposing the motion must furnish  
10 affidavits or other evidence necessary to satisfy its burden of establishing subject  
11 matter jurisdiction.’” *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)  
12 (quoting *Safe Air for Everyone*, 373 F.3d at 1039). Accordingly, in deciding  
13 jurisdictional issues, the court is not bound by the factual allegations within the  
14 complaint. *Augustine*, 704 F.2d at 1077.

## 15 **B. Diversity Jurisdiction**

16 Pursuant to 28 U.S.C. § 1332(a)(1), “[t]he district courts shall have original  
17 jurisdiction of all civil actions where the matter in controversy exceeds the sum or  
18 value of \$75,000, exclusive of interest and costs, and is between . . . citizens of  
19 different States.” “Section 1332 requires *complete* diversity of citizenship; each of  
20 the plaintiffs must be a citizen of a different state than each of the defendants.”

1 *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (emphasis  
2 added) (citing *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996)). “[T]he party  
3 asserting diversity jurisdiction bears the burden of proof.” *Kanter v. Warner-*  
4 *Lambert Co.*, 265 F.3d 853, 857-58 (9th Cir. 2001). Generally, the court’s  
5 jurisdiction is determined at the time of filing. *Grupo Dataflux v. Atlas Global*  
6 *Grp., L.P.*, 541 U.S. 567, 570-71 (2004).

7 For purposes of diversity jurisdiction, an individual is a citizen of his or her  
8 state of domicile. *Munoz v. Small Bus. Admin.*, 644 F.2d 1361, 1365 (9th Cir.  
9 1981). It has long been recognized that a person’s residence is not necessarily his  
10 domicile; whereas an individual may have multiple residences, he or she has only  
11 one domicile. *Martinez v. Bynum*, 461 U.S. 321, 339-40 (1983); *Kanter*, 265 F.3d  
12 at 857 (“A person residing in a given state is not necessarily domiciled there, and  
13 thus is not necessarily a citizen of that state.”).

14 “A domicile once acquired is presumed to continue until it is shown to have  
15 been changed.” *Mitchell v. United States*, 88 U.S. 350, 353 (1874); *Lew v. Moss*,  
16 797 F.2d 747, 750 (9th Cir. 1986) (noting that courts have created a presumption in  
17 favor of an established domicile as against a newly acquired one). A person’s  
18 domicile changes when he is both physically present in, *and* evinces an intention to  
19 remain indefinitely in, a different state. *Lew*, 797 F.2d at 750 (discussing factors  
20

1 that help determine domicile, including current residence, voting registration, tax  
2 returns, and driver's license).

3 Here, Plaintiffs have failed to demonstrate that the McCullars have changed  
4 their domicile from Washington to Arizona. In response to Defendants'  
5 jurisdictional challenge, Plaintiffs assert that (1) the McCullars admitted in a state  
6 court pleading that they were "residents" of Arizona at the time it was filed in May  
7 2015, ECF No. 33-1 at 3; (2) a March 2013 email from Norman Brock, the  
8 McCullars' attorney, mentioned that the McCullars were "discussing the  
9 possibility of . . . becoming Arizona residents," ECF No. 32-1 at 2; and (3) James  
10 McCullar told Plaintiff Jennifer Colley that he was permanently relocating to  
11 Arizona, ECF No. 32 ¶ 3. At most, this evidence demonstrates that the McCullars  
12 have a residence in Arizona and previously considered the *possibility* of becoming  
13 permanent residents of that state. However, the law is clear that an individual's  
14 residence does not necessarily equate to his domicile. *See Martinez*, 461 U.S. at  
15 339.

16 In contrast, Mr. McCullar's declaration asserts that Washington has been  
17 the McCullars' domicile since 2004 and their usual place of abode is in Soap Lake,  
18 Washington. ECF No. 28 at 2-3. While they bought a second home in Arizona in  
19 2014, they filed a nonresident tax return in that state last spring, shortly before this  
20 suit commenced. *Id.*

1           Accordingly, based on the filings before the Court, this Court finds  
2 insufficient proof to demonstrate that the McCullars abandoned their Washington  
3 domicile in favor of Arizona. While Mr. McCullar's statements of intent would  
4 generally be entitled to little weight if contradicted by objective facts, *see Lew*, 797  
5 F.2d at 750, Plaintiffs' evidence does not actually contradict these statements. This  
6 Court notes there is a dearth of evidence in the record regarding the domicile  
7 factors, such as voter registration, driver's license, automobile registration, or bank  
8 accounts. Rather, the evidence put forth discusses the possibility of the McCullars'  
9 becoming permanent residents of Arizona; the undisputed fact that they have a  
10 residence there, in addition to their Soap Lake, Washington, residence; the  
11 McCullars' filing of a nonresident Arizona tax return in the spring before this law  
12 suit commenced; and Mr. McCullar's assertion that his domicile remains in  
13 Washington. On balance, the Court finds Plaintiffs have not met their burden to  
14 show change of domicile and thus the McCullars remain domiciled in Washington.

15           Having found that the McCullars are domiciled in Washington, this Court  
16 further finds that the parties lack complete diversity for purposes of federal  
17 diversity jurisdiction. Plaintiff Colley Management, Inc., is deemed a citizen of the  
18 State of Washington because it is incorporated and doing business in Washington.  
19 *Munoz*, 644 F.2d at 1365 ("A corporation is deemed to be a citizen of the state of  
20 incorporation and the state of its principal place of business."); *see* ECF No. 21 at

1 2. Because Plaintiff Colley Management, Inc., and the McCullar Defendants share  
2 the same Washington citizenship, complete diversity of citizenship is lacking.<sup>1</sup>  
3 Accordingly, as this Court lacks subject matter jurisdiction over this suit,  
4 Defendants' motion to dismiss is granted and this matter is dismissed.

5 **ACCORDINGLY, IT IS ORDERED:**

6 1. Defendants' Motion and Memorandum of Law in Support of Abstention  
7 or Stay of Proceedings (ECF No. 14) is **DENIED** as moot.

8 2. Defendants' Motion and Memorandum of Law in Support of Dismissal  
9 for Lack of Jurisdiction (ECF No. 27) is **GRANTED**. This matter is dismissed for  
10 lack of subject matter jurisdiction.

11 The District Court Executive is directed to enter this Order, provide copies  
12 to counsel, enter **JUDGMENT** for Defendants, and **close** the file.

13 **DATED** March 9, 2016.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE  
Chief United States District Judge

19 \_\_\_\_\_  
20 <sup>1</sup> Plaintiffs' causes of action are all made pursuant to state law; thus, this Court also  
lacks federal question jurisdiction.