

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

**DIRECT RESPONSE PRODUCTS,  
INC.,**

**Plaintiff,**

**v.**

**1:13-cv-0945-WSD**

**WILLIAM S. (SCOTTY)  
RODERICK,**

**Defendant.**

**OPINION AND ORDER**

This matter is before the Court on Defendant William S. (Scotty) Roderick (“Roderick”)’s Motion to Dismiss [14] and Motion to Compel Arbitration and Stay Proceedings [15], and on Plaintiff Direct Response Products, Inc. (“Direct Response” or “Plaintiff”)’s Motion to Amend Complaint [19].

**I. BACKGROUND**

A. Procedural History

On March 25, 2013, Direct Response filed this action asserting against Roderick a claim for a declaratory judgment and claims for breach of contract, tortious interference, breach of fiduciary duty, attorneys’ fees and punitive

damages. On July 16, 2013, after filing his answer, Roderick moved to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1),(3), and (6), on the grounds that the Court lacks jurisdiction over this diversity action because the amount in controversy does not exceed \$75,000, that venue is improper, and that Plaintiff has failed to state a claim upon which relief may be granted. Roderick also moved to stay the case and to compel arbitration. Two weeks later, on August 2, 2013, Plaintiff moved to amend its Complaint to provide additional factual support for its claims.

B. Facts

Direct Response stages sales events for car dealerships and is compensated for these services based on the number of cars sold at each event. Tim Ball (“Ball”) is the president and owner of Direct Response. Roderick worked for Direct Response as an independent contractor pursuant to an independent contractor agreement (“IC Agreement”), which Roderick entered into with Direct Response on May 1, 2012. Roderick held the title of Regional Manager for Plaintiff.

Roderick was responsible for marketing Plaintiff’s sales events to dealerships. Plaintiff and Roderick agreed to split sales event earnings equally. Direct Response alleges that Roderick had access to Plaintiff’s confidential and

proprietary information, including sales leads, database contents, and marketing materials to perform his sales duties.

The IC Agreement contained six-month non-compete, non-solicitation, and non-disclosure provisions. Neither Roderick nor Direct Response has a copy of the executed agreement, but agree that it once existed. Plaintiff submitted a copy of an unexecuted IC Agreement with the Complaint, and contends it is identical to the one Roderick signed. Roderick contends the agreement he signed had been modified to specify it was void if Ball was no longer the sole owner of Direct Response or if Roderick was required to report to someone other than Ball.

Plaintiff claims that on December 6, 2012, Roderick formed Turn Key Promotions, LLC (“Turn Key”) to compete with Direct Response and that on January 8, 2013, Roderick terminated his relationship with Plaintiff, allegedly inducing other members of the Direct Response sales team to join him at Turn Key.

Plaintiff claims that Roderick violated the IC Agreement by competing with Direct Response and soliciting those working for Direct Response, and by using its confidential business information in doing so. Direct Response seeks a declaratory judgment that the non-compete, non-solicit, and non-disclosure provisions of the IC Agreement are enforceable, and it asserts claims for breach of contract, tortious

interference, breach of fiduciary duty, attorneys' fees and punitive damages.

Direct Response alleges damages in the amount of \$829,500.

Plaintiff asserts that the Court has jurisdiction over this matter under 28 U.S.C. § 1332, which provides that federal district courts "shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a). Direct Response is a Georgia corporation with its principal place of business in DeKalb County, Georgia. Plaintiff alleges that Roderick is a resident of Florida. The parties do not dispute that diversity jurisdiction is the only asserted basis for federal jurisdiction over this action.

## II. DISCUSSION

### A. Plaintiff's Allegations of Diversity

The Court first considers, *sua sponte*, whether diversity jurisdiction exists where Plaintiff, a Georgia citizen, alleges only that Roderick is a *resident* of Florida. (See Compl. ¶ 2.)

Federal courts are courts of limited jurisdiction, and thus a federal court must take care to ensure that it has jurisdiction for all cases that come before it. Rembert v. Apfel, 213 F.3d 1331, 1333-34 (11th Cir. 2000). To that end, a district court must always answer the question of whether it has subject-matter jurisdiction

to hear a case, even if a party does not raise the question of jurisdiction by motion. Id.; Smith v. GTE Corp., 236 F.3d 1292, 1299 (11th Cir. 2001) (“[B]ecause a federal court is powerless to act beyond its statutory grant of subject-matter jurisdiction, a court must zealously insure that jurisdiction exists over a case, and should itself raise the question of subject-matter jurisdiction at any point in the litigation where a doubt about jurisdiction arises.”).

“Citizenship for diversity purposes is determined at the time the suit is filed.” MacGinnitie v. Hobbs Grp., LLC, 420 F.3d 1234, 1239 (11th Cir. 2005).

“The burden to show the jurisdictional fact of diversity of citizenship [is] on the . . . plaintiff.” King v. Cessna Aircraft Co., 505 F.3d 1160, 1171 (11th Cir. 2007) (alteration and omission in original) (quoting Slaughter v. Toye Bros. Yellow Cab Co., 359 F.2d 954, 956 (5th Cir. 1966)).

In Travaglio v. American Express Co., the Eleventh Circuit recently held that allegations of mere residence are insufficient to establish diversity jurisdiction. No. 11-15292, 2013 WL 4406389, \*2 (11th Cir. Aug. 19, 2013) (publication pending). “Citizenship, not residence, is the key fact that must be alleged in the complaint to establish diversity for a natural person. Citizenship is equivalent to ‘domicile’ for purposes of diversity jurisdiction. And domicile requires both residence in a state and an intention to remain there indefinitely.” Id. (internal

citations and quotation marks omitted.) See also Am. Motorists Ins. Co. v. Am. Emp'rs' Ins. Co., 600 F.2d 15, 16 (5th Cir. 1979) (per curiam) (“When jurisdiction is based on diversity of citizenship . . . the plaintiff’s complaint must specifically allege each party’s citizenship, and these allegations must show that the plaintiff and defendant are citizens of different states.”).

The Complaint here fails to show Roderick’s citizenship, and the Court is not able to determine whether it has subject matter jurisdiction over this proceeding. As a result, the Court will be required to dismiss this action, unless Plaintiff files an amended complaint, alleging sufficient facts to support the Court’s jurisdiction, or sworn testimony that provides a factual basis for the Court to determine it has jurisdiction over this matter.<sup>1</sup> See Travaglio, 2013 WL 4406389, at \*2–3 (holding that court must dismiss action for lack of subject matter jurisdiction unless pleadings or “sworn” evidence establishes jurisdiction).

The Court next considers Roderick’s motion to dismiss this action, pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject-matter jurisdiction. Roderick argues that Plaintiff failed sufficiently to plead an amount in controversy

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<sup>1</sup> Plaintiff also moves to amend its Complaint to add factual allegations in support of its claims and to withdraw its claim for a declaratory judgment. Roderick did not oppose Plaintiff’s motion. The Court has reviewed the proposed Amended Complaint, and Plaintiff’s Motion to Amend is granted.

that exceeds \$75,000, as required in diversity cases.

B. Motion to Dismiss For Lack of Subject-Matter Jurisdiction

Rule 12(b)(1) of the Federal Rule of Civil Procedure permits dismissal by the Court for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

Roderick argues that Direct Response failed adequately to plead an amount in controversy that meets the jurisdictional requirements of 28 U.S.C. § 1332(a), and, because the Court does not have a basis to find that the amount in controversy meets the statutory minimum, this action is required to be dismissed for lack of jurisdiction.

1. *Amount in Controversy in Diversity Cases*

“In order to invoke a federal court’s diversity jurisdiction, a plaintiff must claim, among other things, that the amount in controversy exceeds \$75,000.”

Federated Mut. Ins. Co. v. McKinnon Motors, LLC, 329 F.3d 805, 807 (11th Cir.

2003); see 28 U.S.C. § 1332(a). A plaintiff satisfies the amount in controversy

requirement by claiming a sufficient sum in good faith. St. Paul Mercury Indem.

Co. v. Red Cab Co., 303 U.S. 283, 288, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938).

“While a federal court must of course give due credit to the good faith claims of the plaintiff, a court would be remiss in its obligations if it accepted every claim of damages at face value, no matter how trivial the underlying injury.” Diefenthal v.

Civil Aeronautics Bd., 681 F.2d 1039, 1052 (5th Cir. 1982).

“Dismissal of a case brought under 28 U.S.C. § 1332 is proper where the pleadings make it clear to a legal certainty that the claim is really for less than the jurisdictional amount.” Leonard v. Enterprise Rent a Car, 279 F.3d 967, 972 (11th Cir. 2002) (quotation omitted). “However, where jurisdiction is based on a claim for indeterminate damages, the . . . ‘legal certainty’ test gives way, and the party seeking to invoke federal jurisdiction bears the burden of proving by a preponderance of the evidence that the claim on which it is basing jurisdiction meets the jurisdictional minimum.” Federated Mut. Ins., 329 F.3d at 807. “A conclusory allegation . . . that the jurisdictional amount is satisfied, without setting forth the underlying facts supporting such an assertion, is insufficient to meet the [plaintiff’s] burden.” See Leonard, 279 F.3d at 972 (quotation omitted) (addressing removal from state court); see also Federated Mut. Ins., 329 F.3d at 809 (noting that a party’s mere speculation that the amount in controversy met the jurisdictional threshold did not satisfy its burden of proving beyond a preponderance of the evidence the claim at issue exceeded \$75,000).

2. *Analysis*

i. *Plaintiff’s alleged damages*

Direct Response asserts that Roderick’s breach of the IC Agreement caused



Plaintiff damages in excess of \$800,000. (Compl. ¶ 48.) To support damages in this alleged amount, Direct Response alleges that Roderick induced other sales managers, including Nik Thomas, Mark Nite, Greg Foster, and Charlie Vitale, to terminate their relationship with Direct Response and to join Turn Key. (*Id.* ¶¶ 33, 39.) These individuals allegedly generated, collectively, over \$1.24 million in sales for Direct Response in 2012. (*Id.* ¶ 33.) Plaintiff also asserts an unspecified claim for contractual attorneys' fees and punitive damages.

ii. *Damages available for breach of IC Agreement*

In Georgia, “[t]he damages recoverable for breach of a restrictive covenant are lost profits as well as the loss of customers, the loss of employees, and the decreased value of the business property purchased in reliance on the covenant. Indeed, it has been stated that recoverable damages are simply all damages incident to the breach.” Ga. Contracts Law and Litigation § 8:13 (2d ed.) (quotations omitted). In some circumstances, such as where an employee wrongfully profits from the use of information obtained from his employer, the measure of damages may be the employee's unjust gain. 2 Callmann on Unfair Comp., Tr. & Mono. § 16:22 (4th ed.).

Plaintiff here alleges that Roderick breached the IC Agreement by, *inter alia*, soliciting Direct Response's employees and inducing them to terminate their

relationship with Direct Response. As a result, Plaintiff was denied the revenue these employees generated. Plaintiff alleges this amount was over \$800,000 in 2012 – well above the jurisdictional minimum. These allegations are sufficient to meet § 1332(a)'s jurisdictional amount requirement. Roderick's motion to dismiss this action for lack of subject-matter jurisdiction based on failure to meet the jurisdictional amount requirement is denied.

C. Motion to Dismiss for Failure to State a Claim

Roderick next moves, pursuant to Rule 12(b)(6), to dismiss this action for failure to state a claim upon which relief can be granted.

The law governing motions to dismiss pursuant to Rule 12(b)(6) is well-settled. Dismissal of a complaint is appropriate “when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action.” Marshall County Bd. of Educ. v. Marshall County Gas. Dist., 992 F.2d 1171, 1174 (11th Cir. 1993). The Court accepts the plaintiff's allegations as true, Hishon v. King & Spalding, 467 U.S. 68, 73 (1984), and considers the allegations in the complaint in the light most favorable to the plaintiff. Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007). Ultimately, the complaint is required to contain “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). To state a claim to

relief that is plausible, the plaintiff must plead factual content that “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

“Plausibility” requires more than a “sheer possibility that a defendant has acted unlawfully,” and a complaint that alleges facts that are “merely consistent with” liability “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” Id. (citing Twombly, 550 U.S. at 557). “To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions; they are required to allege some specific factual bases for those conclusions or face dismissal of their claims.” Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1263 (11th Cir. 2004) (“[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.”). When considering a motion to dismiss, the court normally is required to limit itself to consideration of the allegations of the complaint and any documents attached to it. Fed. R. Civ. P. 12(b)(6).

Roderick argues that Plaintiff has asserted only conclusory allegations without sufficient factual content to support a plausible claim for relief. Roderick, however, discusses in detail the disputed facts related to Plaintiff’s breach of contract claim. For instance, Roderick argues that he had cause to terminate the IC

Agreement because Plaintiff failed to support his sales efforts and that, for a period of time, Roderick was required to report to someone other than Ball. (Def. Mot. at 20.) Roderick argues these developments relieved him of the non-compete and non-solicitation provisions of the IC Agreement, and that Ball and Roderick agreed that they would simply “go their separate ways.” (Id.) Roderick argues, alternatively, that he did not compete with Direct Response or solicit its employees. (Id. at 21.) Essentially, Roderick disputes the facts alleged in the Complaint. In considering a 12(b)(6) motion, the Court must accept as true the allegations in Plaintiff’s Complaint. Hishon, 467 U.S. at 73. The Court concludes that Plaintiff alleged sufficient and plausible factual content to support its breach of contract claim, and Roderick’s motion to dismiss for failure to state a claim is denied.<sup>2</sup>

D. Motion to Dismiss for Improper Venue

Roderick next moves, pursuant to Rule 12(b)(3), to dismiss the Complaint for improper venue. 28 U.S.C. Section 1391, provides

A civil action may be brought in—

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<sup>2</sup> Plaintiff’s motion for leave to file an amended complaint indicates that Plaintiff will allege additional facts to support its claims for tortious interference and breach of fiduciary duty. Because the Court has granted Plaintiff’s motion to amend, Roderick’s motion to dismiss those claims, on the basis of failure to state a claim upon which relief can be granted, is denied as moot.

- (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
- (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
- (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C § 1391. Federal Rule of Civil Procedure 12(b)(3) allows a defendant to move to dismiss an action for improper venue. When venue is improper, a district court shall dismiss the action or “if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a). Whether to dismiss or transfer is within the discretion of the Court. See Pinson v. Rumsfeld, 192 F. App'x 811, 817 (11th Cir. 2006); Naartex Consulting Corp. v. Watt, 722 F.2d 779, 789 (D.C. Cir. 1983).

Plaintiff argues that venue is proper under Section 1391(2) because a “substantial part of the events” giving rise to Plaintiff's claim for breach of the IC Agreement occurred in the Northern District of Georgia. The Eleventh Circuit held that, in considering whether venue is proper under Section 1391(2), “[o]nly the events that directly give rise to a claim are relevant. And of the places where the events have taken place, only those locations hosting a ‘substantial part’ of the events are to be considered.” Jenkins Brick Co. v. Bremer, 321 F.3d 1366, 1371 (11th Cir. 2003).