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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN ZAPATA dba ZAPATA
COLLECTION, SERVICE, an Individual,

Plaintiff,

No. 2:09-cv-03555 GEB KJN PS

v.

ORDER

FLINTCO, INC., an Oklahoma
corporation, SAN JOAQUIN DELTA
COMMUNITY COLLEGE DISTRICT,
a Political Subdivision and JOHN DOE
1-25, inclusive,

Defendants.

_____/

On May 20, 2010, this case was before the undersigned for a status (pretrial scheduling) conference.¹ Plaintiff, who is proceeding without an attorney, appeared on his own behalf. Attorney Jason Suh appeared on behalf of both defendants. As a result of the contentions regarding the court's subject matter jurisdiction contained in the Joint Status Report filed by the parties (Dkt. No. 23), and for the reasons discussed at the status conference, the undersigned will not enter a status (pretrial scheduling) order at this time and, instead, will enter such an order

¹ This action proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1), and was reassigned by an order entered February 9, 2010 (Dkt. No. 5).

1 after the court has resolved whether it has subject matter jurisdiction to hear this case.

2 This dispute arises out of defendant San Joaquin Delta Community College
3 District's (the "District") call for competitive bidding for the construction of a public project
4 consisting of the renovation of the interior of the Goleman Learning Resource Center. (Pl.'s
5 Compl. ¶ 13, Dkt. No. 1.) Plaintiff, an individual, is the purported "assignee of all rights, title,
6 interest due to Midwest Demolition Company of California (Midwest), a California corporation,
7 and against all Defendants." (Id. ¶ 6.) Generally, plaintiff alleges that defendant Flintco, Inc.
8 ("Flintco"), the successful prime contract bidder, initially listed Midwest on an authorized bid
9 form as a subcontractor to conduct certain demolition work in connection with the renovation
10 project. (Id. ¶ 15.) He further alleges that Flintco subsequently substituted another subcontractor
11 for Midwest to perform the demolition work at issue as a result of Midwest's purported refusal to
12 enter into a subcontract with Flintco. (See id. ¶¶ 17-20.)

13 Plaintiff's complaint alleges two claims for relief: (1) "breach of duty not to
14 substitute subcontractor for listed subcontractor without proper consent," which appears to be
15 alleged only against Flintco; and (2) violation of due process, alleged against the District. (Id.
16 ¶¶ 12-36.) Plaintiff seeks damages in the amount of \$348,031.00, costs, collection fees, and
17 attorney's fees. (Dkt. No. 1 at 8.)

18 Plaintiff has alleged that this court has subject matter jurisdiction to hear this case
19 pursuant to the diversity jurisdiction statute, 28 U.S.C. § 1332. (Pl.'s Compl. ¶ 1.) Although
20 defendants have already filed an answer to plaintiff's complaint, defendants have indicated that
21 they intend to challenge the court's subject matter jurisdiction. Defendants contend that the
22 assignment from Midwest to plaintiff is a "sham"; that Midwest, a California corporation, is the
23 proper plaintiff in this action; and that there can be no complete diversity if Midwest is indeed a
24 proper plaintiff because the "District is a California entity." (See Joint Status Report at 2:17-22,
25 Dkt. No. 24.) Defendants have also indicated that they intend to challenge whether plaintiff, an
26 individual, may properly represent Midwest, which defendants believe is a proper party here and

1 is a corporation that may only appear in federal court through an attorney (id. at 4). See, e.g.,
2 Local Rule 183(a).

3 Because the court has an independent obligation to assess its subject matter
4 jurisdiction, Bova v. City of Medford, 564 F.3d 1093, 1095 (9th Cir. 2009), the court declines to
5 enter a status (pretrial scheduling) order at this time and will do so only after the dispute
6 regarding the court’s subject matter jurisdiction has been resolved. As described below, the court
7 will permit defendants to conduct limited discovery, including the taking of a limited deposition
8 of plaintiff, and will permit defendants to file a motion challenging the court’s subject matter
9 jurisdiction.² And because plaintiff has indicated that he will be out of the country from
10 approximately June 18, 2010 through the middle of August of 2010, the undersigned will set a
11 schedule for the taking of limited discovery and a limited deposition of plaintiff, and will set a
12 briefing schedule for defendants’ motion, if any, related to the matters discussed herein. The
13 parties are strongly encouraged to cooperate with a view toward completing the discovery and
14 briefing permitted herein on an expedited basis and moving this case forward.

15 For the foregoing reasons, IT IS HEREBY ORDERED that:

16 1. Defendants will be permitted to conduct limited discovery, consistent with
17 the Federal Rules of Civil Procedure and applicable law, regarding whether the court has subject
18 matter jurisdiction over this case and whether plaintiff may represent a corporate entity, which
19 might be a proper party in this matter, in federal court. This may include discovery regarding the
20 “assignment” from Midwest Demolition Company of California to plaintiff in this case and the
21 nature of plaintiff’s relationship to, or affiliation with, Midwest Demolition Company of
22 California and/or Midwest Demolition Company. However, Defendants are cautioned that,

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24 ² See Fed. R. Civ. P. 12(h)(3); Augustine v. United States, 704 F.2d 1074, 1075 n.3 (9th
25 Cir. 1983) (characterizing a post-answer motion brought pursuant to Rule 12(b)(1) as
26 “technically untimely,” but concluding that the government’s motion was properly before the
court as “a Rule 12(h)(3) suggestion of lack of subject matter jurisdiction”); accord Elvig v.
Calvin Presbyterian Church, 375 F.3d 951, 956 n.2 (9th Cir. 2004).

1 consistent with the undersigned's admonition at the status conference, such discovery shall be
2 limited in nature.

3 2. Defendants may serve written discovery limited to the issues described
4 above and consistent with the discussion at the status conference. Such written discovery shall
5 be served and responded to, if at all possible, before June 17, 2010.³ Additionally, if defendants
6 determine that the taking of plaintiff's deposition—limited to the issues described above and
7 discussed at the status conference—is required, they may take plaintiff's deposition. Any such
8 limited deposition shall take place on or before June 17, 2010, in either Los Angeles or
9 Sacramento, California, or an alternative location within the State of California that is agreeable
10 to both parties.

11 3. If defendants are not able to complete the permitted, limited discovery on
12 on or before June 17, 2010, they shall file a written statement with the court describing the efforts
13 made, and the reasons for the failure, to complete the discovery permitted herein.

14 4. All discovery in this case, except as described above, is stayed until such
15 time as the court has resolved the dispute regarding its subject matter jurisdiction over this case.

16 5. Defendants shall file a motion, if any, challenging the court's subject
17 matter jurisdiction and/or challenging plaintiff's ability to represent a corporate party in federal
18 court within sixty (60) days of the date of entry of this order. If defendants decide not to file such
19 a motion, they shall promptly notify the court in writing and serve such notice on plaintiff. If
20 defendants file such a motion, plaintiff shall have thirty (30) days to file a written opposition or
21 statement of non-opposition. Plaintiff may file and serve such written opposition or statement of
22 non-opposition electronically in .pdf format if needed, and shall contact the undersigned's
23 courtroom deputy, Casey Schultz, in advance of the filing deadline to arrange for timely

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25 ³ Although defendants requested a shortening of time within which plaintiff would be
26 obligated to respond to discovery propounded by defendants, the undersigned advised the parties
that, at least initially, they would be expected to cooperatively address the timing of responses to
such discovery.


1 electronic filing. Defendants shall then have seven (7) days to file an optional written reply. The
2 court will set a hearing date if it determines that a hearing is required.

3 6. Plaintiff's motion for summary judgment filed May 20, 2010 (Dkt. No.
4 27), is dismissed without prejudice to refile after the court has resolved the dispute regarding
5 whether it has subject matter jurisdiction to hear this case.

6 IT IS SO ORDERED.

7 DATED: May 20, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE