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## SARLs & Diversity Jurisdiction: Safeguarding 28 U.S.C. § 1332

Josh Ji

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# SARLs & Diversity Jurisdiction:

## Safeguarding 28 U.S.C. § 1332

Josh Ji\*

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## INTRODUCTION

In our legal system, there are two jurisdictional keys required for access to federal courts: personal jurisdiction and subject matter jurisdiction. Focusing only on the latter component, one way that a litigant may satisfy subject matter jurisdiction is by showing that there is complete diversity of citizenship between the parties (i.e., that the parties are citizens of different states). When a lawsuit arises between natural persons, courts simply determine the domicile of the parties and then assess whether the parties are completely diverse under the federal rules; however, when a lawsuit implicates artificial entities, courts apply varying rules to determine the parties' citizenships.<sup>1</sup>

There are three rules courts use to determine the citizenship of artificial entities: two of them, applied to corporations and national banking associations (NBAs), are statutorily prescribed by the legislature, and one is a judicial invention that is applied to all other "unincorporated associations." The rule used to determine citizenship is significant because it dictates the number of states an entity may be a citizen of, and this in turn regulates an entity's access to the federal forum, which has certain advantages for defendants (e.g., avoiding local prejudice). To illustrate this point:

- an NBA is a citizen of one state (the state where its main office is located);<sup>2</sup>
- a corporation may be a citizen of one or two states (the state of incorporation and the state where it has its principal place of business);<sup>3</sup> and
- an unincorporated entity may be a citizen of one to fifty states and the District of Columbia (according to the domicile of each member).<sup>4</sup>

But how should the citizenship of foreign companies with substantial domestic footprints be addressed? With globalization, foreign companies have become an inextricable part of our world, and the line dividing their state of citizenship is often blurred.<sup>5</sup>

Of course, once a court determines that a company is a foreign citizen (and that the opposing party is a U.S. citizen), the court may then exercise alienage diversity jurisdiction over the lawsuit, assuming all other jurisdictional requirements are satisfied.<sup>6</sup> However, the issue I will address in this Note arises

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1. See 28 U.S.C. § 1332(c)(1) (2012) (corporations); *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990) (unincorporated associations); *Rouse v. Wachovia Mortg., FSB*, 747 F.3d 707 (9th Cir. 2014) (national banking associations).

2. *Rouse*, 747 F.3d at 709.

3. 28 U.S.C. § 1332(c)(1) (2012).

4. See *Carden*, 494 U.S. at 185.

5. See generally Amy L. Levinson, *Developments in the Law—II. Developments in Diversity Jurisdiction*, 37 LOY. L.A. L. REV. 1407 (2004) (discussing recent developments in the area of diversity jurisdiction that stemmed from globalization).

6. See 28 U.S.C. § 1332(a)(2)–(3) (2012).

under the antecedent inquiry—whether that company is a foreign citizen at all. If it is the case that the company is actually a U.S. citizen despite appearances that it is a foreign citizen, subject matter jurisdiction may have been improperly fabricated without true diversity of citizenship. To avoid this situation, courts must resolve the rule for determining the citizenship of such foreign/domestic companies.

In this Note, I will address one foreign company structure that has appeared in federal courts with increasing frequency: the *société à responsabilité limitée* (SARL). SARL (a.k.a. SÀRL, Sàrl, sàrl or S.à r.l.) is a type of private limited liability corporate entity that exists in Lebanon, Macao, Algeria, France, Monaco, Morocco, Tunisia, Madagascar, Switzerland, and Luxembourg—and it is most comparable to an American LLC. A review of the case law reveals that courts have been unable to establish a rule for determining the citizenship of SARLS: some courts have applied the corporate-citizenship rule by itself, while others have applied the corporate-citizenship rule in conjunction with the rule for unincorporated associations.<sup>7</sup> This is problematic when, for example, a defendant claims diversity of citizenship as a SARL incorporated under the laws of France and has its principal place of business in France. In such a situation, the defendant may not be diverse under the rule for unincorporated associations because one of its members is actually domiciled in the forum state, but a court may miss that jurisdictional defect because it incorrectly analyzes the SARL solely under the corporate-citizenship rule. Courts must establish a clear rule to remedy this problem. Why? Because both Congress and federal courts have limited access to the federal forum by allowing only corporations and NBAs to enjoy statutorily prescribed rules that make them citizens of only one or two states; to allow SARLS to claim the corporate-citizenship rule would undermine that effort.

This Note explains how courts should (or should not) analyze SARLS for purposes of diversity jurisdiction. Case law reveals a strong principle against application of the corporate-citizenship rule to noncorporate entities.<sup>8</sup> Indeed, all other unincorporated associations share a catchall rule and are deemed citizens of every state in which their members are citizens, no matter how similar they may be to a corporation in terms of structure.<sup>9</sup> Therefore, the citizenship of a SARL should be analyzed only as other unincorporated associations are analyzed—according to the domicile of each of its members, *without* use of the corporate-citizenship rule.

I will begin by explaining the rules for determining the citizenship of

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7. See *V & M Star, LP v. Centimark Corp.*, 596 F.3d 354 (6th Cir. 2010); *Burge v. Sunrise Medical (US) LLC*, No. 13-cv-02215-PAB-MEH, 2013 WL 6467994 (D. Colo. Dec. 9, 2013); *Indus. Fuel Co. v. Invista S.A.R.L., LLC*, No. 5:06CV40-V, 2008 WL 619189 (W.D.N.C. Feb. 5, 2008).

8. See *Carden*, 494 U.S. at 188.

9. See *id.*; see also Walter W. Jones, Jr., Annotation, *Determination of Citizenship of Unincorporated Associations, for Federal Diversity of Citizenship Purposes, in Actions By or Against Such Associations*, 14 A.L.R. Fed. 849, 852 (1973).

artificial entities in Part I. In that Part, I will also discuss the case law to highlight the courts' safeguarding of the two statutory rules for NBAs and corporations. In Part II, I will discuss SARLs and the case law on the issue of their citizenship. Finally, in Parts III and IV, I will explain why courts should apply only the rule for unincorporated associations—and not the corporate-citizenship rule—when determining the citizenship of SARLs for purposes of diversity jurisdiction.

### I. RULES FOR DETERMINING CITIZENSHIP

Currently, there are three types of entities that have different rules for determining citizenship: (1) corporations, (2) NBAs, and (3) unincorporated associations. As the discussion below reveals, corporations and NBAs owe their rules to legislative action, as courts have merely interpreted the governing statutes. “Unincorporated associations,” on the other hand, share a catchall rule—created by the courts—that applies broadly to entities that do not have a statutorily assigned rule. This means that in the absence of legislative action, the catchall rule should apply, regardless of how similar an entity may be to a corporation or an NBA. I will briefly discuss these rules and return to some guiding principles revealed by the case law in Part III.

#### A. Corporations

28 U.S.C. § 1332(c)(1) provides the rule for determining the citizenship of a corporation. Section 1332 states that “a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . .”<sup>10</sup> The principal place of business is determined by the “nerve center,” or the place where “a corporation’s officers direct, control, and coordinate the corporation’s activities.”<sup>11</sup> Because of the explicit statutory language and the courts’ subsequent interpretations of that language, it is well settled that a corporation is a citizen of only two states: (1) the state of incorporation, and (2) the state where it has its principal place of business<sup>12</sup> (i.e., its “nerve center”). Notably, Congress created the corporate-citizenship rule in an effort to shield the corporation from the prejudice it may face as an outsider in state court.<sup>13</sup>

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10. 28 U.S.C. § 1332(c)(1) (2012).

11. *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010).

12. *TM Mktg., Inc. v. Art & Antiques Assocs., L.P.*, 803 F. Supp. 944, 1000 (D.N.J. 1992) (“A partnership is deemed to be a citizen of each state in which one of its partners is domiciled.” (first citing *Carden*, 494 U.S. at 194–95); then citing *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900); then citing *Knop v. McMahan*, 872 F.2d 1132, 1137 n.11 (3d Cir. 1989); then citing *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 69 (2d Cir. 1990); then citing *McMoran Oil & Gas Co. v. KN Energy, Inc.*, 907 F.2d 1022, 1024 (10th Cir. 1990); and then citing *900 3rd Ave. Assocs. v. Finkielstain*, 758 F. Supp. 928, 931 (S.D.N.Y. 1991)).

13. 13E CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3611, at 469 (3d ed. 2009).

### B. National Banking Associations

28 U.S.C. § 1348 provides the rule for determining the citizenship of NBAs. Under the statute, NBAs are “deemed citizens of the States in which they are respectively located.”<sup>14</sup> The Supreme Court interpreted the term “located” to mean that an NBA is a citizen of the state where it has its main office as set forth in its articles of association (and not every state in which it operates branch offices).<sup>15</sup> Although the Court did not address whether NBAs would also be citizens of the state in which they have their principal place of business, the Ninth Circuit in *Rouse v. Wachovia Mortgage, FSB*, held that an NBA is deemed a citizen only of the state in which its main office is located.<sup>16</sup> Thus—at least in the Ninth Circuit—an NBA is deemed a citizen of only one state. The *Rouse* court reached this conclusion because “[t]he Supreme Court’s holding in *Wachovia Bank* was largely reasoned from the conclusion that Congress intended to protect the right of national banks to remove cases to federal courts,”<sup>17</sup> and if it were to hold otherwise, “the access of a [national] bank to a federal forum would be drastically curtailed . . . .”<sup>18</sup> Thus, in limiting an NBA’s citizenship to one state, the *Rouse* court was giving deference to Congress’s intent to preserve an NBA’s ability to remove its cases to the federal forum.

### C. Unincorporated Associations

Unincorporated associations (or all other artificial entities), in contrast, share a judicially created catchall rule and are deemed to be citizens of each state in which any one of its partners, either general or limited, is domiciled.<sup>19</sup> In crafting this rule, courts reasoned that although corporations are deemed citizens for purposes of federal subject matter jurisdiction, “unincorporated associations remain mere collections of individuals.”<sup>20</sup> Therefore, “[w]hen the ‘persons composing such association’ sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court.”<sup>21</sup> Accordingly, an unincorporated association may be a citizen of one, two, or even fifty states—depending on the number of states in which its partners (general or limited) are domiciled.<sup>22</sup> This rule makes it difficult for a defendant to claim

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14. 28 U.S.C. § 1348 (2012).

15. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 307 (2006).

16. *Rouse v. Wachovia Mortg., FSB*, 747 F.3d 707, 709 (9th Cir. 2014).

17. *Id.* at 711.

18. *Id.* (alteration in original) (quoting *Wachovia Bank*, 546 U.S. at 307).

19. *TM Mktg., Inc. v. Art & Antiques Assocs., L.P.*, 803 F. Supp. 994, 1000 (D.N.J. 1992) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 194–95 (1990)).

20. *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 461 (1980); see also *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 703 (4th Cir. 2010); *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 437 (7th Cir. 1984).

21. *Navarro Sav. Ass’n*, 446 U.S. at 461.

22. See *TM Mktg.*, 803 F. Supp. at 1000.

diversity jurisdiction, since the more states in which a defendant is a citizen, the greater the chances are that there will not be complete diversity.

Courts have extended this rule to limited liability companies, holding that, though “LLCs resemble both partnerships and corporations[,] . . . every circuit that has addressed the question treats them like partnerships for the purposes of diversity jurisdiction.”<sup>23</sup> Hence, the “citizenship of an unincorporated association must be traced through each layer of the association, however many there may be.”<sup>24</sup> Courts have explained that “[t]his treatment accords with the Supreme Court’s consistent refusal to extend the corporate-citizenship rule to non-corporate entities, including those that share some of the characteristics of corporations.”<sup>25</sup> Moreover, “[t]his treatment is also consistent with the common law presumption that unincorporated associations are not legal entities independent of their members.”<sup>26</sup>

As the foregoing discussion suggests, federal courts have declined to extend the corporate-citizenship rule to noncorporate entities, even if such entities are similar to corporations in terms of structure. Accordingly, as I will explain further in Part III, the corporate-citizenship rule is incorrectly applied to SARLs for purposes of diversity jurisdiction.

## II. SARLS AND THEIR CURRENT LEGAL TREATMENT

### A. *What is a SARL?*

Put simply for purposes of this Note, a SARL is not the foreign equivalent to a U.S. corporation. Rather, a SARL is a type of company that “has the characteristics of a capital company (liability of the partners limited to the amount of their contributions) as well as the characteristics of a partnership (non-transferable company shares).”<sup>27</sup> A SARL is defined by statute, and its partners

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23. *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) (first citing *Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 120 (4th Cir. 2004); then citing *GMAC Commercial Credit LLC v. Dillard Dep’t Stores, Inc.*, 357 F.3d 827, 828–29 (8th Cir. 2004); then citing *Rolling Greens MHP, L.P. v. Comcast SCH Holdings LLC*, 374 F.3d 1020, 1022 (11th Cir. 2004); then citing *Handelsman v. Bedford Vill. Assocs. Ltd. P’ship*, 213 F.3d 48, 51 (2d Cir. 2000); and then citing *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998)).

24. *Deep Marine Tech., Inc. v. Conmaco/Rector, L.P.*, 515 F. Supp. 2d 760, 766 (S.D. Tex. 2007) (first citing *Meyerson v. Harrah’s E. Chicago Casino*, 299 F.3d 616, 617 (7th Cir. 2002) (per curiam); and then citing *Kinder Morgan Liquids Terminals, LLC v. Ponns & Co., No. CIV. A H–06–3225*, 2006 WL 3691192, at \*2 (S.D. Tex. Dec. 12, 2006)).

25. *Johnson*, 437 F.3d at 899 (first citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990); and then citing *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456–57 (1900)).

26. *Id.* (citing *Strotek Corp. v. Air Transp. Ass’n of Am.*, 300 F.3d 1129, 1133 n.2 (9th Cir. 2002)).

27. *Limited liability company (SARL)*, GUICHET.LU (Mar. 15, 2016), <http://www.guichet.public.lu/entreprises/en/creation-developpement/forme-juridique/societe-capitaux/sarl/index.html> [<https://perma.cc/S2F8-7ZVD>].

have limited liability.<sup>28</sup> It may have one partner, “but no more than fifty.”<sup>29</sup> A SARL provides for shareholder liability only up to the amount of the shareholder’s contribution, and only a physical person may assume the responsibilities of manager.<sup>30</sup>

Federal courts that have attempted to determine the citizenship of SARLs thus far have found that a SARL is most similar to an American LLC.<sup>31</sup> It should then follow that SARLs should share the catchall rule for unincorporated associations, which applies to American LLCs. However, because of the foreign nature of SARLs, courts have expressed confusion as to which rule to apply for purposes of diversity jurisdiction: the corporate-citizenship rule, the rule for unincorporated associations, or both.

### B. Current Legal Treatment

Federal courts in three seminal cases—*Industrial Fuel Co. v. Invista S.A.R.L., LLC*; *V & M Star, LP v. Centimark Corp.*; and *Burge v. Sunrise Medical (US)*—have attempted to determine a rule to assess the citizenship of SARLs.<sup>32</sup> These cases constitute the primary body of law on the issue and reveal a potential problem that arises in the absence of a clear rule for determining the citizenship of SARLs: defendant companies attempting to gain access to the federal forum by fabricating diversity jurisdiction. In *Industrial Fuel Co.*, the magistrate judge recommended that the citizenship of the SARL defendant be analyzed as both a corporation and as an LLC, noting the absence of authority on the issue and the fact that a SARL is most comparable to an American LLC.<sup>33</sup> Subsequently, in *V & M Star*, the court held “the citizenship of V & M’s ‘French S.A.R.L.’ is unclear for diversity-jurisdiction purposes” and remanded the case to district court, ordering it to determine the citizenship of the defendant and its “sub-members (and potential sub-sub-members)”; however, the court did not explicitly state which rule the district court should apply.<sup>34</sup> And most recently in *Burge*, the district court—after discussing *V & M Star* (noting that there is no controlling precedent on how to determine the citizenship of a SARL) and *Industrial Fuel Co.* (noting the court’s

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28. J. Christian Nahr, *What Is a “Security” for Purposes of the U.S. Federal Securities Laws? An Analysis of Foreign Equity Interests*, 17 AM. U. INT’L L. REV. 723, 761 (2002).

29. *Id.*

30. RICHARD H. WEISE, *The International Corporate Practice (Managing the “Mix”), in REPRESENTING THE CORPORATION: STRATEGIES FOR LEGAL COUNSEL* 41 (2d ed. Supp. 2014).

31. *See* *Indus. Fuel Co. v. Invista S.A.R.L., LLC*, No. 5:06CV40-V, 2008 WL 619189, at \*1 (W.D.N.C. Feb. 5, 2008) (“[T]he North Carolina Secretary of State’s office concluded that a S.A.R.L. entity . . . was most comparable to a LLC . . .”). The Sixth Circuit similarly found that a “SARL is the French abbreviation for a term used to describe a private company similar to an American limited liability company.” *V & M Star, LP v. Centimark Corp.*, 596 F.3d 354, 356 (6th Cir. 2010) (quoting *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 924 n.2 (11th Cir. 2007)).

32. *Burge v. Sunrise Medical (US) LLC*, No. 13-cv-02215-PAB-MEH, 2013 WL 6467994 (D. Colo. Dec. 9, 2013).

33. *Indus. Fuel*, 2008 WL 619189, at \*3.

34. *V & M Star*, 596 F.3d at 356–57.

analysis of the SARL both as a corporation and an LLC)—followed *Industrial Fuel Co.* and held that both frameworks for determining citizenship should apply to analyze the citizenship of defendant Sunrise Medical LLC, whose sole member was Apollo BidCo SARL.<sup>35</sup> After analyzing Apollo's citizenship under both rules, the *Burge* court found that there was no diversity: although the defendants satisfied the jurisdictional requirements under the corporate-citizenship rule, they “failed to show the citizenship of Apollo's members and, as such, [did] not fully [show] the citizenship of Sunrise” under the rule for unincorporated associations.<sup>36</sup> The fact that Apollo would be able to remove the case under the corporate-citizenship rule but not under the rule for unincorporated associations is unsurprising since the analysis under the corporate-citizenship rule is much more forgiving than that under the rule for unincorporated associations.

In sum, the current case law teaches three things: (1) SARLs have been deemed most comparable to the American LLC—and not the equivalent of a U.S. corporation; (2) there is no clear rule for determining the citizenship of a SARL; and (3) in the absence of a clear rule, some courts have applied the corporate-citizenship rule, the rule for unincorporated associations, or both rules, seemingly just to cover their bases. But this lack of clear authority leads us to the heart of the problem: by leaving the question of which rule a court should apply in determining the citizenship of SARLs unanswered, federal courts are keeping the door open for potential “gaming” of the rules for access to the federal forum.

### C. *The Problem: Potential for Gaming of the Federal Forum*

Indeed, a careful analysis of these seminal cases reveals two commonalities that suggest some defendants may be using SARLs to improperly fabricate diversity jurisdiction. First, the party seeking access to the federal forum is the defendant in the action; and second, the defendant self-selects the corporate-citizenship rule as the applicable rule without inquiry as to which rule should apply. For instance, in *Industrial Fuel Co.*, a SARL removed the action to federal court on the basis of diversity of citizenship, asserting it was “a foreign corporation organized under the laws of the Country of Luxembourg, with its principal place of business in Wichita, Kansas.”<sup>37</sup> Similarly in *V & M Star*, the defendant LLC merely stated in support of removal that its partners included one “French S.A.R.L.”<sup>38</sup> Finally, in *Burge*, the defendant asserted it was an LLC whose “sole member is . . . [a SARL] incorporated in Luxembourg.”<sup>39</sup> While the courts and opposing parties in these three cases were particularly astute in noticing the potential jurisdictional deficiency and tackled the problem head on, it is possible that such jurisdictional defects go unnoticed more often than not given a SARL's

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35. *Burge*, 2013 WL 6467994, at \*2–3.

36. *Id.* at \*3–4.

37. *Indus. Fuel*, 2008 WL 619189, at \*1.

38. *V & M Star*, 596 F.3d at 356.

39. *Burge*, 2013 WL 6467994, at \*1.

foreign and unfamiliar nature. This is problematic because defendant companies may be intentionally misrepresenting their nature as corporations to courts in order to fabricate diversity jurisdiction. So why would a defendant do this, and how?

Consider an extreme situation: a SARL (or an LLC whose sole member is a SARL) may have members domiciled in fifty states. In that case, the company would not be able to claim diversity jurisdiction in any state under the LLC rule, but would be a citizen of *only* one or two states under the corporate-citizenship rule. As one can imagine, the difference between being a citizen of fifty states—versus one or two states—is astronomical for any defendant in terms of access to federal court and the litigation advantages that follow.

A more likely situation is where a defendant company might have a member domiciled in the forum state—thereby precluding access to federal courts under diversity jurisdiction—and opts to proffer only its “state of incorporation” and “principal place of business” as an LLC whose sole member is a SARL to skirt the jurisdictional defect. This was the case in *Burge*, where the court found complete diversity under the corporate-citizenship rule but found diversity jurisdiction destroyed under the catchall rule for unincorporated associations.<sup>40</sup> Had the court not issued an Order to Show Cause as to why the action should not be dismissed for lack of subject matter jurisdiction, the case would have proceeded in federal court without proper subject matter jurisdiction.

Ultimately, it is possible for defendants to enter the federal forum through the back door by organizing as a SARL. Further, furtive defendants may organize their company not as a SARL, but as an LLC whose sole member is a foreign SARL—as was the case in *V & M Star* and *Burge*. This sort of pretense, whereby companies create layers of sub- and sub-sub-members under the shell of a SARL, makes it difficult for courts and opposing parties to discover the jurisdictional defect because it appears the party has satisfied the rule for LLCs by proffering the citizenship of each of its members. A more searching examination of the members of the SARL—and not its alleged state of incorporation and principal place of business—may, however, result in having the case remanded for lack of diversity jurisdiction, as was the case in *Burge*.<sup>41</sup>

So how, then, should courts determine the citizenship of SARLs?

### III. ESTABLISHING A RULE FOR SARLS

This Note aims to show that, according to the principles apparent in the case law governing the three rules for citizenship, courts should not analyze a SARL as both a corporation and an LLC; rather, SARLs should be analyzed only under the catchall rule for unincorporated associations. There are two reasons for this. First, 28 U.S. Code § 1332 governs only “corporations,” and SARLs are neither

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40. *Id.* at \*3–4.

41. *Id.* at \*4.

corporations nor the foreign equivalent. Second, courts have thus accorded for all other unincorporated associations—even those similar to corporations—the catchall rule for determining citizenship, which I argue should be the rule applied to SARLs.

*A. Section 1332 Applies Only to Corporations*

Section 1332's corporate-citizenship rule applies solely to "corporations" according to the statute's language; because a SARL is not equivalent to an American corporation, it should fail to qualify for the corporate-citizenship rule under the applicable case law.<sup>42</sup> Therefore, I will (1) show that § 1332 has been applied only to corporations; (2) explain briefly, before I elaborate further on this point in Part IV, what it means to be a "corporation"; and (3) show why SARLs should not be deemed "corporations" under the meaning of § 1332.

*1. Courts Have Safeguarded § 1332 for Corporations*

Case law teaches that courts have not extended the corporate-citizenship rule to noncorporate entities, including those that share some of the characteristics of corporations in deference to the legislature and the plain language of the statute. This principle was aptly and conclusively explained by the court in *Johnson v. Columbia Properties Anchorage*, where the court collected a plethora of cases supporting the proposition that despite the LLCs' corporate traits, "every circuit that has addressed the question has treated them like partnerships for purposes of diversity jurisdiction."<sup>43</sup> Most importantly, the *Johnson* court explained that "[t]his treatment accords with the Supreme Court's consistent refusal to extend the corporate citizenship rule to non-corporate entities, including those that share some of the characteristics of corporations[.]"<sup>44</sup> and "is also consistent with the common law presumption that unincorporated associations are not legal entities independent of their members."<sup>45</sup> In essence, the *Johnson* court declared that under Supreme Court precedent, all artificial entities—save for corporations (and NBAs, both of which have statutory provisions that govern their citizenship)—fall under the catchall rule since such an entity has not been granted citizenship by Congress and remains a mere collection of citizens suing in their collective name.

Indeed, the Supreme Court has held to this principle of safeguarding § 1332's corporate-citizenship rule for over a century. This principle was articulated

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42. See *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006).

43. *Id.* (first citing *Gen. Tech. Application, Inc. v. Exro Ltda*, 388 F.3d 114, 120 (4th Cir. 2004); then citing *GMAC Commercial Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827, 828-29 (8th Cir. 2004); then citing *Rolling Greens MHP, L.P. v. Comcast SCH Holdings, LLC*, 374 F.3d 1020, 1022 (11th Cir. 2004); then citing *Handelsman v. Bedford Vill. Assocs. Ltd. P'ship*, 213 F.3d 48, 51 (2d Cir. 2000); and then citing *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998)).

44. *Id.* (first citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990); and then citing *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456-57 (1900)).

45. *Id.* (citing *Strotek Corp. v. Air Transp. Ass'n of Am.*, 300 F.3d 1129, 1133 n.2 (9th Cir. 2002)).

as early as 1900 (prior to the codification of § 1332) in *Great Southern Fire Proof Hotel Co. v. Jones*, where the Court dismissed a case for lack of diversity jurisdiction because it refused to “hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state within the meaning of the Constitution.”<sup>46</sup> The *Great Southern Fire Proof Hotel Co.* Court reasoned that the fact that a company is organized under the laws of a state does not make it a citizen of that state; rather, it must be a *corporation*, and not merely a “quasi corporation” having some of the characteristics of a corporation.<sup>47</sup> And in *Carden v. Arkoma Associates*, the Court held against the application of the corporate-citizenship rule to noncorporate entities—and appeared to foreclose the possibility of any more judicially created citizenship rules for artificial entities.<sup>48</sup> In finding that the parties lacked complete diversity, the Court held that a limited partnership “may not be deemed a ‘citizen’ under the jurisdictional rule established for corporations,”<sup>49</sup> and cited to many cases to emphasize the point that the Court has consistently refused to extend the corporate-citizenship rule to “other artificial entities.”<sup>50</sup> *Carden* explained that this principle holds true because the question of whether artificial entities other than corporations should be considered “citizens” for diversity jurisdiction purposes is one that is best left to Congress to decide.<sup>51</sup>

Notably, the *Carden* Court avoided deciding how “corporation” should be defined for purposes of § 1332 by simply excluding limited partnerships from the scope of the statute. However, the fact that the *Carden* Court found that limited partnerships do not qualify for § 1332’s corporate-citizenship rule—despite the fact that they possess “some of the characteristics of a corporation”<sup>52</sup>—is telling of the fact that the corporate threshold, if you will, that an entity must satisfy to qualify for the citizenship rule may be quite high.<sup>53</sup>

In sum, *Carden*’s holding proclaims that courts will no longer legislate from the bench on the issue of diversity citizenship, but rather defer to the legislature. In the meantime, the Court will strictly limit application of the corporate-citizenship rule to “corporations.”

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46. *Great S. Fire Proof Hotel Co.*, 177 U.S. at 454–55, 458.

47. *Id.* at 456–57.

48. *See* *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990).

49. *Id.* at 188.

50. *See e.g.*, *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 461–62, 461 n.7 (1980); *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 151 (1965); *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 480–81 (1933); *Great S. Fire Proof Hotel Co.*, 177 U.S. at 456–57; *Chapman v. Barney*, 129 U.S. 677, 682 (1889).

51. *Carden v. Arkoma Assocs.*, 494 U.S. at 196.

52. *Id.* at 189 (quoting *Great S. Fire Proof Hotel Co.*, 177 U.S. at 456)).

53. *See id.*

## 2. Section 1332: Defining “Corporation”

Although courts have yet to resolve the definition of “corporation,” I will attempt to define what a “corporation” is for the limited purpose of assessing whether a SARL is a “corporation” per se under § 1332.

The legislative record of § 1332 shows that the problem courts face with SARLs (i.e., possible gaming of the federal system) is not a new one. By 1958, the year Congress added § 1332(c), the rule that a corporation is deemed a citizen of the state in which it is incorporated was firmly established by case law.<sup>54</sup> However, Congress enacted § 1332(c) to address an emerging problem: corporations gaming the system—or “incorporation shopping”—by exploiting the state-by-state inconsistencies in incorporation laws “by simply incorporating in states in which they did no business, thereby guaranteeing their ability to remove most suits to federal court.”<sup>55</sup> By adding the “principal place of business” to the corporate-citizenship test under § 1332(c), Congress intended to ensure that federal courts’ diversity jurisdiction would not be restricted to those entities state law decides to call “corporations” since such a bright-line rule would be to “[fuse] simplicity of application with the important policy of prohibiting state interference with federal diversity jurisdiction.”<sup>56</sup> Accordingly, the legislative record suggests that a corporation should not be defined under a plain language analysis (i.e., whether the name of the company includes the word “corporation,” or whether a company meets the requirements for incorporation under state laws). However, Congress has yet to define “corporation” for the purposes of § 1332(c), and there is thus no clear directive on how to define a “corporation.” Some courts have consequently wrestled with the task of defining what is required to be a “corporation” for purposes of diversity jurisdiction.<sup>57</sup>

However, case law provides some guiding principles that may be helpful. The Supreme Court has maintained that “judicial extension of citizenship to corporations was a unique occurrence and that all future extensions would require congressional action.”<sup>58</sup> Moreover, the Court in *Carden* opted not to define “corporation” under § 1332 out of deference to Congress, instead holding narrowly that a limited partnership does not qualify for the corporate-citizenship rule under § 1332.<sup>59</sup> Hence, the guiding principle from the case law is that courts should read the diversity jurisdiction statute *narrowly* for artificial entities, because

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54. Recent Case, *Diversity Jurisdiction*—Hoagland v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737 (7th Cir. 2004), 118 HARV. L. REV. 1347, 1352–54 (2005) [hereinafter *Diversity Jurisdiction*].

55. *Id.*

56. *Id.* at 1352–53.

57. See, e.g., Hoagland v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737 (7th Cir. 2004).

58. *Diversity Jurisdiction*, *supra* note 54, at 1352.

59. See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195–97 (1990).

“broadening its scope is a task ‘performed more legitimately by Congress than by courts.’”<sup>60</sup>

The task of conclusively defining “corporation” for purposes of § 1332 is thus best left for Congress (and is a task that cannot be performed in this Note); however, I will return to address some obvious counterarguments that emerge from this absence of a clear directive in Part IV—namely, where courts should draw the line between being sufficiently corporation-like and not being enough. But for now, I will explain why a SARL is not a “corporation” simply by virtue of the fact that it is so unlike the U.S. public business corporation (hereinafter called a “corporation per se”), which the *Carden* Court has arguably embraced as the standard.

### 3. *A SARL Is Not a “Corporation” Per Se, but More Like an LLC*

To show that a SARL should not qualify for the corporate-citizenship rule under *Carden* and its progeny, we need only establish that a SARL is not, in fact, a “corporation” per se in order for the catchall rule for all other unincorporated associations to apply.

As an initial matter, an analysis of the company structure of a SARL reveals that it is dissimilar to an American corporation. Black’s Law Dictionary defines a corporation as an entity

having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely; a group or succession of persons established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it.<sup>61</sup>

This definition, coupled with the case law previously discussed, reveals that a critical requirement needed for an entity to be deemed a corporation is that it must have legal personality and power to act as a single, artificial “citizen” distinct from the individuals who make up the entity. A SARL does not meet this requirement. A SARL is an entity that is indistinct from the individuals who make up the entity since it is statutorily defined as having nontransferable company shares, which provides for shareholder liability up to the amount of the shareholder’s contribution.

Furthermore, the fact that a SARL is not the equivalent of an American corporation is discussed extensively by Professor Loftus E. Becker’s law review article, *The Société Anonyme and the Société à Responsabilité Limitée in France*, which distinguishes SARLs from the American corporation.<sup>62</sup> In his article, Professor Becker explains two types of entities: (1) the Société Anonyme (SA), the

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60. *Diversity Jurisdiction*, *supra* note 54, at 1352 (quoting *Carden*, 494 U.S. at 197).

61. Corporation, BLACK’S LAW DICTIONARY (10th ed.2014).

62. See Loftus E. Becker, *The Société Anonyme and the Société à Responsabilité Limitée in France*, 38 N.Y.U.L. REV. 835 (1963).

counterpart under French law of an American corporation, and (2) the SARL, which he explains “has no exact counterpart under American law.”<sup>63</sup> I will use this French paradigm to support my argument that a SARL—French or otherwise—is not the foreign equivalent to the American corporation per se and is thus unable to claim the corporate-citizenship rule.

Professor Becker explains that the “SA is the form of French enterprise most comparable to that of a United States corporation[.]” and is “[u]tilized by the more important French industrial and commercial enterprises[.]”<sup>64</sup> The SA also “possesses a prestige greater than that enjoyed by a SARL, which is particularly suited for family-owned businesses and smaller enterprises desiring simplicity of operation.”<sup>65</sup> Thus, despite the greater complexity and the additional formalities required to organize an SA, Professor Becker notes that U.S. investors who desire to enter the French market in the most favorable atmosphere organize an SA rather than a SARL;<sup>66</sup> and of those who do opt to organize and operate a SARL for simplicity’s sake, U.S. investors often grow frustrated when they are unable to impose adequate controls and manage the SARL as one could according to U.S. corporate practices.<sup>67</sup> Given that a SARL’s characteristics differ so vastly from the U.S. corporation, Professor Becker concludes that any American investor who contemplates making a “substantial equity investment in France, who has a choice as to the form of organization to be adopted under French law, should give serious consideration to the creation of an SA, even though that form of organization is more complex to organize and to operate.”<sup>68</sup> Thus, Professor Becker’s extensive survey of French corporate practices demonstrates that a SARL is substantially dissimilar to an American corporation.

To further illustrate this point, I have included Table 1 below, highlighting some key differences between a French SARL and an American corporation.

**Table 1**

<b>American Corporation</b>	<b>French SARL</b>
<p>There are five key legal characteristics an American business corporation must possess, two of which are:</p> <ul style="list-style-type: none"> <li>• A (multiperson) board of directors.<sup>69</sup></li> <li>• Fully transferable shares in</li> </ul>	<p>In contrast, a SARL does not, as a matter of law, possess several key characteristics:</p> <ul style="list-style-type: none"> <li>• A SARL can dispense with a collective board in favor of a single, general director or one-person</li> </ul>

63. *Id.* at 836.

64. *Id.*

65. *Id.* at 839.

66. *Id.*

67. *Id.* at 889.

68. *Id.*

69. Henry Hansmann & Reinier Kraakman, *What is Corporate Law?* 13 (Yale Law Sch. Ctr. for Law, Econ., & Pub. Policy Research Paper No. 300, 2004), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=568623](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=568623).

<p>ownership. This permits the company to make a public offering of its shares and to conduct business uninterrupted as the identities of its owners change.<sup>70</sup></p>	<p>board.<sup>71</sup></p> <ul style="list-style-type: none"> <li>• Shares are non-negotiable and are not freely transferable to persons who are not already shareholders in the enterprise.</li> <li>• Moreover, a SARL cannot make a public offering of its shares.<sup>72</sup></li> </ul>
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Given such differences, it is clear that a SARL is not the foreign equivalent of an American corporation<sup>73</sup>—that would be the Société Anonyme, or SA.<sup>74</sup> And according to the guiding principles illustrated by the case law, whether a SARL is most similar to an American LLC or a partnership is of no consequence because both entities share the catchall rule.

*B. The Catchall Rule Applies to All Other Unincorporated Associations*

After *Carden*, it is established that for purposes of diversity jurisdiction, the citizenship of artificial entities—except for corporations—must be that of its individual members.<sup>75</sup> This rule has been applied with respect to labor unions, joint-stock associations, and insurance associations or exchanges, as well as to various other kinds of unincorporated associations,<sup>76</sup> including LLCs and partnerships.<sup>77</sup> The rationale behind this catchall rule is that in the absence of a statute that provides otherwise (e.g., NBAs and corporations),<sup>78</sup> the persons composing such associations sue in their collective name; thus, they are the parties whose citizenship determines the diversity jurisdiction of a federal court.<sup>79</sup> Because Congress has not prescribed a citizenship rule for SARLs, the corporate-citizenship rule should not be extended to SARLs based on the parties' allegations merely for the sake of ease and simplicity. This is especially true because the *Carden* Court solidified the principle that judicial extension of citizenship to corporations was a unique occurrence and that all future extensions would require congressional action, stating: “In other words, having entered the field of diversity policy with regard to artificial entities once (and forcefully) in *Letson*, we have left

70. *Id.* at 10.

71. *Id.* at 13.

72. Becker, *supra* note 62, at 880.

73. See Hansmann & Kraakman, *supra* note 69, at 6 n.10.

74. See Becker, *supra* note 62, at 880 n.204.

75. *Oglesby v. Cooper Mfg. Corp.*, 144 B.R. 700, 710 n.20 (E.D. La. 1992) (recognizing *Carden v. Arkoma Associates*'s abrogation of *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), where the Court held that state law determined the citizenship of a foreign entity resembling the U.S. corporation).

76. Jones, Jr., *supra* note 9, at 852.

77. See *Deep Marine Tech., Inc. v. Conmaco/Rector, L.P.*, 515 F. Supp. 2d 760, 766 (S.D. Tex. 2007).

78. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 197 (1990).

79. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980).

further adjustments to be made by Congress.”<sup>80</sup> If courts were to apply the corporate-citizenship rule either by itself or in conjunction with the rule for unincorporated associations, they would essentially be creating a new rule for citizenship for SARLs—squarely against Supreme Court precedent.

This conclusion is supported by the fact that we need not rely on secondary sources for the proposition that a SARL is not a foreign version of the American corporation. As explained in the discussion above, federal courts have already found that a SARL is not equivalent to the American corporation, but rather similar to the American LLC. To restate the point, the court in *Industrial Fuel* noted that the “North Carolina Secretary of State’s office concluded that a S.A.R.L. entity created under Luxembourg’s laws was most comparable to a [sic] LLC under North Carolina Law,”<sup>81</sup> and the court in *V & M Star* stated that a “SARL is the French abbreviation for a term used to describe a private company similar to an American limited liability company.”<sup>82</sup>

Because primary sources of law already exist and support the proposition that SARLs are not “corporations,” and since Congress has not acted to address the citizenship of SARLs, courts should not apply the corporate-citizenship rule when addressing SARLs. Whether the corporate-citizenship rule would apply to SAs is a separate, more difficult issue not addressed in this Note.

#### IV. THE COUNTERARGUMENT: HOW, THEN, SHOULD “CORPORATION” BE DEFINED FOR DIVERSITY JURISDICTION, AND DOES THIS MATTER FOR SARLS?

This Note has shown thus far that a SARL is not a corporation per se under § 1332. However, that was done by compiling primary and secondary sources in which courts and experts had found that the SA is the foreign equivalent to an American corporation and that a SARL—albeit without an equivalent U.S. company structure—is most similar to an American LLC; it was not done by defining “corporation” and showing how and why a SARL failed to meet that criteria. This is partly because under the current case law, there is no settled definition of “corporation.” Indeed, in holding that an LLC should be analyzed under the catchall rule, the *Carden* Court did not touch on how a court should determine whether an entity is a corporation; it merely held that LLCs should be excluded from the scope of § 1332 by assuming that LLCs are not “corporations per se.”<sup>83</sup> This lack of a clear directive leaves open the possibility that *if* a SARL is deemed to be most similar to some type of “corporation”—perhaps a professional corporation (PC)—it may be entitled to application of the corporate-citizenship rule according to the Seventh Circuit’s holding in *Hoagland*.

The Seventh Circuit in *Hoagland*—in finding that the corporate-citizenship

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80. See *Carden*, 494 U.S. at 196–97.

81. *Indus. Fuel Co. v. Invista S.A.R.L., LLC*, 2008 WL 619189, at \*1 (W.D.N.C. 2008).

82. *V & M Star v. Centimark Corp.*, 596 F.3d 354, 356 (6th Cir. 2010) (quoting *Sloss v. Indus. Corp. v. Eurisol*, 488 F.3d 922, 924 n.2 (11th Cir. 2007)).

83. *Carden*, 494 U.S. at 189.

rule applies to PCs—relied on the plain language of § 1332 to extend the corporate-citizenship rule to “professional corporations” (based on the word “corporation” being used for the business entity as defined by state law) with the aim of reducing jurisdictional litigation.<sup>84</sup> The Supreme Court has yet to comment on *Hoagland*’s plain language rule.

Because the Supreme Court has not defined “corporation” and has not yet ruled on the Seventh Circuit’s plain meaning approach, we are left with two possible approaches for determining the citizenship of SARLs: (A) under Supreme Court precedent, courts should not apply the corporate-citizenship rule to any entity that is not a corporation per se, including PCs and SARLs, until Congress acts to define “corporation” under § 1332; or (B) according to the Seventh Circuit’s decision in *Hoagland*, courts should apply the corporate-citizenship rule to any entity that is referred to as a “corporation” by state statutes, whether or not it is a corporation per se, under a plain meaning analysis. If the Court were to adopt the second, plain meaning rule, it would open the door for SARLs to make jurisdictional arguments for application of the corporate-citizenship rule by virtue of being similar to some sort of “corporation” as defined by certain state laws.

However, critics have argued that adopting the Seventh Circuit’s plain meaning approach would be to “fuse[] simplicity of application with the important policy of prohibiting state interference with federal diversity jurisdiction.”<sup>85</sup> Indeed, such reliance on plain meaning would improperly confer federal jurisdictional policy to the states and lead to interstate confusion because state laws are inconsistent in their requirements for incorporation.<sup>86</sup> That result would contradict the legislative intent behind § 1332 and inevitably lead to the same state-by-state inconsistency that led to “incorporation-shopping” prior to the 1958 addition of the principal place of business rule.<sup>87</sup>

The first approach can help avoid such issues. A rule that would limit application of the corporate-citizenship rule to corporations per se (until Congress acts) would not have this problem because business corporations—or what I have referred to as corporations per se—are much more uniformly regulated than the other types of corporations (like professional corporations) under state law.<sup>88</sup> Indeed, critics of the *Hoagland* decision have commented that “[a] bright-line rule limiting § 1332(c)’s applicability to business corporations would strike a feasible balance between Judge Posner’s concern about minimizing jurisdictional litigation and the principle that state law should not demarcate the reach of federal diversity jurisdiction.”<sup>89</sup> Furthermore, safeguarding the corporate-citizenship rule solely for corporations per se would be in accordance with Supreme Court precedent as well

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84. *Hoagland v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737 (7th Cir. 2004).

85. *Diversity Jurisdiction*, *supra* note 54, at 1353.

86. *Id.* at 1350–53.

87. *Id.* at 1349–53.

88. *Id.* at 1353–54.

89. *Id.* at 1350–51.

as the legislative intent behind § 1332—unlike the Seventh Circuit’s approach in *Hoagland*. Accordingly, the term “corporation,” as used in 28 U.S.C. § 1332, should be reserved for corporations per se, which would preclude private corporations, “limited liability corporations,” and, of course, SARLs from its scope.

#### CONCLUSION

The foregoing discussion shows that the corporate-citizenship rule should not be used in determining the citizenship of SARLs either by itself, or in conjunction with another rule; to do so would be to legislate from the bench and to create a new rule for citizenship, which the Supreme Court has proclaimed to be an improper function for the judiciary. Indeed, noncorporate entities,<sup>90</sup> regardless of any shared characteristics with corporations,<sup>91</sup> should be subject to the rule for unincorporated associations absent legislative action under Supreme Court precedent. Because SARLs have been found by courts to be most similar to the American LLC—and are certainly not the foreign equivalent of the American corporation<sup>92</sup>—it follows that courts should apply only the catchall rule for unincorporated associations, making SARLs a citizen of every state in which a member is domiciled.<sup>93</sup>

By safeguarding the corporate-citizenship rule in this way, courts will be giving due deference to the legislative intent behind § 1332, observing the long-standing common law principle that federal courts should not be in the business of crafting new citizenship rules, and preventing improper fabrication of diversity jurisdiction and access to the federal forum.

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90. *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) (first citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990); and then citing *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456–57 (1900)).

91. *Id.*

92. *See V & M Star v. Centimark Corp.*, 596 F.3d 354, 356 (6th Cir. 2010) (“Furthermore, the citizenship of V & M’s ‘French S.A.R.L.’ is unclear for diversity-jurisdiction purposes. ‘SARL is the French abbreviation for a term used to describe a private company similar to an American limited liability company.’” (quoting *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 924 n.2 (11th Cir. 2007))); *Industrial Fuel Co., Inc. v. Invista S.A.R.L., LLC*, 2008 WL 619189, at \*1 (W.D.N.C. 2008).

93. *See TM Mktg., Inc. v. Art & Antiques Assocs., L.P.*, 803 F. Supp. 994, 1000 (D.N.J. 1992).