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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Bryce Branzell,
Plaintiff,
v.
California Cryobank LLC et al.,
Defendants.

2:19-cv-10745-VAP-Ex

**Order DENYING Defendants'
Motion to Dismiss
(Dkt. 59)**

Before the Court is Defendants California Cryobank LLC (“Cryobank”) and CCB-NWC LLC’s (“CCB-NWC” and collectively, “Defendants”) Motion to Dismiss Plaintiff Bryce Branzell’s (“Plaintiff”) Second Amended Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction (the “Motion”). After considering all the papers filed in support of, and in opposition to, the Motion, the Court deems this matter appropriate for resolution without a hearing pursuant to Local Rule 7-15. The Court DENIES the Motion without prejudice.

I. BACKGROUND¹

This is a dispute over the handling of Plaintiff’s sperm sample as part of a biological inventory. (Dkt. 1). Plaintiff alleges that Defendants released

¹ To the extent certain facts or contentions are not mentioned in this Order, the Court has not found it necessary to consider them in reaching its decision. In addition to considering the evidentiary objections raised by the parties, the Court has reviewed independently the admissibility of the evidence that both parties submitted and has not considered evidence that is irrelevant or inadmissible.

1 his sample to a customer despite Plaintiff's request that the sample not be
2 included in the inventory, after having a change of heart. (*Id.*). As a result of
3 this alleged mishap, Plaintiff claims that he has at least one biological child.
4 (*Id.*)

5
6 Plaintiff filed this lawsuit on December 19, 2019 (Dkt. 1) and filed the
7 operative Second Amended Complaint (Dkt. 38, the "SAC") on June 3,
8 2020. The SAC includes ten claims: (1) negligence; (2) invasion of privacy;
9 (3) trespass to personal property; (4) conversion; (5) breach of fiduciary
10 duty; (6) intentional infliction of emotional distress ("IIED"); (7) negligent
11 infliction of emotional distress ("NIED"); (8) violation of California Business
12 and Professions Code ("CBPC") § 17200 et seq.; violation of CBPC § 17500
13 et seq.; and (10) fraud. (*See generally* Dkt. 38). Defendants moved to
14 dismiss the SAC for failure to state a claim on July 1, 2020. (Dkts. 46, 47).
15 On August 20, 2020, the Court Granted in Part and Denied in Part
16 Defendants' Motion to Dismiss. (Dkt. 56).

17
18 Defendants claim that on or around August 20, 2020, they discovered
19 that a person "with an indirect membership interest" in Cryobank and CCB-
20 NWC may be a Texas citizen. (Dkt. 59-2, ¶ 2). Plaintiff is a Texas citizen
21 (Dkt. 1, ¶ 2.1), and this new information, according to Defendants, destroys
22 diversity jurisdiction. The parties met and conferred on this issue, but
23 Plaintiff claims Defendants failed to provide enough support for their
24 contention that the alleged Texas citizenship destroys diversity jurisdiction.
25 (*Id.*; Dkt. 70, ¶¶ 5-11). The parties were unable to come to a resolution and
26 thus, on September 10, 2020, Defendants filed the instant Motion claiming

1 that the Court lacks diversity jurisdiction. (Dkt. 59-1; Dkt. 59-2, ¶ 2). Plaintiff
2 filed an Opposition on September 28, 2020 arguing that Defendants'
3 evidence does not negate diversity jurisdiction and that jurisdictional
4 discovery is warranted. (Dkt. 68). Defendants filed their Reply on October
5 5, 2020. (Dkt. 71).

7 II. LEGAL STANDARD

8 A. Motion to Dismiss Under Rule 12(b)(1)

9 Defendants bring this Motion pursuant to Rule 12(b)(1). Under
10 12(b)(1), a party may challenge jurisdiction either “facially” or “factually.”
11 *Thornhill Publ'g v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).
12 Here, Defendants seek to bring a “factual challenge” or “speaking
13 challenge,” by submitting extrinsic evidence in the form of a declaration to
14 contradict Plaintiff’s allegations in the SAC.

15
16 In a “factual challenge,” the court may consider extrinsic evidence,
17 and, if the evidence is disputed, weigh the evidence and determine the facts
18 in order to satisfy itself as to its power to hear the case. *Land v. Dollar*, 330
19 U.S. 731, 735 (1947); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.
20 1987) (“[T]he existence of disputed material facts will not preclude the trial
21 court from evaluating for itself the merits of jurisdictional claims.”).

22
23 Unlike a “facial challenge,” in which the court takes as true the
24 allegations in the complaint, in a “factual challenge,” the court attaches no
25 presumptive truthfulness to the plaintiff’s allegations. See *Savage v.*
26 *Glendale High Sch.*, 343 F.3d 1036, 1039, n.2 (9th Cir. 2003) (holding that,

1 in a “factual challenge,” a plaintiff must furnish affidavits and other evidence
2 necessary to satisfy its burden of establishing subject matter jurisdiction);
3 *Commodity Trend Serv. v. Commodity Futures Trading Comm’n*, 149 F.3d
4 679, 685 (7th Cir. 1998) (“The presumption of correctness that we accord to
5 a complaint’s allegations falls away on the jurisdictional issue once a
6 defendant proffers evidence that calls the court’s jurisdiction into question.”).

7
8 To survive a motion to dismiss under Rule 12(b)(1), the Plaintiff bears
9 the burden of proving that the Court has subject-matter jurisdiction to hear
10 her claims. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A
11 court has an “affirmative obligation to ensure that it is acting within the
12 scope of its jurisdictional authority.” *Grand Lodge of Fraternal Order of*
13 *Police v. Ashcroft*, 185 F.Supp.2d 9, 13 (D.D.C. 2001). For this reason, “the
14 [p]laintiff’s factual allegations in the complaint ... will bear closer scrutiny in
15 resolving a 12(b)(1) motion’ than in resolving a 12(b)(6) motion for failure to
16 state a claim.” (*Id.* at 13-14) (quoting 5A Charles A. Wright & Arthur R.
17 Miller, *Federal Practice and Procedure* § 1350 (2d ed.1987) (alteration in
18 original)). Although the Plaintiff’s allegations are not entitled to a
19 presumption of truthfulness, any factual disputes must be resolved in the
20 Plaintiff’s favor. *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016).

21 22 **B. Diversity Jurisdiction**

23 Federal courts have diversity jurisdiction over “all civil actions where
24 the matter in controversy exceeds . . . \$75,000 . . . and is between citizens
25 of different States.” 28 U.S.C. § 1332(a)(1). Diversity must be complete,
26 *i.e.*, “no plaintiff and no defendant [may be] citizens of the same State.” *Wis.*

1 *Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998). “The party asserting
2 diversity jurisdiction bears the burden of proof.” *Lew v. Moss*, 797 F.2d 747,
3 749 (9th Cir. 1986).

4
5 An LLC or partnership’s diversity is determined by the citizenship of
6 all its members. *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d
7 894, 899 (9th Cir. 2006) (holding that “like a partnership, an LLC is a citizen
8 of every state of which its owners/members are citizens.”). Citizenship is
9 determined by domicile. See *Lew*, 797 F.2d at 749. “A person’s domicile is
10 her permanent home, where she resides with the intention to remain or to
11 which she intends to return.” *Kanter v. Warner-Lambert Co.*, 265 F.3d 853,
12 857 (9th Cir. 2001) (*citing Lew*, 797 F.2d at 749). “[E]xistence of domicile . .
13 . is determined as of the time the lawsuit is filed.” *Lew*, 797 F.2d at 750.
14 Changing one’s domicile requires “(a) physical presence at the new location
15 with (b) an intention to remain there indefinitely.” (*Id.*). “[A] person’s old
16 domicile is not lost until a new one is acquired.” (*Id.*).

17 18 **III. DISCUSSION**

19 **A. Diversity Jurisdiction**

20 Defendants argue that the Court is without diversity jurisdiction
21 because both Plaintiff and Defendants are citizens of Texas. (Dkt. 59-1, at
22 5-6). Specifically, Defendants contend that “an individual that presently
23 resides in Texas (and has resided in that state since 1992) with every
24 intention of staying in Texas” destroys diversity. (Dkt. 59-1, at 5). According
25 to Defendants, the alleged Texas citizen is a limited partner in a partnership
26

1 that traces its membership interests to Cryobank and CCB-NWC. (*Id.* at 6).

2 Defendants state the tracing goes as follows:

- 3
- 4 • The alleged Texas citizen is a limited partner in GI Partners
5 Executive Fund V LP. (Dkt. 59-1, at 5; Dkt. 59-3, ¶ 25).
 - 6 • GI Partners Executive Fund V LP is itself a limited partner in GI
7 Generate Holdings LP. (Dkt. 59-1, at 6; Dkt. 59-3, ¶ 23).
 - 8 • GI Generate Holdings LP holds membership interest in GI
9 Generate Parent LLC. (Dkt. 59-1, at 6; Dkt. 59-3, ¶ 20).
 - 10 • GI Generate Parent LLC traces its membership interest to
11 Cryobank and CCB-NWC. (Dkt. 59-1, at 6; Dkt. 59-3, ¶¶ 13,
12 15, 18).
- 13

14 In support of this theory, Defendants rely on a declaration from Kabir
15 Masson, the Assistant General Counsel for GI Manager L.P. (Dkt. 59-1, at
16 5). The Court finds that Masson’s declaration is insufficient for two reasons.

17

18 First, Masson relies on inadmissible hearsay to support a finding of
19 Texas citizenship. A person’s citizenship for purposes of the diversity
20 statute is determined by their domicile. *See Lew*, 797 F.2d at 749. A
21 person’s domicile is the place where they reside and intend to remain
22 indefinitely. (*Id.*).

23

24 Masson states that the alleged Texas citizen told him in two separate
25 emails that “the individual has resided in Texas continuously since 1992 and
26 intends to continue to live in Texas.” (Dkt. 59-3, ¶ 27). The information that

1 Masson was allegedly “told” in the emails is hearsay.² Hearsay is an out of
2 court statement offered for the truth of the matter asserted in the statement.
3 (Federal Rule of Evidence (“FRE”) 801(c)). The statements that Masson
4 says he was “told” are out of court statements. Masson relies on these
5 statements for the truth of the matter asserted to support Defendants’
6 domicile theory – that the person has in fact resided in Texas since 1992
7 and that the person intends to continue to live in Texas. Accordingly, these
8 statements are inadmissible hearsay unless they fall under an exemption
9 from or exception to the hearsay rule.

10
11 Defendants argue that the statements fall under the business records
12 exception to the hearsay rule. (Dkt. 71, at 3 n.2) (“Mr. Masson’s statements
13 are based on records made at or near the time by someone with knowledge
14 and kept in the regular course of business activity of GI Partners.”).
15 Defendants provide no evidence showing that the emails are regularly
16 conducted business activities. FRE 801(6) (“all these conditions [must be]
17 shown by the testimony of the custodian or another qualified witness.”).
18 Accordingly, the hearsay statements do not fall within an exemption from or
19 exception to the hearsay rule and are thus inadmissible.

20
21 Given that the statements contained within the alleged emails are the
22 only evidence Defendants offer to support the domicile of the alleged Texas
23

24 ² The Court further notes that Defendants fail to attach the emails to Mas-
25 son’s declaration and thus the contents of the emails cannot be authenti-
26 cated. Although the statements contained within the emails might be party
admissions, Masson’s statement of what the emails say without attaching
them is inadmissible hearsay.

1 citizen, Defendants have failed to provide sufficient evidence to thwart
2 diversity jurisdiction in this case.

3
4 Second, even assuming Masson's statements regarding the alleged
5 Texas citizen's domicile were admissible (and they are not), Masson's
6 declaration fails to establish that the alleged Texas citizen was an indirect
7 member of Cryobank and CCB-NWC at the time the lawsuit was filed.
8 Diversity jurisdiction is determined at the time a lawsuit is filed. *Atlas Global*
9 *Group*, L.P. 541 U.S. 567, 571 (2004). Where an LLC is a party, diversity is
10 determined based on the citizenship of all its members. *Johnson*, 437 F.3d
11 at 899. Thus, the Court must be able to ascertain who Defendants'
12 members were at the time the lawsuit was filed. The date that each alleged
13 member acquired their membership interest is critical to this analysis.

14
15 Here, the Court cannot ascertain when the alleged Texas citizen
16 became an individual partner in GI Partners Executive Fund V LP because
17 Defendants do not specify this information. Masson only notes in his
18 declaration that "the individual Texas citizen made an investment in GI
19 Partners Executive Fund V LP on or about March 1, 2018." (Dkt. 59-3, ¶
20 26). This statement does not specify when the alleged Texas citizen
21 became an individual partner in GI Partners Executive Fund V LP.

22
23 Moreover, Defendants fail to specify when several other alleged
24 members, including GI Partners Executive Fund V LP, obtained their
25 respective membership interests. (*Compare* Dkt. 59-3, ¶ 13 (stating when
26 GI Generate Acquisition became a member of Cryobank Holdings LLC) *with*

1 *id.*, ¶¶ 14-29 (failing to specify when any other entity, partnership, or person
2 acquired their membership interest)). Thus, the membership chain (starting
3 from Defendants and ending with the alleged Texas citizen) may be faulty,
4 and the alleged Texas citizen’s membership may not have any bearing on
5 the analysis. Further, the secretary of state documents proffered by
6 Defendants only establish when the entities or partnerships were formed,
7 and not when they gained their alleged memberships for purposes of
8 diversity jurisdiction.
9

10 Based on the above, the Defendants’ evidence does not support a
11 finding that diversity jurisdiction is lacking in this case.
12

13 Although Defendants have failed to provide evidence that would
14 destroy diversity jurisdiction, the burden nevertheless lies with Plaintiff to
15 prove that diversity jurisdiction exists under a 12(b)(1) factual attack. See
16 *Lujan*, 504 U.S. at 561. Plaintiff claims that limited jurisdictional discovery is
17 warranted to satisfy this burden. The Court next addresses Plaintiff’s
18 request.
19

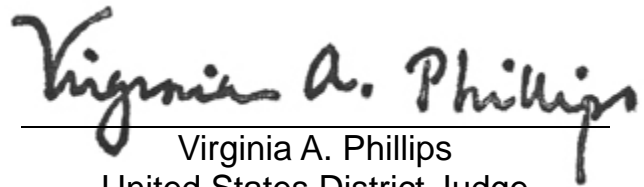
20 **B. Jurisdictional Discovery**

21 As an alternative to dismissal, Plaintiff urges the Court to grant
22 Plaintiff leave to conduct jurisdictional discovery. (Dkt. 68, at 10-11).
23 Specifically, Plaintiff asserts that limited jurisdictional discovery is necessary
24 to ascertain the citizenship of Defendants’ alleged members, including the
25 alleged Texas citizen that purportedly destroys diversity jurisdiction. (*Id.*).
26

1 Defendants' members are; and (2) the citizenship of Defendants' members.
2 The parties shall have NINETY DAYS from the date of this Order to
3 complete the jurisdictional discovery. Defendants may renew their motion
4 following the ninety-day period.
5
6

7 **IT IS SO ORDERED.**

8
9 Dated: 10/19/20



Virginia A. Phillips
United States District Judge