IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

SHAMROCK HOLDINGS OF CALIFORNIA, INC., SHAMROCK CAPITAL ADVISORS, INC., EUGENE I. KRIEGER, GEORGE J. BUCHLER and BRUCE J. STEIN,	)	
Plaintiffs,	)	
v.	)	Civ. No. 04-1339-SLR
AVIE ARENSON, SELK, LLC and LAUREL EQUITY GROUP, LLC,	)	
Defendants.	)	

MEMORANDUM ORDER

I. INTRODUCTION

On September 13, 2004, plaintiffs Shamrock Holdings of California, Inc. ("Shamrock"), Shamrock Capital Advisors, Inc. ("SCA"), Eugene I. Krieger, ("Krieger"), George J. Buchler ("Buchler") and Bruce J. Stein ("Stein") commenced this action against defendants, Avie Arenson ("Arenson"), SELK, LLC ("SELK") and Laurel Equity Group, LLC ("Laurel"), in the Chancery Court of Delaware seeking declaratory relief pursuant to 10 Del. C. §§ 6501 et seq. (2004). (D.I. 16 at 2) On October 6, 2004, defendants removed this action from the Chancery Court to this court. (D.I. 1) After removing this case, defendants filed separate motions to dismiss. (D.I. 3, 4) On October 22, 2004,

the parties stipulated that the motions to dismiss would be stayed until the resolution of plaintiffs' motion to remand, filed on November 5, 2004. (D.I. 6, 15) Pending before the court is plaintiffs' motion to remand.

II. BACKGROUND

Defendants were investors in ALH Holdings, Inc.[1] ("ALH"), a limited liability company organized in 1998 under the laws of Delaware to engage in home-building. (D.I. 20, Ex. A at 1) Ultimately, ALH was an unsuccessful venture, and investors lost their investments. (Id.) In response to their losses, defendants threatened to sue plaintiffs for breach of fiduciary duty, self-interest and wrongful conduct. (Id. at 3) Defendants asserted that plaintiffs owed them "millions of dollars" in order to make them whole again. (Id.)

A. Citizenship of Parties

Plaintiffs Krieger, Buchler and Stein are all citizens of California. (D.I. 20 at ¶ 14) All three were employees of Shamrock, served on ALH's supervisory board and performed "substantial services for SCA." (Id.)

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[1]As owner of Arenson Holdings and D.A. Gardens, defendant Arenson invested $1.4 million. Both Arenson Holdings and D.A. Gardens are class B stock holders. (D.I. 20, Ex. A at 4) SELK, LLC, invested approximately $2.9 million and was a Class B member. Id. Laurel invested $2.9 million and was also a class B member. Plaintiff Shamrock invested $9.1 million in ALH. Shamrock holds about 62% of the Class A membership interest and about 38% of ALH. (D.I. 20, Ex. A at 3)

Buchler and Krieger were the supervisory board representatives for the Class A members of ALH. (Id.) The class A members were citizens of Arizona, California, Colorado and Nevada. (Id. at ¶ 15)

Stein represented the class D members on the supervisory board. The only class D member was a Delaware limited liability company, Lion ALH Capital LLC. The members of this limited liability company were citizens of Delaware and New York.

Plaintiff Shamrock is a corporation organized under the laws of California with its principal place of business in California. (D.I. 20 at ¶ 13) Plaintiff SCA is a Delaware corporation with its principal place of business in California. (Id.)

Defendant Arenson is a citizen of Israel and was the Class B representative on ALH's supervisory board. (D.I. 18 at 13) The class B members were A. Arenson Holdings, Ltd., D.A. Gardens, Ltd., J12ALH, Associates LLC and defendants SELK and Laurel. (D.I. 20, Ex. B at Ex. B) A. Arenson Holdings, Ltd. is a Israeli corporation with its principal place of business in Israel. (D.I. 24 at 10) D.A. Gardens, Ltd., is a Panamanian corporation with its principal place of business in Panama. (Id.) J12ALH is a Delaware LLC whose members are Erica Jesselson, a citizen of New York, and Jays Twelve, LLC. (Id.) The members of Jays Twelve, LLC are all New York citizens. (Id.)

Defendant SELK is a limited liability company formed under the laws of Delaware. (D.I. 20, Ex. A at 5) Its members are Shalom Lamm, a resident of New York, and NACA Holding, Inc. ("NACA"), a British Virgin Islands corporation with, defendants allege, a principal place of business in Tortola, British Virgin Islands. (D.I. 24 at 11) NACA, however, cannot conduct business with residents of the British Virgin Islands or have any interest in real property in the British Virgin Islands other than a lease for business purposes. (D.I. 28 at Ex. B)

Defendant Laurel is a Delaware limited liability company; its members are Mark Frankel, Chesky Frankel and Sallervale Company. (Id.) Mark Frankel is a citizen of New Jersey, Chesky Frankel is a citizen of New York and Sallervale Company is a Bahamian corporation with, defendants allege, a principal place of business in Nassau, Bahamas. (Id.) The Sallervale Company, however, cannot conduct business with a Bahamian resident, nor own an interest in property greater than a lease for business purposes. (D.I. 28 at Ex. A)

B. Content of the Removal Notice

Paragraphs 2-4 of the removal notice identify the dates at which the defendants were served with plaintiffs' complaint. The notice states that the "matter in controversy exceeds the sum of $75,000, exclusive of interest and costs because [p]laintiffs allege in paragraph 6 of this [d]eclaratory [a]ction that [d]efendants 'have demanded millions of dollars.'" (D.I. 20, Ex C at 2) The notice details what it believes to be the citizenship of the plaintiffs. (Id.) It states the citizenship of the members of each of defendant limited liability companies, but not who the members are.[2] For example, the notice states "[SELK] was, and still is a limited liability corporation with its members being citizens of New York and the British Virgin Islands." (Id.) Finally, the notice states that it was made within 30 days after the first defendant received process. (Id. at 3)

III. STANDARD OF REVIEW

The exercise of removal jurisdiction is governed by 28 U.S.C. § 1441(a) (2004). The statute is strictly construed, requiring remand to state court if any doubt exists over whether removal was proper. Shamrock Oil & Gaz Corp. v. Sheets, 313 U.S.

[2]In the notice, defendants stated the Laurel members were citizens of New Jersey, New York and Belgium, but in their answer to plaintiffs' motion for remand, the defendants state that the members are citizens of New Jersey, New York and the Bahamas. (D.I. 20, Ex. C at 3; D.I. 28, Ex. B)

100, 104 (1941). A court will remand a removed case "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c) (2004). The party seeking removal bears the burden to establish federal jurisdiction. Steel Valley Auth. v. Union Switch & Signal Div. Am. Standard, Inc., 809 F.2d 1006 (3d Cir. 1987); Zoren v. Genesis Engery, L.P., 195 F. Supp. 2d 598, 602 (D. Del. 2002). In determining whether remand based on improper removal is appropriate, the court "must focus on the plaintiff's complaint at the time the petition for removal was filed," and assume all factual allegations therein as true. Id.

IV. DISCUSSION

Plaintiffs argue that this case was inappropriately removed from the Court of Chancery because there is no diversity of citizenship and because the Notice of Removal was inadequate.[3] (D.I. 16)

A. Diversity of Citizenship

Plaintiffs argue that there is no diversity of citizenship because plaintiff SCA is a Delaware corporation, defendants SELK and Laurel are Delaware limited liability companies and defendant

[3]Plaintiffs argue that defendants SELK and Laurel should not be allowed to remove this case because they are Delaware citizens. If defendants are citizens of the state in which the action was brought, then the action cannot be removed to federal court. See 14B Charles Alan Wright et al., Federal Practice and Procedure § 3721 (3d ed. 1998). As stated in Part IV.A.1, however, SELK and Laurel are not Delaware citizens.

Arenson can be considered a Delaware citizen, as he represented Delaware residents on the ALH supervisory board. Plaintiffs also assert that plaintiff Stein is a New York resident because he represented New York residents on the ALH supervisory board, and defendants SELK and Laurel are New York residents because they have members who are New York residents. Defendants argue that the citizenship of a limited liability company is determined by the citizenship of its members, not by the states in which the limited liability companies are formed; therefore, SELK and Laurel are not Delaware citizens. Defendants also assert that plaintiff Stein and defendant Arenson cannot be considered residents of Delaware and New York simply because they represented citizens of those states on the ALH board. Therefore, according to defendants, diversity of citizenship does exist.

1. Citizenship of Stein

Plaintiffs argue that the alleged wrongful actions taken by plaintiff Stein were taken in his representative capacity; thus, he should be considered a representative for jurisdictional purposes. Defendants argue that under the ALH Operating Agreement, plaintiff Stein can be independently liable for his actions and the complaint does not indicate he is suing defendants in a representative capacity; therefore, for

jurisdictional purposes, only his individual citizenship should be considered.

It is axiomatic that a person who is a party to litigation is a citizen of the state of his/her domicile. Nevertheless, "a person who sues or is sued in a representative capacity is distinct from that person in his individual capacity" and can be a citizen of the states in which the individuals he/she represents are citizens. Alexander v. Todman, 361 F.2d 744, 746 (3d Cir. 1966).

Delaware law prohibits individual liability of members or managers of limited liability companies, to other members or managers, unless such liability is provided for in the operating agreement. See 6 Del. C. § 18-1101(d) (2004). Section 6.2(f) discusses the liability of representative board members and states:

> Neither the Manager nor any Representative or Deputy Representative shall be liable, responsible, or accountable in damages or otherwise to the Company or any of the Members for any failure to take any action or the taking of any action within the scope of authority conferred on it, him or her by this Agreement made in good faith, except that **the Manager, Representative and Deputy Representatives shall be liable, responsible and accountable for their own fraud, criminal action, bad faith or gross negligence.** Nothing in this Section 6.2(f) shall be deemed to make the Manager or any Representative or Deputy Representative liable, responsible or accountable to any Person other than the Company or the Members.

(D.I. 20, Ex. B at 27)

In this case, the Operating Agreement explicitly states that representatives can only be liable for their own actions. Therefore, defendants could only sue Stein in his individual capacity, and Stein would only have standing to bring a declaratory judgment action in his individual capacity. Under this analysis, Stein is a citizen of California for jurisdictional purposes.

2. Citizenship of SELK and Laurel

The citizenship of artificial entities, such as limited liability companies, has been considered by the Supreme Court and numerous appellate courts. In Cardon v. Arkoma Assoc., 494 U.S. 185, 197 (1990), the Supreme Court declined to extend to partnerships its precedent and 28 U.S.C. § 1332(c), which provide that a corporation is a citizen of the state in which it was incorporated and the state where it has its principal place of business. The Court concluded that changing federal diversity jurisdiction was a Congressional responsibility and, unless Congress acted to include partnerships in the purview of § 1332(c), the citizenship of partnerships would depend on the citizenship of the partners.

This rationale applies equally to limited liability companies. In Cosgrove v. Bartolotta, 150 F.3d 729 (7th Cir. 1998), the Seventh Circuit concluded that, "[g]iven the resemblance between an LLC and a limited partnership, and what

seems to have crystallized as a principle that members of associations are citizens for diversity purposes unless Congress provides otherwise . . . the citizenship of an LLC for purposes of diversity jurisdiction is the citizenship of its members." Id. at 731 (citing Carden, 150 F.3d 185 and United Steelworkers of Am. v. R.H. Bouligny, Inc., 382 U.S. 145, 152-53 (1965)). See also Rolling Green MHP, L.P. v. Comcast SCH Holdings, LLC, 374 F.3d 1020, 1022 (11th Cir. 2004) (finding that a LLC is a citizen of any state of which a member of the company is a citizen); Belleville Catering Co. v. Champaign Mkt. Place, LLC, 350 F.3d 691, 692 (7th Cir. 2003) (holding that LLCs are not like corporations for jurisdictional purposes, and the citizenship of a LLC depends on the citizenship of its members); Ketterson v. Wolf, No. Civ.A. 99-689-JJF, 2001 WL 940909, at *3 (D. Del. Aug. 14, 2001) (concluding that a LLC is a citizen of the states in which its individual members are citizens). Therefore, without Congressional action redefining the citizenship of a limited liability company, this court declines to conclude that the citizenship of a limited liability company is determined by anything other than the citizenship of its members.

The citizenship of SELK and Laurel depends, therefore, on the citizenship of their respective corporate members. Their corporate members, Sallervale and NACA Holdings, are considered citizens of where they were incorporated and where their

principal places of businesses are. See 28 U.S.C. § 1332(c)(1) (2004). The Third Circuit has stated that a principal place of business is determined by business activities, for example, "where the corporation 'conducts its affairs'" and not necessarily just "'where . . . final decisions are made on corporate policy.'" Grand Union Supermkts. of the Virgin Is., Inc. v. H.E. Lockhart Mgmt., Inc., 316 F.3d 408, 411 (3d Cir. 2003) (quoting Kelly v. U.S. Steel Corp., 284 F.2d 850, 854 (3d Cir. 1960)).

The evidence of record with respect to Sallervale and NACA Holdings is negligible. On the one hand, the record indicates that, although they are incorporated in the Bahamas and the British Virgin Islands, respectively, neither is permitted to conduct business with local residents or own an interest in local real estate. Defendants aver in a conclusory fashion that the principal places of business for Sallervale and NACA Holdings are the same as their places of incorporation. Defendants, however, fail to provide any detail as to the corporations' business activities, for example, what business affairs are conducted and where, and where final decisions are made on corporate policy. It could be that these corporations conduct no business, but without any information in this regard, the court declines to accept defendants' averments carte blanche and find federal jurisdiction on this basis. Therefore, if defendants choose to,

they may supplement the record as to these corporate entities. Otherwise, the court does not have a good faith basis upon which to find diversity of citizenship.

B. Adequacy of Defendants' Notice of Removal

Federal diversity jurisdiction requires that the amount in controversy be at least $75,000. See 28 U.S.C. § 1332(a) (2004). The Third Circuit uses the "plaintiff's-view rule" to determine the amount in controversy; thus, the amount in controversy is usually the amount sought by the plaintiff. In re LifeUSA Holding, Inc., 242 F.3d 136, 143 (3d Cir. 2001); In re Corestates Trust Fee Litig., 39 F.3d 61, 64 (3d Cir. 1994). Generally, this would mean that declaratory judgment actions could not be removed because plaintiffs in such actions do not ask for monetary sums. However, typically the amount in controversy can include the worth of the issue being litigated. See Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 339-40 (1977). Recently the Third Circuit considered the monetary amount of a threat to sue by defendants when determining the amount in controversy in a declaratory action. See Liberty Mut. Fire Ins. Co. v. Yoder, No. 03-3623, 2004 WL 2360987 (3d Cir. October 19, 2004).[4] In this case, defendants satisfied the notice requirement by quoting the

[4]Although this case is not published and, therefore, not precedential, it serves as guidance regarding how the Third Circuit would apply the "plaintiff's-view rule" to a declaratory judgment action.

complaint, which stated that defendants had threatened to sue plaintiffs for "millions of dollars." The court finds this allegation sufficient to pass muster under 28 U.S.C. § 1332(a).

V. CONCLUSION

Therefore, at Wilmington this 27th day of January, 2005, having reviewed plaintiffs' motion to remand and defendants' responses thereto;

IT IS ORDERED that, on or before **February 22, 2005,** defendants may supplement the record with respect to Sallervale Company and NACA Holdings, Incorporated. NOTE: FAILURE TO TIMELY SUPPLEMENT WILL RESULT IN PLAINTIFFS' MOTION FOR REMAND (D.I. 15) BEING GRANTED.

Sue L. Robinson
United States District Judge