

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

<b>LEVISA COAL COMPANY, <i>et al.</i>,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>Case No. 1:97CV00117</b>
	)	
<b>v.</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	
<b>CONSOLIDATION COAL</b>	)	<b>By: Samuel G. Wilson</b>
<b>COMPANY, <i>et al.</i>,</b>	)	<b>Chief United States District Judge</b>
	)	
<b>Defendants.</b>	)	

On November 5, 1999, the jury in this case rendered its verdict in favor of Plaintiffs. Because of numerous post-trial motions, more than eleven months elapsed before the court entered judgment on October 26, 2000. The facts and procedural history of this case are well documented, and, thus, they do not warrant repeating.<sup>1</sup> This matter is before the court on (1) Defendants' motions for relief from judgment pursuant to Rule 60(b)(4) and to dismiss for lack of subject matter jurisdiction; and (2) Plaintiffs' motions to alter or amend the judgment pursuant to Rule 59(e) and to sever pursuant to Rule 21. For the reasons stated, the court grants Plaintiffs' motions and denies Defendants' motions.

**I.**

This current round of motions arises from Defendants' post-judgment challenge to the court's diversity jurisdiction. Defendants assert that the court's October 26, 2000, order of judgment is void *ab initio* because the court lacks subject matter jurisdiction over this action. In their second amended complaint, Plaintiffs allege, *inter alia*, that the court has diversity

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<sup>1</sup> For a recitation of the facts and procedural history by the court, see Levisa Coal Co. v. Consolidation Coal Co., No. 1:97CV00117, Memorandum Opinion, September 20, 2000.

jurisdiction pursuant to 28 U.S.C. § 1332. (2d Am. Compl. ¶ 31.) The parties agree that plaintiffs John Irvin, Carol Combs Irvin, and Levisa Coal Co. (“Levisa”) are Texas citizens for diversity purposes. However, Defendants maintain that defendants Conoco, Inc., (“Conoco”) and Pocahontas Gas Partnership (“Pocahontas”) also are Texas citizens for diversity purposes because Conoco’s principal place of business is Texas.<sup>2</sup> Defendants support that position with affidavits from Conoco’s corporate secretary and assistant secretary. Thus, Defendants assert that plaintiffs John Irvin and Carol Combs Irvin are Texas citizens; that plaintiff Levisa must be considered a Texas citizen for diversity purposes; and that defendants Conoco and Pocahontas must be considered Texas citizens for diversity purposes. It follows, according to Defendants, that, because there are Texas plaintiffs and defendants in the same action, the court lacks subject matter jurisdiction.

In response, Plaintiffs dispute Defendants’ contention that Conoco and Pocahontas are citizens of Texas. Specifically, they maintain that Conoco’s principal place of business is Delaware, not Texas, and, therefore, the court has diversity jurisdiction. Plaintiffs support that position with filings Conoco made with the Virginia State Corporation Commission and the Delaware Secretary of State. Alternatively, Plaintiffs assert that the problem is, essentially, a curable joinder problem, which is not grounds for dismissal. As a cure, Plaintiffs would have the court amend the judgment by severing the claims and judgments of plaintiffs Levisa and its partners from the other claims and judgments.

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<sup>2</sup> For purposes of diversity jurisdiction, the citizenship of a partnership is determined by reference to the citizenship of each of its partners. See Carden 494 U.S. at 192-95. Defendants Conoco and Consolidation Coal Company are the two general partners in Pocahontas, which is a Virginia general partnership. Thus, Pocahontas’ citizenship is determined by reference to the citizenship of Conoco and Consolidation Coal Company.

## II.

Federal courts are courts of limited jurisdiction, constrained to exercise only that authority conferred by Article III of the Constitution and affirmatively granted by federal statute. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). Title 28 United States Code § 1332(a)(1) grants federal district courts “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)(1). The federal courts consistently have interpreted § 1332(a)(1) and its predecessors as requiring complete diversity of citizenship. See, e.g., Carden v. Arkoma Associates, 494 U.S. 185, 187 (1990); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). That is, diversity jurisdiction “applies only to cases in which the citizenship of each plaintiff is diverse from the citizenship of each defendant.” Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

Here, the parties disagree over the citizenship of defendants Conoco and Pocahontas. For purposes of determining federal court subject matter jurisdiction based upon diversity of citizenship, “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.” See 28 U.S.C. § 1332(c)(1); Athena Automotive, Inc. v. DiGregorio, 166 F.3d 288, 290 (4th Cir. 1999). The parties agree that Conoco is incorporated in Delaware. However, Plaintiffs claim that Conoco’s principal place of business is Delaware, whereas Defendants claim that Texas is its principal place of business.

The plaintiff has the burden of proving subject matter jurisdiction. See Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999). Thus, Plaintiffs must adduce evidence that

proves the presence of complete diversity and, thus, subject matter jurisdiction. Here, plaintiffs must adduce evidence that proves that Conoco's principal place of business is Delaware rather than Texas. To determine where a corporation has its principal place of business, the Court of Appeals for the Fourth Circuit has recognized two tests, the "nerve center test" and the "place of operations test." See Peterson v. Cooley, 142 F.3d 181, 184 (4th Cir. 1998). In practice, the "nerve center test" applies when a corporation engages primarily in the ownership and management of geographically diverse investment assets. See Athena Automotive, Inc., 166 F.3d at 290. That test establishes the corporation's principal place of business as the place where the corporation "makes the 'home office,' or place where the corporation's officers direct, control, and coordinate its activities." Id. (quoting Peterson, 142 F.3d at 184). Alternatively, when the corporation has multiple centers of manufacturing, purchasing, or sales, the Fourth Circuit applies the "place of operations test," which focuses on "the place where the bulk of corporate activity takes place." Id. (quoting Peterson, 142 F.3d at 184). Because Conoco engages in the ownership and management of geographically diverse investment assets, the court finds that the nerve center test is the appropriate test.

In defending their allegation that Conoco's principal place of business is Delaware, Plaintiffs fail to apply either the nerve center test or the place of operations test. Instead, Plaintiffs simply point to filings made by Conoco with the Virginia State Corporation Commission and the Delaware Secretary of State. Plaintiffs also note that Defendants never previously asserted that Conoco's principal place of business was Texas or questioned diversity jurisdiction. Accordingly, Plaintiffs insist that they "reasonably believed that Delaware was the principal place of business for Conoco." (Defs.' Mem. Resp. & Supp. Mot. at 3.)

The court finds Plaintiffs' argument unavailing. Questions of subject matter jurisdiction "concern the court's very power to hear the case." Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 442 n.4 (4th Cir.1999) (citing 2 James Wm. Moore *et al.*, Moore's Federal Practice § 12.30 (3d ed.1998)). It is axiomatic that subject matter jurisdiction can be challenged at any time. See Fed. R. Civ. P. 12(h)(3); Lovern v. Edwards, 190 F.3d 648, 654 (4th Cir. 1999). Plaintiffs' "reasonable belief" that Delaware is Conoco's principal place of business is immaterial, because there is no "good faith" exception to the rule. Likewise, that Defendants never previously raised the issue is immaterial.<sup>3</sup>

As it stands, Plaintiffs jurisdictional evidence consists of filings made by Conoco with the Virginia State Corporation Commission and the Delaware Secretary of State. The document filed with the Virginia State Corporation Commission contains a Delaware address for Conoco's "Officers/Directors and Principal Office." (Sexton Aff. Ex. 1.) Likewise, the documents filed with the Delaware Secretary of State contain a Delaware address for Conoco's "Principal Place of Business Outside of Delaware."<sup>4</sup> (Sexton Aff. Exs. 2-3, 5.) Although those documents may

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<sup>3</sup> Even if Conoco had concealed its citizenship, that concealment would be immaterial to the issue of whether the court has diversity jurisdiction. See Kroger, 437 U.S. at 377 n.21. In their answer, however, Defendants specifically denied that Conoco's principal place of business is Delaware. (Joint Answer ¶ 3.)

<sup>4</sup> Defendants assert that the filings with the Delaware Secretary of State relied upon by Plaintiffs pertain to what was formerly known as "Conoco Energy Company." Apparently, in 1998, after this action commenced, "Conoco Energy Company" changed its name to "Conoco, Inc." (Sexton Aff. Ex. 4.) Defendants seem to maintain that the "Conoco, Inc." that is a defendant in this lawsuit is, or at least was when this action commenced in 1997, a separate and distinct entity from "Conoco Energy Company." The veracity of Defendants' argument does not concern the court, because the court finds the relationship or distinction between "Conoco, Inc." and "Conoco Energy Company" immaterial in deciding the issue. With that said, the court notes that Defendants' explanation seems to have some truth to it, as Plaintiffs named "Conoco, Inc." as a defendant in their original complaint in 1997. If "Conoco Energy Company" and "Conoco,

provide *some* evidence of Conoco's principal place of business, they are by no means determinative on the issue.

Here, notably absent from Plaintiffs' evidence are facts typically considered in determining a corporation's principal place of business under the nerve center test. None of Plaintiffs' evidence provides insight into the place where corporate decisions are made, where the corporation is funded, where the directors and officers are located, or where the corporate headquarters is located. See Topp v. CompAir, Inc., 814 F.2d 830, 837-38 (1st Cir. 1987); 13B Wright & Miller, Federal Practice & Procedure § 3625 (2d ed. 1984). Instead, Plaintiffs rely on Delaware franchise tax returns that recite Wilmington, Delaware, as Conoco's principal place of business. However, Plaintiffs fail to frame their argument in the context of either test recognized by the Fourth Circuit.

In contrast, through affidavits from its corporate secretary and assistant secretary, Conoco has provided more detailed evidence that Texas, not Delaware, is and always has been Conoco's principal place of business.<sup>5</sup> (Gist Aff. ¶ 3; Garcia Aff. ¶ 4.) According to the corporate secretary's affidavit, from at least June 1997 when this action commenced, senior management has directed Conoco's activities from its corporate headquarters in Houston, Texas, (Gist Aff. ¶

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Inc." are the exact same entity, then the court questions how Plaintiffs knew to name "Conoco, Inc." as a defendant when "Conoco Energy Company" did not change its name to "Conoco, Inc." until 1998.

<sup>5</sup> Although not dispositive of this case, the court notes that other federal courts have recognized Texas as Conoco's principal place of business for purposes of diversity jurisdiction. See E. I. DuPont de Nemours & Co. v. Commissioner, 41 F.3d 130, 131 n.4 (3d Cir. 1994); Geraghty & Miller, Inc. v. Conoco, Inc., 27 F. Supp. 2d 918, 920 (S.D. Tex. 1998), rev'd on other grounds, 2000 WL 1752841 (5th Cir. Dec. 14, 2000); Conoco, Inc. v. Hodel, 626 F. Supp. 287, 288 (D. Del. 1986).

3); the corporate headquarters contains the offices for most of Conoco's officers and directors, including the Chief Executive Officer, Chief Financial Officer, Chairman, General Counsel, Treasurer, and Secretary, (Gist Aff. ¶ 3); the Conoco Management Committee convenes in Texas, (Gist Aff. ¶ 4); and Conoco's Controller and Principal Accounting Officer is located in Texas, (Gist Aff. ¶ 5). Thus, Defendants have adduced detailed evidence demonstrating that Texas is Conoco's principal place of business under the nerve center test. In contrast, Plaintiffs have failed to present evidence from which the court can conclude that Conoco's principal place of business is Delaware rather than Texas. Consequently, Plaintiffs have failed to demonstrate complete diversity in this action as it currently is constituted.

### III.

Defendants argue that, because the court lacks subject matter jurisdiction, the judgments against Defendants are void *ab initio* and the court must relieve Defendants from those judgments pursuant to Rule 60(b)(4). Plaintiffs maintain that the actual issue before the court concerns misjoinder of parties, which is not grounds for dismissal. See Fed. R. Civ. P. 21. Thus, pursuant to Rule 59(e),<sup>6</sup> Plaintiffs move the court to amend the judgment by severing the claims and

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<sup>6</sup> To be timely under Rule 59(e), a motion must be filed within ten days after entry of the judgment, computed in accordance with Rule 6(a). See Fed. R. Civ. P. 59(e); Lichtenberg v. Besicorp Group, Inc., 204 F.3d 397, 401 (2d Cir. 2000); Babb v. Boddie-Noell Enters., Inc., 69 F. Supp. 2d 812, 814 (W.D. Va. 1998). In an actual count of days, Plaintiffs filed their motion thirteen days after the entry of judgment (October 26 to November 8, 2000). However, Rule 6(a) provides that, when the time period for filing a motion is less than eleven days, intermediate holidays, Saturdays, and Sundays are excluded. See Fed. R. Civ. P. 6(a). Here, the judgment was entered on Thursday, October 26, 2000. When the intermediate holidays, Saturdays, and Sundays are excluded, Thursday, November 9, 2000, becomes the last day on which the Rule 59(e) motion could have been filed. Plaintiffs filed their motion on Wednesday, November 8, 2000, and, therefore, it is timely.

judgments of plaintiffs Levisa and its partners from the other claims and judgments in this case.<sup>7</sup>

The court concludes that it can cure the defect in diversity by severing the claims and judgments of plaintiffs Levisa and its partners and, therefore, will grant Plaintiffs' motions.

Sound authority supports the view that federal district courts may cure defects in diversity by dropping a dispensable, non-diverse party whose presence deprives the court of jurisdiction, and motions to do so may be made even after entry of judgment. See Fed. R. Civ. P. 21; Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832 (1989); Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 691-92 (4th Cir. 1978); Weaver v. Marcus, 165 F.2d 862, 864 (4th Cir. 1948). Thus, federal district courts may cure defects in diversity as opposed to dismissing an action for lack of jurisdiction.<sup>8</sup> However, the court has discretion, and “it does not follow as a matter of right” that the court should cure defects in diversity “at the mere desire of the plaintiff.” Caperton, 585 F.2d at 692 (quoting Weaver, 165 F.2d at 684).

Here, the facts weigh heavily in favor of curing the jurisdictional defect by granting Plaintiffs' motion to amend the judgment by severing the claims and judgments of plaintiffs Levisa and its partners from the other claims and judgments. In their second amended complaint, Plaintiffs methodically set out each individual claim, carefully indicating which plaintiffs were

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<sup>7</sup> Specifically, “plaintiffs Levisa and its partners” consist of Levisa Coal Company, Limited Partnership and LLP; John Irvin; Carol Combs Irvin; Helen C. Johnson; Frederick H. Combs, II; Martha E. Combs; Virginia Lee Linwick; Carl J. Puckett, Trustee for the W. Kent Pobst Trust; Meredith E. Iqbal; Frederick H. Combs, II, Trustee for the Marion S. Combs Trust; Phillip G. Linwick; and Elene M. Combs.

<sup>8</sup> Courts may cure jurisdictional defects in suits originally filed in federal court. However, because of the “voluntary-involuntary” rule, jurisdictional defects may not be cured on the motion of a diverse defendant seeking to create federal jurisdiction on removal. See Spann v. Northwestern Mut. Life Ins. Co., 795 F. Supp. 386, 390 (M.D. Ala. 1992).

suing which defendants. In total, that complaint consisted of twelve counts, each of which contained specific plaintiffs, defendants, and a prayer for relief. Plaintiffs Levisa's and its partners' claims are set forth in Count I, containing a separate demand for relief and asserting a claim for relief only against defendants Buchanan Production Company, Appalachian Operators, Inc., and Appalachian Methane, Inc.<sup>9</sup> (2d Am. Compl. ¶ 40.) Likewise, plaintiffs Levisa and its partners did not assert a single claim against the non-diverse defendants, Conoco and Pocahontas, and, if considered separately, there would be complete diversity as to each count in the second amended complaint.<sup>10</sup>

Closer examination of the second amended complaint reveals that all twelve counts could have been brought separately in federal court, as each count involved plaintiffs with claims against completely diverse defendants. Instead, Plaintiffs opted to join their claims in one action despite the fact that each claim involved separate leases. Thus, we have an anomaly—joined, independent claims by plaintiffs who are not asserting joint, several, or even alternative liability against multiple defendants. In effect, this case is a self-initiated consolidation of twelve separate and distinct causes of action asserted by distinct sets of plaintiffs, based upon distinct lease arrangements, and made against distinct groups of defendants.

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<sup>9</sup> The claims asserted against CONSOL, Inc., and MCNIC Oakwood Gathering, Inc., have been dismissed upon the motion of those parties on the grounds that they are not in privity of contract with any of the plaintiffs.

<sup>10</sup> Plaintiffs also argue that, because each plaintiff is diverse as to the defendant against whom a claim is asserted, complete diversity exists. See Williams v. Conseco, 57 F. Supp. 2d 1311, 1315 (S.D. Ala. 1999) (finding that complete diversity existed where there was “no concrete controversy between non-diverse parties” in the case). The court summarily rejects Plaintiffs’ argument, as “diversity jurisdiction . . . cannot be meted out count-by-count.” L’Europeenne de Banque v. La Republica de Venezuela, 700 F. Supp. 114, 125-26 (S.D.N.Y. 1988) (quoting Medina v. Spotnail, Inc., 591 F. Supp. 190, 194 (N.D. Ill. 1984)).

Based on those facts, the court concludes that it can satisfy the complete diversity rule by severing the claims of the non-diverse plaintiffs and entering judgment in accordance with the separate claims and separate verdicts pertaining to those plaintiffs. Although the court's conclusion appears to exalt form over substance, it does so to no greater degree than precedent that permits the court to drop non-diverse parties for the purpose of retroactively curing defects in diversity.<sup>11</sup> Indeed, as both the authority to drop a party and to sever a claim stems from Rule 21, the court finds that one method for correcting the jurisdictional defect should be no more or less favored than the other. See Koehler v. Dodwell, 152 F.3d 304, 308 (4th Cir. 1998) (stating, in dicta, that “a *party or claim* whose presence deprives the court of jurisdiction may be *dropped or severed* from the action,” and that “motions to do so may be made even after entry of judgment”). Finally, in determining whether to cure a jurisdictional defect, a court must consider whether doing so will prejudice any of the parties. See Newman-Green, Inc., 490 U.S. at 838. Here, amending the judgment by severing the claims and judgments of plaintiffs Levisa and its partners from the other claims and judgments does not prejudice any of the parties. Accordingly, the court will grant Plaintiffs' motion to sever and will deny Defendants' motion to dismiss.

#### IV.

For the reasons stated, the court grants Plaintiffs' motions to sever the claims of Levisa and its partners found in Count I of the second amended complaint and to alter or amend the judgment pursuant to Rule 59(e) to reflect that change. The court also will assign a new civil action number to those claims and will enter judgment in the amount specified by the jury for

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<sup>11</sup> Even appellate courts have the authority to dismiss dispensable, non-diverse parties in order to cure jurisdictional defects. See Newman-Green, Inc., 490 U.S. at 832, 837.

those claims. Consequently, the court denies Defendants' motions for relief from judgment pursuant to Rule 60(b)(4) and to dismiss for lack of subject matter jurisdiction. An appropriate order will be entered this day.

**ENTER** this 30th day of January, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE