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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GWENDOLYN WALKER SMITH, et al.,

Plaintiffs,

v.

BREAKTHROUGH INTERNATIONAL, et  
al.,

Defendants.

Case No. 12-cv-01832-JST

**ORDER DISMISSING COMPLAINT  
FOR LACK OF SUBJECT MATTER  
JURISDICTION**

Re: ECF No. 31

**I. INTRODUCTION**

Defendant Breakthrough International, Inc. (“Breakthrough”) has moved to dismiss Plaintiffs Gwendolyn Walker Smith and Zeus Harrison Smith’s (“Plaintiffs”) First Amended Complaint (“FAC”) for lack of subject matter jurisdiction, among other reasons. Notice of Motion and Motion to Dismiss Plaintiffs’ First Amended Complaint (“Mot.”), ECF No. 31. The Court finds that this matter is suitable for disposition without oral argument, pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b). Since the Court is not satisfied that it has subject matter jurisdiction over this matter, it hereby **DISMISSES** the FAC **WITHOUT PREJUDICE**, subject to Plaintiffs filing a sworn affidavit attesting to their state citizenship on April 12, 2012. Without such an affidavit, the Court is likely to dismiss the case with prejudice.

**II. BACKGROUND**

**A. Procedural and Factual Background**

On April 12, 2012, Plaintiffs Gwendolyn Smith and Zeus Harrison Smith (“Plaintiffs”) filed a complaint (“the Complaint”) against Defendants Howard Elan, Reverend Oracle, and Breakthrough, alleging violations of the U.S. and California constitutions, alleging violation of the federal Electronic Communications and Privacy Act (“ECPA”), 18 U.S.C. § 2511, and raising

1 several state tort causes of action. ECF No. 1. The Court granted Plaintiff Gwendolyn Smith’s  
2 application to proceed *in forma pauperis*, but also dismissed the Complaint without prejudice  
3 under the screening procedures in 28 U.S.C. § 1915(e)(2)(B). ECF No. 12.<sup>1</sup> The Court held that  
4 the Complaint failed to state any claim against Breakthrough, that Plaintiffs’ ECPA claim was  
5 time-barred, that the Complaint failed to invoke the Court’s subject matter jurisdiction in the  
6 absence of the ECPA claim, and further finding that that the Complaint failed to allege sufficient  
7 facts to state any claim except defamation, false light, and intentional infliction of emotional  
8 distress. Id. The Court granted Plaintiffs leave to file an amended complaint, but noted that  
9 Plaintiffs asserted Oregon citizenship while at the same time listing a Sebastapol, California  
10 address on the Court’s electronic case filing system. Id. The Court ordered Plaintiffs “to submit  
11 an affidavit, under oath, attesting to their true residency,” in any amended complaint. Id.

12 In October 2012, Plaintiffs filed the FAC. ECF No. 16. In the FAC, Plaintiffs allege that  
13 they are both residents of Portland, Oregon, and are citizens of the State of Oregon. FAC, at ¶ 1.  
14 The FAC asserts that “[p]ursuant to, at a minimum, Cal. Civ. Pro § 410.10 [sic], the Court has  
15 jurisdiction under the provisions of 28 U.S.C. § 1332.” Id. at ¶ 5. The FAC’s caption lists the  
16 Defendants as “Breakthrough International, d/b/a Straighttalknews.org, d/b/a Howard Elan and  
17 Reverend Oracle, Defendants.” Id. The FAC lists four causes of action: “Invasion of Privacy -  
18 Physical Intrusion on Solitude And/Or Private Affairs, in Violation of Federal and State

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20 <sup>1</sup> This and other previous orders in this case were issued by Magistrate Judge Spero, to whom this  
21 case was initially assigned. Plaintiffs consented to proceed before a Magistrate Judge, but  
22 Breakthrough never did. See ECF Nos. 8, 9 & 32. However, a party can “impliedly consent” to a  
23 Magistrate Judge’s authority through its actions even if does not expressly consent. See Roell v.  
24 Withrow, 538 U.S. 580, 590 (2003); Wilhelm v. Rotman, 680 F.3d 1113, 1119-20 (9th Cir. 2012).  
25 Here, Breakthrough filed a motion to dismiss before Judge Spero, without objecting to his  
26 authority to hear the case, and relied on orders he had previously issued in its brief. ECF No. 31.  
27 Therefore, for the purposes of summarizing the case’s current posture, the Court assumes that  
28 Breakthrough had previously impliedly consented to the authority of a Magistrate Judge to hear  
the case. After Judge Spero recused himself in March, the case was reassigned to this Court, and  
this Court ordered Breakthrough to state whether it would consent to proceed before a Magistrate  
Judge. ECF No. 45. At that point, Breakthrough declined to consent. ECF No. 46. The Court  
construes this declination as a refusal to be reassigned *back* to a Magistrate Judge rather than a  
renunciation of a Magistrate Judge’s authority to decide any aspects of the case. To be clear, this  
presumption, while helpful to summarizing the case history, does not alter the Court’s conclusion.  
Even if it disregarded all of the orders issued by Judge Spero in this case, this Court would find  
that Plaintiffs have failed to properly satisfy their burden to allege subject matter jurisdiction.  
Neither the initial complaint nor the FAC meets that burden.

1 Constitutions and 18 U.S.C. § 1702,” “Defamation and Defamation Per Se,” “False Light,” and  
2 “Conspiracy to Defame.” Plaintiffs did not file the affidavit that the Court ordered them to file,  
3 but in November 2012, they filed a notice of change of address, stating that “as of October 10,  
4 2012,” they were no longer receiving mail at their Sebastapol address, and submitting a new  
5 Portland, Oregon address. ECF No. 22.

6 In granting Plaintiff Zeus Harrison Smith’s separate application to proceed *in forma*  
7 *pauperis*, the Court dismissed the FAC’s first and fourth causes of action with prejudice, finding  
8 that the first was time-barred and that the fourth did not state a legal claim. ECF No. 25.

9 Defendant Breakthrough moves to dismiss on the grounds that Plaintiffs have failed to  
10 meet their burden of establishing that the Court has subject matter jurisdiction over the case, that  
11 the FAC does not allege cognizable claims against Breakthrough, and that the remaining claims  
12 are time-barred. Mot.

13 **B. Legal Standards**

14 A party may move to dismiss a complaint for lack of subject matter jurisdiction pursuant to  
15 Federal Rule of Civil Procedure 12(b)(1). “[I]f the court determines at any time that it lacks  
16 subject-matter jurisdiction, it must dismiss the action.” Fed. R. Civ. Pro. 12(h)(3). “The burden  
17 of establishing . . . [a federal court’s jurisdiction] rests upon the party asserting jurisdiction.”  
18 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

19 Federal district courts have original jurisdiction over “all civil actions where the matter in  
20 controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between  
21 . . . citizens of different States.” 28 U.S.C. § 1332(a). This statute requires “complete diversity of  
22 citizenship,” such that “the citizenship of each plaintiff is diverse from the citizenship of each  
23 defendant.” Caterpillar Inc. v. Lewis, 519 U.S. 61, 68 (1996). A “natural person’s state  
24 citizenship is . . . determined by her state of domicile, not her state of residence.” Kanter v.  
25 Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001). “A person's domicile is her permanent  
26 home, where she resides with the intention to remain or to which she intends to return.” Id. “[A]ll  
27 challenges to subject-matter jurisdiction premised upon diversity of citizenship [are measured]  
28 against the state of facts that existed at the time of filing,” and a party’s subsequent change of

1 citizenship cannot cure a lack of diversity which existed at the time of filing. Grupo Dataflux v.  
2 Atlas Global Grp., L.P., 541 U.S. 567, 571 (2004).

3 “In ruling on a challenge to subject matter jurisdiction, the district court is ordinarily free  
4 to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual  
5 disputes where necessary.” Carijano v. Occidental Petroleum Corp., 686 F.3d 1027, 1032 (9th  
6 Cir. 2012) (quoting Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir.1983)). “In such  
7 circumstances, ‘[n]o presumptive truthfulness attaches to plaintiff’s allegations, and the existence  
8 of disputed material facts will not preclude the trial court from evaluating for itself the merits of  
9 jurisdictional claims.’” Augustine, 704 F.2d at 1077 (quoting Thornhill Publishing Co. v. General  
10 Telephone Corp., 594 F.2d 730, 737 (9th Cir. 1979). Without satisfying itself that it has subject  
11 matter jurisdiction, a court may not proceed to the merits of the case. See Steel Co. v. Citizens for  
12 a Better Env’t, 523 U.S. 83, 94-95 (1998) (“[t]he requirement that jurisdiction be established as a  
13 threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’  
14 and is ‘inflexible and without exception.’”) (quoting Mansfield, C. & L.M.R. Co. v. Swan, 111  
15 U.S. 379, 382 (1884)).

16 “Although we construe pleadings liberally in their favor, *pro se* litigants are bound by the  
17 rules of procedure.” Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995).

### 18 **III. DISCUSSION**

19 The only jurisdiction Plaintiffs assert over their remaining claims is diversity jurisdiction.  
20 FAC, at ¶ 5.<sup>2</sup> On the basis of the available evidence, this jurisdiction is very much in question.  
21 Although the FAC does not explicitly identify the citizenship of Breakthrough, the Court  
22 construes it as asserting that Breakthrough is a California citizen, a fact which Breakthrough does  
23 not dispute. See FAC at ¶ 2; Mot. at 8:12-15. Therefore, to invoke diversity jurisdiction, both  
24 Plaintiffs must assert that they were both permanently domiciled in a state other than California on  
25 April 12, 2012.

26 There is compelling evidence tending to indicate that both Plaintiffs, and at least

27 <sup>2</sup> California Civ Pro § 410.10, which the FAC cites as a possible source of jurisdiction, applies  
28 only to California state courts.

1 Ms. Smith, are domiciled in California, or at least were in April 2012. In March 2010, both  
2 Plaintiffs asserted California residency in litigation before this district. Case No. 4:10-cv-0996,  
3 ECF. No. 1, ¶1.<sup>3</sup> In that litigation, Plaintiffs filed a change of address with the Court in December  
4 2011 claiming a Sebastapol, California mailing address. Id. at ECF No. 52. As late as August 6,  
5 2012, Plaintiffs sent submissions to this Court in envelopes which bore the Sebastapol address as  
6 the return address. ECF No. 11-1. Plaintiffs kept that Sebastapol address on file with this Court  
7 until November 2012, and they changed it after receiving this Court’s order pointing to the  
8 discrepancy between the filed address and their asserted Oregon citizenship. ECF No. 22.  
9 Finally, Breakthrough has filed a declaration with the Court indicating that the address both  
10 Plaintiffs now have on file with the Court appears to be an administrative building at Reed  
11 College, and that the “MS” designation in the address indicates that it is a mailbox belonging to a  
12 student. Declaration of Stacy Y. North in Support of Motion to Dismiss Plaintiffs’ First Amended  
13 Complaint, ECF No. 31-1. Ms. Smith has not alleged that she is a student at Reed College.

14 This evidence is even more damaging to Plaintiffs’ invocation of diversity jurisdiction than  
15 Breakthrough suggests in its motion. Under the rule of Grupo Dataflux, complete diversity must  
16 exist at the time of filing, and cannot be cured by any post-filing change in a party’s citizenship.  
17 Even if both Plaintiffs did permanently relocate to Oregon sometime after April 12, 2012, the case  
18 must still be dismissed if they were California residents at the time the complaint was filed. In  
19 their change of address notice, Plaintiffs state that “as of October 1, 2012, mail is no longer  
20 received for them” at their Sebastapol address. ECF No. 22. This indicates that any move to  
21 Oregon came many months after filing.

22 In their opposition to the motion to dismiss, Plaintiffs notably do not take the opportunity  
23 to assure the Court that they both make their permanent domicile in the State of Oregon, and they  
24 make no attempt to refute the evidence presented by Breakthrough. Memorandum of Law in

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25 <sup>3</sup> The Court *sua sponte* takes judicial notice of this and other facts in this paragraph since they are  
26 not subject to reasonable dispute and can be accurately and readily determined from consulting the  
27 Court’s records. Fed. R. Evid. 201(b)(2) & 201(c)(1). See also United States v. Wilson, 631 F.2d  
28 118, 119 (9th Cir. 1980) (“a court may take judicial notice of its own records in other cases”);  
Chandler v. United States, 378 F.2d 906, 909 (9th Cir. 1967) (“a federal district court can take  
judicial notice of its own records”).

1 Opposition to Motion to Dismiss (“Opp.”), ECF No. 36. Instead, they argue that because “this  
2 Court already conducted an evidentiary hearing on the issue of jurisdiction, raised *sua sponte* and  
3 resolved in Plaintiff’s favor,” Breakthrough is estopped from raising the issue again. Id. at 2:18-  
4 21. The Court held no such hearing and issued no order resolving the issue of jurisdiction in  
5 Plaintiffs’ favor. In any case, “subject-matter jurisdiction, because it involves a court’s power to  
6 hear a case, can never be forfeited or waived.” Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006)  
7 (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)).

8 Plaintiffs argue that this Court must “accept as true the factual allegations in the  
9 complaint” if it does not hold an evidentiary hearing. MacLachlan v. Bell, 261 F.3d 908, 909 (9th  
10 Cir. 2001). Breakthrough does not address this point in its reply brief. However, at least one  
11 court in this district has declined to read MacLachlan as requiring district courts always to hold an  
12 evidentiary hearing before concluding that one party has successfully refuted another’s invocation  
13 of jurisdiction. Robertson v. Qadri, 2008 WL 818529, at \*4, n.4 (N.D. Cal. Mar. 25, 2008) aff’d,  
14 399 F. App’x 219 (9th Cir. 2010) (unpublished).

15 In this situation, the Court similarly concludes that no evidentiary hearing is required. The  
16 Court does not view Plaintiffs’ *ipse dixit* assertion that they “are citizens of the State of Oregon”  
17 as the sort of “factual allegation” whose truth must be assumed in the absence of an evidentiary  
18 hearing. Rather, this assertion is closer akin to a “legal conclusion couched as a factual  
19 allegation,” which a court is “not bound to accept as true” on a motion to dismiss. Bell Atl. Corp.  
20 v. Twombly, 550 U.S. 544, 555 (2007) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)). If  
21 merely asserting state citizenship counted as a “factual allegation” under MacLachlan, courts  
22 would be required to hold an evidentiary hearing before ever considering whether one party had  
23 properly disputed the other’s invocation of diversity jurisdiction. It is doubtful that this was  
24 MacLachlan’s intended effect. Such a reading would substantially upend the well-established  
25 principle that the party invoking jurisdiction bears the burden of proving it, as well as the rule that  
26 “no presumptive truthfulness applies to plaintiff’s allegations” when a court inquires into subject-  
27 matter jurisdiction. Augustine, 704 F.2d at 1077. Therefore, the Court assumes the truth of all  
28 legitimately factual allegations in the FAC but does not consider itself bound to assume the truth  
of Plaintiff’s unadorned assertion of Oregon citizenship in the face of substantial evidence to the

1 contrary.

2 On this basis, the Court concludes that Plaintiffs have failed to meet their burden of  
3 establishing subject-matter jurisdiction. Without jurisdiction to hear the case, the Court cannot  
4 proceed to consider Breakthrough's other arguments in support of dismissal.

5 **IV. CONCLUSION**

6 Since Plaintiffs have failed to meet their burden of asserting subject-matter jurisdiction, the  
7 Complaint is hereby DISMISSED pursuant to Federal Rule of Civil Procedure 12(h)(3). Since the  
8 Complaint has not heretofore been dismissed on this ground, and since the standard for dismissing  
9 *pro se* complaints is very liberal, dismissal is WITHOUT PREJUDICE. Rather than giving  
10 Plaintiffs leave to file a further amended complaint, this Court will instead give Plaintiffs a final  
11 opportunity to satisfy their burden of demonstrating that this Court has jurisdiction to hear their  
12 claims.

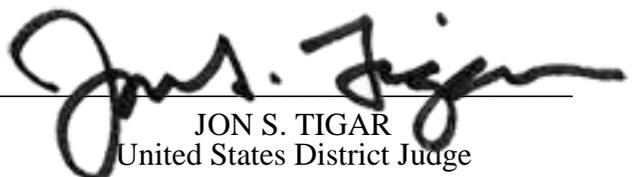
13 Plaintiffs are ordered a second time to file with the Court an affidavit, taken under oath, in  
14 which Plaintiffs attest to both of their permanent domiciles at the time they filed this action: April  
15 12, 2012. The affidavit also must satisfactorily address and refute the evidence discussed above  
16 which indicates that they were domiciled in California at that time. Plaintiffs should also take the  
17 opportunity to submit any admissible evidence within their possession which demonstrates that  
18 their permanent domicile in April was in a state other than California, and refutes the evidence  
19 cited above which tends to indicate that both Plaintiffs very likely do not both make their  
20 permanent domicile at the address they have filed with the Court. If the Court does not receive  
21 such a submission within fourteen days, or if the Court deems this evidence insufficient to  
22 establish Plaintiffs' non-California citizenship, it will dismiss this case with prejudice. The Court  
23 trusts that it need not remind Plaintiffs that it is a serious crime to testify falsely under oath or to  
24 perpetrate a fraud upon a federal court.

25 **IT IS SO ORDERED.**

26 Dated: April 29, 2013

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JON S. TIGAR  
United States District Judge