No. _____

IN THE

Supreme Court of the United States

J. VIRGIL WAGGONER and J.V.W. INVESTMENT LTD.,

Petitioners,

v.

SUISSE SECURITY BANK AND TRUST LTD.,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Thomas G. Rohback
Counsel of Record

Gail L. Gottehrer
LEBOEUF, LAMB, GREENE & MACRAE LLP
Attorneys for Petitioners
125 West 55th Street
New York, New York 10019
Telephone: 212-424-8509

Michael L. Roberts
Caroline L. Curry
ROBERTS LAW FIRM, P.A.
Attorneys for Petitioners
20 Rahling Circle
Little Rock, Arkansas 72223
Telephone: 501-821-5575

QUESTION PRESENTED

Whether the amount in controversy requirement of 28 U.S.C. § 1332 should be determined solely from the plaintiff's perspective (as five circuits now apply the statute) or from the perspective of both parties to the controversy (as six circuits now apply the statute)?

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Whether the amount in controversy requirement of 28 U.S.C. § 1332 should be determined solely from the plaintiff's perspective (as five circuits now apply the statute) or from the perspective of both parties to the controversy (as six circuits now apply the statute)?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners J. Virgil Waggoner and J.V.W. Investment Ltd. were appellants below.

The respondent in this Court, and the appellee below, is Suisse Security Bank and Trust, Ltd.

Other persons named in the court of appeals' caption, but which neither participated in the court of appeals nor are respondents here are Correspondent Services Corporation, First Equities Corporation of Florida, and Donal Kelleher.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state that petitioner J.V.W. Investment Ltd. is a corporation. J.V.W. Investment Ltd. does not have any parent corporations. There is no publicly-held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners J. Virgil Waggoner and J.V.W. Investment Ltd. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 442 F.3d 767, and is reprinted in the Appendix to the Petition ("App.") at 30a. The District Court's opinion, which was not published in the federal reporter, is reprinted at App. 46a. The final judgment entered by the District Court is reported at 232 F.R.D. 173, and is reprinted at App. 40a.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2006. The court of appeals denied Petitioners' petition for rehearing en banc on September 15, 2006. *See* App. at 27a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 28 U.S.C. § 1332. The relevant statutory provision is reproduced in the Appendix at App. 3a.

STATEMENT OF THE CASE

A commercial clearinghouse, Correspondent Services Corporation ("CSC"), was holding a $10 million Certificate of Deposit ("CD"), when a dispute arose as to who was entitled to the CD. Shortly after the CD matured, CSC filed an interpleader action, which it subsequently amended to include a complaint for declaratory relief as to who was the rightful owner of the CD.

After several years of litigation, the district court dismissed the entire case for lack of subject matter jurisdiction, finding that the case did not satisfy the amount in controversy requirement of 28 U.S.C. § 1332 since the CD had matured and the proceeds had been placed into a bank account. The Court of Appeals for the Second Circuit affirmed, holding that, from the plaintiff's perspective, the CD did not satisfy the amount in controversy requirement.

Notwithstanding the district court's findings regarding the value of the expired CD, Petitioners ask this Court to review these decisions because millions of dollars are actually at issue in this case. The parties to this action have litigated tenaciously for years -- not over a worthless CD -- but over the millions of dollars which are the proceeds of that CD. In short, this is not the type of "insubstantial" case that the amount in controversy requirement of 28 U.S.C. § 1332 was designed to keep out of federal courts.

Factual Background

In 1998, Petitioner J. Virgil Waggoner ("Waggoner") established an investment company, J.V.W. Investment Ltd. ("JVW"), to invest $10 million belonging to Waggoner. Waggoner had previously entered into a Joint Par-

ticipation Agreement with Donal Kelleher ("Kelleher") to manage JVW and its investments.

Pursuant to this arrangement, Kelleher opened a bank account in JVW's name at Suisse Security Bank and Trust, Ltd. ("SSBT") and deposited the entire $10 million. Kelleher also obtained a CD from British Trade and Commerce Bank ("BTCB"). On its face, the bearer CD had an expiration date of June 25, 1999. Kelleher directed BTCB to deliver the CD to SSBT and directed SSBT to fund the CD with the $10 million that Kelleher had just deposited at SSBT.[1] The CD was later physically transferred to CSC.

By November 1998, Waggoner and Kelleher became embroiled in a dispute. Waggoner removed Kelleher as director of JVW, and appointed himself as sole director of JVW. Kelleher, however, did not accept Waggoner's acts of dissolution and discharge. Instead, Kelleher claimed to be the sole director of JVW. Shortly before the CD was scheduled to mature, Kelleher demanded that CSC freeze the CD and its proceeds. Notwithstanding Kelleher's demand, the CD matured according to its terms on June 25, 1999, and the proceeds reverted to a savings account at BTCB in the name of JVW, although both Kelleher and Waggoner still claimed the exclusive right to act on behalf

[1] Notwithstanding Kelleher's instructions, SSBT did not promptly fund the CD with the $10 million. Instead, in October 1998, with the CD's one-year term being roughly half over, SSBT finally funded the CD -- but only in the amount of $7.7 million. The remaining $2.3 million dollars were never recovered, and later became an issue in litigation subsequently instituted by CSC in the United States District Court for the Southern District of New York.

of JVW. There continues to be a dispute as to who is entitled to those proceeds.[2]

Procedural History

Faced with these conflicting demands for the CD and its proceeds, CSC filed suit in the United States District Court for the Southern District of New York on August 16, 1999, under 28 U.S.C. § 1335. Waggoner and JVW were named as potential claimants, as were Kelleher and BTCB. The existence of diversity jurisdiction is not disputed.

The parties filed a variety of cross-claims, including claims for breach of contract, breach of fiduciary duty, conversion, and fraud. In addition, JVW, Waggoner, and Kelleher filed claims against SSBT for the approximately $3 million which SSBT had failed to include in the initial $10 million funding of the CD. Thereafter, $3 million of SSBT's funds in New York were attached pursuant to orders dated November 13, 2000 and April 18, 2001. SSBT asserted cross-claims against JVW, Waggoner and Kelleher.

After nearly a full year of litigation, SSBT wrote a letter to the district court questioning the subject matter jurisdiction of the court, since the CD had matured and had no value. In response to this letter, the district court granted CSC leave to file an amended complaint, which it did on August 20, 2001. In addition to its initial reliance on the interpleader statute, 28 U.S.C. § 1335, CSC invoked the

[2] Although the district court had held that Waggoner was the rightful owner of JVW, and therefore of the proceeds held in the bank account, that decision became void when the district court declared a lack of subject matter jurisdiction *ab initio*. BTCB's license was later revoked, it entered liquidation, and Waggoner never recovered any of the initial $10 million dollars he invested.

court's jurisdiction under New York's state interpleader provision and the federal Declaratory Judgment Act, 28 U.S.C. § 2201. In the amended complaint, CSC made it clear that the controversy concerned conflicting claims -- not merely to the physical CD -- but to the money underlying this piece of paper.

Among the allegations of the Amended Complaint, CSC alleged:

> "CSC informed the parties that 'it has received conflicting claims as to who has authority over' JVW's account . . ."
>
> * * *
>
> "CSC would be responsible for funds in that amount if the CD was reflected as having no value. . . ."
>
> * * *
>
> "On July 6, 1999 Kelleher wrote FECF, with a copy to CSC, stating that any transfer of funds backing the CD to BTCB was unauthorized . . . ."
>
> * * *
>
> "Kelleher wrote CSC on July 21, 1999 demanding that the CD not be transferred and that CSC remain as custodian of either the CD itself 'or it's [sic] cash equivalent of USD 10.6 Million.'"
>
> * * *
>
> "that CSC was obligated to retain either the CD or the cash equivalent in the amount of $10,600,000, ..."
>
> * * *

> "CSC is a mere stakeholder and has no beneficial interest in the proceeds of the aforementioned CD. . . ."
>
> * * *
>
> "CSC has been threatened with claims by Kelleher in excess of ten million dollars ($10,000,000) in the event it transferred the CD to anyone but Kelleher or his designees."

Amended Complaint, ¶¶ 14, 15, 16, 20, 23, 30, 37.

SSBT moved to dismiss CSC's complaint on the ground that subject matter jurisdiction was lacking because the CD had no value.[3] The district court agreed that the CD had no value and dismissed the case for lack of subject matter jurisdiction in an order entered May 31, 2002. In so doing, the district court vacated its attachment order and awarded attorney's fees to SSBT. Petitioners appealed.

On July 16, 2003, the Second Circuit vacated the district court's May 31, 2002, order, and remanded the case for the district court to consider whether it had diversity jurisdiction in light of CSC's additional grounds for jurisdiction, and whether the amended complaint related back to the date CSC filed its initial complaint. The district court was also directed to reconsider its refusal to exercise supplemental jurisdiction in light of the fact that the court had failed to address the potential prejudice to Petitioners if the court vacated its attachment order.

Once again, the district court, in an order entered January 7, 2005, dismissed the action in its entirety for lack of

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[3] CSC later filed a notice of voluntary of dismissal on October 21, 2001, after Kelleher released all claims he had against SSBT.

subject matter jurisdiction, vacated its attachment order, and ordered Petitioners to compensate SSBT for damages incurred since November 17, 2000, when the initial order of attachment was entered. Petitioners again appealed on February 3, 2005. The court of appeals, in an opinion filed March 10, 2006, affirmed the dismissal.

On March 23, 2006, Petitioners filed a petition for rehearing en banc, asking the court of appeals to apply the "either-viewpoint" test applied by other circuit courts, or to clarify the existing law by establishing a general rule of application that is subject to exception in order to avoid undue prejudice to a party. The Second Circuit rejected the petition for rehearing en banc in an Order entered September 15, 2006. Petitioners now seek review by this Court.

REASONS FOR GRANTING THE PETITION

To ensure that only cases of substance are brought in federal court, 28 U.S.C. § 1332 contains an "amount in controversy" requirement. The various circuit courts of appeal are divided as to whether this amount in controversy is determined exclusively from the perspective of the plaintiffs or from a review of the entire controversy. This case presents the Court with an opportunity to resolve this split among the circuits. By its plain language and by its statutory purpose, the amount in controversy requirement is determined by the amount in controversy between two parties -- not simply the amount alleged by a plaintiff in a complaint.

I. THE AMOUNT IN CONTROVERSY BETWEEN PARTIES SHOULD NOT BE LIMITED SOLELY TO THE AMOUNT CLAIMED BY PLAINTIFF

By its very language, 28 U.S.C. § 1332 provides that "the district courts *shall* have original jurisdiction of all civil actions where *the matter in controversy* exceeds the sum or value of $75,000, exclusive of interest and costs". *Id.* (emphasis added). A plain reading of this provision reveals that Congress chose to define the jurisdictional threshold based on the "matter in controversy" -- not simply based on the plaintiff's demand. Certainly, if that had been the congressional intent, the statute could have easily limited jurisdiction to "the amounts set forth in plaintiff's claim." This Court has expressly stated that courts "must not give jurisdictional statutes a more expansive interpretation than their text warrants . . . but it is just as important not to adopt an artificial construction that is narrower than what the text provides." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, ___, 125 S. Ct. 2611, 2620 (2005). By limiting the jurisdictional inquiry to the amount demanded by plaintiff, courts will artificially and improperly constrict access to our federal courts. In essence, a truly substantial "matter in controversy" may be excluded based solely on a race to the courthouse and the manner in which the plaintiff characterizes its interest in the controversy.

There is no dispute that the purpose behind 28 U.S.C. § 1332 is to keep "trivial" cases out of federal court. *See* 14B Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE § 3703 (3d ed. 1998); *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 395 (7th Cir. 1979) ("the jurisdictional amount prerequisite was enacted pri-

marily to measure substantiality of the suit"). This is true for both parties to an action, and it is the either-viewpoint rule that more adequately ensures that the policy surrounding the amount-in-controversy requirement is satisfied. Indeed, as the Seventh Circuit noted, it is "beyond absurd to allow a defendant to remove if the plaintiff is seeking damages of $75,000.01, but not if the plaintiff is seeking an injunction directing the defendant to tear down, as a nuisance, a $10 million building that the defendant owns." *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 553 (7th Cir. 2002).

It is for these reasons that leading commentators and experts on federal practice and procedure have endorsed the either-viewpoint rule. As Wright and Miller state in section 3703, the either-viewpoint rule "seems to be the desirable rule, since the purpose of a jurisdictional amount in controversy requirement . . . is satisfied when the case is worth a large sum of money to either party." MOORE'S FEDERAL PRACTICE agrees, adding that, given the fact that the primary purpose behind the amount-in-controversy requirement is to ensure the substantiality of a matter, "the question of whether the controversy is substantial should not be answered unqualifiedly by looking only to the value of that which the plaintiff stands to gain or lose." 15 James Wm. Moore, *et al.*, MOORE'S FEDERAL PRACTICE § 102.109 (3d ed. 2004); *see also McCarty*, 595 F.2d at 394 (recognizing that policy considerations "support the either viewpoint rule").

Here, the case at bar has spanned approximately seven years. The parties to this action have litigated aggressively (and expensively) over millions of dollars -- not over a worthless piece of paper. Kelleher contended from the out-

set that he was entitled to the CD and the $10 million which was supposed to fund that CD. He went so far as to threaten CSC with legal action, which could have resulted in a judgment in Kelleher's favor in excess of $10 million dollars. CSC filed first to determine whether it had any duty to Waggoner or Kelleher as the individuals claiming to control JVW, its CD, and the millions associated with that CD.

This case is not "trivial" in any manner. Parties in federal court should not have the threshold, jurisdictional amount-in-controversy determination be subject to conflicting results depending simply on the circuit in which the plaintiff chooses to file its claim.

II. THERE IS A SPLIT AMONG THE CIRCUITS

The Second Circuit adopted the district court's application of the "plaintiff's-viewpoint" test in this case. *See Correspondent Servs. Corp. v. First Equities Corp. of Florida*, 442 F.3d 767, 769 (2d Cir. 2006) (applying *Kheel v. Port of New York Auth.*, 457 F.2d 46, 49 (2d Cir. 1972), *cert. denied*, 409 U.S. 983 (1972)); *see also Cent. Mexico Light & Power Co. v. Munch*, 116 F.2d 85, 87 (2d Cir. 1940). The test applied in the Second Circuit is currently applied by four other circuits. *See Garcia v. Koch Oil Co. of Texas, Inc.*, 351 F.3d 636, 639-40 (5th Cir. 2003); *Smith v. Am. States Preferred Ins. Co.*, 249 F.3d 812, 813 (8th Cir. 2001); *Ericsson GE Mobile Commc'ns, Inc. v. Motorola Commc'ns & Elec., Inc.*, 120 F.3d 216, 220 & n.13 (11th Cir. 1997); *Columbia Gas Transmission Corp. v. Tarbuck*, 62 F.3d 538, 542-43 (3d Cir. 1995). Thus, five circuits currently apply the plaintiff's-view-

point test when determining whether the amount in controversy requirement is met.

The five circuits identified are in direct conflict with six circuits that have adopted the either-viewpoint test when resolving the same jurisdictional issue. *See Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002) (acknowledging that it had been "settled that the test for determining the amount in controversy in a diversity proceeding is the pecuniary result to either party which [a] judgment would produce") (internal quotation marks and citation omitted); *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 553 (7th Cir. 2002) (recognizing that "the jurisdictional minimum in diversity cases is not the amount sought by the plaintiff but the amount at stake to either party to the suit"); *In re Ford Motor Co./Citibank (S.D.), N.A.*, 264 F.3d 952, 958 (9th Cir. 2001) (noting the appropriate application of the "either viewpoint" rule in single-plaintiff cases by that Circuit, but declining to apply that rule to class action suits); *Williams v. Kleppe*, 539 F.2d 803, 804 n.1 (1st Cir. 1976) (recognizing that the court "can rely on the extent of the claimed pecuniary burden on defendants were plaintiffs to prevail"); *Comm. for GI Rights v. Callaway*, 518 F.2d 466, 472 (D.C. Cir. 1975) (noting that the "value of the right sought to be gained by the plaintiff or the cost of enforcing that right to the defendant" may be used when determining the amount in controversy); *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940) ("the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce"). Thus, an almost even split among the circuits currently exists. Only one jurisdiction, the Sixth Circuit, has not adopted either approach. *See Olden v. LaFarge Corp.*, 383 F.3d 495, 502 n.1 (6th Cir.

2004) (recognizing the split among the circuits, and that the Sixth Circuit had not yet chosen an approach, but declining to adopt either approach at that time). All federal courts should apply the same standard.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), this Court referred to *Ronzio*, 116 F.2d at 606 (10th Cir. 1940), which recognized that the proper "test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce." *Id.* at 98. The *Illinois* Court also cited C. Wright, Law of Federal Courts 117-19 (2d ed. 1970), which recognized that the either party rule "seems the desirable rule, since the purpose of a jurisdictional amount, to keep trivial cases away from the court, is satisfied where the case is worth a large sum to either party." *Id.* Finally, *Illinois* referred to a law review article in which the author noted that, "in many instances in which either party might have initiated the proceeding, it seems irrational to consider the plaintiffs interest exclusively, and such a practice may well provoke a race to the courts." *Id.* (*quoting* Note, "Federal Jurisdictional Amount: Determination of the Matter in Controversy," 73 HARV. L. REV. 1369 (1960)).

In *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961) and *Smith v. Adams*, 130 U.S. 167 (1889), this Court suggested that the application of the either-viewpoint test is appropriate in diversity actions. In *Horton*, for example, this Court observed that "[n]o matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined under the same rules." *Horton*, 367 U.S. at 354. *See also Smith v. Adams*, *supra* at 175 ("the pecuniary value of the matter in dispute may be determined . . . by the

pecuniary result to one of the parties immediately from the judgment"). Again, the statute at issue expressly directs the courts to determine the jurisdictional amount from "the matter in controversy" -- not from "plaintiff's demand."

Petitioners now ask this Court to resolve the question presented in this case with its clear and unquestionable endorsement of the either-viewpoint test.

III. AS A MATTER OF PUBLIC POLICY, THE EITHER-VIEWPOINT TEST MOST ADEQUATELY PROTECTS AGAINST UNJUST DISPOSITION OF MATTERS CLEARLY SURPASSING THE $75,000 THRESHOLD

As of August 16, 1999, when CSC commenced this action, Kelleher had demanded and sought to recover $10.6 million from CSC (although this amount was subsequently reduced to $7.7 million) that had been transferred from SSBT to fund the CD. When the action began, Waggoner and Kelleher each claimed ownership and control of JVW and, therefore, authority and control over the proceeds associated with the CD. Measured from defendants' points of view, the matter in controversy exceeded the $75,000 required to confer jurisdiction on the district court.

Under the Second Circuit's narrow reading of 28 U.S.C. § 1332 and rigid application of the plaintiff's-viewpoint rule, the parties to this action are deprived of the right to litigate in federal court a matter in which there exists a controversy over the right to millions of dollars. Moreover, in this case, Petitioners will lose a pre-bankruptcy lien (and the accompanying status of secured cred-

itor), as embodied by the district court's order of attachment. Once that lien has dissolved, the possibility that Petitioners will be able to recover any of the money retained by SSBT is virtually nonexistent. Additionally, although Petitioners did not file the initial declaratory judgment action, they have also been ordered to pay what may total millions of dollars to the very party or parties that have improperly retained $2.3 million dollars initially invested by Petitioners. Congress could not have intended such a result when it enacted 28 U.S.C. § 1332; thus, Petitioners respectfully ask this Court to adopt the either-viewpoint test, to ensure uniformity of justice throughout the circuits in cases such as this.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Thomas G. Rohback
THOMAS G. ROHBACK
Counsel of Record

GAIL L. GOTTEHRER
LeBoeuf, Lamb, Greene & MacRae LLP
Attorneys for Petitioners
125 West 55th Street
New York, New York 10019
Telephone: (212) 424-8509

MICHAEL L. ROBERTS
CAROLINE L. CURRY
Roberts Law Firm, P.A.
Attorneys for Petitioners
20 Rahling Circle
Little Rock, Arkansas 72223
Telephone: (501) 821-5575

December 12, 2006

APPENDIX

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 81. SUPREME COURT

28 USCS § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

HISTORY:

(June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P.L. 100-352, § 2(a), (b), 102 Stat. 662.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., §§ 346 and 347 (Mar. 3, 1911, ch. 231, §§ 239, 240, 36 Stat. 1157; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926).

Section consolidates sections 346 and 347 of title 28, U.S.C., 1940 ed.

Words "or in the United States Court of Appeals for the District of Columbia" and "or of the United States Court of Appeals for the District of Columbia" in sections 346 and 347 of title 28, U.S.C., 1940 ed., were omitted. (See section 41 of this title.)

The prefatory words of this section preceding paragraph (1) were substituted for subsection (c) of said section 347.

The revised section omits the words of section 347 of title 28, U.S.C., 1940 ed., "and with like effect as if the case had been brought there with unrestricted appeal", and the words of section 346 of such title "in the same manner as if it had been brought there by appeal". The effect of subsections (1) and (3) of the revised section is to preserve existing law and retain the power of unrestricted review of cases certified or brought up on certiorari. Only in subsection (2) is review restricted.

Changes were made in phraseology and arrangement.

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

28 USCS § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have 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—

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335 [28 USCS § 1335], and section 1441 [28 USCS § 1441], an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or

value of $ 75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 [28 USCS § 1441]—

(1) 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, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

28 USCS § 1335

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 of this title [28 USCS § 1332], are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the

plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

HISTORY:

(June 25, 1948, ch 646, § 1, 62 Stat. 931.)
(As amended Feb. 18, 2005, P.L. 109-2, § 4(b)(1), 119 Stat. 12.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., § 41(26) (Mar. 3, 1911, ch. 231, § 24, P 26, as added Jan. 20, 1936, ch. 13, § 1, 49 Stat. 1096).

Words "civil action" were substituted for "suits in equity"; word "plaintiff" was substituted for "complainant"; and word "judgment" was substituted for "decree," in order to make the language of this section conform with the Federal Rules of Civil Procedure.

The words "duly verified" following "in the nature of interpleader," near the beginning of the section, were omitted. Under Rule 11 of the Federal Rules of Civil Procedure pleadings are no longer required to be verified or accompanied

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 151. DECLARATORY JUDGMENTS

28 USCS § 2201

Review expert commentary from The National Institute for Trial Advocacy preceding 28 USCS § 2201 (relating to declaratory judgments).

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 [26 USCS § 7428], a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930 [19 USCS § 1516a(f)(10)], as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 355 or 360b].

HISTORY:

(June 25, 1948, ch 646, § 1, 62 Stat. 964; May 24, 1949, ch 139, § 111, 63 Stat. 105; Aug. 28, 1954, ch 1033, 68 Stat. 890; July 7, 1958, P.L. 85-508, § 12(p), 72 Stat. 349; Oct. 4, 1976, P.L. 94-455, Title XIII, § 1306(b)(8), 90 Stat. 1719; Nov. 6, 1978, P.L. 95-598, Title II, § 249, 92 Stat. 2672; Sept. 24, 1984, P.L. 98-417, Title I, § 106, 98 Stat. 1597; Sept. 28, 1988, P.L. 100-449, Title IV, § 402(c), 102 Stat. 1884; Nov. 16, 1988, P.L. 100-670, Title I, § 107(b), 102 Stat. 3984.)
(As amended Dec. 8, 1993, P.L. 103-182, Title IV, Subtitle B, § 414(b), 107 Stat. 2147.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on Act March 3, 1911, ch 231, § 274d, as added June 14, 1934, ch 512, 48 Stat. 955; Aug. 30, 1935, ch 829, § 405, 49 Stat. 1027 (§ 400 of former Title 28).

This section is based on the first paragraph of former 28 USCS § 400. Other provisions of such section are incorporated in 28 USCS § 2202. While this section does not exclude declaratory judgments with respect to State taxes, such suits will not ordinarily be entertained in the courts of the United States where State law makes provision for payment under protest and recovery back or otherwise affords adequate remedy in the State courts. See Great Lakes Dredge &

* * *

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 16th day of July, two thousand and three.

Docket No. 02-7744
[Oval Stamp]
Filed: July 16, 2003
Roseann B. MacKechnie, Clerk

Before:

Hon. Dennis Jacobs,
Hon. Rosemary S. Pooler,
Hon. Sonia Sotomayor,
Circuit Judges.

CORRESPONDENT SERVICES CORPORATION,

Plaintiff-Counter-Defendant,

v.

FIRST EQUITIES CORPORATION OF FLORIDA,

Defendant-Cross-Defendant,

J.V.W. INVESTMENTS LTD.,

Defendant-Cross-Claimant-Counter-Claimant-Cross-Defendant-Appellant,

J.V. WAGGONER,

Defendant-Cross-Claimant-Cross-Defendant-Appellant,

DONAL KELLEHER,

Defendant-Cross-Defendant,

SUISSE SECURITY BANK AND TRUST, LTD.,

Cross-Defendant-Appellee.

MANDATE

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is VACATED and REMANDED in accordance with the opinion of this Court.

FOR THE COURT,
ROSEANN B. MACKECHNIE, Clerk

By: /s/ ARTHUR M. HELLER
Motions Staff Attorney

A TRUE COPY
Roseann B. MacKechnie
by [ILLEGIBLE]
DEPUTY CLERK

MANDATE: AUG -6 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: February 4, 2003 Decided: July 16, 2003)
Docket No. 02-7744

CORRESPONDENT SERVICES CORPORATION,

Plaintiff-Counter-Defendant,

– v. –

FIRST EQUITIES CORPORATION OF FLORIDA,

Defendant-Cross-Defendant,

J.V.W. INVESTMENT LTD.,

Defendant-Cross-Claimant-Counter-Claimant-Cross-Defendant-Appellant,

J.V. WAGGONER,

Defendant-Cross-Claimant-Cross-Defendant-Appellant,

DONAL KELLEHER,

Defendant-Cross-Defendant,

SUISSE SECURITY BANK AND TRUST, LTD.,

Cross-Defendant-Appellee.

Stakeholder which had physical possession of certificate of deposit (CD) brought interpleader action to determine ownership of CD. Two defendants filed cross-claims and third party claim against bank. The United States District Court for the Southern District of New York, Robert W. Sweet, J., 205 F.Supp.2d 191, granted voluntary dismissal of main action and declined to exercise supplemental jurisdiction over cross-claims. Defendants appealed. The Court of Appeals, Sotomayor, Circuit Judge, held that: (1) jurisdiction over interpleader action was lacking; (2) district court could not assert diversity jurisdiction based upon cross-claims alone; but (3) district court failed to address whether amended complaint related back to original complaint.

Vacated and Remanded.

KENNETH A. CARUSO, Chadbourne & Parke LLP (Marvin R. Lange, Jeffrey I. Wasserman, on the brief), New York, New York, *for Appellants*.

ANDREW E. TOMBACK, *Of Counsel*, Milbank, Tweed, Hadley & McCloy (Charles W. Westland, Jonathan W. Wolfe, on the brief), New York, New York, *for Cross-Defendant-Appellee*.

Before:

JACOBS, POOLER, AND SOTOMAYOR,

Circuit Judges.

SOTOMAYOR, *Circuit Judge*:

Appellants J.V.W. Investment, Ltd. ("JVW")[1] and J. Virgil Waggoner, two of the several original defendants below, appeal from an order of the United States District Court for the Southern District of New York (Sweet, *J.*), dismissing an action in the nature of interpleader brought by Correspondent Services Corporation ("CSC"). With CSC's action no longer before it, the district court declined to exercise supplemental jurisdiction over appellants' state law cross-claims against appellee Suisse Security Bank & Trust, Ltd. ("SSBT"), and therefore vacated an attachment of assets belonging to SSBT that had been entered in conjunction with these cross-claims. Although the substance of these cross-claims apparently remains viable for litigation in state court, the attachment, and especially its current priority in SSBT's ongoing liquidation proceedings, might not be restored if this federal action were to be dismissed.

The district court dismissed CSC's claims after both granting CSC's Rule 41(a)(2) motion for voluntary dismissal and determining that it lacked subject matter jurisdiction over CSC's original complaint, without considering CSC's amended complaint. We vacate the dismissal and remand to the district court for the following proceedings: first, to clarify whether jurisdiction existed under CSC's amended complaint and, if it did, whether the allegations establishing jurisdiction related back to the original complaint; and second, if the allegations sufficient to establish jurisdiction relate back to the original complaint, to consider whether the prejudice to appellants flowing from the vacating of the attachment precludes dismissal of either

[1] Erroneously sued as J.V.W. Investments, Ltd.

CSC's action under Rule 41(a)(2) or the appellants' cross-claim for lack of supplemental jurisdiction.

BACKGROUND

While the facts of this case illustrate one of the myriad ways in which complicated investment transactions can turn sour, the question that confronts us is much less complicated: whether the district court had jurisdiction over this action, and, if so, whether it abused its discretion by allowing CSC to withdraw the action or by declining to exercise supplemental jurisdiction over the remaining claims amongst the interpleader and third-party defendants. Although the specifics of the investment scheme are neither uncontested nor necessary to resolve this case, in abbreviated form they serve the alternate purpose of introducing the relationships between the parties in this action.

I. The Investment Scheme

In 1998, Donald Kelleher, a United Kingdom citizen, undertook for a commission to realize enormous financial returns by investing $10 million belonging to J. Virgil Waggoner, a Texas businessman. A Joint Participation Agreement memorializing this investment scheme implied that the investment would achieve a 500% profit within three to five months, and that Kelleher was to receive between twenty and twenty-five percent of these profits.

Kelleher and Waggoner established JVW, an alien corporation organized under the laws of the Republic of Dominica, with Waggoner as the sole shareholder and Kelleher as the director. Through JVW, Kelleher entered into an agreement with British Trade & Commerce Bank

("BTCB"), a Dominica bank, to invest the $10 million in a CD. BTCB issued the CD to JVW, and the CD was transferred to First Equities Corp. of Florida ("First Equity"), a Florida subsidiary of BTCB, which in turn placed the unfunded CD into the custody of CSC, a company that provided custodial services for First Equity. CSC is a citizen of New York and Delaware.

Meanwhile, Kelleher, through JVW, created a bank account at SSBT, an offshore bank organized under the laws of the Bahamas, and caused Waggoner's $10 million to be deposited into this account. After several unsuccessful attempts to transfer this money from JVW's SSBT account into BTCB's SSBT account and thus to fund the CD, only approximately $7.7 million was transferred to BTCB/First Equity, leaving $2.3 million unaccounted for. Even after the CD was funded, however, CSC possessed only the physical CD document, and it never controlled any of the funds received by BTCB/First Equity.

Waggoner and Kelleher then had a disagreement, and Waggoner dissolved the Joint Participation Agreement, removed Kelleher as director of JVW, and appointed himself JVW's sole director. Waggoner received the proceeds of the $7.7 million investment when the CD matured in June 1999. Kelleher, in turn, demanded from CSC, BTCB and First Equity not merely that sum but the entire $10.6 million that a fully funded $10 million CD would have yielded upon maturity. Kelleher continued to make this demand even after First Equity determined that its transfer of the CD proceeds to Waggoner was proper.

II. The Interpleader Action

In August 1999, still with custody of the physical CD and facing Waggoner's and Kelleher's apparently conflicting claims to it,[2] CSC commenced a statutory interpleader action under 28 U.S.C. § 1335, naming Waggoner, Kelleher, JVW, BTCB and First Equity as potential claimants. CSC's complaint made clear that it believed the stake was the CD itself, rather than proceeds from the CD.

A flurry of state-law cross-claims followed, contesting ownership of the CD, liability and responsibility for the $2.3 million loss. In one of these cross-claims, Waggoner and JVW brought a claim against Kelleher, added SSBT as a third-party defendant, and moved to attach approximately $3 million of SSBT's assets located in New York. Based upon evidence that SSBT may have forged documents to conceal its potential wrongdoing, the district court found that Waggoner and JVW were likely to succeed on the merits of their claims against SSBT, and ordered the attachment.

After some litigation and significant discovery on the merits of the various cross-claims, SSBT went into bankruptcy. SSBT's liquidator in the Bahamas[3] then moved to dismiss CSC's interpleader action for lack of subject matter jurisdiction because the CD upon which the action was

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[2] By this time, Waggoner's claim to the proceeds of the CD had been accepted by First Equity, and he had received those proceeds; Kelleher was the only potential claimant still making demands. Waggoner's and Kelleher's claims were still conflicting, however, in the sense that only one of them was entitled to the proceeds of the CD.

[3] A Bahamanian liquidator is akin to a bankruptcy trustee in the United States, and SSBT's liquidator acted on behalf of SSBT in the litigation once SSBT declared bankruptcy.

based had no value, and to vacate the attachment of SSBT's assets. Dissolving the attachment, which had been granted prior to SSBT's initiation of bankruptcy proceedings, would effect a subordination of JVW's and Waggoner's claim to the $3 million and might result in their receiving a smaller share of SSBT's total assets than they would receive if the attachment remained in place. In response to SSBT's motion, CSC initially argued that subject matter jurisdiction was proper and filed an amended complaint reasserting jurisdiction under § 1335 and also including a declaratory judgment claim, allegedly with diversity jurisdiction under 28 U.S.C. § 1332. After obtaining a release of all claims from Kelleher, however, CSC subsequently filed a notice of voluntary dismissal with the court.

The district court dismissed the action as well as all of the cross-claims. It held that it did not have subject matter jurisdiction based on the original complaint, vacated the attachment because it had no jurisdiction at the time it was granted, and held that SSBT was entitled to attorney's fees incurred defending against the wrongful attachment. The district court then granted CSC voluntary dismissal under Fed. R. Civ. P. 41(a)(2) and declined supplemental jurisdiction over defendants' state-law cross-claims, without considering in either of these decisions the potential prejudice to JVW and Waggoner that losing their attachment of SSBT's assets would create. Furthermore, to make these decisions in the first place, the district court must have implicitly determined that it had subject matter jurisdiction over the amended complaint at least as of the time of SSBT's motions; it did not, however, articulate its basis for jurisdiction under the amended complaint, or consider whether the amended complaint related back to the origi-

nal filing date to cure the jurisdictional defect inherent in CSC's original complaint.

JVW and Waggoner appealed, and SSBT, the only other party with an interest in this appeal, responded.

DISCUSSION

I. Standard of Review[4]

On appeal from a dismissal for lack of subject matter jurisdiction, we review a district court's factual findings for clear error and its legal conclusions *de novo*. *See Luckett v. Bure*, 290 F.3d 493, 496 (2d Cir. 2002). A district court's voluntary dismissal of claims under Rule 41(a)(2) and its decision not to exercise supplemental jurisdiction are reviewed for abuse of discretion. *See Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990) (voluntary dis-

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[4] We also have a duty to investigate our jurisdiction when there is any question as to its validity. *See Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 116 F.3d 53, 58 (2d Cir. 1997). While no party objects to our jurisdiction, given the cavalier nature in which the parties have dealt with jurisdictional issues thus far, we deem it prudent to mention that appellate jurisdiction is proper. Our jurisdiction under 28 U.S.C. § 1291 is limited to final judgments. The pending motion for attorney's fees in the district court is collateral to the merits of the underlying action and does not affect the finality of the district court's judgment or, therefore, our jurisdiction. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) (adopting "a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final"). Similarly, the delayed entry of final judgment, coming after oral argument on appeal, does not divest us of jurisdiction to hear the appeal. *See Cooper v. Salomon Bros. Inc.*, F.3d 82, 84, 85 (2d Cir. 1993). Because the order on which the appeal was taken disposed of the merits of the action, appellate jurisdiction is proper.

missal); *Purgess v. Sharrock,* 33 F.3d 134, 138 (2d Cir. 1994) (supplemental jurisdiction).

II. Potential Jurisdiction over an Interpleader Action

Appellants first contend that the district court erred in deciding that jurisdiction under the interpleader statute, 28 U.S.C. § 1335, was improper. To obtain jurisdiction under the interpleader statute, two of the interpleader defendants must be of different citizenship and the stake at issue must be worth at least $500. *See* 28 U.S.C. § 1335(a). As it is undisputed that CSC possessed only the physical CD, which had no value when CSC brought suit, statutory interpleader did not provide a basis for jurisdiction over this action.[5]

Appellants also rely on their rule interpleader claim, based upon Fed. R. Civ. P. 22. Rule 22 allows a stakeholder to interplead multiple defendants "when their claims are such that the plaintiff is or may be exposed to double or multiple liability." Fed. R. Civ. P. 22(1). As appellants recognize, rule interpleader does not provide an independent basis for jurisdiction; in this case, jurisdiction could only be premised on the diversity statute, 28 U.S.C. § 1332. *See Franceskin v. Credit Suisse*, 214 F.3d 253, 259 (2d Cir. 2000). This requires that the plaintiff, CSC, be of diverse citizenship to all defendants, and that the amount in controversy be greater than $75,000. Again, because CSC owned nothing of value to be interpleaded relating to

[5] Had CSC retained possession of the proceeds of the CD, the amount in controversy might be measured by the value of the proceeds, rather than the valueless CD itself. As it is undisputed that CSC did not retain the proceeds of the CD (the potential "stake" in an interpleader action), we do not reach this issue.

defendants' claims, CSC's claim based upon rule interpleader cannot provide the basis for diversity jurisdiction.

We therefore agree with the district court's conclusion that neither a statutory interpleader action under § 1335 nor a rule interpleader action based upon diversity provide jurisdiction over CSC's action.

III. Potential Jurisdiction over Kelleher's Cross-Claims

Waggoner and JVW argue in the alternative that diversity jurisdiction is proper over at least some of the remaining state-law claims, after CSC's dismissal, even if jurisdiction did not exist before CSC's discharge of liability on December 5, 2000. Their argument involves treating Kelleher as a plaintiff, suing Waggoner and First Equity (but not JVW), and then treating JVW as an intervenor. They provide, however, no caselaw to support their contention that the parties should be rearranged, without thought to the plaintiff, CSC. In general, a defendant or third party may only be realigned with the plaintiff if its real interests coincide with those of the plaintiff. *See, e.g., Smith v. Sperling*, 354 U.S. 91, 96 (1957) (holding that the determinative factors are "the issue of antagonism on the face of the pleadings and . . . the nature of the controversy"). Kelleher plainly does not qualify as a plaintiff under this standard.

Waggoner and JVW also argue that the district court had independent jurisdiction over at least some of the cross-claims without realigning parties. Appellants argue that this Court should look only to Kelleher's claims in determining whether complete diversity exists, ignoring JVW and Waggoner's cross-claims, which would destroy complete diversity. Even if this Court were to accept this novel

argument, however, we must look to all of Kelleher's claims after CSC was discharged, including Kelleher's claims against SSBT, which destroy complete diversity. *See* 28 U.S.C. § 1332 (requiring all of plaintiff's claims to be against defendants of diverse citizenship from plaintiff); 28 U.S.C. § 1367 (denying supplemental jurisdiction over plaintiff's claims that destroy diversity). Thus, the district court correctly found that it could not assert diversity jurisdiction based upon Kelleher's cross-claims alone.

IV. Potential Jurisdiction over a Declaratory Judgment Action

In its order dismissing the action, the district court did not address appellants' argument that CSC's amended complaint alleges, *inter alia*, that jurisdiction is proper in this case under 28 U.S.C. § 1332, the diversity statute.[6] In its amended complaint, filed on August 20, 2001, CSC asserts a declaratory judgment claim pursuant to 28 U.S.C. § 2201 with respect to its potential liability for $10 million to Kelleher.

Although CSC's original complaint did not assert a declaratory judgment claim or jurisdiction pursuant to 28 U.S.C. § 1332, if both the assertion of jurisdiction under § 1332 and the declaratory judgment claim relate back to

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[6] Appellants made this argument in district court in a letter dated July 13, 2001 (requesting leave to amend the complaint to assert diversity jurisdiction), in their sur-reply to SSBT's motion to dismiss, and, apparently, in their opposition to SSBT's motion to dismiss. Because appellants' opposition to SSBT's motion to dismiss was not docketed, however, it is not a part of the record on appeal and we do not consider it. SSBT had ample opportunity to respond to this argument in its reply and sur-sur-reply. We therefore find that appellants did not waive this argument by failing to raise it below.

the commencement of the action, the amended complaint cures the jurisdictional defect, assuming for the moment that the amended complaint satisfies the requirements of § 1332. The assertion of diversity jurisdiction relates back to the commencement of the action when the underlying facts, if properly pled, would have supported jurisdiction at the time the action commenced. *See LeBlanc v. Cleveland* , 248 F.3d 95, 99-100 (2d Cir. 2001) (per curiam); *see also Herrick Co. v. SCS Communications, Inc.*, 251 F.3d 315, 329 (2d Cir. 2001) ("[A] federal court may simply allow a complaint to be amended to assert those necessary facts and then treat diversity jurisdiction as having existed from the beginning."). Similarly, a new claim relates back to the commencement of the action if "the claim . . . arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). Because the district court did not address whether the amended complaint related back to the original complaint and the parties do not focus on this question in this appeal, we leave the issue for the district court to address in the first instance on remand. *See Schonfeld v. Hilliard*, 218 F.3d 164, 184 (2d Cir. 2000) (finding remand appropriate where issues on appeal "have been briefed and argued only cursorily").

Assuming arguendo that CSC's amended complaint does relate back to the commencement of the action, the remaining question is whether the amended complaint supports diversity jurisdiction. The district court did not explicitly determine this issue. CSC, a New York and Delaware citizen, is diverse from all defendants (aliens, Floridians and Texans alike). Appellants argue that CSC's declaratory judgment claim satisfies the amount in controversy requirement. As the citizenship of each party is not at issue, the

only question is whether the amount in controversy may be measured by Kelleher's demand ($10.6 million) or must be measured by the value of the CD (zero). CSC's declaratory judgment claim, which is based upon Kelleher's demand for $10.6 million, requests the following relief:

> [A] declaration . . . that CSC has no liability to Kelleher and that CSC, having acted in accordance with the terms of the CD and/or having deposited the CD with the Clerk of the Court, has no further liability to any party in connection with the CD or its role as custodian of the CD, that it is discharged from liability, and awarding CSC its costs and attorneys' fees.

Appellants focus on CSC's request for a declaration that it owes no liability to Kelleher and argue that the value of the declaratory judgment should be measured by Kelleher's demand. *See Beacon Constr. Co. v. Matco Elec. Co.*, 521 F.2d 392, 399 (2d Cir. 1975) ("[T]he amount in controversy is not necessarily the money judgment sought or recovered, but rather the value of the consequences which may result from the litigation."). Appellee argues that CSC's request is based solely on the CD, and that although "the amount in controversy is measured by the value of the object of the litigation," *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977), the "object of the litigation" in this case is the CD. Because the district court did not discuss this issue in its order, and the parties' argument to this court on the issue is somewhat cursory, we deem it prudent to allow the district court to address these arguments in the first instance. *See Schonfeld*, 218 F.3d at 184.

The district court dissolved the attachment of SSBT's assets because it believed it lacked jurisdiction over the action at the time the attachment was granted. If the district court determines that jurisdiction over the action was proper under the diversity statute, it should reconsider its ruling with respect to the attachment as well. We therefore vacate the district court's order dissolving the attachment and remand for further proceedings.

V. Supplemental Jurisdiction and Voluntary Dismissal

The district court also granted CSC's motion for voluntary dismissal under Fed. R. Civ. P. 41(a)(2) and determined that exercising supplemental jurisdiction in this case would be unwise.[7] Rule 41(a)(2) provides that, except where all parties agree to a stipulation of dismissal, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." A district court may allow a plaintiff to dismiss an action "if the defendant will not be prejudiced thereby." *Wakefield v. N. Telecom, Inc.*, 769 F.2d 109, 114 (2d Cir. 1985). In exercising its discretion with respect to retaining supplemental jurisdiction, the district court balances several factors "including considerations of judicial economy, convenience, and fairness to litigants." *Purgess*, 33 F.3d at 138.

In making these rulings, the district court did not weigh the prejudice that JVW and Waggoner would suffer if they lost their attachment of SSBT's assets. Because of SSBT's bankruptcy, the loss of appellants' pre-bankruptcy attach-

[7] Again, if subject matter jurisdiction is lacking, these determinations carry no weight; the district court should have dismissed the entire action without reaching these issues.

ment of SSBT's assets would destroy appellants' preferential claim to a portion of SSBT's bankruptcy estate. Having a preferential claim is not a windfall to appellants; it is simply the structure of the bankruptcy code, which rewards creditors that protect their interests early. Under both Rule 41(a)(2) and § 1367, the district court should consider whether the litigants will be prejudiced by the voluntary dismissal or decision not to exercise supplemental jurisdiction. *See Wakefield*, 769 F.2d at 114; *Purgess*, 33 F.3d at 138 (holding "fairness to litigants" is one factor to consider in determining whether supplemental jurisdiction is appropriate); *see also* Fed. R. Civ. P. 41(a)(2) ("an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."). If the district court determines that subject matter jurisdiction is proper over CSC's amended complaint and relates back to the commencement of the action, the district court should evaluate the extent to which losing the attachment prejudices JVW and Waggoner, and weigh this prejudice in its determination whether CSC's voluntary dismissal and the exercise of supplement jurisdiction are appropriate. We therefore vacate CSC's dismissal and the decision not to exercise supplemental jurisdiction and remand for possible reconsideration of these rulings after the district court addresses the question of subject matter jurisdiction based upon CSC's amended complaint.

CONCLUSION

For the reasons stated above, we vacate the decision of the district court below and remand for the district court to address appellants' argument that subject matter jurisdic-

tion is proper pursuant to CSC's amended complaint. Based on its conclusion regarding this question, the district court should also, if appropriate, reconsider its rulings with respect to CSC's voluntary dismissal motion, the exercise of supplemental jurisdiction, and the dissolution of the attachment of SSBT's assets. As noted, we also deny as moot appellee's motion to strike a portion of the record on appeal, and appellants' cross-motion to supplement the record on appeal.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DANIEL PATRICK MOYNIHAN UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NY 10007

Roseann B. MacKechnie
CLERK

Date:	
Docket Number:	04-5561-cv
Short Title:	Correspondent Svces v. First Equities Corp.
DC Docket Number:	99-cv-8934
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Robert Sweet

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of September, two thousand six.

[Oval Stamp]
Filed: September 15, 2006

Correspondent Services Corporation,

Plaintiff-Counter-Defendant,

v.

First Equities Corporation of Florida,

Defendant-Cross-Defendant,

Suisse Security Bank and Trust, Ltd.,

Defendant-Cross-Defendant-Appellee,

Donal Kelleher,

Defendant-Cross-Defendant-Counter-Claimant-Appellee,

v.

J.V. Waggoner,

Defendant-Cross-Claimant-Cross-Defendant-Appellant,

J.V.W. Investment Ltd.,

Defendant-Cross-Claimant-Counter-Claimant-Cross-Defendant-Appellant.

MANDATE

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant J. Virgil Waggoner and J.V.W. Investments Ltd. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal

and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: /s/ [ILLEGIBLE] HELLER
Motion Staff Attorney

Issued as Mandate: 9/27/06.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: October 18, 2005 Decided: March 10, 2006)
Docket Nos. 04-5561-cv(L),
05-0643-cv(CON), 05-0935-cv(CON)

CORRESPONDENT SERVICES CORPORATION,

Plaintiff-Counter-Defendant,

– v. –

FIRST EQUITIES CORPORATION OF FLORIDA,

Defendant-Cross-Defendant,

J.V.W. INVESTMENT LTD.,

Defendant-Cross-Claimant-Counter-Claimant-Cross-Defendant-Appellant,

J.V. WAGGONER,

Defendant-Cross-Claimant-Cross-Defendant-Appellant,

DONAL KELLEHER,

Defendant-Cross-Defendant,

SUISSE SECURITY BANK AND TRUST, LTD.,

Cross-Defendant-Appellee.

Defendants J. Virgil Waggoner and J.V.W. Investment Ltd. appeal from a judgment dated September 29, 2004 of the United States District Court for the Southern District of New York (Sweet, J.) granting cross-defendant Suisse Security Bank & Trust, Ltd.'s motion to dismiss for lack of subject matter jurisdiction, granting SSBT's motion to vacate the district court's previous orders of attachment, and granting SSBT's motion for costs and attorney's fees. *Correspondent Servs. Corp. v. JVW Inv., Ltd.*, 2004 U.S. Dist. LEXIS 19341 (S.D.N.Y., Sept. 29, 2004)

Affirmed.

KENNETH A. CARUSO, New York, New York (Chadbourne & Parke LLP, New York, New York), *for Defendant-Appellant.*

ANDREW E. TOMBACK, CHARLES W. WESTLAND, New York, New York (Milbank, Tweed, Hadley & McCloy LLP, New York, New York), JONATHAN W. WOLFE, Livingston, New Jersey (Skoloff & Wolfe, P.C., Livingston, New Jersey), *for Cross-Defendant-Appellee.*

Before:

Hon. Amalya L. Kearse, Hon. Roger J. Miner,
Hon. Peter W. Hall,

Circuit Judges.

PER CURIAM:

Defendants J. Virgil Waggoner and J.V.W. Investment Ltd. (the "Waggoner Parties"), two of several defendants

below, appeal from the dismissal of a declaratory judgment claim brought by plaintiff Correspondent Services Corporation ("CSC"). Having found no basis for the exercise of its subject matter jurisdiction over the declaratory judgment claim, the district court declined to exercise supplemental jurisdiction over appellants' state law cross-claims against appellee Suisse Security Bank & Trust, Ltd. ("SSBT") and therefore vacated its previously-entered attachment of SSBT's assets. We affirm the dismissal for lack of subject matter jurisdiction.

Background

As we noted in our July 16, 2003 opinion in this case, "while the facts of this case illustrate one of the myriad ways in which complicated investment transactions can turn sour, the question that confronts us is much less complicated: whether the district court had jurisdiction over this action . . . ." *Correspondent Servs. Corp. v. First Equities Corp. of Florida*, 338 F.3d 119, 121 (2d Cir. 2003). There, we affirmed the district court's dismissal of CSC's interpleader action but remanded for the district court to consider whether it could exercise subject matter jurisdiction over CSC's declaratory judgment claim in its amended complaint.

We recounted the specifics of the underlying investment scheme in our 2003 opinion and here provide only those additional facts relevant to the disposition of the present appeal. Those facts are contained in the following paragraphs of CSC's Amended Complaint:

> P20. In response to CSC's announced intention to deliver the CD to FECF, Kelleher wrote CSC on July 21, 1999 demanding that the CD not be trans-

ferred and that CSC remain as custodian of either the CD itself "or it's [sic] cash equivalent of USD 10.6 million." Indeed, Kelleher even referred to the CD as "the valuable CD worth 10,600,000."

P22. Kelleher wrote CSC yet again on July 23, 1999, once more referring to the CD as "our asset of USD 10,600,000" and threatening CSC with litigation by suggesting that CSC must have notified SIPC and its insurer, the Travelers Casualty and Surety Company of America, "of the probability of a claim if you transfer our assets as you note . . . ."

P23. CSC was confronted with repeated claims by Kelleher that the CD had a value of $ 10,600,000, that CSC was obligated to retain either the CD or the cash equivalent in the amount of $ 10,600,000, and that CSC risked being subject to a claim by Kelleher in that amount if it transferred the CD to anyone other than him or those designated by him.

P37. There is an actual controversy pending as to the ownership of the CD which CSC has deposited into Court. Among other things, CSC has been threatened with claims by Kelleher in excess of ten million dollars ($ 10,000,000) in the event it transferred the CD to anyone but Kelleher or his designees.

P38. CSC seeks a declaration pursuant to 28 U.S.C. § 2201 that CSC has no liability to Kelleher and that CSC, having acted in accordance with the terms of the CD and/or having deposited the CD with the Clerk of the Court, has no further liability to any party in connection with the CD or its role as

custodian of the CD, that it is discharged from liability, and awarding CSC its costs and attorneys' fees.

Standard of Review

On appeal from a dismissal for lack of subject matter jurisdiction, we review the district court's legal conclusions de novo, *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 112 (2d Cir. 2004), and its factual findings for clear error. *Luckett v. Bure*, 290 F.3d 493, 496 (2d Cir. 2002).

Discussion

We are asked in this appeal to consider whether CSC's declaratory judgment claim failed to satisfy the "amount-in-controversy" requirement such that the district court properly dismissed the claim for lack of subject matter jurisdiction under 28 U.S.C. § 1332. The parties do not dispute that when CSC brought this action, the CD had no value.

As the district court correctly noted, the Declaratory Judgment Act does not by itself confer subject matter jurisdiction on the federal courts. *See* 28 U.S.C. § 2201(a) ("In a case of actual controversy *within its jurisdiction* . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (emphasis added)). Rather, there must be an independent basis of jurisdiction before a district court may issue a declaratory judgment. *See Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747, 752 (2d Cir. 1996). The asserted basis for jurisdiction in

this case is 28 U.S.C. § 1332, requiring that the parties be diverse and that the amount in controversy exceed $ 75,000. Diversity of citizenship is not disputed here; the jurisdictional dispute relates only to the amount in controversy.

"In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). We have observed that "the amount in controversy is calculated from the plaintiff's standpoint; the value of the suit's intended benefit or the value of the right being protected or the injury being averted constitutes the amount in controversy when damages are not requested." *Kheel v. Port of New York Auth.*, 457 F.2d 46, 49 (2d Cir. 1972) (internal quotations omitted).

Based on its review of the relevant allegations in the complaint, the district court concluded that the object of the litigation in this case was the worthless CD and therefore determined that the § 1332 jurisdictional amount had not been satisfied. In support of its decision, the district court cited paragraph 37 of the complaint, which specified that "there is an actual controversy pending *as to the ownership of the CD* which CSC has deposited into Court." The district court therefore held:

> Because the CD has been identified by the plaintiff in this action as the object of the "actual controversy," its value provides the appropriate basis for the measure of the amount in controversy .... It follows that, since the CD "had no value when CSC brought suit," the amount in controversy with

regard to Count Three falls short of the requisite $ 75,000.

In reaching this conclusion, the district court considered the Waggoner Parties' argument that CSC brought the declaratory judgment claim in order to avoid liability to Kelleher in the approximate amount of $ 10 million and that this is the appropriate measure of the jurisdictional amount under § 1332. The district court emphasized, however, that "while [the Waggoner Parties are] correct that the amended complaint reflects a concern with potential liability, the allegations contained in [the declaratory judgment count] amply demonstrate that this attention to liability is derived from the 'controversy pending as to the ownership of the CD.'" Focusing its § 1332 analysis on the CD as the object of the litigation, the district court declined to exercise jurisdiction. We agree with and adopt the above reasoning of the district court, and therefore affirm its holding that diversity jurisdiction was lacking over CSC's declaratory judgment claim.

Conclusion

For the foregoing reasons, we AFFIRM the decision of the district court.

UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF NEW YORK

[Stamp]
RECEIVED: DECEMBER 3, 2004
JUDGE SWEET [ILLEGIBLE]
99 CIV. 8934 (RWS)

CORRESPONDENT SERVICES CORPORATION,

Interpleader Plaintiff,

v.

J.V.W. INVESTMENT LTD., FIRST EQUITIES CORPORATION OF FLORIDA, J.V. WAGGONER, and DONAL KELLEHER,

Interpleader Defendants,

And

SUISSE SECURITY BANK AND TRUST, LTD.,

Additional Defendant on Cross-Claims.

ORDER
PURSUANT TO RULE 12(h)(3)

WHEREAS, defendant Suisse Security Bank and Trust, Ltd. ("SSBT") moved on February 3, 2004 for an order pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure dismissing the action with prejudice for lack of subject matter jurisdiction, vacating this Court's orders of

attachment of SSBT's assets (the "Orders of Attachment"), and awarding SSBT damages pursuant to CPLR 6212(e);

WHEREAS, on April 21, 2004, the Waggoner Parties made a motion to file a reply memorandum of law;

WHEREAS, on September 29, 2004, the Court issued its Opinion and Order granting the Waggoner Parties' motion to file a sur-reply memorandum of law and granting SSBT's motion to (i) dismiss the action with prejudice for lack of subject under jurisdiction, (ii) vacate the Orders of Attachment, and (iii) award SSBT damages pursuant to CPLR 6212(e);

WHEREAS, the undersigned expressly determines that there is no just reason for a delay;

IT IS ORDERED that:

(i) final judgment be entered:

(a) The Waggoner Parties' motion to file a sur-reply memorandum of law is granted;

(b) SSBT's motion to dismiss is granted, dismissing the action in its entirety for lack of subject matter jurisdiction;

(c) The Orders of Attachment are vacated;

(d) Pursuant to this Court's prior Order, filed on February 25, 2004 and pending completion of all appellate proceedings, there shall be a stay pursuant to CPLR § 6224, suspending the effect of the annulment of the attachment;

(e) The Waggoner Parties shall compensate SSBT pursuant to CPLR 6212(e) for the damages that it has sustained as a result of the Orders of

Attachment since the entry of the original Order of attachment on November 17, 2000;

(ii) the Court shall retain jurisdiction over this action for the purposes of implementing and carrying out the terms of all orders and decrees which may be entered herein and to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, including, but not limited to, the determination of the measure of damages to which SSBT is entitled pursuant to CPLR 6212(e).

Dated: New York, NY
January 7, 2005

SO ORDERED:

By: /s/ ROBERT W. SWEET
Honorable Robert W. Sweet
United States District Judge

United States District Court,
S.D. New York.

No. 99 Civ. 8934(RWS).
Jan. 10, 2005.

CORRESPONDENT SERVICES CORPORATION,

Interpleader Plaintiff,

– v. –

J.V.W. INVESTMENT LTD., First Equities Corporation of Florida, J.V. Waggoner, and Donal Kelleher,

Interpleader Defendants,

– and.–

SUISSE SECURITY BANK AND TRUST, LTD.,

Additional Defendant on Cross-Claims.

Application was filed for entry of final judgment dismissing claim in interpleader action for lack of subject matter jurisdiction, even though not all claims had been decided.

The District Court, Sweet, *J.*, held that the judgment could be certified as final for appeal while the amount of costs and fees to be awarded remained for resolution.

Application granted.

James John Mahon, Casey, Mahon & Rooney, LLP, Kenneth Andrew Caruso, Bracewell & Giuliani, LLP, New York City, for defendants.

Andrew E. Tomback, Charles Westland, Scott Edelman, Milbank, Tweed, Hadley & McCloy, New York City, Jonathan W. Wolfe, Skoloff & Wolfe, P.C., Livingston, NJ, for cross defendant.

MEMORANDUM OPINION and ORDER

SWEET, *District Judge.*

On February 3, 2004, cross-claim defendant Suisse Security Bank and Trust, Ltd. ("SSBT") moved for an order pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure dismissing Count Three of the amended complaint of interpleader plaintiff Correspondent Services Corporation ("CSC") with prejudice for lack of subject matter jurisdiction, vacating this Court's previous orders of attachment of SSBT's assets, and awarding SSBT damages pursuant to CPLR 6212(e). J.V.W. Investments, Ltd. and J. Virgil Waggoner (collectively, the "Waggoner Parties") opposed SSBT's motion and moved for leave to file a surreply memorandum. In an opinion issued on September 29, 2004, both motions were granted. *See Correspondent Services Corp. v. JVW Investment, Ltd.,* No. 99 Civ. 8934(RWS), 2004 WL 2181087 (S.D.N.Y. Sept.29, 2004) (the "Opinion"). As set forth in the Opinion, this action was "dismissed in its entirety for lack of subject matter jurisdiction," *id.* at *18, although the Court retained jurisdiction to assess the costs and fees awarded to SSBT for the wrongful attachment of its assets. *See id.* at *14-18.

In correspondence dated October 15, 2004, SSBT and the Waggoner Parties separately sought entry of judgment with regard to the Opinion pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and in accordance with

the terms of a stipulation and order entered on February 25, 2004. On that same date, the Clerk of Court entered judgment pursuant to the Opinion and the Waggoner Parties filed a notice of appeal from that judgment. In a letter dated December 27, 2004, SSBT renewed the application for entry of judgment pursuant to Rule 54(b). For the reasons set forth below and in the accompanying order, the application for entry of judgment pursuant to Rule 54(b) is hereby granted.

The Rule 54(b) Standard

Rule 54(b) provides in relevant part that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Fed.R.Civ.P. 54(b). Thus, to enter judgment pursuant to Rule 54(b),

> (1) multiple claims or multiple parties must be present, (2) at least one claim, or the rights and liabilities of at least one party, must finally be decided within the meaning of 28 U.S.C. § 1291, and (3) the district court must make "an express determination that there is no just reason for delay" and expressly direct the clerk to enter judgment.

Ginett v. Computer Task Group, Inc., 962 F.2d 1085, 1091 (2d Cir.1992) (quoting Fed.R.Civ.P. 54(b)) (emphasis in original).

The first two factors identified in *Ginett* "address the issue of whether rule 54(b) applies at all to the circumstances of the case." *Id.* A claim is deemed finally decided "[i]f the decision 'ends the litigation [of that claim] on the merits and leaves nothing for the court to do but execute the judgment' entered on that claim." *Id.* at 1092 (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)) (second alteration in original); *accord Ellis v. Israel,* 12 F.3d 21, 23 (2d Cir.1993).

Once the application of Rule 54(b) to the circumstances of the case has been established, the question of whether to direct entry of judgment is committed to the sound discretion of the district court, *see Ginett,* 962 F.2d at 1092, although it "must be considered in light of the goal of judicial economy as served by the 'historic federal policy against piecemeal appeals.'" *O'Bert ex rel. Estate of O'Bert v. Vargo,* 331 F.3d 29, 41 (2d Cir.2003) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.,* 446 U.S. 1, 8, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980)) (internal quotation marks omitted). "[I]t does not suffice for the district court to announce its determination that 'there is no just cause for delay' in conclusory form. Rather, its certification must be accompanied by a reasoned, even if brief, explanation of its conclusion." *Id.; see also Harriscom Svenska AB v. Harris Corp.,* 947 F.2d 627, 629 (2d Cir.1991); *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy,* 891 F.2d 414, 419 (2d Cir.1989).

In reaching a reasoned conclusion, "[t]he proper guiding star, as the Supreme Court has emphasized, is 'the interest of sound judicial administration.'" *Ginett,* 962 F.2d at

1095 (quoting *Curtiss-Wright,* 446 U.S. at 8, 100 S.Ct. 1460). "[N]ow that the garden variety civil complaint often involves multiple claims and/or multiple parties, we cannot, as the Supreme Court has recognized, hide behind the old 'infrequent harsh case' chestnut" previously used to limit the application of Rule 54(b). *Id.* With the interest of sound judicial administration as the goal,

> Only those claims "inherently inseparable" from or "inextricably interrelated" to each other are inappropriate for rule 54(b) certification. When the claims are "separable" or "extricable" from each other, there is generally no reason to disturb the district court's exercise of its discretion.

Ginett, 962 F.2d at 1096; *see also Hudson River Sloop Clearwater,* 891 F.2d at 418 (concluding that the certification of a judgment on certain claims was proper where the claims "involve a unique factual scenario . . . and raise legal issues wholly distinct from those that remain for trial" and "any subsequent appeals on the remaining claims . . . will involve questions of fact and law entirely distinct" from those at stake in the certified claims).

Although the Court of Appeals for the Second Circuit has cautioned that certification under Rule 54(b) following the filing of a notice of appeal is not "generally sound practice," it has indicated that a Rule 54(b) certification issued shortly after a notice of appeal had been filed "would apparently be honored in this circuit." *Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council,* 839 F.2d 69, 71 n. 2 (2d Cir.1988); *see also Leonhard v. United States,* 633 F.2d 599, 611 (2d Cir.1980) ("In the absence of prejudice to the nonappealing party, this Court . . . has declined to dismiss premature notices of appeal where sub-

sequent actions of the district court have imbued the order appealed from with finality.") (collecting cases).

Discussion

As set forth in the Opinion and the prior decisions in this matter, this case has enjoyed a tortured history as to jurisdictional matters. In view of the stipulation and order entered on February 25, 2004 setting forth the Court's intention to enter judgment pursuant to Rule 54(b) in the case that SSBT's motion was granted, and in view of the desirability of a determination of the principal and most significant issue in this case—the matter of this Court's jurisdiction—the application for certification of the judgment pursuant to Rule 54(b) is granted.

The first two factors identified in *Ginett* are satisfied here, as there are multiple claims and parties present in the action, and, insofar as the amount of costs and fees to be awarded SSBT pursuant to the Opinion constitutes an issue remaining for resolution, not all aspects of the case were fully disposed of by the Opinion and subsequent judgment entered. As to the third and final factor of the *Ginett* analysis, there is no just reason for delay here, as a determination on appeal of the crucial issue of the Court's subject matter jurisdiction will serve the interests of justice and of judicial economy by expediting a final resolution to this case.

Accordingly, insofar as the judgment entered on or about October 15, 2004 was not a final judgment, the judgment is hereby certified pursuant to Rule 54(b), Fed.R.Civ.P., in accordance with this opinion and order and the accompanying order, to which the parties named herein have stipulated.

It is so ordered.

United States District Court,
S.D. New York.

No. 99 Civ. 8934 RWS.
Sept. 29, 2004.

CORRESPONDENT SERVICES CORPORATION,

Interpleader Plaintiff,

– v. –

J.V.W. INVESTMENT LTD., First Equities Corporation of Florida, J.V. Waggoner, and Donal Kelleher,

Interpleader Defendants,

– and.–

SUISSE SECURITY BANK AND TRUST, LTD.,

Additional Defendant on Cross-Claims.

Chadbourne & Parke, New York, NY, By: Kenneth A. Caruso, Jeffrey I. Wasserman, Daniel S. Meyers, for Interpleader-Defendants, of counsel.

Milbank, Tweed, Hadley & McCloy, New York, NY, By: Andrew E. Tomback, Charles Westland, Skoloff & Wolfe, Livingston, NJ, By: Jonathan W. Wolfe, for Additional Defendant Suisse Security Bank, of counsel.

OPINION

SWEET, J.

Cross-claim defendant Suisse Security Bank and Trust, Ltd. ("SSBT") has renewed its motion to dismiss Count Three of the amended complaint of interpleader plaintiff Correspondent Services Corporation ("CSC") pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, to vacate this Court's previous orders of attachment, and for an award of its costs and attorney's fees incurred in this action pursuant to CPLR 6212(e). J.V.W. Investments Ltd. ("JVW") and J. Virgil Waggoner ("Waggoner") (collectively, the "Waggoner Parties") have opposed SSBT's motion and moved for leave to file a surreply memorandum of law in further opposition to SSBT's motion. For the reasons set forth below, both motions are granted and this action is dismissed.

Prior Proceedings and Background

This interpleader action, commenced on August 16, 1999, by CSC, has been the subject of six prior opinions issued by this Court, familiarity with which is assumed. *See Correspondent Services Corp. v. J.V.W. Investments Ltd.*, No. 99 Civ. 8934(RWS), 2003 WL 221746 (S.D.N.Y. Jan. 31, 2003) (*"JVW VI"*); *Correspondent Services Corp. v. J.V.W. Investments Ltd.*, 205 F.Supp.2d 191 (S.D.N.Y. 2002) (*"JVW V"*), *vacated and remanded sub nom. Correspondent Services Corp. v. First Equities Corp. of Florida*, 338 F.3d 119 (2d Cir.2003); *Correspondent Services Corp. v. J.V.W. Investments Ltd.*, 173 F.Supp.2d 171 (S.D.N.Y.2001) (*"JVW IV"*); *Correspondent Services Corp. v. J.V.W. Investments Ltd.*, 204 F.R.D. 47 (S.D.N.Y. 2001) (*"JVW III"*); *Correspondent Services Corp. v.*

J.V.W. Investments Ltd., 120 F.Supp.2d 401 (S.D.N.Y. 2000) (*"JVW II"*); *Correspondent Services Corp. v. J.V.W. Investments Ltd.,* No. 99 Civ. 8934(RWS), 2000 WL 1174980 (S.D.N.Y. Aug. 18, 2000) (*"JVW I"*). Although the course of this litigation and the underlying dispute have already been amply charted, certain events relevant to the instant motions warrant repetition.

In 1998, Donal Kelleher ("Kelleher"), a citizen of Great Britain, undertook to invest $10 million belonging to Waggoner. Kelleher and Waggoner established JVW, a Commonwealth of Dominica International Business Company, with Waggoner as the sole shareholder and Kelleher as the director. Through JVW, Kelleher entered into an agreement with British Trade and Commerce Bank ("BTCB"), organized under the laws of Dominica, to invest Waggoner's $10 million in a Certificate of Deposit. On June 26, 1998, BTCB issued a Certificate of Time Deposit ("CTD") to JVW for the face value of "TEN MILLION DOLLARS." *JVW V,* 205 F.Supp.2d at 194 (internal quotation marks omitted).

At the time the CTD was issued to JVW, JVW had made no deposits with BTCB, although Waggoner had wired $10 million to JVW's account at SSBT on June 18, 1998, and Kelleher had represented to BTCB that the $10 million was available for immediate investment. JVW instructed BTCB to deliver the CTD to SSBT in the Bahamas, where the CTD would be held in JVW's account with SSBT. JVW thereafter requested that SSBT transfer the CTD to First Equity Corporation of Florida ("First Equity"), a Florida subsidiary of BTCB, which in turn placed the unfunded CD into the custody of CSC, which company provided custodial services for First Equity. CSC is a citizen of New York and Delaware.

In September and October of 1998, after several unsuccessful attempts to transfer Waggoner's $10 million from JVW's SSBT account into BTCB's SSBT account and thus to fund the CD, approximately $7.7 million was transferred to BTCB/First Equity, leaving approximately $2.3 million of the original $10 million unaccounted for. BTCB then issued a Certificate of Deposit ("CD") as a substitute for the CTD issued earlier. The CD, like the CTD which it had replaced, was due to mature on June 25, 1999 and set forth as a term that "[d]eposits made in any form shall not be considered good until the same have been cleared." *JVW V,* 205 F.Supp.2d at 195 (internal quotation marks omitted). The CD was identical to the original CTD except for its title and for the fact that it was issued to "Bearer" rather than to JVW. From July 1998 through May 1999, the CTD and thereafter its replacement, the CD, were reflected on JVW's account statements from First Equity, which clears through CSC, as having a face value of $10 million. Even after the CD was funded, CSC was only in possession of the physical CD document and never controlled any of the funds received by BTCB/First Equity.

Waggoner and Kelleher subsequently had a disagreement, and Waggoner dissolved the Joint Participation Agreement underlying their venture, removed Kelleher as director of JVW, and appointed himself as JVW's sole director. In June of 1999, Kelleher commenced a letter-writing campaign to UBS PaineWebber, CSC's parent company, and other entities in which he purported to be the sole director of JVW and made demands with respect to JVW's brokerage account at First Equity and his entitlement to the CD.

On June 25, 1999, the CD matured and pursuant to its terms reverted to a savings account at BTCB. At the same

time, JVW liquidated its bank account at BTCB and transferred the funds contained therein (approximately $7.7 million) to another account in the name of a different corporation, the Wagonwheel Trust. The monthly statements for JVW's brokerage account at First Equity thereafter reflected a "zero" value for the CD.

On August 16, 1999, CSC commenced the instant action seeking to resolve what it regarded as competing claims to the CD in its possession. The complaint named but did not otherwise assert causes of action against interpleader defendants JVW, First Equity, Waggoner and Kelleher, and alleged jurisdiction under 28 U.S.C. § 1335. The Waggoner Parties jointly answered and asserted a variety of claims against Kelleher, who, in turn, asserted claims against Waggoner for breach of fiduciary duty and breach of contract.

On September 28, 2000, the Waggoner Parties moved by order to show cause to assert claims against SSBT for conversion, aiding and abetting a conversion, breach of contract, and unjust enrichment, and sought to attach $3 million of funds belonging to SSBT. This Court confirmed the attachment by order of November 13, 2000, and a second amended order of attachment was entered on April 18, 2001, after which SSBT's funds were turned over to the United States Marshal. Thereafter, Kelleher asserted claims against SSBT for interference with economic advantage and indemnification. SSBT answered the claims asserted against it, and counterclaimed against Kelleher and the Waggoner Parties for contribution and indemnity.

On July 3, 2001, SSBT, by letter to the Court, raised the question whether the Court had subject matter jurisdiction. CSC was granted leave to file an amended complaint, which CSC did on August 20, 2001. In addition to reiterat-

ing the interpleader claim under 28 U.S.C. § 1335 first posed in its initial complaint, CSC added two additional counts: an interpleader claim under CPLR 1006(f) (Count Two) and a declaratory judgment claim under 28 U.S.C. § 2201 (Count Three). In Count Three, CSC repeats and reiterates its preceding allegations with respect to the first two counts, and further alleges:

> 37. There is an actual controversy pending as to the ownership of the CD which CSC has deposited into Court. Among other things, CSC has been threatened with claims by Kelleher in excess of ten million dollars ($10,000,000) in the event it transferred the CD to anyone but Kelleher or his designees.
>
> 38. CSC seeks a declaration pursuant to 28 U.S.C. § 2201 that CSC has no liability to Kelleher and that CSC, having acted in accordance with the terms of the CD and/or having deposited the CD with the Clerk of the Court, has no further liability to any party in connection with the CD or its role as custodian of the CD, that it is discharged from liability, and awarding CSC its costs and attorney's fees.
>
> (Am. Compl. at 10-11.) In light of the allegations, CSC sought the following relief with regard to Count Three:[A]n Order and Judgment of this Court pursuant to 28 U.S.C. § 2201 permitting and directing to [sic] CSC to deposit the subject CD with the Clerk of the Court; enjoining defendants from taking any action as against CSC; discharging CSC with prejudice; and reimbursing CSC for its costs and attorney's fees.

(*Id.* at 11.)

Two days later, on August 22, 2001, SSBT moved to dismiss CSC's original complaint on the grounds that subject matter jurisdiction was lacking because the CD had no value after its expiration on June 25, 1999 and, thus, had no value at the time CSC commenced this action on August 16, 1999. Thereafter, on or about October 21, 2001, CSC submitted a "Notice of Voluntary Dismissal of Amended Complaint," asserting that because CSC had received a complete release of all claims from Kelleher, it no longer faced competing claims to the CD and had no desire to continue with litigation.

On November 8, 2001, the Waggoner Parties commenced an action against SSBT in the Supreme Court of the State of New York, New York County (the "State Court Action"), and moved for an attachment over the same monies already attached in this action. On May 9, 2002, the Honorable Ira Gammerman granted the Waggoner Parties' motion for an order of attachment, setting forth that the attachment in the State Court Action constituted a continuation of the attachment in the action in this Court.

In May of 2002, this Court issued *JVW V,* dismissing CSC's interpleader action upon a grant of CSC's Rule 41(a)(2), Fed.R.Civ.P., motion for voluntary dismissal, determining that subject matter jurisdiction over CSC's interpleader claim was otherwise lacking as a result of the CD's "zero" value, declining to exercise supplemental jurisdiction over the remaining cross-claims among the Waggoner Parties, Kelleher and SSBT, vacating the attachment of SSBT's assets, and awarding attorney's fees to SSBT. *See JVW V,* 205 F.Supp.2d at 205. The Waggoner Parties appealed, and on July 16, 2003, the Court of Appeals for the Second Circuit vacated *JVW V,* reasoning that in order to reach its ruling this Court appeared to have

"implicitly determined that it had subject matter jurisdiction over the amended complaint at least as of the time of SSBT's motions" but concluding that the failure to articulate the basis for such jurisdiction or to determine whether the amended complaint related back to the original filing date required vacatur and remand. *See Correspondent Services,* 338 F.3d at 123.

Although the Court of Appeals determined that the failure to address subject matter jurisdiction under the amended complaint required vacatur of *JVW V,* it nonetheless expressed approval for various of the rulings reached therein. Specifically, the Court of Appeals noted its agreement with the conclusion reached in *JVW V* that statutory interpleader premised on 28 U.S.C. § 1335 provides no basis for jurisdiction. *See Correspondent Services,* 338 F.3d at 124. Explaining that "it is undisputed that CSC possessed only the physical CD, which had no value when CSC brought suit," the Court of Appeals observed that "statutory interpleader did not provide a basis for jurisdiction over this action." *Id.* The Court of Appeals also stated that interpleader under Rule 22, Fed.R.Civ.P., provides no basis for jurisdiction, as "CSC owned nothing of value to be interpleaded" and, accordingly, the action failed to meet the $75,000 amount-in-controversy requirement for diversity jurisdiction pursuant to 28 U.S.C. § 1332. *Id.* Further, the Court of Appeals rejected the Waggoner Parties' contentions that diversity jurisdiction existed on the basis of the state-law cross-claims asserted by and between the Waggoner Parties and Kelleher. *See id.* at 124-25.

Vacatur of the decision below was required, according to the Court of Appeals, because in dismissing CSC's action in *JVW V* this Court did not address the Waggoner Parties' argument that jurisdiction is proper in this case under 28

U.S.C. § 1332 on the basis of the allegations in the declaratory judgment claim, Count Three of the amended complaint. *See id.* at 125. Noting that this Court "did not explicitly determine" whether CSC's declaratory judgment claim pursuant to 28 U.S.C. § 2201 "supports diversity jurisdiction," the Second Circuit explained that "if both the assertion of jurisdiction under § 1332 and the declaratory judgment claim relate back to the commencement of the action, the amended complaint cures the jurisdictional defect, assuming for the moment that the amended complaint satisfies the requirements of § 1332." *Id.* Accordingly, the Second Circuit vacated CSC's dismissal and remanded for a determination of these issues.

The Court of Appeals also vacated the determination reached in *JVW V* that supplemental jurisdiction would not be exercised, and remanded for possible reconsideration in light of the fact that "the district court did not weigh the prejudice that JVW and Waggoner would suffer if they lost their attachment of SSBT's assets . . . . [as] the loss of [the Waggoner Parties'] pre-bankruptcy attachment of SSBT's assets would destroy [their] preferential claim to a portion of SSBT's bankruptcy estate." *Id.* at 126-27. The Court of Appeals directed that,

> If the district court determines that subject matter jurisdiction is proper over CSC's amended complaint and relates back to the commencement of the action, the district court should evaluate the extent to which losing the attachment prejudices JVW and Waggoner, and weigh this prejudice in its determination whether CSC's voluntary dismissal and the exercise of supplement jurisdiction are appropriate.

Id. at 127. Thus, in sum, as the Court of Appeals explained,

> We vacate the dismissal and remand to the district court for the following proceedings: first, to clarify whether jurisdiction existed under CSC's amended complaint and, if it did, whether the allegations establishing jurisdiction related back to the original complaint; and second, if the allegations sufficient to establish jurisdiction relate back to the original complaint, to consider whether the prejudice to appellants flowing from the vacating of the attachment precludes dismissal of either CSC's action under Rule 41(a)(2) or the appellants' cross-claim for lack of supplemental jurisdiction.

Id. at 121.

In the body of its opinion the Court of Appeals appears to treat the relation-back concept first and addresses the determination of whether the amended complaint supports diversity jurisdiction as "the remaining question." *See id.* at 125-26. However, in view of the introduction and conclusion of the opinion of the Court of Appeals expressing what constitutes the threshold issue, *see id.* at 121, 127, the parties have agreed to limit the instant motion practice to the issue of whether jurisdiction exists over CSC's declaratory judgment claim, an agreement set forth in a stipulation and order signed by this Court on January 27, 2004.

Accordingly, on February 3, 2004, SSBT moved to dismiss Count Three of the amended complaint for lack of subject matter jurisdiction, to vacate the Court's prior attachment orders, and for an award to SSBT of its costs and attorney's fees incurred in this action. The Waggoner Parties opposed SSBT's motion and SSBT replied to the

Waggoner Parties' opposition papers. On April 21, 2004, the Waggoner Parties moved for leave to file a surreply memorandum of law, such surreply accompanying their motion, and SSBT thereafter opposed the Waggoner Parties' motion. Oral arguments were heard on May 5, 2004, at which time the motions were deemed fully submitted.

Standard of Review

"It is a fundamental principle that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 374 (1978). Under Rule 12(h)(3) of the Federal Rules of Civil Procedure, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Motions brought pursuant to Rule 12(h)(3) are subject to the same standards as motions to dismiss for want of subject matter jurisdiction brought pursuant to Rule 12(b)(1), Fed.R. Civ.P. *See Brotman v. United States,* 111 F.Supp.2d 418, 420 n. 1 (S.D.N.Y.2000); *Peterson v. Continental Airlines, Inc.,* 970 F.Supp. 246, 248-49 (S.D.N.Y.1997); *Int'l Paving Sys., Inc. v. Van-Tulco, Inc.,* 866 F.Supp. 682, 688 n. 2 (E.D.N.Y.1994). Accordingly, SSBT's motion will be construed as a motion to dismiss pursuant to Rule 12(b)(1).

Once subject matter jurisdiction is challenged, the burden of establishing jurisdiction rests with the party asserting that it exists. *See Thomson v. Gaskill,* 315 U.S. 442, 446 (1942); *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000). The party asserting subject matter jurisdiction must prove that the court has such jurisdiction by a

preponderance of the evidence. *See APWU v. Potter,* 343 F.3d 619, 623 (2d Cir.2003); *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir.2003); *Makarova,* 201 F.3d at 113.

On a motion to dismiss for lack of subject matter jurisdiction, the court must accept the material factual allegations contained in the complaint. *See Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.,* 968 F.2d 196, 198 (2d Cir. 1992). Nonetheless, the court may resolve disputed jurisdictional factual issues by reference to evidence outside the pleadings. *See Flores v. S. Peru Copper Corp.,* 343 F.3d 140, 161 n. 30 (2d Cir.2003); *Luckett v. Bure,* 290 F.3d 493, 496-97 (2d Cir.2002). The court may decide the matter on the basis of affidavits or other evidence, *see Filetech S.A. v. France Telecom S.A.,* 157 F.3d 922, 932 (2d Cir.1998), but "argumentative inferences favorable to the party asserting jurisdiction should not be drawn." *Atl. Mut. Ins.,* 968 F.2d at 198. In other words, "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp v. Drakos,* 140 F.3d 129, 131 (2d Cir.1998).

District courts "shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000" and is between diverse citizens. 28 U.S.C. § 1332(a). The threshold amount of $75,000 is a necessary condition for diversity jurisdiction. *See E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.,* 160 F.3d 925, 933 (2d Cir.1998) (observing that the amount in controversy is an unwaivable jurisdictional requirement under 28 U.S.C. § 1332). The party seeking "to invoke jurisdiction under 28 U.S.C. § 1332 bears the burden of demonstrating that the grounds for diversity exist and that diversity is complete." *Advani Enters., Inc. v. Underwrit-*

ers at Lloyds, 140 F.3d 157, 160 (2d Cir.1998). Thus, where diversity jurisdiction is at stake, the party invoking the jurisdiction of the federal court "has the burden of proving that it appears to a 'reasonable probability' that the claim is in excess of the statutory jurisdictional amount" of $75,000. *Tongkook Am., Inc. v. Shipton Sportswear Co.,* 14 F.3d 781, 784 (2d Cir.1994) (quoting *Moore v. Betit,* 511 F.2d 1004, 1006 (2d Cir.1975) (noting that "absolute certainty in valuation of the right involved is not required to meet the amount in controversy requirement")). "Conversely, courts should dismiss only when it is clear to a legal certainty that jurisdictional amounts cannot be met." *Moore,* 511 F.2d at 1006; *see also Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 289 (1938); *Zacharia v. Harbor Island Spa, Inc.,* 684 F.2d 199, 202 (2d Cir.1982). "Where jurisdiction is lacking, . . . dismissal is mandatory." *See United Food & Commercial Workers Union Local 919 v. CenterMark Props. Meriden Square, Inc.,* 30 F.3d 298, 301 (2d Cir.1994).

Discussion

I. *The Waggoner Parties' Motion For Leave To File A Surreply Is Granted*

Following the filing of SSBT's reply papers on the motion to dismiss, the Waggoner Parties moved for leave to file a surreply memorandum of law, asserting that new matter was raised in SSBT's reply brief and arguing that the Court should grant CSC leave to file a second amended complaint to remedy any failings identified by SSBT's "narrow construction" of the amended complaint. (Declaration of Kenneth A. Caruso, dated Apr. 20, 2004, at 2.) The Waggoner Parties' motion is procedurally flawed,

insofar as the proposed surreply memorandum was filed in conjunction with and attached to their motion for leave to file such papers. *See Travelers Inc. Co. v. Buffalo Reinsurance Co.*, 735 F.Supp. 492, 495 (S.D.N.Y.), *vacated in part on other grounds*, 739 F.Supp. 209 (S.D.N.Y.1990); *cf. United States v. Int'l Bus. Machs. Corp.*, 66 F.R.D. 383, 385 (S.D.N.Y.1975). Notwithstanding this flaw, in an exercise of this Court's discretion the Waggoner Parties' motion is granted so as to permit comprehensive adjudication of the issues raised.

II. *SSBT's Motion to Dismiss Count Three Is Granted*

The Declaratory Judgment Act, 28 U.S.C. § 2201, does not confer subject matter jurisdiction on the federal courts. *See Concerned Citizens of Cohocton Valley, Inc. v. New York State Dep't of Envtl. Conservation*, 127 F.3d 201, 206 (2d Cir.1997) (describing as "settled law" the rule that the Declaratory Judgment Act does not provide for subject matter jurisdiction in the federal courts). Thus, for Count Three to survive SSBT's motion to dismiss for want of subject matter jurisdiction, it must be demonstrated that the grounds for jurisdiction under 28 U.S.C. § 1332 exist, namely that the parties are diverse and the amount in controversy exceeds the sum or value of $75,000. As the Court of Appeals recognized in its opinion of July 2003, "the citizenship of each party is not at issue"; "the only question is whether the amount in controversy may be measured by Kelleher's demand ($10.6 million) or must be measured by the value of the CD (zero)." *Correspondent Services*, 338 F.3d at 126.[1] SSBT argues that diversity jurisdiction is

[1] Kelleher's demand for $10.6 million reflects the face value of the CD, $10 million, as well as interest calculated at 6% per annum, as provided for by the terms of the CD.

lacking here because the amount-in-controversy requirement has not been met. The object of Count Three, according to SSBT, is the CD, and the CD, as the Court of Appeals has stated, "had no value when CSC brought suit." *Id.* at 124. The Waggoner Parties do not dispute the value of the CD at the time CSC commenced this action but argue that the amount in controversy should be measured not by the value of the CD but by the magnitude of Kelleher's demand.

"In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 347 (1977) (citations omitted). Notwithstanding the seeming simplicity of this principle,

Valuation of the matter in controversy in suits for declaratory or injunctive relief is a complex task. The court must not only undertake to evaluate intangible rights as opposed to objects commonly found in the marketplace, but it must decide what rights are involved in the controversy and from whose viewpoint their value is to be measured.

Law Audit Services, Inc. v. Studebaker Tech., Inc., No. 96 Civ. 926(LMM), 1996 WL 137492, at *3 (S.D.N.Y. Mar. 27, 1996) (quoting *McCarty v. Amoco Pipeline Co.,* 595 F.2d 389, 391-92 (7th Cir.1979)) (quotation marks omitted). The complexity of this task may be magnified, as it has been here, by the terms employed by courts to describe the measures by which the amount in controversy may be ascertained. *See, e.g., Beacon Constr. Co. v. Matco Elec. Co.,* 521 F.2d 392, 399 (2d Cir.1975) ("[T]he amount in controversy is not necessarily the money judgment sought or recovered, but rather *the value of the conse-*

quences which may result from the litigation.") (emphasis supplied); *Kheel v. Port of New York Auth.*, 457 F.2d 46, 49 (2d Cir.1972) ("[T]he amount in controversy is calculated from the plaintiff's standpoint; *the value of the suit's intended benefit* or *the value of the right being protected* or *the injury being averted* constitutes the amount in controversy when damages are not requested.") (internal quotation marks and citations omitted and emphasis supplied). "Not surprisingly, the particular methodology of measurement that will be used by the district court [in determining the amount in controversy] depends on the substantive nature of the proceeding itself." 14B Charles Alan Wright *et al., Federal Practice & Procedure* § 3702 (3d ed. 1998 & Supp.2004).

Under the most straight-forward reading of both Count Three of the amended complaint and the relevant statutory language, the object of the litigation is the CD. The Declaratory Judgment Act provides, in relevant part, that

> In a case of actual controversy within its jurisdiction, . . . court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a). In Count Three of its amended complaint, CSC specifies that "[t]here is an actual controversy pending *as to the ownership of the CD* which CSC has deposited into Court." (Am. Compl. at ¶ 37 (emphasis supplied).) Because the CD has been identified by the plaintiff in this action as the object of the "actual controversy," its value provides the appropriate basis for the measure of the amount in controversy for Count Three. It follows that,

since the CD "had no value when CSC brought suit," *Correspondent Services,* 338 F.3d at 124, the amount in controversy with regard to Count Three falls short of the requisite $75,000.

This conclusion is consonant with the conclusions reached in cases dealing with contested ownership of real or personal property. Thus, where a plaintiff has commenced an action to quiet title to real property, the amount in controversy is determined by the value of the realty directly affected by the contest for ownership. *See, e.g., ACLI Gov't Sec., Inc. v. Rhoades,* 907 F.Supp. 66, 70 (S.D.N.Y.1995) (quoting from an unpublished opinion of the Court of Appeals for the Second Circuit in that same case explaining that the amount in controversy in a declaratory judgment action concerning the ownership of real property is measured by the purchase price of the property itself); *cf. South Park Assocs. v. Renzulli,* 94 F.Supp.2d 460, 462 (S.D.N.Y.) (holding that diversity jurisdiction existed where the plaintiff landlord who was seeking a declaratory judgment that certain apartments were rent destabilized alleged that the value of property free from rent control was in excess of $75,000), *aff'd,* 242 F.3d 368 (2d Cir.2000) (unpublished table decision).

Likewise, where a plaintiff seeks a declaration as to the ownership of personal property, the object of the litigation is the property at stake, and the value of that property dictates the amount in controversy. *See, e.g., John Deere Co. v. Pritchard,* No. 93 Civ. 482, 1994 WL 447416, at *1 (N.D.N.Y. Aug. 18, 1994) (holding that the amount in controversy is set by the value of the chattel to which the plaintiff claimed an ownership interest); *ITT Commercial Fin. Corp. v. Unlimited Auto., Inc.,* 814 F.Supp. 664, 667-68 (N.D.Ill.1992) (holding that the

amount in controversy with respect to claims brought by a creditor seeking declaratory judgment that it is the owner of two motor homes is determined by the value of those motor homes).

The conclusion reached here is also in accord with caselaw involving suits brought to declare ownership rights with respect to commercial paper or securities. *See, e.g., Walker v. Waller,* 267 F.Supp.2d 31, 33 (D.D.C.2003) (holding that, to the extent the plaintiff was seeking declaratory relief regarding the ownership of certain stock, the amount in controversy was, at most, the value of the stock at issue); *Giffin v. Bank One Dayton, N.A.,* No. 4:90-CV-150, 1991 WL 303602, at *2 (W.D.Mich. Dec. 3, 1991) (observing that in a commercial paper case where plaintiffs seek a declaratory judgment that the defendant was not a holder in due course of certain promissory notes, "the amount in controversy can readily be determined by the amount due on the promissory notes").

In light of the allegations in the amended complaint and the parallels with the cases just described, the CD constitutes the object of the litigation with respect to Count Three. The Waggoner Parties urge a contrary result, however, raising several distinct arguments which will be addressed in turn.

First, the Waggoner Parties argue that the allegations of Count Three set forth a specific request for a declaration "that CSC has no liability to Kelleher and that CSC . . . has no further liability to any party in connection with the CD or its role as custodian of the CD" (Am. Compl. at ¶38). According to the Waggoner Parties, the articulated request identifies CSC's potential liability to Kelleher (rather than the CD) as the subject of Count Three and hence the appropriate yardstick for determining the amount in controver-

sy.[2] While the Waggoner Parties are correct that the amended complaint reflects a concern with potential liability, the allegations contained in Count Three amply demonstrate that this attention to liability is derived from the "controversy pending as to the ownership of the CD," the possibility of a claim from Kelleher arising "in the event [CSC] transferred the CD," and the potential for any other claims "in connection with the CD or [CSC's] role as custodian of the CD." (Am. Compl. at ¶¶ 37-38.) Under these circumstances, to conclude that the object of the litigation with regard to Count Three is something other than the CD would run contrary to the most reasonable reading of the amended complaint, particularly in light of the marked similarities between the allegations of Count Three and

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[2] If, as the Waggoner Parties posit, CSC's potential liability to Kelleher on Kelleher's threatened $10.6 million claim represents the object of the litigation, it appears that an actual controversy no longer exists as to that claim in light of Kelleher's execution of a release of all claims against CSC. *See, e.g., Allen v. Stephan Co.*, No. 96 Civ. 536(JFK), 1996 WL 551708, at *2-3 (S.D.N .Y. Sept. 26, 1996) (noting that "an actual controversy must exist throughout the pendency of [a] declaratory judgment action, not merely at the time the complaint is filed" and holding that a stipulation by defendants' counsel waiving any claims the defendants might have asserted under the federal securities laws "effectively neutralize[d] Defendants' previous threat to file federal securities law claims against Plaintiffs," thereby rendering "the controversy with respect to that threat . . . moot") (citations omitted). As Kelleher's release was executed after CSC filed its amended complaint, however, whether a controversy currently exists has no bearing on whether subject matter jurisdiction existed as of the filing of the amended complaint and whether such jurisdiction existed, by virtue of the relation-back doctrine, at the time the original complaint was filed.

those contained in Count One, as to which the CD is the undisputed object of litigation.[3]

Leaving aside textual exegesis, the Waggoner Parties next argue that where, as here, a plaintiff is not seeking money damages, the amount in controversy should be measured by the injury that the plaintiff seeks to avert, in this case liability to Kelleher in the amount of $10.6 million. In support of this general principle, the Waggoner Parties rely on *Kheel v. Port of New York Auth.*, 457 F.2d 46 (2d Cir.1972), in which plaintiffs sought a declaratory

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[3] In Count One CSC alleges:

> 29. If CSC delivers the CD to Kelleher or [First Equity], it could be subject to multiple claims and potential liability.
>
> 30. CSC is a mere stakeholder and has no beneficial interest in the proceeds of the aforementioned CD.
>
> 31. CSC is unable to conclusively determine which of the defendants is entitled to the CD.

(Am. Compl. at 9.) The prayer for relief set forth in Count One requests:

> [A]n Order and Judgment of this Court pursuant to 28 U.S.C. § 1335 permitting and directing to [sic] CSC to deposit the subject CD with the Clerk of the Court; enjoining defendants from taking any action as against CSC; discharging CSC with prejudice; and reimbursing CSC for its costs and attorneys' fees.

(*Id.*) Count Three sets forth markedly similar allegations as to a dispute concerning ownership and the possibility of multiple claims and potential liability, and concludes with a virtually verbatim reiteration of Count One's request for relief seeking:

> [A]n Order and Judgment of this Court pursuant to 28 U.S.C. § 2201 permitting and directing to [sic] CSC to deposit the subject CD with the Clerk of the Court; enjoining defendants from taking any action as against CSC; discharging CSC with prejudice; and reimbursing CSC for its costs and attorneys' fees.

(*Id.* at 11.)

judgment that certain legislation was unconstitutional and that the defendant was violating its mandate to plan and construct various transportation facilities.

Although in declaratory judgment actions such as *Kheel* where money damages are not sought the amount in controversy *may* be measured by the injury the plaintiff seeks to avoid, the Waggoner Parties have pointed to no authority suggesting that the injury to be averted represents the unique and mandatory gauge to be employed in measuring the amount in controversy under such circumstances. Indeed, as the *Kheel* court explained, "the value of the suit's intended benefit *or* the value of the right being protected *or* the injury being averted constitutes the amount in controversy when damages are not requested." *Kheel,* 457 F.2d at 49 (internal quotation marks and citations omitted and emphasis supplied). Moreover, to the extent that the Waggoner Parties are seeking to invoke the particular method by which the *Kheel* court resolved the dispute before it, *Kheel* is distinguishable on the facts. *Kheel* involved a request for a declaration as to rights and obligations; no identified *res* was at stake in *Kheel* as in the present controversy. As set forth above, in declaratory judgment actions involving controversy over the ownership of an identified *res* courts have repeatedly followed the *Hunt* court's articulated standard in its most literal sense and measured the amount in controversy by reference to that *res*.

Building on the general principle that the amount in controversy should be measured by the injury that the plaintiff seeks to avert, the Waggoner Parties further contend that the amount in controversy in a declaratory judgment action brought following a threat of litigation should be measured by the magnitude of the liability asserted in connection

with that threat. Although several courts have evaluated the amount in controversy based in part on the magnitude of a threat of litigation, neither *Kheel* nor the other authorities cited by the Waggoner Parties demonstrates that such an approach should be followed under the circumstances presented here.

In *Allstate Insurance Co. v. Hilbun,* 692 F.Supp. 698 (S.D.Miss.1988), for instance, the court held that subject matter jurisdiction existed over the plaintiff insurance company's action seeking a declaratory judgment as to its liability to the defendant under an insurance policy. In reaching this determination, the court took into account the amount of a threatened claim for punitive damages announced by the defendant in correspondence prior to the commencement of the action and in her answer but never formally brought through counterclaims. *See Hilbun,* 692 F.Supp. at 701. While the court considered the threat of a counterclaim, however, it also noted that even in the absence of the threatened claim for punitive damages, the jurisdictional requirement had been satisfied, since the plaintiff was seeking a declaration as to its liability up to the full extent of the insurance policy, which was governed by a $100,000 limit. *See id.* The *Hilbun* court was not, accordingly, faced with the question presented here as to whether the amount of a claim associated with a mere threat of litigation may provide a sufficient basis for calculating the amount in controversy where no additional basis exists.

The Waggoner Parties' reliance on *Dow Agrosciences LLC v. Bates,* 332 F.3d 323 (5th Cir.2003), *cert. granted,* 124 S.Ct. 2903 (2004), is likewise misplaced. The plaintiff in *Bates* sought a judgment declaring, *inter alia,* that federal law preempted certain state law claims threatened by

the defendant peanut farmers in demand letters sent to the plaintiff, an herbicide manufacturer. Although the Court of Appeals for the Fifth Circuit relied in part on the damages asserted in the defendants' demand letters and "[t]he mere availability of treble damages" in affirming the district court's determination that the amount-in-controversy requirement had been met, *Bates,* 332 F.3d at 326 & n. 3, the *Bates* court also made much of the fact that the defendants had sought the damages available to them by interposing counterclaims subsequent to the issuance of their demand letters. *See id.* at 326. As the *Bates* court relied on the assertion of counterclaims as well as the earlier threats of litigation in concluding that the threshold requirement for diversity jurisdiction had been met, *Bates* does not establish that the amount of damages associated with a threat of litigation may provide a solely sufficient basis for calculating the amount in controversy in a declaratory judgment action where, as here, no counterclaims have been filed making real the earlier threat.

The Waggoner Parties have also cited *Markel Insurance Co. v. United States Judo Association,* No. 99 Civ. 591, 1999 WL 371633 (E .D. Pa. May 24, 1999), in support of their argument. In *Markel,* the plaintiff insurance company sought a declaratory judgment to the effect that the insurance policy which it had issued to the defendants did not require the plaintiff to defend or indemnify the defendants in connection with a lawsuit then pending in a Pennsylvania state court. Although the *Markel* court noted that the defendants had threatened the plaintiff with a possible lawsuit for bad-faith handling of the insurance coverage before the plaintiff filed its complaint, *see Markel,* 1999 WL 371633, at *1, this threat of a separate lawsuit seeking an unspecified sum played no part in the court's calcula-

tion of the amount in controversy. Rather, the court concluded that the amount-in-controversy requirement was satisfied because the damages at issue in the pending state court litigation could well exceed $75,000, damages as to which the plaintiff might have to indemnify the defendants and as to which obligation the plaintiff sought a declaratory judgment. *See id.*

Finally, even if the Waggoner Parties' reliance on the unpublished opinion in *Nutter v. Rents,* 945 F.2d 398, 1991 WL 193490 (4th Cir. Oct. 1, 1991) (unpublished table decision), were proper, which is doubtful,[4] *Nutter* is inapposite. Although the *Nutter* court concluded that it was "appropriate to gauge the amount in controversy by reference to the amount involved in [the defendant's] threatened action which [the plaintiff's] first-strike action was designed to forestall," *Nutter,* 1991 WL 193490, at *4, the court proceeded to explain that the defendant had brought counterclaims seeking the damages alluded to in the earlier correspondence, damages in excess of the then-threshold statutory amount of $50,000. It was on this collective basis and in light of the Fourth Circuit's "either party" rule, which calls for the calculation of the amount in controversy by reference to the pecuniary result to either party, that the Court of Appeals deemed federal jurisdiction established. *See id.; compare Gibson v. H.M.H. of*

[4] The Court of Appeals for the Fourth Circuit has deemed citation to its unpublished dispositions "disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." 4th Cir. R. 36(c). Citation to unpublished dispositions of the Fourth Circuit is only otherwise permitted where counsel believes that the disposition "has *precedential value* in relation to a material issue in a case and that there is no published opinion that would serve as well. . . ." *Id.* (emphasis supplied).

Salina, LLC, No. 99-1492-JTM, 2000 WL 554123, at *3 (D.Kan. Apr. 6, 2000) (applying the "either party" rule but rejecting the plaintiff's argument that the amount-in-controversy requirement had been met by the defendant's mere threat of litigation where no counterclaim had been filed). As the "either party" rule is not followed in this circuit, *see, e.g., Kheel,* 457 F.2d at 49, nor have counterclaims been filed by Kelleher in this action as they were in *Nutter,* the relevance of *Nutter* to these proceedings is limited at best.

The authorities cited by the Waggoner Parties, none of which involves factual circumstances akin to those at issue here, thus fail to demonstrate that the mere threat of litigation by Kelleher constitutes the proper touchstone for determining the amount in controversy with regard to Count Three.[5] As Kelleher's threat of litigation does not appear to be a proper basis for measuring the amount in controversy, the Waggoner Parties' suggestion that Kelleher's threat should be construed as, *inter alia,* a claim of conversion, and their further suggestion that CSC's request for a declaration that CSC "has no liability to Kelleher" (Am. Compl. at ¶ 38) is sufficiently broad to encompass a reference to the threat thus construed are inventive but ultimately immaterial. The parties' dispute over the law

[5] The Waggoner Parties assert that whether Kelleher eventually brought a counterclaim making good on his threat is irrelevant to the amount-in-controversy calculus. Since the cases cited by the Waggoner Parties have found subject matter jurisdiction to exist based on pre-litigation threats only where the threat of a legal claim is coupled with the presence of either subsequent counterclaims, as in *Dow Agrosciences* and *Nutter,* or a separate and sufficient ground for establishing the amount in controversy, as in *Hilbun,* the absence of both of those factors here is decidedly relevant to the success of the Waggoner Parties' arguments.

applicable to these various hypothetical claims is likewise irrelevant.

In their surreply papers, the Waggoner Parties argue that if their proposed construction of the amended complaint is found wanting, CSC should be given leave to file a second amended complaint. According to the Waggoner Parties,

> CSC could thereby clarify the kinds of "liability" as to which it wanted a declaration "that CSC has no liability to Kelleher." Pursuant to Rule 15(a), [Fed.R. Civ.P.,] such "leave shall be freely given when justice so requires."

(Waggoner Parties Surreply Mem. at 3.) The Waggoner Parties acknowledge that the plaintiff is normally the party who seeks leave to amend its own complaint, but they argue that Rule 15, Fed.R.Civ.P., places no restriction on which parties may seek leave to amend and that, in any case, since a court may grant leave to amend *sua sponte,* a court likewise may, in the exercise of its discretion, grant leave where leave is requested by the party "most affected by the content of the pleading." (*Id.*) It would be an abuse of discretion, in the Waggoner Parties' estimation, if leave to amend were not granted.

The Waggoner Parties may not amend CSC's amended complaint themselves, *see* Fed.R.Civ.P. 15(a) (providing, in relevant part, that "*a* party may amend *the* party's pleading only by leave of court") (emphasis supplied), nor have they pointed to any authority expressly permitting them to do so. CSC, which has previously filed a motion for voluntary dismissal of this action and has not opposed SSBT's instant motion to dismiss, has not requested leave to amend nor has it, or the Waggoner Parties, provided any indication that such an amendment would be forthcoming

were leave granted by this Court *sua sponte*. Under these circumstances, granting CSC leave to amend the amended complaint would be both unwarranted and, in light of Kelleher's release and CSC's representation that the dispute which initially led it to seek interpleader relief no longer exists, futile. Accordingly, no such leave to amend is given.

In light of the foregoing, the object of the litigation with regard to Count Three of CSC's amended complaint is the CD, which, as set forth above, was valueless at the time CSC filed its initial complaint and at all times thereafter. It necessarily follows that the amount-in-controversy requirement of 28 U.S.C. § 1332 has not been satisfied and this Court lacks subject matter jurisdiction over Count Three.

III. *The Remaining Claims And Crossclaims Are Dismissed For Lack Of Subject Matter Jurisdiction*

Subject matter jurisdiction is lacking over Count One, the federal interpleader claim, for the reasons set forth in *JVW V, see JVW V,* 205 F.Supp.2d at 198, reasoning approved of by the Court of Appeals on appeal, *see Correspondent Services,* 338 F.3d at 124, and hereby adopted. Because no grounds for jurisdiction may be found in the only remaining cause of action, an interpleader claim premised on state law, supplemental jurisdiction shall not be exercised over the remaining claim in the amended complaint or over the cross-claims asserted by various defendants. *See, e.g., Nowak v. Ironworkers Local 6 Pension Fund,* 81 F.3d 1182, 1187 (2d Cir.1996) (stating that a district court "cannot exercise supplemental jurisdiction unless there is first a proper basis for original federal jurisdiction") (citations omitted); *accord Parker v. Della*

Rocco, 252 F.3d 663, 666 (2d Cir.2001); *see also* Correspondent Services, 338 F.3d at 125 (noting that "the district court correctly found that it could not assert diversity jurisdiction based upon Kelleher's cross-claims alone"). The amended complaint of CSC therefore must be dismissed in its entirety.

IV. *SSBT's Motion To Vacate This Court's Orders Of Attachment Is Granted*

As the amended complaint failed to cure the jurisdictional defects of the original complaint for the reasons set forth above, the prior attachment orders of this Court are vacated due to the dismissal of this action and the Court's lack of subject matter jurisdiction at the time of the orders of attachment. *See, e.g .*, *Kenyon & Kenyon v. Advanced Eng'g Research & Dev. Corp.,* No. 97 Civ. 5909(DC), 1998 WL 318712, at *3 (S.D.N.Y. June 16, 1998) (dismissing the complaint for want of an independent basis for subject matter jurisdiction and vacating an order of attachment, explaining that "[a] judgment or order is void and subject to vacatur where the court lacks subject matter jurisdiction") (citing *United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp.,* 907 F.Supp. 663, 668 (S.D.N.Y.1995); *Koa Hwa Shipping Co. v. China Steel Corp.,* 816 F.Supp. 910, 913 (S.D.N.Y.1993)). In ordering vacatur, this Court expresses no view as to the inherent propriety or proper continuation of the attachment ordered in the State Court Action.

V. *SSBT's Motion For An Award of Costs And Attorney's Fees Is Granted*

In its motion papers, SSBT seeks an award of costs and attorney's fees incurred in defending against this action. Specifically, SSBT premises its request on CPLR 6212(e), which permits a defendant whose property has been wrongfully attached to recover "all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment . . . if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property." CPLR 6212(e). The purpose of this section is "to make the attaching plaintiff strictly liable for all damages occasioned by a wrongful attachment" including "reasonable attorney's fees, which may be sustained by reason of the attachment." *Roth v. Pritikin,* 787 F.2d 54, 59 (2d Cir.1986) (citation and internal quotations omitted). The Waggoner Parties have opposed SSBT's request.

This Court previously ruled in *JVW V* that SSBT was entitled to its costs and fees pursuant to CPLR 6212(e). *See JVW V,* 205 F.Supp.2d at 204-05 (explaining that a dismissal of the case or of the attachment on any basis, procedural or substantive, would be sufficient to support an award under CPLR 6212(e), regardless of whether culpable conduct had been shown, and concluding that "SSBT is entitled to an award of attorney's fees that it has incurred since the entry of the order of attachment on November 17, 2000"); *see also JVW VI,* 2003 WL 221746, at *2 (reiterating that CPLR 6212(e) "entitles SSBT to recover the costs and fees expended in connection with this litigation" and rejecting the argument that liability for any award of costs and fees is attributable solely to JVW, in view of the fact that both JVW and Waggoner had moved for the

attachment of SSBT's assets). In its decision vacating *JVW V*, the Court of Appeals expressed no view with regard to those portions of *JVW V* that discussed an award under CPLR 6212(e).

Neither party has addressed the power of the Court to award costs and fees in the absence of a jurisdictional finding. In view of the Court's obligation to inquire into its own jurisdiction and given "the cavalier nature in which the parties have dealt with jurisdictional issues thus far" noted by the Court of Appeals, *Correspondent Services,* 338 F.3d at 123 n. 4, it must first be determined whether this Court has the power to award the costs and fees sought by SSBT under the circumstances presented here.

The prevailing rule in the federal courts is that dismissal of a case for want of jurisdiction deprives a court of the power to assess costs. *See, e.g., Smyth v. Asphalt Belt Ry. Co.,* 267 U.S. 326, 330 (1925) ("If the District Court had lacked jurisdiction as a federal court, it would have been without power to order the plaintiffs to pay costs."); *Citizens' Bank of Louisiana v. Cannon,* 164 U.S. 319, 324 (1896) ("Having dismissed the bill for want of jurisdiction, the court was without power to decree the payment of costs and penalties."); *Pentlarge v. Kirby,* 20 F. 898, 898 (2d Cir.1884) ("The rule is uniform in the federal courts that where the case is one of which the court has no jurisdiction, the duty of the court is to dismiss it upon that ground, and without costs.") (collecting cases); *Budris v. Consolidation Coal Co.,* 251 F. 673, 677 (E.D.N.Y.1918) ("The prayer for costs cannot be granted, as the court has no jurisdiction over the case. . . ."); *United States Envelope Co. v. Transo Paper Co.,* 229 F. 576, 579 (D.Conn.1916) ("As the case is dismissed for want of jurisdiction, no costs can be taxed.").

Various statutory exceptions have been carved out from this general rule, including the exception set forth in 28 U.S.C. § 1919, which provides that:

> Whenever any action or suit is dismissed in any district court, the Court of International Trade, or the Court of Federal Claims for want of jurisdiction, such court may order the payment of just costs.

28 U.S.C. § 1919; *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990) (citing 28 U.S.C. § 1919 for the proposition that "district courts may award costs after an action is dismissed for want of jurisdiction"); *Bridgewater Operating Corp. v. Feldstein,* 346 F.3d 27, 30 n. 4 (2d Cir.2003) (stating that 28 U.S.C. § 1919 "permit[s] the imposition of appropriate sanctions following dismissal for lack of subject matter jurisdiction"), *petition for cert. filed,* 72 U.S.L.W. 3726 (U.S. May 10, 2004) (No. 03-1546); *W.G. v. Senatore,* 18 F.3d 60, 64 & n. 1 (2d Cir. 1994) (observing that, as a general rule, a district court lacks the power to do anything but strike a case from its docket once it determines that jurisdiction is lacking, but noting that this general rule is "tempered with several exceptions, including 28 U.S.C. § 1919"); *see generally In re N. Indiana Oil Co.,* 192 F.2d 139, 141-42 (7th Cir.1951) (describing the statutory progression that led to the current formulation of the exception set forth in 28 U.S.C. § 1919). Determining whether "just costs" should be awarded under Section 1919 is a matter within the sound discretion of the district court. *See, e.g., Miles v.. California,* 320 F.3d 986, 988 n. 2 (9th Cir.2003) (noting that Section 1919 "is permissive"); *Callicrate v. Farmland Indus., Inc.,* 139 F.3d 1336, 1339 (10th Cir.1998) (applying Sec-

tion 1919 and observing that "[t]he taxing of costs rests in the sound judicial discretion of the district court").

Section 1919 thus provides a jurisdictional basis upon which SSBT's application may be considered, *see, e.g., Barron's Educ. Series, Inc. v. Hiltzik,* 987 F.Supp. 224 (E.D.N.Y. 1997) (considering an application for attorney's fees under 28 U.S.C. § 1919 following dismissal of a declaratory judgment action for lack of jurisdiction), but the section is not without its complications. While the fact that costs may be awarded under Section 1919 is self-evident, the inclusion of attorney's fees in any award granted by virtue of this same provision is somewhat less straightforward.

Those courts to have considered the question have held that attorney's fees may not be included in the "just costs" awarded under Section 1919 absent a showing of extraordinary circumstances. *See, e.g., Wilkinson v. D.M. Weatherly Co.,* 655 F.2d 47, 49 (5th Cir.1981) (explaining that the "just costs" in Section 1919 do not include attorney's fees, but also noting that "the general rule that attorney's fees are not allowable unless expressly authorized" admits of certain limited exceptions "founded on equitable considerations, so that in 'extraordinary circumstances' attorney's fees may be awarded") (internal citation omitted); *Signorile v. Ouaker Oats Co.,* 499 F.2d 142, 146 (7th Cir.1974) (concluding that the "just costs" in Section 1919 do not encompass attorney's fees absent a showing of extraordinary circumstances such as financial burden or hardship); *Barron's Educ. Series,* 987 F.Supp. at 225-26 (noting that "there is not a single reported case in the history of American jurisprudence in which attorney's fees have been awarded under § 1919" and denying a request for attorney's fees under Section 1919 because there was

no "indication of fraud or trickery practiced upon this Court or the defendants . . . [and] no showing that defendants suffered financial burden or hardship"); *Hylte Bruks Aktiebolag v. Babcock & Wilcox Co.,* 305 F.Supp. 803, 810 (S.D.N.Y.1969) (concluding that, "[a]lthough 28 U.S.C. 1919 permits the taxing of just costs, which may be seen as somewhat enhancing this Court's discretion to tax extraordinary items of costs such as attorney's fees, the circumstances of this case do not warrant the exercise of such discretion" where there had been no indication of fraud or trickery practiced on the court or on any party) (internal citation and footnote omitted). In determining whether extraordinary circumstances might permit an award of attorney's fees, the courts thus have found it appropriate to consider the financial burden or hardship suffered by a party. *See Signorile,* 499 F.2d at 146; *Barron's Educ. Series,* 987 F.Supp. at 226. The parties' conduct may also be taken into consideration. *See Hylte Bruks Aktiebolag,* 305 F.Supp. at 810.

Section 1919 does not provide the unique basis upon which this Court may consider SSBT's application. Both the U.S. Supreme Court and the Court of Appeals for the Second Circuit have held that, under appropriate circumstances, a district court lacking jurisdiction over the merits of an action may nonetheless determine collateral issues flowing from the underlying action and the manner in which the parties litigated that action. *See Willy v. Coastal Corp.,* 503 U.S. 131, 137-39 (1992) (concluding that an award of sanctions under Rule 11, Fed.R.Civ.P., was properly considered following dismissal for lack of subject matter jurisdiction, as such a consideration "does not signify a district court's assessment of the legal merits of the complaint") (quotation marks and citation omitted);

Bridgewater Operating, 346 F.3d at 30 n. 4 (rejecting the argument that the district court lacked the power to enjoin the plaintiffs from filing further lawsuits once the court had determined that it lacked subject matter jurisdiction and concluding that the courts have the power to impose "appropriate sanctions following dismissal for lack of subject matter jurisdiction"); *Perpetual Sec., Inc. v. Tang,* 290 F.3d 132, 141 (2d Cir.2002) (explaining that, "[a]lthough the district court lacked jurisdiction to decide the merits of the underlying action, it retained the power to determine collateral issues, such as the appropriateness of [Fed.R. Civ.P. 11] sanctions").

Under either line of reasoning, this Court has the power to award SSBT both costs and attorney's fees under the circumstances of this action. If considered under the rubric of Section 1919, the attachment of SSBT's assets-obtained under circumstances that suggest that Waggoner had reason to know that subject matter jurisdiction was lacking when it was, in fact, lacking-was wrongful, and as a result of the attachment SSBT has sustained a substantial financial burden by virtue of its lack of access to the funds at issue. These circumstances are sufficiently extraordinary to warrant the award of both costs and attorney's fees.

In addition, the assessment of costs and fees under CPLR 6212(e)[6] following a dismissal for want of subject

[6] Pursuant to Rule 64, Fed.R.Civ.P., the remedy of attachment is governed by state law. *See Chemical Bank v. Haseotes,* 13 F.3d 569, 572 (2d Cir.1994) ("Fed.R.Civ.P. 64 makes available to the federal courts 'all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action . . . under the circumstances and in the manner provided by the law of the state in which the district court is held." ') (quoting Fed.R.Civ.P. 64). It follows that the manner provided by CPLR 6212(e) for addressing the damages occasioned by wrongful

matter jurisdiction is proper under the circumstances presented here, because the conclusion that the attachment was wrongful is incidental to, closely related to, and necessarily flows from the determination that subject matter jurisdiction is lacking, for the reasons set forth in *JVW V,* 205 F.Supp.2d at 204-05, hereby adopted. *See also Merck & Co. v. Technoquimicas S.A.,* No. 01 Civ. 5345(NRB), 2001 WL 963977, at *3 (S.D.N.Y. Aug. 22, 2001) ("[I]t is significant that § 6212(e) is not worded in the conditional. . . . Thus, New York law requires an award of fees by virtue of the fact that the attachment was vacated as unwarranted."). Moreover, the conclusion that the attachment was wrongful "implicates no constitutional concern because it does not signify a district court's assessment of the legal merits of the complaint." *Willy,* 503 U.S. at 138 (internal quotation marks and citation omitted). "It therefore does not raise the issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction." *Id.*

The Waggoner Parties' arguments advanced in opposition to SSBT's CPLR 6212(e) request warrant mention. First, the Waggoner Parties contend that the *Erie* doctrine requires this Court to apply CPLR 326(b) ("Procedure on

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attachments of property is the appropriate mechanism to assess SSBT's application for an award here. *See Merck & Co. v. Technoquimicas S.A.,* No. 01 Civ. 5345(NRB), 2001 WL 963977, at *3 (S.D.N.Y. Aug. 22, 2001) ("Having availed themselves [sic] of one subsection of § 6212, plaintiff is bound by the provisions of subsection § 6212(e)-and, likewise, so is this Court.") (citing *Vitrix Steamship Co. v. Salen Dry Cargo A.B,* 825 F.2d 709, 713 (2d Cir.1987) (The plaintiff, "having elected to avail itself of a state court remedy under the 'saving to suitors' clause, must accept the state court procedural rules applicable to the remedy it has sought," and thus may be liable for attorney's fees for a wrongful attachment.)).

removal: Order and subsequent proceedings"), which, in turn, calls for denial of an award. Second, the Waggoner Parties suggest that even if the *Erie* doctrine does not compel application of Rule 326(b), Rule 6212(e) should be construed so as not to authorize an award here in light of *Erie* considerations and on the particular facts of this case.

Rule 326(b) provides, in part:

> Where an order of removal is made by a court other than the court in which the action is pending, a certified copy of the order shall be filed with the clerk of the court in which the action is pending.... Subsequent proceedings shall be had in the court to which it has been ordered removed as if the action had been originally commenced there and no process, provisional remedy or other proceeding taken in the court from which the action was removed shall be invalid as the result of the removal.

CPLR 326(b). As the instant action is being dismissed and is not being removed to any other court, CPLR 326(b) has no bearing here. While some or all of the parties involved in the present action may also be involved in the State Court Action, the existence of a simultaneous proceeding in state court does not support the Waggoner Parties' claim that dismissal in the present action will "move" this action from a federal court to a state court in any way that might trigger the provisions of Rule 326(b). (Waggoner Parties Opp. Mem. at 31.) Moreover, no formal order of removal has been either sought or granted, nor has it even been demonstrated that CPLR 326(b) and its related Rules concerning removal among the various state courts of New York State have any application in federal court, much less

in a federal district court that has found there to be no basis for diversity jurisdiction under 28 U.S.C. § 1332.

The Waggoner Parties' second argument asserts that, because "the litigation will merely shift from a New York federal court sitting as a state court to a New York state court" as a result of dismissal (Waggoner Parties Opp. Mem. at 31), and because the attachment in the State Court Action was described therein as a continuation of the attachment ordered in this action, it has not been "finally decided that the plaintiff was not entitled to an attachment of the defendant's property." CPLR 6212(e). This argument was already addressed in *JVW VI,* where the notion that no final decision had been reached with respect to the attachment was rejected:

It has been finally determined that the plaintiff . . . had no right to bring the action in this forum. Having no such right, he had no right to obtain an attachment here and this is a final determination on the merits of the attachment. Whether or not [plaintiff] can maintain an action in some other forum has nothing to do with the question presented.

JVW VI, 2003 WL 2221746, at *2 (quoting *Minskoff v. Fidelity & Cas. Co.,* 28 A.D.2d 85, 87, 281 N.Y.S.2d 410, 412 (N.Y.App. Div. 1st Dep't 1967), *aff'd,* 23 N.Y.2d 706, 296 N.Y.S.2d 151, 243 N.E.2d 755 (1968)) (quotation marks omitted). The Waggoner Parties' efforts to distinguish *Minskoff* are unconvincing and their reliance on *In re Koreag, Controle et Revision S.A.,* 130 B.R. 705 (Bankr. S.D.N.Y.1991), *vacated,* 961 F.2d 341 (2d Cir.1992), is misplaced for the reasons previously set forth in *JVW VI, see JVW VI,* 2003 WL 2221746, at *2, and for the additional reason that the plaintiff in *Koreag* was found to be "entitled" to pursue its remedies in the chosen forum, an

entitlement absent here by virtue of the lack of subject matter jurisdiction.

The cursory recitation of the Waggoner Parties' further argument that JVW, and not Waggoner, is the party who obtained the attachment and that references to Waggoner in the relevant pleadings and motion papers were mere surplusage provides insufficient grounds for revisiting this Court's earlier determination, hereby readopted, that both JVW and Waggoner are liable for SSBT's costs and fees with regard to the wrongful attachment. *See JVW VI,* 2003 WL 221746, at *2; *see also Correspondent Services,* 338 F.3d at 126 (discussing the possible "prejudice that JVW and Waggoner would suffer if they lost *their* attachment of SSBT's assets") (emphasis supplied).

In view of the foregoing, SSBT's request for an award of costs and attorney's fees with regard to the wrongful attachment of its assets is granted. SSBT shall submit to this Court within thirty (30) days of entry of this opinion and order such materials as it may deem necessary to ascertain the amount of such costs and fees to be awarded, whereupon a briefing schedule and, if appropriate, a date for a hearing as to the amount of any such damages shall be set by the Court.

Conclusion

For the reasons set forth above, the Waggoner Parties' motion for leave to file a surreply memorandum of law is granted, as is SSBT's motion to dismiss Count Three of the amended complaint, to vacate this Court's previous orders of attachment, and for an award of costs and attorney's fees. This action is dismissed in its entirety for lack of subject matter jurisdiction, and SSBT shall submit to this Court within thirty (30) days of entry of this opinion and

order such materials as it may deem necessary to ascertain the amount of costs and attorney's fees to be awarded to SSBT.

It is so ordered.