No. _____

IN THE

Supreme Court of the United States

ELIAS KIFLE AND ETHIOPIAN REVIEW, INC.,
Petitioners,

v.

JEMAL AHMED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NOAH C. GRAUBART
Counsel of Record
FISH & RICHARDSON P.C.
1180 Peachtree St., NE
21st Floor
Atlanta, GA 30309
(404) 892-5005
graubart@fr.com

JONATHAN B. BRIGHT
FISH & RICHARDSON P.C.
1180 Peachtree St., NE
21st Floor
Atlanta, GA 30309
(404) 892-5005
jbright@fr.com

QUESTION PRESENTED

It is hornbook law that a district court must ordinarily assess its subject-matter jurisdiction based on the facts as they exist when the complaint is filed. A narrow exception to that rule permits a federal court to create subject matter jurisdiction retroactively by dismissing a diversity-destroying party in a case incorrectly premised on diversity jurisdiction. However, this Court has emphasized that this authority exists only where the non-diverse party is dispensable under Federal Rule of Civil Procedure 19, and should be exercised "sparingly."

While the existence of this authority is now settled, the Courts of Appeals are deeply divided over the standard of review of a District Court's dispensability determination, applying standards varying from "abuse of discretion" to "de novo," depending on which subsection of Rule 19 is at issue and to what extent the District Court's dispensability determination rests on questions of law or factual findings.

The question presented is:

What is the standard of review for a District Court's determination that a required party is dispensable under Federal Rule of Civil Procedure 19?

RULE 29.6 STATEMENT

Petitioner Elias Kifle is not a corporate entity.

Petitioner Ethiopian Review, Inc. was a private corporation without a parent company. No publicly traded company or corporation owns an interest in Ethiopian Review, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Elias Kifle and Ethiopian Review, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The District Court's unpublished order and opinion is reproduced at Pet. App. 7a-19a.[1] The Eleventh Circuit's opinion is reported at 728 F. App'x 934, and is reproduced at Pet. App. 1a-6a. The Eleventh Circuit's orders denying Petitioners' petitions for rehearing and rehearing *en banc* are not reported, and are reproduced at Pet. App. 20a-23a.

JURISDICTION

The Court of Appeals entered judgment on March 19, 2018. Pet. App. 1a-6a. On May 25, 2018, the Court of Appeals denied petitioners' petitions for panel rehearing and rehearing *en banc*. Pet. App. 7a-19a. On August 16, 2018, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including October 22, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Federal Rules of Civil Procedure 19 and 21, and also 28 U.S.C. § 1332, which

---

[1] The District Court's docket entries are cited herein as "(D__.)" The appendix to this petition is cited as "Pet. App. __."

provides district courts with subject-matter jurisdiction in diversity actions. Rules 19 and 21 are reproduced in full at Pet. App. 24a-27a. Section 1332 of Title 28 is reproduced in full at Pet. App. 28a-38a.

INTRODUCTION

For more than two centuries, Federal diversity jurisdiction has required "complete" diversity, so that "the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005); *Strawbridge v. Curtiss*, 3 Cranch 267 (1806).

Normally, complete diversity must exist at the time the Complaint was filed. *Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 569 (2004); *Mollan v. Torrance*, 9 Wheat. 537, 539 (1824) ("[T]he jurisdiction of the court depends upon the state of things at the time of the action brought"). Hence, a post-filing change in a party's citizenship that creates complete diversity cannot cure a jurisdictional defect at the time of filing, even if the lack of subject-matter jurisdiction is raised only after trial. *Dataflux*, 545 U.S. at 574-76.

There is, however, a narrow exception to the time-of-filing rule. Defects in diversity jurisdiction can be "cured by the dismissal of the party that had destroyed diversity." *Id.* at 572; *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989). However, a lack of subject-matter jurisdiction can be cured in this manner only if the diversity-destroying party is

"dispensable" under Federal Rule of Civil Procedure 19. *Newman-Green*, 490 U.S. at 832-33, 835-36; *see also Horn v. Lockhart*, 17 Wall. 570, 579 (1873) ("[T]he question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether . . . they are indispensable parties.").[2] And even where the diversity-destroying party is dispensable, this narrow exception to the time-of-filing rule "should be exercised sparingly." *Newman-Green*, 490 U.S. at 837.

Despite the frequency with which courts' dispensability determinations under Rule 19 impact subject-matter jurisdiction, the Courts of Appeals apply widely varying standards of review to these determinations. To illustrate, the Sixth Circuit reviews a district court's Rule 19(a) analysis for an abuse of discretion, but reviews its Rule 19(b) analysis *de novo*. *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1346 (6th Cir. 1993). In contrast, the Third and D.C. Circuits review Rule 19(b) determinations for an abuse of discretion, while applying de novo review to at least some subsections within Rule 19(a). *E.g.*, *Nanko Shipping, USA v. Alcoa, Inc.,* 850 F.3d 461, 464 (D.C. Cir. 2017); *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1495 n.4 (D.C. Cir. 1995) (noting that the D.C. Circuit "reviews determinations under Rule 19(a)(2)(ii) de novo"); *Huber v. Taylor*, 532 F.3d 237, 247 (3d Cir. 2008); *Alpha Painting & Constr. Co. v. Del. River Port Auth. Of Pa. & N.J.*, 853 F.3d 671, 687 n.21 (3d Cir. 2017). Indeed, the Courts of Appeals

---

[2] The word "indispensable" was removed from Rule 19 in 2007, but this change was stylistic only. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 855-56 (2008).

have explicitly recognized the split in authority in this area. *E.g.*, *Nat'l Union Fire Ins. Co. v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 250 & n.7 (4th Cir. 2000); *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 132 n.3 (2d Cir. 2013).

In this case, the Eleventh Circuit applied particularly lax review, further widening the split between the circuits. Unlike the Sixth, Third, and D.C. Circuits, the Eleventh Circuit applied an "abuse of discretion" standard to all elements of Rule 19. Pet. App. 1a-6a. And whereas other circuits applying an "abuse of discretion" standard further specify that underlying questions of law are reviewed de novo, *e.g.*, *Bacardi Int'l Ltd. v. Suarez & Co.*, 719 F.3d 1, 8-9 (1st Cir. 2013), the Eleventh Circuit drew no such distinction here, instead treating the District Court's dispensability determination as purely discretionary. Pet. App. 17a-19a. The Eleventh Circuit's lack of scrutiny of the District Court's analysis, even as to wholly legal issues, led it to erroneously affirm a determination that Petitioner Elias Kifle was dispensable even in a suit primarily seeking injunctive relief against him.

This Court should grant this petition to resolve the split among the circuits as to the appropriate standard of review under Rule 19, providing definitive guidance regarding an important question affecting the subject-matter jurisdiction of the federal courts.

STATEMENT OF THE CASE

1. This is a defamation case against Elias Kifle, an Ethiopian-born journalist and prominent critic of the Ethiopian government. (D144-7 at 2-3; D144-8 at

9.) Kifle has spent decades writing and publishing news and opinion articles to fight corruption in Ethiopia. (*Id.*; D1 ¶ 7.) Kifle's efforts to expose corruption in Ethiopia have earned him the ire of the Ethiopian government. Kifle's publication, the *Ethiopian Review*, is banned in Ethiopia. (D144-7 at 2-3.) Indeed, Ethiopia has gone so far as to convict Kifle of treason *in absentia*, sentencing him to life in prison. (D144-8 at 9; D26 at 2-3.) In addition to his work writing and publishing for the *Ethiopian Review*, Kifle incorporated Petitioner Ethiopian Review, Inc. ("ERI") in 2011 to raise funds to support families of fellow journalists jailed by the Ethiopian regime. (D22; D26 at 8-9; D150-1; D158-1 ¶ 11; D158-5.) ERI was dissolved in 2013. (D150-1.)

On March 15, 2012, an unrelated publication called the *Saudi Gazette* published an article stating that Ethiopia was planning "to send 45,000 maids to the Kingdom [of Saudi Arabia] every month," citing "an informed source at the Ethiopian Embassy in Saudi Arabia." (D1 ¶ 16 & Ex. A.) The *Saudi Gazette* article further stated that there was "increasing demand for Ethiopian housemaids by Saudi families" because, *inter alia*, "the percentage of runaways is low." (*Id.*)

Kifle republished this article on the *Ethiopian Review* website the next day, with commentary condemning the plans described in the *Saudi Gazette* article. (D1 ¶ 18.) Approximately two weeks later, Kifle published another article, alleging that Saudi/Ethiopian businessman Mohammed Hussein Al Amoudi was involved in the plans to send Ethiopian "maids"

to Saudi Arabia. (D1 ¶ 19 & Ex. C.) The article further identified Respondent Jemal Ahmed "Al Amoudi's human trafficker in Ethiopia." (*Id.*) Ahmed is a prominent Ethiopian businessman with significant business interests around the word, including Horizon Plantations PLC and Saudi Star Agricultural Developments PLC, which have been linked to human rights abuses committed by the Ethiopian military. (D1 ¶ 3; D11 Ex. F; D99 Ex. 44; D144-6; Jan. 29, 2015, Hr'g Tr. 11:4-12:25.)

2. Ahmed brought the underlying action in the United States District Court for the Northern District of Georgia, alleging that Kifle's article implicating Ahmed in participating in human trafficking constituted defamation under Georgia state law, O.C.G.A. § 51-5-1 *et seq*. (D1 ¶¶ 39-49.) Ahmed asserted diversity jurisdiction under 28 U.S.C. § 1332(a). (D1 ¶ 12.) In his complaint, Ahmed identified himself as "a citizen and resident of the country of Ethiopia" and alleged that Kifle "is an alien admitted to the United States for permanent residence." (D1 ¶¶ 3, 5.)

Unable to afford counsel and confident that the veracity of his serious accusations would be vindicated, Kifle proceeded *pro se*.[3] Even though he lacked representation, Kifle's first responsive pleading identified a jurisdictional defect that Ahmed—represented

[3] Because Kifle could not afford counsel, ERI went unrepresented, *see Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985) ("[Corporations] must be represented by licensed counsel."), and the District Court entered default judgment against it. (D92, D93.)

by one of the world's largest law firms—had overlooked. Specifically, Kifle asserted that "there is no diversity of citizenship" because "Plaintiff Ahmed is an Ethiopian citizen" and "I am an Ethiopian citizen." (D11 at 4.) Ahmed did not respond to this jurisdictional issue, except by mischaracterizing it as "based on the doctrine of *forum non conveniens*." (D13 at 19.) And despite the District Court's "independent obligation to determine whether subject-matter jurisdiction exists," *Arbaugh v. Y&C Corp.*, 546 U.S. 500, 514 (2006), the District Court did not take up the jurisdictional issue either. (D15.) In fact, there is no indication that the District Court considered its subject-matter jurisdiction at all, notwithstanding the fact that Kifle correctly and explicitly identified a lack of jurisdiction in his *pro se* answer that diversity jurisdiction did not exist in a case between two Ethiopian citizens.

The case against Kifle thus proceeded to discovery on the merits despite a lack of subject-matter jurisdiction. Ahmed served discovery requests seeking, *inter alia*, information regarding the identities of Kifle's confidential foreign sources. (*See* D43 at 3-4.) Kifle did not respond to Ahmed's discovery requests, but informed the Court that his associates abroad would face "grave and imminent danger" if he provided Ahmed with "the information sought." (D40 at 1.)

The District Court acknowledged Kifle's confidentiality concerns, but held that they "can be addressed in an appropriate protective order." (D43 at 6-7.) However, once the District Court entered a protective order, Ahmed immediately filed a motion for "clarifi-

cation" of the protective order. (D46.) Ahmed's motion specifically requested that Ahmed himself be permitted "full access" to even confidential "documents and information exchanged in this case." (*Id.* at 1-2.) The Court granted that motion even though it defeated the entire purpose of the protective order. (D48.) Kifle therefore refused to disclose the identities of his sources in discovery, arguing that doing so would be "as good . . . as a death warrant against [his] sources in Ethiopia." (D66 at 1-2.)[4]

Adopting a magistrate judge's recommendation, the District Court held that Kifle's refusal to turn over the identities of his sources to Ahmed constituted failure to comply with a discovery order under Federal Rule of Civil Procedure 37(b)(2)(A) and entered the ultimate penalty of default judgment as a sanction. (D68, D70.) The district court awarded compensatory damages for the alleged defamation ($145,210) and

---

[4] Kifle's concerns were not farfetched. The U.S. Department of State, Bureau of Democracy, Human Rights and Labor published a report on Ethiopia in 2007 describing *inter alia*, unlawful killings by police, oppression of free speech, unlawful killings of opposition supporters, arbitrary arrest and detention, harassment of journalists, exploitation of children, and human trafficking as human rights abuses reported during the previous year. (D144-8.) The State Department's 2014 report makes clear that these problems persisted to the time when Kifle refused to disclose his confidential sources, identifying "restrictions on freedom of expression . . . including through arrests; politically motivated trials; and harassment and intimidation of opposition members and journalists" as among "the most significant human rights problems" in Ethiopia at the time. U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor, *Ethiopia 2014 Human Rights Report*, https://www.state.gov/documents/organization/236570.pdf.

punitive damages ($50,000) and attorneys' fees ($233,700) for Kifle's alleged litigation misconduct of not disclosing his confidential sources. (D92 at 21, D93.)

3. Following these default judgments, Petitioners obtained *pro bono* counsel. Shortly thereafter, Petitioners moved to vacate the default judgments and dismiss the case for lack of subject-matter jurisdiction. (D139 at 1-2.) The district court granted that motion, nullifying the default judgments. (D160.)

Ahmed appealed and moved the Eleventh Circuit to "sever" Kifle or, alternatively, remand for a ruling on Ahmed's motion to sever filed below, *see* (D162.) The Eleventh Circuit remanded, instructing the District Court to determine whether Kifle, as the diversity-destroying party, could be retroactively severed from the case under Federal Rule of Civil Procedure 21. (*See* Appeal No. 15-15604, Order dated Sept. 1, 2016.)

On remand, the District Court found that Kifle was dispensable under Rule 19, dismissed him, and reinstated the default judgment against ERI (D178 at 10, 13-14; D179 at 1.) The District Court's decision relied upon the bare, unsupported allegations of Ahmed's Complaint—allegedly deemed admitted through Petitioners' default, Pet. App. 5a, 12-13a, and upon alleged misconduct by Kifle. *Id.* at 4a, 10a. The Court reasoned that Kifle was not a required party under Rule 19(a)(1)(A) because he is supposedly jointly and severally liable with ERI. *Id.* at 16a-18a. The Court did not articulate any basis for its assump-

tion that Kifle and ERI were jointly and severally liable. *Id.* The District Court further held that Kifle was not required under Rule 19(a)(1)(B) because Kifle's interests would allegedly not be prejudiced by a suit against ERI alone. *Id.* at 17a.

The District Court alternatively held that, under Rule 19(b), the case should proceed without Kifle even if he were required under Rule 19(a). *Id.* at 17a-19a. The Court again relied heavily on supposed "joint and several liability" between Kifle and ERI.[5] *Id.* It further held that Ahmed could obtain complete relief against ERI alone, even though Ahmed sought injunctive relief against Kifle. *Id.* at 18a. Having found Ahmed dispensable, the District Court granted Ahmed's motion to sever Kifle from the case against ERI under Federal Rule of Civil Procedure 21 and dismissed the action as to Kifle. *Id.* at 19a.

Kifle and ERI timely appealed. (D180.) An Eleventh Circuit panel heard oral argument on March 9, 2018 and affirmed on March 19, 2018. It held that the District Court's decision dismissing Kifle to retroactively create subject-matter jurisdiction post-judgment was subject exclusively to deferential abuse-of-discretion review. Pet. App. 5a. It further held that the District Court did not abuse its discretion in finding Kifle dispensable because the District Court found Kifle and ERI to be jointly and severally liable. *Id.* at 4a-6a.

---

[5] As discussed below, Georgia abolished joint and several liability in tort cases like this one prior to this action.

Petitioners requested panel or *en banc* rehearing on both of these conclusions. The Eleventh Circuit denied this request. Pet. App. 20a-23a.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Are Irreconcilably Split Regarding the Standard of Review under Rule 19

The Courts of Appeals are badly fractured regarding the appropriate standard of review of district courts' Rule 19 determinations. This confusion is particularly problematic in cases—like this one—where the District Court conducted its Rule 19 analysis to determine whether it could and should retroactively create subject-matter jurisdiction in a case erroneously premised on diversity jurisdiction. This Court should grant this Petition to resolve the acknowledged and intractable division among the circuits in this area.

Confusion regarding the standard of review governing a district court's Rule 19 determinations is longstanding. In 1982, the Ninth Circuit observed that that "the vast majority of appellate decisions in this court and others engage in an independent analysis under Rule 19(b) and contain no reference to any standard of review whatever." *Walsh v. Centeio*, 692 F.2d 1239, 1241 (9th Cir. 1982).

Even decades later, the Circuits have still not coalesced around a consistent standard. Eighteen years after *Walsh*, the Fourth Circuit observed that "[t]he

circuits vary greatly in the standard of review to apply to a district court's Rule 19 determination." *Nat'l Union*, 210 F.3d at 250 & n.7. Another thirteen years later, the Second Circuit noted that "[t]he standard of review applicable to Rule 19(b) is apparently the subject of a circuit split." *Marvel Characters,* 726 F.3d at 132 n.3.

The landscape today is so convoluted and inconsistently applied as to evade straightforward description. Different circuits apply different standards of review depending on which subsection of Rule 19 is at issue. Moreover, some circuits distinguish between the standard of review applied to perceived questions of law or questions of fact underlying a district court's analysis and the district court's ultimate determination under Rule 19, whereas other circuits have not drawn such distinctions.

In the Sixth Circuit, the standard of review depends on whether subsection (a) or subsection (b) of Rule 19 is at issue. "[A] Rule 19(a) finding that a party is necessary to an action" is reviewed "under an abuse of discretion standard." *Keweenaw Bay*, 11 F.3d at 1346. But "a Rule 19(b) determination that a party is indispensable to an action" is reviewed "*de novo*." *Id.*; *see also Local 670 v. Int'l Union, United Rubber, Cork, Linoleum & Plastic Workers*, 822 F.2d 613, 618-619 (6th Cir. 1987) ("[A] determination that a party is 'indispensable,' thereby requiring dismissal of an action, represents a legal conclusion reached after balancing the prescribed factors under Rule 19. In that sense, it becomes a conclusion of law which this court reviews *de novo*." (citations omitted)).

The D.C. Circuit also applies different standards of review depending on which subsection is at issue, but the standards are almost diametrically opposed to those of the Sixth Circuit. Whereas the Sixth Circuit treats Rule 19(b) determinations as questions of law reviewed *de novo*, the D.C. Circuit reviews "Rule 19(b)'s 'equity and good conscience test' for abuse of discretion," although any questions of law underlying that determination are reviewed de novo. *Nanko Shipping*, 850 F.3d at 464. Yet, the D.C. Circuit also departs from the Sixth Circuit's practice of reviewing Rule 19(a) determinations for an abuse of discretion. Specifically, the D.C. Circuit carves out Rule 19(a)(1)(B)(ii)[6] for *de novo* review. *Kickapoo*, 43 F.3d at 1495 n.4 (noting that the D.C. Circuit "reviews determinations under Rule 19(a)(2)(ii) de novo"); *W. Md. Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 963 n.6 (D.C. Cir. 1990). The D.C. Circuit does not appear to have explicitly articulated any standard of review to other portions of Rule 19(a).

The Third Circuit likewise applies varying standards of review. Like the D.C. Circuit, the Third Circuit reviews Rule 19(b) determinations for an abuse of discretion. *Huber*, 532 F.3d at 247. But whereas the D.C. Circuit explicitly reviews underlying legal questions de novo, the Third Circuit does not appear to have drawn such a distinction. *See id.* The Third

---

[6] The D.C. Circuit decisions announcing this rule predate the 2007 Amendment to Rule 19, which reorganized Rule 19 so that former Rule 19(a)(2)(ii) is now Rule 19(a)(1)(B)(ii). But the 2007 changes "were stylistic only" and "the substance and operation of the Rule both pre- and post-2007 are unchanged." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 855-56 (2008).

Circuit has drawn that distinction for Rule 19(a), however, holding that underlying questions of law are reviewed de novo for Rule 19(a), whereas factual findings are reviewed for clear error. *Id.* Finally, the Third Circuit also "undertake[s] plenary review of a District Court's ruling under Rule 19 that an absent party's rights were not necessary," *Alpha Painting*, 853 F.3d at 687 n.21, which would seem to require complete de novo review of at least determinations under Rule 19(a)(1)(B).

The First, Second, and Tenth Circuits apply an abuse of discretion standard to all Rule 19 determinations, regardless of which subsection is at issue, but all review questions of law affecting the determination de novo. *Am. Trucking Ass'n*, 795 F.3d at 356-57; *Bacardi Int'l Ltd. v. Suarez & Co.*, 719 F.3d 1, 8-9 (1st Cir. 2013); *Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999).

Similarly, the Eighth Circuit reviews Rule 19(b) determinations solely for an abuse of discretion, *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998), and reviews "de novo any conclusions of law informing the district court's Rule 19(a) determination." *Gwartz v. Jefferson Mem'l Hosp. Ass'n*, 23 F.3d 1426, 1428 (8th Cir. 1994). The Eighth Circuit does not appear to have otherwise articulated a standard of review under Rule 19(a).

The Eleventh Circuit, as it did in the decision below, generally applies an abuse of discretion standard to both Rule 19(a) and (b) determinations, without applying a different standard to questions of law. *Laker*

Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 847 (11th Cir. 1999); *Mann v. City of Albany, Ga.*, 833 F.2d 999, 1003 (11th Cir. 1989).

Finally, the Seventh Circuit has sought to avoid this quagmire by expressly declining to adopt an ultimate standard of review for Rule 19 determinations. *In re Veluchamy*, 879 F.3d 808, 819 (7th Cir. 2018); *Askew v. Sheriff of Cook Cty., Ill.*, 568 F.3d 632, 634 (7th Cir. 2009). However, the Seventh Circuit has held that a "clear error" standard applies to any underlying factual determinations, *Veluchamy*, 879 F.3d at 819, and that de novo review applies to any legal conclusions, *Davis Companies v. Emerald Casino, Inc.*, 268 F.3d 477, 482 (7th Cir. 2001). In sum, there is a clear and acknowledged division of authority regarding the appropriate standard of review, at least under Rule 19(b) and certain subsections of Rule 19(a).

In recent years, this Court has repeatedly granted certiorari to resolve circuit splits regarding the applicable standard of review. *E.g.*, *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 583 U.S. ___, 138 S. Ct. 960 (2018); *McLane Co. v. EEOC*, 581 U.S. ___, 137 S. Ct. 1159 (2017). The Court should take this opportunity to resolve another deep and longstanding split between the Circuit Courts regarding the appropriate standard of appellate review.

II. This Case Presents an Ideal Vehicle for Clarifying an Important Issue Affecting the Jurisdiction of the Federal Courts

The appropriate standard of review for a district court's Rule 19 determinations is important. In many cases, like this one, the Rule 19 determination also determines whether the court can cure a jurisdictional defect and retroactively exercise subject-matter jurisdiction over the entire case. *Newman-Green,* 490 U.S. at 829, 837-38. This Court "emphasize[d] that such authority should be exercised sparingly," *id.* at 837, because—as Justice Kennedy observed—this is an "awesome power." *Id.* at 839 (Kennedy, J., dissenting).

After all, "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." *Ex Parte McCardle*, 7 Wall. 506, 514 (1868). Any approach that "carries the courts beyond the bounds of authorized judicial action . . . offends fundamental principles of separation of powers." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). That is why "[t]he requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception.'" *Id.* at 94-95 (quoting *Mansfield, C. & L.M.R. v. Swan*, 111 U.S. 379, 382 (1884)).

For similar reasons, this Court has repeatedly emphasized the need for clarity and uniformity in the application of rules bearing on jurisdiction. *E.g.*, *Dataflux*, 541 U.S. at 582 ("Uncertainty regarding the

question of jurisdiction is particularly undesirable."); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. ___, 136 S. Ct. 1562, 1578 (2016) (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)); *Michigan v. Long*, 463 U.S. 1032, 1037-39 (1983); *Lapides v. Bd. of Regents of Univ Sys. of Ga.*, 535 U.S. 613, 621 (2002). But that clarity and uniformity will elude litigants as long as the standard of review for jurisdiction-determinative Rule 19 issues remains a patchwork of varying levels of deference in different circuits.

This Court had an opportunity to articulate the appropriate standard of review under Rule 19(b) in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), but demurred because the judgment at issue "could not stand … [w]hatever the appropriate standard of review." 553 U.S. 851, 864 (2008).

In contrast, the District Court's decision here could not have withstood any lesser standard of review than the pure "abuse of discretion" standard applied by the Eleventh Circuit. Indeed, one member of the Eleventh Circuit panel confirmed during oral argument that the standard of review could be dispositive. (Eleventh Circuit Oral Argument at 7:55) ("There seems to be some disagreement about what

our standard of review is, which—I mean, just speaking for myself—might determine the outcome of the appeal.").[7]

This case is also an unusually clean vehicle for resolving the standard of review issue. Because the only judgments rendered in the case are default judgments, there are no rulings on the merits—at trial or otherwise—which could complicate review of the Rule 19 determination.

As discussed above, the circuit split regarding the standard of review for Rule 19 has now persisted for decades, so it is unlikely that further consideration in the Courts of Appeals would be fruitful. And it is unlikely that this Court will be presented with as clean of an opportunity to address this important issue again in the near future. The Court should therefore accept this opportunity to take up the issue explicitly left open in *Republic of Philippines v. Pimentel* and definitely resolve the entrenched circuit split over the appropriate standard of review.

III. The Eleventh Circuit Erred in Treating Dispensability under Rule 19 as Purely Discretionary

The District Court's Rule 19 assessment in this case was manifestly unreasonable, and the Eleventh Circuit upheld its determination that Kifle was dis-

---

[7] An audio recording of oral argument at the Eleventh Circuit is available at http://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/16-17008.mp3?download=1

pensable only by treating the matter as purely discretionary.[8] Thus, the Eleventh Circuit did not address numerous problems with the District Court's analysis, as discussed below. Pet. App. 1a-6a. Instead, the Eleventh Circuit held that the District Court did not abuse its discretion solely because Kifle and ERI were allegedly jointly and severally liable for damages. Pet. App. 5a-6a.

For example, the District Court's order faulted Kifle—a *pro se* litigant with no legal training—for "only" mentioning the lack of diversity jurisdiction in his initial pleading. Pet. App. 10a. But that criticism ignores the District Court's own independent obligation to confirm its subject-matter jurisdiction, *Arbaugh*, 546 U.S. at 514, as well as its obligation to interpret Kifle's *pro se* filings liberally. *E.g.*, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The District Court then relied on Georgia's statute of limitations for libel actions to conclude that Rule 19(b)(4) weighed against dismissal, *see* Pet. App. 18a (citing O.C.G.A. § 9-3-33), ignoring the fact that Ahmed could have timely brought a state court action if he had not disregarded Kifle's prompt identification of the jurisdictional defect in his very first responsive pleading.

The District Court's analysis also improperly relied on Kifle and ERI having purportedly been "deemed to have admitted" the allegations of Ahmed's

---

[8] Indeed, the Eleventh Circuit should have reversed even under the abuse of discretion standard it purported to apply because "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

complaint based on default judgments entered earlier in the litigation. Pet. App. 12a-13a. But the rule that well-pleaded allegations are admitted by virtue of a default judgment "has no bearing on an inquiry into whether the default judgment itself is void for lack of subject matter jurisdiction." *Transatlantic Mar. Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 108 (2d Cir. 1997). Indeed, the District Court here had already vacated the default judgments for lack of jurisdiction. (D160.) To rely on those very same default judgments as a basis retroactively to confer subject matter jurisdiction indisputably lacking at the time was clear legal error.

This Court's decision in *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee* further underscores the District Court's error in relying on purported admissions arising out of default judgments. 456 U.S. 694 (1982). In *Insurance Corporation of Ireland*, the district court had issued an order deeming *personal* jurisdiction established as a discovery sanction under Federal Rule of Civil Procedure 37(b)(2)(A). *Id.* at 698-99. This Court held that application of Rule 37(b)(2)(A) to establish personal jurisdiction did not violate the Due Process Clause. *Id.* at 701-07. This Court explained that *personal* jurisdiction, unlike *subject-matter jurisdiction* could be waived, and that "[a] sanction under Rule 37(b)(2)(A) consisting of a finding of personal jurisdiction has precisely the same effect" as a waiver. *Id.* at 705.

In contrast, the Court explained that subject-matter jurisdiction is "a restriction on federal power," such that "no action of the parties can confer subject-matter jurisdiction upon a federal court." *Id.* at 702.

Hence, neither waiver nor estoppel can establish subject-matter jurisdiction. *Id.* It follows from this Court's reasoning that Rule 37(b)(2)(A) sanctions also cannot be used to establish subject-matter jurisdiction. *See id* at 701-07. Yet that is precisely what the District Court did here—it established its own subject-matter jurisdiction only by holding that Kifle, and otherwise diversity-destroying party, was dispensable under Rule 19. Pet. App. 7a-19a. And it reached that conclusion only by relying on allegations against Kifle deemed admitted based on a default judgment entered under Rule 37(b)(2)(A). *Id.*; (D68, D70.)

The District Court compounded these errors by applying an erroneous standard in evaluating whether the court could "accord complete relief among the existing parties" in Kifle's absence, Fed. R. Civ. P. 19(a)(1)(A), and relatedly "whether a judgment rendered in [Kifle's] absence would be adequate," *see* Fed. R. Civ. P. 19(b)(3). While the District Court's analysis focused on damages, Ahmed's Complaint and conduct confirms that he sought, first and foremost, equitable relief from Kifle. (See Hr'g for Def. Kifle to Show Cause 10:6-20, March 10, 2015; D1 at 13 (seeking a "declaration that the statements by Defendants Kifle and the [ERI] . . . are false and defamatory").) Complete relief cannot be provided where a plaintiff seeks specific performance from a particular party that is absent from the litigation. *See Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm. v. Eldredge*, 459 U.S. 917, 920-22 (1982) (Rehnquist, J., dissenting from denial of certiorari) (explaining that employers accused of discriminatory practices were

required parties where the relief sought included injunctive relief directed at their hiring practices); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1280 (11th Cir. 2003) (finding complete relief could not be afforded where the plaintiff sought an injunction requiring the absent party "to run a particular advertisement on its bus shelters").

Even as to damages, the District Court's reasoning ignores the pragmatic considerations that are supposed to be paramount under Rule 19. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 106-07, 119-21 & n.16 (1968). The non-profit, ERI, has been dissolved for years and has no assets. (D150-1.) The only possibility of Ahmed recovering any damages would thus lie in an attempt to enforce the judgment against ERI against Kifle—the supposedly unnecessary party—by piercing the corporate veil. Tellingly, Ahmed's counsel refused to disclaim an intent to do so during oral argument before the Eleventh Circuit. (Eleventh Circuit Oral Argument at 21:00-22:33.) As this Court explained in *Pimentel*, "adequacy" in the context of Rule 19(b)(3) "refers to the 'public stake in settling disputes by wholes, whenever possible.'" 553 U.S. at 870 (quoting *Provident Bank*, 390 U.S. at 111). That standard can hardly be satisfied where the only hope of any recovery lies in follow-on litigation against the supposedly dispensable party.

The District Court likewise applied too narrow a standard in evaluating whether Kifle has "an interest relating to the subject of the action," Fed. R. Civ. P. 19(a)(1)(B), which would be prejudiced by a judgment in his absence. Fed. R. Civ. P. 19(b)(1). In particular,

the District Court focused exclusively on the extent to which a judgment for damages might bind Kifle in later litigation. Pet. App. 17a. But that analysis wrongly ignores Kifle's more fundamental interest in protecting his own free expression.

There have long been strict limits on the use of libel actions like Ahmed's to silence political speech by journalists like Kifle. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Those limits recognize "an individual's right to participate in the public debate through political expression," and "are important regardless whether the individual is, on the one hand, 'a lone pamphleteer[] or street corner orator[] in the Tom Paine mold,' or is, on the other, someone who spends 'substantial amounts of money in order to communicate [his] political ideas through sophisticated' means." *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985)) (alterations in the original).

Kifle is a journalist whose life's work has been exposing political corruption, (D144-7 at 2-3; D144-8 at 9), and the subject matter of his article—allegations of human trafficking of tens of thousands of young girls every month, (D1 ¶¶ 17-19 & Ex. A-C)—is unquestionably a matter of grave public concern. The District Court's suggestion that Kifle had no interest that might be prejudiced by adjudicating whether or not his article was libelous in his absence flies in the face of Kifle's constitutionally-protected individual rights to free speech and free press. *E.g.*, *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) ("[I]mperative is the need to preserve inviolate the constitutional rights of

free speech, free press and free assembly in order to maintain the opportunity for free political discussion.").

As discussed above, the Eleventh Circuit did not consider these issues due to the standard of review, instead upholding the District Court's Rule 19 determination based solely on alleged joint and several liability between Kifle and ERI. Pet. App. 5a-6a. But purported joint and several liability was no basis for concluding that Kifle is dispensable on the facts of this case for at least two reasons.

First, the District Court's joint and several liability determination lacks any legal basis. The Georgia Tort Reform Act of 2005 abolished joint and several liability in tort cases, including Ahmed's defamation action. Ga. L. 2005, p.1, § 12, *codified at* O.C.G.A. § 51-12-31 *et seq*. Instead, Georgia law now requires the trier of fact "to divide responsibility for an injury among all of those who 'contributed to' it—parties and nonparties alike—according to their respective shares of the combined 'fault' that produced the injury." *Zaldivar v. Prickett*, 774 S.E.2d 668, 690 (Ga. 2015). In other words, judgment "must be entered severally." O.C.G.A. § 51-12-31. Section 51-12-33 further requires apportioning damages "among the persons who are liable according to the percentage of fault of each person," and states that there "shall not be a joint liability among the persons liable." O.C.G.A. § 51-12-33(b).

Had the District Court applied the correct legal standard, it would have necessarily concluded that Ahmed could not obtain complete relief in a suit

against ERI alone. After all, Georgia's tort reform law "limit[s] the liability of each [party or nonparty] to the extent to which she was assigned responsibility," *id.*, reducing the plaintiff's recovery against a defendant even if a contributing nonparty is entirely immune to liability. *Walker v. Tensor Mach. Ltd.*, 779 S.E.2d 651, 653-54 (Ga. 2015). Thus, ERI could only be held liable for its "share[] of the combined 'fault,'" *Zaldivar*, 774 S.E.2d at 690, and Ahmed could not recover for Kifle's share. The District Court's failure to apply this state law and instead invoke joint and several liability was clear legal error—not a matter subject to review only for an abuse of discretion. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Second, even setting aside the lack of joint and several liability for defamation in Georgia, the lower courts' fixation on money damages ignores that Kifle's presence was required based on Ahmed's requests for injunctive relief directed to Kifle. *E.g.*, *Carpenters 46*, 459 U.S. at 920-22 (Rehnquist, J., dissenting from denial of certiorari). Indeed, the conduct of the litigation prior to the District Court's realization that it lacked subject-matter jurisdiction confirms that Ahmed could not have obtained the injunctive relief he sought in a suit against ERI alone. After all, Ahmed obtained the injunctive relief he sought only when the District Court issued orders to Kifle—personally—directing him to retract the allegedly defamatory article. (D85 at 2) ("Defendant Elias Kifle is ORDERED to remove all postings, articles, comments relating to, and any other reference to, Plaintiff Jemal Ahmed, whether by name or implication from any website he owns or manages, including, but not limited to, the website

known as 'Ethiopian Review.'"); (D92 at 21) ("Defendant Kifle is ORDERED to post the retraction message . . . in a conspicuous location on Defendant Ethiopian Review's website."); *see also* (D116 at 9) (again ordering Kifle to post a retraction message, but without commentary attached to or surrounding the message).

Now that those orders have been adjudged to have issued without subject-matter jurisdiction and Kifle has been dismissed from the case, the orders directing Kifle to remove the articles in question from his website and post a retraction are a legal nullity. And Ahmed cannot obtain that relief from a suit solely against ERI, a defunct corporate entity with no authority to control the content of the Ethiopian Review website. (D22 at 4; D150-1; D158-1 ¶¶ 4-6, 10-11.) The current default judgment confirms as much, ordering only money damages and not addressing Ahmed's request for injunctive relief. (D179.) Thus, the complete relief Ahmed himself sought—including the retraction Ahmed demanded and the district court ordered—is now impossible, demonstrating that Kifle was indeed a necessary party.

The Eleventh Circuit's lax review in this case affirms the District Court's dismissal of diversity-destroying Kifle to reinstate the default judgment against ERI, grossly enlarging the scope of a power that this Court instructed to be used "sparingly."[9]

---

[9] The fact that the Eleventh Circuit chose not to publish this decision should not allow it to escape review. "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case." *C.I.R.*

Newman-Green, 490 U.S. at 837. This Court should correct that error.

CONCLUSION

For these reasons, the Eleventh Circuit should not have treated the dispensability issue as a matter purely within the District Court's discretion. Certiorari is thus necessary to enunciate the proper standard of review, under which reversal is required in this case.

Petitioners Elias Kifle and Ethiopian Review, Inc. respectfully request that this Court grant their petition for a writ of certiorari.

---

v. McCoy, 484 U.S. 3, 7 (1987); *see also Smith v. United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting from denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant.").

Respectfully submitted,

NOAH C. GRAUBART
Counsel of Record
FISH & RICHARDSON P.C.
1180 Peachtree St., NE
21st Floor
Atlanta, GA 30309
(404) 892-5005
graubart@fr.com

JONATHAN B. BRIGHT
FISH & RICHARDSON P.C.
1180 Peachtree St., NE
21st Floor
Atlanta, GA 30309
(404) 892-5005
jbright@fr.com

October 22, 2018

APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

No. 16-17008

D.C. Docket No. 1:12-cv-02697-SCJ

JEMAL AHMED,

Plaintiff - Appellee,

versus

ELIAS KIFLE,
ETHIOPIAN REVIEW, INC.,

Defendants - Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(March 19, 2018)

Before WILSON, and DUBINA, Circuit Judges and GOLDBERG,* Judge. PER CURIAM:

Defendants/Appellants Ethiopian Review, Inc. ("ER") and Elias Kifle ("Kifle") appeal the district court's order reinstating a default judgment against ER and dismissing Kifle from the case. For the reasons that follow, we affirm.

I. BACKGROUND

This case arises out of the publication by Kifle and ER of allegedly false and defamatory statements that Appellee Jemal Ahmed ("Ahmed"), a private business man, runs a vast human trafficking operation. According to a March 2012 post on ER's website, this illegal scheme allegedly involves trafficking of underage girls to the Middle East where they are reportedly held against their will and subjected to horrific abuses. Immediately after learning of the publication, Ahmed advised Kifle that the statements were untrue and demanded that they be removed from the website. Kifle not only refused to do so, but further dared Ahmed to sue him and, thereafter, republished the article. Given the very serious nature of the charges and Kifle's refusal to remove the defamatory material, Ahmed filed a defamation suit against both Kifle and ER.

---

*Honorable Richard W. Goldberg, Judge for the United States Court of International Trade, sitting by designation.

After two years of court proceedings—which included ER's failure to appear and significant misconduct by Kifle—the case was litigated to a final judgment in the district court. After a default by Kifle and ER and a subsequent bench trial for damages, the district court entered an award for Ahmed of $428,910.00 for compensatory and punitive damages, costs and attorneys' fees, along with injunctive relief.

Approximately five months after the judgment had been entered, Kifle and ER moved to dismiss the case for lack of complete diversity between the parties. The district court granted that motion and vacated its previous judgment in Ahmed's favor. Ahmed appealed that order to our court and moved us to sever Kifle to preserve diversity jurisdiction, or, in the alternative, to remand to the district court to decide the still-pending motion to sever. We granted that motion and remanded the case to the district court. On remand, the district court granted Ahmed's motion and severed Kifle from the judgment, thus preserving diversity jurisdiction and reinstating the judgment as to ER. Kifle and ER then perfected this appeal.

II. ISSUE

Whether the district court erred in dismissing Kifle from the case to create subject-matter jurisdiction on the basis that Kifle was neither a required party nor an indispensable party pursuant to Fed. R. Civ. P. 19 and thereby improperly reinstated the default judgement against ER.

III. STANDARD OF REVIEW

Both Fed. R. Civ. P. 19 and Fed. R. Civ. P. 21 determinations are reviewed for an abuse of discretion. *See United States v. Rigel Ships Agencies, Inc.,* 432 F.3d 1282, 1291 (11th Cir. 2005); *Laker Airways, Inc. v. British Airways, PLC,* 182 F.3d 843, 847 (11th Cir. 1999); *Mann v. City of Albany*, 883 F.2d 999, 1003 (11th Cir. 1989); *Fritz v. Am. Home Shield Corp.,* 751 F.2d 1152, 1154 (11th Cir. 1985).

IV. DISCUSSION

First, we conclude that the district court correctly noted that by defaulting both ER and Kifle are deemed to have admitted the well-pled allegations in the complaint. *See Giovanno v. Fabec*, 804 F.3d 1361, 1366 (11th Cir. 2015). This court has also recognized that a default judgment is a legitimate sanction for a party's repeated refusal to cooperate with court proceedings and to obey court orders, as was the case here. *See African Methodist Episcopal Church, Inc. v. Ward*, 185 F.3d 1201, 1203 (11th Cir. 1999).

Contrary to Kifle and ER's claims, we conclude that the district court properly found that ER was coresponsible with Kifle for the posting of the defamatory content in question. That finding was based on evidence submitted by Ahmed from the website itself, which solicited donations to ER to be used in support of the website. Kifle's belated self-serving affidavit

claiming sole responsibility for the website cannot rebut the admission. Moreover, the affidavit cannot evade the consequences of ER's failure to appear and the default judgment entered against it.

This appeal really turns on Kifle and ER's challenge of the district court's finding that Kifle is not a required party under Fed. R. Civ. P. 19(a). Rule 19 presents "a two-part test for determining whether an action should proceed in a nonparty's absence." *City of Marietta v. CSX Transp., Inc.,* 196 F.3d 1300, 1305 (11th Cir. 1999). This court has held that the relevant inquiry, in the first step, "is whether complete relief can be afforded in the present procedural posture, or whether the nonparty's absence will impede either the nonparty's protection of an interest at stake or subject parties to a risk of inconsistent obligations." *Id.* (citing Fed. R. Civ. P. 19(a)(1)–(2)). Because defendant ER was the corporate vehicle through which the website was funded and operated, we conclude that the district court correctly found that Kifle was not a required or indispensable party and thus could be severed under Rule 21 of the Federal Rules of Civil Procedure. Indeed, complete relief in the form of money damages can be afforded to Ahmed from ER, which was found jointly and severely liable for defamation in the district court. We also conclude that there has been no showing of prejudice to either Kifle or ER resulting from Kifle's severance.

In *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 109 S. Ct. 2218 (1989), the Supreme Court

of the United States affirmed the court of appeals' dismissal of a non-diverse party, noting that "given that all of the [defendants] are jointly and severally liable, it cannot be argued that [one defendant] was indispensable to the suit." *Id.* at 838, 109 S. Ct. at 2226.

Accordingly, for all of the above reasons, we affirm the district court's order dismissing Kifle from this case and in its reinstatement of the judgment against ER.

AFFIRMED.

APPENDIX B

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

JEMAL AHMED,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	1:12-CV-2697-SCJ
	:	
ELIAS KIFLE;	:	
ETHIOPIAN REVIEW,	:	
INC.	:	
	:	
Defendants.	:	

ORDER

This case appears before the Court on remand from the Eleventh Circuit for the limited purpose of adjudicating Plaintiff Jemal Ahmed's Motion to Sever Defendant Elias Kille. Doc. No. [157].

I. BACKGROUND

In August 2012, Plaintiff filed suit against Defendant Kifle and Defendant Ethiopian Review, Inc. ("Ethiopian Review") alleging that "Kifle and Ethiopian Review" published false and defamatory statements about Plaintiff in an article "on the Ethiopian Review's website." See Doc. No. [1], pp. 6-7, 10, ¶¶19-

23, 37. The complaint identifies Defendant Ethiopian Review as "an English/ Amharic language on-line 'news and opinion journal' available at www.ehtiopianreview.com." Id. p. 3, ¶7. Both Defendants were properly served, but failed to file a timely answer, and thus an entry of default was entered against them. See Doc. Nos. [8], [9], [10]. Two weeks after default was entered against him, Defendant Kifle moved to set aside the entry of default, noting that both he and Plaintiff are Ethiopian citizens and that, thus, "there is no diversity of citizenship." Doc. No. [11], p. 4, ¶14.

Judge Julie E. Carnes, the presiding judge at the time, granted Defendant Kifle's motion to set aside the default and ordered him to respond to the complaint by August 9, 2013. Doc. No. [15]. Four days before the deadline, Defendant Kifle requested an extension of time of over four months "because of travel." Doc. No. [17]. Although the Judge Carnes granted Defendant Kille an extension of more than a month, he failed to file a timely answer and default was again entered against him. See Doc. Nos. [21], [23]. Defendant Kifle eventually filed an answer, however, due to his repeated and willful violations of the Court's discovery orders, Magistrate Judge E. Clayton Scofield, III, recommended granting Plaintiff's motion for default judgment. See Doc. No. [68], p. 18.

Receiving no objections, the Court adopted the Magistrate Judge's report and recommendation,

granted the motion for default judgment, and scheduled the matter for a hearing on damages. Doc. No. [70]. In the order awarding Plaintiff damages and attorneys' fees, the Court also granted an unopposed motion for default judgment against Ethiopian Review and ordered that a retraction of the defamatory article be posed "in a conspicuous location on Defendant Ethiopian Review's website." Doc. No. [92], p. 21. While Defendant Kifle was held in contempt for posting the "retraction" as part of an article attacking Plaintiff and criticizing the Court, he eventually complied with the Court's order requiring him to post the retraction message, without any of his additional commentary, "on the home page of the Ethiopian Review website located at http://ethiopianreview.com." See Doc. No. [116], p. 7.

Over the course of nearly three years of litigation, Defendant Kifle filed no fewer than 18 *pro se* motions, including at least 2 motions to dismiss, but only mentioned his contention that the parties were not completely diverse in his first motion to set aside the entry of default. See Doc. Nos. [11], [17], [26], [31], [40], [50], [55], [56], [57], [58], [59], [81], [88], [90], [91], [99], [100], [102]. After appeal had been taken in this case, Defendant Kifle's appellate counsel filed a motion to dismiss for lack of subject-matter jurisdiction, which the Court granted. See Doc. No. [160]. The matter is presently before the Court on Plaintiff's Motion to Sever Defendant Kille in order to preserve jurisdiction. Doc. No. [157].

II. LEGAL STANDARD

Courts "may at any time, on just terms, ... drop a party" who is improperly joined. Fed. R. Civ. P. 21. In order to determine whether the nondiverse party can be dismissed in order to preserve jurisdiction, the Court must decide if the "party is indispensable under [Fed. R. Civ. P.]19." Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1343 (11th Cir. 2011). If the party is indispensable, then the case must be dismissed. Id. Rule 19 is a two-step inquiry. First, the Court must determine whether Defendant Kifle is a "required" party within the meaning of 19(a). Id. at 1344. A party is required if the Court cannot accord complete relief in that person's absence. Fed. R. Civ. P. 19(a)(l)(A). A party is also required if the person has an interest in the subject matter of the action, and disposing of the action in that person's absence may impair the person's ability to protect the interest or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Id. 19(a)(l)(B).

If Defendant Kifle is a required party, Rule 19(b) provides a list of factors "to determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). The factors to be considered include:(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;(2) the extent to which any prejudice could be lessened or avoide;(3) whether a judgment rendered in the person's absence would be

adequate; and(4) whether the plaintiff would have an adequate remedy if the action were dismissed. Id.

These factors are "not intended to exclude other considerations," and "pragmatic considerations" play a key role in the determination. Molinos, 633 F.3d at 1344. The Supreme Court has cautioned that the power "to dismiss a dispensable nondiverse party" in order to preserve jurisdiction "should be exercised sparingly," and that courts should consider whether "the presence of the nondiverse party produced a tactical advantage" to the other side. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 837-38, 109 S. Ct. 2218, 2225, 104 L. Ed. 2d 893 (1989). However, the Supreme Court has also noted that once a case has been fully adjudicated "considerations of finality, efficiency, and economy become overwhelming." Caterpillar Inc. v. Lewis, 519 U.S. 61, 75, 117 S. Ct. 467,476, 136 L. Ed. 2d 437 (1996).

III. ANALYSIS

The complaint in this case clearly identified Defendant Ethiopian Review as "an English/ Amharic language on-line 'news and opinion journal' available at www.ehtiopianreview.com." Doc. No. [l], p. 3, ¶7. The complaint further laid out the precise circumstances behind the false and defamatory statements about Plaintiff allegedly published by Defendant Ethiopian Review in an article "on the Ethiopian Review's website." See id. pp. 6-7, 10, ¶¶19-23, 37. Because default judgment has been entered, Defendants are

deemed to have admitted these well-pleaded allegations of the complaint and are barred from contesting them. See Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc., 561 F.3d 1298, 1307 (11th Cir. 2009). Nevertheless, they argue that the Court should consider extrinsic evidence submitted by Defendant Kifle because subject-matter jurisdiction is dependent on his dispensability. Doc. No. [177-2], p. 16. Accepting, *arguendo*, that the Court can "consider extrinsic evidence" in deciding this issue, the Court must "free to weigh the facts" presented in making its determination. See Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1336 (11th Cir. 2013). Even considering the evidence, the Court finds that Defendant Kifle is dispensable because his affidavit is contradicted by the record.

Since the very first document he filed in this Court in October 2012, Defendant Kifle himself has treated Defendant Ethiopian Review as synonymous with "[his] blog, EthiopianReview.com, an Ethiopian blog that is read by Ethiopians mostly in the Diaspora." Doc. No. [11], p. 4, ¶14. He specifically averred that "Ethiopian Review [was not] a 501(c)(3) corporation," although he later made the self-serving assertion that Ethiopian Review "is a charitable organization that ... has nothing to do with the article in question." Id. ¶15; Doc. No. [22], p. 4. Over nearly three years of litigation, Defendant Kifle did not mention his contention that Defendant Ethiopian Review "has nothing to do with the article in question" again. Now that Plaintiff has filed a motion to sever Defendant Kifle, however, he has filed an affidavit with the bald

contention that "Ethiopian Review, Inc., does not own the ethiopianreview.com domain name and lacks authority or control over what is posted on the website." Doc. No. [158-1], p. 1, ¶4. In support of this assertion, the affidavit also states that Defendant Kifle has paid the "domain name fees for the ethiopianreview.com domain name" and other related expenses "out of [his] own personal bank account." Id. p. 2, ¶8.

Although Defendant Kifle baldly asserts that Defendant Ethiopian review "has nothing to do" with the website or the libelous article that is the subject of this lawsuit, the website itself tells a different story. See Doc. No. [22], p. 4; Doc. No. [147-1]. In fact, a page on www.ethiopianreview.com entitled "Sponsor Ethiopian Review for 16 cents a day" states that funds should be sent to "Ethiopian Review, Inc." Doc. No. [147-1]. The page says absolutely nothing about the funds sent to Ethiopian Review Inc. being "used to support families of journalists who are jailed by the Ethiopian regime," which is how, in his affidavit, Defendant Kifle claims the funds were used. See id.; Doc. No. [158-1], p. 3, ¶11. Instead, the website states that the money sent to Ethiopian Review, Inc. "will be used for: 1) funding information units inside Ethiopia; 2) maximizing the web site's technical capacity to make it faster and fight off hacking; and 3) to defend ourselves from ... lawyers who are constantly making threats of lawsuit against Ethiopian Review." Doc. No. [147-1], p. 1.

This piece of evidence was submitted by Plaintiff and has been a part of the docket for more than a

year. See id. In that time, Defendants have filed three briefs in which they have repeatedly argued that Defendant Ethiopian Review used donations to support the families of imprisoned journalists and had no authority or control over the website. See Doc. No. [158], p. 5; see also Doc. No. [148], pp. 7-15; Doc. No. [177-2]. Nowhere, however, have Defendants ever addressed the direct evidence that funds sent to Defendant Ethiopian Review were used to support media operations, pay for web services, and fight libel lawsuits. Conspicuously, the www.ethiopianreview.com website has been altered-presumably by Defendant Kifle, who asserts that he controls the website- so that the page about sponsorship is no longer accessible from the homepage. See http:/ /www.ethiopianreview.com (last accessed Oct. 3, 2016); see also http:/ /www.ethiopianreview.com/main/(last accessed Oct. 3, 2016). Yet, as of the date of this Order, the sponsorship page can still be accessed directly. See http://www.ethiopianreview.com/80405 (last accessed Oct. 3, 2016).

Defendants have also raised the argument that the Court cannot afford complete relief without Defendant Kifle because Plaintiff wanted a retraction posted on the website and Defendant Ethiopian Review allegedly has no control over the site. Doc. No. [177-2], p. 15. However, the Court's orders directing Defendants to publish a retraction are telling. The Court initially ordered that a retraction of the defamatory article be posed "in a conspicuous location on Defendant Ethiopian Review's website." Doc. No. [92], p. 21. Defendants instead posted a "retraction" that mainly focused on criticizing Plaintiff and the Court

on the website at issue, but never asserted that the website was not "Defendant Ethiopian Review's website."

The Court held Defendant Kifle in contempt and again ordered that a proper retraction be posted "on the home page of the Ethiopian Review website located at http://ethiopianreview.com." See Doc. No. [116], p. 7. Defendants finally complied with this order, and again did not raise any contention that the website did not belong to Defendant Ethiopian Review. See Doc. No. [123]. Thus, Defendant Kifle is not a required party under Rule 19(a)(l)(A) because the Court can afford complete relief in his absence. See Fed. R. Civ. P. 19(a)(l)(A); see also Templev. Synthes Corp., 498 U.S. 5, 7, 111 S. Ct. 315, 316, 112 L. Ed. 2d 263 (1990) (noting that a party is not required under Rule 19(a) if, as here, he is jointly and severally liable with another defendant).

Defendant Kifle is also not a required party under Rule 19(a)(l)(B). Defendant Kifle dissolved Ethiopian Review, Inc. after learning of this lawsuit, and thus argues that the only way for Plaintiff to collect a judgment against Defendant Ethiopian Review would be to collect from him. Doc. No. [158], p. 7. However, the Court finds that Defendant Ethiopian Review was the corporate vehicle through which the website was funded and operated. The mere fact that Defendant Kifle paid web-hosting costs for the website out of his personal bank account is not dispositive. Defendant Ethiopian Review is not absolved of liability for the

articles published on its website simply because Defendant Kifle failed to maintain every corporate formality in operating Ethiopian Review.

No bank records have been submitted demonstrating how funds given to Defendant Ethiopian Review were actually used. and Defendant Kifle's affidavit about how those funds were used contradicts the scant facts the Court has. Defendant Kifle argues that he is required because Plaintiff will attempt to pierce the corporate veil or assert "alter ego" liability and he would be unable to protect his interests if he is not a party to this suit. See Doc. No. [158], pp. 7, 9-10. However, his argument that the Court would, in effect, be imputing his conduct to Defendant Ethiopian Review rests largely on his contention that he is solely responsible for the content of the website. The Court has considered and rejected this argument. Defendant Kifle's argument that Plaintiff may attempt to pierce the corporate veil misses the point that Defendant Ethiopian Review is liable for its own conduct. Defendant Kifle is not required because interest will not be prejudiced. He maintains that Plaintiff should not be allowed to pierce the corporate veil or assert "alter ego" liability, and he can fully litigate his position if Plaintiff ever attempts to make those arguments. Doc. No. [158], p.10. At this point, however, Plaintiff has not argued that the Court should allow him to pierce the corporate veil.

Even if Defendant Kifle were a required party,

the Court still finds that, "in equity and good conscience, the action should proceed" because the 19(b) factors weigh in favor of Plaintiff. Defendant Kifle notes that part of the damages awarded are based on his own repeated misconduct over the course of the litigation. See Doc. No. [177-2], p. 21. The Court agrees that Defendant Ethiopian Review is not liable for Defendant Kifle's misconduct during the litigation. But neither he nor Defendant Ethiopian Review will be prejudiced because the Court can amend the award of damages so that it only reflects Defendant Ethiopian Review's own liability. Likewise, the fact that Defendant Kifle is jointly and severally liable with Defendant Ethiopian Review for other the damages does not make him indispensable. As the Supreme Court has noted, a party who is jointly and severally liable is not indispensable. Newman-Green, 490 U.S. at 838 (holding that because the defendants were "jointly and severally liable, it [could not] be argued that [the severed defendant] was indispensable to the suit"). Damages can be apportioned to "shape the relief" and avoid any prejudice. See Fed. R. Civ. P. 19(b)(2)(B).

Additionally, both the third and fourth factors listed in Rule 19(b) weigh in Plaintiff's favor. For the reasons discussed in greater detail above, Defendant Kifle's argument that the judgment would be inadequate because Plaintiff may pursue "a 'corporate veil piercing' theory," is unpersuasive. The Court can afford Plaintiff complete relief by ordering that a retraction of the defamatory article be posed "in a conspicuous location on Defendant Ethiopian Review's website," which the Court has already done, and issuing

an award of damages against Defendant Ethiopian Review. See Doc. No. [92], p. 21. Dismissing the suit at this point would leave Plaintiff without an adequate remedy, as the statute of limitations for libel actions in Georgia is one year. See O.C.G.A. § 9-3-33.

Finally, the other "pragmatic considerations" not listed in Rule 19(b) also weigh in favor of a finding that Defendant Kifle is dispensable. See Molinos, 633 F.3d at 1344. Defendant Kille's presence in this suit has not "produced a tactical advantage" to Plaintiff because Plaintiff did not receive any discovery to which he was not already entitled. See Newman-Green, 490 U.S. at 837-38. Crucially, the "considerations of finality, efficiency, and economy" are "overwhelming" because this case was been adjudicated to judgment over the course of nearly three years of litigation. See Caterpillar, 519 U.S. at 75. Defendants' argument that enforcing the judgment "will necessarily reignite the entire lawsuit" is baseless. See Doc. No. [177-2], p. 26.[1] The Court will not allow Defendant Ethiopian Review to relitigate the merits of Plaintiff's claim because it

[1] Defendants grossly mischaracterize the default judgments in this case as being "entered as a result of a journalist's attempt to protect his sources from harassment." See Doc. No. [177-2], p. 26. Default was entered against Defendant Ethiopian Review because it never filed any kind of responsive pleading. The Magistrate Judge recommended entering default against Defendant Kifle because he willfully refused to comply with discovery orders, in spite of the protective order entered to ensure the confidentiality of any information he provided. See Doc. Nos. [48], [68]. Defendant Kifle never made any objection to the Magistrate Judge's recommendation. See Doc. No. [70], p. 1.

is barred from contesting the well-pleaded allegations of the complaint due to the default judgment. See Eagle Hosp. Physicians, 561 F.3d at 1307. The only possible issue remaining is how much of the damages Defendant Ethiopian Review will ultimately be required to pay.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that Defendant Kifle is not a required party and that, even if he were, he is dispensable. See Fed. R. Civ. P. 19. Thus, the Court's previous order dismissing this case (Doc. No. [160]) is hereby VACATED. Plaintiff's Motion to Sever Defendant Kifle (Doc. No. [157]) is GRANTED. Defendant Kifle is DISMISSED from the lawsuit, and the default judgment (Doc. No. [93]) is REINSTATED with respect to Defendant Ethiopian Review.

IT IS SO ORDERED**,** this 5th day of October, 2016.

_____

HONORABLE STEVE C. JONES
UNITED STATES DISTRCT
JUDGE

APPENDIX C

IN THE UNITED STATES COUR OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17008-GG

JEMAL AHMED,

Plaintiff-Appellee,

Versus

ELIAS KIFLE,
ETHIOPIAN REVIEW, INC.,

Defendants-Appellants.

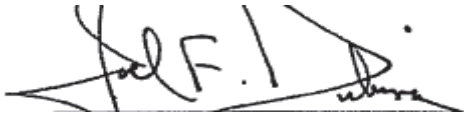
Appeal from the United States District Court
for the Northern District of Georgia

BEFORE: WILSON and DUBINA, Circuit Judges, and GOLDBERG,* Judge.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellants is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

*Honorable Richard W. Goldberg, Judge for the United States Court of International Trade, sitting by designation.

IN THE UNITED STATES COUR OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17008-GG

JEMAL AHMED,

Plaintiff-Appellee,

Versus

ELIAS KIFLE,
ETHIOPIAN REVIEW, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

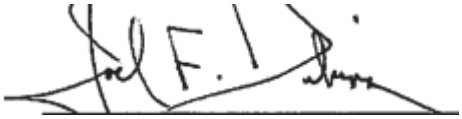
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON and DUBINA, Circuit Judges, and GOLDBERG,* Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

*Honorable Richard W. Goldberg, Judge for the United States Court of International Trade, sitting by designation.

APPENDIX D

Rule 19 – Required Joinder of Parties

(a) **Persons Required to Be Joined if Feasible**.

(1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) *Joinder by Court Order.* If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) *Venue.* If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) **When Joinder Is Not Feasible**. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) **Pleading the Reasons for Nonjoinder**. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) **Exception for Class Actions**. This rule is subject to Rule 23.

APPENDIX E

Rule 21 – Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

APPENDIX F

28 U.S.C. § 1332 - U.S. Code - Unannotated Title 28. Judiciary and Judicial Procedure § 1332. Diversity of citizenship; amount in controversy; costs

(a) The 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--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where

the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

> **(1)** a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of--
>
> > **(A)** every State and foreign state of which the insured is a citizen;
> >
> > **(B)** every State and foreign state by which the insurer has been incorporated; and
> >
> > **(C)** the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection--

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of

$5,000,000, exclusive of interest and costs, and is a class action in which--

> **(A)** any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> **(B)** any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
>
> **(C)** any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

> **(A)** whether the claims asserted involve matters of national or interstate interest;
>
> **(B)** whether the claims asserted will be governed by laws of the State in which

the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A)(i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which--

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

> **(A)** concerning a covered security as defined under 16(f)(3) 1 of the Securities Act of 1933 (15 U.S.C. 78p(f)(3) 2) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));
>
> **(B)** that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or
>
> **(C)** that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453 , an unincorporated association shall be deemed to be a citizen of the State where it

has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453 , a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which--

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407 , or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407 .

(ii) This subparagraph will not apply--

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure ; or

(II) if plaintiffs propose that the action proceed as a class action

pursuant to rule 23 of the Federal Rules of Civil Procedure .

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.