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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

**SECOND ORDER GRANTING
LEAVE TO AMEND**

Re: Dkt. Nos. 59, 60

21 The Court has twice ordered plaintiff to show cause why this breach of contract action
22 should not be dismissed for lack of subject matter jurisdiction, because plaintiff failed to
23 allege that defendant Montealegre was a citizen of another state and thus diverse from
24 plaintiff at the time this action was initiated. Dkt. Nos. 56, 60.

25 Plaintiff has responded to the order to show cause by requesting leave to amend the
26 complaint for a second opportunity to cure this pleading defect. Dkt. No. 62. For the same
27 reasons as discussed in the Court's previous order granting leave to amend, Dkt. No. 58, the
28 Court grants leave to plaintiff to amend its complaint as proposed at docket entry 62, except
that plaintiff must correct the typographical error in paragraph 4 so as to read that defendant

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1 was not “a permanent resident” rather than a “permanent residence.”

2 The Court finds that plaintiff may amend his complaint to cure the subject matter
3 jurisdiction defect without serving the amended complaint on the defaulting defendants (and
4 starting over the process for acquiring a default judgment) because the amendment adds
5 new factual allegations but will not add a new claim. *See* Fed. R. Civ. P. 5(a)(2) (“No
6 service is required on a party who is in default for failing to appear. But a pleading that
7 asserts a new claim for relief against such a party must be served on that party under Rule
8 4.”); *Bd. of Trs. of Laborers Health & Welfare Trust Fund for N. Cal. v. Perez*, No. 10-cv-
9 02002 JSW (JCS), 2011 WL 6151506, at *5 (N.D. Cal. Nov. 7, 2011) (finding default
10 judgment could be granted despite plaintiff not serving defaulting defendant with amended
11 complaint, where amended complaint contained “new factual allegations” but not new
12 claims).

13 Plaintiff may amend his complaint as proposed within seven days of this order. The
14 Court will then address plaintiff’s motion for default judgment based on the second
15 amended complaint. The order to show cause is discharged.

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18 IT IS SO ORDERED.

19 Date: August 12, 2014



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21 Nathanael M. Cousins
United States Magistrate Judge