No. _____

October Term 2019

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE RICHARD METSCH and
METSCHLAW, P.A.,

Petitioners,

v.

TIMOTHY HAJDASZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, CASE NO. 19-12528

LAWRENCE R. METSCH
Counsel of Record
Fla. Bar No. 133162
Metschlaw, P.A.
20801 Biscayne Blvd., Suite 300
Aventura, FL 33180-1423
Telephone: (305) 792-2540
Telecopier: (305) 792-2541
E-Mail: l.metsch@metsch.com

July 31, 2020

QUESTION PRESENTED

In order to avoid removal to Federal Court, Florida State Court personal injury plaintiffs' attorneys routinely fail to specify in their complaints the amounts of damages sought and, instead, formulaically assert that their clients' claims are "in excess of $15,000.00".[1] Every effort is then made in pre-trial discovery proceedings to prevent the amount of the claim from being locked down. Answers to written interrogatories provide limited information and assert that the amount of the claim is "undetermined". Questions posed at depositions are deflected.

In this action, the ploy was escalated to the extreme. The jury was selected. Opening statements were made. On cross-examination, the plaintiff was not forthcoming. Then the parties rested.

Having exhausted all avenues for delay, the plaintiff's attorney filed a *written* motion for a directed verdict in which he asked for damages in an amount that was in excess of $75,000.00, the trigger amount under 28 U.S.C. § 1332. The defendant finally had a good faith, non-speculative belief that diversity jurisdiction existed and removed the case to Federal Court.

There is generally a one-year time limit on removal after a complaint is filed or until the defendant receives, from the plaintiff, "an amended pleading, motion, order or other paper" showing facts to establish Federal Court subject-matter jurisdiction.

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[1] Effective January 1, 2020, the civil controversy subject-matter jurisdiction of the Florida Circuit Court was changed from claims in excess of $15,000.00 to claims in excess of $30,000.00.

Thus, a civil action may not be removed until the defendant receives an unambiguous statement of the claim and has a good faith belief that the jurisdictional predicate amount is satisfied. The Eleventh Circuit has admonished defendants' counsel not to remove a proceeding based purely on speculation as the amount of damages claimed by the plaintiff.

The plaintiff successfully "stonewalled" the defendant's effort to establish that the plaintiff was claiming damages in excess of $75,000.00 until more than one year had elapsed after the filing of the complaint. Immediately after the plaintiff's counsel disclosed that his client was seeking more than $75,000.00 in damages, the defendant removed the lawsuit to Federal Court.

But the Federal Court rewarded the plaintiff's effort to obstruct the defendant's right to remove by remanding- on the basis of the expiration of the one-year limitation- the civil action to the Florida State Court and imposing monetary sanctions on the defendant's lawyer pursuant to Rule 11, Federal Rules of Civil Procedure ("Rule 11"). The defendant's lawyer appealed and the Eleventh Circuit affirmed.

Did the Eleventh Circuit err when it affirmed the District Court's imposition of sanctions pursuant to Rule 11, for the removal by Petitioners Lawrence Richard Metsch and Metschlaw, P.A. (hereinafter collectively referred to as "Metsch") of the Florida State Court personal injury action of Respondent Timothy Hajdasz ("Hajdasz") against Magic Burgers, LLC ("MBLLC"), notwithstanding Metsch's heeding of the Eleventh Circuit's Rule 11-based warning in *Lowery v. Alabama Power Co.*, 483 F. 3d 1184, 1213, fn. 63 (11th Cir. 2007)?

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TABLE OF AUTHORITIES

PARTIES TO THE PROCEEDINGS BELOW

Metsch was counsel for MBLLC in: (1) *Timothy Hajdasz v. Magic Burgers, LLC,* Case No. 17-30366-CICI, Circuit Civil Division, Seventh Circuit Court, Volusia County, Florida ("Case No. 17-30366") and, following removal, (2) *Timothy Hajdasz v. Magic Burgers, LLC,* Case No. 6:18-CV-1755-ORL-ACC, U.S. District Court, Middle District of Florida, Orlando Division ("Case No. 18-1755").

Hajdasz was the Plaintiff in Case No. 17-30366 and Case No. 18-1755.

PETITION FOR A WRIT OF CERTIORARI

Metsch prays that a Writ of Certiorari issue to review the decision of the Eleventh Circuit in Case No. 19-12528.

CITATIONS TO OPINIONS BELOW

A copy of the March 11, 2020, opinion of the Eleventh Circuit in this cause, reported as *Timothy Hajdasz v. Magic Burgers, LLC,*, 805 Fed. Appx. 884, 2020 U.S. App. LEXIS 7559, is attached to this Petition as Attachment "A."

A copy of the December 10, 2018, District Court order of remand in Case No. 18-1755, reported as *Timothy Hajdasz v. Magic Burgers, LLC,* 2018 WL 7436133, 2018 U.S. Dist. LEXIS 222910, is attached to this Petition as Attachment "B."

A copy of May 17, 2019, Report and Recommendation of the U.S. Magistrate Judge in Case No. 18-1755, reported as *Timothy Hajdasz v. Magic Burgers, LLC,* 2019 WL 3383546, 2019 U.S. Dist. LEXIS 127047, is attached to this Petition as Attachment "C".

A copy of the June 26, 2019, District Court order in Case No. 18-1755 imposing Rule 11 sanctions on Metsch, reported as *Timothy Hajdasz v. Magic Burgers, LLC,* 2019 WL 3383429, 2019 U.S. Dist. LEXIS 127046, is attached to this Petition as Attachment "D".

STATEMENT OF JURISDICTION

Metsch invokes this Court's jurisdiction to grant this petition for a Writ of Certiorari to the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1). The Eleventh Circuit denied Metsch's petition for rehearing en banc on April 30, 2020, and issued its judgment as mandate on May 8, 2020. Pursuant to this Court's order of March 19, 2020, concerning the COVID-19 public health emergency, Metsch has 150 days from April 30, 2020, in which to petition this Court for the issuance of a Writ of Certiorari to the Eleventh Circuit.

INTRODUCTION

U.S. Circuit Judge Gerald Bard Tjoflat's opinion for the Eleventh Circuit in *Lowery v. Alabama Power Co., supra,* at Footnote 63, warned:

> Under the first paragraph of § 1446(b), a case may be removed on the face of the complaint if the plaintiff has alleged facts sufficient to establish the jurisdictional requirements. Under the second paragraph, a case becomes removable when three conditions are present: there must be (1) "an amended pleading, motion, order or other paper," which (2) the defendant must have received from the plaintiff (or from the court, if the document is an order), and from which (3) the defendant can "first ascertain" that federal jurisdiction exists. § 1446(b). Under either paragraph, the documents received by the defendant must contain an unambiguous statement that clearly establishes federal jurisdiction. *See* *Bosky v. Kroger Texas, LP*, 288 F.3d 208, 211 (5th Cir.2002) (holding that grounds must be "unequivocally clear and certain"); *Huffman v. Saul Holdings, LP*, 194 F.3d 1072, 1078 (10th Cir.1999) (same).
>
> > As we have noted, a removing defendant's counsel is bound by Rule 11 to file a notice of removal only when counsel can do so in good faith. We think it highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case such as the one before us—where the defendant, the party with the burden of proof, has only bare pleadings containing unspecified damages on which to base its notice—without seriously testing the limits of compliance with Rule 11. Unlike the typical plaintiff who originally brings a diversity action in federal court, the removing defendant generally will have no direct knowledge of the value of the plaintiff's claims. *See* *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288, 290, 58 S.Ct. 586, 590–91, 82 L.Ed. 845 (1938) (observing that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith," and that "[the plaintiff] knows or should know whether his claim is within the statutory requirement as to amount").
> >
> > To the extent the defendant does obtain knowledge of the claims' value, it will generally come from the plaintiff herself in the form of information in an "other paper." *See* § 1446(b). This is so because a plaintiff who has chosen to

> file her case in state court will generally wish to remain beyond the reach of federal jurisdiction, and as a result, she will not assign a specific amount to the damages sought in her complaint. In such a case, like the case before us, the defendant would need an "other paper" to provide the grounds for removal under the second paragraph of § 1446(b). In the absence of such a document, the defendant's appraisal of the amount in controversy may be purely speculative and will ordinarily not provide grounds for his counsel to sign a notice of removal in good faith.

As his "reward" for heeding Judge Tjoflat's warning in *Lowery v. Alabama Power Co., supra,* Metsch has been subjected to Rule 11 sanctions by the District Court and the Eleventh Circuit because, as counsel for MBLLC, he removed Case No. 17-30366 to the District Court. Metsch respectfully urges this Court to right the wrong which Metsch has suffered by reason of the Rule 11-based sanctions imposed on him by the courts below.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Hajdasz was represented in Case No. 17-30366 by Attorney Martin J. Jaffe, a member of Morgan & Morgan, P.A., Deland, Florida.

In his complaint in Case No. 17-30366, Hajdasz alleged that, on July 27, 2015, he had sustained personal injuries when he had slipped and fallen on water in the men's restroom of a Burger King restaurant operated by MBLLC and located at 330 South Atlantic Avenue, Ormond Beach, Volusia County, Florida, thereby sustaining personal injury damages in excess of $15,000.00. Hajdasz's complaint in pertinent part alleged:

> 8. As a direct and proximate result of the negligence of Defendant, the Plaintiff suffered bodily injury in or about his body and extremities, resulting in pain and suffering, disability, disfigurement, permanent and significant scarring, mental anguish, loss of the capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss of earning, loss of the ability to earn money, and aggravation of previously existing condition. The losses are either permanent or continuing and Plaintiff will suffer losses in the future.

By way of defense in Case No. 17-30366, MBLLC contended that Hajdasz's claimed July 27, 2015, slip and fall accident, to which there had been no witnesses, was a figment of his imagination.

On March 14, 2017, MBLLC propounded its first set of written interrogatories to Hajdasz in Case No. 17-30366, which he answered on July 25, 2017. Pertinent interrogatories and answers follow:

Interrogatory No. 11: Describe each injury for which you are claiming damages in this case, specifying the part of your body that was injured, the nature of the injury, and, as to any injuries you contend are permanent, the effects on you that you claim are permanent.

Answer: I have suffered injuries as set forth in my medical records, including but not limited to permanent injuries to my back and head, which have resulted in constant and ongoing pain.

Interrogatory No. 12: List each item of expense or damage, other than loss of income or earning capacity, that you claim to have incurred as a result of the incident described in the complaint, giving for each item the date incurred, the name and business address of the person or entity to whom each was paid or is owed, and the goods or services for which each was incurred.

Answer:

Florida Hospital Oceanside 264 South Atlantic Avenue Ormond Beach, FL 32176	7/27/15 8/2/15	$3,564.16 $4,504.15
Shorecoast ER Services P.O. Box 8668 Philadelphia, PA 19101	7/27/15	$1,698.00
The Medicine Shoppe 22 Broadway Avenue Kissimmee, FL 34741		$undetermined
Coastal Neurology and Rehab Ctr 801 Belville Road South Daytona, FL 32119	8/10-15-4/12/16	$9,140.00
Stand Up MRI & Diagnostic Center, P.A, P.O. Box 127 Farmingdale, NY 11735	8/19/15	$5,900.00

Prescriptions/transportation expenses

Interrogatory No. 13: Do you contend that you have lost any income, benefits, or earning capacity in the past or future as a result of the incident described in the complaint? If so, state the nature of the income, benefits, or earning capacity, and the amount and the method that you used in computing the amount.

Answer: Total amount of wages lost are undetermined at this time.

On January 11, 2018, Metsch took Hajdasz's deposition examination in Deland, Florida. During that deposition examination, the following discussion occurred:

Q. Okay. Got it. You're here today asking for an award of damages, is that correct?

A. That's correct.

Q. So the only thing you're going to get out of this lawsuit is money? I can't restore your health. Mr. Braun can't restore it, no one can. That's another power. You're asking for an award of damages, is that correct?

A. Correct.

Q. How much are you asking for?

MR. JAFFE: Object to the form.

A. I'm not going to answer that.

MR. JAFFE: As a matter of attorney client privilege I'm going to instruct my client not to answer that at this time.

MR. METSCH: Are you asking for compensation for your lost wages because you can't work?

A. Again, I'm not going to answer that.

MR. METSCH: Can we go off the record just a second?

(Discussion off the record)

MR. METSCH: I don't think you have to certify questions any longer, but go ahead and make a mark on your transcript.

MR. JAFFE: And, also, settlement negotiations are confidential.

MR. METSCH: I'm not taking about settlement. I want to know what his demand is.

MR. METSCH: What do you think this claim is worth? What is your claim here?

A. I'm not going to answer.

MR. JAFFE: I'm going to instruct you those are questions that we have discussed, attorney-client privilege, and I'm going to instruct you not to answer.

On May 23, 2018, in connection with Case No. 17-30366, the parties participated in a court-ordered mediation conference in Deland, Florida, the communications during which were confidential by virtue of § 44.405, Florida Statutes. In the course of that mediation conference, Metsch advised the mediator and Attorney Jaffe that, should Hajdasz thereafter provide to MBLLC, in a non-confidential setting, a "paper" reflecting his true settlement demand, MBLLC would forthwith remove Case No. 17-30366 to the District Court pursuant to 28 U.S.C. §§ 1332 and 1441. The mediator then declared an impasse.

On June 27, 2018, MBLLC moved in Case No. 17-30366 to compel Hajdasz to answer the January 11, 2018, deposition questions relating to the amount of his claimed damages. Circuit Judge Michael S. Orfinger, on August 10, 2018, entered an

amended order which in pertinent part ruled:

> 10. Defendant's Motion to Compel Answers to Deposition Questions is **DENIED.** The Court finds that Plaintiff's privilege objections to the questions at issue were proper, based upon the way in which the questions were phrased. The Court does hereby sustain those objections.
>
> 11. Notwithstanding the foregoing paragraph, Defendant's *ore tenus* Motion to Reopen Plaintiff's Deposition is **GRANTED**, subject to the following:
>
> > a. Defendant may notice and take the Plaintiff's deposition on the sole issue of the dollar amount of damages Plaintiff claims. Defendant is to inquire separately about economic and non-economic damages;
> >
> > b. No additional areas of inquiry are permitted; and
> >
> > c. Defendant must take the deposition via telephone or pay the Plaintiff's round-trip cost for travel to Florida.

In accordance with Judge Orfinger's August 10, 2018, amended order, Metsch took a second, telephonic deposition examination of Hajdasz on August 13, 2018. Obeying the instructions of Attorney Jaffe, Hajdasz refused to provide substantive answers to Metsch's questions concerning the amounts of economic and non-economic damages claimed by Hajdasz in Case No. 17-30366.

MBLLC, on August 14, 2018, moved in Case No. 17-30366 for the entry of an order precluding Attorney Jaffe from arguing to the jury that Hajdasz should be awarded a specific sum of money as damages for his alleged personal injuries. That motion in pertinent part contended:

> 3. In violation of ¶ 11 of the Court's August 10, 2019, order, counsel for Hajdasz, during the foregoing August 13, 2018, deposition examination, repeatedly and improperly instructed Hajdasz not to answer the undersigned's legitimate questions concerning the amount of damages which Hajdasz seeks in this civil action. Under these circumstances, the Court should enter the preclusion order requested in the introductory portion of this motion.

Judge Orfinger denied MBLLC's preclusion order on October 10, 2018.

On August 15, 2018, Attorney Jaffe and Metsch met in Daytona Beach, Florida. At that meeting, Attorney Jaffe provided Metsch with copies of Hajdasz's Coastal Neurology, Inc., medical records and a summary of his medical bills.

In the medical records, there appeared a progress note authored by Dr. Sanjay S. Sastry, dated September 20, 2016, which in pertinent part observed:

> **Plan:** Based on the patient's history, subjective complaints and objective findings it is my professional opinion this patient has reached a point of maximum medical improvement under our care. It is further my opinion that this patient has sustained a 4% permanent impairment for headaches, 7% permanent impairment to the cervical spine, and an 8% permanent impairment to the lumber spine. Combined the total whole body impairment is a 17% based on the American Medical Association Guide to Physical Impairment, sixth edition.
>
> Future medicals: It is likely, based on the patient's subjective complaints and objective findings, this patient will need ongoing supportive and palliative care. He should therefore, receive physical therapy and interventional pain management on a p.r.n. basis. His future medical costs will be anywhere between $2,800 and $5,500.00 per year.

Hajdasz's Coastal Neurology, Inc., medical records contained one (1) later-dated entry: a February 7, 2017, procedure note describing Dr. Sastry's administration of a

fluoroscopically-assisted translaminar lumbar epidural steroid injection in the L5-S1 region of Hajdasz's spine. Translated into plain English: as of August 15, 2018, more than eighteen (18) months had elapsed since Hajdasz's most recent consultation with, and treatment by, Dr. Sastry.

The summary of medical bills which was provided by Attorney Jaffe to Metsch on August 15, 2018, reflected the following:

MEDICAL PROVIDER	**AMOUNT**
Florida Hospital Oceanside	$8,068.31
Shorecoast ER Services	$3,396.00
Coastal Neurology, Inc.	$12,070.00
Stand Up MRI & Diagnostic Center, P.A.	$5,900.00
TOTAL	$29,434.31

The trial of Case No. 17-30366 began on October 15, 2018, in Daytona Beach, Florida. Before the venire was brought into the courtroom, Attorney Jaffe informed Judge Orfinger and Metsch that:

> Judge, first, I do believe the Court is correct on losing jurisdiction immediately upon removal. I've been in federal court enough to know that I think that that is just the rule and the law.
>
> With respect to those future damages, they're in the record. They have been in the record. And if you take even the low number of Mr. Hajdasz's future medicals at $2,800 per year, as is in the record and has been in the medical records since August 1st, in addition to the one year, I'm very comfortable that the federal court is going to send this back to us, and we'll be just getting ready for trial again.

> Like I said, I am not in the – I'm not in the business of wasting anyone's time here, especially the Court's. And I think it's very clear on the record we're going to ask for past medicals, we're going to ask for future medicals as testified on the record by Dr. Sastry. And then we're going to make, as we always do, suggestions for non-economic damages of, you know, whatever the jury decides is reasonable.
>
> At the end of the day, the economics alone on futures, as is in the record, is, on the low end, $62,000. The past medical expenses in the record, as counsel has known about, is $27,000 plus. So adding them together, at the low end, the economics far exceed 75 here.
>
> The issue is defendants didn't do their job, essentially, to remove this timely. And that will be pointed out to the federal court on a motion to remand if they remove it.
>
> But I would ask that we don't sit here with a charade and go through and waste the Court's time and these jurors' time to have Mr. Metsch go ahead and file a notice of removal after they's spent two days here or even two hours here. It's not fair to them, it's not fair to the Court, or everyone else here.

The jury was then selected and counsel for the parties gave their opening statements. On October 16, 2018, Hajdasz presented his evidence. Testifying on cross-examination, Hajdaz (a) acknowledged that, prior to slipping and falling, he had seen the water on the floor of the men's restroom and had then stepped into that water and (b) refused to quantify his claim for non-economic personal injury damages.

At the conclusion of Hajdasz's evidence, on October 16, 2018, MBLLC moved for a directed verdict on two (2) grounds: (1) Hajdasz's claim for personal injury damages was barred by the "open and obvious hazard" doctrine articulated in *Brookie v. Winn-Dixie Stores, Inc.*, 213 So. 3d 1129 (Fla. 1st DCA 2017); and (2) Hajdasz had offered no

evidence to carry his burden, under § 768.0755, Florida Statutes, of proving either actual or constructive [pre-alleged accident] knowledge on MBLLC's part of the presence of a "transitory foreign substance" on the floor of the men's restroom. Judge Orfinger denied that motion.

Thereafter, on October 16, 2018, in Case No. 17-30366, Hajdasz moved orally *and in writing* for a directed verdict as to causation, permanency and past/future medical expenses. In his written motion, Hajdasz confirmed that he was seeking more than $75,000.00 in economic damages and additional non-economic damages. Judge Orfinger granted that motion as to past medical expenses and denied it as to causation, permanency and future medical expenses.

On October 17, 2018, at 8:58 A.M., MBLLC removed Case No. 17-30366 to the District Court pursuant to 28 U.S.C. §§ 1332 and 1441. Immediately thereafter, Judge Orfinger declared a mistrial in Case No. 17-30366 on the basis that MBLLC's removal had deprived the Florida State Court of subject-matter jurisdiction.

(2) *The District Court Proceedings*

The District Court, in its December 10, 2018, order (Attachment "B"), determined that:

(A) MBLLC had missed the one (1) year notice of removal deadline prescribed by 28 U.S.C. § 1446(c)(1), necessitating the remand of Case No. 18-1755 to the Florida State Court; and

(B) Metsch had violated Rule 11, Federal Rules of Civil Procedure, by removing Case No. 17-30366 from the Florida State Court.

The United States Magistrate Judge, on May 17, 2019, in Case No. 18-1755, recommended that Metsch be sanctioned pursuant to Rule 11 in the sum of $2,750.00. (Attachment "C").

On June 26, 2019, the United States District Judge, in Case No. 18-1755, adopted the United States Magistrate Judge's recommendation and, pursuant to Rule 11, entered judgment against Metsch in the sum of $2,750.00. Metsch's notice of appeal to the Eleventh Circuit was filed on July 2, 2019,

(3) *The Eleventh Circuit Proceedings*

On March 11, 2020, in an unpublished *per curiam* opinion, the Eleventh Circuit affirmed the District Court's Rule 11-based judgment against Metsch. (Attachment "A") The Eleventh Circuit concluded that Metsch's removal of Case No. 17-30366 had been "frivolous" and, in part, reasoned:

> Lastly, Metsch argues that he did not remove until after the one-year deadline because he was "constrained" by our warning in *Lowery* that a removing defendant must possess a document containing an unambiguous statement establishing federal diversity jurisdiction. *See Lowery,* 483 F. 3d at 1213, n. 63. To be sure, *Lowery* justifies a defendant's caution in removing a diversity case based on something other than incomplete information contained in a sparse initial pleading. But *Lowery* cannot be used as an excuse for failing to put forth a diligent effort in ascertaining the amount of damages sought in advance of the statutory deadlines. Tellingly, the "unambiguous statement" Metsch ultimately relied on to remove the case- Hajdasz's $2,800 per year future medical expenses- derived from Dr. Sastry's September 2016 medical report, and thus was obtainable well before the March 7, 2018 one-year deadline for removal.

Hajdasz v. Magic Burgers, LLC, pp. 11-12.[2]

On March 19, 2020, Metsch moved for rehearing and rehearing en banc. In that motion, he argued that the panel's decision:

(A) conflicted with the decisions in *Lemos v. Fencl*, 828 F. 2d 616 (9th Cir. 1987), *City of El Paso, Texas v. City of Socorro, Texas,* 917 F. 2d 7 (5th Cir. 1990), and *Gibson v. Chrysler Corp.*, 261 F. 3d 927 (9th Cir. 2001); and

(B) had effectively overruled *Lowery v. Alabama Power Co., supra,* a decision on which Metsch had justifiably relied.

The Eleventh Circuit, on April 30, 2020, denied Metsch's March 19, 2020, motion.

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[2] Contrary to the Eleventh Circuit's assertion, Metsch did *not* rely on Dr. Sastre's September, 2016, medical report to derive the existence of the $75,000.00 amount in controversy prescribed by 28 U.S.C. § 1332. Metsch determined the satisfaction of the $75,000.00 amount in controversy criterion by reference to Hajdasz's post-presentation of evidence written motion for a partial directed verdict, which was an unambiguous "paper" within the meaning of 28 U.S.C. § 1446(b)(3).

REASONS FOR GRANTING THE PETITION

A. *Conflict With The Decisions Of Other Circuits*

In *Lemos v. Fencl, supra,* the Ninth Circuit declined to rule upon the validity of the removal following the District Court's bifurcation order. However, citing its decision in *Zaldivar v. City of Los Angeles,* 780 F. 2d 823 (9th Cir. 1986), it concluded that the District Court's imposition of Rule 11(b) sanctions had been erroneous:

> The district court inferred improper purpose from its finding that the petition was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Because we find that Metropolitan's argument is not frivolous under Rule 11 and because we find no support in the record for an independent finding of improper purpose, we disagree with the district court's conclusion that the petition was filed for an improper purpose in violation of Rule 11.

826 F. 2d at 619.

The Fifth Circuit, in *City of El Paso, Texas v. City of Socorro, Texas, supra,* reversed the District Court's imposition of Rule 11(b) sanctions on counsel for the City of El Paso, Texas. Judge Duhe's opinion for the Court of Appeals reasoned:

> The district judge improperly focused on whether Miranda's conclusion was correct rather than whether it was the product of reasonable inquiry.
>
> As the judge conceded, "jurisdiction and removal are some of the most difficult areas in federal law." Opposing counsel testified that he thought the petition was well founded, and had no plans to seek remand. From our review of the pleadings and the record, it appears Miranda could have concluded the counterclaim alleged constitutional violations that were not necessarily derivative of state law, thus providing an arguable basis for federal jurisdiction. To this extent, we find the district could abused its discretion in

> imposing Rule 11 sanctions against Miranda. (Footnote omitted)

917 F. 2d at 9.

The Ninth Circuit, in *Gibson, supra,* reversed the District Court's imposition of Rule 11(c) sanctions against Chrysler Corporation for improper removals of three class actions. Judge Fletcher's opinion for the Court of Appeals noted:

> Under the circumstances, we reverse the award of sanctions against Chrysler. On the record in this case, we are sympathetic with the district court, which was forced by a persistent defendant to revisit nearly identical legal issues. At the same time, however, we recognize the difficulties faced by parties who seek to advance novel legal arguments in opposition to remand. Because of the general bar upon direct appellate review of district court remand orders, *see* 28 U.S.C. § 1447(d), Chrysler was forced either to abide by the district court's view of the law without an authoritative ruling from this circuit, or to risk sanctions by reiterating its arguments. We find it important that Chrysler's core argument- that supplemental jurisdiction can extend to the jurisdictionally insufficient claims of unnamed class members in a diversity class action- was a live issue both at the time of the second notice of removal and at the time of the district court's order granting sanctions.

261 F. 3d at 949.

* * * * * * * *

> We therefore cannot agree with the district court that the arguments advanced in Chrysler's second notice of removal were "clearly frivolous." Indeed, we note that the Supreme Court granted certiorari on *Abbott Laboratories,* albeit after the district court's order in this case, *see* 120 S. Ct. 525 (November 29, 1999), and eventually affirmed the Fifth Circuit's position without opinion by an equally divided court. *See* 120 S. Ct. 1578 (April 3, 2000). We believe that sanctioning a defendant for making (or even for repeating) a plausible argument that has failed previously in district

> court when the failure to make (or to repeat) that argument will potentially have the consequence of depriving the defendant of a favorable ruling from an appellate court is not an appropriate use of the sanction power... We therefore hold that the district abused its discretion in sanctioning Chrysler in this case. (Citations omitted)

261 F. 3d at 949-950.

In deciding when to remove Case No. 17-30366, Metsch was caught between "a rock and a hard place". On one hand, Judge Tjoflat's warning in *Lowery, supra,* militated in favor of delaying removal until a "paper" had been received from Hajdasz unambiguously asserting a claim for damages greater than $75,000.00. On the other hand, the one-year removal deadline prescribed by 28 U.S.C. § 1446(c)(1) loomed large and its "bad faith" exception, 28 U.S.C. § 1446(c)(3), had not been the subject of any reported decisions. Metsch cast his lot with Judge Tjoflat and has paid the Rule 11 price.

The Eleventh Circuit's harsh Rule 11 treatment of Metsch's removal of Case No. 17-30366 conflicts with the lenient Rule 11 treatments afforded counsel for the removing parties by the Ninth and Fifth Circuits, *supra.*

The interplay of Rule 11 with 28 U.S.C. § 1446 has not been addressed by this Court, resulting in a split among the Courts of Appeals. This case is an excellent vehicle for the resolution of that split.

B. *The Burial Of Lowery*

From Metsch's perspective, the Eleventh Circuit's decision in Case No. 19-12528 effectively laid to rest Footnote 63 of its opinion in *Lowery, supra.* But fundamental

fairness requires that Metsch, who had justifiably relied on and heeded Judge Tjoflat's warning, be absolved from paying the funeral director for the burial.

CONCLUSION

Metsch's petition for Writ of Certiorari should be granted. The Eleventh Circuit's judgment in Case No. 19-12528 should be set aside. This cause should be remanded to the Eleventh Circuit with directions that the cause be further remanded to the District Court with a further instruction that Hajdasz's motion for the imposition of Rule 11 sanctions against Metsch be denied.

Respectfully submitted,

LAWRENCE R.METSCH
Counsel of Record for Metsch
FBN 133162
c/o Metschlaw, P.A.
20801 Biscayne Blvd., Ste. 300
Aventura, FL 33180-1423
Telephone: (305) 792-2540
Telecopier: (305) 792-2541
E-Mail: l.metsch@metsch.com

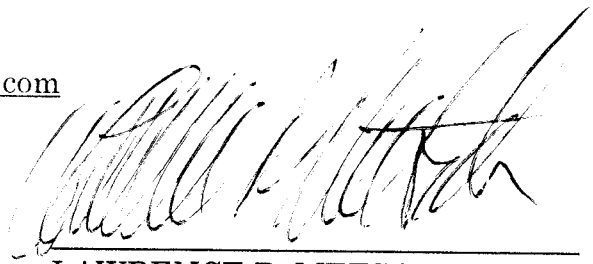
July 31, 2020

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing petition have been electronically served this 31st day of July, 2020, on:

Martin J. Jaffe, Esq.
Morgan & Morgan, P.A.
100 East New York Avenue
Suite 315
Deland, FL 32724
E-Mail: Mjaffe@forthepeople.com

Nicholas A. Shannin, Esq.
Shannin Law Firm, P.A.
214 South Lucerne Circle East
Suite 200
Orlando, FL 32801
E-Mail: service@shanninlaw.com



LAWRENCE R. METSCH

ATTACHMENT "A"

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12528
Non-Argument Calendar

D.C. Docket No. 6:18-cv-01755-ACC-LRH

TIMOTHY HAJDASZ,

Plaintiff - Appellee,

versus

MAGIC BURGERS, LLC,

Defendant,

LAWRENCE RICHARD METSCH,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 11, 2020)

Before MARTIN, ROSENBAUM, and BRANCH, Circuit Judges.

PER CURIAM:

Attorney Lawrence Metsch appeals the district court's imposition of sanctions in connection with his client's removal of a civil lawsuit past the one-year deadline set forth in 28 U.S.C. § 1446(c)(1).[1] We affirm.

I. Background

The underlying litigation involves a slip-and-fall lawsuit in Florida state court against Metsch's client, Magic Burgers, filed on March 6, 2017 by Timothy Hajdasz. The complaint asserted damages "that exceed Fifteen Thousand Dollars," but did not specify an exact amount. Stating the damages in this manner satisfied the jurisdictional requirement in Florida state court. On its face, however, this complaint did not satisfy the amount-in-controversy requirement for federal diversity jurisdiction pursuant to 28 U.S.C. § 1332(a).[2]

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[1] We note for clarification that Metsch does not appear to be appealing the district court's remand of his client's case to Florida state court. Insofar as he is attempting to do so, we are without jurisdiction to review that decision. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal . . . ."); *see Overlook Gardens Props., LLC v. ORIX USA, L.P.*, 927 F.3d 1194, 1198 (11th Cir. 2019) (acknowledging that "the Supreme Court has repeatedly held that . . . remands based on either a defect in the removal process or a lack of jurisdiction are excluded from appellate review by § 1447(d)). We therefore do not decide the merits of that holding.

[2] The federal diversity jurisdiction statute provides that "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 citizens of different States." 28 U.S.C. § 1332(a). Hajdasz is a New York citizen. Magic Burgers is a business incorporated in Texas.

On March 14, 2017, Magic Burgers sent Hajdasz requests for production and a set of written interrogatories which were aimed in part at soliciting the total damage amount sought by Hajdasz.[3] Hajdasz objected to the requests for production as "overbroad, vague and ambiguous, irrelevant, inadmissible and unduly burdensome." And in response to Magic Burger's interrogatories, Hajdasz listed identifying information for specific medical providers along with certain medical expenses totaling $24,806.31, but stated that the amount owed one medical provider and the total amount of lost wages were "undetermined" at that time. Magic Burgers did not seek additional written discovery from Hajdasz or his medical providers on the damages issue and did not seek to compel Hajdasz's responses to what was served.

Ten months later, on January 11, 2018, Magic Burgers took Hajdasz's deposition and asked him a few questions regarding damages,[4] to which Hajdasz's attorney objected to form and asserted attorney-client privilege. Magic Burgers

[3] Specifically, Magic Burgers requested production of documents pertaining to "the amount of money which would compensate Hajdasz for the injury he sustained as the consequence of [Magic Burger's] negligence." In its interrogatories, Magic Burgers asked Hajdasz to "[l]ist each item of expense or damage, other than loss of income or earning capacity" that resulted from the injury, and to "state the nature of the income, benefits, or earning capacity" that he lost "in the past or future as a result of the incident."

[4] Metsch asked Hajdasz: (1) "How much are you asking for?"; (2) "Are you asking for compensation for your lost wages because you can't work?"; (3) "What do you think this claim is worth? What is your claim here?"

did not notice additional depositions seeking information on damages until September 2018 (see *infra*).

On June 27, 2018—nearly 16 months after the filing of the complaint—Magic Burgers finally filed a motion to compel Hajdasz to answer the deposition questions related to the damage amount. The Florida state court denied the motion and sustained Hajdasz's previous objections, but ordered a new deposition of Hajdasz on the specific subject of damages. At this new deposition on August 13, 2018, Magic Burgers asked Hajdasz the monetary amount of his "pain and suffering," "disability," "mental anguish," "loss of the capacity for the enjoyment of life," and "aggravation of previously existing condition." Hajdasz's attorney once again asserted attorney-client privilege to these questions, and Hajdasz himself responded by saying that he either "c[ouldn't] put a monetary value on it" or "d[idn't] know how to answer" and would "just leave it with a [j]ury and see what a [j]ury would award."[5] Magic Burgers also inquired about Hajdasz's "future

[5] Magic Burgers additionally asked Hajdasz to provide updated and exact amounts regarding the "expense of hospitalization" and "medical nursing care and treatment" related to his alleged injury, to which Hajdasz responded that all medical bills had been sent to his attorney and that he consequently did not know the amounts. Magic Burgers then inquired into Hajdasz's "loss of earnings," to which Hajdasz stated that he had "never sat down and actually figured it out," and his attorney interjected that he was unsure whether Hajdasz would be bringing a wage-loss claim at trial. Magic Burgers then asked whether Hajdasz had experienced a "loss of the ability to earn money," to which Hajdasz responded that he could not work two previous jobs because they required standing. Lastly, Magic Burgers asked for the "total amount of money . . . award" he was seeking, and Hajdasz's attorney asserted attorney-client privilege and instructed Hajdasz to not answer.

medical" expenses, to which Hajdasz admitted there had been a "discussion between [him] and Dr. Sastry [his surgeon]" on the subject, but that he did not know what type of procedure might be required and had not yet had it performed because he "c[ouldn't] afford it."

In August 2018, the parties exchanged exhibits in preparation for trial. As part of that exchange, Magic Burgers received a written medical opinion from Dr. Sastry—dated September 20, 2016 (nearly two-years old)—stating that his future medical treatment would cost $2,800 to $5,000 per year. On September 12, 2018, Magic Burgers took the deposition of Dr. Sastry.

Trial began on October 15, 2018. Magic Burgers entered no exhibits and called no witnesses.[6] At the close of evidence on October 16, Hajdasz filed a motion for partial directed verdict in which he sought damages for past medical bills in the amount of $26,434.31 *and* "future medical expenses of a minimum of $2,800.00 per year for [Hajdasz's] lifetime pursuant to the life expectancy in the mortality tables." At the time, Hajdasz was 58 years old and expected to live for another 22 years based on the mortality table submitted by Hajdasz at trial. This life expectancy meant that his future medical expenses, when using the low-end estimate by Dr. Sastry ($2,800), would be $61,600. When this figure is combined

[6] Having failed to submit a list of witnesses or exhibits before trial, Magic Burgers was barred by local rules from presenting evidence in either form at trial.

with his past medical expenses, the amount of damages Hajdasz requested in his motion for partial directed verdict is $88,034.31.

The following morning, on October 17, Magic Burgers removed the case to federal court on the basis of diversity jurisdiction. Upon removal, the Florida state court declared a mistrial.

The district court subsequently granted Hajdasz's motion to remand the case. The court also granted Hajdasz's motion to impose Rule 11 sanctions in the amount of $2,750 upon Metsch for removing the case after the one-year limit in violation of § 1446(c)(1).[7] Metsch timely appealed the imposition of Rule 11 sanctions.[8]

II. Standard of Review

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[7] Hajdasz's Rule 11 motion sought sanctions against both Metsch *and* Magic Burgers, however, the district court determined that sanctions were appropriate against Metsch alone because "it was Mr. Metsch as counsel, and not the client, who was required to know the Federal Rules of Civil Procedure and the statutes governing the procedures for removal of cases." Magic Burgers was nonetheless charged fees pursuant to 28 U.S.C. § 1447(c) for lacking an objectively reasonable basis for seeking removal.

[8] Although the district court remanded the principal case, we have jurisdiction to hear Metsch's appeal because it involves the collateral issue of sanctions under Rule 11. *Didie v. Howes*, 988 F.2d 1097, 1103 (11th Cir. 1993) ("[A] district court appropriately may impose Rule 11 sanctions in a case in which the district court subsequently is determined to have been without subject matter jurisdiction.") (citing *Willy v. Coastal Corp.*, 503 U.S. 131 (1992)); *see also Mahone v. Ray*, 326 F.3d 1176, 1180 (11th Cir. 2003) ("As both the Supreme Court and we have recognized, Rule 11 motions raise issues that are collateral to the merits of an appeal, and as such may be filed even after the court no longer has jurisdiction over the substance of the case."). Furthermore, a district court's remand to state court on the basis of an untimely filing does not necessarily imply that the case has a jurisdictional defect. *Moore v. N. Am. Sports, Inc.*, 623 F.3d 1325, 1329 (11th Cir. 2010) ("[T]he timeliness of removal is a procedural defect—not a jurisdictional one."). Thus, our review of the Rule 11 sanctions is proper.

"[A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." *Smith v. Psychiatric Sol., Inc.*, 750 F.3d 1253, 1260 (11th Cir. 2014) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). "An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination or bases an award . . . upon findings of fact that are clearly erroneous." *Silva v. Pro Transport, Inc.*, 898 F.3d 1335, 1339 (11th Cir. 2018) (quoting *Mut. Servs. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1322 (11th Cir. 2004)).

III. Analysis

An attorney who presents any "written motion" to the court "certifies" that "legal contentions" contained therein "are warranted by existing law or by a nonfrivolous argument . . . for establishing new law." Fed. R. Civ. P. 11(b). If an attorney violates Rule 11(b), the court may "impose an appropriate sanction" on that attorney. Fed. R. Civ. P. 11(c). A party moving for Rule 11 sanctions against an opposing counsel need only establish that opposing counsel filed a motion "that is based on a legal theory that has no *reasonable* chance of success." *Silva*, 898 F.3d at 1340 (emphasis added). We have stated that "Rule 11 sanctions are designed to discourage dilatory or abusive tactics and help streamline the litigation process by lessening frivolous claims or defenses." *Messengale v. Ray*, 267 F.3d

1298, 1302 (11th Cir. 2001) (quoting *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987)). As well, "sanctions may be imposed for the purpose of deterrence, compensation and punishment." *Id.* (quoting *Aetna Ins. Co. v. Meeker*, 953 F.2d 1328, 1334 (11th Cir. 1992)).

Because Metsch's decision to remove his clients' case is the basis for the Rule 11 sanctions, we review that law here. Any removal to federal court on the basis of diversity jurisdiction must satisfy both the substantive jurisdiction requirements of 28 U.S.C. § 1332 *and* the "procedural requirements regarding the timeliness of removal" pursuant to 28 U.S.C. § 1446. *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 756 (11th Cir. 2010). Where the requirements for diversity jurisdiction can be derived from the face of the complaint, "notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant . . . of a copy of the initial pleading." 28 U.S.C. § 1446(b)(1). Where, as here, the complaint does not state facts that satisfy diversity jurisdiction, "a notice of removal may be filed within 30 days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *Id.* § 1446(b)(3). This late-removal procedure has a time limit, however, as a case that comes to satisfy the substantive requirements of federal diversity jurisdiction may not be removed "more than 1 year after the commencement of the action." *Id.*

§ 1446(c)(1). The sole exception to this one-year removal cutoff is where "the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." *Id.* § 1446(c)(1). Bad faith is shown where the district court determines that "the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal." *Id.* § 1446(c)(3)(B).

Here, Metsch removed his client's case beyond the one-year anniversary of the filing of the complaint. Thus, one-year bar was plainly implicated. *Id.*. § 1446(c)(1). Metsch argues nonetheless that his client was excepted from the one-year deadline for two reasons: (1) Hajdasz's refusal during discovery to provide a damages calculation amounted to "bad-faith"; and (2) our cautionary language in *Lowery v. Alabama Power Co.*, where we stated that, in the context of a § 1446(b)(3)-type removal, a defendant removing a case to federal court must possess a document containing an "unambiguous statement that clearly establishes federal jurisdiction." 483 F.3d 1184, 1213 n.63 (11th Cir. 2007). For these reasons, Metsch contends he had no option but to wait until Hajdasz moved in writing for a directed verdict of more than $75,000—which just happened to occur at the end of trial—before removing the case, and thus his decision to remove the case was not frivolous.

The district court found that Metsch's invocation of the bad-faith exception to § 1446(c)(1) was "insupportable."[9] We agree.[10] The district court found that the plaintiff's discovery objections were well-taken and that there was no "bad-faith pattern" or failure to disclose the amount in controversy. Metsch has not demonstrated that the district court abused its discretion in so ruling.

Further, as the district court noted, the delay in learning the total damage amount was squarely attributable to Metsch:

> The most telling factor in this particular case is the timeline of the discovery and the lack of any effort by Magic Burgers to take any steps whatsoever *within the one-year removal period* to compel

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[9] Metsch did not mention in his notice of removal that the "bad-faith" exception of 28 U.S.C. § 1446(c)(1) applied. Rather, the first time he mentioned the bad-faith exception was when he filed a response to Hajdasz's motion to remand. In assessing Rule 11 sanctions against Metsch, the district court found that he "failed in the Notice of Removal to even acknowledge, no less argue an exception to, the one-year limitation for diversity cases in § 1446(c)(1)."

On appeal, Metsch argues that this finding was error. In other words, Metsch contends—without citation to case law—that § 1446(a) does not require a removing party to mention specifically any applicable bad-faith exception to the one-year cutoff under §1446(c) in its actual notice of removal. We can find no case addressing this issue. And we need not reach this issue here, because Metsch failed to argue below—in neither his response in opposition to Hajdasz's motion to remand nor in his response in opposition to Hajdasz's motion for Rule 11 sanctions—that he should not be required to mention specifically the bad-faith exception in his notice of removal. With very limited exceptions, we do not typically entertain arguments not presented in the district court. *See Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004) (listing the "five circumstances" in which we have "permitted issues to be raised for the first time on appeal"). As Metsch fails to point us toward any applicable exception, we decline to address his argument that a removing party is not required to mention specifically any applicable bad-faith exception to the one-year cutoff in its notice of removal. Furthermore, we need not resolve this issue here because Metsch does not prevail even if his notice of removal did not need to include mention of the bad-faith exception.

[10] Again, we note that this holding pertains only to the district court's imposition of Rule 11 sanctions against Metsch and not to its decision to remand the case.

> [Hajdasz's] damages response which it now alleges [Hajdasz] "deliberately withheld to avoid removal."

Hajdasz v. Magic Burgers, LLC, No. 6:18-cv-01755-ACC-LRH, 2018 WL7436133, at *8 (M.D. Fla. Dec. 10, 2018) (emphasis added). Indeed, Magic Burgers took Hajdasz's deposition 10 months after the suit was filed, asked only a few questions at that deposition pertaining to the damage amount, and neglected to move to compel answers to those deposition questions for nearly 16 months after the complaint was filed. And not once did Magic Burgers seek to compel responses to written discovery regarding damages. Because of Metsch's lack of diligence, the one-year deadline passed. His untimely attempt to remove during trial, accordingly, was arguably frivolous. And therefore the district court did not abuse its discretion in so ruling. *See A.S. ex rel. Miller v. SmithKline Beecham Corp.*, 769 F.3d 204, 212 (3d Cir. 2014) (finding that the bad-faith exception to the one-year limit applies only where a defendant can demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005))).

Lastly, Metsch argues that he did not remove until after the one-year deadline because he was "constrained" by our warning in *Lowery* that a removing defendant must possess a document containing an unambiguous statement establishing federal diversity jurisdiction. *See Lowery*, 483 F.3d at 1213 n.63. To

be sure, *Lowery* justifies a defendant's caution in removing a diversity case based on something other than incomplete information contained in a sparse initial pleading. But *Lowery* cannot be used as an excuse for failing to put forth a diligent effort in ascertaining the amount of damages sought in advance of the statutory deadlines. Tellingly, the "unambiguous statement" Metsch ultimately relied on to remove the case—Hajdasz's $2,800 per year future medical expenses—derived from Dr. Sastry's September 2016 medical report, and thus was obtainable well before the March 7, 2018 one-year deadline for removal.

Accordingly, we **AFFIRM** the district court's imposition of Rule 11 sanctions and **DENY** Hajdasz's motion for Appellate Attorney's Fees.[11]

[11] Hajdasz motioned this Court to impose sanctions on Metsch pursuant to Rule 38 of the Federal Rules of Appellate Procedure. We exercise our discretion and DENY that motion.

ATTACHMENT "B"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TIMOTHY HAJDASZ,

Plaintiff,

v.

Case No: 6:18-cv-1755-Orl-22KRS

MAGIC BURGERS, LLC,

Defendant.

ORDER

This cause comes before the Court on Plaintiff's Motion to Remand the case to the state court from which Defendant Magic Burgers, LLC removed the case in the midst of trial, causing the state judge to declare a mistrial. Docs. 29, 31. Because the Court finds Magic Burgers' removal of the case was objectively unreasonable, Plaintiff's Motion to Remand will be granted and, in the Court's discretion, attorney's fees and costs will be awarded against Magic Burgers. Attorney's fees and costs will also be awarded against Mr. Metsch as a sanction for violation of Rule 11 of the Federal Rules of Civil Procedure.

I. PROCEDURAL BACKGROUND

More than nineteen months ago, on March 6, 2017, Plaintiff filed a premises liability suit in the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, Case No. 2017-30366, against Magic Burgers, LLC, which operates a franchised Burger King restaurant in Ormond Beach, Florida. Doc. 1. Plaintiff alleges that on July 27, 2015, while a customer at the Burger King, he slipped in the restroom which had water all over the floor and buckets attempting to catch dripping water, and he sustained injuries. Doc. 3-2 at 5 (state complaint).

On October 17, 2018, although the trial of the case in state court had nearly finished and was about to be presented to the jury, Magic Burgers filed a two-page "Notice of Removal"

asserting it was removing the case to this federal district court, allegedly based on diversity jurisdiction, 28 U.S.C. § 1332. Doc. 1. The Notice of Removal[1] asserted that the case had been removed "within 30 days after the filing of [Plaintiff's] Motion For Partial Directed Verdict" during the *second day of trial* in state court when Magic Burgers allegedly learned "for the first time on the record" that Plaintiff was "seeking more than $75,000 in compensatory damages" *Id.* ¶ 7 (emphasis added). According to Magic Burgers, "[p]rior to October 16, 2018, [Magic Burgers] knew only that [Plaintiff] was seeking more than $15,000 in compensatory damages." *Id.* at 12-13.

On October 24, 2018, Plaintiff filed a Motion to Remand the case, and Magic Burgers filed its response on November 1, 2018. Docs. 29, 32. On November 19, 2018, Plaintiff filed a Motion for Sanctions pursuant to Federal Rule of Civil Procedure 11; Magic Burgers filed its Response to the Motion for Sanctions on November 23, 2018. Docs. 35, 37.

II. LEGAL STANDARD

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). A district court has original jurisdiction over cases in which the parties are of diverse citizenship and "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). Federal jurisdiction pursuant to 28 U.S.C. § 1332 exists only when there is complete diversity between the plaintiffs and the defendants and the amount in controversy

[1] Magic Burgers was required to file a "corrected" Notice because the original one did not have all of the filings from the state court docket attached, in violation of 28 U.S.C. § 1446(a) & 1447(a). *See* Doc. 3. As an illustration of just how far along the case was before the removal, the state court record was so large that counsel for Magic Burgers had to file it in 18 separate "parts" (notably without providing intelligible descriptions of the documents listed as exhibits) and sought a one-week extension of time to file it. *See* Docs. 10-27.

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requirement is met. *See Owen Equip. and Recreation Co. v. Kroger*, 427 U.S. 365, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978).

"The substantive jurisdictional requirements, however, are not the only hurdles that a removing defendant must clear. There are also procedural requirements regarding the timeliness of removal." *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 756 (11th Cir. 2010); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1194 (11th Cir. 2007). "The notice of removal of a civil action or proceeding shall be filed within [thirty] days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b)(1). If the case is not immediately removable, "a notice of removal may be filed within [thirty] days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3). However, when the federal court's jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332, the case may not be removed more than one year after commencement of the action. 28 U.S.C. § 1446(c)(1). The single exception to the one-year bar is where "the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." *Id.* If the Court "finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith." 28 U.S.C. § 1446(c)(3)(B).

It is well established that removal statutes are to be strictly construed against removal, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). Because "removal jurisdiction raises significant federalism concerns," any doubt as to "jurisdiction should be resolved in favor of remand to state court." *See, e.g., Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999). "[W]hen the parties dispute jurisdiction, uncertainties are resolved in favor of remand." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1094 (11th Cir. 1994). The defendant bears the burden

of proving bad faith. "[T]he party asserting federal jurisdiction in a removal case bears the burden of showing, at all stages of the litigation, that the case is properly before the federal court." *See Frederico v. Home Depot*, 507 F.3d 188, 193 (3d Cir. 2007).

Generally, in determining the boundary between a plaintiff's bad faith in forum "manipulation" as opposed to a valid litigation strategy, courts have considered the extent to which the plaintiff has engaged in intentional conduct to deliberately delay for more than a year the defendant's ability to remove the case. In *Tedford v. Warner-Lambert Company*, the Fifth Circuit found that the plaintiffs had engaged in forum manipulation because they intentionally failed to notify the defendants and the court they had dismissed their claims against a non-diverse defendant prior to the one-year mark after the lawsuit's commencement and denied the diverse defendants the opportunity to remove the action. 327 F.3d 423, 427–28 (5th Cir. 2003) (applying an estoppel exception, the pre-cursor to the current § 1446(c)(1)). Other courts considering similar situations have found plaintiffs operated in bad faith to deliberately let the one-year pass by delaying acceptance of settlement offers from non-diverse defendants. *See, e.g., Hiser v. Seay*, No. 5:14-cv-00170, 2014 WL 6885433, at *4 (W.D. Ky. Dec. 5, 2014) (denying remand where the plaintiff intentionally chose to delay accepting a settlement offer with a nondiverse defendant until after the one-year time period elapsed); *cf. Shorraw v. Bell*, No. 4:15-CV-03998-JMC, 2016 WL 3586675, at *6 (D.S.C. July 5, 2016) (finding plaintiff's negligence claim against a non-diverse defendant to the litigation, which precluded removal, was not asserted in bad faith where plaintiff had a viable cause of action against him that she intended to pursue in active litigation).

Courts have also found bad faith when plaintiffs have intentionally delayed disclosure of the amount in controversy until after the one-year limitation passed. *Brown v. Wal-Mart Stores, Inc.*, No. 5:13-cv-00081, 2014 WL 60044, at *2 (W.D. Va. Jan. 7, 2014) (holding the plaintiffs' actions in delaying disclosure of the amount in controversy until after the one-year time period

was in bad faith); *Thompson v. Belk, Inc.*, No. 1:13–CV–1412–WSD, 2013 WL 5786587, at *3 (N.D. Ga. Oct. 28, 2013) (finding bad faith where plaintiff refused to respond to discovery requests regarding her alleged damages—going so far as to voluntarily dismiss her case with the intent of re-filing—until the one year removal period expired); *Cameron v. Teeberry Logistics*, LLC, 920 F.Supp.2d 1309, 1316 (N.D. Ga. 2013) (finding bad faith where plaintiff specifically pled that the case was not removable, but sent a letter demanding $575,000 exactly one year and four days after commencement of her suit); *Ford–Fisher v. Stone*, No. 2:06-CV-575, 2007 WL 190153, at *4, *7 (E.D. Va. Jan. 22, 2007) (finding that the amount in controversy exceeded the sum in the plaintiff's state court ad damnum clause where plaintiff admitted to planning to amend her ad damnum clause to $450,000, demanded $300,000 to settle her claims, and acknowledged that her injuries were not yet fully known and her medical treatment was ongoing).

Rule 11 sanctions may be awarded by the Court in the context of a removal. Section 1446(a) expressly requires that a notice of removal be signed pursuant to Rule 11 of the Federal Rules of Civil Procedure. 28 U.S.C. § 1446(a).[2] "This reference to Rule 11 is redundant because Rule 11 would apply anyway, but the reference constitutes an extra-special warning to removing defendants that they are subject to sanctions if the averments in their notice of removal are not well grounded in fact and warranted by law." *Gray v. New York Life Ins. Co.*, 906 F. Supp. 628, 630 (N.D. Ala. 1995)[3](construing the changes made to §§ 1446 and 1447 by the Judicial Improvements and Access to Justice Act of 1988 and finding that Congress made explicit that attorney's fees could be awarded even where there was no finding of "bad faith" or "wrongdoing"; awarding attorney's fees of $10,674 as part of remand for defendant's removal of case erroneously based on ERISA claim). "The fact that §§ 1447(c) and 1446(a) were amended simultaneously so that §

[2]To the extent Magic Burgers argues that Rule 11 "is inapplicable to the removal of a civil action" (Doc. 37 at 1, 5-6), the argument is incorrect and is addressed *supra*.

[3]The *Gray* case was decided before the changes implemented in 2011, including the addition of the one-year bar to removal for diversity cases.

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1447(c) specifically allows for the awarding of attorney's fees against a defendant whose removal proves erroneous, might constitute a double redundancy if the application of § 1447(c) called for no more than a Rule 11 style analysis in deciding whether to award attorney's fees." *Id.* The court in *Gray* analyzed the interplay between the relatively new language (at that time) in § 1447(c) allowing attorney's fees in an award of costs and the attorney's fees allowed as a sanction under Rule 11:

> The idea behind the § 1447(c) attorneys fee is not to limit removals to those that are entirely risk-free but to obligate the defendant to make a risk assessment and to be prepared for the consequences. That assessment must, of course, include in its calculation the degree of exposure to attorney's fees under § 1447(c) or, in other words, the likelihood of the removal misfiring. It is obvious that any party who files any paper in a federal court should assess his exposure to Rule 11 sanctions. A similar assessment is necessary when a removal notice is about to be filed, although the risk of having to pay attorney's fees under § 1447(c) is, and should be, substantially greater than the risk of being hit with a Rule 11 sanction. A party should have the right to take the risk, but he nevertheless should take that risk only after "forethought." Defendants in this case had the right, a right which they exercised, to attempt an appellate review of the order of remand. Their risk of success there was minimal, and they, not unexpectedly, lost. Whether that loss in the Eleventh Circuit will cost them anything is a question for that court and not this one. The point, however, is that there was risk in the appellate process just as there was risk here. The words of § 1447(c) constitute a clear warning to defendants: "Remove at your peril!"
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> [T]he foregoing discussion leads this court to conclude that the decision as to whether to award fees under § 1447(c) turns primarily, if not solely, on the merit of the removal. Every gambler occasionally loses. Before he rolls the dice he knows that he might come up "snake eyes.". . . . A defendant's risk assessment must be intelligent as well as honest. There is no place for playing a hunch or for simply betting on which judge the case will be assigned to. The risk assessment must include . . . the virtual impossibility of doing anything to prevent the remand of a case over which state courts admittedly have concurrent jurisdiction, even if the remand is erroneous. . . . This is why "good faith" is not a defense to a claim for § 1447(c) fees. Defendants in the instant case took a calculated (or possibly an uncalculated) risk, presumptively understanding that they had the burden both to plead and to prove a basis for the removal and not to come up with an after-the-fact rationalization. Although the "totality of circumstances" has a broad circumference, its key element is the degree of merit in the removal, enhanced by the presumption in favor of awarding fees in the event the removal can be fairly described as "improvident." Congress meant § 1447(c) to be a signal that in every removal there is risk of having to pay the plaintiff's reasonable attorney's fees.

Id. at 635 (collecting illustrative cases). Congress amended § 1446 "to make it clear" that the "sanctions available under Rule 11," would also be "available in cases of improvident removal." *See, e.g., Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1217 n.74 (11th Cir. 2007) (noting that the legislative history for § 1446 indicates "that Congress intended § 1446 to be read alongside the good faith requirements of Rule 11") (citing H.R. Rep. 100-889 (Aug. 26. 1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032).

Under Rule 11, the Court can impose sanctions "(1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) when the party files a pleading in bad faith for an improper purpose." *Massengale v. Ray*, 267 F.3d 1298, 1301 (11th Cir. 2001); *Jones v. International Riding Helmets, Ltd.*, 49 F.3d 692, 694 (11th Cir. 1995) (quotation omitted). "The goal of Rule 11 sanctions is to reduce frivolous claims, defenses, or motions, and to deter costly meritless maneuvers." *Massengale*, 267 F.3d at 1301. "A legal claim is frivolous if no reasonably competent attorney could conclude that it has any reasonable chance of success or is a reasonable argument to change existing law." *In re BankAtlantic Bancorp, Inc. Securities Litigation*, 851 F. Supp. 2d 1299, 1308 (S.D. Fla. 2011). "A factual claim is frivolous if no reasonable competent attorney could conclude that it has a reasonable evidentiary basis, because it is supported by no evidence or only by patently frivolous evidence." *Id.* "Imposition of sanctions on the attorney rather than, or in addition to, the client is sometimes proper 'since it may well be more appropriate than a sanction that penalizes the parties for the offenses of their counsel.'" *Jones v. International Riding Helmets, Ltd.*, 49 F.3d 692, 694 (11th Cir. 1995).

In this case, Magic Burgers' Notice of Removal violated the procedural requirements of § 1446(c)(1) because it was filed more than nineteen months after the suit was commenced in state

court and just minutes before the state case—in which Magic Burgers presented no witnesses or evidence—was to go to the jury. Moreover, appearing to be completely unaware of the one-year limitation, Magic Burgers failed to even mention in the Notice of Removal that any exception to the one-year bar applied. *See* Doc. 1. Only after Plaintiff filed his Motion to Remand did Magic Burgers briefly assert in response that Plaintiff had allegedly acted in a "bad faith pattern" to conceal the amount in controversy.

III. ANALYSIS

A. *Plaintiff's Motion to Remand*

On October 24, 2018, Plaintiff filed his Motion to Remand the case to the state court, pointing out that Magic Burgers had failed to remove the case within one year, had not asserted any exception to the limitation applied, and could not demonstrate that there was any basis for a finding of Plaintiff's "bad faith" concealing the amount in controversy to warrant the exception applied. Doc. 29. On November 19, 2018, Plaintiff filed a Motion for Rule 11 Sanctions against Magic Burgers as well as its attorney, Lawrence R. Metsch, Esq., for the "bad faith" removal—based on the identical grounds as set forth in the Motion for Remand—which caused Plaintiff to expend "needless fees and costs prosecuting this lawsuit—up until closing argument at [the state court] trial." Doc. 35.[4] Plaintiff argues that an award of attorneys' fees and costs under Rule 11 is warranted here because Magic Burgers' removal had no reasonable factual basis, was based on a legal theory that had no reasonable chance of success, could not be advanced as a reasonable argument to change existing law.

Plaintiff argues that Magic Burgers had failed to properly engage in discovery in the state court case and the sole reason that Magic Burgers failed to file a timely Notice of Removal was its

[4]Plaintiff represents, and it is not disputed by Magic Burgers, that Plaintiff served a copy of his Motion for Rule 11 Sanctions on Magic Burgers at least 21 days prior to filing the Motion with the Court. Doc. 35.

own lack of diligence in discovery. *Id.* at 5-6. Plaintiff argues that, during the state court case, "Defendant simply made no attempts to find out how much was in controversy," even though Plaintiff had provided a "detailed accounting of past medical expenses, as well as the names and addresses of all of Plaintiff's medical providers[5] and prior employers." *Id.* He argues that Magic Burgers did not propound or seek to compel or subpoena any additional discovery, such as non-party medical or employment records. *Id.* at 6. At Plaintiff's January 11, 2018 deposition, Magic Burgers asked a single question about what Plaintiff believed his "claim to be worth," and his counsel objected on the grounds of attorney-client privilege; when the state court judge sustained counsel's objection at a hearing to compel the answer, Magic Burgers did not serve any additional written discovery before trial. *Id.* at 6. On August 1, 2018, two months before trial, Magic Burgers received the balance of Plaintiff's medical records during the parties' exhibit exchange, which contained the September 20, 2016 (nearly two-year-old) report of Plaintiff's doctor, Dr. Sastry, who opined Plaintiff's future medical treatment would be $2800-$5000 per year. On September 12, 2018, Magic Burgers took the deposition of Dr. Sastry.

Plaintiff points to counsel for Magic Burgers' concession on October 17, 2018, the day it removed the case to federal court, that he "did have" Plaintiff's medical records from Dr. Sastry which quantified "at the low end, $2,800 [per] year" in future medicals. Doc. 29-7 at 21.[6] Magic Burgers' counsel argued that it had "nothing on the record" on Plaintiff's "life expectancy" but Plaintiff's counsel "plugged that hole" when he put into evidence the mortality table and specified that it would be 22 years; then "we were over $75,000" as the amount in controversy. *Id.* at 22. In

[5]Plaintiff also argued that his pre-suit demand provided a complete list of the identity of the medical providers and medical records available at that time, but Magic Burgers failed to propound discovery to find out additional details. Doc. 29 at 8.

[6]Plaintiff's Motion refers to the trial transcript from October 15, 2018. Doc. 29 at 10 (citing Exhibit 6 to Motion (Doc. 29) at 7-10). However, the transcript attached as Exhibit 6 (Doc. 29-6) is actually from a hearing on August 15, 2018. On November 19, 2018, Plaintiff filed a Notice filing the correct transcript from October 15, 2018 in support of his Motion for Sanctions. Doc. 36.

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frustration, the state court judge pointed out that Magic Burgers had known how old Plaintiff was prior to filing of the complaint and had the same access to public record mortality tables from the onset of the case; thus, Magic Burgers could have computed just as easily as Plaintiff (and prior to trial) the amount of future care Plaintiff would require. *Id.* Because Magic Burger's counsel had raised the issue of removal in the several months prior to trial, Plaintiff's counsel specifically raised the issue on the record in court prior to voir dire "in an effort to prevent a complete waste of trial resources." Doc. 36-1 at 3 (Tr. at 7-8). When the state court judge asked counsel for Magic Burgers to respond, he stated that "no final decision ha[d] been made." *Id.* (Tr. at 9).

Plaintiff contends there was "clearly a premeditated decision concerning [Magic Burgers'] actions." Doc. 29 at 10. After the close of Plaintiff's case in the state court trial, Magic Burgers "did not call a single witness, nor enter a single exhibit," having "never filed a witness or exhibit list," and was "barred from bringing same pursuant to the state trial court's rules." *Id.* Plaintiff argues that "[t]his failure to participate in routine pre-trial procedures leads to the interesting possibility" that Defendant may have "always planned on removing the case" in "a dramatic display before closing arguments regardless of what the trial revealed." *Id.* Given Magic Burgers' lack of evidence and "lack of due diligence," Plaintiff argues, "it cannot simply lay in wait for the opportunity—as in this case—just minutes before closing arguments at [the state court] trial were to begin," to remove the case, "which would be a clear abuse of the judicial system." *Id.* at 11-12 (citing *Heilman v. Florida Dept. of Revenue*, 727 So.2d 958, 960 (Fla. 1998)). In support of the Motion for Rule 11 Sanctions to be assessed by this Court, Plaintiff additionally argues Magic Burgers was "sanctioned multiple times by the state trial court for failing to respond to Court Orders compelling discovery, as well as basic rules of discovery (*i.e.* the duty to prepare a corporate representative for deposition)." Doc. 35.

B. *Defendant's Response*

On November 1, 2018, Magic Burgers filed its Response in Opposition (Doc. 32), arguing that Plaintiff's Motion to Remand should be denied because Magic Burgers "did not miss" either the thirty-day or the one-year removal "deadlines." Doc. 32 at 5. Magic Burgers argues that its October 17, 2018 Notice of Removal was timely because the thirty-day deadline was not "triggered" on August 15, 2018 when Plaintiff provided copies of his trial exhibits—including the medical report opining Plaintiff would incur $2,800 in annual expenses for injections related to his neck/back pain from the slip and fall and the mortality table—because those trial exhibits did not provide "specific and unambiguous notice" that Plaintiff was seeking compensatory damages in excess of $75,000. Doc. 32 at 7-8 (citing *Clark v. Unum Life Insurance Company of America*, 95 F. Supp. 3d 1335 (M.D. Fla. 2015)). Instead, Magic Burgers argues, the thirty-day removal period did not commence to run until either: (1) October 15, 2018, the first day of trial, when Plaintiff "specifically and unambiguously"[7] stated on the record at trial that he was seeking to recover past and future medical expenses in excess of $75,000 or (2) October 16, 2018, the second day of trial, when Plaintiff moved for a partial directed verdict for past and future medical expenses in excess of $75,000. Doc. 32 at 7.

In two very brief paragraphs of argument (Doc. 32 at 11), Magic Burgers argues that it did not miss the one-year removal "deadline" because Plaintiff acted in bad faith by deliberately failing to disclose the amount in controversy allegedly for the purpose of preventing Magic Burgers from removing the case. Magic Burgers cites the transcript of Plaintiff's deposition, where his counsel objected to a question about what Plaintiff "thought the claim was worth" on the basis of attorney-client privilege. However, on August 10, 2018, the state court judge denied Magic Burgers' motion

[7]The standard of proof for the removing defendant to establish that federal jurisdiction exists is preponderance of the evidence or "more likely than not" the amount in controversy is met, *see Williams v. Best Buy Company, Inc.*, 269 F.3d 1316, 1319-20 (11th Cir. 2001), and not the higher bar that Magic Burgers seems to suggest required a statement from Plaintiff "specifically and unambiguously on the record" of the amount of past and future medical expenses he was seeking. *See Pretka*, 608 F.3d at 754-55 (a removing party is not required to prove the amount in controversy "beyond all doubt or to banish all uncertainty about it").

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to compel the answer to that question and held that the Plaintiff's "privilege objections to the questions at issue were proper, based upon the way in which the questions were phrased," but allowed Defendant to take a telephone deposition of Plaintiff "on the sole issue of the dollar amount of damages Plaintiff claims," and required separate inquiries about "economic and non-economic damages." *Id.* On August 13, 2018, Magic Burgers again deposed Plaintiff (via telephone) and asked him "concerning his claim for damages." *Id.* Magic Burgers contends—without specifically quoting the transcript—that it "establishes that [Plaintiff], with the assistance of his counsel, deliberately failed to disclose the amount in controversy for the purpose of preventing [Magic Burgers] from removing Case No. 17-30366 to this Court." *Id.* Magic Burgers further argues that, at the state court trial, when its counsel "repeatedly" asked Plaintiff to "quantify his claimed damages," Plaintiff "repeatedly" declined so to do" and "consistently stated that he would entrust the quantification of his damages to the members of the jury." *Id.* Magic Burgers argues that Plaintiff's "refusal to quantify his damages was consistent with his bad faith pattern of deliberately failing to disclose the amount in controversy for the purpose of preventing" Magic Burgers from removing the case. *Id.*

Magic Burgers' sole non-frivolous argument against an award of sanctions under Rule 11 is that the relief Plaintiff sought, *i.e.*, "withdrawal" of the "notice of removal" during the twenty-one-day safe harbor period in the Rule—was "impossible to perform" under the statutes governing removal. Doc. 37 at 6-7.

C. *Discussion*

Congress amended 28 U.S.C. § 1446(c) in 2011 to allow for a bad faith exception to the one-year limitation on diversity removal, recognizing that without such an exception, plaintiffs could intentionally avoid removal of an otherwise removable case. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011) (applying the

amendments to any action commenced on or after January 6, 2012); *see Ehrenreich v. Black*, 994 F. Supp. 2d 284, 288-89 (E.D.N.Y. 2014). Currently, the statute provides, in relevant part:

> A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

28 U.S.C. § 1446(c)(1).

The determination of bad faith is left to the discretion of the district court, but "the exception to the bar of removal after one year is limited in scope." H.R. Rep. No. 112-10, at 15; see *A.S. ex rel. Miller v. SmithKline Beecham Corp.*, 769 F.3d 204, 211-12 (3d Cir. 2014) (holding that equitable tolling of the one-year bar was inappropriate where no "extraordinary circumstances" were present). "[T]he plaintiff's claims are in bad faith if, by [his] actions, [he] attempted to disguise the existence of the removability of the case until the one-year limitation had run." *Barnett v. Sylacauga Autoplex*, 973 F. Supp. 1358, 1367 (N.D. Ala. 1997); *see also* 28 U.S.C. § 1446(c)(3)(B) (deliberately failing to disclose the true amount in controversy in order to prevent removal is bad faith).

Magic Burgers completely fails to point to any specific statements in Plaintiff's deposition transcript to establish the so-called "bad faith pattern" of failing to disclose the amount in controversy. Moreover, Magic Burgers has not cited, analyzed, or pointed to any case, no less a relevant case with a similar fact pattern to the facts of this case.

"The 2011 amendments to § 1446 were intended to stop just this sort of gamesmanship and forum shopping," such as when a plaintiff simply increases his claim for damages once the window for removing the case closes. *See Barnett*, 973 F. Supp. at 1367 ("Bad faith can generally be inferred from [an] amendment [to the complaint] outside of the statutory bar" where the plaintiff "has provided no justification" for the delay.); *see also Hill v. Allianz Life Ins. Co. of N. Am.*, 51 F. Supp. 3d 1277, 1282 (M.D. Fla. 2014) (finding bad faith to avoid removal where plaintiff's

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complaint stated damages were "greater than $15,000 but less than $75,000" so case could not be removed, up until three months past the one year removal window when plaintiff moved to amend the complaint so damages were no longer restricted to under $75,000); *Cameron v. Teeberry Logistics, LLC*, 920 F.Supp.2d 1309, 1316 (N.D. Ga. 2013) (bad faith exception applied where the defendants relied on the plaintiff's representation that the amount in issue "was less than $50,000 and "does not come close to $75,000," but she subsequently sent a demand letter for $575,00 exactly one year and four days after commencement of the suit). In this case, Magic Burgers has failed to point to any intentional conduct by Plaintiff to delay amending his claims or allegations in the Complaint until after the one-year mark.

Instead, Magic Burgers argues that Plaintiff acted in "bad faith" by deliberately failing to answer questions basically about how much Plaintiff thought "his claim was worth" and the values he put on certain categories of damages. The Court has reviewed the entire transcript from Plaintiff's August 13, 2018 deposition submitted by Magic Burgers (Doc. 32 at 21 to 42) and fails to see the "bad faith pattern" in Plaintiff's responses to questions about his damages. While Plaintiff's counsel several times raised an objection based on attorney-client privilege—the same objection which the state court judge had previously *sustained* based on the way counsel for Magic Burgers phrased the questions—Plaintiff did respond to direct questions concerning his medical treatment and the medical providers by explaining that he did not know the specific amounts he owed the medical providers because all of the bills for his medical treatment were going directly to his attorney. Even though Plaintiff could not be specific about the amounts owed, it is clear from the content of the questions that Magic Burgers' counsel had the information identifying the medical providers and the amounts owed via Plaintiff's previous responses to written discovery because defense counsel repeatedly referred to the written responses by name as listed on "Interrogatory No. 12" when questioning Plaintiff. After listing the medical providers by name,

defense counsel stated Plaintiff had listed the dollar amounts owed to these providers and counsel would "accept those numbers for the moment." Doc. 32 at 30 (Tr. at 12). When defense counsel asked Plaintiff whether there were additional medical billings, he responded, "not that I know of" (*id.* at 32), and Plaintiff's counsel interjected that Plaintiff was probably not aware of the exact numbers, but the outstanding balance at Coastal Neurology was $3,000 higher than previously stated in response to Interrogatory No. 12, while the amounts owed to other providers remained the same. *Id.* at 33.

As to the value of any wage loss claim, when Plaintiff stated that he had not "sat down and figured out the amount," his counsel stated that they "were not even sure whether ultimately [they] were going to be bringing a wage loss claim at trial." *Id* at 34. Plaintiff testified that he could not work at his former type of job because he could no longer perform the work in a standing position since the accident; without employment he had had to move in with his sister who paid his expenses. *Id.* at 34. When Plaintiff was asked about the aggravation of his "preexisting condition," he testified that he "did not know how to answer it" (and his attorney objected based on attorney-client privilege), but Plaintiff had credibly testified earlier in the deposition that he did not understand the medical terms used to describe his back injury. *Id.* at 35. Asked whether there would be future medical expenses, Plaintiff testified that Dr. Sastry had recommended surgery, but Plaintiff could not describe the surgery because, he explained, he was "not a doctor," he was not "in the medical field," and he had not had the surgery because he could not afford it.[8] *Id.* at 36-37.

When Plaintiff was asked about the monetary value of certain *non*-economic damages, *i.e.*, for his pain and suffering, his "disability," mental anguish, and loss of the capacity for the

[8]When asked why he did not apply for Medicaid, Plaintiff explained that he could not qualify as a Florida resident because "Florida doesn't have it until a certain age," and he was not a resident of New York because he was only temporarily staying with his sister and he still had a Florida identification (non-drivers license) card. Doc. 32 at 37-38.

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enjoyment of life, Plaintiff answered (after his counsel repeated his attorney-client privilege objection) to the effect that "[a]s far as dollar wise, I think I would see what the jury would award me" and "I can't put a monetary value on it."[9] *Id.* at 22-24, 28-29. Although the state court judge did not provide detail on why he ordered Magic Burgers to depose Plaintiff separately on the non-economic damages, federal courts applying Federal Rule of Civil Procedure 26(a) have held that a plaintiff need not provide a computation for non-economic damages where the plaintiff does not intend to ask the jury for a specific dollar amount. *See, e.g., Nagele v. Delta Air Lines, Inc.*, No. 17-22559-CIV, 2017 WL 6398337, at *2 (S.D. Fla. Dec. 13, 2017) (holding that plaintiff was not required to provide a computation for non-economic damages where she had stipulated that she did not intend to ask the jury for a specific dollar amount or range); *Gray v. Florida Dept. of Juvenile Justice*, No. 3:06-cv-990-J020MCR, 2007 WL 295514, at *2 (M.D. Fla. Jan. 30, 2007) (holding that plaintiff was not required to provide defendant with a calculation of her suggested compensatory damages for emotional distress but she would be precluded from suggesting to the jury an amount of compensatory damages for her emotional distress).

None of Plaintiff's answers demonstrate a deliberate "pattern of bad faith." Moreover, the objections by Plaintiff's counsel at the August 13, 2018 deposition to the phrasing of some of the questions on the basis of attorney-client privilege, is the same objection the state court judge sustained on August 10, 2018 "based upon the way in which the questions were phrased."

The most telling factor in this particular case is the timeline of the discovery and the lack of any effort by Magic Burgers to take any steps whatsoever *within the one-year removal period* to compel Plaintiff's damages response which it now alleges Plaintiff "deliberately withheld to avoid removal." Plaintiff filed suit on March 6, 2017 in state court. Magic Burgers first took Plaintiff's deposition on January 11, 2018 (Doc. 29-4), ten months after suit was filed; at the

[9] To questions about disfigurement or visible scars, Plaintiff answered he had "none." Doc. 32 at 25-26.

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deposition, Magic Burgers asked a single question related to damages. Then Magic Burgers did absolutely nothing to compel Plaintiff's further response to what it now alleges was a crucial damages question for *seven months* until August 10, 2018.

When Plaintiff did not give a sufficient response during the January 11, 2018 deposition, Magic Burgers could have easily taken steps to compel Plaintiff to answer the question (or served other discovery) well within the one-year period, *i.e.*, before March 6, 2018. Magic Burgers' lack of any effort to compel Plaintiff to respond to the damages question or conduct other discovery to ascertain the damages amount before the August/September 2018 timeframe belies its current argument at the nineteen-month mark that Plaintiff's failure to answer a single (objected-to) question was a deliberate effort by Plaintiff to keep Magic Burgers from learning the "actual" amount in controversy. *See, e.g., Hubbard v. Diaz*, No. 16-cv-3006, 2017 WL 436252, at *2 (D.N.J. Jan. 31, 2017) (holding that defendants failed to meet their burden of proving plaintiffs' bad faith where they merely cited to the plaintiffs' failure to timely serve discovery responses which did not show it was deliberately done to prevent removal, and defendants had not made "repeated attempts" to secure the requested discovery). Moreover, as the state court judge noted, Magic Burgers could have just as easily calculated the amount of damages Plaintiff would allege for future treatment if it had used publicly-available mortality tables, since Magic Burgers had the report of Dr. Sastry opining the minimum required for Plaintiff's future care in August 2018. *See Bader v. Schmidt Baking Co.*, No. 13-cv-5697, 2014 WL 116365 (D.N.J. Jan. 10, 2014) (holding that an untimely statement of damages was insufficient evidence of bad faith where the plaintiff had served the defendants with discovery responses within one year of the complaint being filed providing them a "wealth of information" from which to "extrapolate data points" to calculate damages as likely to exceed the jurisdictional threshold). Magic Burgers has indisputably failed to meet its burden to show that Plaintiff deliberately failed to disclose the "actual amount in

controversy" to prevent Magic Burgers' removal of the case within the one-year period after commencement of the suit.

D. *Awarding Attorney's Fees and Costs for the Untimely Removal*

In addition to remand, Plaintiff requests an award of his attorney's fees and costs for Magic Burgers' untimely removal of the case under § 1447(c). Magic Burgers does not respond specifically to the merits of Plaintiff's argument about fees for the objectively unreasonable removal under § 1447(c). Instead, Magic Burgers argues that its removal of the case was timely and Plaintiff allegedly engaged in a "bad-faith pattern" not to disclose the amount in controversy at the August 13, 2018 deposition. Doc. 32 at 8, 11.

In response to Plaintiff's nearly identical arguments in the Motion for Sanctions, that Magic Burgers and its counsel's "bad faith" removal of the state court case at the end of the trial wasted precious judicial resources, juror and witness time, and months of preparation for trial, they respond with the erroneous proposition that Rule 11 "is inapplicable to the removal of a civil action" (Doc. 37 at 1, 5-6). This argument is clearly incorrect in light of the plain language of § 1446(a) governing the "Procedure for Removal" to the federal courts.[10] The Court has rejected all three of these arguments and finds that an award of fees under § 1447(c) against Magic Burgers and, under Rule 11, against Magic Burgers and Mr. Metsch jointly and severally is warranted.

1. Fees under § 1447(c)

Title 28 U.S.C. § 1447(c) provides, in pertinent part, that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Where a plaintiff fails to specify the total amount of damages, a defendant

[10]Magic Burgers mischaracterizes the holding of *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1091 (11th Cir. 1994), as holding "a Notice of Removal cannot serve as the basis of a Rule 11 violation" (Doc. 37 at 6), when the cited portion of *Worldwide Primates* actually states that Rule 11 is inapplicable to a *plaintiff's complaint* "filed before removal" originally in the *state court* and does not address the notice of removal which is filed by a *defendant* in the *federal court*. 26 F.3d at 1091 (emphasis added).

seeking removal based on diversity jurisdiction must prove by a preponderance of the evidence that the amount in controversy exceeds the $75,000.00 jurisdictional requirement. If the complaint does not expressly allege a specific amount in controversy, removal is proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional requirement. *Williams*, 269 F.3d at 1319-20. "However, if the jurisdictional amount is not facially apparent from the complaint, the court should look to the notice of removal and may require evidence relevant to the amount in controversy at the time the case was removed" because "a conclusory allegation" in the notice of removal that the jurisdictional amount is satisfied is "insufficient" to meet the defendant's burden. *Id.*; *Leonard v. Enterprise Rent a Car*, 279 F.3d 967 (11th Cir. 2002); *see also Pretka*, 608 F.3d at 754-55 (noting that a removing party may present additional evidence, such as business records and affidavits, to satisfy its jurisdictional burden); *Roe v. Michelin North America, Inc.*, 613 F.3d. 1058 (11th Cir. 2010) (discussing factors for trial court to consider in discerning whether the complaint presents a case that "more likely than not" exceeds $75,000).

Plaintiff argues that he alleged in the Complaint only the minimum jurisdictional amount for Florida circuit court jurisdiction, $15,000, and his Complaint did not contain allegations from which Magic Burgers could infer or establish that the amount in controversy exceeded $75,000 for federal court diversity jurisdiction. Doc. 29. Yet, Plaintiff contends, Magic Burgers did nothing in the nineteen months that the case was pending in state court to ascertain the amount in controversy. Plaintiff points to Magic Burgers' failure to serve written discovery in the form of requests for admissions or appropriate requests for production and its failure to serve a single subpoena for medical records even though it was aware of the identity of Plaintiff's medical providers as early as December 2015. Plaintiff also argues that despite Magic Burgers having the burden to establish the amount in controversy to timely remove the case within the removal deadlines, it failed to actively engage in discovery and actually failed to respond to Court Orders compelling discovery;

thus, Magic Burgers should not be allowed to "simply lay in wait" for the opportunity to remove the action—as it did in this case—just minutes before closing arguments at the end of the state court trial. Especially because the trial in the state court case revealed no new information about his damages, Plaintiff argues, "in an almost spiteful disregard for the proceeding," Magic Burgers "ignored the clear language of the removal statute, pushed through trial, knowing full well that he would never call a single witness or enter a single exhibit. Then, [Magic Burgers] waited until the jurors had arrived at the courthouse for closing arguments to file an untimely Notice of Removal which wasted precious judicial resources, months of preparation, costs, juror and witness time and effort." *Id.* at 14 Plaintiff argues that fees should be awarded as a deterrent to defendants considering similar actions in future cases:

> Unfortunately, this type of conduct, left unchecked has the potential chilling effect of permitting any defendant from removing a case that has gone poorly at trial. Without a doubt, the fee award in this case must have a deterrent effect for others who may be tempted to mirror this conduct. For example, a defendant may choose to absorb an unsuccessful removal and choose to pay a comparatively small fee as opposed to a rather large verdict at trial. As such, Plaintiff respectfully requests that this Honorable Court award its fees and costs for not only having to defend this improper removal, *but attorney's fees and costs incurred for having to prepare and attend the trial of this matter that was [declared a mistrial]* before closing arguments as a result of Defendant's willful conduct.

Id. (emphasis added)

The Supreme Court has explained the reasoning underlying the fee provision of § 1447(c) in *Martin v. Franklin Capital Corporation*, 546 U.S. 132, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005):

> Congress thought fee shifting appropriate in some cases. The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff. The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

Id., 546 U.S. at 140, 126 S. Ct. at 711; *accord Bell v. Burlington N. R. Co.*, 738 P.2d 949, 951 (Okla. Ct. App. 1986) (strongly criticizing a defendant-railroad who attempted to remove a twenty-month old case during the lunch break on the final day of a weeklong trial to avoid the jury verdict in favor of a train crash victim who lost the use of three limbs: "Congress did not intend to provide a defendant with a means of halting a lengthy trial just before the case is to [be] given to the jury . . . [which is] an onerous burden on both the federal and state judicial systems, promote[s] a great waste of state resources, and oppress[es] hapless removal-related litigants by subjecting them to distressing losses of time and money.").[11]

Absent unusual circumstances, "courts may award attorney's fees under § 1447(c) *only where the removing party lacked an objectively reasonable basis* for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.*, 546 U.S. at 141, 126 S. Ct. at 711 (emphasis added); *see also Bauknight v. Monroe County, Fla.*, 446 F.3d 1327, 1329 (11th Cir. 2006) (affirming district court's denial of fee motion based on objective reasonableness of defendant's removal where the complaint plausibly presented a ripe § 1983 claim even though the claim eventually proved to be unripe). The district court retains the discretion to "consider whether unusual circumstances warrant a departure from the rule in a given case." *Martin*, 546 U.S. at 140, 126 S. Ct. at 711. The court must consider the propriety of the removing party's actions at the time of removal, based on an objective view of the legal and factual elements in each

[11]Although the Oklahoma appellate court in *Bell* ultimately affirmed the trial judge's decision to "disregard the maneuver" and allow the lawyers to make their closing arguments to the jury and the jury to render a verdict for the plaintiffs, 738 P.2d at 952, the holding of the *Bell* decision has wisely been questioned in light of an abundance of case law holding to the contrary. *See, e.g., Fed. Nat'l Mortg. Ass'n v. Milasinovich*, 161 F. Supp. 3d 981, 1007, 1011-12 (D.N.M. 2016) (rejecting the statutory analysis of § 1446 in *Bell* and similar cases and holding that a federal court immediately gains exclusive jurisdiction upon defendant's filing of the notice of removal); *see also Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1254–55 (11th Cir. 1988) (holding, after removal, any subsequent proceedings in state court on the case are void *ab initio*, the jurisdiction of the state court absolutely ceases, and the state court has a duty not to proceed any further). Nonetheless, the state appellate court's description of the wasted resources which an unreasonable removal causes in both court systems is apropos here.

particular case, irrespective of the fact that the court ultimately determined the removal was improper. *Id.*

The Eleventh Circuit has affirmed fee awards for improvident removal where the defendant failed to demonstrate an objectively reasonable basis for the removal. *See, e.g., Rae v. Perry*, 392 F. App'x 753, 756 (11th Cir. 2010) (affirming award of fees where defendant failed to show by preponderance of the evidence that the compensatory and unspecified damages in the complaint met the jurisdictional amount where they were based only on defendant's own speculation and not objectively reasonable); *Devine v. Prison Health Services, Inc.*, 212 F. App'x 890 (11th Cir. 2006) (affirming district court award of fees "where the complaint asserted no federal question on its face and [defendant] failed to provide a reasonable argument in support of diversity jurisdiction"); *Gonzalez v. J.C. Penney Corp.*, 209 F. App'x 867 (11th Cir. 2006) (affirming award of attorney's fees to plaintiff, car accident victim, where the car owner did not even attempt to establish that the victim had fraudulently joined non-diverse defendants to defeat diversity jurisdiction, and at best counsel for the owner was carelessly unaware her client's ownership and employment relationship which was a "moving target").

Courts have also awarded attorney's fees or costs pursuant to § 1447(c) in diversity cases where defendants believed the untimely removal was excused by the plaintiff's bad-faith, but this was not an objectively reasonable belief because, as the courts found, the plaintiff had not acted in bad faith. *See, e.g., Sanders v. Farina*, 183 F. Supp. 3d 762, 765-66 (E.D. Va.), *aff'd*, 669 F. App'x 184 (4th Cir. 2016) (fees awarded to plaintiff incurred as result of former client's second removal of attorney's breach of contract case where defendant's sole basis for removal was the "fatally flawed" theory of his "purported right to jury trial" and the state court judge had ruled three times that defendant had waived the right); *Amrou v. Casa Blanca Condo. Ass'n, Inc.*, No. 3:12-CV-5019-N, 2012 WL 12358934, at *1 (N.D. Tex. Dec. 21, 2012) (granting § 1447 fee award against

defendant who removed case for the second time and after one-year bar by arguing the "unreasonable" position that preliminary, nonbinding Rule 11 agreements with two defendants were binding "settlements agreements" which plaintiff had allegedly misrepresented to prevent the defendant from removing case); *but see Petrie v. Wells Fargo Bank, N.A.*, No. II-14-cv-411, 2014 WL 1621781, at *3 (S.D. Tex. Apr. 22, 2014) (remanding removed case as untimely even though banks claimed bad faith exception for plaintiffs' late dismissal of nondiverse defendant; awarding costs (not fees) for banks' objectively unreasonable assertion of bad faith where plaintiffs had continued to litigate claim against nondiverse defendant for nine months past the one-year mark, had defended against its summary judgment motion during that time, and only nonsuited defendant after state judge commented on a reduced "possibility" of recovery).

In this case, Magic Burgers lacked an "objectively reasonable basis for seeking removal," having failed to review the discovery Plaintiff produced or expended any effort to determine Plaintiff's damages to determine the actual amount in controversy within one year of commencement of the case. *See Martin*, 546 U.S. at 140. It was objectively unreasonable for Magic Burgers to remove the case to this Court without even mentioning in its two-page Notice of Removal an exception to overcome the one-year bar for diversity cases in § 1446(c), such as the belatedly-raised argument Plaintiff had acted in bad faith by not answering questions about what "he thought [his] claim was worth" in order to defeat removal. Doc. 1. For the reasons described above, the Court rejects Magic Burgers' contention that Plaintiff showed a "bad faith pattern" in not answering defense counsel's questions at his deposition. Plaintiff's assertion of attorney-client privilege was sustained after his first deposition and Plaintiff answered the questioning about his economic damages (to the extent he was able) at the second damages-specific deposition on August 13, 2018. To the extent that Magic Burgers needed additional information on Plaintiff's

damages claim, it certainly had the opportunity to conduct discovery (beyond the interrogatories responses) but chose not to during the nineteen months before the case went to trial.

Instead, Magic Burgers made the strategic decision to proceed to trial in front of the state court jury without any witnesses or any exhibits to present. When Magic Burgers decided it did not want to risk the outcome of the jury's verdict, it decided, immediately before closing arguments to the jury were to begin, to remove the case to this Court for a "do-over." In other words, Magic Burgers hoped to have a second opportunity to convince a new jury of the weakness of Plaintiff's case or the strength of a (future) newly-minted defense, and/or maneuver a lengthy new discovery schedule before the second trial to put pressure on the economically disadvantaged[12] Plaintiff to settle the second time around in federal court.

Plaintiff is entitled to an award of his attorney's fees and costs for the removal by Magic Burgers who "lacked an objectively reasonable basis for seeking removal." *See Martin*, 546 U.S. at 140. "A defendant's untimeliness in filing his notice of removal is precisely the type of removal defect contemplated by § 1447(c)." *Garrett v. Cook*, 652 F.3d 1249, 1254 (10th Cir. 2011) (internal citation omitted). "[Where] a litigant's decision to remove comes years late and appears to have been spurred by a desire to avoid an adverse state-court ruling, no objectively reasonable grounds for removal exists." *Id.* (affirming award of attorney's fees and costs for significantly untimely removal based on unfounded federal "race discrimination" allegations against the state judge and filed the day before the judge's scheduled hearing to "avoid an adverse ruling"). Moreover, the Court finds that awarding Plaintiff his attorney's fees and costs in this case pursuant to § 1447(c) will reduce the attractiveness of removal as a "method for delaying litigation and imposing costs on the plaintiff." *See, e.g., BancorpSouth Bank v. Miller*, No. 1:12-CV-287-HSO-RHW, 2012 WL 6553615, at *5 (S.D. Miss. Dec. 14, 2012) (imposing an award of attorney's fees and costs against

[12]Plaintiff testified at the August 13, 2018 deposition that he had not been able to work since the accident.

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a law-student-defendant for an untimely and facially improvident removal in a fifteen-month old case where he intentionally delayed the litigation and imposed unnecessary costs on the plaintiff by purposely evading service of process, wasted judicial resources by filing a duplicative lawsuit and removing the case with no objectively reasonable basis in erroneously alleging federal question jurisdiction existed based on his counterclaim and diversity jurisdiction existed even though his co-defendant was a citizen of plaintiff's state and she had not consented to the removal); *Tran v. Thompson*, No. 14-cv-263, 2014 WL 4161784, at *6 (M.D. La. Aug. 19, 2014) (awarding attorney's fees under § 1446 where the defendants' removal notice relied on a "revival" exception to argue removal was timely in spite of well-established case law finding that exception clearly did not apply, which they omitted in subsequent arguments, and their unreasonable reliance on other "illogical arguments" for an exception to the one year time limit).

The Seventh Circuit has held that the overarching principle in fee-shifting statutes such as § 1447(c) is that "the victor should recoup his full outlay." *Wisconsin v. Hotline Industries, Inc.*, 236 F.3d 363, 367 (7th Cir. 2000). "The rationale of fee-shifting rules is that the victor should be made whole—should be as well off as if the opponent had respected his legal rights in the first place; [i]mproper removal prolongs litigation (and jacks up fees)." *Id.* Under the American Rule parties bear their expenses in one court system, 'but when their adversary wrongfully drags them into a second judicial system the loser must expect to cover the incremental costs.'" *Id.* at 367–68. Because Magic Burgers' removal was untimely and objectively unreasonable, Plaintiff is entitled to an award of "just costs and any actual expenses, including attorney fees, incurred as a result of the removal" under § 1447(c). *See Garrett v. Trenchless Infrastructure Tech.*, No. 10-cv-71, 2010 WL 11530583, at *3 (D.N.M. Aug. 11, 2010) (remanding case of "abusive and vexatious" litigant who "exacted significant time and resources from opposing parties" with his "antics" and ordering the removing party to pay the opposing parties' removal-related attorney's fees and costs once

they submitted supporting documents), *aff'd*, 652 F.3d at 1254 (affirming $22,325 award of § 1447(c) attorney's fees and costs against the removing third-party defendant for the objectively unreasonable and untimely removal filed specifically to avoid an adverse ruling in state court).

However, to the extent Plaintiff seeks to recover the attorney's fees and costs incurred for work performed in the state court forum, § 1447(c) allows recovery of only those costs and attorney's fees incurred "as a result of the removal." The previous portion of the litigation between the parties that occurred in state court—including nineteen months of preparing the case for trial and actually trying the case—cannot be the basis of the § 1447(c) award of costs and attorney's fees which must relate to the removal itself in this federal court. *See, e.g., Taylor Newman Cabinetry, Inc. v. Classic Soft Trim, Inc.*, No. 6:10-CV-1445-ORL-22DAB, 2012 WL 695670, at *2-3 (M.D. Fla. Feb. 14, 2012) (recommending denial of fees for work performed related to the state court proceeding because the federal court is "without jurisdiction to award fees for work performed in a separate judicial system, and plaintiffs do not cite any authority to the contrary"), *adopted*, 2012 WL 695843 (M.D. Fla. Mar. 1, 2012) (Conway, C.J.) (awarding $16,992 in attorney's fees under § 1447(c) for work in the federal district and appellate courts,[13] exclusive of any work performed in the state court); *Gardner v. Allstate Indem. Co.*, 147 F.Supp.2d 1257 (M.D. Ala. 2001) (holding that, in addition to fees incurred by the plaintiff in challenging the removal itself, the defendant would also be responsible for those fees incurred by the plaintiff litigating the right to recover fees under the removal statute); *cf. Musa v. Wells Fargo Delaware Tr. Co.*, 181 So. 3d 1275, 1284 (Fla. 1st DCA 2015) ("While the jurisdictional consequences of removal are clear, we do not condone frivolous or bad faith filings of notices of removal, nor in any way limit the circuit court's inherent authority to sanction such conduct (once it regains jurisdiction), if the

[13]This Court's original decision granting the plaintiffs' motion to remand and awarding attorney's fees of $2,500 for the untimely removal, allegedly based on "fraudulent joinder," was affirmed on appeal by the Eleventh Circuit. *Taylor Newman Cabinetry, Inc. v. Classic Soft Trim, Inc.*, No. 6:10-CV-1445-ORL-22DAB, 2010 WL 4941445, at *4 (Nov. 29, 2010) (Conway, C.J.), *aff'd*, 436 F. App'x 888, 894-95 (11th Cir. 2011).

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removal was effected on frivolous grounds."); *Id.* at 1284 (Bibrey, J., concurring) (noting that, upon remand following an improper removal, the state court has the authority to assess sanctions for fraud on the court including striking of a party's pleadings).

2. Attorney's fees and costs as a sanction under Rule 11

Turning to Plaintiff's request for an award of sanctions under Rule 11 against Magic Burgers and its counsel, Lawrence R. Metsch, Esq., the Court finds that a sanctions award against Mr. Metsch is warranted for his removal of the case well after the one-year limitation in § 1446(c)(1), nineteen months into the litigation in state court, and just minutes before the case was to go to the state court jury. "Imposition of sanctions on the attorney rather than, or in addition to, the client is sometimes proper 'since it may well be more appropriate than a sanction that penalizes the parties for the offenses of their counsel.'" *Jones*, 49 F.3d at 694.

Under Rule 11, which is explicitly incorporated by §1446(a), the Court may impose sanctions when counsel files a notice of removal that is based on a legal theory that has no reasonable chance of success and/or when he files a pleading "in bad faith for an improper purpose." *See Massengale v. Ray*, 267 F.3d 1298, 1301-02 (11th Cir. 2001). The goal of Rule 11 sanctions is to "deter costly meritless maneuvers" and "discourage dilatory or abusive tactics." *Id.* "Sanctions [also] may be imposed for the purpose of deterrence, compensation and punishment," *Aetna Ins. Co. v. Meeker*, 953 F.2d 1328, 1334 (11th Cir. 1992).

Magic Burgers and Mr. Metsch argue that the Court should not award sanctions under Rule 11 because the relief Plaintiff sought in the correspondence accompanying the Motion for Rule 11 sanctions— what they characterize as a "withdrawal" of the filed "notice of removal" during the twenty-one-day "safe harbor" period—was "impossible to perform" because

> There exists no statutory mechanism by means of which the removing litigant . . . could "withdraw" its Notice of Removal and thereby effectuate the remand of the civil action to the originating State Court.

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Doc. 37 at 7. Magic Burgers and Mr. Metsch rely exclusively on the word "withdraw" within the sanctions provisions of Rule 11, the pertinent portion of which is more broad and states that the motion for sanctions is not to be filed if the "challenged paper, claim, defense, contention or denial is *withdrawn or appropriately corrected* within 21 days." Fed. R. Civ. P. 11(c)(2) (emphasis added). Magic Burgers and Mr. Metsch undoubtedly could have "appropriately corrected" the untimely removal by filing a *consent* to remand of the case to state court, once they received Plaintiff's Motion for Remand and realized the one-year limitation made the removal untimely, he could have filed a consent to remand of the case, limiting the amount of sanctions to be awarded. *Cf. Bldg. Materials Corp. of Am. V. Henkel Corp.*, No. 6:15-cv-548, 2018 WL 1008442, at *2 (M.D. Fla. Feb. 22, 2018) (Conway, C.J.) (denying plaintiff's motion for sanctions under the court's inherent power where defendant immediately filed a motion to remand to state court as soon as it realized (on appeal) that complete diversity of citizenship between the parties had been predicated on the incorrect state of incorporation and had not existed at the time of removal of case; awarding attorney's fees under § 1447(c) for improvident removal, but limited to 5% of fees expended); *Perez y Cia. De Puerto Rico, Inc. v. C & O Brokerage*, 672 F. Supp. 2d 257, 261 (D.P.R. 2009) (denying Rule 11 sanctions because plaintiff had filed a notice of voluntary dismissal during the "safe harbor" period).

In this case, an award of attorney's fees under Rule 11 against counsel will discourage other attorneys from ignoring the one-year limitation against removal (in diversity cases) and filing the removal a substantial number of months *after* the one-year limitation, and during a nearly-completed trial in the state court. Magic Burgers and Mr. Metsch chose to pursue a litigation strategy in state court by submitting no exhibits or witness which ran the risk of an adverse verdict. Rather than risk the adverse verdict in the state court trial, Magic Burgers and Mr. Metsch made the ill-advised and last-minute decision to remove the case in spite of the one-year limitation for

diversity cases and the specific discussions of this very provision by opposing counsel and the state court judge who was forced to declare a mistrial. Magic Burgers and Mr. Metsch's decision has resulted in a tremendous waste of judicial, witness, and juror resources that such an ill-considered maneuver entails.

However, even when advising a sophisticated client such as Magic Burgers whose management has extensive experience owning hundreds[14] of fast food restaurant franchises, Rule 11 precludes sanctions against a litigant if the violation is based on a frivolous legal claim or contention. Rule 11 explicitly limits a court's award of a monetary sanction against a "represented party" when the violation is based on a "claim, defense, or legal contention" which the Court finds was not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law." Fed. R. Civ. P. 11(c)(5)(A) (incorporating Fed. R. Civ. P. 11(b)(2)). In this case, it was Mr. Metsch as counsel, and not the client, who was required to know the Federal Rules of Civil Procedure and the statutes governing the procedures for removal of cases, particularly all limitations on removing cases premised on diversity jurisdiction, as set forth in § 1446(c).

Mr. Metsch failed in the Notice of Removal to even acknowledge, no less argue an exception to, the one-year limitation for diversity cases in § 1446(c)(1). He alone and (not his client) failed to make a non-frivolous legal argument warranted by existing law, or by the extension, modification, reversal, or establishment of new law to overcome the one-year limitation. Mr. Metsch's belated justification for the untimely removal because Plaintiff engaged in "bad-faith" by "deliberately failing to disclose the amount in controversy" was only asserted in response to Plaintiff's Motion to Remand. Moreover, it was insupportable, as explained *infra*, given Magic

[14]As of September 2012, Sun Holdings, Inc., and Mr. Guillermo Perales, the managing parent company and the sole member of Magic Burgers, LLC, ran one of the largest Burger King franchise operations in the United States, and Mr. Perales and his companies own more than 100 fast food locations comprised of several additional food chains. *See* www.entrepreneur.com article 224180; Doc. 38.

Burgers' complete failure to diligently conduct written discovery, and Mr. Metsch's failure to set a single deposition to ascertain economic damages or the amount in controversy before the one-year anniversary of the commencement of the lawsuit.

3. *Quantifying the attorney's fee award*

Plaintiff has not made a specific case for a substantial award or any particular amount, other than to argue that Magic Burgers and counsel's actions have caused a significant waste of resources, especially within the state court system. Plaintiff also argues Magic Burgers' removal of the case was "a continuation of contemptuous conduct" that occurred "throughout the state court action." Doc. 35 at 6-7. However, even when a sanction in the form of a fee award is based on Rule 11, as opposed to a fee award based on § 1447(c), the Eleventh Circuit has held that Rule 11 "does not apply to pleadings filed *before* removal" in the state court. *See Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1091 (11th Cir. 1994) (emphasis added). Plaintiff also does not suggest an amount of attorney's fees and costs which would have the appropriate deterrent effect resulting from the violation, if awarded under Rule 11. *See* Fed. R. Civ. P. 11(c)(4) ("A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include. . . . if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.").

Plaintiff will be given the opportunity to file the documentation in support of his request for attorney's fees and costs incurred "as a result of the removal" and expended (only) for work performed in this federal Court. However, the Court's final award of attorney's fees and costs must be limited to an assessment of work done in the federal court. Any amount awarded by this Court does not preclude any additional award of attorney's fees, costs, or any other sanction to be

determined by the state court for the parties' actions taken in the state court or any attorney work performed in the state court.

Based on the foregoing, it is ordered as follows:

1. Plaintiff's Motion to Remand (Doc. 29) is **GRANTED,** and this case is hereby remanded to the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, Case No. 2017-30366.
2. The Clerk is **DIRECTED** to mail a certified copy of this Order remanding the case to the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, Case No. 2017-30366; and, thereafter, **CLOSE** the case.
3. Plaintiff is **ORDERED** to file within 14 days of the date of this Order a motion for final computation of the amount of removal-related attorney's fees and costs, supported by the appropriate documentation containing an itemized accounting of his just costs and actual expenses, including attorney fees, incurred as a result of Magic Burgers' removal of this case, or justified as a deterrent under Rule 11, consistent with the analysis set forth above.

DONE and **ORDERED** in Chambers, in Orlando, Florida on December 10, 2018.

ANNE C CONWAY
United States District Judge

Copies furnished to:

Counsel of Record

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ATTACHMENT "C"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TIMOTHY HAJDASZ,

Plaintiff,

v. **Case No: 6:18-cv-1755-Orl-22LRH**

MAGIC BURGERS, LLC and LAWRENCE RICHARD METSCH,

Defendants.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT:

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION:	**PLAINTIFF'S RENEWED MOTION FOR FINAL ASSESSMENT OF ATTORNEY'S FEES AND COSTS AND SUPPORTING AFFIDAVITS (Doc. No. 49)**
FILED:	**February 21, 2019**

THEREON it is RECOMMENDED that the motion be GRANTED in part and DENIED in part.

I. BACKGROUND.

On October 17, 2018, Defendant Magic Burgers, LLC, represented by counsel Lawrence Richard Metsch, Esq., filed a notice of removal of the case from state court pursuant to 28 U.S.C. §§ 1441 and 1446, alleging diversity jurisdiction under 28 U.S.C. § 1332. Doc. No. 3. The notice of removal asserted that the notice was filed "within 30 days after the filing of Plaintiff's Motion for Partial Directed Verdict," which, according to Magic Burgers, was the first time that it learned

that Plaintiff Timothy Hajdasz was seeking more than $75,000.00 in compensatory damages. *Id.* at 2. Plaintiff had filed the premises liability complaint against Magic Burgers in state court on March 6, 2017, and the notice of removal was filed during the second day of trial, prompting the state court judge to declare a mistrial. *See* Doc. No. 40, at 1–2.

On October 24, 2018, Plaintiff filed a motion to remand the case to state court, which sought both remand and an award of attorney's fees pursuant to 28 U.S.C. § 1447(c). Doc. No. 29. On November 19, 2018, Plaintiff filed a motion for sanctions pursuant to Federal Rule of Civil Procedure 11, seeking sanctions against both Magic Burgers and Attorney Metsch. Doc. No. 35.

The Court granted the motion to remand. Doc. No. 40. The Court found that Magic Burgers's notice of removal violated the procedural requirements of 28 U.S.C. § 1446(c)(1) "because it was filed more than nineteen months after the suit was commenced in state court and just minutes before the state case . . . was to go to the jury." *Id.* at 7–8; *see* 28 U.S.C. § 1446(c)(1) ("A case may not be removed . . . on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action."). The Court concluded that Magic Burgers had failed to demonstrate that Plaintiff had acted in bad faith. Doc. No. 40 at 14–18.

The Court also granted Plaintiff's request for attorney's fees and costs for the untimely removal. *Id.* at 18. The Court found an award of fees under 28 U.S.C. § 1447(c) against Magic Burgers proper because it lacked an "objectively reasonable basis for seeking removal." *Id.* at 18, 23–24. In addition, the Court found that an award of fees under Federal Rule of Civil Procedure 11 against Attorney Metsch was warranted. *Id.* at 18, 27–30.[1] However, Plaintiff had not provided

[1] "[F]ee awards may not be imposed on attorneys under Section 1447(c)." *Mortg. Elec. Registration Sys., Inc. v. Malugen*, No. 6:11-cv-2033-Orl-22DAB, 2012 WL 1382265, at *5 (M.D. Fla. Apr.

appropriate evidence to quantify the attorney's fee award. *Id.* at 30. Accordingly, the Court ordered Plaintiff to file documentation for attorney's fees and costs incurred "as a result of the removal," because an award of such fees and costs "must be limited to an assessment of work done in the federal court." *Id.*[2]

On December 21, 2018, Plaintiff filed a motion for attorney's fees to determine the amount to be awarded. Doc. No. 41. The Court denied that motion without prejudice, finding that the motion lacked sufficient supporting documentation. Doc. No. 44. On February 21, 2019, Plaintiff filed a Renewed Motion for Final Assessment of Attorney's Fees and Costs and Supporting Affidavits. Doc. No. 49. Plaintiff included with the motion: (1) an Affidavit for Reasonable Attorney's Fees and Costs prepared by his counsel of record, Martin J. Jaffe, Esq., (Doc. No. 49-1, at 1–6); (2) state court-ordered fee awards that Attorney Jaffe avers were in favor of attorneys in the community of similar experience who received similar awards (Doc. No. 49-1, at 7–36); (3) invoices for certified transcripts (Doc. No. 49-1, at 37–39); (4) an Affidavit of Reasonable Attorneys' Fees prepared by Charles Chobee Ebbets, Esq. (Doc. No. 49-2); and (5) an Affidavit prepared by Andrew J. Leeper, Esq. (Doc. No. 49-3). Plaintiff seeks a total of $11,165.01 in attorney's fees and costs. Doc. No. 49 ¶ 5. He asks the Court to award $500.00 per hour for the services performed related

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3, 2012), *report and recommendation adopted*, 2012 WL 1382991 (M.D. Fla. Apr. 20, 2012). As discussed in more detail below, the undersigned has determined that the Court's Order authorized attorney's fees against Magic Burgers solely pursuant to 28 U.S.C. § 1447(c) and only against Attorney Metsch pursuant to Fed. R. Civ. P. 11.

[2] As detailed in the Order granting the motion to remand and finding entitlement to attorney's fees, Plaintiff is only entitled to fees related to the removal of the case and the fees incurred in this Court. Doc. No. 40, at 26, 30; *see also Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1091 (11th Cir. 1994); *Taylor Newman Cabinetry, Inc. v. Classic Soft Trim, Inc.*, No. 6:10-cv-1445-Orl-22DAB, 2012 WL 695670, at *2–3 (M.D. Fla. Feb. 14, 2012). Neither Magic Burgers nor Attorney Metsch has argued that the hours sought by Plaintiff in the present motion include anything other than those related to the matters that were before this Court.

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to the notice of removal. Doc. No. 49-1 ¶ 3. He avers that he spent 20.1 hours on removal-related matters. *Id.* at 3–4.

Through new counsel of record,[3] Magic Burgers filed a Memorandum of Law in Opposition to Plaintiff's Renewed Motion for Final Assessment of Attorney's Fees and Costs on March 14, 2019. Doc. No. 54. Attorney Metsch did not file a response on his own behalf.[4]

The Renewed Motion for Final Assessment of Attorney's Fees and Costs and Supporting Affidavits was referred to the undersigned for issuance of a Report and Recommendation (Doc. No. 51), and the matter is ripe for review.

II. LEGAL STANDARDS.

A. Attorney's Fees Under 28 U.S.C. § 1447(c) and Fed. R. Civ. P. 11.

28 U.S.C. § 1447(c) provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Federal Rule of Civil Procedure 11 sanctions are also authorized in the context of removal. *E.g.*, *Gray v. New York Life Ins. Co.*, 906 F. Supp. 628, 630 (N.D. Ala. 1995). Because the Court has already determined that Plaintiff is entitled to attorney's fees under both of these provisions (Doc. No. 40), the only remaining issues are the proper amount and the allocation between Magic Burgers and Attorney Metsch.

"The starting point for determining attorney's fees is to multiply hours reasonably expended by a reasonable hourly rate to arrive at a lodestar figure." *Turner v. Sec'y of Air Force*, 944 F.2d

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[3] Counsel for Magic Burgers states that Attorney Metsch no longer represents Magic Burgers (Doc. No. 54, at 1 n.1); however, Attorney Metsch has not filed a motion to withdraw as counsel for Magic Burgers in this case.

[4] On February 13, 2019, Attorney Metsch filed a Motion of Attorney Lawrence R. Metsch (FBN 133162) to Vacate Order Imposing Rule 11 Sanctions and Supporting Memorandum of Law. Doc. No. 47. That motion was denied. Doc. No. 48.

804, 808 (11th Cir. 1991) (citations omitted). The party seeking fees pursuant to Rule 11 or § 1447(c) bears the burden of providing evidence supporting the amount of fees sought. *See, e.g.*, *Sussman v. Salem, Saxon, & Nielsen, P.A.*, 152 F.R.D. 648, 652 (M.D. Fla. 1994) (Rule 11 sanctions); *Guthrie v. Finnegans Wake Irish Pubs, LLC*, No. 3:09cv39/MCR/EMT, 2009 WL 5176537, at *1 (N.D. Fla. Dec. 22, 2009) (Section 1447(c)); *see also Am. Civil Liberties Union v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999) (The "fee applicant bears the burden of . . . documenting the appropriate hours and hourly rates." (quoting *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988))).

The fee applicant must produce satisfactory evidence that the requested rate is within the prevailing market rates and support the number of hours worked and the rate sought. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "[F]ee counsel should have maintained records to show the time spent on the different claims, and the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity." *Norman*, 836 F.2d at 1303. Moreover, fee applicants must provide "fairly definite information" concerning activities performed by each attorney. *See Mallory v. Harkness*, 923 F. Supp. 1546, 1556 (S.D. Fla. 1996) (quoting *FMC Corp. v. Varonos*, 892 F.2d 1308, 1317 (7th Cir. 1990)).

It is well established that the Court may use its discretion and expertise to determine the appropriate hourly rate to be applied to an award of attorney's fees. *See Scelta v. Delicatessen Support Serv., Inc.*, 203 F. Supp. 2d 1328, 1331 (M.D. Fla. 2002). The Court "is itself an expert on the question [of reasonable fees] and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value." *Norman*, 836 F.2d at 1303 (citations omitted).

B. Taxable Costs.

The costs recoverable pursuant to 28 U.S.C. § 1447(c) are limited to those provided in 28 U.S.C. § 1920. *Bujanowski v. Kocontes*, No. 8:08-CV-390-T-33EAJ, 2009 WL 1564244, at *3 (M.D. Fla. May 1, 2009), *aff'd*, 359 F. App'x 112 (11th Cir. 2009). The following costs are allowable pursuant to 28 U.S.C. § 1920:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under 28 U.S.C. § 1923;

(6) Compensation of court appointed experts, interpreters, and special interpretation services.

A court cannot award costs other than those specifically authorized in § 1920, unless authorized by another applicable statute. *See U.S. E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 620 (11th Cir. 2000) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)).

III. ANALYSIS.

A. Amount of Attorney's Fees against Magic Burgers.

Magic Burgers has three central objections to the amount of requested attorney's fees and costs. First, it claims that Plaintiff has failed to provide evidence of reasonable hourly rates and rates paid in similar lawsuits, as required by the Court's previous Order. Doc. No. 54, at 3–4. Second, it argues that the Court's Order granting sanctions under Rule 11 does not apply to Magic

Burgers; thus, any attorney's fees and costs incurred in drafting the motion for sanctions should not be included in any award against Magic Burgers. *Id.* at 4–6. Finally, Magic Burgers contends that the amount of attorney's fees awarded should be reduced based on counsel's failure to keep contemporaneous time records. *Id.* at 6–7. I will address each of these contentions in turn.

1. Evidence of Reasonable Hourly Rate.

Plaintiff seeks to recover $500.00 per hour for the work performed related to the removal of this case from state court. Doc. No. 49-1 ¶ 3. His counsel, Attorney Jaffe, avers that he spent 20.1 hours on removal-related issues, and that no paralegal or any other non-attorney time is included in this figure. *Id.* at 3–4. Magic Burgers objects to the hourly rate. Doc. No. 54.

Under the lodestar method, a reasonable hourly rate for an attorney is "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman*, 836 F.2d at 1299. The "relevant market" is "the place where the case is filed." *Barnes*, 168 F.3d at 437 (quoting *Cullens v. Georgia Dep't. of Transp.*, 29 F.3d 1489, 1494 (11th Cir. 1994)). To establish that the requested hourly rate is consistent with the prevailing market rate, the fee applicant must "produc[e] satisfactory evidence" that "speak[s] to rates actually billed and paid in similar lawsuits." *Norman*, 836 F.2d at 1299. This requires "more than the affidavit of the attorney performing the work." *Id.*

To support his motion, Plaintiff filed the affidavit of Attorney Jaffe, in which he avers that he has been a member of the Florida Bar since 1998, admitted in federal court since 1999, and he is an experienced trial attorney who has practiced on both the defense and plaintiff side of civil litigation. Doc. No. 49-1 ¶ 2. Attorney Jaffe's experience includes several complex product liability trials as well as representation of auto manufacturers and Fortune 500 companies. *Id.* Since 2009, he has practiced personal injury law, and he currently handles personal injury cases,

wrongful death matters, and complex product liability and toxic tort litigation. *Id.* ¶¶ 2, 3. He has secured several verdicts and settlements in excess of one million dollars and has been lead counsel in thousands of cases. *Id.* ¶ 2.

Attorney Jaffe avers that a reasonable hourly rate for counsel with experience similar to his is $500.00 per hour. *Id.* ¶ 3. He also includes state court orders on attorney's fees in seven cases, in which counsel were awarded similar fees in Central Florida, ranging from $425.00 through $600.00 per hour. *Id.* at 7–36. He states that he has reviewed the experience levels of counsel in those cases, and he avers that their experience and qualification levels are substantially similar to his. *Id.* ¶ 3. He further avers that he has not received any court orders in his career awarding a specific amount and hourly rate for his attorney's fee; for the past ten years, he has represented plaintiffs. *Id.* ¶ 8. However, he has included an affidavit from Andrew Leeper, Esq., in which Attorney Leeper avers that in a case in which he was opposing counsel, he did not object to $500.00 per hour for Attorney Jaffe pursuant to a proposal for settlement. *Id.*; *see* Doc. No 49-3.

Attorney Leeper further avers that in his experience, a reasonable hourly rate for a lawyer with experience and expertise similar to Attorney Jaffe is $500.00 per hour. Doc. No. 49-3 ¶ 4. Attorney Leeper has been a member of the Florida Bar since 1987, is an experienced trial attorney, and practices insurance defense litigation. *Id.* ¶ 2.

The motion also includes an Affidavit of Reasonable Attorneys' Fees from Charles Chobee Ebbets, Esq., who reviewed the motion, docket, and time records in this case. Doc. No. 49-2. Attorney Ebbets avers that he is a member of the Florida Bar, has been licensed since 1976, and has been Board Certified in Civil Trial Law since 1984. *Id.* ¶ 1. He is a partner with the firm of Chobee Ebetts, P.A., which handles all aspects of civil litigation, and his practice focuses on prosecuting and defending personal injury cases and other complex matters. *Id.* ¶¶ 1–2. He

avers that he is familiar with attorney's fees customarily charged in the Central Florida community, and has opined on fee requests in other matters on numerous occasions. *Id.* ¶ 3. He avers that the reasonably hourly rate in cases similar to the case at bar ranges from $300.00 to $700.00 per hour. *Id.* ¶ 7. Based on Attorney Ebbetts's familiarity with Attorney Jaffe's work history, capabilities, and reputation, as well as his review of the record in this matter, Attorney Ebbetts avers that the $500.00 hourly rate sought is reasonable in this legal market based on Attorney Jaffe's skill and experience, and that 20.1 hours is a reasonable number of hours spent on this matter. *Id.* ¶¶ 6–11.

Magic Burgers contends that this evidence is insufficient and fails to demonstrate rates billed and paid in similar lawsuits. Doc. No. 54, at 4. Magic Burgers only directly challenges Plaintiff's reliance on the state court judgments, contending that those cases do not relate to improper removal or the underlying state court claims, and further arguing that Plaintiff failed "to provide information regarding the experience and expertise of the attorneys involved in those judgments for purposes of comparing to Plaintiff's counsel." *Id.* Magic Burgers has provided no evidence in opposition to the evidence submitted by Plaintiff, nor has it cited any authority supporting its position. *Id.*

Magic Burgers's arguments are unpersuasive. Although the state court orders are not sufficient evidence by itself to support Plaintiff's fee request, Plaintiff has submitted affidavits from two other attorneys who practice within the geographic boundaries of the Orlando Division and who have extensive experience with personal injury claims. Both attorneys have opined that $500.00 per hour is a reasonable hourly rate in this matter. In addition, Attorney Ebbets specifically averred that based on the relevant range for similar cases ($300.00–$700.00 per hour), and based on Attorney Jaffe's level of experience, $500.00 per hour is reasonable in this case. Doc. Nos. 49-2, 49-3. The Eleventh Circuit recognizes that evidence of reasonable hourly rates may be established by opinion evidence of rates billed and paid in similar lawsuits. *Norman*, 836 F.2d at 1299. The

evidence submitted by Plaintiff goes beyond merely "the affidavit of the attorney performing the work." *Id.* (citing *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984)). And Magic Burgers has not submitted any evidence rebutting that submitted by Plaintiff, nor has it provided any authority to the Court demonstrating that the affidavits submitted by Plaintiff are insufficient.

Thus, I recommend that the Court find that the $500.00 hourly rate for Attorney Jaffe is reasonable in this case[5] because Plaintiff has submitted sufficient, unrefuted evidence supporting this claim.

2. Fees as Sanction Under Fed. R. Civ. P. 11.

Magic Burgers next asserts that the Court's Order did not assess sanctions against it pursuant to Rule 11; thus, it argues, it should not be ordered to pay attorney's fees incurred in litigating the motion for Rule 11 sanctions. Doc. No. 54, at 5. Specifically, Magic Burgers seeks to remove the following time entries sought against it:

10/25/2018	Review Rule 11 case law for Plaintiff's Motion for Sanctions	2.5
10/26/2018	Draft and finalize Motion for Sanctions	2.5
11/23/2018	Review Defendant's Response to Motion for Sanctions	.5

Id. at 5–6; *see also* Doc. No. 49-1, at 3–4 (counsel's affidavit containing reconstruction of time records).

Regarding Plaintiff's entitlement to attorney's fees, the Court's Order initially states:

> Because the Court finds Magic Burgers' removal of the case was objectively unreasonable, Plaintiff's Motion to Remand will be granted and, in the Court's discretion, attorney's fees and costs will be awarded against Magic Burgers. *Attorney's fees and costs will also be awarded against Mr. Metsch as a sanction for violation of Rule 11* of the Federal Rules of Civil Procedure.

[5] The undersigned's recommendation pertains to the circumstances of this case alone and is not intended for use by counsel in setting a fee in other cases.

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Doc. No. 40, at 1 (emphasis added). The Court's Order later states, "an award of fees under § 1447(c) against Magic Burgers *and, under Rule 11, against Magic Burgers and Mr. Metsch jointly and severally is warranted*." *Id.* at 18 (emphasis added). However, when discussing Rule 11 sanctions, the Court states that it "finds that a sanctions award *against Mr. Metsch* is warranted," further stating:

> [E]ven when advising a sophisticated client such as Magic Burgers whose management has extensive experience owning hundreds of fast food restaurant franchises, Rule 11 precludes sanctions against a litigant if the violation is based on a frivolous legal claim or contention. Rule 11 explicitly limits a court's award of a monetary sanction against a "represented party" when the violation is based on a "claim, defense, or legal contention" which the Court finds was not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law." Fed. R. Civ. P. 11(c)(5)(A) (incorporating Fed. R. Civ. P. 11(b)(2)). In this case, *it was Mr. Metsch as counsel, and not the client*, who was required to know the Federal Rules of Civil Procedure and the statutes governing the procedures for removal of cases, particularly all limitations on removing cases premised on diversity jurisdiction, as set forth in § 1446(c).
>
> Mr. Metsch failed in the Notice of Removal to even acknowledge, no less argue an exception to, the one-year limitation for diversity cases in § 1446(c)(1). *He alone and (not his client) failed to make a non-frivolous legal argument* warranted by existing law, or by the extension, modification, reversal, or establishment of new law to overcome the one-year limitation. . . .

Id. at 27, 29 (emphasis added) (footnote omitted).

Thus, based on the Court's Order determining entitlement, the undersigned finds that the Court held that an award of attorney's fees against Magic Burgers was proper under 28 U.S.C. § 1447(c), while an award of attorney's fees against Attorney Metsch was proper pursuant to Rule 11.[6]

[6] Should the Court disagree with this conclusion and find that its Order authorized Rule 11 sanctions against both Magic Burgers and Attorney Metsch, then I alternatively recommend that Magic Burgers be held jointly and severally liable with Attorney Metsch for the entire Rule 11 fee award.

Based on the foregoing, Magic Burgers contends that because Plaintiff did not prevail on the motion for Rule 11 sanctions as it relates to Magic Burgers, any time spent by counsel in drafting the motion for sanctions should not be calculated in the award of attorney's fees against Magic Burgers. Doc. No. 54, at 5. Thus, Magic Burgers asserts that 5.5 hours of the total hours of work performed by Attorney Jaffe should not be charged against it. Doc. No. 54, at 6.[7]

The undersigned agrees. "In allocating [Rule 11] sanctions, the court must 'ascertain the extent to which responsibility for the violation rests with client or counsel and to apportion fees appropriately between the two of them.'" *See Yurus v. Variable Annuity Life Ins. Co.*, No. 4:01 CV 17 MCR/WCS, 2006 WL 2131309, at *7 (N.D. Fla. July 28, 2006) (quoting *PaineWebber, Inc. v. Can Am Financial Group, Ltd.*, 121 F.R.D. 324, 335 (N.D. Ill. 1988), *aff'd*, 885 F.2d 873 (7th Cir. 1989)). Because the Court did not award Rule 11 sanctions against Magic Burgers, any time spent by Plaintiff in seeking Rule 11 sanctions should not be taxed against Magic Burgers. *See* Fed. R. Civ. P. 11(c)(1) (emphasis added) ("[T]he court may impose an appropriate sanction on any attorney, law firm, or *party that violated the rule or is responsible for the violation.*"); Fed. R. Civ. P. 11(c)(4) (emphasis added) (authorizing attorney's fees "*directly resulting from the violation*"); *cf. Norman*, 836 F.2d at 1302 ("[I]n determining reasonable hours the district court must deduct time spent on discrete and unsuccessful claims." (citing *Hensley*, 461 U.S. at 435)).

I therefore recommend that, pursuant to the Court's Order regarding entitlement, the 5.5 hours sought by Plaintiff related to the motion for sanctions be assessed solely against Attorney Metsch and his law firm,[8] and the remaining hours assessed against Magic Burgers pursuant to 28 U.S.C. § 1447(c).

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[7] Magic Burgers specifically notes that it does not argue that Plaintiff did not prevail in his motion for Rule 11 sanctions against Attorney Metsch. Doc. No. 54, at 6 n.2.

[8] "Absent exceptional circumstances, a law firm must be held jointly responsible for a violation

3. Contemporaneous Time Records.

Finally, Magic Burgers notes that Attorney Jaffe failed to maintain contemporaneous detailed time records of the time spent and tasks performed. Based on this failure, Magic Burgers asks the Court, in its discretion, to reduce the amount of recovery because Attorney Jaffe's affidavit "was drafted over two months after the alleged tasks were performed and the time items included are no more than a rough estimate of the actual time incurred in each task." Doc. No. 54, at 8.

Magic Burgers is correct that "a court has discretion to determine the credibility of hours claimed in the absence of contemporaneous records." *See Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 878 (11th Cir. 1990) (citation omitted). Here, however, Attorney Jaffe avers that although his hours were not documented via contemporaneous time records, "the hours worked and tasks performed were carefully and conservatively reconstructed by the undersigned personally reviewing the Court docket, work product notes from preparing motions, reviewing the client's physical file, reviewing legal research logs, as well as the client's electronic file to determine all tasks completed." Doc. No. 49-1 ¶ 5. In his affidavit he provides detailed date entries that include a description of the work performed as well as the number of hours spent on each particular matter. *Id.* at 3–4. Moreover, Attorney Ebbets opined that 20.1 hours was a reasonable number of hours expended by Attorney Jaffe in this case. Doc. No. 49-2 ¶ 10. I too agree that 20.1 hours is a reasonable amount to expend on the removal and sanctions matters before this Court.

Because Attorney Jaffe submitted a detailed reconstruction of the time records, and Magic Burgers asserts no specific objection to any of the line items, I recommend that the Court decline to reduce the number of hours for which Plaintiff seeks recovery. *Cf. Barnes*, 168 F.3d at 428 ("Those opposing fee applications have obligations, too. In order for courts to carry out their duties in this

committed by [a] partner, associate, or employee." Fed. R. Civ. P. 11(c)(1).

area, 'objections and proof from fee opponents' concerning hours that should be excluded must be specific and 'reasonably precise.'" (quoting *Norman*, 836 F.2d at 1301)).

In sum, I recommend that the Court find that an hourly rate of $500.00 for Attorney Jaffe in this case is reasonable. However, I recommend that the Court only award attorney's fees pursuant to 28 U.S.C. § 1447(c) against Magic Burgers for 14.6 total hours, thereby reducing the overall number of hours taxed against Magic Burgers by 5.5, which were the hours incurred by Plaintiff in preparing the motion for Rule 11 sanctions. Thus, the total fee award against Magic Burgers should be $7,300.00 ($500.00 per hour x 14.6 hours = $7,300.00). As discussed below, I further recommend that the remaining $2,750.00 in fees ($500.00 per hour x 5.5 hours) be awarded to Plaintiff and jointly and severally against Attorney Metsch and his law firm pursuant to Rule 11.

B. Taxable Costs against Magic Burgers.

Plaintiff seeks to recover a total of $1,115.01 in costs. Doc. No. 49-1, at 4. He supports this request with three invoices. *Id.* at 37–39. The first invoice seeks to recover costs for a certified transcript of proceedings in state court, which includes $203.50 for 74 pages; $31.85 for a "litigation support package"; and $20.00 for processing and handling. *Id.* at 37. The second invoice documents a total cost of $435.53 for original transcripts, which includes $182.60 for 44 pages; $201.08 for expedited overnight; $31.85 for "litigation support package"; and $20.00 for processing and handling. *Id.* at 38. The third invoice is for a trial transcript, which includes $174.30 for 42 pages; $217.98 for a same-day expedited transcript; and $31.85 for "litigation support package." *Id.* at 39.

Absent a valid explanation from Plaintiff, it does not appear that the "litigation support package" fees are authorized by § 1920. "[T]he party seeking costs must provide sufficient detail and documentation regarding the requested costs so the opposing party may challenge the costs and

the court may conduct a meaningful review . . . . Failure to provide sufficient detail or supporting documentation . . . can be grounds for denial of costs." *See Johnston v. Borders*, No. 6:15-cv-936-ORL-40DCI, 2017 WL 1968352, at *5 (M.D. Fla. Apr. 24, 2017), *report and recommendation adopted*, 2017 WL 1957278 (M.D. Fla. May 11, 2017) (internal quotation and citations omitted). "Charges for condensed transcripts, summaries, scanning, and CD litigation packages are typically not recoverable because they are costs incurred for the party's convenience." *HRCC, Ltd. v. Hard Rock Cafe Int'l (USA), Inc.*, No. 6:14-cv-2004-ORL-40KRS, 2018 WL 1863778, at *11 (M.D. Fla. Mar. 26, 2018), *report and recommendation adopted*, 2018 WL 1863779 (M.D. Fla. Apr. 13, 2018) (citations omitted). Thus, the total costs requested should be reduced by $95.55 ($31.85 x 3).

In addition, Plaintiff provides no explanation for the charge of $201.08 for expedited overnight of the transcript on the second invoice, nor does he provide an explanation regarding the charge of $217.98 for a same-day expedited transcript on the third invoice. Accordingly, I recommend that the Court further reduce the costs awarded by $419.06. *See, e.g., WrestleReunion, LLC v. Live Nation Television Holdings, Inc.*, No. 8:07-CV-2093-JDW-MAP, 2010 WL 11508234, at *2 (M.D. Fla. Feb. 10, 2010) ("[F]ees for expedited transcripts are not reimbursable under § 1920."); *Ferguson v. Bombardier Servs. Corp.*, No. 8:03-CV-539-T-31DAB, 2007 WL 601921, at *4 (M.D. Fla. Feb. 21, 2007) ("[I]mbedded in the deposition transcript fees are fees for converting the videos to digital, expedited or condensed transcripts, and copies, all of which are not reimbursable under § 1920.").[9]

[9] Processing and handling fees, on the other hand, appear to be recoverable. *See, e.g., Maronda Homes, Inc. of Fla. v. Progressive Express Ins. Co.*, No. 6:14-cv-1287-Orl-31TBS, 2015 WL 6468191, at *3 (M.D. Fla. Oct. 26, 2015) (quoting *Ferguson*, 2007 WL 601921, at *4 ("Attendance fees of the court reporter or per diem, processing and handling, and delivery fees are part of the court reporter's fee and are taxable.")).

Therefore, I recommend that the Court award total costs to Plaintiff and against Magic Burgers in the amount of $600.40.[10]

C. Amount of Attorney's Fees against Attorney Metsch.

As to Rule 11 Sanctions against Attorney Metsch, the Court's Order determined entitlement but did not specify whether Attorney Metsch should be personally liable for the entire attorney's fee award. The Court further noted that Plaintiff had failed to allege an amount of fees and costs that "would have the appropriate deterrent effect resulting from the violation" under Rule 11. Doc. No. 40, at 30. In the instant motion, Plaintiff again fails to specify the amount of fees sought pursuant to Rule 11. Doc. No. 49.

Pursuant to Rule 11, the Court must limit the sanction imposed "to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. Rule. Civ. P. 11(c)(4); *see also Mortg. Elec. Registration Sys., Inc. v. Malugen*, No. 6:11-cv-2033-Orl-22GJK, 2012 WL 1382265, at *10 (M.D. Fla. Apr. 3, 2012), *report and recommendation adopted*, 2012 WL 1382991 (M.D. Fla. Apr. 20, 2012) (limiting fee award against counsel for improper removal to $500.00). As discussed above, I recommend that the Court award the attorney's fees incurred in litigating the motion for sanctions solely against Attorney Metsch and his law firm. This would be a sanction of $2,750.00 ($500.00 per hour x 5.5 hours = $2,750.00). I recommend that the Court find that, pursuant to Rule 11, this is a sufficient award "to deter repetition of . . . comparable conduct by others similarly situated." *See* Fed. Rule. Civ. P. 11(c)(4); *see also Malugen*, 2012 WL 1382265, at *10, *report and recommendation adopted*, 2012 WL 1382991 (M.D. Fla. Apr. 20, 2012); *In re Gen. Plastics Corp.*, 184 B.R. 1008, 1014 (Bankr. S.D. Fla. 1995) ("Rule 11 does not

[10] Calculated as follows: $1,115.01 (total costs sought) - $ 95.55 (litigation support package fees) - $419.06 (charges for expedited shipping) = $600.40.

necessarily entitle a party to the award of its entire reasonable fee. . . . [A] court may properly award less than a fee otherwise reasonable when it determines that the rule's goal of deterrence may be achieved by a lesser sanction." (citing *Fox v. Acadia State Bank*, 937 F.2d 1566, 1571 (11th Cir. 1991))).

IV. RECOMMENDATIONS.

Based on the foregoing, **I RESPECTFULLY RECOMMEND** that the Court do the following:

1. **GRANT in part and DENY in part** Plaintiff's Renewed Motion for Final Assessment of Attorney's Fees and Costs and Supporting Affidavits (Doc. No. 49);
2. **AWARD** Plaintiff $7,300.00 in attorney's fees payable by Magic Burgers pursuant to 28 U.S.C. § 1447(c);
3. **AWARD** Plaintiff $600.40 in costs payable by Magic Burgers pursuant to 28 U.S.C. § 1447(c);
4. **AWARD** Plaintiff $2,750.00 in attorney's fees payable by Attorney Metsch and his law firm pursuant to Fed. R. Civ. P. 11;
5. **DENY** the motion in all other respects; and
6. **DIRECT** the Clerk of Court to enter judgment in favor of Plaintiff Timothy Hadjasz and against Defendants Magic Burgers and Attorney Metsch in these amounts.

NOTICE TO PARTIES

A party has fourteen days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

Recommended in Orlando, Florida on May 17, 2019.

Leslie R. Hoffman

LESLIE R. HOFFMAN
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Unrepresented Party
Courtroom Deputy

ATTACHMENT "D"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TIMOTHY HAJDASZ,

Plaintiff,

v. **Case No: 6:18-cv-1755-Orl-22LRH**

MAGIC BURGERS, LLC,

Defendant.

ORDER

This cause is before the Court on Plaintiff's Renewed Motion for Final Assessment of Attorney's Fees and Costs and Supporting Affidavits (Doc. 49) filed on February 21, 2019.

The United States Magistrate Judge has submitted a report recommending that the Motion be granted in part and denied in part.

After an independent *de novo* review of the record in this matter, including the objections filed by Attorney Lawrence Richard Metsch ("Attorney Metsch")[1], the Court agrees entirely with the findings of fact and conclusions of law in the Report and Recommendation.

I. BACKGROUND[2]

In this case, Plaintiff challenged the removal of his state court action by Defendant Magic Burger, LLC and its counsel Attorney Metsch.[3] More than nineteen months ago, on March 6, 2017, Plaintiff filed a premises liability suit in the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, Case No.2017-30366, against Magic Burgers, LLC, which

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[1]In the Report and Recommendation, the Magistrate Judge refers to Attorney Metsch as a defendant. *See* (Doc. 55 at 17). However, he is not a defendant in this case.

[2]The facts are derived from the Court's Remand Order (Doc. 40) and the Magistrate Judge's Report and Recommendation (Doc. 55). Neither the parties nor Attorney Metsch objected to the facts in the Magistrate Judge's Report and Recommendation.

[3] Although Magic Burgers asserted that Attorney Metsch is no longer its counsel (Doc. 54 at 1 n.1), Attorney Metsch has not filed a motion to withdraw as counsel for Magic Burgers as required under Local Rule 2.03(b). Therefore, the Court has not granted him leave to withdraw as counsel.

operates a franchised Burger King restaurant in Ormond Beach, Florida. (Doc. 1, Ex. A). Plaintiff alleges that on July 27, 2015, while a customer at the Burger King, he slipped in the restroom which had water all over the floor and buckets attempting to catch dripping water, and he sustained injuries. (Doc. 3-2 at 2).

On October 17, 2018, although the trial of the case in state court had nearly finished and was about to be presented to the jury, Magic Burgers, represented by Attorney Metsch, filed a two-page "Notice of Removal" asserting it was removing the case to this federal district court, allegedly based on diversity jurisdiction, 28 U.S.C. § 1332. (Doc. 1). The Notice of Removal asserted that the case had been removed "within 30 days after the filing of [Plaintiff's] Motion For Partial Directed Verdict" during the *second day of trial* in state court when Magic Burgers allegedly learned "for the first time on the record" that Plaintiff was "seeking more than $75,000 in compensatory damages" (*Id.* ¶ 7) (emphasis added). According to Magic Burgers, "[p]rior to October 16, 2018, [Magic Burgers] knew only that [Plaintiff] was seeking more than $15,000 in compensatory damages." (*Id.*)

On October 24, 2018, Plaintiff filed a motion to remand the case to state court, which sought both remand and an award of attorney's fees pursuant to 28 U.S.C. § 1447(c). (Doc. 29). On November 19, 2018, Plaintiff filed a motion for sanctions pursuant to Federal Rule of Civil Procedure 11, seeking sanctions against both Magic Burgers and Attorney Metsch. (Doc. 35).

The Court granted the motion to remand. (Doc. 40). The Court found that Magic Burgers's notice of removal violated the procedural requirements of 28 U.S.C. § 1446(c)(1) "because it was filed more than nineteen months after the suit was commenced in state court and just minutes before the state case . . . was to go to the jury." (*Id.* at 7–8); *see* 28 U.S.C. § 1446(c)(1) ("A case may not be removed . . . on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action."). The Court concluded that

Magic Burgers had failed to demonstrate that Plaintiff had acted in bad faith. (Doc. 40 at 14–18).

The Court also granted Plaintiff's request for attorney's fees and costs for the untimely removal. (*Id.* at 18). The Court found an award of fees under 28 U.S.C. § 1447(c) against Magic Burgers proper because it lacked an "objectively reasonable basis for seeking removal." (*Id.* at 18, 23–24). In addition, the Court found that an award of fees under Federal Rule of Civil Procedure 11 against Attorney Metsch and the law firm of Metsch Law, P.A., jointly and severally, was warranted.[4] (*Id.* at 18, 27–30). However, Plaintiff had not provided appropriate evidence to quantify the attorney's fee award. (*Id.* at 30). Accordingly, the Court ordered Plaintiff to file documentation for attorney's fees and costs incurred "as a result of the removal," because an award of such fees and costs "must be limited to an assessment of work done in the federal court." *Id.*

On December 21, 2018, Plaintiff filed a motion for attorney's fees to determine the amount to be awarded. (Doc. 41.) The Magistrate Judge denied that motion without prejudice, finding that the motion lacked sufficient supporting documentation. (Doc. 44). On February 21, 2019, Plaintiff filed a Renewed Motion for Final Assessment of Attorney's Fees and Costs and Supporting Affidavits. (Doc. 49). Plaintiff included with the motion: (1) an Affidavit for Reasonable Attorney's Fees and Costs prepared by his counsel of record, Martin J. Jaffe, Esq., (Doc. 49-1 at 1–6); (2) state court-ordered fee awards that Attorney Jaffe avers were in favor of attorneys in the community of similar experience who received similar awards (*Id.* at 7–36); (3) invoices for certified transcripts (*Id.* at 37–39); (4) an Affidavit of Reasonable Attorneys' Fees prepared by Charles Chobee Ebbets, Esq. (Doc. 49-2); and (5) an Affidavit prepared by Andrew J. Leeper, Esq.

[4]Due to a drafting error, the Court's Remand Order (Doc. 40 at 18) inadvertently referred to the Rule 11 sanctions being award against "Magic Burgers and Mr. Metsch jointly and severally" when the Order explicitly stated that Rule 11 sanctions were only awarded against Mr. Metsch as counsel and not against his client, Magic Burgers. *See* (Doc. 40 at 29-30 & Doc. 55 at 11) (discussing the inconsistency). However, Rule 11 sanctions are generally awarded against counsel and counsel's law firm jointly and severally "absent exceptional circumstances." *See* Rule 11(c)(1) ("Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by [a] partner, associate, or employee."); thus, the Rule 11 sanction will be awarded against Attorney Metsch and the law firm of Metsch Law, P.A. jointly and severally.

(Doc. 49-3). Plaintiff seeks a total of $11,165.01 in attorney's fees and costs. (Doc. 49 ¶ 5). He asks the Court to award $500.00 per hour for the services performed related to the notice of removal. (Doc. 49-1 at 2–4). He avers his counsel spent 20.1 hours on removal-related matters. (*Id.* at 3–4).

Through new counsel of record, Magic Burgers filed a Memorandum of Law in Opposition to Plaintiff's Renewed Motion for Final Assessment of Attorney's Fees and Costs on March 14, 2019. (Doc. 54). Attorney Metsch did not file a response on his own behalf. Instead, on February 13, 2019, Attorney Metsch filed a Motion to Vacate Order Imposing Rule 11 Sanctions and Supporting Memorandum of Law on the basis that Plaintiff had not filed his renewed motion for attorney's fees. (Doc. 47). On February 14, 2019, the Court denied this motion because the deadline had not passed for Plaintiff to file his renewed motion for attorney's fees and Attorney Metsch failed to comply with Local Rule 3.01(g). (Doc. 48).

On May 17, 2019, the Magistrate Judge issued the Report and Recommendation ("R&R"), recommending that the Court grant in part and deny in part Plaintiff's Motion. (Doc. 55). On May 25, 2019, Attorney Metsch filed Objections to the R&R. (Doc. 56). Neither Plaintiff nor Magic Burgers filed objections or responded to Attorney Metsch's Objections within the appropriate deadlines. *See* Fed. R. Civ. P. 72(b)(2).

II. LEGAL STANDARD

District courts review de novo any portion of a magistrate judge's disposition of a dispositive motion to which a party has properly objected. Fed. R. Civ. P. 72(b)(3); *Ekokotu v. Fed. Express Corp.*, 408 F. App'x 331, 336 n.3 (11th Cir. 2011) (per curiam).[5] The district judge may reject, modify, or accept in whole or in part the magistrate judge's recommended disposition, among other options. Fed. R. Civ. P. 72(b)(3). De novo review of a magistrate judge's findings of

[5]Unpublished opinions of the Eleventh Circuit constitute persuasive, not binding, authority. *See* 11th Cir. R. 36-2 and I.O.P. 6

fact must be "independent and based upon the record before the court." *LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir. 1988). The district court "need only satisfy itself that there is no clear error on the face of the record" in order to affirm a portion of the Magistrate Judge's recommendation to which there is no timely objection. Fed. R. Civ. P. 72 advisory committee's note (1983) (citations omitted); *see also Gropp v. United Airlines, Inc.*, 817 F. Supp. 1558, 1562 (M.D. Fla. 1993).

III. DISCUSSION

A. The R&R

In Plaintiff's Motion, he seeks a total of $11,165.01 in attorney's fees and costs, which is composed of $10,050.50 in fees and $1,115.01 in costs. (Doc. 49 & Doc. 49-1 at 2–4). Plaintiff based the $10,050.50 in attorney's fees on a rate of $500 per hour times 20.1 hours, the amount of time Plaintiff's counsel spent on the present case as result of the removal. (Doc. 49-1 at 2–4). Plaintiff's cost amount is based on court reporter fees. (*Id.* at 37–39). The Magistrate Judge addressed fees and costs separately.

1. Amount of Attorney's Fees against Magic Burgers under 28 U.S.C. § 1447(c)

Plaintiff seeks to recover $500 per hour for the work performed related to the removal of this case from the state court. (Doc. 49-1 ¶ 3). Despite Magic Burgers' objection to this hourly rate, the Magistrate Judge found this to be a reasonable rate based on evidence submitted by Plaintiff: an affidavit by Plaintiff's counsel, two affidavits submitted by other attorneys with extensive experience in attorney's fees in these types of cases and in the Central Florida community, and state court orders. (Doc. 55 at 7–10).

Plaintiff seeks to recover for the 20.1 hours that its counsel spent on the present case as a result of the removal. (Doc. 49-1 at 3–4). Magic Burgers argued that the amount of recovery should be reduced because Plaintiff's counsel failed to maintain contemporaneous detailed time records of the time spent and tasks performed. (Doc. 54 at 6–8). However, the Magistrate Judge found that

20.1 hours was a reasonable amount of time to expend on the removal and sanctions matters in the present case. (Doc. 55 at 13). The Magistrate Judge was persuaded by a detailed reconstruction of the time records contained in Plaintiff's counsel's affidavit and an affidavit by Attorney Charles Chobee Ebbets, Esq., which stated that 20.1 hours was a reasonable number of hours expended in the case. (*Id.*) The Magistrate Judge noted that Magic Burgers did not specifically dispute any particular line item on Plaintiff's counsel's reconstruction of the time records. (*Id.*) However, the Magistrate Judge recommended that the Court "only award attorney's fees pursuant to 28 U.S.C. § 1447(c) against Magic Burgers for 14.6 total hours, thereby reducing the overall number of hours taxed against Magic Burgers by 5.5, which were the hours incurred by Plaintiff in preparing the motion for Rule 11 sanctions." (*Id.* at 14). Consequently, the Magistrate Judge stated that the total fee award against Magic Burgers should be $7,300.00, which is $500 per hour times 14.6 hours. (*Id.* at 15). She also recommended "that the remaining $2,750.00 in fees ($500.00 per hour x 5.5 hours) be awarded to Plaintiff and jointly and severally against Attorney Metsch and his law firm pursuant to Rule 11." (*Id.*)

2. Taxable Costs against Magic Burgers

Plaintiff seeks to recover $1,115.01 in costs and provides three invoices based on certified transcripts of proceedings in state court to support this request. (Doc. 49-1 at 4 & 37–39). The Magistrate Judge took issue with certain items on the invoices. First, she addressed the $31.85 cost for "litigation support package" listed on all three invoices, which totals $95.55. (Doc. 55 at 14–15). As Plaintiff failed to provide a valid explanation for the "litigation support package" costs, the Magistrate Judge found that they were not authorized by 28 U.S.C. § 1920 and the total costs should be reduced by $95.55. (*Id.*) Similarly, the Magistrate Judge also took issue with Plaintiff providing no explanation for the $201.08 charge for the expedited overnight transcript on the second invoice (Doc. 49-1 at 38) and the $217.98 charge for a same-day expedited transcript on the third invoice (Doc. 49-1 at 39). (Doc. 55 at 15). Therefore, she recommended the Court further

reduce the costs awarded by $419.06, the total of the expedited costs (*Id.* at 16). Based on reducing the total costs sought by these costs, the Magistrate Judge recommended that that Court award total costs to Plaintiff and against Magic Burgers in the amount of $600.40.[6] (*Id.*)

3. Fees as Sanctions under Rule 11

In analyzing the Court's Remand Order, the Magistrate Judge found that the Court held that an award of attorney's fees against Attorney Metsch, not Magic Burgers, was proper pursuant to Rule 11. (Doc. 55 at 11). The Magistrate Judge noted that the Court's Remand Order did not specify whether Attorney Metsch should be personally liable for the entire attorney's fee award and Plaintiff failed to specify the amount of fees sought pursuant to Rule 11. (Doc. 55 at 16). She recommended that the Court award the attorney's fees incurred in litigating the motion for sanctions solely against Attorney Metsch and his law firm. (*Id.*) She further recommended that the sanction be $2,750, based on the rate of $500 per hour times the 5.5 hours that Plaintiff's counsel spent on the motion for sanctions (*Id.*) She found this amount to be sufficient "to deter repetition of. . . comparable conduct by others similarly situated." (*Id.*) (quoting Fed. R. Civ. P. 11(c)(4)).

B. Attorney Metsch's Objections

Attorney Metsch makes five objections: (1) the *District Court* erred when it imposed Rule 11 sanctions upon him for his removal of this case from state court; (2) the *District Court* violated his procedural due process rights under the Fifth Amendment to the United States Constitution when it found without conducting a hearing and without taking any competent evidence that Plaintiff had not deliberately failed to disclose the actual amount in controversy to prevent removal; (3) the *District Court* substantively erred when it found that Plaintiff had not deliberately failed to disclose the actual amount in controversy; (4) the *District Court* erred when it determined that the thirty (30) day removal period pursuant to 28 U.S.C. § 1446(b) had begun to run on August

[6]This figure is calculated as follows: $1,115.01 (total costs sought) - $95.55 (litigation support package costs) - $419.06 (for expedited transcript costs) = $600.40.

15, 2018, when Plaintiff's counsel delivered his client's medical records to Attorney Metsch; and (5) the Magistrate Judge erred in determining that Plaintiff's counsel's reasonable hourly rate for professional services rendered in this slip and fall was $500 per hour.[7] (Doc. 56) (emphasis added). At the outset, the Court overrules Attorney Metsch's first four objections because they are inappropriate at this juncture. These objections address the Court's prior Remand Order, not the R&R. Pursuant to Rule 72, the Court is required to review any part of the R&R that a party objected to, not the Court's own previous orders. Fed. R. Civ. P. 72(b)(3) ("The district judge must determine de novo any part of *the magistrate judge's disposition* that has been properly objected to.") (emphasis added). The Court will now turn to Attorney Metsch's fifth objection.

Attorney Metsch objects to the Magistrate Judge's finding that $500 is a reasonable hourly rate, arguing that it is "patently excessive." (Doc. 56 ¶ 5). However, the Court agrees with the Magistrate Judge's finding. "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing *Blum v. Stenson*, 465 U.S. 886, 895–96 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). The party seeking a particular hourly rate "bears the burden of producing satisfactory evidence that the requested rate is in line with prevailing market rates." *Id.* The Court finds that Plaintiff has satisfied this burden by submitting affidavits confirming that $500 an hour is a reasonable amount in this matter based on Plaintiff's counsel's experience from two attorneys other than Plaintiff's counsel who are familiar with the rates charged by attorneys in Central Florida and who have years of experience in personal injury cases. *See* (Doc. 49-2 ¶ 9) ("I believe that his rate of $500 per hour is reasonable in this legal market based on his skill and experience."); (Doc. 49-3 ¶ 4) ("A reasonable hourly fee for a lawyer with similar experience and expertise in the Central Florida area

[7] In Attorney Metsch's Objections, he repeatedly refers to the Court's Remand Order as being Doc. 32. (Doc. 56). However, the Court's Remand Order is Doc. 30.

is $500.00 per hour."). "Evidence of rates may be adduced through direct evidence of charges by lawyers under similar circumstances or by opinion evidence." *Norman*, 836 F.2d at 1299; *see M.H. v. Comm'r of the Georgia Dep't of Cmty. Health*, 656 F. App'x 458, 461–62 (11th Cir. 2016) ("Because the district court based its award on a sufficiently detailed expert affidavit, we find that the court did not abuse its discretion in determining Plaintiffs' attorneys' reasonable hourly rates."). Plaintiff also provided state court orders and an affidavit from his counsel to support his fee request. (Doc. 49-1 at 1–36). Conversely, Attorney Metsch provided no evidence or case law rebutting Plaintiff's $500 per hour figure. Therefore, the Court finds that $500 per hour is a reasonable hour rate in this case. *See M.H.*,656 F. App'x at 462 (affirming an attorney's fees award where the defendant did not adequately rebut the reasonable rate presented by the plaintiffs' expert in his affidavit).

IV. CONCLUSION

Therefore, it is **ORDERED** as follows:

1. The Report and Recommendation filed May 17, 2019 (Doc. 55), is **ADOPTED** and **CONFIRMED** and made a part of this Order.
2. Plaintiff's Renewed Motion for Final Assessment of Attorney's Fees and Costs and Supporting Affidavits is hereby **GRANTED in part** and **DENIED in part**. The Motion is **GRANTED** insofar as it seeks an award of attorneys' fees and costs, and **DENIED** as to the amount of fees and costs requested.
3. Plaintiff is awarded **$7,300** in attorney's fees payable by Magic Burgers pursuant to 28 U.S.C. § 1447(c).
4. Plaintiff is awarded **$600.40** in costs payable by Magic Burgers pursuant to 28 U.S.C. § 1447(c).
5. Plaintiff is awarded **$2,750.00** in attorney's fees payable by Attorney Metsch and the law firm of Metsch Law, P.A., jointly and severally, pursuant to Rule 11.

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6. The Court **DIRECTS** the Clerk of Court to enter judgment in favor of Plaintiff against Magic Burger, Attorney Metsch, and the law firm of Metsch Law, P.A., in these amounts.

DONE and **ORDERED** in Orlando, Florida on June 26, 2019.

ANNE C CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties

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