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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 JBR, INC., a California corporation, doing
12 business as ROGERS FAMILY COMPANY,

13 Plaintiff,

14 v.

15 CAFÉ DON PACO, INC.; ALVARO
16 MONTEALGRE, aka ALVARO E.
17 MONTEALEGRE RIVAS; ROBERTO
18 BENDAÑA, aka ROBERTO BENDAÑA
19 McEWAN,

20 Defendants.

Case No. 12-cv-02377 NC

**ORDER GRANTING LEAVE TO
AMEND**

Re: Dkt. Nos. 1, 56

21 The Court previously ordered plaintiff to show cause why this breach of contract
22 action should not be dismissed for lack of subject matter jurisdiction, because plaintiff
23 failed to allege that defendant Montealegre was a *citizen* of another state and thus diverse
24 from plaintiff. *See* Dkt. No. 1 at ¶ 4 (alleging defendant Montealegre “is a resident of
25 Texas.”); *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) (“The natural
26 person’s state citizenship is then determined by her state of domicile, not her state of
27 residence. A person’s domicile is her permanent home, where she resides with the intention
28 to remain or to which she intends to return.”).

Plaintiff has responded to the order to show cause by requesting leave to amend the

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1 complaint to cure this pleading defect. Dkt. No. 57. Plaintiff states that defendant
2 Montealegre “is a citizen of Nicaragua, and, as of the date of filing the complaint, was not
3 domiciled in any state in the United States. In fact, defendant and his family moved back to
4 Nicaragua in 2004.” *Id.* at 1-2. The Court grants leave to amend the complaint to make the
5 proposed amendment, as long as counsel has a Rule 11 good faith basis to believe two
6 things are true: First, defendant Montealegre must have been an alien or citizen of a diverse
7 state at the time of initiating the lawsuit, not at an earlier or later time. *See Grupo Dataflux*
8 *v. Atlas Global Grp., L.P.*, 541 U.S. 567, 571 (2004) (diversity of citizenship is measured
9 “against the state of facts that existed at the time of filing.”). Second, defendant must not be
10 a U.S. citizen domiciled in Nicaragua, as U.S. citizens domiciled abroad are “neither a
11 ‘citizen of a state’ nor an alien under 28 U.S.C. § 1332(a)(3)” and thus may not be sued in
12 federal court based on diversity jurisdiction. *Brady v. Brown*, 51 F.3d 810, 815 (9th Cir.
13 1995).

14 The Court finds that plaintiff may amend his complaint to cure the subject matter
15 jurisdiction defect without serving the amended complaint on the defaulting defendants (and
16 starting over the process for acquiring a default judgment) because the amendment adds
17 new factual allegations but will not add a new claim. *See Fed. R. Civ. P. 5(a)(2)* (“No
18 service is required on a party who is in default for failing to appear. But a pleading that
19 asserts a new claim for relief against such a party must be served on that party under Rule
20 4.”); *Bd. of Trs. of Laborers Health & Welfare Trust Fund for N. Cal. v. Perez*, No. 10-cv-
21 02002 JSW JCS, 2011 WL 6151506, at *5 (N.D. Cal. Nov. 7, 2011) (finding default
22 judgment could be granted despite plaintiff not serving defaulting defendant with amended
23 complaint, where amended complaint contained “new factual allegations” but not new
24 claims).

25 Plaintiff may amend his complaint as proposed within seven days of this order. The
26 Court will then address plaintiff’s motion for default judgment based on the amended
27 complaint.

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IT IS SO ORDERED.

Date: July 10, 2014



Nathanael M. Cousins
United States Magistrate Judge