

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

KENNETH GUZMAN,

Plaintiff,

v.

WELL HEALTH LABS LLC and X
CALIBER CONTAINER LLC,

Defendants.

Case No. 22-2229-JWB-RES

ORDER

This matter comes before the Court on Plaintiff's Motion for an Extension of Time to Respond to the Court's Notice and Order to Show Cause and for Early Discovery. ECF No. 5. For the reasons explained below, the motion is granted insofar as the Court withdraws its Report and Recommendation (ECF No. 4) and grants Plaintiff up to and including August 5, 2022, to respond to the show-cause order. Any such response shall include a proposed amended complaint attached as an exhibit to that response that, if possible, corrects the defects noted in the show-cause order (ECF No. 3). The motion is otherwise denied.

I. BACKGROUND

On June 16, 2022, Plaintiff filed his Complaint, naming two limited liability companies ("LLC") as Defendants. ECF No. 1. Plaintiff alleges diversity jurisdiction as the only basis for proceeding in federal court. *Id.* at 1-2, ¶ 6.

On June 21, 2022, the undersigned Magistrate Judge ordered Plaintiff to show cause in writing by July 8, 2022, why the Magistrate Judge should not recommend that the District Judge dismiss the case without prejudice for lack of subject matter jurisdiction because Plaintiff had not

pleaded facts sufficient to establish the citizenships of the LLC Defendants. ECF No. 3. Plaintiff did not respond to the show-cause order by the deadline.

Because Plaintiff did not timely respond, the Magistrate Judge filed a Report and Recommendation recommending that the District Judge dismiss this case without prejudice for lack of subject matter jurisdiction. ECF No. 4. On July 15, 2022, three days after the Magistrate Judge's Report and a week after the deadline to respond to the Court's show-cause order, Plaintiff filed the present motion for an extension of time to respond to the show-cause order and for leave to take expedited discovery regarding Defendants' citizenships. ECF No. 5. While summonses have been issued by the Clerk's Office, Defendants have not appeared in this case, and the docket reflects no proof of service to date.

II. DISCUSSION

Plaintiff's motion seeks (1) an extension of the now-lapsed deadline to respond to the Court's show-cause order, and (2) leave of Court to take expedited jurisdictional discovery from Defendants regarding their citizenship. The Court addresses each request below.

A. Extension of Time to Respond to the Show-Cause Order

D. Kan. Rule 6.1(a)(4) states that a party must file a motion for extension of time "before the specified time expires." After a deadline has passed, the Court will not grant an extension absent a showing of excusable neglect. *Id.*; *see also* Fed. R. Civ. P. 6(b)(1)(B). In evaluating whether a party has shown excusable neglect, the Court considers four factors: "[1] the danger of prejudice to the [non-moving party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Perez v. El Tequila, LLC*, 847 F.3d 1247, 1253 (10th Cir. 2017) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*

P'ship, 507 U.S. 380, 395 (1993)). The most important factor is the reason for the delay, and “an inadequate explanation for delay may, by itself, be sufficient to reject a finding of excusable neglect.” *Id.*

Plaintiff addresses none of these excusable neglect factors. He provides no explanation for his decision not to respond to the Court’s show-cause order, which was an action entirely within his control. To the extent Plaintiff required more time to respond to the show-cause order, he articulates no reason why he could not have made that request in a timely manner, either as soon as the Court entered the show-cause order on June 21, 2022, or at any point leading up to the July 8, 2022 deadline. He does not allege that he acted in good faith and does not address that his delay in responding negatively impacted the judicial proceedings.

Instead, Plaintiff belatedly argues that the Court’s order places Plaintiff in “an impossible position” in that Plaintiff does not know the citizenship of the members of either LLC Defendant, and Plaintiff requires Defendants’ cooperation to learn this information. ECF No. 5 at 1-2. Plaintiff states that he researched the LLCs prior to filing suit, learning only that the registered agents for the Defendants were located in Texas. ECF No. 5 at 2. But he makes no mention of any other steps taken to determine Defendants’ members and the citizenship of those members since the Court’s June 21, 2022 show-cause order. In sum, Plaintiff has not shown excusable neglect.

Nonetheless, in the “interests of justice, fairness and judicial economy,” the Court will give Plaintiff one final opportunity “to ‘cure’ such pleading defects, if possible.” *Penteco Corp. P'ship—1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1523 (10th Cir. 1991). The Court will, in its discretion, permit Plaintiff up to and including August 5, 2022, to file a response to the show-cause order if Plaintiff can cure the jurisdictional defects contained in the original complaint.

Plaintiff's response shall include as an exhibit a proposed amended complaint reflecting in redline any changes to the original complaint. The Court will withdraw its Report and Recommendation during this period.

B. Expedited Jurisdictional Discovery

As it is required to do at this stage, the Court accepts as true all “well-pled (that is, plausible, conclusory, and non-speculative) . . . facts” in Plaintiff's Complaint. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (internal citation omitted). Plaintiff's allegations, however, even when accepted as true, fail to establish a right for Plaintiff to proceed in federal court. As explained in the show-cause order, Plaintiff's negative allegations of citizenship are insufficient to establish complete diversity because Plaintiff must affirmatively identify and state the citizenship of each of the LLC Defendants' members. *See* ECF No. 3 at 1-2 (collecting cases).

Plaintiff does not dispute that the face of his Complaint fails to allege subject matter jurisdiction or that such information is required to be alleged within the four corners of his Complaint, but instead complains that he cannot allege the missing information because such information “is not publicly available[.]” ECF No. 5 at 1. Plaintiff argues that “[a]bsent timely cooperation of Defendants, the Court's Order and short deadline places Plaintiff in an impossible position, as information related to members of a limited liability company is not publicly available information, and Plaintiff cannot force an entity to divulge such information prior to commencement of an action.” ECF No. 5 at 1-2. While Plaintiff acknowledges that he is prohibited from serving discovery at this time, he seeks an order pursuant to Rule 26(d)(1) authorizing limited discovery to proceed on an expedited basis. *Id.* at 2. In essence, Plaintiff asks

the Court to order expedited discovery to help Plaintiff meet his threshold burden of establishing that the Court has subject matter jurisdiction over this action. The Court denies this request.

“Since federal courts are courts of limited jurisdiction, there is a presumption against our jurisdiction” *Penteco Corp. P’ship—1985A*, 929 F.2d at 1521. Plaintiff, as the party invoking federal jurisdiction, bears the burden of proof and must allege facts essential to show subject matter jurisdiction. *Id.* The Court has an independent obligation to satisfy itself that subject matter jurisdiction is proper. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). If the Court determines that it lacks subject matter jurisdiction, it “must dismiss the cause at any stage of the proceedings.” *Penteco Corp. P’ship—1985A*, 929 F.2d at 1521; *see also* Fed. R. Civ. P. 12(h)(3) (same).

Because the face of Plaintiff’s Complaint fails to allege complete diversity, the Court has no additional jurisdiction over this action and cannot order discovery in a case in which it has determined that it lacks subject matter jurisdiction. *See Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) (“A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators.”); *Cunningham v. BHP Petroleum Great Britain PLC*, 427 F.3d 1238, 1245 (10th Cir. 2005) (“A court may not . . . exercise authority over a case for which it does not have subject matter jurisdiction. . . . Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue.” (internal citations omitted)).

Plaintiff does not cite a single case in support of his request for jurisdictional discovery when, as here, a complaint facially fails to allege subject matter jurisdiction. *See generally* ECF No. 5. This failure alone merits denial of Plaintiff’s request. *See, e.g., Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1189 n.11 (10th Cir. 2010) (holding

“we previously have placed the burden of demonstrating a legal entitlement to jurisdictional discovery—and the related prejudice flowing from the discovery’s denial—on the party seeking the discovery”).

Courts that have considered similar facts persuasively deny such discovery because courts should not allow a party “to look for what [it] should have had—but did not—before coming through the courthouse doors.” *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1216 (11th Cir. 2007). For example, in evaluating a defendant’s request for jurisdictional discovery to support a defendant’s removal of an action to federal court, the Eleventh Circuit stated:

The defendants’ request for discovery is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists. The natural consequence of such an admission is remand to state court.

Post-removal discovery disrupts the careful assignment of burdens and the delicate balance struck by the underlying rules. A district court should not insert itself into the fray by granting leave for the defendant to conduct discovery or by engaging in its own discovery. Doing so impermissibly lightens the defendant’s burden of establishing jurisdiction. A court should not participate in a one-sided subversion of the rules. The proper course is remand.

Lowery, 483 F.3d at 1217-18. Ultimately, the Eleventh Circuit found that “[s]uch fishing expeditions would clog the federal judicial machinery, frustrating the limited nature of federal jurisdiction by encouraging defendants to remove, at best, prematurely, and at worst, in cases in which they will never be able to establish jurisdiction.” *Id.* at 1217.

Courts in this Circuit have reached similar conclusions. For example, Judge Lungstrum denied a plaintiff’s motion for leave to conduct jurisdictional discovery related to diversity jurisdiction because such discovery was merely a “tool to fish for that solid factual basis” to be in federal court. *See LS Carlson L., PC v. Shain*, No. 22-2070-JWL, 2022 WL 1471368, at *2 (D. Kan. May 10, 2022) (“This Court will not, in its discretion, allow the invoking party to utilize the

Court's power to order discovery as a tool to fish for that solid factual basis. In other words, the Court will not order discovery on the issue of diversity jurisdiction unless the plaintiffs have already provided sufficient evidence of the parties' citizenship to instill in the Court a belief that further discovery would probably lead to proof of diversity and enable the plaintiff to establish subject matter jurisdiction." (citation and quotation marks omitted)). Similarly, the District of Colorado held that granting a plaintiff's request for jurisdictional discovery when plaintiff failed to allege the citizenship of defendants' LLC members "would undermine the well-established rule that the party invoking federal jurisdiction bears the burden of establishing such jurisdiction." *Nancy P. Assad Tr. v. Berry Petroleum Co.*, No. 13-CV-00544-PAB, 2013 WL 1151912, at *3 (D. Colo. Mar. 20, 2013).

While the Court has "broad discretion in determining whether to permit jurisdictional discovery," *Health Grades, Inc. v. Decatur Mem'l Hosp.*, 190 F. App'x 586, 589 (10th Cir. 2006), such requests for jurisdictional discovery typically arise when there is a dispute regarding personal jurisdiction or if a party challenges the factual bases for a court's subject matter jurisdiction after a party has facially alleged the existence of subject matter jurisdiction. *See LS Carlson L., PC*, 2022 WL 1471368, at *2 ("It is true that federal courts have been willing to order discovery when the parties have disputed jurisdictional issues. But this is done in the courts' discretion, and generally only where the challenge has been directed at personal jurisdiction or where the challenge to the courts' subject matter jurisdiction is based on the application of a federal statute[.]" (citation and quotation marks omitted)); *Nancy P. Assad Tr.*, 2013 WL 1151912, at *2 ("The cases plaintiff cites do not support a right to discovery regarding an LLC's members. First, these cases do not concern diversity jurisdiction, which is a threshold issue for the court. In its absence, a court lacks the constitutional power to adjudicate a case that does not arise under federal law.").

In 2020, the Tenth Circuit discussed the standards for allowing jurisdictional discovery in resolving a motion to dismiss for a lack of personal jurisdiction:

A district court abuses its discretion in denying a jurisdictional discovery request where the denial prejudices the party seeking discovery. Prejudice exists where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary. The party seeking discovery bears the burden of showing prejudice.

Dental Dynamics, LLC v. Jolly Dental Grp., LLC, 946 F.3d 1223, 1233 (10th Cir. 2020) (internal quotations and citations omitted).

Even assuming that the prejudice standard articulated in *Dental Dynamics* applies here, where Plaintiff fails to allege any facts to facially support the existence of subject matter jurisdiction, Plaintiff does not address whether he will suffer prejudice if the Court denies his discovery requests, which is Plaintiff's burden to establish. This is not a situation where there are controverted facts because Plaintiff's Complaint does not allege those threshold facts. Moreover, this is not a situation in which merely "more satisfactory" facts are needed because Plaintiff has no basis for alleging that any information that could be obtained by discovery would necessarily support a finding of subject matter jurisdiction, as opposed to revealing that certain LLC members destroy diversity jurisdiction. Instead, Plaintiff's argument for jurisdictional discovery rests wholly on his unsupported hope that discovery will support his "*belief* that diversity exists between Plaintiff and Defendants." ECF No. 5 at 2 (emphasis added). Pure speculation that Defendants will produce information that will support Plaintiff's belief regarding Defendants' citizenship, however, is insufficient to support a request for jurisdictional discovery.¹

¹ See *Dental Dynamics, LLC*, 946 F.3d at 1233-34 ("Dental Dynamics points to no relevant facts in dispute. Instead, Dental Dynamics seeks additional discovery based only on speculation that '[l]imited discovery on [defendant's] business relationship would likely aid Dental Dynamics in establishing personal jurisdiction.' As we and other have held, pure speculation as

Plaintiff has not met his burden of establishing his right to proceed in federal court. The Court will not grant leave for a jurisdictional fishing expedition in which Plaintiff hopes to locate information that should have been included on the face of Plaintiff's Complaint. *See LS Carlson L., PC*, 2022 WL 1471368, at *2 ("It is not sufficient for the party seeking [jurisdictional] discovery merely to rely on speculation as to the existence of helpful facts."); *see also Breakthrough Mgmt. Group, Inc.*, 629 F.3d at 1189 (rejecting a "conclusory assertion that jurisdictional discovery was necessary" because it seems like "a fishing expedition"). As such, the Court denies Plaintiff's request for jurisdictional discovery.

III. CONCLUSION

For the reasons stated above, Plaintiff's Motion for an Extension of Time to Respond to the Court's Notice and Order to Show Cause and for Early Discovery (ECF No. 5) is **GRANTED** in part and **DENIED** in part. The motion is granted insofar as the Magistrate Judge withdraws the Report and Recommendation (ECF No. 4) issued to the District Judge and gives Plaintiff up to and including August 5, 2022, to file a response to the show-cause order if Plaintiff can cure the jurisdictional defects contained in the original complaint. Plaintiff's response shall include as an exhibit a proposed amended complaint reflecting in redline any changes to the original complaint.

The Court otherwise **DENIES** Plaintiff's motion, including Plaintiff's request for jurisdictional discovery.

IT IS SO ORDERED.

to the existence of helpful facts is insufficient, as a matter of law, to constitute the type of prejudice that warrants reversing the district court area of discovery management." (internal citation omitted; collecting cases)); *see also LS Carlson L., PC*, 2022 WL 1471368, at *2.

Dated July 21, 2022, at Topeka, Kansas.

/s/ Rachel E. Schwartz
Rachel E. Schwartz
United States Magistrate Judge