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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

STEVEN AMES BROWN, et al.,

Plaintiffs,

v.

ANDREW B. STROUD, et al.,

Defendants

No. 08-cv-02348 JSW (NC)

No. 09-cv-03796 JSW (NC)

No. 11-cv-05822 JSW (NC)

**ORDER RE: FURTHER
BRIEFING ON THE ISSUE OF
SUBJECT MATTER
JURISDICTION**

ANDREW B. STROUD, et al.,

Plaintiffs,

v.

CASTLE ROCK ENTERTAINMENT, et al.,

Defendants

LISA SIMONE KELLY,

Plaintiff,

v.

WALLY ROKER, et al.,

Defendants

ORDER RE: FURTHER BRIEFING
ON THE ISSUE OF JURISDICTION

1 These three related cases were referred to the undersigned Magistrate Judge for a
2 report and recommendation on the pending motions for default judgment. The Court held a
3 hearing and took the motions under submission. After further review of the pleadings,
4 however, the Court has concerns about the possible lack of subject matter jurisdiction over
5 the claims asserted by the Estate of Nina Simone (“the Simone Estate”) in the *Kelly v.*
6 *Roker* action and its counterclaims in the *Brown v. Stroud* action. In light of the
7 fundamental, threshold nature of the jurisdictional issue, the Simone Estate is ordered to
8 submit further briefing addressing these concerns as set forth below.

9 When presented with a motion for default judgment, the Court has “an affirmative
10 duty to look into its jurisdiction over both the subject matter and the parties.” *In re Tuli*,
11 172 F.3d 707, 712 (9th Cir. 1999). Furthermore, federal courts are courts of limited
12 jurisdiction and are presumptively without jurisdiction. *Kokkonen v. Guardian Life Ins.*
13 *Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court may dismiss an action on its own
14 motion if it finds that it lacks subject matter jurisdiction over the action. *Fiedler v. Clark*,
15 714 F.2d 77, 78-79 (9th Cir. 1983); *see also* Fed. R. Civ. P. 12(h)(3) (“If the court
16 determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the
17 action.”).

18 Federal courts have original jurisdiction over “all civil actions arising under the
19 Constitution, laws, or treaties of the United States,” 28 U.S.C. § 1331, and over “all civil
20 actions where the matter in controversy exceeds the sum or value of \$75,000 . . . and is
21 between citizens of different states,” 28 U.S.C. § 1332(a). District courts have diversity
22 jurisdiction over “all civil actions where the matter in controversy exceeds the sum or value
23 of \$75,000, exclusive of interest and costs” and the action is between: “(1) citizens of
24 different States; (2) citizens of a State and citizens or subjects of a foreign state . . . ; (3)
25 citizens of different States and in which citizens or subjects of a foreign state are additional
26 parties; and (4) a foreign state . . . as plaintiff and citizen of a State or of different States.”
27 28 U.S.C. § 1332. “Absent unusual circumstances, a party seeking to invoke diversity
28 jurisdiction should be able to allege affirmatively the actual citizenship of the relevant

1 parties.” *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). Challenges to
2 diversity jurisdiction are measured against the state of facts that existed at the time the
3 action was filed. *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570-71 (2004).

4 **A. *Kelly v. Roker***

5 On December 2, 2011, Lisa Simone Kelly (“Kelly”), as the duly appointed
6 administrator of the Simone Estate, commenced this action against Andrew Stroud, Andy
7 Stroud, Inc. (“ASI”), and Wally Roker, individually and doing business as ICU Ent. Dist.
8 and Wally Roker Music. Dkt. No. 1.¹ According to the complaint, the action arises out of
9 the alleged fraudulent conveyance, disposal, and/or spoliation of the Nina Simone materials
10 subject to the pending *Brown v. Stroud* litigation. *Id.* at 3. The complaint asserts state law
11 claims for conversion, accounting, and fraudulent transfer under Cal. Civ. Code § 3439.04,
12 and a claim for declaratory relief under 28 U.S.C. § 2201. *Id.* at 10-15. The complaint
13 further asserts that the Court has jurisdiction over the subject matter of the action pursuant
14 based on diversity, 28 U.S.C. § 1332. *Id.* at 3. The complaint alleges that Kelly is “an
15 individual who resides in Florida”; Wally Roker is a citizen of California; ICU Ent. Dist.
16 and Wally Roker Music are Roker’s business designees; Andrew Stroud is a citizen of New
17 York; and “ASI is a corporation organized under the laws of the State of New York.” *Id.* at
18 1-2.

19 ASI counterclaimed against Kelly, in her capacity as the duly appointed
20 administrator of the Simone Estate, asserting claims for declaratory judgment, copyright
21 infringement, vicarious copyright infringement, contributory copyright infringement, and
22 copyright infringement under California law. Dkt. No. 11 at 11, 16-23. ASI asserts that
23 “jurisdiction is proper because the counterclaims form part of the same case or controversy
24 as the original claim and therefore falls within the supplemental jurisdiction of this Court
25 under section 1367 of Title 28 of the United States Code.” *Id.* at 11. ASI’s counterclaims
26 repeat the same allegations as to the citizenship of ASI and Kelly stated in the Simone
27

28 ¹ Unless otherwise indicated, all references to docket numbers in this section are to the docket in the
case *Lisa Simone Kelly v. Wally Roker et al.*, No. 11-cv-05822 JSW.
ORDER RE: FURTHER BRIEFING
ON THE ISSUE OF JURISDICTION

1 Estate’s complaint. *Id.*

2 With the exception of the declaratory relief claim, all other claims asserted in the
3 Simone Estate’s complaint are based on state law. It is well established that the Declaratory
4 Judgment Act, 28 U.S.C. § 2201, is not an independent basis for federal jurisdiction. *Skelly*
5 *Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *N. Cnty. Commc’ns Corp. v.*
6 *California Catalog & Tech.*, 594 F.3d 1149, 1154 (9th Cir. 2010). The Simone Estate does
7 not contend otherwise, asserting instead that this Court has subject matter jurisdiction over
8 the complaint based on diversity. However, the complaint does not contain sufficient
9 allegations to establish the citizenship of the relevant parties for diversity purposes.

10 The allegation that Kelly is “an individual who resides in Florida,” Dkt. No. 1 at 1, is
11 inadequate for two reasons. First, allegations of residence are insufficient for purposes of
12 establishing jurisdiction under 28 U.S.C. § 1332, which requires an analysis of citizenship.
13 *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) (“The natural person’s
14 state citizenship is then determined by her state of domicile, not her state of residence. A
15 person’s domicile is her permanent home, where she resides with the intention to remain or
16 to which she intends to return.”); *Quinn v. McGraw-Hill Companies, Inc.*, 168 F.3d 331,
17 334 n.1 (7th Cir. 1999). Second, and more fundamentally, it is the citizenship of the person
18 or entity on whose behalf the action is maintained (here, the Simone Estate) that controls
19 for diversity purposes. 28 U.S.C. § 1332(c)(2) (“[T]he legal representative of the estate of
20 a decedent shall be deemed to be a citizen only of the same State as the decedent.”); *see*
21 *also Gustafson v. zumBrunnen*, 546 F.3d 398, 400 (7th Cir. 2008) (“[T]he federal diversity
22 statute treats ‘the legal representative’ of a decedent’s estate (or the estate of an infant or an
23 incompetent) as a citizen of the same state as the decedent.”). The complaint here fails to
24 allege the citizenship of the decedent, Nina Simone.

25 Furthermore, the Supreme Court has held that “[i]n order to be a citizen of a State
26 within the meaning of the diversity statute, a natural person must both be a citizen of the
27 United States *and* be domiciled within the State.” *Newman-Green, Inc. v. Alfonzo-*
28 *Larrain*, 490 U.S. 826, 828 (1989) (citations omitted). Thus, an American citizen who

1 moves abroad is not a citizen of any state for purposes of § 1332(a)(1) or an alien for the
2 purposes of § 1332(a)(2), and thus cannot sue or be sued in federal court on the basis of
3 diversity jurisdiction. *Id.*; *see also Brady v. Brown*, 51 F.3d 810, 815 (9th Cir. 1995);
4 *Brady Büchel-Ruegsegger v. Büchel*, 576 F.3d 451, 454-55 (7th Cir. 2009).

5 The Court also notes that the statement that “ASI is a corporation organized under
6 the laws of the State of New York,” Dkt. No. 1 at 2, does not adequately allege the
7 citizenship of ASI. *See* 28 U.S.C. § 1332(c)(1) (for purposes of diversity, “a corporation
8 shall be deemed to be a citizen of every State and foreign state by which it has been
9 incorporated *and* of the State or foreign state where it has its principal place of business”)
10 (emphasis added). Thus, the mere allegation that a corporate party is incorporated in a
11 particular state, without alleging where its principal place of business is located, is
12 insufficient to establish diversity. *Indiana Hi-Rail Corp. v. Decatur Junction Ry. Co.*, 37
13 F.3d 363, 365 n.3 (7th Cir. 1994); *Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035, 1039
14 (5th Cir. 1982). This deficiency, however, is not fatal, given the allegation by Andrew
15 Stroud and ASI in their Fourth Amended Counterclaims in the related action *Brown v.*
16 *Stroud* that ASI “is a corporation formed in New York with its principal place of business
17 in New York.” Case No. 08-cv-02348 JSW, Dkt. No. 297 at 2.

18 The Simone Estate’s motion for default judgment does not discuss the issue of
19 subject matter jurisdiction. Dkt. No. 133. By January 15, 2014, the Simone Estate must
20 submit a supplemental brief, accompanied by any appropriate declaration, providing
21 support for its position that the Court has subject matter jurisdiction over this action based
22 on diversity, and, if complete diversity is not present, explaining whether a different source
23 of subject matter jurisdiction exists. Any other party may file a brief limited to the issues
24 raised in this order within 7 days of filing of the Simone Estate’s brief.

25 **B. *Brown v. Stroud***

26 On May 7, 2008, Steven Ames Brown (“Brown”) filed a complaint against Andrew
27 Stroud and Stroud Productions and Enterprises, Inc. (“SPE”) in this Court. Dkt. No. 1.²

28 ²Unless otherwise indicated, all references to docket numbers in this section are to the docket in the
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1 Brown’s First Amended Complaint asserts causes of action for declaratory relief and
2 common law copyright infringement. Dkt. No. 35 at 4-5. The complaint states that “[t]he
3 jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1332” and that the action “also
4 arises under the Federal Declaratory Judgment Act 28 U.S.C. §§ 2201, 2202.” *Id.* at 1.
5 Brown alleges that he is a citizen of California and that defendants Andrew Stroud and SPE
6 are citizens of New York. *Id.*

7 Andrew Stroud and ASI counterclaimed against Brown and the Estate of Nina
8 Simone for declaratory judgment, copyright infringement, vicarious copyright
9 infringement, contributory copyright infringement, violation of the Digital Millennium
10 Copyright Act, and copyright infringement under California law. Dkt. No. 297 at 6-7. The
11 counterclaims state that “jurisdiction is proper because the claims set out in this pleading
12 form part of the same case or controversy as the original claim over which the Court has
13 original jurisdiction and, therefore, falls within the supplemental jurisdiction of the Court
14 under section 1367 of Title 28 of the United States Code.” *Id.* at 2. The counterclaims
15 further allege that Andrew Stroud is a resident of New York; SPE “was a corporation
16 formed in New York with its principal place of business in New York”; ASI “is a
17 corporation formed in New York with its principal place of business in New York”; Brown
18 “is a resident of the State of California”; and “[t]he Estate of Nina Simone is administered
19 in the State of California.” *Id.*

20 Brown filed reply counterclaims against Andrew Stroud and SPE for declaratory
21 judgment, unfair competition under California Business & Professions Code § 17200 *et*
22 *seq.*, and relief under the All Writs Act, 28 U.S.C. § 1651. Dkt. No. 82 at 11-13. The
23 claim for declaratory judgment is also asserted against Sony Music Entertainment (“Sony
24 Music”). Dkt. No. 82 at 11. Brown’s reply counterclaims state that “[t]he jurisdiction of
25 this Court is invoked pursuant to 28 U.S.C. § 1332” and that the action “also arises under
26 the Federal Declaratory Judgment Act 28 U.S.C. §§ 2201, 2202 and the All Writs Act 28
27 U.S.C. § 1651.” *Id.* at 7. Brown claims that jurisdiction is also proper “because the claims

1 set out below are part of the same case or controversy that is raised in Defendant’s
2 *Counterclaims*, and, therefore, jurisdiction is invoked pursuant to 28 U.S.C. § 1367.” *Id.*
3 Brown alleges that he is a citizen of California; Andrew Stroud is a citizen of New York;
4 and Sony Music is a citizen of Delaware. *Id.*

5 The Simone Estate also counterclaimed. In its First Amended Counterclaims, Dkt.
6 No. 263, the Simone Estate, “by its duly appointed administrator Lisa Simone Kelly,”
7 asserts claims for declaratory judgment, conversion, replevin, and accounting. Dkt. No.
8 263 at 12-23. The counterclaims state that “[t]his Court has jurisdiction over the subject
9 matter of this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1338 and principles of
10 supplemental jurisdiction.” *Id.* at 2. The counterclaims further assert that “[t]he claims
11 herein arise under §§106, 201, and 501 of the Copyright Act (17 U.S.C. §§ 106, 201, 501),
12 the Federal Declaratory Judgment Act 28 U.S.C., §§ 2201, 2202, and the common law,”
13 and that “[j]urisdiction is also proper because the claims set out below are part of the same
14 case or controversy that is raised in Stroud’s SACC, pursuant to 28 U.S.C. §1367.” *Id.*
15 The Simone Estate alleges that it “is an estate which is administered in the State of
16 California.” *Id.*

17 Because the Declaratory Judgment Act, 28 U.S.C. § 2201, is not an independent
18 basis for federal jurisdiction, Brown’s First Amended Complaint contains only state law
19 claims and thus can only support the exercise of subject matter jurisdiction based on
20 diversity. The same is true with respect to Brown’s reply counterclaims because the All
21 Writs Act, 28 U.S.C. § 1651, is also not a separate claim for relief. *See* Dkt. No. 251 at 18-
22 19; *Lights of America, Inc. v United States District Court*, 130 F. 3d 1369, 1370 (9th Cir.
23 1997) (courts must possess an independent source of jurisdiction before entertaining a
24 request for a writ).

25 To the extent the Simone Estate contends that this Court has subject matter
26 jurisdiction over the Estate’s First Amended Counterclaims based on diversity, the Simone
27 Estate has not sufficiently alleged its citizenship for the same reasons discussed above in
28 connection with the *Kelly v. Roker* case. Furthermore, the allegation by the Simone Estate

1 that it “is an estate which is administered in the State of California” is inconsistent with its
2 jurisdictional allegations in the *Kelly v. Roker* case which were premised on the residence
3 of the administrator of the Simone Estate. Again, the issue of subject matter jurisdiction is
4 not addressed in either the Simone Estate’s or Brown’s motion for default judgment. Dkt.
5 Nos. 522, 530.

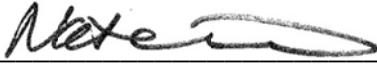
6 By January 15, 2014, the Simone Estate must submit a supplemental brief,
7 accompanied by any appropriate declaration, providing support for its position that this
8 Court has subject matter jurisdiction over the Simone Estate’s counterclaims based on
9 diversity, and, if complete diversity is not present, explaining whether a different source of
10 subject matter jurisdiction exists and on what specific basis. Any other party may file a
11 brief limited to the issues raised in this order within 7 days of filing of the Simone Estate’s
12 brief.

13 The Simone Estate must serve a copy of this order and the Simone Estate’s response
14 on the parties in default, and must file a proof of service with the Court.

15 The Court will defer ruling on the default judgment motions until these jurisdictional
16 issues are resolved.

17 IT IS SO ORDERED.

18 Date: December 18, 2013


Nathanael M. Cousins
United States Magistrate Judge