No. 04-712

IN THE
Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether an entity not named or joined as a defendant in the lawsuit can nonetheless be deemed a "real party in interest" to destroy complete diversity of citizenship in a case removed from state court under 28 U.S.C. § 1441(b).

2. Whether a limited partnership's citizenship for diversity subject-matter jurisdiction purposes is determined not by the citizenship of its partners but by whether its business activities establish a "very close nexus" with the state.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Lincoln Property Company and State of Wisconsin Investment Board state the following:

Lincoln Property Company is a privately held company. Lincoln Property Company has no parent company, and no publicly held company owns 10% or more of its stock.

The State of Wisconsin Investment Board ("SWIB"), incorrectly sued below as SWIB Investment Company, is an independent agency of the State of Wisconsin and, as such, has no parent companies, subsidiaries, or affiliates for which disclosure is required.

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INTRODUCTION

This case involves critical rules for determining whether defendants have diverse citizenship and thus may remove a case brought against them to federal court. The Fourth Circuit struck a double blow against legal clarity and sound judicial administration. First, it held that a court's duty is to look *outside* the complaint to determine whether some putative defendant that plaintiffs had *not* named in the complaint or joined as a party defendant could nonetheless destroy the complete diversity that exists between the plaintiffs and the named defendants. If such a non-named putative defendant exists, the court held, then the defendants fail to carry their burden of showing that removal was proper. Second, the court opined that, if the non-named entity is a limited partnership, it is not enough that the citizenship of each partner be actually diverse to the citizenship of each plaintiff. Rather, the partnership must demonstrate that it lacks a "very close nexus" with the state of plaintiff's citizenship.

Both rules depart from longstanding principles adopted by this Court. The Fourth Circuit's first holding conflicts with the plain language of the removal statute, which permits removal where each of the "parties in interest *properly joined and served* as defendants" is diverse to each plaintiff. 28 U.S.C. § 1441(b) (emphasis added). It also departs from a series of cases decided by this Court that set forth clear jurisdictional rules by which plaintiffs are held to the choices they make in framing the parties and jurisdictional facts alleged in the complaint. The Fourth Circuit's second holding is equally erroneous, because it replaces a bright-line rule of jurisdiction established by this Court in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) – that the citizenship of a limited partnership is based on the citizenship of each partner – with a "nexus" test made up out of whole cloth that is virtually impossible to administer in a fair and consistent manner. This Court should reject both holdings and reverse the Fourth Circuit's judgment.

OPINIONS BELOW

The opinions of the district court granting petitioners' motion for summary judgment and denying respondents' motion for summary judgment (Pet. App. 22a-40a), and denying respondents' motion to remand (*id.* at 84a-93a), are unreported. The district court's opinion granting petitioners' motion to exclude the testimony of respondents' medical expert (*id.* at 42a-79a) is reported at 278 F. Supp. 2d 744. The court of appeals' opinion (Pet. App. 1a-19a) is reported at 373 F.3d 610.

JURISDICTION

The court of appeals entered its judgment on June 30, 2004. A petition for rehearing was denied on July 27, 2004. Pet. App. 97a. On October 18, 2004, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including November 24, 2004, *id.* at 98a, and the petition was filed on that date. The petition for a writ of certiorari was granted on February 28, 2005. 125 S. Ct. 1398. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The provisions of 28 U.S.C. §§ 1332, 1441, and 1447, and Federal Rules of Civil Procedure 17 and 19, are set forth in the addendum to this brief.

STATEMENT

1. Petitioner State of Wisconsin Investment Board ("SWIB") is the owner of Westfield Village Apartments, located in Centreville, Virginia. *See* JA 89, 94. Respondents Christophe Roche and Juanita Roche entered into a lease with SWIB dated March 30, 2001, for Unit 104 at Westfield Village. *See* JA 89-100. The first sentence of that lease states that the parties to the lease "are the owner of the Apartment . . . , acting by and through its authorized agent, Lincoln Property Company (LPC) and the residents." JA 90. Lincoln Property Co., petitioner here, will be referred to as "Lincoln." The lease was

executed on behalf of SWIB by "Lincoln Property Company ECW, Inc. Agent." JA 94.

On August 22, 2002, respondents filed nearly identical complaints in a Virginia state court (each styled a "Motion for Judgment" pursuant to Virginia practice). Each complaint asserted the same 11 state-law tort and contract claims (plus a twelfth claim in Mr. Roche's complaint based on his employment relationship with Lincoln), which alleged the presence of "toxic mold that adversely affected the personal property and health of the Roche family." JA 29, 55.[1] The complaints named SWIB, a party to the lease and the owner of Westfield Village, as a defendant. The complaints also named as a defendant the SWIB agent denominated in the lease, Lincoln Property Company, as follows: "Lincoln Property Company t/a Lincoln Property Company ECW, Inc." JA 26, 52.[2]

Respondents alleged that Mr. Roche "was employed by Lincoln in December of 2001" and that he was unlawfully terminated because he had raised the issue of the presence of mold in his apartment. JA 36-37, 62-63. They also asserted that Lincoln and SWIB were responsible, not only for their own acts, but also for those of their

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[1] Mr. Roche's complaint alleged the following claims: Count I, Negligence – *Per Se*; Count II, Breach of Lease; Count III, Breach of Implied Warranties; Count IV, Breach of Contract; Count V, Actual Fraud/Intentional Misrepresentation; Count VI, Constructive Fraud/ Negligent Misrepresentation; Count VII, Consumer Fraud/Trebling of Damages (Violation of Virginia Consumer Protection Act); Count VIII, False Advertising (Violation of Virginia Code Section 18.2-216); Count IX, Tortuous [*sic*] Interference With Contract by Improper Methods; Count X, Conversion; Count XI, Intentional Infliction of Emotional Distress; Count XII, Negligent Infliction of Emotional Distress. *See* JA 38-50. Mrs. Roche's complaint alleged the same claims except for Count IX. *See* JA 64-75.

[2] The complaints also named a third defendant, INVESCO Institutional, an entity dismissed from this suit by the district court on November 27, 2002. *See* JA 112, 113. Plaintiffs never challenged that dismissal, and they chose not to name INVESCO as a defendant in either of their two subsequent amended complaints.

agents, alleging that "[a]ll the defendants, acting either through Lincoln and/or their obligations as owners of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment." JA 30, 56. The complaints also alleged the following with respect to the activities of Lincoln (JA 27, 53):

> 3. Upon information and belief, Lincoln Property Company is a corporation with corporate headquarters located at 500 North Akard Street, Suite 3300, Dallas, Texas. It is a developer and manager of residential communities, including the property located in Fairfax County, Virginia, known as Westfield Village. (Henceforth, Lincoln Property Company will be referred to as ("Lincoln")).
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> 4. Upon information and belief, Lincoln is one of the largest and most diversified real estate firms in the United States, employing over 4,000 people. It has an established presence in over 100 markets in 19 states and manages over 120 million square feet of commercial property nationwide, valued at over 6.4 billion dollars.
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> 5. Lincoln trades under various and sundry names throughout the United States, including the property which is the subject of this lawsuit which is known as 5111 Woodmere Drive, Westfield Village Apartments, Unit #104, Centreville, Fairfax County, Virginia 20120. This property is managed and was at all relevant times managed by the Lincoln Property Company through its regional offices located at 1155 Herndon Parkway, Suite 100, Herndon, Virginia.

2. Defendants SWIB and Lincoln, petitioners here, removed the cases to the United States District Court for the Eastern District of Virginia based on diversity jurisdiction and consolidated them into a single proceeding.

See JA 76-83. The complaints identified the plaintiffs as citizens and domiciliaries of Virginia. *See* JA 27, 53.

Petitioners' notices of removal stated that "Lincoln is a Texas corporation with its principal place of business in Texas," and "SWIB is an independent agency of the state of Wisconsin and, thus, a Wisconsin citizen." JA 77, 81. At the time of removal, respondents did not object to removal, seek to have the case remanded to state court, or attempt to join any additional defendants to the suit. Nor did they seek to join any additional defendants subsequently, despite having stated in their complaints that they would, "[u]pon further discovery," "determine if additional defendant or defendants will be named." JA 28, 54.

Following their removal of the case to federal court, petitioners moved under Federal Rules of Civil Procedure 8(a)(2), 9(b), and 12(b)(6) to dismiss the complaints. The district court substantially granted that motion and dismissed all but one of their claims, but gave respondents leave to amend. *See* JA 101-13. On December 16, 2002, respondents filed a second amended complaint against petitioners alleging only four claims.[3] Because the district court had held that the original complaints violated Rule 8(a)(2) by denying petitioners fair notice of which claims were alleged against which defendant, the second amended complaint specified which claims were alleged against which defendant, as follows: Count I, Negligence ~ *Per se* (Lincoln and SWIB); Count III, Breach of Implied Warranties (SWIB only); and Count IV, Conversion (Lincoln only). *See* JA 128-31, 133-34. Subsequently, respondents voluntarily dismissed their Count II claim for breach of lease alleged against SWIB only, pursuant to Federal Rule of Civil Procedure 41(a)(2). *See* JA 182.

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[3] Respondents had sought to file an amended complaint after petitioners filed their motion to dismiss, but before the district court had ruled on it. The court declined to accept the first amendment because it was drafted without the benefit of its ruling. *See* JA 113.

The second amended complaint, like the original complaints, rested in part on an agency theory. It alleged that "SWIB as owner of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment." JA 118; *see also* JA 115 ("The Defendant Lincoln acted as the agent for SWIB in maintaining the plaintiffs' apartment."); JA 125 ("Under the theory of *respondeat superior*, 'SWIB', as the principal, is accountable for all of the wrongdoings and breaches by its agent, Lincoln.").

Following the close of discovery, petitioners filed a motion for summary judgment on all three claims alleged in the second amended complaint. Petitioners also filed a motion under this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), seeking to bar the testimony of Dr. Richard Bernstein, respondents' only medical causation expert. On April 16, 2003, the district court entered an order notifying the parties that it had granted petitioners' motions in their entirety and that the court would be issuing a Memorandum Order and Judgment setting forth the reasons for its decision in the near future. *See* Pet. App. 20a-21a. On July 25, 2003, the district court issued two memorandum orders granting petitioners' motions for summary judgment and excluding Dr. Bernstein's testimony. *See id.* at 22a-41a, 42a-81a. None of those rulings on the merits is before this Court.

3. On April 22, 2003, six days after the court gave notice that it had granted summary judgment in favor of petitioners, respondents filed a motion seeking to remand the case to state court, asserting that the court lacked diversity jurisdiction because Lincoln was a citizen of Virginia. Respondents argued, based primarily on misconstrued deposition testimony of Lincoln representatives, that "defendant Lincoln Property Co., is not a Texas Corporation, but a Partnership with one of its partners

residing in the Commonwealth of Virginia." JA 226.[4] Respondents claimed that the partnership they had sued was EQR/Lincoln Limited Partnership ("EQR"), an entity affiliated with Lincoln that collected the fees for managing Westfield Village from SWIB. *See* JA 228-30. Nevertheless, even at the post-judgment stage, respondents sought neither to name EQR as a defendant nor to join it as an indispensable party.

In response to respondents' motion, petitioner Lincoln submitted a declaration from Lincoln's General Counsel Dan Jacks affirming that Lincoln, the entity sued by respondents, was a Texas corporation with its principal place of business in Texas. *See* JA 238. Lincoln attached to the Jacks declaration its articles of incorporation, which established that Lincoln is a corporation, not a partnership. *See* JA 241-46. That evidence thus conclusively established that Lincoln – the only Lincoln entity that had been "properly joined and served" under § 1441 and therefore the only relevant Lincoln entity for purposes of assessing diversity jurisdiction – was in fact diverse.

Moreover, to clarify why respondents' argument concerning EQR was unfounded – even assuming the relevance of a non-named defendant for determining diversity – Lincoln also submitted evidence establishing that EQR was completely diverse from respondents because none of EQR's partners – general or limited – was a citizen of Virginia. *See* JA 247-70. The Jacks declaration demonstrated that the general partner of EQR was Lincoln Eastern Management Corporation ("LEMC"), a Texas corporation with its principal place of business in Dallas, Texas, and its limited partner was Lincoln Placeholder Limited

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[4] Respondents relied primarily on the deposition testimony of Fred Chaney and John LeBeau. Based on respondents' misunderstanding of Chaney's and LeBeau's testimony regarding Lincoln's corporate structure, respondents asserted the theory that the Lincoln entity they had sued was not a Texas corporation, but rather a partnership with one partner who was a Virginia resident. *See* JA 230-32.

Partnership ("LPLP"). *See* JA 239. The Jacks declaration further detailed the citizenship of those entities by attaching partnership and corporate documents establishing that LPLP's general partner was LEMC and its limited partner was Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Dallas, Texas. *See id.*[5] Respondents did not challenge that evidence or the briefing on that issue, but claimed only that EQR had its "principal place of business" in Virginia. *See* Plaintiffs' Motion for Leave To File Supplemental Brief at 3 (filed June 13, 2003). *See infra* pp. 41-44.[6]

On August 11, 2003, the district court entered an order denying respondents' motion to remand and for relief from judgment. *See* Pet. App. 84a-93a. The court held that it had diversity jurisdiction because Lincoln, the entity named in respondents' complaints, was a Texas corporation:

> [T]he entity Plaintiffs identified in their Motion for Judgment filed in state court is Lincoln Property Company, located at 3300 Lincoln Plaza, 500 North Akard Street, Dallas, Texas, 72501. This corporation is a Texas corporation with its principal place of business in Texas. (Dan M. Jacks Decl., Ex. 1(A)-(E).) Therefore, the entity that Plaintiffs sued is a Texas corporation.

Id. at 86a-87a.

The district court also rejected respondents' assertions with respect to EQR. While maintaining that the citizenship of EQR was irrelevant because respondents had never sought to name it as a defendant, the court held

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[5] A chart setting forth the relevant Lincoln entities in diagrammatic form is reproduced at Pet. App. 96a.

[6] Respondents subsequently added a new argument to their motion to remand, asserting that the court also lacked jurisdiction over SWIB because it allegedly was an "arm" of the State of Wisconsin. JA 290. The district court denied that claim, *see* Pet. App. 88a-92a, and respondents declined to ask this Court to review that decision.

that, "even if EQR is the proper defendant in this case (although Plaintiffs did not sue this entity), EQR is not a citizen of Virginia." *Id.* at 87a. Based on the unrebutted evidence submitted by Lincoln concerning the citizenship of EQR, the district court held that

> EQR is a partnership registered and operating under the laws of Delaware. Furthermore, EQR's partners are: (1) Lincoln Eastern Management Corporation, which is incorporated in Texas and maintains its principal place of business in Texas, and (2) Lincoln Placeholder Limited Partnership, which is a Texas partnership. In addition, Lincoln Placeholder Limited Partnership's partners are Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Texas. Therefore, EQR is a citizen of Texas and no other state; and, even assuming that EQR is the proper defendant, EQR's citizenship is diverse from [respondents].

Id. at 87a-88a (citations omitted).

4. Respondents appealed. In their arguments to the Fourth Circuit, they did not challenge the district court's ruling that Lincoln – the entity they sued – was diverse. Nor did they challenge the district court's holding that EQR – an entity they declined to sue – was also diverse. Accordingly, in their briefs to the court of appeals, none of the parties presented arguments or cited evidence concerning the citizenship of Lincoln or any of its affiliates such as EQR.

Instead, respondents appealed the district court's orders on three main grounds. *First*, they challenged the entry of summary judgment on only two of the three claims in the second amended complaint – the implied warranty of habitability claim alleged only against SWIB, and the conversion claim alleged only against Lincoln. Respondents did not, however, challenge the entry of summary judgment on the second amended complaint's

negligence claim alleged against both Lincoln and SWIB.[7] Nor did they challenge the district court's Rule 12(b)(6) dismissal of *any* of the claims from their original state-court complaints. *Second*, respondents challenged the court's *Daubert* holding that their medical causation expert's testimony was unreliable and therefore inadmissible. *Third*, respondents appealed the district court's holding that SWIB was not the alter ego of the State of Wisconsin and was therefore diverse to the plaintiffs for purposes of diversity jurisdiction.

The Fourth Circuit addressed none of these fully briefed issues in its decision. Instead, on June 30, 2004, the court of appeals entered a *sua sponte* ruling that petitioner Lincoln had not established diversity jurisdiction with respect to "some Lincoln entity related to this action." Pet. App. 11a. That issue had not been raised by respondents in their appeal. The court perceived its duty to be to ascertain what it characterized as the "real party in interest" on the defendants' side of the case, notwithstanding that respondents had not sued or joined any other Lincoln-affiliated defendant. *Id.* at 9a-10a. It then identified the supposed "real party in interest," which it thought was EQR because that entity "receives the management fees for Westfield Village Apartments." *Id.* at 11a-12a (internal quotation marks omitted).

Having identified EQR as the "real" interested (yet non-named) defendant, the court of appeals then assumed that Lincoln had failed to disclose all of EQR's limited partners because a Lincoln deponent, John LeBeau, had identified an individual named Jeff Franzen, a Virginia citizen and Lincoln Senior Vice President, as a "partner" of an unspecified partnership affiliated with Lincoln. *See*

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[7] While respondents mentioned in passing that their complaint had "included a Count for negligence *per se*," Brief of Appellants at 24, they did not present any argument for reversing dismissal of that claim and did not identify it in their statement of the issues presented to the court of appeals, *see id.* at 1-2.

id. at 11a.[8] The court then discounted an affidavit by Mr. Franzen averring that he was not a partner in EQR. The court opined that Mr. Franzen "never identifies those other limited partnerships, nor is there any evidence as to how they are distinct or uninvolved in Lincoln's Virginia business enterprises and many Virginia property holdings, nor does Franzen identify any of his partners." *Id.* Left with what it perceived to be an evidentiary gap, the court held that Lincoln had failed to meet "its burden of establishing diversity," *id*. at 13a, because it had failed to show "that one member of the Lincoln group of companies doing business in Virginia is not a citizen of the Commonwealth," *id.* at 17a. It also viewed the evidence as suggesting that EQR was not diverse because it had a "very close nexus" with Virginia. *Id*. at 16a. Rather than remand for fact-finding in the district court on the issue of EQR's "nexus" with Virginia – which the court of appeals had raised *sua sponte* without giving the parties an opportunity for briefing – the Fourth Circuit ordered this case to be remanded to state court. *See id.* at 18a-19a.

5. Upon remand to the district court, Lincoln unsuccessfully moved for relief from the mandate or for the presentation of new evidence in order to fill the evidentiary gaps perceived by the court of appeals. First, the evidence proffered by Lincoln showed that, even if the Fourth Circuit's novel "very close nexus" test were applicable, EQR's nexus with Virginia was far from being "very close." At the time the plaintiffs filed their complaints in state court on August 26, 2002, EQR fee-managed 281

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[8] Although Mr. LeBeau was not designated as a 30(b)(6) witness on any topic, the court stated that Mr. LeBeau was "Lincoln's 30(b)(6) deponent," Pet. App. 11a, and quoted his testimony as that of a 30(b)(6) deponent, *see id*. at 11a & n.10 (citing C.A. App. 1606, reproduced at JA 274). The court also quoted the testimony of Mr. Chaney as that of a 30(b)(6) deponent. *See id*. at 11a; *see also id*. at 8a. While Mr. Chaney was designated as a 30(b)(6) witness on certain limited topics (*i.e.*, Lincoln's mold policies and its relationship with SWIB), respondents did not notice him (or any other witness) as a corporate spokesman regarding Lincoln's corporate structure or affiliated partnerships.

projects, including 79,487 apartment units, in 17 states; only 15, or 5%, of those projects were located in Virginia, and those Virginia projects accounted for only 14% of EQR's total revenues for fee-management services in 2002. *See* Declaration of Dan M. Jacks (Aug. 5, 2004). In addition, EQR's headquarters and principal place of business were in Dallas, Texas. *See id*. Second, in response to the Fourth Circuit's criticism that Lincoln had failed to prove the negative that Jeff Franzen was *not* a partner in EQR, *see* Pet. App. 11a, 13a, Lincoln submitted evidence setting out all the partnerships in which he was a partner, none of which includes EQR. *See* Declaration of Jeff Franzen (Aug. 5, 2004).[9]

SUMMARY OF ARGUMENT

I. Neither congressional statute nor this Court's precedents sanction the court of appeals' wide-ranging, *sua sponte* inquiry into the citizenship of entities *not* named in the plaintiff's complaint in determining whether diversity jurisdiction exists. Plaintiffs, as masters of their complaint, may sue or decline to sue any entity that potentially may be liable to them. As the district court correctly understood, the diversity-jurisdiction inquiry focuses only on the defendants actually named to the suit – not on putative defendants that plaintiffs might have named but chose not to name. That rule is consistent with the decisions of this Court in closely analogous

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[9] Both of the two-page declarations cited in this paragraph were attached to Lincoln Property Co.'s Memorandum in Support of Motion for Relief From Mandate and, in the Alternative, To Present New Evidence (filed Aug. 5, 2004), which is docketed as entry number 186 on the district court's docket sheet. *See* JA 18. Petitioners did not include this document in the joint appendix because respondents objected that, since it was submitted to the district court after the Fourth Circuit's remand, it is not properly part of the official record now before the Court. Lincoln disagrees with that characterization and believes that it is part of the official record because it was docketed in the district court and the complete record in the district court is to be transmitted to this Court. In any case, Lincoln stands ready to lodge these declarations with the Court promptly upon request.

circumstances, which permit plaintiffs to dismiss a non-diverse, named defendant in order to create diversity where none existed when the complaint was filed. If plaintiffs are permitted voluntarily to dismiss a *named* defendant, then it would be odd to hold that the existence of a *non-named* entity having some interest in the lawsuit could destroy diversity. This Court's precedents make clear that, while plaintiffs are masters of their complaint, they must be held to the choices they make in deciding what to allege and whom to sue.

The Fourth Circuit's approach would lead to massive uncertainty and increased litigation. Plaintiffs who lose on the merits in the district court would be free, post-judgment, to cast about for jurisdictional spoilers that they declined to sue, whether through clever strategem or dilatoriness. A substantial amount of federal-court litigation in diversity cases would thus become a mere dress rehearsal for plaintiffs' re-litigation of the merits in state court. Defendants would have little assurance that a district court's final judgment would survive a jurisdictional challenge based on the existence of an interested, non-diverse person or entity that plaintiffs never named as a defendant.

II. Even if it were proper for the court of appeals to have considered the citizenship of non-named EQR at all – and it was wholly improper – diversity jurisdiction still would exist because EQR, a limited partnership whose partners were all citizens of Texas at the time the complaints were filed and the case was removed, was completely diverse to the Virginia respondents-plaintiffs. The Fourth Circuit simply took this Court's controlling rule – that the citizenship of a limited partnership is based only on the citizenship of all its partners – and engrafted upon it a made-up "very close nexus" test that, similar to its first misguided holding, requires a far-reaching, indeterminate, and unpredictable inquiry into the "nexus" that a non-named defendant has with the plaintiffs' state of citizenship. That novel addition to this Court's controlling

rule finds no support in law. Indeed, nearly 40 years ago, this Court squarely *rejected* an analogous request to hold that an unincorporated association is a citizen of its principal place of business, and Congress has not acted on subsequent proposals to do so. The Fourth Circuit, in a *sua sponte* and errant decision, has thus functionally done what this Court and Congress have declined to do. That holding therefore also should be reversed.

ARGUMENT

I. THE CITIZENSHIP OF A LINCOLN AFFILIATE THAT PLAINTIFFS DID NOT SUE IS IRRELEVANT TO DIVERSITY JURISDICTION

A. Removal Is Proper Because Complete Diversity Exists In This Case

The federal diversity jurisdiction statute provides, in pertinent part, that "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a). This Court has construed a predecessor to this present diversity jurisdiction statute to require "complete" diversity, such that all plaintiffs must be diverse from all defendants. *See*, *e.g.*, *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

The removal statute, in turn, provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States." 28 U.S.C. § 1441(a). Section 1441(b) provides that diversity cases "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

The statutory requisites were readily satisfied here. There was complete diversity because defendants and plaintiffs were "citizens of different States" (§ 1332(a)), thus giving the district court "original jurisdiction" (§ 1441(a)); SWIB and Lincoln were "parties in interest

properly joined and served as defendants" (§ 1441(b)); and neither defendant was a "citizen of the State in which such action is brought" (*id.*). SWIB was a citizen of Wisconsin because it was an independent agency of the State of Wisconsin. *See* JA 77, 81. Lincoln was a Texas corporation with its principal place of business in Dallas, Texas, and was therefore a citizen of Texas. *See id.*; *see also* 28 U.S.C. § 1332(c)(1) ("For the purposes of this section and section 1441 of this title . . . a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business").[10] Respondents-plaintiffs, on the other hand, were both citizens of Virginia. *See* JA 27, 53, 114. Accordingly, there was complete diversity between all parties named by plaintiffs to the suit, and no defendant was a citizen of Virginia, the state in which the action was brought.[11]

It does not matter that there might have been other putative defendants that plaintiffs chose not to sue. Indeed, even if it were the case that plaintiffs' claims had little or no chance of success on the merits against the defendants they did sue, that would not give them – or the court below – post-judgment leave to cast about for other potential defendants under the guise of identifying a jurisdictional flaw. In any case, there is no reason to think respondents failed to bring any claims on which both SWIB and Lincoln faced potential liability on all 12 counts. The original complaints, as well as the second amended complaint, alleged that SWIB owned Westfield Village and was a party to the lease. *See* JA 28, 54, 115.

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[10] Respondents never claimed that Lincoln's principal place of business was in Virginia (rather than in Texas) and, in fact, submitted evidence from the Virginia State Corporation Commission that Lincoln is neither incorporated nor registered to do business in Virginia. *See* JA 234-35.

[11] There is no dispute that the amount-in-controversy requirement is satisfied, for the state complaints and the second amended complaint sought $10 million in damages.

Respondents alleged all 12 of their original claims, and three of their four second amended complaint claims, against SWIB.

Respondents also apparently alleged all 12 of their original claims,[12] and two of the claims in their second amended complaint, against Lincoln. Respondents' theory was that Lincoln was responsible for its own acts, those of its agents, and those it committed as the agent of SWIB. *See* JA 30, 56 ("All the defendants, acting either through Lincoln and/or their obligations as owners of the property through the Lease, and acting by and through their agents, were responsible for one or more acts of common law and/or statutory negligent conduct, with respect to Roche's apartment"). The theory of respondents' suit was thus that Lincoln was responsible for managing the Westfield complex. *See also supra* pp. 2-4.[13] The complaints also alleged that "Mr. Roche was employed by Lincoln in December of 2001" and suffered adverse employment action. JA 36-37, 62-63, 124-25.[14] Accordingly, based on respondents' allegations, Lincoln faced potential liability either (1) for its own acts; (2) as the agent of SWIB; (3) as a joint tortfeasor with SWIB or another

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[12] Or so it arguably appeared until the district court ordered respondents under Rule 8(a)(2) to amend their claims to give each petitioner fair notice of which claims were being alleged against which petitioner. *See* JA 103 ("Where the complaint names several defendants, the complaint must allege, with precision, the wrongful conduct charged to a particular defendant and cannot plead all of its claims against all defendants collectively.").

[13] Lincoln and SWIB admitted the allegation that "[t]he Defendant Lincoln acted as the agent for SWIB in maintaining the plaintiffs' apartment." JA 115; *see* JA 138, 151 (answering second amended complaint ¶ 7(b)).

[14] Lincoln and SWIB admitted the allegation that "Mr. Roche was employed by Lincoln in December of 2001." JA 124; *see* JA 142, 155 (answering second amended complaint ¶ 41).

Lincoln affiliate; or (4) for the acts of its own agents, which could arguably include EQR.[15]

Accordingly, examination of citizenship of the defendants named in the complaint should have been the end of the Fourth Circuit's *sua sponte* inquiry into whether diversity jurisdiction is present in this case between Lincoln and respondents. Based on the plain language of § 1441, the court of appeals should have affirmed the district court's ruling that the case was properly removed. The court had no statutory basis for examining the citizenship of entities that had *not* been "properly joined and served as defendants" in deciding whether removal under § 1441(b) was proper.

B. This Court's Cases Announcing Rules In Diversity Cases Further Support Removal In The Circumstances Presented Here

Over the past two centuries, this Court has announced a range of decisions addressing diversity jurisdiction that amply support removal of respondents' complaints and demonstrate that the court's analysis should focus only on the named defendants. The following principles confirm the propriety of removal in this case: (1) as masters of their complaint, plaintiffs' choice of whom to sue is respected when they choose to sue only diverse parties; and (2) even if plaintiffs sue a non-diverse defendant, they are permitted voluntarily to dismiss that party to create diversity jurisdiction.

1. The choice of respondents, as masters of their complaint, not to sue any non-diverse defendants is dispositive. The citizenship of the named defendants a plaintiff has chosen to sue determines diversity jurisdiction. In *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), this Court squarely rejected the notion that the

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[15] *See United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business"); *United States v. BestFoods*, 524 U.S. 51, 64-65 (1998) (same).

citizenship of a non-named putative defendant must be taken into account in determining whether complete diversity is destroyed. In that case, the Court held that a suit by an injured motorist against the tortfeasor's insurance company satisfied complete diversity, even though the tortfeasor's presence as a defendant would have destroyed diversity. The Court examined the citizenship of the *named* defendant to establish diversity and determined that the plaintiff could choose whether to sue the non-diverse tortfeasor; it was immaterial that the suit against the insurer would "encompass[] proof of the tortfeasor's negligence." *Id.* at 51. There was no reason to disregard the citizenship of the insurer simply because the non-diverse insured might also have been sued, much less to treat a non-named party as the true defendant. "Thus a complete disposition of the entire claim may be made in this one action, without injustice to any of the participants." *Id.* at 52. Applied to the facts here, therefore, *Lumbermen's Mutual* stands for the proposition that the existence of a non-named, non-diverse defendant against whom respondents might have a cause of action is irrelevant. It cannot destroy diversity against defendants actually named.

In the closely related area of federal-question jurisdiction, the right of removal is likewise based on what the plaintiff alleges – not on what might have been alleged. Thus, "since the plaintiff is 'the master of the complaint,' the well-pleaded-complaint rule enables him, 'by eschewing claims based on federal law, . . . to have the cause heard in state court.'" *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1989)) (ellipsis in original); *see also Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). Likewise, a plaintiff's state-court case becomes removable if the complaint alleges a federal claim. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (1997) ("ICS errs in relying on the established principle that a plaintiff, as master of the complaint, can choose to have the cause

heard in state court. By raising several claims that arise under federal law, ICS subjected itself to the possibility that the City would remove the case to the federal courts.") (internal quotation marks and citation omitted).

There simply is no reason to ignore these long-established principles and cast aside the master-of-the-complaint rule in the diversity context whenever a plaintiff fails to sue all possible defendants, loses on the merits in federal court, and seeks to try the case again in state court by identifying a potentially non-diverse, putative defendant. That rule would only create a re-litigation catastrophe, as numerous losing plaintiffs in removed cases would no doubt seek a post-judgment remand based on the discovery of a non-diverse, putative defendant that they, for whatever reason, did not sue at the outset. Diversity jurisdiction, like that based on a federal question, must be based on what a plaintiff alleges against named defendants – not what the plaintiff might have alleged against non-named defendants.

In this case, respondents filed their motion to remand a mere six days after the district court dismissed their original complaint. *See supra* p. 6. Whether that shows respondents were dilatory or strategic in holding back a jurisdictional issue until shortly after they had lost on the merits, the result is the same. Respondents chose whom they wanted to sue, and a rule permitting them to cast about for jurisdictional spoilers they could have named, but chose not to name, in their complaints finds no support in statutory or doctrinal law. As this Court has similarly explained in a case vacating a lower-court dismissal for the plaintiff's failure to name a supposedly indispensable, non-diverse party, "clearly the plaintiff, who himself chose . . . the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968).

Aside from the decision below, the courts of appeals have generally applied that understanding of procedural

law. In *Simpson v. Providence Washington Insurance Group*, 608 F.2d 1171 (9th Cir. 1979), for example, then-Judge Kennedy's opinion for the Ninth Circuit found diversity jurisdiction proper where the plaintiff "chose to sue the Rhode Island parent corporation" rather than a non-diverse affiliate. *Id.* at 1173. The court explained that, because "the parties are diverse and the amount-in-controversy requirement is satisfied, our only inquiry is whether this jurisdiction must be disregarded because the diversity is improper or collusive." *Id.*; *see* 28 U.S.C. § 1359 ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."). Because a "plaintiff ordinarily is free to decide who shall be parties to his lawsuit," 608 F.2d at 1174, diversity jurisdiction was proper in *Simpson* even though the plaintiff arguably *could have* named as a defendant a non-diverse affiliate of the diverse parent corporation.[16] To like effect is the Fifth Circuit's decision in *Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 252 (5th Cir. 1973), where the court opined, "[t]he citizenship of one who has an interest in the lawsuit but who has not been made a party to the lawsuit by plaintiff cannot be used by plaintiff on a motion to remand to defeat diversity jurisdiction." Thus, because respondents chose to sue only diverse defendants, removal was proper and the Fourth Circuit erred in holding that non-named entities could be

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[16] Then-Judge Thomas has similarly explained that the failure to name a non-diverse entity that could have been sued as a defendant in no way defeats diversity, even if the non-joinder was due to collusion (which is not the case here). "Congress has so far proscribed only collusive joinder meant to invoke federal jurisdiction, *see* 28 U.S.C. § 1359; parties may still obtain a federal forum by colluding not to join." *Western Maryland Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 964 (D.C. Cir. 1990) (Thomas, J.) (holding that defendants in one suit could be sued in a second suit by a wholly owned subsidiary of a plaintiff in the original suit, even though the cases were consolidated and diversity would have been lacking had the two suits been brought as one).

considered in determining whether complete diversity was satisfied.

2. A second analogous principle is that a plaintiff can dismiss voluntarily a non-diverse party to create diversity. If a plaintiff has license to create diversity jurisdiction in that manner, then it makes no sense to defeat a defendant's removal based on an entity the plaintiff has *not* sued. This Court's decisions support the proposition that, even *after* filing suit, a plaintiff may voluntarily dismiss a non-diverse defendant that was properly named, in order to create diversity jurisdiction where none existed at the time of filing. *See*, *e.g.*, *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996) (plaintiff's settlement with and voluntary dismissal of non-diverse defendant created requisite diversity); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989) ("[I]t is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered.").[17] Important here, the Court in those circumstances found it an "overriding consideration" that, "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Caterpillar*, 519 U.S. at 75 (parallel citations omitted).[18]

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[17] *See also Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 281 (1918) (plaintiff can cure lack of diversity "by the voluntary dismissal or nonsuit by him of a party or of parties defendant"); *American Car & Foundry Co. v. Kettelhake*, 236 U.S. 311, 316 (1915) ("voluntary" "dismissal as to resident defendants . . . so as to leave a controversy wholly between the plaintiff and the nonresident defendant"); *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579 (1873) ("The objection to the jurisdiction of the court, that two of the defendants were residents of Texas, the same State with the complainants, was met and obviated by the dismissal of the suit as to them.").

[18] Those considerations of finality for a judgment on the merits are equally present in a case, such as this one, fully litigated on summary judgment.

Accordingly, respondents' failure here to name such an additional defendant (either in the original complaint or subsequently) cannot be deemed to destroy the diversity jurisdiction that plainly exists between respondents and the defendants (petitioners) that respondents chose of their own accord to sue.

It plainly would be inconsistent to give the plaintiff the power to create diversity where none would exist by dismissing a non-diverse defendant, but not to permit the very same result when the plaintiff fails to sue or join a non-diverse party at all. Yet the Fourth Circuit's holding that Lincoln had to prove the diversity of non-named affiliates to the suit leads to that flawed result. The court's error is well-illustrated by its treatment of the conversion claim – the only claim alleged against Lincoln that respondents chose to appeal. The court noted respondents' contention that both "Lincoln and Barco (the Virginia environmental company hired by Lincoln to perform mold remediation) were 'bailees' of their property" and cited respondents' own failure to name Barco as a defendant as "[a]nother reason jurisdiction may be lacking." Pet. App. 13a n.12. While the court opted to "defer further consideration of this concern," *id.* at 14a n.12, its suggestion that respondents' failure to name Barco as a defendant would destroy diversity – even assuming Barco were a Virginia citizen, which it is not[19] – was flatly wrong because it was for respondents to decide whether or not to name Barco, and they decided not to do so. Indeed, had respondents done so initially, they could still have created diversity by dismissing their claims against Barco, *see supra* p. 21, so there is no basis for concluding that jurisdiction could be destroyed by a decision *not* to sue Barco.[20]

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[19] Petitioners on remand showed that Barco is a Maryland corporation with its principal place of business in Maryland. *See* Tab 1 to Lincoln's Reply in Support of Its Motion for Relief from Mandate and, in the Alternative, To Present New Evidence (filed Aug. 17, 2004).

[20] Respondents also declined in their second amended complaint to sue INVESCO, which was a named defendant in their original com-

Respondents likewise declined to name as defendants the manufacturer or installer of the plumbing pipe they claim was defective and caused the mold. *See* JA 30, 56, 118 (alleging defendants were liable for "failing to provide and equip the apartment with replacement piping for the polybutylene piping that had been recalled five years ago by the pipe producers and subject of many settlements due to recall lawsuits"). But applying the court of appeals' faulty analysis would make a jurisdictional issue of respondents' decision not to sue them as well.

The fact that there are multiple "parties in interest" that a plaintiff *might* have "properly joined and served" under the removal statute (§ 1441(b)) does not give a court the authority to dismiss a case because of the plaintiff's failure to do so, even if a putative defendant would have destroyed complete diversity had it been named as a defendant after the lawsuit had been removed. To hold otherwise would only encourage sandbagging, for plaintiffs could sue fewer than all possible defendants in federal court and then claim lack of diversity if unsuccessful in order to try again in state court by revealing a non-named, non-diverse party that it could have named as a defendant. This Court has precluded similar gamesmanship by plaintiffs seeking to defeat removal based on diversity by subsequently reducing the amount of damages sought in the original complaint. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) ("If the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. . . . [T]he plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election."). There is no reason to endorse the

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plaints. In any case, INVESCO was diverse because, as petitioners' notices of removal explained, "INVESCO is a Delaware corporation with its principal place of business in Georgia." JA 77, 81.

Fourth Circuit's rule that enables plaintiffs to engage in similarly objectionable gamesmanship.

C. The Court Of Appeals' "Real Party In Interest" Analysis Is Fundamentally Misguided

Although the Fourth Circuit did not explain the statutory basis for its analysis – and there is nothing in the removal statute that would justify its approach – the court appears to have taken the words "parties in interest" in § 1441(b) and conflated that phrase with the concept of "real party in interest," a term used in Federal Rule of Civil Procedure 17(a). *See* Pet. App. 17a n.17 ("joinder of the 'real party in interest' would be required under Rule 17(a)"). The court then compounded its error by misunderstanding this Court's cases involving a "real party in interest" analysis, which arise in a very different context. Both mistakes led the court of appeals to the erroneous holding that the citizenship of "some Lincoln entity related to this action," *id.* at 11a, is as important as the "real party in interest" in the case. That analysis is deeply flawed.

1. The Fourth Circuit's implicit references to the removal statute and procedural rules were mistaken. *First*, the court's holding finds no support in § 1441(b), which limits the class of "parties in interest" to those that are "properly joined and served as defendants." Under the plain language of § 1441(b), there was simply no basis for the court to look outside the named defendants in respondents' action to ascertain the citizenship of "some Lincoln entity related to this action." Pet. App. 11a. EQR, the Lincoln affiliate the Fourth Circuit thought was the "real party in interest," was never "joined and served as [a] defendant[]" in this lawsuit. Its citizenship is therefore irrelevant to a determination of complete diversity of the defendants that were named in the suit, Lincoln and SWIB.

Second, § 1441(b)'s phrase, "parties in interest properly joined and served," is best understood to refer to the Court's longstanding principle of ignoring formal,

nominal, or fraudulently joined parties in determining whether diversity exists. "Jurisdiction cannot be defeated by joining formal or unnecessary parties." *Salem Trust Co. v. Manufacturers' Fin. Co.*, 264 U.S. 182, 189-90 (1924) (non-diverse trustee obligated to pay deposited money to winner of suit did not destroy diversity). And the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) (non-diverse employee of corporate defendant did not destroy diversity where plaintiff had no good-faith intention to prosecute a claim against that employee).[21] In these inquiries, the Court looks only at the *named* defendants to determine whether the citizenship of any of them should be disregarded for purposes of determining whether diversity exists. But the analysis does not assess the citizenship of putative defendants *not named* in the complaint.

Third, although Federal Rule of Civil Procedure 17(a) employs the phrase, a "real party in interest," the court of appeals' analysis is flatly inconsistent with that rule. Rule 17(a) does not use that term to determine whether defendants may remove an action. Rather, the "real party in interest" analysis in Rule 17(a) requires a court to determine that "[e]very action shall be *prosecuted* in the name of the real party in interest." Fed. R. Civ. P. 17(a) (emphasis added); *see also id.* (certain representatives "*may sue* in that person's own name without joining the

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[21] *See also*, *e.g.*, *Geer v. Mathieson Alkali Works*, 190 U.S. 428, 433-37 (1903) (non-diverse corporate directors held to be nominal parties when relief sought against both the company and its directors is to be recovered from the company only); *Walden v. Skinner*, 101 U.S. 577, 589 (1879) (non-diverse trustee defendant "would not defeat the jurisdiction in a case where he is a mere nominal party, and is merely joined to perform the ministerial act of conveying the title if adjudged to the complainant"); *Removal Cases*, 100 U.S. 457, 469 (1879) (railroad was nominal party for removal purposes after it resolved its dispute with defendant and it had no common interest with the trustee plaintiffs).

party for whose benefit the action is brought") (emphasis added). "By its very nature, Rule 17(a) applies only to those who are asserting a claim." 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1543, at 339 (2d ed. 1990) ("Wright & Miller"); *accord Simpson*, 608 F.2d at 1173 n.2 (Kennedy, J.) ("The real party in interest concept is correctly applied only to those persons prosecuting an action, not to a defendant."). Where a defendant does not assert a counterclaim or third-party claim, as in this case, the "real party in interest" analysis simply is irrelevant in determining the status or citizenship of the named defendants to the lawsuit.

The purpose behind identifying the "real party in interest" is "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Fed. R. Civ. P. 17 advisory committee notes (1966 Amendment). In sharp contrast to Rule 17(a)'s express limitation to plaintiffs, Rules 17(b) and 17(c) apply to both plaintiffs and defendants alike. Rule 17(b) controls a person's "capacity to *sue or be sued*" (emphasis added), and Rule 17(c) provides that an infant or incompetent person's "representative may *sue or defend* on behalf of the infant or incompetent person" (emphasis added). Thus, the intentional omission of defendants in the real-party-in-interest concept of Rule 17(a) provides ample support that a court is not to engage in a "real party in interest" analysis for defendants to determine complete diversity. *Cf. Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

2. The court's error also stemmed from a grave misreading of this Court's cases addressing the principle that

"the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be *real and substantial parties* to the controversy." Pet. App. 4a (quoting *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980)). The court below accurately quoted *Navarro Savings*, but misunderstood that case. In *Navarro Savings*, this Court invoked the notion of "real parties to the controversy" (446 U.S. at 461) to determine whether the plaintiff trustees who had invoked diversity jurisdiction under § 1332(a)(1) were the real parties in interest in bringing the lawsuit. That case does not address the situation presented here – where all the defendants are completely diverse from the plaintiffs and the court speculates that other, non-named entities might also have an interest in the outcome as defendants.

In *Navarro Savings*, the defendants sought to defeat complete diversity by asserting that a court must consider the citizenship of the beneficial shareholders of a trust even though they were non-parties who were aligned with the plaintiffs to the complaint. *Id.* at 460. But this Court rejected that argument, stressing that "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others. The trustees in this case have such powers." *Id.* at 464 (footnote omitted). The Court's holding in *Navarro Savings* thus rested on the unique structure of a trust; the "real party in interest" analysis was used to ascertain the citizenship of the *plaintiffs*; the Court looked at the citizenship of third parties to determine whether the fact that they could benefit from the recovery required consideration of their citizenship; and the judgment in fact *upheld* complete diversity. The Fourth Circuit therefore had no basis for concluding that *Navarro Savings* authorizes a court to look outside the complaint and beyond the named

defendants to determine whether complete diversity has been destroyed.[22]

D. The Fourth Circuit's Rule Functionally Abrogates Federal Rule Of Civil Procedure 19

Adoption of the lower court's disruptive and indeterminate "real party in interest" analysis would strip Federal Rule of Civil Procedure 19 of its significance. That rule, entitled "Joinder of Persons Needed for Just Adjudication," governs the analysis of when a suit must be dismissed due to the non-joinder of a party deemed "indispensable" because a court should not "in equity and good conscience" "proceed among the parties before it." Fed. R. Civ. P. 19(b). Without referencing Rule 19, the Fourth Circuit concluded *sua sponte* that "both the Texas parent [*i.e.*, Lincoln] and the Virginia sub-'partnership' [*i.e.*, EQR] should be parties to the instant action." Pet. App. 16a. That conclusion was tantamount to a ruling that EQR was an indispensable party, without whose presence the case could not proceed. But respondents never once sought to add EQR (or any other non-party) as a defendant under Rule 19 or any other theory, despite filing two amended complaints and then moving voluntarily to dismiss one of their claims in the second amended complaint.

Rule 19 makes plain that there is no cause here to reform respondents' unilateral choice of whom to sue, even assuming they had timely sought to join EQR, which they never did. Then-Judge Thomas has explained how Rule 19 operates:

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[22] Nor, as we explain in the petition (at 12-14), was the Fourth Circuit correct to rely on several court of appeals' decisions. Particularly far afield was that court's reliance on the principle that the alter ego of a state is not a "citizen" of the state for diversity purposes. *See* Pet. App. 5a (citing *Hughes-Bechtol, Inc. v. West Virginia Bd. of Regents*, 737 F.2d 540, 543-44 (6th Cir. 1984)); *see State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194, 199 (1929) ("The state acting through the highway commission, as it might through any officer, became a party to the original agreement and obligated herself thereby."). There is no suggestion that Lincoln was the alter ego of a state.

> When a party to a federal lawsuit moves to join a nonparty resisting joinder, the district court must answer three questions: Should the absentee be joined? If the absentee should be joined, can the absentee be joined? [Rule 19(a).] If the absentee cannot be joined, should the lawsuit proceed without her nonetheless? [Rule 19(b).] "To use the familiar [if] confusing terminology," *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968): Is the absentee's presence necessary? If the absentee's presence is necessary, is her joinder feasible? If the absentee's joinder is not feasible, is she indispensable?

Western Maryland Ry., 910 F.2d at 961 (third alteration in original; footnotes and parallel citations omitted).[23]

Importantly, the Rule 19 inquiry is *not* a jurisdictional rule, but rather is based on equity. As Chief Justice Marshall explained for the Court, the objection of a failure to join an indispensable party "does not affect the jurisdiction, but addresses itself to the policy of the Court." *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166 (1825); *see also Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 198 (1827) ("We do not put this case upon the ground of jurisdiction"); *Provident Tradesmens*, 390 U.S. at 120-21 (citing *Elmendorf* and *Mallow*); *Simpson*, 608 F.2d at 1174 n.4 (Kennedy, J.) ("Failure to join indispensable parties does not oust jurisdiction."). Thus,

> it is important to recognize that the court does have jurisdiction both over the parties properly before it and the subject matter of the action, even though the indispensable party cannot be joined. The decision by the court not to proceed is based on equitable considerations alone. Because the doctrine of indispensability is equitable in character, the court will

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[23] The full text of Federal Rule of Civil Procedure 19, which sets out multiple factors for a court to consider, is set forth in the addendum to this brief.

> not dismiss for nonjoinder when special circumstances would make it inequitable to do so.

7 Wright & Miller, § 1611, at 169 (3d ed. 2001) (footnote omitted).

Although a Rule 19 analysis should be completely unnecessary to a proper decision whether removal is appropriate in this case, we set forth below the reasons why EQR – the entity the Fourth Circuit thought should destroy diversity – is neither a necessary nor an indispensable party.

1. EQR is not a necessary party

EQR is not a necessary party under Rule 19(a), much less an indispensable one under Rule 19(b). The court below stated that "[respondents] contend that Lincoln's Virginia entity is the real and substantial party in interest, without whom they cannot be made whole." Pet. App. 7a n.5. Even if that were true – for example, because respondents sued the wrong defendant – it would be irrelevant. This Court has made that clear in a seminal decision applying Rule 19 and vacating a court of appeals' *sua sponte* holding that a non-party was indispensable. When the plaintiff has been dilatory in asserting its own interest under Rule 19, that interest simply cannot be counted as a reason for upsetting a final judgment: "clearly the plaintiff, who himself chose . . . the parties defendant, will not be heard to complain about sufficiency of the relief obtainable against them." *Provident Tradesmens*, 390 U.S. at 111.[24] That should be the end of the matter, and there is no other reason to hold that EQR is a necessary party. That is true with respect to both the tort and contract claims respondents have asserted.

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[24] While in *Provident Tradesmens* the plaintiffs had also chosen the federal forum, in this case the plaintiffs never sought, in either of the courts below, to obtain a remand by joining a non-diverse defendant. They therefore should not be heard to complain, now that they have suffered an adverse judgment, about their own voluntary failure to seek to join EQR as a defendant.

a. EQR is not a necessary party to respondents' tort claims. "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (per curiam) (citing cases); *see* Fed. R. Civ. P. 19 advisory committee notes (1966 Amendment) (Rule 19 incorporates the "settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability. Joinder of these tortfeasors continues to be regulated by Rule 20 . . . .") (citations omitted).

Here, nine of the 12 original claims alleged by Mr. Roche (and eight of the 11 original claims alleged by Mrs. Roche) were tort claims based on common law or Virginia statute. *See supra* p. 3 n.1 (setting out alleged claims). Respondents' second amended complaint, in turn, alleged only two tort claims: negligence and conversion. Respondents did not, however, appeal the dismissal of any of their original claims or the second amended complaint's negligence claim. Accordingly, because respondents voluntarily ceased to advance their dismissed claims on appeal, only the conversion claim could be relevant here.[25]

In any event, a potential joint tortfeasor – which is what EQR would be – is a "merely permissive part[y]."

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[25] Ordinarily, the Court looks at the suit as it was originally filed in determining whether removal was proper. *See Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 390 (1998) ("[F]or purposes of removal jurisdiction, we are to look at the case as of the time it was filed in state court – prior to the time when the defendants filed their answer in federal court."). When the plaintiff voluntarily drops claims or parties after removal, however, the removal analysis is governed by the new posture of the case. *See supra* p. 21. Accordingly, the Court may examine the propriety of removal here based solely on the conversion claim, for respondents voluntarily declined to advance any other claim against Lincoln in their Fourth Circuit appeal. *See Quinn v. Aetna Life & Cas. Co.*, 616 F.2d 38, 40 n.2 (2d Cir. 1980) (per curiam) ("plaintiffs' failure to take an appeal constituted the functional equivalent of a 'voluntary' dismissal" for purposes of § 1441 removal); *see also Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 72 n.3 (7th Cir. 1992) (suggesting agreement with *Quinn* but not reaching the issue).

Temple, 498 U.S. at 8. As Professors Wright and Miller have explained, "joinder has not been required of principals and agents, or parent and subsidiary corporations who may be jointly and severally liable." 7 Wright & Miller, § 1623, at 365-66 (citing cases; footnotes omitted).

Thus, in *Pujol v. Shearson/American Express, Inc.*, 877 F.2d 132 (1st Cir. 1989), then-Judge Breyer's opinion held that a non-diverse subsidiary of Shearson, the named corporate defendant, was not a necessary party because Shearson would want to defend by showing that "no one behaved improperly at its Subsidiary, that Pujol's charges were without foundation, and that its own actions in response to Pujol's baseless accusations were therefore reasonable. This is precisely what the Subsidiary would wish to show." *Id.* at 135. Accordingly, the plaintiff's failure to name the subsidiary would not "'as a practical matter impair or impede' the Subsidiary's 'ability to protect [its] interest'" in the suit against its corporate parent. *Id.* (quoting Rule 19(a)(2)(i)). The same is true here, for Lincoln would want to – and did in fact – defend vigorously against any claims that it and an affiliate using its trade name acted improperly. *See id.* ("Shearson's counsel's motives and ability to defend *Shearson* do not differ significantly, as a practical matter, from Shearson's counsel's motives and ability to defend the *Subsidiary's* interests as well.").[26]

b. EQR is not a necessary party to respondents' contract claims. Counts II-IV of the original complaints alleged that petitioners breached their contract in three respects. *See* JA 40-44, 66-70. But the Roches sued the *only* parties named on the lease – SWIB, the owner of the

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[26] The First Circuit in *Pujol* also held that it made no difference whether the plaintiff might seek to introduce evidence that the subsidiary was an "active participant" in the alleged wrongdoing. "Given the vast range of potential insults and allegations of impropriety that may be directed at non-parties in civil litigation, a contrary view would greatly expand the universe of Rule 19(a) necessary parties." *Pujol*, 877 F.2d at 136.

Westfield apartments, and Lincoln, as SWIB's "authorized agent."[27] The lease does not even mention EQR. It should be self-evident that a non-party to a contract is not a necessary party to a lawsuit on that contract. *See*, *e.g.*, *Conn-Tech Dev. Co. v. University of Connecticut Educ. Props., Inc.*, 102 F.3d 677, 682 (2d Cir. 1996) ("A nonparty to a commercial contract ordinarily is not a necessary party to an adjudication of rights under the contract.") (internal quotation marks omitted).

In any case, the second amended complaint did not allege *any* contract claims against Lincoln, and respondents chose voluntarily not to appeal the dismissal of any of their original contract claims. The two contract claims in the second amended complaint (one of which respondents voluntarily dismissed, *see* JA 182) were alleged against SWIB only. *See* JA 131-33. Respondents decided to focus their contract theories solely on SWIB after the district court ruled that their original complaints violated Rule 8(a)(2) because they failed to give petitioners fair notice of which claims were being alleged against which petitioner and ordered respondents to file the second amended complaint if they wished to proceed on those claims. As this Court recently held in finding a complaint deficient under Rule 8(a)(2), "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627, 1634 (2005). Thus, it is clear that respondents chose voluntarily not to allege any contract claims at all against Lincoln in their second amended complaint, although they were certainly free to try under the district court's Rule 8(a)(2) holding.

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[27] The lease was signed on behalf of SWIB by Matthew Levis for "Lincoln Property Company ECW, Inc. Agent," as "Lincoln Property Company Agent." JA 94. Instead of also naming Lincoln Property Company ECW, Inc. as a defendant, respondents chose, for whatever reason, to caption their complaints as against "Lincoln Property Company t/a Lincoln Property Company ECW, Inc." JA 26, 52.

Accordingly, the contract claims respondents chose to pursue only against SWIB have no relevance in determining whether *any* Lincoln affiliate might be a "necessary" party within the meaning of Rule 19(a).

2. EQR is not an indispensable party

It is axiomatic that, if EQR is not a "necessary" party under Rule 19(a), it cannot possibly be an "indispensable" party under Rule 19(b). However, even assuming EQR's status as a "necessary" party, it fails to meet the requisites of an indispensable party under Rule 19(b).

In *Provident Tradesmens*, Justice Harlan explained in a unanimous opinion how to apply Rule 19(b), and that analysis makes clear that EQR could not be deemed an indispensable party. That case was a diversity suit concerning a fatal automobile accident allegedly caused by the driver of a borrowed car. Three of the injured parties (or their estates) sued the car owner's insurance company for damages on the theory that the driver had the owner's permission to drive the car and was thus covered by the owner's insurance policy. *See* 390 U.S. at 104-05. The car's owner, Edward Dutcher, however, was not named as a defendant; if he had been, then diversity would have been destroyed. *See id.* At trial, the jury found that the driver had Dutcher's permission and awarded damages to the plaintiffs against Dutcher's insurance company. On appeal, the court of appeals *sua sponte* dismissed for lack of diversity on the ground that Dutcher was an indispensable party. *See id.* at 106-07.

This Court reversed, relying partly on the fact that the defendant insurance company – the losing party – had never sought to join Dutcher in the district court. The Court found that the "interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage." *Id.* at 112; *see also Caterpillar*, 519 U.S. at 75 (finding same concern in preserving final judgment "overwhelming"). The Court found such "[o]pposing considerations" to be "hard to find" where the losing parties

at trial had "showed no interest in joinder until the Court of Appeals took the matter into its own hands. This properly forecloses any interest of theirs." 390 U.S. at 112.

Likewise, in this case Lincoln and SWIB have a strong interest in preserving the fully litigated judgment they obtained in the district court,[28] and respondents never sought to join EQR as a defendant in either the district court or the court of appeals. To accept the Fourth Circuit's approach or to view EQR as an indispensable party would give plaintiffs an incentive and opportunity to game the system by declining to name certain non-diverse parties as defendants only to assert, after suffering an adverse judgment, that the court lacked jurisdiction and should remand the case for a new start in state court. That is why the Court explained in *Provident Tradesmens* that "clearly the plaintiff, who himself chose . . . the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them." 390 U.S. at 111. *Cf.* Fed. R. Civ. P. 12(h)(2) (indispensable-party defense may be asserted only until trial). That principle has even more force here, where EQR's interests are protected by Lincoln's defense of the suit against it.[29]

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[28] As respondents themselves explained to the district court in their motion to remand, "[a]n immense amount of time, energy and resources of plaintiffs' counsel, as well as this Court have been exhausted because everyone believed that subject matter jurisdiction existed. Five different Motions with Memorandums were argued before Magistrate Judges; two more conducted by telephone conference. Your Honor and your staff heard a lengthy Motion to Dismiss; *Daubert* Motion to Exclude Experts; and a Motion for Summary Judgment. Voluminous documents and exhibits have been filed." C.A. App. 1528.

[29] In addition, now that Lincoln has won summary judgment on all claims in the district court, there is no longer a danger to EQR of an adverse judgment affecting its interest. *See Provident Tradesmens*, 390 U.S. at 110-11 ("The judgment appealed from may not in fact affect the interest of any outsider even though there existed, before trial, a possibility that a judgment affecting his interest would be rendered."); *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 71 (1936) ("[S]ince the bill states no cause of action against any one, the rights of absent parties are in no way threatened by it, and to enter upon a consideration

Nor should respondents be allowed now to assert protection of EQR's interest (they have never before attempted to do so), for that would plainly be a self-serving attempt to gain a remand and fresh start in state court in order to escape the adverse judgment they suffered in federal court. *Cf. Provident Tradesmens*, 390 U.S. at 110 ("After trial, . . . if the defendant has failed to assert this interest [in avoiding multiple litigation], it is quite proper to consider it foreclosed.").[30]

E. The Fourth Circuit's Rule Would Produce Massive Uncertainty And Unwarranted Litigation

This Court has frequently made clear that "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1930 (2004). It has emphatically declined to create jurisdictional rules that "would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Thus, jurisdictional rules have been designed "to avoid . . . uncertainty and litigation over the preliminary issue of the forum's competence." *Burnham v. Superior Court of California*, 495

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of the question of their indispensability would be a vain waste of time.").

[30] Although it cited the *Provident Tradesmens* case, the court of appeals deemed that case irrelevant because it arose under Rule 19. *See* Pet. App. 7a n.5. In addition, the Fourth Circuit's description of the case got it exactly backwards by erroneously reporting that the nonjoined party was "an insurance company who had, at best, a tangential interest in the pending claim." *Id.* Contrary to the lower court's misreading, however, the insurance company *was* joined, and the insured – who faced liability over and above his policy limit in subsequent suits and thus had an obvious and substantial interest in preserving the $100,000 fund – was *not* joined and was nevertheless found *not* to be indispensable.

U.S. 604, 626 (1990) (plurality); *see also Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (Court should avoid jurisdictional "tests produc[ing] the sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible").[31]

This Court has never sanctioned the wide-ranging inquiry into non-named entities that a plaintiff might have named in the complaint. But that is precisely what the Fourth Circuit's misguided rule requires. The massive uncertainty and collateral litigation flowing from that approach plainly counsel against changing course now. *See Grupo Dataflux*, 124 S. Ct. at 1930 ("The stability provided by our time-tested rule weighs heavily against the approval of any new deviation."). In contrast, the district court below appropriately examined the citizenship of the defendants actually named in respondents' complaint, and even indulged respondents' speculation about EQR, even though nothing in the Federal Rules of Civil Procedure or this Court's cases obliged it to do so. The Fourth Circuit's

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[31] The boundary between judicial power and nullity should . . . , if possible, be a bright line, so that very little thought is required to enable judges to keep inside it. If, on the contrary, that boundary is vague and obscure, raising "questions of penumbra, of shadowy marches," two bad consequences will ensue similar to those on the traffic artery. Sometimes judges will be misled into trying lengthy cases and laboriously reaching decisions which do not bind anybody. At other times, judges will be so fearful of exceeding the uncertain limits of their powers that they will cautiously throw out disputes which they really have capacity to settle, and thus justice which badly needs to be done will be completely denied. Furthermore, an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases. In short, a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there.

Sisson, 497 U.S. at 375 (Scalia, J., concurring in the judgment) (quoting Zachariah Chafee, The Thomas M. Cooley Lectures, *Some Problems of Equity* 312 (1950) (quoting, in turn, *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring))).

rule imposes a burden on a defendant to prove a negative – that there is no other possible non-named defendant who might have an interest in the lawsuit and that, if there are, those non-named putative defendants also are completely diverse from the plaintiffs. Such open-ended and standardless requirements should not be engrafted onto removal determinations, which occur thousands of times per year in the federal courts.

F. This Court Should Express Disfavor With The Fourth Circuit's *Sua Sponte* Reversal

The court of appeals might have avoided its errors had it asked the parties to address in supplemental briefing the jurisdictional issue about which the court had become concerned. Instead, the court created its own flawed legal rationale and then misapplied the facts to it, without giving petitioners notice or an opportunity to be heard on that issue. Lincoln had no cause to brief that issue because, on appeal, respondents did not challenge the district court's ruling that Lincoln was diverse to respondents.[32] This Court should therefore instruct courts of appeals not to engage in the types of *sua sponte* decision-making engaged in by the Fourth Circuit below absent extraordinary circumstances.

As a matter of elemental due process, this Court has long held that the Constitution, at a minimum, requires

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[32] Although respondents did file a post-judgment motion to remand in the district court, they did so based on the theory that "Defendant Lincoln is not a Texas corporation, but rather is not a corporation at all and, instead, is a partnership with a partner who is a Virginia resident." Pet. App. 8a. But that was a different theory from the far-reaching one invented by the court of appeals, which required petitioners to negate the existence of "some" non-diverse and non-named "Lincoln entity related to this action" and to establish the degree of that entity's "nexus" with Virginia. *Id.* at 11a; *see also id.* at 17a (requiring "sufficient indicia – by a preponderance of the evidence – that one member of the Lincoln group of companies doing business in Virginia is not a citizen of the Commonwealth [of Virginia]"). Lincoln thus had no reason to submit evidence or argument to meet the curveball presented by the court of appeals' unprecedented jurisdictional rule.

prior notice and an opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). These procedural due process safeguards are deeply rooted in our judicial system. *See Rochin v. California*, 342 U.S. 165, 170-71 (1952). The Fourth Circuit denied Lincoln those procedural protections when it ordered the case to be remanded *sua sponte* to state court without input from the parties. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000) (party must be "afforded a proper opportunity to respond to the claim" before it is adjudicated against that party); *Boddie*, 401 U.S. at 377 ("[P]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."); *Mullane*, 339 U.S. at 314 ("[t]he notice must be of such nature as reasonably to convey the required information"). While, in this case, Lincoln was fortunate that this Court granted certiorari to review the Fourth Circuit's decision, in the vast majority of cases a court of appeals' *sua sponte* disposition of the case would be the end of the line.[33]

Surprise *sua sponte* judicial decisionmaking is fundamentally at odds with our adversary system of justice. "If

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[33] Lincoln's opportunity under appellate rules of procedure to request a rehearing (which it, in fact, did) cannot substitute for the type of process necessary to present its jurisdictional arguments to counter the *sua sponte* decision of the court. As is the case with the vast majority of all such petitions, the rehearing petition here was summarily denied. Because there is such a heavy presumption against the likelihood that a rehearing petition will have merit, arguments that might have carried the day simply are not given the same credence as if they had been presented when the case was still being briefed, argued, and considered for decision by the panel. As the federal courts of appeals have recognized, a summary denial of a rehearing petition does not constitute a decision on the merits of the arguments raised in the petition. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1479-80 (Fed. Cir. 1998) (collecting cases). Thus, a summary denial of a rehearing petition does not provide the opportunity to be heard required by the Fifth Amendment.

notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error, and with that, the possibility of an incorrect result." *Lankford v. Idaho*, 500 U.S. 110, 127 (1991) (citation omitted). Thus, if a "hearing is to ensure fairness, it must provide [the affected party] an opportunity to present her case effectively" before issues are resolved without proper briefing and argument. *Landon v. Plasencia*, 459 U.S. 21, 36-37 (1982). As similarly expressed by Judge Friendly, "[t]he district court has no authority to dismiss a complaint for failure to state a claim upon which relief can be granted without giving the plaintiff an opportunity to be heard." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1365 (2d Cir. 1985), *aff'd*, 476 U.S. 409 (1986).

To be sure, a court has an independent duty to ensure that it has jurisdiction to address the merits. *See*, *e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). But to raise and decide *sua sponte* a jurisdictional issue that has the effect of overturning a judgment on the merits without giving the adversely affected party notice and an opportunity to be heard present very different concerns. Thus, as the Seventh Circuit has explained, "even when the dismissal is on jurisdictional grounds, unless the defect is clearly incurable a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue, or provide the plaintiff with the opportunity to discover the facts necessary to establish jurisdiction." *Shockley v. Jones*, 823 F.2d 1068, 1073 (7th Cir. 1987). "Notice serves several important purposes. It gives the adversely affected party a chance to develop the record to show why dismissal is improper; it facilitates *de novo* review of legal conclusions by ensuring the presence of a fully-developed record before an appellate court; and, it helps the trial court avoid the risk that it may have overlooked valid answers to what it perceives as defects in plaintiff's case." *McGinty v. New York*, 251 F.3d 84, 90 (2d Cir. 2001) (citations omitted).

The Fourth Circuit here overlooked numerous "valid answers" (*id.*) to its questions, both legal and factual. *See supra* pp. 14-38; *infra* pp. 41-48. This Court should make clear that such *sua sponte* decisionmaking without giving the parties an opportunity to address the issue of a possible jurisdictional flaw is strongly disfavored and should be reserved only for exceptional circumstances.

II. THE CITIZENSHIP OF A LIMITED PARTNERSHIP IS BASED SOLELY ON THE CITIZENSHIP OF EACH PARTNER – NOT ON WHETHER THE PARTNERSHIP HAS A "VERY CLOSE NEXUS" WITH THE STATE OF PLAINTIFFS' CITIZENSHIP

Even assuming the court of appeals properly considered the citizenship of EQR – a non-named limited partnership that respondents *never* sought to join despite having had every opportunity to do so – that court misapplied this Court's precedents for determining the citizenship of a limited partnership. This Court has squarely rejected the "very close nexus" test fabricated and applied by the court of appeals in its flawed *sua sponte* decision. *See* Pet. App. 16a. And, under this Court's controlling test, EQR is a citizen of Texas because all of its partners (both general and limited) are citizens of Texas. It is therefore diverse from the Virginia plaintiffs. Although this Court conceivably could decide this case solely on the first issue, it should also reverse the Fourth Circuit on the second question because its flawed analysis of diversity for limited partnerships creates great uncertainty for the business community.

A. Limited Partnership EQR's "Nexus" Of Activities To Virginia Is Irrelevant To Determining Its Citizenship For Diversity Jurisdiction

1. This Court's cases hold that a partnership's citizenship is determined by the state of citizenship of its partners. In *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), this Court held that a court must look to the

citizenship of each partner in a limited partnership, both limited and general, in determining whether complete diversity exists. *Id.* at 195. In reaching that conclusion, the Court applied its precedents treating unincorporated associations as having the citizenship of each of its members. *Id.* at 189 (discussing *Chapman v. Barney*, 129 U.S. 677 (1889) ("joint-stock company," *i.e.*, partnership); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900) (limited partnership); and *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (labor union)). Nowhere did the Court in *Carden* suggest that a court may look beyond the entity's membership and assess whether its activities in the forum state constituted a "very close nexus" with that state.

Indeed, the Court long ago rejected the quite similar proposition that an unincorporated association should be deemed a citizen of the state comprising its principal place of business. In *Bouligny*, the Court noted the statutory rule that "'a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.'" 382 U.S. at 148 n.4, 152 (quoting 28 U.S.C. § 1332(c)(1)). But the Court specifically *rejected* application of that principal-place-of-business rule to unincorporated associations, explaining that whether such a rule should be so applied involved "decisions which we believe suited to the legislative and not the judicial branch." *Id.* at 153. Thus, the Court concluded, "[w]hether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes" is "properly a matter for legislative consideration which cannot adequately or appropriately be dealt with by this Court." *Id.* at 147, 153.[34]

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[34] In contrast, the Court has interpreted the venue statute, 28 U.S.C. § 1391(b), to permit suit against an unincorporated association "wherever it is 'doing business.'" *Denver & Rio Grande Western R.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 562 (1967) (quoting § 1391(b)). The Court made clear in that context, however, that whether diversity jurisdiction exists is a wholly different, and

The Court later explained that its decision in *Bouligny* meant that the Court, "having entered the field of diversity policy with regard to artificial entities once (and forcefully) [in holding that corporations are citizens of the state of incorporation], we have left further adjustments to be made by Congress." *Carden*, 494 U.S. at 196. Thus, as the leading treatise explains, "the citizenship of all the partners or members of an organization is critical and the state where the limited partnership or other entity is registered or has its *principal place of business is not considered for purposes of removal*." 14B Wright & Miller, § 3723, at 601 (3d ed. 1998) (emphasis added). Until the Fourth Circuit's aberrant decision here, that principle had been consistently applied by other courts of appeals.[35]

Instead, those courts have given full effect to Congress's legislative determination of which types of business entities should have their citizenship determined, in part, by the state of its principal place of business and which should not be. By statute, Congress has required the citizenship of a corporation to be deemed in part by the state of its principal place of business. *See* 28 U.S.C. § 1332(c)(1). Congress has also done so in another specific instance by declaring that an insurer, "whether incorporated or unincorporated," is a citizen "of the State where it has its principal place of business." *Id.* But Congress has never adopted a principal-place-of-business rule for

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antecedent, question to that of venue. *See id.* at 559, 563 (discussing *Bouligny*).

[35] *See ConnTech*, 102 F.3d at 681 (property-development partnership doing business in defendant's state of citizenship held diverse because its partners were citizens of different states); *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 60 (1st Cir. 1993) (property-development partnership operating in Puerto Rico held not to be a citizen of Puerto Rico because its partners were New York corporations with their principal places of business in New York); *Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 357 n.1 (D.C. Cir. 1983) (per curiam) ("For diversity purposes, the citizenship of a limited partnership does not depend upon the state of its organization, the location of its principal place of business, or any of its other features as an entity").

limited partnerships or, more generally, for other types of unincorporated associations, and thus has declined to express any different legislative preference than the construction given by this Court's holding in *Bouligny*.

To be sure, proposals from time to time have been advanced so that "unincorporated associations [are] deemed citizens of the States in which their principal places of business are located." *Bouligny*, 382 U.S. at 153 n.12 (citing American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, Proposed Final Draft No. 1 (1965)). Nothing has ever come of those proposals in Congress, however – despite the fact that, as the ALI's reporter has since explained, Congress did adopt other proposals from the same ALI study (which was finalized in 1969) "on a piecemeal basis." John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 872 (1998) ("[A]s a manifesto for change, its reach exceeded its grasp; the 1969 study has had relatively scant impact in reforming the body of law it evaluated."). Thus, given that Congress has declined to adopt a proposal to rest citizenship of an unincorporated association on its principal place of business, the court of appeals' adoption of its "very close nexus" test was patently lacking in statutory or doctrinal support.[36]

2. Even if a "very close nexus" test applies, EQR does not have such a nexus with Virginia. After the Fourth Circuit's remand, Lincoln moved in the district court for relief from the mandate and to present evidence of EQR's business activities in Virginia and elsewhere. Of course, prior to the Fourth Circuit's announcement of its new rule, there was no reason for Lincoln to have placed that

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[36] The Fourth Circuit's "very close nexus" rule might well be *broader* than the principal-place-of-business rule Congress declined to adopt. While a corporation can have only one principal place of business, an unincorporated association could plausibly have a "very close nexus" with multiple states, particularly given the lack of any precise standards for determining the sufficiency of a "nexus" with a state.

evidence in the record, and it was not requested by respondents in discovery. That evidence shows that, as of the date of filing of respondents' complaints in state court on August 26, 2002, EQR fee-managed 281 projects, including 79,487 apartment units, in 17 states; only 15, or 5%, of those projects were located in Virginia, and those Virginia projects accounted for only 14% of EQR's total revenues for fee-management services in 2002. *See supra* pp. 11-12. And EQR's headquarters and principal place of business were in Dallas, Texas. *See id.*

B. In Any Case, EQR Is Completely Diverse

Even if the citizenship of non-party EQR mattered, EQR's presence in the case would not destroy diversity based on a straightforward application of the Court's controlling rule in *Carden*. The record plainly shows that EQR, a partnership formed under Delaware law, is a Texas citizen that is completely diverse from respondents, who are both Virginia citizens. Lincoln General Counsel and Vice President Dan M. Jacks submitted a sworn declaration, including corporate and partnership documents filed with the States of Texas and Delaware, explaining that EQR's general and limited partners are both Texas citizens. *See* JA 238-70; *see also* Pet. App. 96a (setting out chart of EQR's partners).

As the district court properly found, *see supra* p. 9, EQR's general partner is Lincoln Eastern Management Corporation ("LEMC"), a Texas corporation with its principal place of business in Dallas, Texas. *See* JA 239 (Jacks Declaration), 247-50 (Certificate of Limited Partnership for EQR, as certified by the State of Delaware), 254-58 (LEMC Articles of Incorporation as certified by the State of Texas).

EQR's limited partners are LEMC (also its general partner, as just discussed[37]) and Lincoln Placeholder

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[37] The court of appeals faulted this dual role for LEMC because, in its view, "a limited partner generally may not be a general partner." Pet. App. 13a n.11 (citing two non-Delaware cases). Regardless of

Limited Partnership ("LPLP"). *See* JA 239 (Jacks Declaration), 259-61 (LPLP Certificate of Limited Partnership as certified by the State of Texas), 262-64 (excerpt of LPLP Partnership Agreement). The partners of LPLP, in turn, are as follows: LPLP's general partner is LEMC, a citizen of Texas as discussed above, and its limited partner is Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Dallas, Texas. *See* JA 239 (Jacks Declaration), 265-70 (Articles of Incorporation as certified by the State of Texas).

Respondents did not challenge any of the above evidence,[38] and the district court readily concluded from it

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what other states might require, Delaware law – under which EQR was formed – expressly provides that "[a] limited partner is not liable for the obligations of a limited partnership unless he or she is *also* a general partner" of the limited partnership. Del. Code Ann. tit. 6, § 17-303(a) (emphasis added). This statute would be nonsensical if a limited partner could not be a general partner, as the court of appeals incorrectly surmised without even examining Delaware law. *See Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc.*, No. 315, 1993, 1994 Del. LEXIS 190, at *1 (Del. June 9, 1994) (adjudicating Delaware limited partnership agreement in which one entity "was the sole general partner as well as a limited partner"); *Lubakoff & Altman on Delaware Limited Partnerships* § 5.4, at 5-11 (2005 Supp.) (limited partner may be "shown on a certificate of limited partnership as a general partner" and is thus liable as a general partner). Indicative of the court's faulty analysis here are back-to-back irreconcilable statements in which the court first concluded that "[t]he partnership filings in the record . . . do not disclose the identity or citizenship of **any** of EQR/Lincoln Limited Partnership's limited partners," Pet. App. 12a-13a, but then acknowledged in the footnote attached to that same sentence that "[t]he Limited Partnership Agreement . . . designates Lincoln Eastern Management Corporation as both general and limited partner of EQR/Lincoln Limited Partnership," *id.* at 13a n.11 (citing EQR's partnership agreement at C.A. App. 1576-77, reproduced in JA 251-52). In addition, the court appeared to overlook the fact that LPLP was listed as a second limited partner of EQR on the very next page of the same partnership agreement to which the court had cited. *See* JA 253 (C.A. App. 1578). *But cf.* Pet. App. 13a n.11 (setting out the general and limited partners of LPLP).

[38] Respondents claimed only that they believed that EQR had its "principal place of business" in Virginia. Plaintiffs' Motion for Leave To File Supplemental Brief at 3 (filed June 13, 2003). As discussed

that EQR was completely diverse from the Roches. *See* Pet. App. 87a-88a. The district court also correctly noted that EQR's citizenship need not even be addressed because it was not a named defendant, but it did so merely to explain why respondents' argument failed for that reason as well. *See id.*; *supra* p. 9.

C. The Fourth Circuit's Indeterminate "Very Close Nexus" Test Would Create Massive Uncertainty

The Fourth Circuit's wayward departure from the controlling rule in *Carden* through articulation of its "nexus" test is the antithesis of a rule of jurisdiction that promotes certainty and ease of administration. The court went so far as to hold that "the citizenship of the nominal parties listed on the Complaint," *i.e.*, the entities that were actually sued, "is in no way dispositive of a subject matter jurisdiction challenge." Pet. App. 17a. Instead, the court of appeals held that a removing defendant "ha[s] the burden" of placing into the record "sufficient indicia – by a preponderance of the evidence – that one member" of the "group of companies doing business in Virginia is not a citizen of the Commonwealth." *Id*. Moreover, the Fourth Circuit demands that removing defendants provide "evidence as to how" entities legally separate from the named defendant and that were not sued "are distinct or uninvolved in" the named defendant's "business enterprises" and "property holdings" in the Commonwealth of Virginia. *Id*. at 11a. That heavy burden would effectively slam shut the doors of the federal courts to companies, like property development and management companies, that do business in multiple states or that partner with local entities to carry out individual projects.

As the *amicus* participation of the Real Estate Roundtable demonstrates, at least one complete sector of the economy – real estate development – conducts business

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above, however, a partnership's "principal place of business" is irrelevant to determining its state of citizenship. *See supra* pp. 41-44.

around the country through these business forms. One reason why those businesses create separate business associations for each development project is so that they can create legal certainty – for liability, tax, security, and other purposes. The Fourth Circuit's rule destroys that certainty by inviting plaintiffs unhappy with removal decisions to scour corporate and partnership records to point to some related, alternative entity that they could have sued – but did not actually sue. In structuring their business affairs, partnerships and unincorporated associations have no way, under the Fourth Circuit's formula, of knowing what constitutes a "nexus" with a state for citizenship in that state to be imputed. That would have a devastating effect on predictability for the more than 2.2 million partnerships in the United States. *See* Tim Wheeler & Maureen Parsons, U.S. Internal Revenue Service, *Statistics of Income Bulletin – Partnership Returns, 2002*, at 46, 47 (Fall 2004) (figures as of 2002), *available at* http://www.irs.gov/pub/irs-soi/02partnr.pdf.

The Fourth Circuit's rule also has a deeper, more insidious effect: it invites plaintiffs to sandbag district courts, as respondents did here. By holding in reserve a possible related business entity, plaintiffs can test-drive their complaint in federal court after removal. If they lose on the merits, as respondents did below, they can raise post-judgment challenges to the court's jurisdiction and seek a remand to state court for a second bite at the apple. The Fourth Circuit's "very close nexus" rule invites plaintiffs to pick away at business affiliates of a named defendant in the hope that some related entity might (a) have some interest in the outcome of the lawsuit to warrant inclusion as a defendant, and (b) have some nexus to the state sufficient to justify deeming it a "citizen" of that state for diversity purposes. Given the tens of thousands of diversity cases filed in and removed to federal courts every year, this Court should not endorse the jurisdictional chaos suggested by the Fourth Circuit's unprecedented and wayward approach to the citizenship of limited partnerships.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTES INVOLVED

28 U.S.C. § 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;

(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.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(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 any State by which it has been incorporated and of the 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 the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it 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) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the

United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not

be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 17 provides:

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Federal Rule of Civil Procedure 19 provides:

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plain-

tiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.