

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

NATIONAL CITY COMMERCIAL
CAPITAL COMPANY, LLC,

Plaintiff,

Civil Action No. 1:08-cv-468

vs.

CALIBER HOMES, LLC, et al.,

Defendants

**ORDER AND REPORT AND
RECOMMENDATION**
(Weber, J.; Hogan, M.J.)

This matter is before the Court on defendants' motion to dismiss (Doc. 11), to which plaintiff has not responded,¹ and plaintiff's unopposed motion for leave to amend the complaint *instanter*. (Doc. 16).

Invoking the diversity jurisdiction of the Court, plaintiff National City Commercial Capital Company, LLC, filed a complaint against defendants Caliber Homes, LLC, Caliber Holdings Company, LLC, Performance Construction, Inc., Michael J. Lichtie, Brent D. Butcher, and Deseret Sky Development, LLC on July 11, 2008. (Doc. 1). The complaint alleges that each defendant is a guarantor on a loan made by plaintiff National City to Deseret Aviation, LLC in connection with Deseret Aviation's purchase of a Learjet aircraft. The complaint further alleges that Deseret is in default of the Promissory Note and Security Agreement and that defendants are jointly and severally liable for the amounts due and

¹On December 4, 2008, plaintiff requested and was granted an extension of time until December 18, 2008 to file a response to the motion to dismiss. (Docs. 12, 13). To date, plaintiff has not filed a memorandum in opposition to the motion to dismiss. Rather, plaintiff filed the instant motion for leave to amend the complaint on January 21, 2009, over one month after the deadline for filing a response to the motion to dismiss.

owing. (Doc. 1, at ¶¶15, 21, 23).

Defendants seek dismissal of this action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendants also object to the Court's exercise of personal jurisdiction over them and to venue of this action in this judicial district and division, pursuant to Fed. R. Civ. P. 12(b)(2) and (3), on the ground that the enforceability of the forum selection clause contained in the guarantees on which plaintiff's action is predicated is subject to a factual determination that cannot be made in the absence of a record. (Doc. 11).

A district court has jurisdiction over a suit between citizens of different states when the amount in controversy "exceeds the sum or value of \$75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). For a federal court to have diversity jurisdiction pursuant to section 1332(a), the citizenship of the plaintiff must be "diverse from the citizenship of each defendant" thereby ensuring "complete diversity." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996), citing *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967). In other words, for complete diversity to exist the plaintiff must be a citizen of a different state than each of the defendants. *Caterpillar*, 519 U.S. at 68; *Napletana v. Hillsdale College*, 385 F.2d 871, 872 (6th Cir. 1967). In the absence of complete diversity, the Court lacks subject matter jurisdiction. *Caterpillar*, 519 U.S. at 68. Plaintiff bears the burden of demonstrating the Court's jurisdiction. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). In the face of a motion to dismiss for lack of subject matter jurisdiction, "the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." *Id.* (citing *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 930 (6th Cir.

1974)).

The original complaint alleges that plaintiff is an Indiana limited liability company, and that defendants Caliber Homes, Caliber Holdings Company, and Deseret Sky Development are also limited liability companies. The complaint does not identify the members of these limited liability companies nor the citizenship of each member. “A limited liability company is not treated as a corporation and has the citizenship of its members’ for purposes of establishing diversity citizenship.” *Pandey v. Sharma*, 2008 WL 3008232, 3 (S.D. Ohio 2008) (quoting *Homfeld II, L.L.C. v. Comair Holdings, Inc.*, 53 Fed. Appx. 731, 732 (6th Cir. 2002)). See also *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342, 346 (8th Cir. 2007); *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 267 (7th Cir. 2006); *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). Since the original complaint fails to allege the citizenship of each of the members of the limited liability companies, defendants seek dismissal for lack of subject matter jurisdiction.

Plaintiff acknowledges the deficiencies of the original complaint and that the citizenship of the members of a limited liability company should be alleged to show diversity of citizenship. (Doc. 16 at 3). Plaintiff asserts the proper course of action is not to dismiss the complaint, but rather to permit amendment of the complaint to provide this information. Plaintiff’s proposed amended complaint now alleges the citizenship of each member of the limited liability companies involved in this action. Defendants do not oppose amendment of the complaint. As such, and for good cause shown, amendment of the complaint is warranted and plaintiff’s motion for leave to amend the complaint is **GRANTED**.


Since an amended complaint supersedes the original complaint and is the “legally

operative complaint,” *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir. 2000), *cert. denied*, 533 U.S. 951 (2001), defendants’ motion to dismiss the original complaint for lack of subject matter jurisdiction should be denied as moot. *See ComputerEase Software, Inc. v. Hemisphere Corp.*, 2007 WL 852103, *1 (S.D. Ohio 2007). Defendants are not prohibited, however, from renewing any objections they may have to personal jurisdiction or venue in this matter.

Accordingly, it is hereby **RECOMMENDED** that defendants’ motion to dismiss for lack of subject matter jurisdiction be **DENIED** as moot.

Date: _____

1/2/19



Timothy S. Hogan
United States Magistrate Judge

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NOTICE TO PARTIES REGARDING FILING OF OBJECTIONS TO R&R

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to this Report & Recommendation (“R&R”) within TEN (10) DAYS after being served with a copy thereof. That period may be extended further by the Court on timely motion by either side for an extension of time. All objections shall specify the portion(s) of the R&R objected to, and shall be accompanied by a memorandum of law in support of the objections. A party shall respond to an opponent’s objections within TEN DAYS after being served with a copy of those objections. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).