NEW YORK CITY BAR

CONTACT
POLICY DEPARTMENT
ELIZABETH KOCIENDA
212.382.4788 | ekocienda@nycbar.org
MARY MARGULIS-OHNUMA
212.382.6767 | mmargulis-ohnuma@nycbar.org

COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

The New York City Bar Association greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the proposed amendment to the Federal Rules of Civil Procedure. The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in virtually every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The Association's Committee on Federal Courts (the "Federal Courts Committee" or "Committee") is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules. The Federal Courts Committee respectfully submits the following comments on the proposed amendment.

I. COMMENT ON PROPOSED REVISION TO FEDERAL RULE OF CIVIL PROCEDURE 7.1

The Civil Rules Advisory Committee ("Civil Rules Advisory Committee") has proposed revisions to Rule 7.1 of the Federal Rules of Civil Procedure ("Rule 7.1"), including the addition of a new Rule 7.1(a)(2), which would require parties to a case in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to file a disclosure statement that names and identifies the citizenship of every individual or entity whose citizenship is attributed to that party at the time the action is filed. According to the excerpt from the June 4, 2019 Report of the Advisory Committee on Civil Rules (the "Report"), this revision is intended "to facilitate the determination whether diversity jurisdiction is defeated by attribution of a nonparty's citizenship to a party." The Report further explains that Rule 7.1(a)(2) "protects against the risk that a federal court's substantial investment in a case would be lost by a belated discovery … that there is no diversity" in cases involving entities or individuals that take on the citizenship of other parties.

We do not support the change to the proposed new Rule 7.1(a)(2). While the Federal Courts Committee agrees that finding a means to support diversity determinations is a worthwhile goal, the Committee has significant reservations about whether the proposed revision to Rule 7.1 is the appropriate way to address this concern, for the following reasons.

First, Rule 7.1 serves as a tool to support "properly informed disqualification decisions" under Cannon 3C(1)(c) of the Code of Conduct for United States judges, Fed. R. Civ. P. 7.1, Committee Note (2002), not diversity determinations. As such, the disclosures required by the existing Rule 7.1(a) have been "limited"—by design—because "[u]nnecessary disclosures of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and may also create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question." *Id.* The proposed

new Rule 7.1(a)(2) is not so limited. In fact, in some circumstances, Rule 7.1(a)(2) would require disclosure of voluminous information, including about individuals and entities with only indirect and attenuated ownership interests in a party. While those disclosures are ostensibly intended to inform diversity determinations, they also may impact and complicate disqualification determinations, prompt unwarranted motion practice about disqualification, or give rise to unnecessary disqualifications.

Second, Rule 12(h)(3) of the Federal Rules of Civil Procedure authorizes a federal court to determine "at any time that it lacks subject matter jurisdiction" and to "dismiss the action." Federal courts thus already have full discretion and authority to direct the parties before them to provide whatever information the presiding judge deems necessary or appropriate to determine its subject matter jurisdiction *sua sponte* and any such disclosure requests may be tailored to the facts and circumstances of a particular case. By contrast, the proposed revisions to Rule 7.1(a)(2) would effectively mandate that federal courts make such diversity determinations on a predetermined factual record at the outset of every case that invokes diversity jurisdiction, even if (1) the pleading may be dismissed for failure to adequately allege diversity jurisdiction,[1] (2) diversity is adequately alleged but unchallenged, and there is no reason to conclude that federal jurisdiction is not proper,[2] or (3) there is an alternative adequate basis for the exercise of federal jurisdiction over claims for which diversity jurisdiction under 28 U.S.C. § 1332(a) is pleaded in the alternative.[3]

Third, "[t]he burden of persuasion for establishing jurisdiction … remains on the party asserting it." *Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010). *See also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction … It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting it.") (citations omitted); *S. Freedman and Co., Inc. v. Raab*, 180 F. App'x 316, 320 (3d Cir. 2006) ("It is well established that the basis

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[1] *See*, *e.g.*, *Rahab v. Freeman*, 612 F. App'x 528, 529 (10th Cir. 2015) (affirming dismissal for lack of subject matter jurisdiction: "Nor does Rahab allege diversity jurisdiction under 28 U.S.C. § 1332—his original complaint alleged that all parties were citizens of Kansas and his amended complaint said nothing about the parties' citizenship."); *Guar. Nat. Title Co., Inc. v. J.E.G. Assocs.*, 101 F.3d 57, 59 (7th Cir. 1996) ("[I]t is not the court's obligation to lead counsel through a jurisdictional paint-by-numbers scheme. Litigants who call on the resources of a federal court must establish that the tribunal has jurisdiction, and when after multiple opportunities they do not demonstrate that jurisdiction is present, the appropriate response is clear. Counsel have only themselves to blame if they must now litigate this case from scratch in state court."); *Wilkins v. Stapleton*, No. 6:17-cv-1342-Orl-37GJK, 2017 WL 11219132, at *1 (M.D. Fla. Aug. 1, 2017) (dismissing without prejudice for failure to "provide the necessary factual allegations to support" diversity jurisdiction; "if you are unsure about how to properly allege citizenship, do some basic research").

[2] *See*, *e.g.*, *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996) ("A court is not required to conduct a searching inquiry into the truth of every uncontested jurisdictional allegation. If the plaintiff in a diversity suit alleges, and the defendant admits, that the defendant is incorporated in Delaware, the district judge is not required to run to Moody's to see whether it really is a Delaware corporation, or to insist on the production of a certified copy of the defendant's certificate of incorporation.").

[3] *See*, *e.g.*, *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 381 (1959) (permitting claim to proceed against non-diverse party where "an independent basis for federal jurisdiction" existed), *superseded by statute on other grounds*, 498 U.S. 19 (1991); *Palmer v. Hosp. Auth. of Randolph Cty.*, 22 F.3d 1559, 1564 (11th Cir. 1994) ("a court may ignore the citizenship of a plaintiff which has an independent basis of original federal jurisdiction against the defendant").

upon which jurisdiction depends must be alleged affirmatively and distinctly and cannot be established argumentatively or by mere inference.") (citations omitted); Fed. R. Civ. P. 8(a)(1) (requiring a pleading to contain "a short and plain statement of the grounds for the court's jurisdiction"). Some courts have relaxed the burden to permit a plaintiff asserting diversity jurisdiction over an unincorporated entity to "survive a facial challenge" by alleging that none of its "members are citizens of State X." *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 108 (3d Cir. 2015) (holding that the "unincorporated association, which is in the best position to ascertain its own membership, may then mount a factual challenge by identifying any member who destroys diversity"). However, the proposed Rule 7.1(a)(2) would relieve the party invoking diversity jurisdiction of any burden whatsoever by compelling other parties to disclose all of their ownership and citizenship information and the court to determine whether diversity exists, even if the party invoking jurisdiction fails to meet its threshold pleading requirements.

Fourth, the disclosures required by proposed new Rule 7.1(a)(2) exceed what is necessary to determine whether diversity may be defeated. Because § 1332(a) requires complete diversity, no incremental benefit is served by requiring responding parties to disclose the identity or citizenship of more than one individual or entity whose citizen is attributed to that party and is not diverse from the party invoking diversity jurisdiction. *See, e.g., D.B. Zwirn Special Opportunities Fund, L.P. v. Mehrotra*, 661 F.3d 124, 127 (1st Cir. 2011) ("if even one of Zwirn's members is another unincorporated association, and if that association has one member or partner that is either a stateless person or an entity treated like a stateless person, we would not have diversity jurisdiction over this matter"). Although the Committee Note acknowledges that "[d]isclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction," or limited in "appropriate circumstances," such as when "substantial interests in privacy" merit protecting the identity of the parties, the proposed rule presents a conundrum: to seek relief from the disclosure requirement, a party must appear and make a motion, but pursuant to Rule 7.1(b), the disclosure statement "must" be filed with a party's "first appearance."[4]

Fifth, unless the party invoking jurisdiction separately alleges the basis for subject matter jurisdiction for every claim, the application of the disclosure requirements of Rule 7.1(a)(2) to each party in multi-party, multi-claim complaints will be potentially difficult to determine. As a result, some parties will be required to make burdensome disclosures under the Rule even when § 1332(a) may be inapposite.

Sixth, the burden of disclosing the names and citizenship of "every individual or entity whose citizenship is attributed to that party at the time the action is filed" is potentially very substantial. For some unincorporated entities, Rule 7.1(a)(2) could require tracing many layers of partners, members or owners and the disclosure of the identities of potentially thousands of

[4] In some jurisdictions, early motion practice seeking relief from disclosure requirements may put waivable defenses such as personal jurisdiction or insufficient service at risk. *See Gerber v. Riordan*, 649 F.3d 514, 520 (6th Cir. 2011) ("it is clear that Defendants' filing of a general appearance with the district court constituted a voluntary acceptance of the district court's jurisdiction, and therefore, a waiver of Defendants' personal jurisdiction defense"); *PaineWebber Inc. v. The Chase Manhattan Private Bank (Switzerland)*, 260 F.3d 453, 460–61 (5th Cir. 2001) ("[W]hen 'a party seeks affirmative relief from a court, it normally submits itself to the jurisdiction of the court with respect to the adjudication of claims arising from the same subject matter.").

individuals and entities and each of their citizenship as of the filing date.[5] That information, which may not be necessary for a diversity determination, would be time-consuming and difficult to assemble and implicates potential privacy interests of parties whose interests in the litigation are remote or non-existent. In some circumstances, the burden would be compounded by the need for a responding party to undertake legal research to determine—under standards that vary by state and type of entity, and that are the subject of evolving and conflicting case law—which individuals' and entities' citizenship should be included in the disclosure.[6]

Finally, the goal that the proposed revision to Rule 7.1(a)(2) serves is a problem that should be addressed by the legislature, not by rule change. As explained recently in *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S.Ct. 1012 (2016):

> Exercising its powers under Article III, the First Congress granted federal courts jurisdiction over controversies between a "citizen" of one State and "a citizen of another State." 1 Stat. 78. For a long time, however, Congress failed to explain how to determine the citizenship of a nonbreathing entity like a business association. In the early 19th century, this Court took that silence literally, ruling that only a human could be a citizen for jurisdictional purposes. *Bank of United States v. Deveaux*, 5 Cranch 61, 86–91, 3 L.Ed. 38 (1809). If a "mere legal entity" like a corporation were sued, the relevant citizens were its "members," or the "real persons who come into court" in the entity's name. *Id*., at 86, 91.
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> This Court later carved a limited exception for corporations, holding that a corporation itself could be considered a citizen of its State of incorporation. *See Louisville, C. & C.R. Co. v. Letson*, 2 How. 497, 558, 11 L.Ed. 353 (1844). Congress etched this exception into the U.S. Code, adding that a corporation should also be considered a citizen of the State where it has its principal place of business. 28 U.S.C. § 1332(c) (1958 ed.). <u>But Congress never expanded this grant of citizenship to include artificial entities other than corporations, such as joint-stock companies or limited partnerships</u>.

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[5] *See, e.g., Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010) ("[A]s with partnerships, where an LLC has, as one of its members, another LLC, the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be to determine the citizenship of the LLC."); *CNX Gas Co., LLC. v. Lloyd's of London*, Civil Action No. 2:19-cv-699-WSS, 2019 WL 5258166, at *1 (W.D. Pa. Oct. 17, 2019) ("Lloyd's unique structure as merely a forum for thousands of underwriters to buy shares of risk makes it difficult to execute the citizenship analysis required to determine diversity jurisdiction."); *Ascension Par. Sales & Use Tax Auth. v. Turner Bros. Crane & Rigging*, No. CIV.A. 10-248-BAJ, 2011 WL 1884004, at *4 (M.D. La. Apr. 29, 2011), *report and recommendation adopted*, No. CIV.A. 10-248-BAJ, 2011 WL 1897401 (M.D. La. May 18, 2011) (recognizing, in the context of a diversity analysis, the "fact that … the partnership or membership [may] consist[ ] of several or thousands of partners/members … for multi-tiered business entities").

[6] *See, e.g., Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012 (2016) ("when a trustee files a lawsuit or is sued in her own name, her citizenship is all that matters for diversity purposes" but this rule does not "limit[ ] an entity's membership to its trustees just because the entity happens to call itself a trust"); *CNX Gas Co.*, 2019 WL 5258166, at *6 ("The nature of the Lloyd's business model raises questions of whose citizenship is relevant for diversity of citizenship analysis. A circuit split exists on this issue."); *WNWSR, L.L.C. v. Chesapeake Energy Corp.*, No. CV 4:15-1860, 2015 WL 7357840, at *4 (S.D. Tex. Nov. 19, 2015) ("The issue of determining the citizenship of noncorporate entities, however, is not entirely free from doubt.").

Id. at 2015 (emphasis added).

If Congress shared the Civil Rules Committee's concern that federal courts cannot adequately address the belated discovery that diversity is lacking with the tools currently available to the courts, it stands to reason that Congress would expand § 1332(c) to identify a simpler method to determine the citizenship of non-corporate entities.

Based on the foregoing considerations, this Committee recommends deleting Rule 7.1(a)(2) from the proposed amendment to Rule 7.1(a).

Respectfully submitted,

Federal Courts Committee
Harry Sandick, Chair

<u>Drafting Subcommittee</u>
Brian Fraser
Richard Hong
Mara Leventhal
Kiran Rosenkilde
Justin Weddle

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