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[DO NOT PUBLISH]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.

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*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.

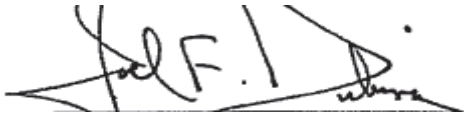
Appeal from the United States District Court
for the Northern District of Georgia

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

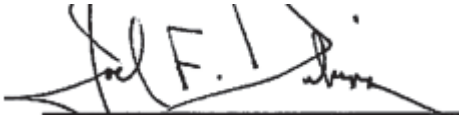
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

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.