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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 David R Dabdoub,

10 Plaintiff,

11 v.

12 Triduum Financial LLC, et al.,

13 Defendants.
14

No. CV-16-00766-TUC-DCB

ORDER

15
16 Plaintiff filed a Complaint on December 8, 2016. He alleged that Defendants
17 solicited an investment loan from him in the sum of \$500,000.00, pursuant to a Gurantee
18 Agreement. He alleges they fraudulently and negligently breached the Guarantee
19 Agreement. This action arises because the Plaintiff was unable to recover from the
20 borrower under the Promissory Note, and now proceeds against the Gurantors. On
21 February 25, 2017, the Defendant Stewarts filed a Motion to Dismiss for lack of subject
22 matter jurisdiction based upon a lack of complete diversity between the parties. The
23 Court grants the motion, as explained below.

24 Plaintiff's complaint alleges that this Court has subject jurisdiction over this case
25 pursuant to 28 U.S.C. § 1332(a)(2), which vests the district courts with original
26 jurisdiction over civil actions where the matter exceeds the jurisdictional sum of \$75,000
27 and is between "citizens of a State and citizens or subjects of a foreign state." Diversity
28 is destroyed if even just one of the defendants has the same citizenship as the plaintiff.

1 Here, the Stewarts argue that diversity between the parties does not exist since they share
2 Arizona citizenship with the Plaintiff. The Plaintiff alleges the Stewarts are citizens of
3 Wyoming because in a prior proceeding between these parties all agreed that diversity
4 existed based on the Stewarts being citizens of Wyoming because they own a business
5 there. The prior proceeding was voluntarily dismissed so that the Plaintiff could attempt
6 recovery from the borrower under the Promissory Note, which he did do without success.
7 The Plaintiff argues, alternatively, that if the Court is not inclined to find jurisdiction
8 based on this stipulation, the Court enter a discovery order requiring the Stewarts to
9 provide evidence to enable the Court and the Plaintiff to better evaluate the Defendant's
10 claim of citizenship.

11 The seminal case in the Ninth Circuit setting out the legal standard and standard of
12 review for determining whether subject matter jurisdiction exists in a diversity case is
13 *Lew v. Moss*, 797 F.2d 747 (9th Cir. 1986). Plaintiff, as the party asserting diversity
14 jurisdiction, has the burden of proof concerning the assertion. *Id.* at 748. Courts have
15 created a presumption in favor of a previously established domicile as against a newly
16 acquired one. *Id.* at 751. When a prior presumption of domicile has been made, the
17 burden of production of evidence shifts to the party challenging diversity, but the burden
18 of proof remains with the plaintiff. *Id.* Discovery should be allowed where pertinent facts
19 bearing on the question to jurisdiction or venue are in dispute. *America West Airlines,*
20 *Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989).

21 Importantly, domicile and residence are not the same thing; residence is one of the
22 *Lew* factors. A person is “domiciled” in a location where he or she has established a
23 “fixed habitation or abode in a particular place, and intends to remain there permanently
24 or indefinitely” and the existence of domicile is determined as of the time the lawsuit is
25 filed. *Lew*, 797 F.2d, at 748. The determination of domicile involves a number of factors,
26 with no single factor controlling, including: current residence, voting registration and
27 voting practices, location of personal and real property, location of brokerage and bank
28 accounts, location of spouse and family, membership in unions and other organizations,
place of employment or business, driver license and automobile registration, and payment

1 of taxes. *Id.* A person can have multiple residences but only one domicile for
2 determining citizenship. Domicile is evaluated by objective facts, and statements of
3 intent are less important when they conflict with facts. *Id.* at 750. Importantly, a previous
4 domicile is valid until there is confluence of physical presence at the new location with
5 an intention to remain there indefinitely. *Id.*

6 Here, the Plaintiff filed the first Complaint against Defendants on November 22,
7 2013. The Complaint alleged diversity jurisdiction existed in that case based on the
8 Stewarts being citizens of Wyoming. There was no objection, and in the Joint Case
9 Management Plan, the parties agreed to jurisdiction existed based on diversity. The
10 Plaintiff argues that the Stewarts' admission during the first action that diversity
11 jurisdiction existed was necessarily an admission to being citizens of Wyoming.

12 A party cannot stipulate to jurisdiction. *See e.g. Stock West, Inc. v. Confederated*
13 *Tribes of Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989) (a party cannot waive
14 lack of subject matter jurisdiction by consent or contract). Therefore, the admission in
15 the first action is not binding to establish subject matter jurisdiction over this case. The
16 Plaintiff provides no evidence that the Stewarts ever admitted the fact of being citizens of
17 Wyoming.

18 Defendant Stewarts' motion to dismiss tracks the *Lew* factors. The Stewarts argue
19 that Mr. Stewart has lived in Arizona since 1968, except when he resided in Seattle from
20 1989-1993, has never resided in the State of Wyoming, and his last time to visit
21 Wyoming was 30 years ago. His wife has not resided in Wyoming for at least 29 years.
22 The Stewarts have been married for over 29 years and have lived together in their present
23 house in Scottsdale, Arizona since 2013. The Plaintiff mailed this Complaint to the
24 Stewarts addressed to an Arizona post box. With the motion, the Stewarts provide their
25 "current residence," "location of spouse and family," "driver's license" and Veteran's
26 Administration ("VA") registration and receipt of benefits in Arizona

27 1) Redacted Addendums to a 6/13/13 Contract: Objective factors in evaluating
28 residence include whether a person owns or rents in the state. The addendums extended a
prior contract for a rental in Scottsdale, Arizona, but the Stewarts did not provide the

1 rental contract and the addendums redacted the physical address of the property.

2 2) 3/9/17 Southwest Gas Customer Service Letter: Utility bills are typically not one
3 of the objective factors courts consider as evidence of citizenship. Here, the billing
4 address reflects Scottsdale, Arizona, and the Southwest Gas Customer Service letter
5 states that Mr. Stewart has active gas service as of March 9, 2017.

6 3) Invalid Arizona Driver's License Issued on October 12, 2011: Proof of a valid
7 driver's license in the state is an objective factor for citizenship. However, Mr. Stewart's
8 driver's license is invalid because the address provided on it is not a resident but a
9 PostNet Store rental mailbox, which is not permitted by Arizona Department of
10 Transportation. This is not a valid driver license for this Court to consider in determining
11 citizenship.

12 4) VA Health ID Card and 2009 Letter from VA to PostNet Rental Mailbox: Like the
13 3/9/17 Southwest Gas Customer Service Letter, Health ID Cards are not one of the
14 objective factors courts consider in connection with citizenship. Even as a cumulative
15 factor, a letter in 2009 from the VA to the Defendant Stewarts' PostNet rental mailbox on
16 an unspecified date is weak evidence to establish Arizona citizenship.

17 Until seeing the Reply, this Court was prepared to allow the Plaintiff to conduct
18 discovery on the question of citizenship. Until the Reply, the evidence tendered by the
19 Stewarts suggests a residence in Arizona, but does not prove domicile. The utility bill
20 and VA card are not *Lew* factors; nevertheless, the Court considered the evidence as
21 similar to union or other organization membership. The Court notes that the Stewarts
22 tendered evidence of recent residency and nothing to support the assertion that they have
23 domiciled in Arizona for over 20 years.

24 Finally, in the Reply, the Stewarts provided clear evidence of citizenship in Arizona.
25 The Stewarts provided Mrs. Stewart's Voter Identification Card, which was issued on
26 8/13/2016, and lists the Stewarts' residential street address in Scottsdale, Arizona.
27 Voting registration unequivocally establishes the Mrs. Stewart's physical presence in
28 Arizona with an intention to remain here because voting is restricted to a person's
permanent residence, i.e., domicile. With Mrs. Stewart's Voter Identification Card, the

