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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SHYH-YIH HAO,)	Case No.: 10-CV-00826-LHK
)	
Plaintiff,)	ORDER GRANTING MOTION TO
)	DISMISS WITH LEAVE TO AMEND
v.)	
)	
WU-FU CHEN, and DOES 1 through 10,)	
inclusive,)	
)	
Defendant.)	
)	

Defendant Wu-Fu Chen moves to dismiss this action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), or, in the alternative, to dismiss or stay the action under federal doctrines of abstention. Pursuant to Local Civil Rule 7-1(b), the Court concludes that the limited issues requiring resolution at this time are appropriately determined without oral argument. Accordingly, having considered the parties’ submissions and the relevant law, the Court GRANTS Defendant’s motion to dismiss for lack of subject matter jurisdiction, with leave to amend. The motion hearing and case management conference set for October 7, 2010 are vacated.

I. Background

Plaintiff Shyh-Yih Hao (“Hao”) is the brother-in-law of Defendant Wu-Fu Chen (“Chen”). Compl. ¶ 4. Chen is a Silicon Valley venture capitalist who co-founded Ardent Communications Corp., a successful IT company acquired by Cisco Systems in the 1990s. Compl. ¶ 4; Decl. of Wu-Fu Chen in Supp. of Mot. to Dismiss (“Chen Decl.”) ¶ 5(a), ECF No. 7. Through this venture and

1 others, Chen “amassed a considerable personal fortune.” Compl. ¶ 4. In the mid-1990s, Chen
2 began dating Hao’s sister, Ellen Hao Chen (“Ellen”), and in 2000 they married. Chen Decl. ¶ 5(b).
3 Chen and Ellen are currently involved in marriage dissolution proceedings in the Santa Clara
4 County Superior Court. Chen Decl. ¶ 2.

5 On February 26, 2010, Hao initiated this action against Chen, alleging conversion, breach
6 of fiduciary duty, and unjust enrichment and seeking an accounting and other forms of relief. The
7 facts underlying Hao’s allegations are highly disputed. The Complaint alleges that Plaintiff Hao
8 invested millions of dollars into two venture fund companies – Chens, LLC, and WFChen, LLC –
9 established by Defendant in July 1998 and April 2000, respectively. Compl. ¶ 5. Sometime
10 thereafter, these companies were transferred to Cascade Capital Management, LLC, a company
11 formed in the Cayman Islands and allegedly managed by Defendant. Compl. ¶ 9. Plaintiff alleges
12 that he was unaware of this transfer until sometime in 2009; that his signature was forged on the
13 Interest Transfer Agreement that transferred his ownership interest in Chens, LLC, and WFChen,
14 LLC; and that he never received the \$7,084,808 he was due under the Interest Transfer Agreement.
15 Compl. ¶¶ 8-9. He therefore seeks an accounting of transactions relating to Chens, LCC, and
16 WFChen, LCC, as well as actual and punitive damages, restitution, disgorgement of profits, and
17 imposition of a constructive trust.

18 Defendant Chen provides a very different account of the facts in his motion to dismiss and
19 attached declaration. According to Chen, Hao never invested any of his own money in the venture
20 funds. Rather, Defendant alleges that while he and Hao’s sister, Ellen, were dating, he placed
21 stock into a Charles Schwab account for Ellen to manage. Chen Decl. ¶ 5(b). At the time, Ellen
22 was divorcing her first husband, and Chen alleges that he created the Schwab account in Hao’s
23 name in order to prevent Ellen’s first husband from learning about the transaction. Chen Decl.
24 ¶ 5(c). Chen claims that the funds in the Schwab account were not a gift and that, although held in
25 Hao’s name, the funds were expressly intended to be the community property of Ellen and Chen
26 when they married. *Id.* According to Chen, the money used to pay for Hao’s interest in Chens,
27 LLC, as well as allegedly unauthorized capital contributions to WFChen, LLC, came from the
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1 funds in the Schwab account. Chen Decl. ¶ 5(k). He therefore alleges that any interest Hao claims
2 in the venture funds was “a fiction intended to describe the interest of Ellen.” Chen Decl. ¶ 5(l).

3 In accordance with this view of the facts, Chen argues that the funds and investments at
4 issue in this case are either community property of Chen and Ellen or separate property belonging
5 to Chen and that characterization and accounting of these assets will have to be undertaken in the
6 dissolution proceedings currently underway in state court. He therefore urges this court to dismiss
7 this action for lack of subject matter jurisdiction under the domestic relationship exception to
8 diversity jurisdiction or to abstain from exercising jurisdiction based on the close relationship of
9 this case to the state court proceeding. Plaintiff Hao, on the other hand, argues that because Ellen
10 does not claim a community property interest in the funds held in Hao’s name, the state court will
11 not be required to make a determination as to the ownership of those funds. Thus, he contends that
12 the state court action poses no barrier to the exercise of jurisdiction by this Court.

13 As discussed below, the Court will not resolve these complicated issues of fact at this time.
14 The court agrees with Defendant’s alternative argument that Plaintiff has not sufficiently pled
15 diversity jurisdiction and will defer the question of abstention until the Court is satisfied that it has
16 subject matter jurisdiction over this case.

17 **II. Legal Standard**

18 It is axiomatic that federal courts are courts of limited jurisdiction. *Vacek v. U.S. Postal*
19 *Service*, 447 F.3d 1248, 1250 (9th Cir. 2006). “A federal court is presumed to lack jurisdiction in a
20 particular case unless the contrary affirmatively appears.” *A-Z Int’l v. Phillips*, 323 F.3d 1141, 1145
21 (9th Cir. 2003). Accordingly, on a motion to dismiss for lack of subject matter jurisdiction under
22 Rule 12(b)(1), the party asserting jurisdiction has the burden of establishing that subject matter
23 jurisdiction is proper. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

24 A Rule 12(b)(1) motion may be either a facial or factual attack on jurisdiction. *Wolfe v.*
25 *Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). In a facial attack, the defendant “asserts that the
26 allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.”
27 *Id.* In considering a facial attack, a court must take the allegations in the Complaint as true and
28 draw all reasonable inferences in the plaintiff’s favor. *Id.* In a factual attack, on the other hand, the

1 defendant challenges the truth of the allegations establishing federal jurisdiction. *Id.* Generally, in
2 considering a factual attack, a court need not assume the truth of the plaintiff's allegations, and the
3 plaintiff may be required to "furnish affidavits or other evidence necessary to satisfy its burden."

4 *Id.*

5 **III. Discussion**

6 **A. Subject Matter Jurisdiction**

7 Defendant Chen moves to dismiss this action under Rule 12(b)(1) on several grounds. In
8 his Memorandum of Points and Authorities filed on April 9, 2010, ECF No. 7, Chen argues that the
9 Court lacks subject matter jurisdiction based on the domestic relations exception to diversity
10 jurisdiction. Chen also alleges several additional jurisdictional defects in his Second Amended
11 Notice of Motion and Motion to Dismiss, ECF No. 27, including Plaintiff's failure to allege that
12 Defendant is a citizen of any state for diversity purposes. The Court agrees that Plaintiff has not
13 adequately alleged Defendant's domicile or state citizenship for purposes of diversity jurisdiction.
14 Thus, the Court will first address the sufficiency of the pleadings and then briefly discuss
15 Defendant's remaining jurisdictional arguments.

16 **1. Sufficiency of the pleadings**

17 In his Second Amended Notice of Motion and Motion to Dismiss, Defendant argues that
18 Plaintiff has failed to plead facts sufficient to establish diversity jurisdiction because Defendant is
19 not alleged to be a citizen of any state. Defendant is correct on this point. Plaintiff's Complaint
20 does not allege Chen's citizenship, but instead states only that "Defendant is a citizen of the United
21 States residing in Los Altos, California." Compl. ¶ 2. However, the citizenship of a natural person
22 is determined based on his state of domicile, not his state of residence. *Kanter v. Warner-Lambert*
23 *Co.*, 265 F.3d 853, 857 (9th Cir. 2001). A person's domicile is his permanent home, where he
24 resides with the intention to remain indefinitely or where he has resided in the past and intends to
25 return. *Id.* Domicile is determined based on a number of factors, including: current residence,
26 voting, location of personal and real property, location of brokerage and bank accounts, location of
27 spouse and family, place of employment, driver's license and automobile registration, and payment
28 of taxes. *Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986). Thus, although a person's current

1 residence may be a factor, “[a] person residing in a given state is not necessarily domiciled there,
2 and thus is not necessarily a citizen of that state.” *Kanter*, 265 F.3d at 857. For this reason,
3 allegations of residence are insufficient to establish diversity jurisdiction. *Id.* at 857-58.

4 Perhaps recognizing this, Plaintiff responded to Defendant’s amended notice of motion by
5 filing a First Amended Complaint (“FAC”) on September 16, 2010, along with his Opposition to
6 Defendant’s motion. The FAC states, “On information and belief, Defendant is a California citizen
7 residing in Los Altos, California.”¹ FAC ¶ 2. In his Reply, Defendant argues that the Court should
8 not consider the FAC because it is untimely under Federal Rule 15(a)(1)(B). If the Court does
9 consider the FAC, Defendant contends that Plaintiff’s allegation of California citizenship, made on
10 information and believe, is insufficient to establish jurisdiction. Defendant also alleges, without
11 elaboration, that his domicile “is likely in Taiwan,” Def.’s Reply 9, ECF No. 33, thereby
12 precluding diversity jurisdiction.

13 The Court agrees that Plaintiff’s FAC is procedurally improper. A party may amend its
14 pleading once as a matter of right 21 days after service of a responsive pleading or service of a
15 Rule 12 motion, whichever is earlier. Fed. R. Civ. Pro. 15(a)(1)(B). Because Defendant initially
16 filed this Rule 12 motion in April 2010, Plaintiff’s time to amend as a matter of right expired
17 months ago, and Plaintiff was required to seek either leave of the Court or Defendant’s written
18 consent before filing an amended Complaint. Fed. R. Civ. Pro. 15(a)(2). Particularly if Defendant
19 intends to contest the domicile attributed to him in the FAC, it is important that the allegations of
20 citizenship be presented through proper procedures that will allow the parties to present evidence
21 of Defendant’s domicile, if necessary. Accordingly, the Court GRANTS Defendant’s motion to
22 dismiss on grounds that Plaintiff failed to plead facts sufficient to establish diversity of citizenship.
23 Because leave to amend is freely granted to cure jurisdictional defects, *see* 28 U.S.C.A. § 1653;
24 *Montrose Chemical Corp. of California v. American Motorists Ins. Co.*, 117 F.3d 1128, 1136 (9th
25 Cir. 1997), the Court grants Plaintiff leave to amend.

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¹ The FAC differs from the original Complaint only in this respect.

1 **2. Additional Jurisdictional Arguments**

2 Although the Court need not resolve the remaining jurisdictional arguments raised by
3 Defendant, the Court will briefly address two additional jurisdictional arguments made by
4 Defendant, in order to provide guidance to Plaintiff if he chooses to amend the Complaint and to
5 narrow the issues for any future motion to dismiss. First, relying on the Supreme Court’s decision
6 in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), Defendant argues that this case falls within the
7 domestic relations exception to diversity jurisdiction because it may present issues that overlap
8 with divorce proceedings currently underway in state court. While such overlap might, if
9 adequately proven, constitute grounds for abstention, it does not deprive this Court of subject
10 matter jurisdiction.² The Supreme Court’s decision in *Ankenbrandt* clearly limits the domestic
11 relations exception to “cases involving the issuance of a divorce, alimony, or child custody
12 decree.” *Ankenbrandt v. Richards*, 504 U.S. 689, 704, 112 S.Ct. 2206 (1992); *see also McIntyre v.*
13 *McIntyre*, 771 F.2d 1316, 1317-18 (9th Cir. 1985) (“the exception to jurisdiction arises in those
14 cases where a federal court is asked to grant a decree of divorce or annulment, or to grant custody
15 or fix payments for support”). Even under the arguably broader, pre-*Ankenbrandt* decisions that
16 Defendant cites, the domestic relations exception applied only to cases in which “the primary issue
17 concerns the status of parent and child or husband and wife.” *Csibi v. Fustos*, 670 F.2d 134, 137
18 (9th Cir. 1982) (quoting *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968)). The allegations in
19 this Complaint do not seek issuance of a divorce, alimony, or child custody decree, nor does the
20 primary issue in this case involve the marital or custodial status of Defendant Chen or Ellen Hao
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22 ² Defendant attempts to bring this case into the domestic relationship exception by relying on the
23 Eighth Circuit’s decision *Kahn v. Kahn*, 21 F.3d 859 (8th Cir. 1994). In *Kahn*, the plaintiff brought
24 a federal action against her husband seeking tort damages and an accounting. 21 F.3d at 860. The
25 federal complaint “asserted essentially the same conduct as set forth in the dissolution petition,”
26 and the court found that the domestic relations exception applied because the allegations in the
27 federal action were “inextricably intertwined” with the divorce proceedings. *Id.* at 860-61. Here,
28 however, the allegations in Plaintiff’s Complaint are not alleged to be identical to those in the
divorce proceeding between Chen and Ellen. Additionally, to the extent that the Complaint in this
case raises issues that are intertwined with the divorce proceeding, this Court finds that the
relationship between the two actions is more properly considered in the context of abstention. *See*
Ankenbrandt, 504 U.S. at 704 (addressing grounds for abstention after determining that narrow
domestic relationship exception does not apply); *Kahn*, 21 F.3d at 860 n.1 (“Courts generally use
abstention in the context of a dispute relating to domestic relations when the controversy does not
fall within the exact purview of divorce, alimony or child custody, but instead is closely related.”).

1 Chen. Accordingly, this case does not fall within the domestic relations exception as articulated by
2 the Supreme Court, and the Court is not deprived of jurisdiction on that ground.

3 Second, Defendant also argues that the presence of unnamed Doe defendants destroy
4 diversity, thereby divesting this Court of jurisdiction. It is true that a few Ninth Circuit decisions
5 hold that the inclusion of Doe defendants destroys diversity. See *Garner-Bare Co. v. Munsingwear,*
6 *Inc.*, 650 F.2d 975, 981 (9th Cir. 1981) (stating that inclusion of Doe defendants destroys
7 diversity); *Molnar v. National Broadcasting Co.*, 231 F.2d 684, 687 (9th Cir. 1956). However,
8 more recent decisions call this rule into question. In particular, the Ninth Circuit in *Lindley v.*
9 *General Elec. Co.* held that a California state law which extends the statute of limitations for Doe
10 defendants named in a complaint is state substantive law that must be applied by a federal court
11 sitting in diversity. 780 F.2d 797, 799-81 (9th Cir. 1986). As the District of Hawaii has noted, “if
12 including Doe Defendants automatically destroyed diversity, then *Lindley* and its progeny would
13 be ‘meaningless.’” *Fat T, Inc. v. Aloha Tower Associates Piers 7, 8, and 9*, 172 F.R.D. 411, 414
14 (D. Haw. 1996). For under *Lindley*, a federal court sitting in diversity is required to apply the
15 state’s Doe defendant statute, yet once a plaintiff includes Doe defendants pursuant to such a
16 statute, the court would be required to dismiss the matter for lack of subject matter jurisdiction
17 under *Garner-Bare Co. Id.* This Court agrees with courts in Hawaii and California that the more
18 sensible approach is to permit Doe defendants and to defer the jurisdictional question until actual
19 parties are substituted. *Id.*; *Pacific Maritime Freight, Inc. v. Foster*, No. 10-cv-0578, 2010 WL
20 3339432, at *3 n.1 (S.D. Cal. Aug. 24, 2010) (stating that “inclusion of Doe defendants does not
21 presumptively destroy diversity” and characterizing authority to the contrary as outdated). As
22 these courts have noted, this approach is also consistent with the revisions to the removal statute
23 that occurred since *Grater-Bare Co.* and which provide that Doe defendants do not destroy
24 diversity in the removal context. See *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1527 (9th Cir.
25 1989) (describing amendments to removal statute and concluding that “Congress obviously
26 reached the conclusion that doe defendants should not defeat diversity jurisdiction”). Accordingly,
27 this Court finds that the inclusion of Doe defendants does not destroy diversity, and the Court is not
28 divested of jurisdiction on that ground.

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B. Abstention

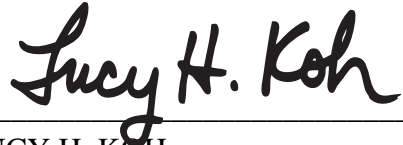
Defendant also moves, in the alternative, to dismiss or stay this case under federal principles of abstention. However, the Court has already determined that Plaintiff’s Complaint does not allege facts necessary to invoke the diversity jurisdiction of this Court. Until the Court has properly established that it has subject matter jurisdiction over this case, it is not appropriate to consider whether the Court should abstain from exercising that jurisdiction. Accordingly, the Court does not reach the issue of abstention at this time.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendant’s motion to dismiss, with leave to amend, for lack of subject matter jurisdiction, on grounds that Plaintiff has failed to allege Defendant’s domicile or state citizenship. Plaintiff shall file an amended Complaint, if any, within 30 days of this order.

IT IS SO ORDERED.

Dated: October 5, 2010



LUCY H. KOH
United States District Judge