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UNRAVELING THE JURISDICTIONAL CITIZENSHIP OF MASTER LIMITED PARTNERSHIPS

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I. INTRODUCTION

The master limited partnership (MLP) has emerged in recent years as an increasingly popular form of organization for energy companies seeking to enjoy the significant tax and investment benefits associated with MLP status. First created in 1981, the attractiveness of MLPs as investment vehicles has become more pronounced as the oil and gas industry continues to rapidly expand.[1] As MLPs grow in number, so too, naturally, will the frequency with which they are involved in litigation.

Although the MLP form has existed for more than three decades, neither the Supreme Court nor any of the circuit courts have definitively announced the method of determining an MLP's citizenship for diversity jurisdiction purposes, as has been done with, for example, corporations (state of incorporation and principal place of business), limited partnerships (LPs) (partner citizenship), limited liability companies (LLCs) (member citizenship), and individuals (domicile).[2] Consequently, district courts faced with adjudicating subject matter jurisdiction-related motions[3] involving MLPs must look to, by analogy, higher courts' rulings determining the citizenship of similar entities—principally, LPs, LLCs, and corporations.

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1. Donna D. Adler, *Master Limited Partnerships*, 40 U. FLA. L. REV. 755, 756 (1988); J.T. Carpenter, Comment, *Master Limited Partnerships Shed a Tier*, 53 S. TEX. L. REV. 381, 389 (2011). Houston-based companies alone accounted for 43% of all capital raised by initial public offerings of MLPs nationwide in 2012. Katherine Feser, *Master Limited Partnership Trend Keeps Building*, HOUS. CHRON. June 24, 2013.

2. Hertz Corp. v. Friend, 559 U.S. 77, 80–81 (2010) (corporate citizenship); Carden v. Arkoma Assocs., 494 U.S. 185, 195–96 (1990) (LP citizenship); Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1079–80 (5th Cir. 2008) (LLC citizenship); Veranda Assocs., L.P. v. Hooper, 496 F. App'x 455, 457 (5th Cir. 2012) (per curiam) (citing Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954)) (individual citizenship).

3. For example, motions to remand pursuant to 28 U.S.C. § 1447 or motions to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

As a hybrid organizational structure taking characteristics from both partnerships and corporations, the MLP does not fit perfectly into any existing methodology for establishing citizenship. As the law stands today, assigning citizenship to an MLP can be categorized by two possible approaches. First, pursuant to what has been described as the "persons composing" rule, an MLP's citizenship would be determined by the citizenship of each of its constituent unitholders, similar to the approach taken with partnerships and LLCs.[4] Alternatively, under the "entity citizenship" rule, an MLP would be treated as a legal person and deemed a citizen of its state of organization and its principal place of business, similar to corporations.[5] This Article examines the two possible approaches within the context of the existing law and predicts an outlook for MLP litigants seeking to invoke federal diversity jurisdiction.

II. BACKGROUND ON MLPS

A master limited partnership is a limited partnership or limited liability company with publicly traded interests, called "common units."[6] MLPs share many characteristics with traditional LPs, including the existence of limited partners—in the MLP context, "unitholders"—who provide capital and a general partner who manages the partnership's affairs.[7] What primarily separates an MLP from a traditional LP is the MLP's status as a publicly traded entity.[8]

Federal law limits MLP status principally to entities that generate at least 90% of their income from "the exploration, development, mining or production, processing, refining, [or] transportation . . . of any mineral or natural resource," such as oil and natural gas.[9] As a result of these statutory requirements, the MLP market is heavily slanted towards companies that own oil and gas exploration, transportation, and production assets.[10]

The chief benefit of MLP status is the tax benefit enjoyed by investing unitholders.[11] Although an MLP's ownership interests are traded like corporate stock on an exchange, its classification as a partnership for federal

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4. Debra R. Cohen, *Limited Liability Company Citizenship: Reconsidering an Illogical and Inconsistent Choice*, 90 MARQ. L. REV. 269, 271 (2006).

5. *Id.* at 271–72. The terms "persons composing" rule and "entity citizenship" rule are not universally adopted, but are incorporated in this Article for ease of reference to the legal frameworks they represent.

6. John Goodgame, *New Developments in Master Limited Partnership Governance*, 68 BUS. LAW. 81, 82 (2012).

7. Hite Hedge LP v. El Paso Corp., No. 7117VCG, 2012 WL 4788658, at *1 (Del. Ch. Oct. 9, 2012).

8. *Id.*

9. I.R.C. § 7704(c)(2), (d)(1)(E) (2012). Also included within the definition of "qualifying income" are "real property rents" and "gain from the sale or other disposition of real property." I.R.C. § 7704(d)(1)(C)–(D) (2012). The Master Limited Partnerships Parity Act, introduced in 2013, would extend MLP status to certain renewable energy projects. Master Limited Partnerships Parity Act, H.R. 1696, 113th Cong. § 2(a)(4)(ii) (2013). The legislation has at least nominal bipartisan support in Congress, as both Republican and Democrat legislators have cosponsored it. *Id.*

10. Goodgame, *supra* note 6, at 82.

11. *Id.*

taxation purposes allows for "pass through" tax treatment on income.[12] Because an MLP pays no taxes on its earnings, it instead pays out earnings as cash distributions to its investors.[13] This characteristic has contributed to the increase in prominence of MLPs in recent years.[14]

Today, there are close to one hundred different oil and gas-related MLPs traded on U.S. exchanges, nearly two-thirds of which are characterized primarily as midstream companies.[15] Because these MLPs are traded on widely accessible exchanges, such as the New York Stock Exchange (NYSE) or NASDAQ, unitholders often come from all corners of the world, which, as discussed below, could lead to complications when attempting to assert an MLP's jurisdictional citizenship.

III. FEDERAL DIVERSITY JURISDICTION

Federal district courts are vested with original jurisdiction over claims between citizens of different states when the amount in controversy exceeds $75,000 and there is complete diversity of citizenship between all plaintiffs and all defendants.[16] The complete diversity rule requires that each defendant must be a citizen of a different state from each plaintiff.[17] This rule applies equally whether the suit involves citizens of different U.S. jurisdictions or foreign nations.[18]

When determining citizenship for diversity purposes, the Supreme Court and the Fifth Circuit have established certain bright-line tests for various entities. For instance, an individual is a citizen of the state in which he is domiciled, which is defined as "permanent residence in a particular state with the intention of remaining."[19] As explicitly stated in the federal diversity statute, the citizenship of a corporation is determined by the state in which it is incorporated and the state of its principle place of business, which is the state in which the corporation's nerve center is located.[20] Unlike

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12. *Id.*

13. WILLIAM H. HOFFMAN, JR. ET AL., WEST FEDERAL TAXATION: CORPORATIONS, PARTNERSHIPS, ESTATES & TRUSTS 11-35 (2008 ed. 2008).

14. *See* Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555, 557 (2012) ("[T]he number and size of [MLPs] have in recent years undergone dramatic growth, making them an increasingly significant part of the business world.").

15. *PTPs Currently Traded on U.S. Exchanges*, NAT'L ASS'N OF PUBLICLY TRADED PARTNERSHIPS, http://www.naptp.org/PTP101/CurrentPTPs.htm (last visited Mar. 17, 2014).

16. 28 U.S.C. § 1332(a) (2012); Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89 (2005) (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806)).

17. *Roche*, 546 U.S. at 89 (citing *Strawbridge*, 7 U.S. (3 Cranch) at 267). Although the diversity statute itself does not necessitate complete diversity of citizenship, the Supreme Court has long mandated such a requirement, first announcing the doctrine in the 1806 decision of *Strawbridge v. Curtiss*. 28 U.S.C. § 1332 (2012); *Strawbridge*, 7 U.S. (3 Cranch) at 267.

18. Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp., 506 F.2d 757, 758 (5th Cir. 1975).

19. Veranda Assocs., L.P. v. Hooper, 496 F. App'x 455, 457 (5th Cir. 2012) (per curiam) (quoting Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954)).

20. 28 U.S.C. § 1332(c)(1); Hertz Corp. v. Friend, 559 U.S. 77, 80–81 (2010).

corporations, the citizenship of an LLC or a partnership is determined by the citizenship of all its constituent members or partners.[21]

Because federal courts are courts of limited jurisdiction, there is a presumption against federal subject matter jurisdiction, and the burden of establishing the contrary rests on the party seeking to invoke the federal court's jurisdiction.[22] Therefore, "[f]ederal courts, both trial and appellate, have a continuing obligation to examine the basis for their jurisdiction."[23] "The issue may be raised by parties, or by the court *sua sponte*, at any time."[24] "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."[25]

When a party seeks to litigate in the federal court system on the basis of diversity, the grounds for diversity jurisdiction must be "distinctly and affirmatively alleged."[26] "Failure [to adequately] allege the basis for diversity jurisdiction mandates dismissal."[27] Accordingly, an LLC or LP seeking to establish diversity jurisdiction must plead jurisdictional facts showing the citizenship of every member or partner and that each member or partner is completely diverse from the opposition's parties.

IV. THE CURRENT LAW

Although the question of whether an MLP should be accorded jurisdictional citizenship in accordance with the "persons composing" rule or the "entity citizenship" rule has not been directly addressed by either the Supreme Court or the circuit courts, the Supreme Court has definitively announced a bright-line rule that the citizenship of all unincorporated entities is determined by the citizenship of the entity's constituent members.

In *Carden v. Arkoma Associates*, the issue before the Court was whether the citizenship of a limited partnership's individual partners must be considered when determining the jurisdictional citizenship of the limited partnership as a whole.[28] After considering its historical treatment of unincorporated entities, as well as Congress's decision to carve out in the diversity statute a special jurisdictional citizenship rule for corporations but not other entities,[29] the Court explained that "[w]hile the

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21. Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1079–80 (5th Cir. 2008); *see also* Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 585 n.1 (2004) ("Although the [Supreme] Court has never ruled on the issue, Courts of Appeals have held the citizenship of each member of an LLC counts for diversity purposes.").

22. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

23. MCG, Inc. v. Great W. Energy Corp., 896 F.2d 170, 173 (5th Cir. 1990).

24. *Id.*

25. FED. R. CIV. P. 12(h)(3).

26. Mullins v. TestAmerica, Inc., 564 F.3d 386, 397 (5th Cir. 2009) (emphasis omitted).

27. Stafford v. Mobil Oil Corp., 945 F.2d 803, 805 (5th Cir. 1991).

28. Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990).

29. 28 U.S.C. § 1332(c)(1) (2012) ("[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . .").

rule regarding the treatment of corporations as 'citizens' has become firmly established, we have . . . just as firmly resisted extending that treatment to other entities," including LPs.[30] Referring to this "doctrinal wall," the Court held that "[t]here could be no doubt . . . that at least common-law entities . . . [are] treated for purposes of the diversity statute pursuant to . . . '[t]he tradition of the common law,' which is 'to treat as legal persons only incorporated groups and to assimilate all others to partnerships.'"[31] Thus, in accordance with this doctrinal wall, only incorporated groups possess legal personhood, and all other entities are citizens of the various states of their constituent members.

The only exception to this apparent bright-line rule was announced in *Puerto Rico v. Russell & Co.*, in which the Court held that an entity created under Puerto Rican civil law known as a *sociedad en comandita* was a jurisdictional citizen of Puerto Rico.[32] The Court reasoned that the *sociedad*'s jurisdictional "personality is so complete in contemplation of the law of Puerto Rico that [there is] no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law."[33] Since *Russell*, the Supreme Court has declined to extend any exception to the general corporate–noncorporate dichotomy beyond the specific circumstances associated with the *sociedad*.

In the few lower court cases that have addressed the issue of MLP citizenship since *Carden*, each court has characterized MLPs as noncorporate entities subject to noncorporate jurisdictional citizenship. In cases from 2010, 2011, and 2012, districts courts in Maryland, Pennsylvania, and Idaho held that, under *Carden*, MLPs take the citizenship of their general and limited partners (i.e., their unitholders).[34] Moreover, a recent case from the U.S. District Court for the Southern District of Texas applied *Carden* to conclude that "[t]he citizenship of all unincorporated entities, including master limited partnerships, is determined by the citizenship of each of its underlying members, not by its state of organization and the state in which its principal place of business is located."[35] Thus, although precedent in this area is sparse,

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30. *Carden*, 494 U.S. at 189–90, 195–97.

31. *Id.* at 190 (third alteration in original) (quoting Puerto Rico v. Russell & Co., 288 U.S. 476, 480 (1933)).

32. *Russell & Co.*, 288 U.S. at 482.

33. *Id.* (emphasis added).

34. Ada Cnty. Highway Dist. v. Nw. Pipeline GP, No. 1:12-cv-00184-BLW, 2012 WL 4737869, at *1–2 (D. Idaho Oct. 3, 2012) (citing *Carden*, 494 U.S. at 195) (rejecting an argument that because the defendant MLP was "'atypical' from limited partnerships" and more similar to corporations, that it should be treated as a corporation for jurisdictional purposes); Vosburg v. Williams Field Servs. Co., No. 3:11-cv-1624, 2011 WL 3881277, at *2 & n.2 (M.D. Pa. Sept. 2, 2011) ("[A]s a master limited partnership is an artificial entity of the sort referenced in *Carden*, . . . this Court sees no reason why limited partnership principles for diversity should not apply." (citing *Carden*, 494 U.S. at 195)); Wood v. Walton, No. WDQ-09-3398, 2010 WL 458574, at *2 (D. Md. Feb. 2, 2010) (citing *Carden*, 494 U.S. at 195–96) (concluding that an MLP with a limited partner located in Maryland was a citizen of Maryland).

35. Trafigura AG v. Enter. Prods. Operating LLC, No. H-13-2712, 2014 WL 501962, at *4 (S.D. Tex. Jan. 21, 2014).

courts seem to be applying LP or LLC citizenship rules, in accordance with *Carden*, to MLPs.

V. OUTLOOK

Consider the following scenario: an MLP is sued in Texas state court by an oilfield services company for breach of contract, a cause of action arising under state law. The original petition seeks liquidated damages of $1 million.

The MLP is a midstream oil and gas company publicly traded on the NYSE. It has a market capitalization of $1 billion, and its 50 million outstanding units are owned by more than 10,000 individual investors. Its principal place of business is Oklahoma City, Oklahoma, and it is organized under the laws of Delaware. Its various investors include individuals in all fifty states and more than a dozen foreign countries. The plaintiff is organized as a corporation under the laws of Texas, and its principal place of business is in Houston, Texas.

After receiving service of summons, the defendant MLP timely removes the case to federal court to take advantage of more favorable motion to dismiss procedural law.[36] Can the plaintiff succeed on a motion to remand the case to state court?[37]

Because the single claim asserted arises under state, rather than federal law, federal question jurisdiction is clearly improper.[38] Diversity jurisdiction would therefore be the only potential basis for remaining in federal court. With the amount in controversy requirement satisfied by a claim for $1 million in damages, the issue then becomes whether there is complete diversity among the parties.

Under the "entity citizenship" approach, the answer is simple: because the MLP's principal place of business is in Oklahoma and it is organized under Delaware law, it is a citizen of both Oklahoma and Delaware. The plaintiff, organized under Texas law and based in Houston, is solely a citizen of Texas. Complete diversity therefore exists, allowing the MLP to avail itself of the federal court's jurisdiction, and the motion to remand would be denied.

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36. Texas's "fair notice" pleading standard is considerably less stringent than the federal system's post-*Twombly* and *Iqbal* Rule 8 pleading standard. Garcia v. Nationwide Prop. & Cas. Ins. Co., No. H-10-4088, 2011 WL 1885248, at *4 & n.2 (S.D. Tex. May 16, 2011); *see also* Edwea, Inc. v. Allstate Ins. Co., No. H-10-2970, 2010 WL 5099607, at *3 (S.D. Tex. Dec. 8, 2010) (examining the differences between the two pleading standards).

37. Remand is required "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed from state court]." Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 87 (1991) (alterations in original) (quoting 28 U.S.C. § 1447(c)). Just as the burden is on a plaintiff who files in federal court to establish the existence of subject matter jurisdiction, so too is the burden on the removing defendant to establish that a state court suit is removable to federal court. Vantage Drilling Co. v. Hsin-Chi Su, 741 F.3d 535, 537 (5th Cir. 2014) (per curiam). Therefore, when evaluating a motion to remand, doubts about the propriety of removal are resolved in favor of remand. *Id.*

38. 28 U.S.C. § 1331 (2012).

The answer is less clear if the court applies the "persons composing" rule. Although the plaintiff's citizenship, as a corporation, remains unchanged, the citizenship of the defendant MLP would be far more difficult to establish. With 50 million units owned by more than 10,000 unitholders, the burden would fall on the defendant, as the removing party, to demonstrate that not a single one of the unitholders is a citizen of Texas. In this factual scenario, we know that there are unitholders in all fifty states, including Texas. As such, because at least one of the MLP's constituent unitholders is a citizen of Texas, the MLP itself is a Texas citizen, complete diversity is absent, diversity jurisdiction would therefore be destroyed, and the plaintiff's motion to remand would be granted.[39]

Furthermore, if such citizenship information was not readily available (as would be likely in an actual lawsuit), the defendant MLP would be burdened with discovering jurisdictional facts of every single unitholder—understanding that, as a NYSE-listed publicly traded entity, unitholders would be entering and exiting the "partnership" perhaps daily—and pleading those facts on the face of the notice of removal.

The practical implication of applying *Carden*'s corporate–noncorporate dichotomy to MLPs is thus likely to make even a small-cap MLP with individual investors (as opposed to merely several large institutional investors) a jurisdictional citizen of nearly every state and multiple foreign countries. Consequently, requiring an MLP to plead the citizenship of each individual unitholder greatly limits the availability of the federal forum to such entities. This result has led commentators, in the analogous context of LLC citizenship, to criticize the "persons composing" rule as overly formulaic, improperly grounded in concerns about an overcrowded federal docket, and detached from the realities of modern business organizations.[40] In particular, unitholders wield very little direct influence on an MLP's governance, and unlike traditional partnerships, unitholders frequently enter and exit the MLP.[41] It can be argued, therefore, that MLPs should not be treated like LLCs or LPs, but rather like corporations.

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39. Aside from the absence of the requisite complete diversity, under these facts, the forum-defendant rule would likewise necessitate remand. The forum-defendant rule provides that "[a] civil action otherwise removable solely on the basis of [diversity] jurisdiction . . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b)(2) (2012). Because the defendant would be determined to be a citizen of Texas, it could therefore not remove a case from Texas state court to federal court.

40. *See, e.g.*, Cohen, *supra* note 4, at 273 ("Refusing to grant LLCs entity citizenship is a continuation of ends-oriented decisions clothed in language of precedent and deference. The motivation for these decisions stems from judicial concerns regarding an overcrowded federal docket, not substantial changes in the laws governing business organizations or the purpose of diversity jurisdiction."); Charles A. Szypszak, *Jural Entities, Real Parties in Controversy and Representative Litigants: A Unified Approach to the Diversity Jurisdiction Requirements for Business Organizations*, 44 ME. L. REV. 1, 36 (1992) ("Corporations have been granted a special diversity status without a sound analytical basis for distinguishing among the various business organizations.").

41. Goodgame, *supra* note 6, at 83, 86.

The Supreme Court itself acknowledged in *Carden* that its treatment of unincorporated entities "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization."[42] Nevertheless, despite this admittedly valid criticism, the Court deferred to Congress as the appropriate body, rather than the courts, for better aligning the law on jurisdictional citizenship with the changing realities of modern business organizations. As stated by the Court: "We have long since decided that, having established special treatment for corporations, we will leave the rest to Congress."[43] Based on the Court's plain unwillingness to deviate from a bright-line rule in *Carden*, it thus appears that Congressional action would be required for MLPs to receive entity citizenship. In short, until Congress codifies MLP citizenship specifically into the diversity statute, as it did with corporations, *Carden*'s corporate–noncorporate distinction will remain controlling.

Litigants seeking to invoke federal diversity jurisdiction in suits involving an MLP should therefore be prepared to plead the jurisdictional facts of each of the MLP's unitholders. Given the near impossibility of such an undertaking for many MLPs, the practical consequence frequently will be to divest a federal court of diversity jurisdiction. Yet, despite potentially legitimate criticism that the existing law is overly formulaic and removed from the reality of modern business organizations, Congress has not acted to alter the diversity statute, and until it does, the law is unlikely to change.

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42. Carden v. Arkoma Assocs., 494 U.S. 185, 196 (1990).

43. *See id.* at 197.