UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

QI QIN,
Petitioner,

v. **Case No. 21-MC-17**

PAUL DESLONGCHAMPS,
Respondent.

DECISION AND ORDER

Qi Qin has filed a petition to perpetuate testimony under Federal Rule of Civil Procedure 27. According to representations he makes in his brief in support of his petition, *see* Reply at 2, Qin and 164 other Chinese nationals are investors and limited partners in an entity called Colorado Regional Center Project Solaris LLP.[1] The Chinese nationals collectively invested $82.5 million with this entity in 2011. The money was supposed to be managed by a general partner of the LLP, which is an entity named Colorado Regional Center I LLC. Qin contends that this entity, which I will refer to as "Regional Center LLC," mismanaged the invested funds and thereby breached the limited partnership agreement. Qin would like to bring a class action against Regional Center LLC on behalf of himself and the other investors for breach of the agreement. And he would like to bring that action in federal court under the diversity jurisdiction, 28 U.S.C. § 1332(a). Regional Center LLC is a limited liability company, and therefore its citizenship for purposes of § 1332(a) is the citizenships of its members. *See, e.g., West v. Louisville Gas & Elec. Co.*, 951 F.3d 827,

[1] In his response to the petition, the respondent states that Qin purchased his partnership interest "as part of an approved EB-5 Program through the U.S. Citizenship and Immigration Services to obtain a permanent residence visa." Response ¶ 2.

829 (7th Cir. 2020). But Qin does not know the members of Regional Center LLC or their citizenships, and therefore he lacks information that he would need to have before he could properly allege in a federal complaint that the parties are diverse for purposes of § 1332(a).[2] He suspects that a different limited liability company, Waveland Ventures LLC, is a member of Regional Center LLC, and that the respondent, Paul Deslongchamps, is a member of Waveland Ventures and/or Regional Center LLC. Qin seeks to use Federal Rule of Civil Procedure 27 to take Deslongchamps' deposition and ask him to identify the members of Regional Center LLC.

Deslongchamps, who resides in Milwaukee, Wisconsin, filed a response to Qin's petition. He contends that the petition must be denied for two reasons: (1) Qin fails to demonstrate that his contemplated action would be cognizable in a United States court, and (2) he fails to demonstrate that a deposition to perpetuate testimony is necessary to prevent known testimony from being lost.[3] Because I agree with Deslongchamps on both points, the petition will be denied.

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[2] Because Qin brought this proceeding to obtain information about the LLC's members, he apparently does not intend to assert in his contemplated suit that jurisdiction would exist under the Class Action Fairness Act of 2005 ("CAFA"). *See* 28 U.S.C. § 1332(d). Under CAFA, the citizenship of an unincorporated association, including an LLC, is not determined by the citizenship of the association's members, as it is under § 1332(a). Rather, under CAFA, the citizenship of an unincorporated association is determined by its state of organization and its principal place of business. *See* 28 U.S.C. § 1332(d)(10); *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 699–700 (4th Cir. 2010) (holding that limited liability company is an "unincorporated association" within the meaning of § 1332(d)(10)).

[3] Deslongchamps also contends that the petition must be denied because it is unverified. However, after Deslongchamps noted that the petition was unverified, Qin filed a verification page. *See* ECF No. 6. Thus, lack of verification is no longer a reason to deny the petition.

Federal Rule of Civil Procedure 27 allows district courts to permit depositions to perpetuate testimony before an action is filed. *See* Fed. R. Civ. P. 27(a).[4] The rule specifies that the purpose of the deposition must be "to perpetuate testimony about any matter cognizable in a United States court." Rule 27(a)(1). A party who desires to take a deposition before an action is filed must file a verified petition in the district court for the district in which the person from whom the testimony is sought resides and serve it on that person. Rule 27(a)(1)–(2). The petition must show, among other things, "that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought." Rule 27(a)(1)(A). If the district court is "satisfied that perpetuating the testimony may prevent a failure or delay of justice," the court must issue an order allowing the deposition. Rule 27(a)(3).

I first consider Deslongchamps' argument that Qin's petition is deficient because it does not show that his contemplated action would be "cognizable in a United States court." Rule 27(a)(1)(A). In the context in which it is used in the rule, "cognizable" means "[c]apable of being judicially tried or examined before a designated tribunal; within the court's jurisdiction." Black's Law Dictionary (11th ed. 2019). Thus, Rule 27, by its terms, is available to perpetuate testimony only if the petition shows that the action in which the testimony would be used would be within the subject-matter jurisdiction of a United States court. *See also* 8A Wright and Miller, *Federal Practice and Procedure* § 2072 (3d ed.), Westlaw (database updated April 2021) (stating that, although "there need not be an independent basis of federal jurisdiction for the proceeding to perpetuate," the petitioner

[4] The rule also allows courts to grant permission to take such depositions pending appeal, *see* Fed. R. Civ. P. 27(b), but this part of the rule is not relevant here.

must "show that in the contemplated action, for which the testimony is being perpetuated, federal jurisdiction would exist"); 6 Moore's Federal Practice-Civil § 27.10[1], LexisNexis (database updated March 2021) (stating that it is "common ground" that "the petitioner must show that the contemplated action for which the testimony is being perpetuated will be a matter for which federal jurisdiction exists"); *id.* § 27.02[1] ("the petitioner must be prepared to show that there is federal jurisdiction over the contemplated action for which the testimony is being perpetuated").

Qin, however, necessarily cannot show that a federal court would have subject-matter jurisdiction over his contemplated action. That is so because he filed this proceeding for the precise purpose of discovering whether a federal court would have subject-matter jurisdiction over the action. In his reply brief in support of his petition, Qin does not dispute this point. Instead, he asserts that his suit "is likely to fall under diversity jurisdiction because Qin is a citizen of China and Florida, while [Regional Center LLC] via Deslongchamps is a citizen of Wisconsin." Reply at 9. However, Qin does not cite authority or develop a legal argument supporting his implied assertion that, if it is "likely" that the contemplated action will be within federal jurisdiction, then Rule 27's requirement that the contemplated action be "cognizable in a United States court" is satisfied. Moreover, Qin's reason for believing that the suit is likely to fall under the diversity jurisdiction appears to rest on a misunderstanding of the requirements of diversity jurisdiction. Qin states that he is a "citizen" of China and Florida. Because a person cannot be a citizen of a state unless that person is also a citizen of the United States, *see Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989), Qin must be a dual citizen of China and the United States. As a dual citizen, Qin cannot bring his proposed

suit under the alienage jurisdiction, 28 U.S.C. § 1332(a)(2), because for purposes of the alienage jurisdiction the foreign citizenship of a person who also has United States citizenship is disregarded. *See Buchel-Ruegsegger v. Buchel*, 576 F.3d 451, 453–55 (7th Cir. 2009). Thus, if diversity jurisdiction for the contemplated suit is to exist, it must exist under § 1332(a)(1), which requires the parties to be citizens of different states. Qin seems to think that because Deslongchamps is a citizen of Wisconsin, Regional Center LLC must also be a citizen of Wisconsin. But while that belief is accurate so far as it goes (assuming that Deslongchamps is in fact a member of Regional Center LLC and that he is a citizen—not merely a resident—of Wisconsin[5]), it overlooks the possibility that Regional Center has other members that are, like Qin, citizens of Florida. Because unincorporated associations such as partnerships and limited liability companies are citizens of every state in which one of their members is a citizen, *West*, 951 F.3d at 829, the presence of even one Florida citizen among the members of Regional Center LLC would destroy diversity. Qin has not shown that it is "likely" that no member of Regional Center LLC is a citizen of Florida, and so even if a likelihood of federal jurisdiction were sufficient to satisfy the "cognizable in a United States court" requirement of Rule 27, Qin would not have satisfied it here.

A second reason why Qin has not shown that his contemplated action would be "cognizable in a United States court" is that he has not identified the amount that would be in controversy in the action. Diversity jurisdiction under § 1332(a) is available only if

[5] For diversity purposes, the citizenship of a natural person is determined by domicile rather than residence. *See, e.g., Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 670 (7th Cir. 2012).

the amount in controversy exceeds $75,000, exclusive of interest and costs. Qin does not allege, either in his petition or in his brief, that the amount in controversy would exceed the jurisdictional minimum. To be sure, Qin's reply brief notes that he and the other limited partners invested $82.5 million in the venture at issue and that Regional Center LLC was paid $1.6 million per year. *See* Reply at 2. But he does not allege that he will seek relief that exceeds the sum or value of $75,000 in his contemplated action for breach of contract. And I cannot merely assume from the large amounts invested and paid that Qin will seek to recover more than the jurisdictional minimum.

Deslongchamps' second ground for denying Qin's petition is also meritorious. The federal courts have held that Rule 27 can be used only to prevent known testimony from being lost, not as a discovery tool to assist in preparing a complaint. The leading commentators on federal practice have collected federal cases supporting this proposition. They explain that "[t]he purpose of Rule 27 is to preserve evidence that is in imminent danger of being lost to a prospective litigant." 6 Moore's, *supra*, § 27.03; *see also* 8A Wright & Miller, supra, § 2071 (citing cases holding that Rule 27 is intended to apply to "situations where, for one reason or another, testimony might be lost to a prospective litigant unless taken immediately, without waiting until after a suit or other legal proceeding is commenced"). The courts have made clear that "Rule 27 may not be used to search for possible claims, or to search for possible defendants . . . [or] to gather facts for use in framing a complaint." 6 Moore's, *supra*, § 27.03; *see also* 8A Wight & Miller, *supra*, § 2071 (stating that "the courts have generally agreed that to allow Rule 27 to be used for [the purpose of discovery before an action is commenced] would be an 'abuse of the rule.'"). This view of Rule 27 is supported by the rule's text, which permits

depositions to "perpetuate testimony." The word "perpetuate" means "to make perpetual or cause to last indefinitely." *See* www.merriam-webster.com/dictionary/perpetuate (last viewed May 14, 2021). And in legal contexts, "perpetuation of testimony" is defined as "[t]he means or procedure for preserving for future use witness testimony that might otherwise be unavailable at trial." Black's Law Dictionary, *supra*. Thus, the text of Rule 27(a) reveals that the rule can be used only to preserve witness testimony that might otherwise be lost.

In the present case, Qin seeks to discover information rather than to preserve testimony that is in danger of being lost. As discussed, he does not know the members of Regional Center LLC or their citizenships, and he seeks to use Rule 27(a) to discover that information. Qin does not show that there is any imminent danger that this information might be lost before he is able to file suit. He does not, for example, allege that Deslongchamps is the only person who knows the members of Regional Center LLC and that he is on the verge of death. Accordingly, Qin is not seeking to perpetuate testimony and therefore cannot take Deslongchamps' deposition under Rule 27(a).

Qin argues, based on a case decided by another judge of this district, *see Hadley Claim I, LLC v. United Solutions and Servs. LLC*, No. 13-C-1162, 2014 WL 12676237 (E.D. Wis. Oct. 31, 2014), that a federal court has the power to compel a party to disclose facts relating to its citizenship. Qin seems to rely on this case as an alternative to Rule 27(a). However, the case provides no support whatsoever for Qin's claim that a federal court may compel the disclosure of information about a person or entity's citizenship when no action is pending before the court. This is so because, in *Hadley*, the order to compel the disclosure of information occurred as part of a *pending* civil action. In *Hadley*, the

plaintiff was an LLC, and it commenced the federal action by filing a complaint in the district court under the diversity jurisdiction. The case was assigned to former Judge Clevert, who *sua sponte* noted that the plaintiff had not properly identified its own citizenship because it had not identified its own members and their citizenships. Judge Clevert required the plaintiff to correct this deficiency. When the plaintiff failed to do so during an initial round of briefing, Judge Clevert entered an order requiring the plaintiff to provide the defendants with information concerning the plaintiff's citizenship. Judge Clevert wrote that "[t]he court believes that the plaintiff should have this information and that the defendants are entitled to see it immediately." *Id.* at *2. Thus, *Hadley* shows only that, when a plaintiff commences a federal action under the diversity jurisdiction, the defendant is entitled to take discovery about the plaintiff's citizenship to determine whether the action was properly filed in federal court. The case does not show that a plaintiff who wishes to commence an action in federal court is entitled to pre-suit discovery from the intended defendant about its own citizenship.

Finally, Qin criticizes federal cases holding that the citizenship of a limited liability company is determined by the citizenship of its members and notes that proposals have been made to either treat LLCs like corporations or require parties who are LLCs to disclose information about their members. *See* Reply Br. at 5–8. However, even if I agreed with Qin's criticism, I would not have the power to either apply Rule 27(a) outside its domain or invent another procedure to provide Qin with the information he seeks. Qin asks me to choose one of these options to prevent an injustice. But I do not see how Qin's inability to obtain the information he seeks could result in an injustice. For even if Qin could not bring his proposed action for breach of contract in federal court, he could still

bring it in state court. State courts are just as capable of administering justice as federal courts, and therefore pre-suit disclosure of Regional Center LLC's members is not necessary to prevent an injustice.

For these reasons, **IT IS ORDERED** that the petition to perpetuate testimony is **DENIED**. For the same reasons, **IT IS ORDERED** that Qin's redundant "motion to enforce deposition via petition to perpetuate testimony" (ECF No. 9) is **DENIED**.

Dated at Milwaukee, Wisconsin, this 14th day of May, 2021.

s/Lynn Adelman_____
LYNN ADELMAN
United States District Judge