IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLIFTON G. SWIGER,	CIVIL ACTION
Plaintiff,	No. 05-5725 - JCJ
v.	
ALLEGHENY ENERGY, INC., et al.,	
Defendants.	

PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Clifton G. Swiger sued defendants, claiming abuse of process, wrongful use of civil proceedings, invasion of privacy, and wrongful discharge. Plaintiff alleged that defendants wrongfully used the courts to uncover his identity as the anonymous author of a critical posting about his employer on a public Internet message board, and that, as a result of defendants' conduct, he was fired from his job. Defendant Morgan, Lewis & Bockius moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) on the ground that complete diversity among the parties is lacking. Defendants Allegheny Energy, Inc., Allegheny Energy Supply Co., LLC, and Allegheny Energy Service Corp. joined Morgan Lewis's motion. Plaintiff requests that this Court deny the motion to dismiss for the reasons set forth below.

INTRODUCTION

In their motion to dismiss, defendants combine two distinct archaic jurisdictional doctrines to derive an illogical and incorrect result. Defendants argue that the domicile of

four Morgan, Lewis & Bockius partners in foreign countries destroys the citizenship of its remaining partners for diversity purposes, creating an association that is not susceptible to federal diversity jurisdiction anywhere in the United States. Defendants' theory thereby establishes a new entity previously unknown to the law of this circuit—the stateless partnership—which would come into existence any time a United States citizen who is a member of a partnership establishes a domicile in a foreign country. This entity would join the small class of existing stateless entities under the law, presently including only American expatriates, stateless aliens, and Indian tribes, that are completely immune from federal diversity jurisdiction.[1] Contrary to defendants' argument, however, it makes no sense to conclude that the partnership *as a whole* is a stateless entity as long as the citizenship of the partnership is capable of being determined by reference to the state citizenship of those partners who are not themselves stateless. Defendants' interpretation conflicts with Supreme Court precedent, common sense, and the purpose of the diversity statute. This Court should therefore conclude that it has diversity jurisdiction over the case.

Even if this Court were to agree with defendants' interpretation of the law, dismissal with prejudice is not the appropriate remedy for the jurisdictional deficiency alleged here. Instead, this Court should allow plaintiff the opportunity to take discovery of the partners and to investigate the facts surrounding their citizenship. If, after discovery, diversity is ultimately found to be lacking, plaintiff should then be given the

[1] *See* 13B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure §§ 3621 & 3622 (2d ed. 2005).

opportunity to amend the complaint to substitute individual diverse partners for the partnership as a whole, or to re-file the action in state court. For these reasons, the defendants' motion to dismiss should be denied.

ARGUMENT

A. Complete Diversity Exists Among the Plaintiff and the Defendants.

Defendants' motion to dismiss is based entirely on the following syllogism: A partnership takes on the citizenship of each of its members for diversity purposes, and a United States citizen domiciled abroad is not a citizen of any state; therefore, the partnership also takes on the *non*-citizenship of its stateless members for diversity purposes.

Plaintiff does not challenge the validity of either of defendants' two underlying premises. Although both have faced heavy criticism, there is no question that they are now firmly established.[2] It is thus clear that the citizenship of an unincorporated association for diversity purposes is determined by looking to the citizenship of its

[2] The first premise—that the partnership takes on the citizenship of its members—was established by the Supreme Court's 1889 decision in *Chapman v. Barney*, 129 U.S. 677 (1889). It has been criticized on the ground that the differing treatment of corporations, which under a 1958 statutory amendment are considered to be citizens only of their states of incorporation and of their primary places of business, and unincorporated associations, which are considered to be citizens of all the states of their members, is out of touch with modern business realities. *See, e.g.*, *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196-97 (1990). Nevertheless, the Supreme Court has firmly rejected efforts to revise the rule. *Id.* The second premise—that a United States citizen domiciled abroad is not a citizen of any state—was recognized by the Supreme Court in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989). It too has been heavily criticized, on the ground that "an American domiciled abroad is as likely to be considered as much a stranger to a state forum as is an individual domiciled in a neighboring state." 13B Wright, Miller & Cooper, *supra* note 1, § 3621.

members (so, since Morgan Lewis has partners in Pennsylvania, New York, and California, among other states, it must be considered a citizen of at least those states), and that a United States citizen domiciled abroad is effectively "stateless" for purposes of diversity (so, the four partners identified by Morgan Lewis who fit this description cannot individually add any additional state citizenships to the citizenship of the partnership as a whole). Where defendants err is in taking the extra—and illogical—leap of concluding that Morgan Lewis's few stateless partners somehow wipe out the citizenship of the rest, rendering the entire partnership jurisdictionally stateless. This conclusion is wrong.

1. The Morgan Lewis Partnership as a Whole Is Completely Diverse from Plaintiff.

Under the rule of complete diversity, "diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). Defendants' error apparently arises from the assumption that a suit against a partnership is equivalent to a suit against each of the partnership's individual members, so that complete diversity is lacking if even a single partner lacks state citizenship. But under the rule set forth by the Supreme Court in *Carden v. Arkoma Associates*, Morgan Lewis's *partners* are not defendants in this case; the actual defendant for purposes of the complete diversity requirement is the limited-liability partnership *as a whole*. 494 U.S. 185, 188 n.1 (1990) (holding that in a case involving a limited partnership "[t]here are *not* . . . multiple [parties] before the Court, but only *one*: the artificial entity . . ., a limited partnership"). In *Grupo Dataflux v. Atlas Global Group, L.P.*, the Supreme Court recently clarified the importance of this

distinction, holding that although "the court 'looks to' the citizenship of the several persons composing the entity, [] it does so for the purpose of determining the citizenship *of the entity that is a party*, not to determine which citizens who compose the entity are to be treated as parties." 541 U.S. 567, 579 (2004) (emphasis added).

As in *Carden* and *Grupo Dataflux*, the only question before this Court is therefore "how the citizenship of [the] single artificial entity is to be determined." *Carden*, 494 U.S. at 188 n.1. The answer to this question depends on the resolution of an issue never addressed in defendants' motion to dismiss: whether the presence of *stateless* members in a partnership somehow erases the *state* citizenship of any remaining members, or whether, as we maintain, these stateless members act only as jurisdictional "zeros," neither adding to nor subtracting from the citizenship of the partnership as a whole.

According to the rule set forth in *Carden* and amplified in *Grupo Dataflux*, the latter conclusion is correct. A partnership "is a citizen of *each state or foreign country of which any of its partners is a citizen*." *Grupo Dataflux*, 541 U.S. at 569 (emphasis added); *see also Carlsberg Res. Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1258 (3d Cir. 1977) ("[A]n unincorporated association [is] viewed as a citizen of *each state in which it has a member*.") (emphasis added). The states in which Morgan Lewis has partners are Pennsylvania, New York, and California, among others. This is the end of the question—nothing in the diversity statute or its jurisprudence requires a court to consider also the citizenship of those partners whose state citizenship cannot be determined or who are, for legal purposes, "stateless."

This is in no way inconsistent with *Carden*'s requirement that "diversity jurisdiction in a suit by or against the entity depends on the citizenship of '*all the members*.'" *Carden*, 494 U.S. at 195 (quotation omitted, emphasis added). It is, after all, the *citizenship* of all the members that must be examined, not the *lack* thereof. The Court in *Carden* did not have before it a partnership that included a stateless member, nor could it have anticipated that its rule would be applied to such a context. A stateless partner has *no* citizenship, and so is in effect a citizen of "nowhere" for diversity purposes. Therefore, a partnership with one citizen of Pennsylvania and one stateless citizen would be a citizen of Pennsylvania and "nowhere," or in other words, simply a citizen of Pennsylvania.

Of course, if one of Morgan Lewis's partners also happened to be a citizen of West Virginia (where plaintiff is domiciled), complete diversity would be destroyed because, in that case, the law firm as a whole would be a citizen of the same state as the plaintiff. It was concern over *this* possibility—that some of the members of an unincorporated association might be citizens of a plaintiff's home state—that led the Supreme Court in *Chapman v. Barney* to adopt the rule for determining citizenship of unincorporated associations in the first place. 129 U.S. 677, 682 (1889) (finding no diversity when the members of the association were "not shown to be citizens of some state other than [the plaintiff's state of citizenship]"). On the other hand, a partner with *no* state citizenship is obviously not a citizen of the same state as the plaintiff and does not cause the partnership to become a citizen of that state. Assuming no partners are citizens of the plaintiff's home state, a case therefore presents "two adverse parties [who]

are not co-citizens," *Grupo Dataflux*, 541 U.S. at 579 (quotation omitted), thereby satisfying the complete diversity rule. *See Grand Union Supermarkets v. H.E. Lockhart Mgmt., Inc.*, 316 F.3d 408, 410 (3d Cir. 2003) (noting that complete diversity requires that "no plaintiff can be a citizen of the same state as any of the defendants").

The "stateless citizen" doctrine cited by defendants does nothing to change this result. The doctrine was initially developed because of a gap in the diversity statute, apparently unforeseen by Congress, that excluded American expatriates from the statute's coverage. *Dadzie v. Leslie*, 550 F. Supp. 77, 79 (E.D. Pa. 1982) (noting this "anomalous gap" in the statute). Because 28 U.S.C. § 1332(a)(1) gives the federal courts jurisdiction only over civil actions between "citizens of different States," courts were forced to conclude that the provision provided no jurisdiction over a party who is not a citizen of any state of the United States. *See id.* at 78-79. But the rigorous fidelity to the plain language of the statute that led courts to adopt this rule, despite its anomalous results, does not require the same outcome here. So long as a partnership has at least *one* citizen who is a citizen of a state, the partnership *as a whole* can easily be described as a "citizen of a state" for diversity purposes. As explained by the Supreme Court in *Newman-Green, Inc. v. Alfonzo-Larrain*, the stateless person rule comes into play only when a party "has no domicile in *any* State." 490 U.S. 826, 828 (1989) (emphasis added). Though extremely unlikely, such a situation could theoretically arise if *all* the members of an unincorporated association were United States citizens with domiciles outside the United States. In contrast, when, as here, hundreds of partners are domiciled in the United States

and a mere four are without state citizenship, to say that the partnership has no domicile in *any* state is absurd.

2. No Binding Authority Supports Defendants' Position.

Neither the Supreme Court nor the Third Circuit has ever examined the effect that a stateless member has on an unincorporated association as a whole. *Pemberton v. Colonna*, cited by defendants, held only that an *individual* United States citizen who had changed her domicile from Pennsylvania to Mexico was a citizen of neither Pennsylvania nor Mexico for diversity purposes. 290 F.2d 220, 221 (3d Cir. 1961). Plaintiff does not dispute this conclusion—which would flow ineluctably from *Newman-Green*—or the general applicability of the stateless person doctrine. But *Pemberton* did not involve an unincorporated association and has nothing to say about the effect a single stateless member has on the citizenship of an association as a whole. The same is true for the only other case in this circuit cited by defendants, *Dadzie*, 550 F. Supp. at 79 (noting that if an *individual defendant* "is found to be a citizen of no state at the time plaintiffs instituted this action, she falls within an anomalous gap in the diversity statute which prohibits United States citizens who are domiciled abroad from suing or being sued in federal court based solely on diversity grounds").

Courts have faced an analogous problem, however, in addressing multinational corporations that are incorporated in the United States. Like unincorporated associations, corporations are capable of having more than one state of citizenship for diversity purposes. The diversity statute provides that a corporation is "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." 28 U.S.C. § 1332(c)(1). Because corporations are often incorporated in states other than the state where they conduct their primary place of business, these entities assume the citizenship of both states. *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 951 (2006).

A problem arises, however, when a corporation is incorporated in a state of the United States, but has its principal place of business abroad. In that circumstance, courts have held that there is no "State where [the corporation] has its principal place of business." *See Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989).[3] Yet, these courts do not hold that the lack of state citizenship based on principal place of business also destroys the corporation's citizenship based on state of incorporation. Rather, the citizenship of the corporation defaults to the only state citizenship that is capable of being determined—that of the state of incorporation. *See Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543-44 (5th Cir. 1997); *Cabalceta*, 883 F.2d at 1561; 15 Moore's Federal Practice § 102.50 (3d ed. 2005) ("[A] corporation incorporated in the United States with a principal place of business abroad is a citizen solely of the state of incorporation."). Similarly, the citizenship of a partnership as a whole should default to just those state citizenships that are capable of being determined.

In the long history of the diversity statute, we could locate only three cases that have endorsed defendants' position, all coming from courts in the Second Circuit and all with little analysis. In *Cresswell v. Sullivan & Cromwell*, the court reasoned, in dicta, as

[3] These courts hold that the word "State" in 28 U.S.C. § 1332(c)(1), like § 1332(a)(1), refers only to states of the United States, not to foreign states. *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1559 (11th Cir. 1989).

follows: "[A] diversity suit could not be brought against [the stateless partners] individually; in that circumstance, since for diversity purposes a partnership is deemed to take on the citizenship of each of its partners, a suit against [the partnership] could not be premised on diversity." 922 F.2d 60, 69 (2d Cir. 1990) (citations omitted). This reasoning, which constitutes the entirety of the court's analysis, errs in treating a suit against a *partnership* as nothing more than a suit against a collection of *individuals*. *Cresswell* did not even attempt to answer the question of how the presence of a stateless partner affects the citizenship of the partnership *as a whole*. The only other circuit-level case on the issue, *Herrick Co. v. SCS Communications, Inc.*, adopted *Cresswell*'s logic as its holding and is wrong for the same reason. 251 F.3d 315, 322 (2d Cir. 2001). Given that the Second Circuit did not have the benefit of the Supreme Court's reasoning in *Grupo Dataflux*, which explicitly rejected the idea that partnerships could be treated as collections of individual parties, this error is not particularly surprising.[4]

The third case, *Coudert Bros. v. Easyfind International, Inc.*, was decided by a district court and, like *Cresswell*, treated a partnership for diversity purposes as an accumulation of individuals. 601 F. Supp. 525, 527 (S.D.N.Y. 1985) (holding that, "[f]or jurisdictional purposes [the partnership] must be considered to include partners who lack the citizenship status required"). Interestingly, a prior decision of the same court confronted the more difficult question of the effect that a single stateless partner has on the partnership as a whole, but ultimately avoided deciding the issue. *Venture Fund*

[4] Moore's Federal Practice, also cited by defendants, merely cites the rule in *Herrick* and is not independent authority for their proposed rule. Moore's Federal Practice § 102.37[16] (3d ed. 2005).

(Int'l) N.V. v. Willkie Farr & Gallagher, 418 F. Supp. 550, 556 (S.D.N.Y. 1976) (noting that "there remains a cogent argument that a 'stateless' [partner] is a 'zero' who cannot destroy diversity").

3. Defendants' Proposed Rule Runs Headlong into the Purpose of Diversity Jurisdiction and Would Have a Far-Reaching Negative Impact.

The purpose of diversity jurisdiction also counsels against the interpretation of § 1332 urged by defendants. The traditional explanation of that purpose is "the fear that state courts would be prejudiced against out-of-state litigants." *See Witherow v. Firestone Tire & Rubber Co.*, 530 F.2d 160, 165 n.5 (3rd Cir. 1976) (citing 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3601 (1975)). Morgan Lewis has its main office in Philadelphia, and a large percentage of its partners are domiciled there. Whenever a partnership is headquartered in the forum state, a potential exists for local bias in favor of the partnership. The purpose behind diversity jurisdiction demands in such a case that the non-local party be given access to a federal forum. The fact that a few partners happen to have their domiciles abroad does nothing to alleviate the potential

for local prejudice and therefore should have no effect on the availability of federal diversity jurisdiction.[5]

In drafting the diversity statute, Congress could not possibly have intended or predicted the application of the statute advocated by defendants. In fact, the possibility that even a single person, much less a partnership, could be stateless for diversity purposes was never foreseen by Congress. Rather, "a basic assumption of the drafters was that anyone who was not a citizen of the United States must by definition have been subject to the power of a foreign government or sovereign" and therefore susceptible to federal diversity jurisdiction under 28 U.S.C. § 1332(a)(2) instead of § 1332(a)(1). *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 415-16 (3d Cir. 1999) (quotation omitted). As noted by the Third Circuit, "[m]ost courts have accepted the proposition that the problem of 'statelessness' was unanticipated by the Framers, because it is a twentieth-century phenomenon." *Id.* Given that Congress did not predict the stateless person problem in drafting § 1332, it could scarcely have intended to legislate the creation of the kind of large-scale stateless entities that would exist under defendants' proposed rule.

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[5] Admittedly, the *Carden* rule would hold a partnership to be a citizen of a state even when only a few partners reside there, though the potential for bias in such a case would be relatively small. But weak though the connection may be in such a case, the *Carden* rule would at least still be tethered to the purposes of diversity jurisdiction, because there is some possibility that a partnership with only a single local partner will receive a degree of local favoritism (for example, if that partner is well-known in the community). The rule proposed by the defendants, however, severs the logical moorings of the *Carden* rule by disconnecting the issue of a partnership's domicile entirely from the question of local bias. If anything, the shaky legal and policy grounds on which the *Carden* rule is built, *see supra* note 2, counsel against extending the rule in ways that are required by neither the text nor the purpose of the diversity statute.

Although problematic, the stateless person anomaly has at least historically been limited to an "extremely small" class of cases. 13B Wright, Miller & Cooper, *supra* note 1, at § 3621. The rule espoused by defendants, however, would have far-reaching negative effects. Unincorporated associations such as limited-liability companies and limited-liability partnerships have dramatically grown in popularity in recent years, as has the number of companies that send United States citizens to work abroad. Peter B. Oh, *A Jurisdictional Approach to Collapsing Corporate Distinctions*, 55 Rutgers L. Rev. 389, 458-59 (Winter, 2003) (applying the *Cresswell* rule and concluding that "unincorporated associations are now more likely than ever to have stateless members"). If defendants' proposed rule were the law, the convergence of these two trends would make the problem of stateless organizations "potentially ubiquitous." *Id.* at 459. Indeed, the nation's 250 largest law firms had nearly 13,000 attorneys working in foreign offices in the year 2005. National Law Journal, *Healthy Growth Seen in Firms' Foreign Offices*, Nov. 14, 2005, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1131640455697. Defendants' rule would immunize large American law firms from federal diversity jurisdiction.

Defendants' rule would have other undesirable effects as well. The ease of acquiring just a single partner domiciled abroad would make such a rule ripe for abuse by unincorporated associations wishing to escape the diversity jurisdiction of the federal courts. *See* Oh, *supra*, at 459. Furthermore, it would be nearly impossible for a plaintiff to determine whether federal jurisdiction exists prior to filing suit, because any member

who is a United States citizen domiciled abroad could cause the entire organization to lose its state citizenship merely by deciding to establish a permanent domicile there.

To be sure, the Supreme Court declined to consider similar policy arguments in *Carden*. 494 U.S. at 196-97. Although sympathetic to these arguments, the Court nevertheless held that the rule for determining the citizenship of unincorporated associations is "technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization." *Id.* at 196. But neither *Carden* nor its related cases involved a partnership with members who had no determinable citizenship. The *Carden* rule itself may be unresponsive to policy considerations, but it is both appropriate and necessary to examine policy implications before extending *Carden* into new and previously unconsidered contexts, that, as we have shown, have no basis in § 1332's text or purpose.

B. Dismissal with Prejudice Is an Inappropriate Remedy for the Alleged Jurisdictional Deficiency.

In their motion to dismiss, defendants request dismissal with prejudice. That remedy, however, would be entirely inappropriate until plaintiff has had the opportunity to challenge defendants' representation of the facts and, if necessary, to amend the complaint or re-file the action in state court.

1. Plaintiff Should Be Given the Opportunity to Conduct Discovery.

The only evidence submitted by defendants regarding the domicile of the four named partners is the declaration of Clare D'Agostino, who asserts that the partners currently reside outside the United States. To establish domicile, the defendants must

show both residence and the intention to remain indefinitely. *Gallagher v. Phila. Transp. Co.*, 185 F.2d 543, 545 (3d Cir. 1951). The D'Agostino declaration addresses the second requirement—that of intent—by stating that the partners have no "immediate plans" to return to the United States. Although the rule does not require an intent to remain abroad *permanently*, it does require at least the intent to remain "for an indefinite period of time" and "the absence of an intention to go elsewhere." *Id.* at 546. The mere absence of "immediate plans" to return does not rule out the existence of longer term, but nonetheless definite, plans or intentions to return to the United States. Furthermore, the partners themselves have not submitted declarations regarding their subjective intent, and D'Agostino's declaration does not claim a basis for personal knowledge of that intent. *See* D'Agostino Declaration ¶ 1.

Even if defendants were to submit statements of intent from the allegedly stateless partners themselves, such self-serving declarations would still not be controlling on the question of domicile. *Korn v. Korn*, 398 F.2d 689, 691 (3d Cir. 1968) ("One's testimony as to his intention to establish a domicile, while entitled to full and fair consideration, is subject to the infirmity of any self-serving declaration, and it cannot prevail to establish domicile when it is contradicted or negatived by an inconsistent course of conduct; otherwise stated, actions speak louder than words."); *see also Sadat v. Mertes*, 615 F.2d 1176, 1181 (7th Cir. 1980) ("[I]ntent is a state of mind which must be evaluated through the circumstantial evidence of a person's manifested conduct, and statements of intent are entitled to little weight when in conflict with the facts.") (citations and quotations omitted). To determine a person's citizenship, courts must examine *all* the circumstances

of the case, including such facts as "current residence, voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations, place of employment or business; driver's license and automobile registration; payment of taxes; as well as several others." *Avins v. Hannum*, 497 F. Supp. 930, 937 (E.D. Pa. 1980) (quoting 13 Wright, Miller & Cooper § 3612 (1975)). This determination is an issue of fact that can be decided by either the court or by a jury. *McNello v. John B. Kelly, Inc.*, 283 F.2d 96, 99 n.2 (3d Cir. 1960).

All the partners identified by D'Agostino were educated in the United States and are licensed to practice law here. In addition, all have maintained their United States citizenship, and all but one have resided abroad for less than five years. It is entirely possible, if not likely, that these partners intend to return to the United States at some point in the future. But because only the Morgan Lewis partners have access to the evidence needed to establish their intent, plaintiff cannot effectively rebut defendants' conclusory assertions without being given an opportunity for discovery. *Prakash v. American Univ.*, 727 F.2d 1174, 1179-80 (D.C. Cir. 1984) (holding that the court "must [] afford the nonmoving party an ample opportunity to secure and present evidence relevant to the existence of jurisdiction") (quotation omitted); *Miller v. United States*, 530 F. Supp. 611, 616 n.3 (E.D. Pa. 1982) ("[F]undamental fairness requires that the non-moving party be afforded the opportunity to conduct discovery so that he can, if possible, meet his burden of establishing jurisdiction").

Before dismissing the case, plaintiff should therefore be allowed to conduct discovery to meet his burden of establishing diversity jurisdiction in this case. *See Local 336, American Fed'n of Musicians v. Bonatz*, 475 F.2d 433, 437 (3d Cir. 1973) ("[E]ven on [issues of jurisdictional fact] the record must clearly establish that after jurisdiction was challenged the plaintiff had an opportunity to present facts by affidavit or by deposition, or in an evidentiary hearing, in support of his jurisdictional contention."). Plaintiff therefore requests that this Court allow discovery to proceed. Once all discovery is complete, plaintiff will be able to argue the diversity issue.

2. Plaintiff Should Be Given the Opportunity to Amend the Complaint or Re-File the Action in State Court.

Even if the evidence were to establish that the Morgan Lewis partnership is not susceptible to federal diversity jurisdiction, plaintiff nevertheless should be given the opportunity to amend the complaint to perfect jurisdiction. *See Grupo Dataflux*, 541 U.S. at 572-73 ("By now, it 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.") (quotation omitted). Furthermore, in cases where particular members of an unincorporated association destroy diversity of citizenship, the plaintiff can amend the complaint to substitute only those members of the association that are diverse from the plaintiff. *Kaplan Co. v. Indus. Risk Insurers*, 86 F.R.D. 484, 491 (E.D. Pa. 1980); *see also Tuck v. United Servs. Auto. Ass'n*, 859 F.2d 842, 846 (10th Cir. 1988); *Jaser v. N.Y. Prop. Ins. Underwriting Ass'n*, 815 F.2d 240, 243-44 (2d Cir. 1987). Here, the allegations in the complaint would support personal liability against individual Morgan

Lewis partners, including four who are mentioned by name in the complaint and who thus had actual notice of the action when it was served on Morgan Lewis. *See* Complaint ¶¶ 20, 21, 25, 31 (discussing the actions of Steven R. Wall, Joseph N. Frabizzio, Pam R. Jenoff, and Brian L. Johnsrud). Thus, if this Court were inclined to grant defendants' motion to dismiss, plaintiff requests an opportunity to first amend the complaint to substitute these individual partners.

Finally, the conclusion that a case lacks subject-matter jurisdiction is not a decision on the merits that would bar a subsequent action on the same claim. *In re Orthopedic "Bone Screw" Prods. Liab. Litig.*, 132 F.3d 152, 155-56 (3d Cir. 1997). The proper remedy in a case where the court lacks jurisdiction is to dismiss without prejudice, so that the plaintiff has an opportunity to re-file in state court or in federal court after perfecting jurisdiction. *Ernst v. Rising*, 427 F.3d 351, 367 (6th Cir. 2005) (noting the "heavy presumption that a dismissal for lack of jurisdiction will be without prejudice"); *In re Orthopedic "Bone Screw" Prods. Liab. Litig.*, 132 F.3d at 155-56 ("If a case, over which the court lacks subject matter jurisdiction, was originally filed in federal court, it must be dismissed. . . . The disposition of such a case will, however, be without prejudice."). Pennsylvania specifically provides statutory authority for a plaintiff to re-file such a case in state court while preserving the filing date of the federal action. 42 Pa. C.S. § 5103 ("Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth"). Even assuming defendants' motion to

dismiss is warranted, the proper remedy would therefore be dismissal without prejudice to re-file in state or federal court.

CONCLUSION

The defendants' motion to dismiss should be denied.

Dated: February 3, 2006

Respectfully submitted,

/s Gregory A. Beck (electronically filed)
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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on February 3, 2006, I mailed a copy of Plaintiff's Response Brief in Opposition to Defendants' Motion to Dismiss by first-class U.S. mail, postage prepaid, to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLIFTON G. SWIGER, Plaintiff, v. ALLEGHENY ENERGY, INC., et al., Defendants.	CIVIL ACTION No. 2:05-cv-5725-JCJ

ORDER

Now this _____ day of _____, 2006, having considered Defendant's Motion to Dismiss Plaintiff's Complaint, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

_____
The Honorable J. Curtis Joyner