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3 UNITED STATES DISTRICT COURT  
4 NORTHERN DISTRICT OF CALIFORNIA  
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7 AO VENTURES, LLC,

8 Plaintiff,

9 v.

10 ARMANDO GUTIERREZ, et al.,

11 Defendants.

Case No. 12-04625 JCS

**AMENDED ORDER RE MOTIONS TO  
DISMISS [Docket Nos. 15, 22]<sup>1</sup>**

12  
13 **I. INTRODUCTION**

14 Plaintiff AO Ventures, LLC (“AO Ventures”) alleges in its complaint that it entered into an  
15 agreement with Defendant Armando Gutierrez for the purchase of the domain name  
16 StudyingAbroad.com (“the Domain Name”) for the amount of \$14,500. Complaint, ¶ 14. Instead  
17 of transferring the Domain Name to AO Ventures, Plaintiff alleges, Gutierrez transferred it to  
18 Defendant CEA Global Education (“CEA”). On the basis of these allegations, AO ventures  
19 asserts claims for breach of contract, specific performance and fraud against Gutierrez and for  
20 intentional interference with contract against CEA. Plaintiff alleges that there is federal subject  
21 matter jurisdiction under 28 U.S.C. § 1332(a) on the basis that there is complete diversity of  
22 citizenship and the amount in controversy exceeds \$75,000.

23 Gutierrez brings a motion to dismiss (“Gutierrez Motion”) asserting that: 1) there is no  
24 personal jurisdiction over Gutierrez, who is a resident of Florida; 2) there is no subject matter  
25 jurisdiction because it is apparent to a legal certainty that the amount-in-controversy requirement  
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28 <sup>1</sup> The Court amends its previous order to reflect that dismissal of Plaintiff’s complaint is *without*  
prejudice.

1 is not met; and 3) a forum selection clause in the registration agreement makes clear that litigation  
2 must be conducted in Broward County, Florida.

3 CEA brings a motion to dismiss (“CEA Motion”) asserting that the allegations of  
4 intentional interference with contract are too conclusory to state a claim under Rule 12(b)(6).  
5 CEA further asserts that AO Ventures cannot cure this deficiency because CEA did not, in fact,  
6 know anything about the agreement between Gutierrez and AO Ventures for the purchase of the  
7 domain name -- a required element to state a claim for intentional interference with contract.  
8 CEA also asserts, in a footnote, that there is no subject matter jurisdiction because it is clear that  
9 the amount in controversy requirement is not satisfied.

10 The parties have consented to the jurisdiction of a United States Magistrate Judge pursuant  
11 to 28 U.S.C. § 636(c). The Court finds that the Motions are suitable for determination without  
12 oral argument, pursuant to Civil Local Rule 7-1(b), and **therefore vacates the December 21,**  
13 **2012 hearing.** The Court concludes that the amount-in-controversy requirement is not met and  
14 therefore GRANTS the Gutierrez Motion on that basis and dismisses Plaintiff’s complaint in its  
15 entirety.<sup>2</sup>

## 16 **II. ANALYSIS**

### 17 **A. Legal Standard**

18 Gutierrez seeks dismissal of this action pursuant to Rule 12(b)(1) of the Federal Rules of Civil  
19 Procedure, which permits a defendant to seek dismissal on the basis of lack of subject matter  
20 jurisdiction. The Complaint in this action asserts that there is federal diversity jurisdiction  
21 pursuant to 28 U.S.C. § 1332(a)(1). Under that provision, “[t]he district courts shall have original  
22 jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of  
23 \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.” It is  
24 undisputed that the parties to this action are citizens of different states. Therefore, diversity  
25 jurisdiction exists if Plaintiff has met the amount-in-controversy requirement.

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27  
28 <sup>2</sup> Because the court finds there is no subject matter jurisdiction over this action, the Court need  
not rule on the CEA Motion.

1 To determine whether the amount-in-controversy requirement is met, courts apply the “legal  
2 certainty” test: “[I]f, from the face of the pleadings, it is apparent, to a legal certainty, that the  
3 plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like  
4 certainty that the plaintiff never was entitled to recover that amount, and that his claim was  
5 therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.” *St. Paul*  
6 *Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). “[T]he legal impossibility of  
7 recovery must be so certain as virtually to negative the plaintiff’s good faith in asserting the claim.  
8 If the right of recovery is uncertain, the doubt should be resolved, for jurisdictional purposes, in  
9 favor of the subjective good faith of the plaintiff.” *McDonald v. Patton*, 240 F.2d 424, 426 (4th  
10 Cir. 1957).

11 A motion to dismiss based on lack of subject matter jurisdiction can be either “facial” or  
12 “factual.” *See, e.g., White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Where a defendant brings  
13 a facial challenge, that is, a challenge to the court’s subject matter jurisdiction based on the  
14 allegations in the complaint, the court conducts an inquiry that is “analogous to a 12(b)(6)  
15 motion.” *Roberts v. Corrothers*, 812 F.2d 1173, 1178 (9th Cir. 1987). On the other hand, “[i]f  
16 the moving party converts ‘the motion to dismiss into a factual motion by presenting affidavits or  
17 other evidence properly brought before the court, the party opposing the motion must furnish  
18 affidavits or other evidence necessary to satisfy its burden of establishing subject matter  
19 jurisdiction.’” *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (quoting *Safe Air for*  
20 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2004) (quoting *Savage v. Glendale Union High*  
21 *Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir.2003), cert. denied, 541 U.S. 1009, 124 S.Ct. 2067, 158  
22 L.Ed.2d 618 (2004))). The district court may review this evidence without converting the motion  
23 to dismiss into a motion for summary judgment. *Safe Air for Everyone*, 373 F.3d at 1039.  
24 Where a party brings a factual challenge to subject matter jurisdiction, the court does not presume  
25 that the factual allegations in the complaint are true. *Id.* However, a court may not resolve  
26 genuinely disputed facts where the question of jurisdiction is dependent on the resolution of  
27 factual issues going to the merits. *Id.*

28 **B. Summary of Evidence Submitted on Amount in Controversy**

1 Gutierrez brings a factual challenge to the existence of subject matter jurisdiction, citing not  
2 only the amount Plaintiff agreed to pay for the Domain Name, that is \$14,500, but also emails  
3 from the individual who negotiated the agreement on behalf of Plaintiff stating that the Domain  
4 Name was worth less than \$15,000. *See* Declaration of Armando Gutierrez, Jr. in Support of his  
5 Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(3)  
6 (“Gutierrez Decl.”), ¶ 4 & Ex. 1(emails).

7 Plaintiff, in turn, cites evidence that a similar domain name, onlineeducation.com, sold for  
8 \$100,000 in 2009, in support of the contention that the Domain Name “can be valued in excess of  
9 \$75,000.” Declaration of Alex Alexander in Support of Opposition to Armando Gutierrez, Jr.’s  
10 Motion to Dismiss (“Alexander Decl.”), ¶ 13. In addition, Plaintiff presents evidence that “[f]rom  
11 approximately two months before May 2, 2012 when escrow was initiated [in connection with  
12 Plaintiff’s agreement to purchase the Domain Name] until today, AO ventures has invested over  
13 eight months of design, programming and business development efforts in building out the  
14 studying abroad business.” *Id.*, ¶ 11. Mr. Alexander estimates that the value of these efforts is  
15 approximately \$5,000 per month, for a total of \$40,000. *Id.* He further states that AO Ventures  
16 has retained an expert in the studying abroad market and that the cost of the expert over the last  
17 eight months to date was \$40,000. *Id.*, ¶ 12.

### 18 **C. Application of the Law to the Facts**

19 Because Defendant Gutierrez presented evidence going to the amount in controversy, Plaintiff  
20 was required to come forth with evidence demonstrating that the legal certainty test is not met.  
21 Plaintiff failed to do so.

22 First, Plaintiff’s vague statement that the Domain Name “can be valued in excess of  
23 \$75,000” based on another Domain Name that was sold in 2009 is not credible. Plaintiff offers no  
24 explanation for its dramatic change in position in comparison to the opinion stated by Mr.  
25 Alexander in early 2012, when he was negotiating to purchase the Domain Name on behalf of AO  
26 Ventures, that the Domain Name was not worth even \$15,000. Rather, it is apparent to the Court  
27 that this new-found opinion is simply an attempt to manufacture subject matter jurisdiction and is  
28 not made in good faith.

1           Second, Plaintiff offers no basis from which to conclude that either the development costs  
2 or the costs of retaining an expert were incurred as a result of Defendant's failure to transfer the  
3 Domain Name to Plaintiff. Indeed, all but two months of the development expenditures  
4 (approximately \$10,000 based on Plaintiff's estimate of \$5,000 a month) were incurred *after*  
5 Gutierrez allegedly cancelled the transaction, on May 17, 2012. *See* Complaint, ¶ 19. Similarly,  
6 the Alexander Declaration does not state that *any* of the costs to retain the expert were incurred  
7 before the alleged breach. Because consequential damages resulting from a breach of contract  
8 must be reasonably foreseeable at the time the contract was entered, *see 999 v. CIT Corp.*, 776  
9 F.2d 866, 872 (9th Cir. 1985), this evidence is not sufficient to counter the evidence presented by  
10 Gutierrez as to the amount in controversy.

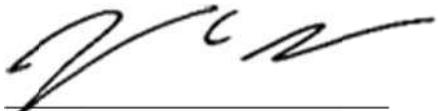
11           Based on the evidence presented by the parties, it is apparent to a legal certainty that the  
12 \$75,000 amount-in-controversy requirement is not met in this case.

### 13 **III. CONCLUSION**

14           For the reasons stated above, the Gutierrez Motion is GRANTED. The Court dismisses this  
15 action, in its entirety, without prejudice for lack of subject matter jurisdiction. Because the Court  
16 finds based on the evidence presented by the parties that this deficiency cannot be cured, Plaintiff  
17 shall not be permitted to file an amended complaint. The Clerk is instructed to close the file in  
18 this case.

19           IT IS SO ORDERED

20           Dated: December 18, 2012

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23 Joseph C. Spero  
24 United States Magistrate Judge  
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