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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Dream Team Holdings LLC, et al.,

10 Plaintiffs,

11 v.

12 Rudy Alarcon, et al.,

13 Defendants.
14

No. CV-16-01420-PHX-DLR

ORDER

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16 Plaintiffs have filed a motion to remand, (Doc. 10), a motion to compel arbitration,
17 (Doc. 13), a request for judicial notice, (Doc. 15), and two motions to expedite, (Docs.
18 26, 51). All the motions are fully briefed, and no party has requested argument. For the
19 reasons stated below, Plaintiffs' motion to remand is denied, Plaintiffs' motion to compel
20 arbitration is denied, Plaintiffs' request for judicial notice is granted in part, and
21 Plaintiffs' motions to expedite are denied.

22 **BACKGROUND**

23 This lawsuit arises out of the parties' joint management of a marijuana dispensary.
24 On March 30, 2016, Defendants Rudy Alarcon and Kristen Abelon met with Plaintiff
25 Green Light Holdings, LLC (Green Light) to discuss forming Dream Team Holdings,
26 LLC (Dream Team) to further their joint venture. The parties executed a Term Sheet,
27 which "set[] forth the terms and conditions of an Operating Agreement of Dream Team
28 Holdings, LLC[.]" (Doc. 18-1 at 2.) The Term Sheet noted that the "effective date of the

1 Operating Agreement . . . shall be the date upon which the Company’s Articles of
2 Organization are filed with the Arizona Corporation Commission.” (*Id.*) The parties
3 agreed that the Term Sheet “represents a legally binding agreement between the parties
4 hereto regarding the principle terms of the Members’ agreement to operate the Company,
5 which will be evidenced by a formal Operating Agreement . . . to be effective upon [the
6 filing of the Articles of Organization for Dream Team].” (*Id.* at 14.) The Term Sheet
7 further provided that “if an Operating Agreement is not entered into between the parties,
8 this Term Sheet shall continue in full force and effect.” (*Id.*)

9 After further negotiations, the parties drafted a Memorandum of Understanding
10 (MOU), which set forth the steps necessary to finalize the joint venture. (*Id.* at 20.) It
11 explicitly stated: “No Joint Venture or Partnership Formed.” (*Id.*) It also contemplated
12 formation of Dream Team, noting that “Upon execution of the MOU, the Parties shall
13 form Dream Team Holdings, LLC . . . by filing the Articles of Organization[.]” (*Id.*)
14 Once the MOU is executed, the parties would then prepare and execute an Operating
15 Agreement, “which shall substantially reflect the business terms set forth on the . . . Term
16 Sheet[.]” (*Id.* at 21.) The parties never executed the MOU, no Articles of Organization
17 were filed, and negotiations eventually halted.

18 On April 29, 2016, Green Light brought suit against Defendants alleging, *inter*
19 *alia*, breach of contract and fraud. The lawsuit named Dream Team as a Plaintiff even
20 though no articles of organization had been filed with the Arizona Corporation
21 Commission. On May 9, 2016, Defendants Rudy Alarcon, Kristen Abelon, and Energy
22 Clinics, LLC (Energy Clinics) removed the case to federal court on the basis of diversity
23 jurisdiction. Defendants argue that Dream Team did not exist at the time Plaintiffs filed
24 their complaint and assert that Dream Team was created solely for the purpose of
25 destroying diversity jurisdiction. Defendants also assert that after negotiations fell
26 through, the parties never agreed to form Dream Team. On May 11, 2016, Dream
27 Team’s articles of organization were filed by Plaintiffs’ counsel naming Alarcon as a
28 member. On May 27, 2016, Alarcon filed suit in Maricopa County Superior Court to

1 dissolve Dream Team, arguing that he never consented to becoming a member and that
2 Dream Team was fraudulently organized. On May 31, 2016, Plaintiffs moved to compel
3 arbitration and stay the case, citing an arbitration provision in the Term Sheet.

4 **REQUEST FOR JUDICIAL NOTICE**

5 Plaintiffs request that the Court take judicial notice of Alarcon’s state court
6 complaint seeking to dissolve Dream Team. (Doc. 15.) Plaintiffs argue that the state
7 court complaint alleges that Dream Team is an Arizona resident, and thus “there was no
8 evidence or factual basis to justify removal jurisdiction based on diversity of citizenship”
9 in the instant case. (*Id.* at 3.) Plaintiffs claim that this constitutes Defendants’ admission
10 that remand is appropriate. Plaintiffs also seek sanctions for failing to inform the Court
11 “that they are no longer contesting that federal diversity jurisdiction exists.” (*Id.* at 5.)

12 “The court may judicially notice a fact that is not subject to reasonable dispute
13 because it . . . can be accurately and readily determined from sources whose accuracy
14 cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Courts routinely take
15 judicial notice of proceedings in other courts “if those proceedings have a direct relation
16 to matters at issue.” *United States ex rel. Robinson Racheria Citizens Council v. Borneo,*
17 *Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (internal quotation marks omitted).

18 The request for judicial notice is granted in part. The state court proceedings
19 relating to the dissolution of Dream Team are relevant to this case. As such, the Court
20 will take judicial notice of Alarcon’s state court complaint.

21 The Court will not, however, issue sanctions against Defendants. Contrary to
22 Plaintiffs’ argument, the fact that Alarcon alleges that Dream Team is a resident of
23 Arizona in the state court complaint does not undermine Defendants’ basis for removal in
24 the instant case. Defendants do not dispute Dream Team’s citizenship. Instead, they
25 argue that Dream Team should not be considered for purposes of diversity jurisdiction
26 because it was not formed at the time of the complaint and Defendants did not consent to
27 its formation. Plaintiffs’ argument misses the point, and the request for sanctions is
28 inappropriate.

1 **MOTION TO REMAND**

2 Plaintiffs argue this case must be remanded to Maricopa County Superior Court
3 because complete diversity does not exist between the parties. They assert that although
4 Dream Team was not yet organized at the time the complaint was filed, this defect was
5 cured by filing the articles of organization two weeks later. Even if it was not cured,
6 Plaintiffs argue that Dream Team should be treated as an unincorporated business
7 association for purposes of diversity jurisdiction. Alternatively, Plaintiffs argue that even
8 if Dream Team is not considered for purposes of diversity, complete diversity still does
9 not exist between the parties.

10 **I. Legal Standard**

11 “The party asserting jurisdiction has the burden of proving all jurisdictional facts.”
12 *Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990). Civil actions filed in
13 state court may be removed to federal district court if the district court would have had
14 original jurisdiction over the action. 28 U.S.C. § 1441(a). Federal district courts have
15 subject-matter jurisdiction over “all civil actions where the matter in controversy exceeds
16 \$75,000 . . . and is between . . . citizens of different States.” 28 U.S.C. § 1332(a).
17 Section 1332 “requires complete diversity—no plaintiff may be a citizen of the same
18 state as any defendant.” *Cady v. Am. Family Ins. Co.*, 771 F. Supp. 2d 1129, 1130 (D.
19 Ariz. 2011). Section 1332 also “requires courts in certain contexts to look behind the
20 pleadings to ensure that parties are not improperly creating or destroying diversity
21 jurisdiction.” *Mississippi ex rel. Hood v. AU Optronics Corp*, 134 S. Ct. 736, 745 (2014).

22 **II. Should Dream Team be Considered for Diversity Purposes?**

23 Defendants argue that Dream Team had not been formed at the time Plaintiffs
24 filed their complaint or at the time Defendants filed their notice of removal. Therefore,
25 they assert Dream Team should not be considered for purposes of diversity jurisdiction.
26 The Court agrees.

27 Under Arizona law, a LLC “is formed when the articles of organization are
28 delivered to the commission for filing[.]” A.R.S. § 29-635(A). Plaintiffs do not dispute

1 that Dream Team’s articles of organization were not filed until after Plaintiffs
2 commenced suit and after Defendants removed the case to this Court. Therefore, at the
3 time the complaint was filed, Dream Team Holdings was unorganized and did not exist.

4 It should go without saying that a nonexistent entity does not have standing to
5 bring suit, and therefore should not be considered for purposes of determining diversity
6 jurisdiction. Nonetheless, Plaintiffs repeatedly argue that Dream Team is an
7 “unincorporated association” and has the citizenship of its members. A LLC is an
8 unincorporated association, but Plaintiffs ignore the fact that Dream Team *did not exist* as
9 an unincorporated association (or LLC) at the time they filed suit. Plaintiffs failed to
10 comply with the Arizona statute governing formation of LLCs, and thus Dream Team
11 was a nonexistent unorganized—not unincorporated—entity.

12 Plaintiffs argue that they cured this jurisdictional defect by filing the articles of
13 incorporation two weeks after they filed suit. But “[i]t has long been the case that ‘the
14 jurisdiction of the court depends upon the state of things at the time of the action
15 brought.’” *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570-71 (2004)
16 (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539 (1824)). This rule applies “regardless of
17 the costs it imposes.” *Id.* at 571. Here, the state of things at the time Plaintiffs filed the
18 complaint was that Dream Team did not exist, and Defendants properly removed the case
19 to this Court based on diversity jurisdiction.

20 In conclusion, the Court finds that Dream Team was not formed at the time
21 Plaintiffs filed the complaint. It will not be considered in determining whether diversity
22 jurisdiction exists in this action.¹

23 **III. Does Complete Diversity Exist Between the Parties?**

24 Plaintiffs argue that complete diversity does not exist even in the absence of

25
26 ¹ There is a serious question whether the parties agreed to form and operate Dream
27 Team. The Term Sheet appears to be an agreement regarding the principle terms of a
28 forthcoming Operating Agreement should the parties later agree to create Dream Team.
It does not instruct the parties to actually create Dream Team. In contrast, the MOU
specifically instructed the parties to form Dream Team by filing the articles of
organization. The MOU was never signed, however, and the parties did not brief what
legal effect, if any, the Term Sheet has in light of the failed negotiations.

1 Dream Team. It asserts that Plaintiff Green Light is a citizen of California and that one
2 of Defendant Energy Clinics' members is a California resident, thus destroying complete
3 diversity. Plaintiffs are incorrect.

4 Plaintiff Green Light is a Delaware corporation with its principal place of business
5 in California. (Doc. 10-1 at 2.) A corporation is a citizen of the state in which it is
6 incorporated and the state where its principal place of business is located. 28 U.S.C. §
7 1332(c)(1). As such, Green Light is a citizen of both Delaware and California.

8 Two Defendants named in this action are LLCs. A LLC is a citizen of "every state
9 in which its owners/members are citizens." *Johnson v. Columbia Props. Anchorage, LP*,
10 437 F.3d 894, 899 (9th Cir. 2006). In Arizona, a member of a LLC may withdraw from
11 membership by "delivering written notice of withdrawal to the other members." A.R.S. §
12 29-734.

13 All Defendants are citizens of Arizona. Energy Clinics was organized in 2012 and
14 had three members: Alarcon, Abelon, and Jason Santos. Alarcon and Abelon are
15 citizens of Arizona, and Santos is a citizen of California. Santos, however, withdrew as a
16 member from Energy Clinics in October 2013. (Doc. 18-1 at 74.) As such, Energy
17 Clinics is a citizen of Arizona.

18 Defendant Firebrand Infusions, LLC is another company whose creation was
19 contemplated by the MOU, but never created. It is alleged to be an Arizona LLC by
20 Plaintiffs. Defendant Organica Patient Group, Inc. is an Arizona corporation with its
21 principal place of business in Arizona. Further, although Plaintiffs name several DOES
22 as defendants, "the citizenship of defendants sued under fictitious names shall be
23 disregarded for the purposes of removal." *Newcombe v. Adolf Coors Co.*, 157 F.3d 686,
24 690 (9th Cir. 1998).

25 Accordingly, because complete diversity exists between the parties, the Court has
26 subject-matter jurisdiction over this action, and Plaintiffs' motion to remand is denied.

27 **MOTION TO COMPEL ARBITRATION**

28 Plaintiffs argue that Defendants should be compelled to arbitrate Plaintiffs' claims

1 given the arbitration provision in the Term Sheet. The provision provides:

2 Any dispute arising out of the Operating Agreement shall be resolved by
3 binding arbitration, in Maricopa County, Arizona (or such other jurisdiction
4 as the parties may agree). The prevailing party or parties in any such
5 arbitration shall be entitled to reimbursement from the non-prevailing
6 parties for their reasonable attorneys' fees in connection with such dispute
7 and arbitration.

8 (Doc. 18-1 at 13-14.) Defendants argue that the Term Sheet is not binding because the
9 MOU was never executed and Dream Team was never formed. They also argue that the
10 Operating Agreement was never created, and thus the instant suit cannot arise out of the
11 Operating Agreement. The Court agrees.

12 The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, “mandates that district
13 courts shall direct the parties the process to arbitration on issues as to which an arbitration
14 agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218
15 (1985). “The court’s role under the Act is therefore limited to determining (1) whether a
16 valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses
17 the dispute at issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130
18 (9th Cir. 2000).

19 The Term Sheet requires the parties to arbitrate disputes “arising out of the
20 Operating Agreement[.]” (Doc. 18-1 at 13.) The Term Sheet was signed by all the
21 relevant parties to this litigation, and thus the Court finds that a valid agreement to
22 arbitrate exists. Because the Operating Agreement was never created, however, the
23 agreement to arbitrate does not encompass the claims raised in the instant lawsuit.

24 Plaintiffs allege breach of the “Operating Agreement” in their complaint. (Doc. 1-
25 1 at 9-10.) But the Term Sheet is the only signed agreement submitted by the parties in
26 this case. And Plaintiffs do not dispute that the Term Sheet was the only agreement
27 executed between the parties. (Doc. 13 at 2.) The Term Sheet clearly evidences the
28 parties’ intent to formalize the terms of the joint venture in a separate Operating
Agreement. It states that “[t]he [Term Sheet] is a legally binding agreement between the
parties hereto regarding the principal terms of the Members’ agreement to operate the

1 Company, *which will be evidenced by a formal Operating Agreement[.]*” (*Id.* (emphasis
2 added).) It also notes that “if an Operating Agreement is not formed,” the Term Sheet
3 remains in effect.²

4 The arbitration provision only applies to disputes arising out of the Operating
5 Agreement. However, because no Operating Agreement was ever executed—no
6 Operating Agreement exists. Consequently, the arbitration provision does not encompass
7 the dispute at issue, and Plaintiffs’ motion to compel arbitration is denied.³

8 **IT IS ORDERED:**

- 9 1. Plaintiffs’ request for judicial notice, (Doc. 15), is **GRANTED IN PART**.
10 2. Plaintiffs’ motion to remand, (Doc. 10), is **DENIED**.
11 3. Plaintiffs’ motion to compel arbitration, (Doc. 13), is **DENIED**.
12 4. Plaintiffs’ motions to expedite, (Docs. 26, 51), are **DENIED**.
13 5. The Court will set a scheduling conference by separate order.

14 Dated this 7th day of October, 2016.

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19 Douglas L. Rayes
United States District Judge

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25 _____
26 ² As noted above, the extent to which Term Sheet continues to govern the
27 relationship between the parties is not addressed in the briefs.

28 ³ Defendants also argue that Plaintiffs waived any right to arbitrate by filing this
action. Because no agreement to arbitrate was formed, however, the Court need not
reach this issue.