NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GINA RUSSOMANNO	:	
Plaintiff,	:	Civil Action No.:
vs.	:	19-5945 (FLW)
	:	
SUNOVION PHARMACEUTICALS, and IQVIA Inc,	:	**OPINION**
Defendants,	:	
	:	

WOLFSON, Chief Judge:

Plaintiff Gina Russomanno ("Plaintiff"), proceeding pro se, brings this employment action against her former employer, Sunovion Pharmaceuticals Inc. ("Sunovion"), and IQVIA, Inc., ("IQVIA"), (cumulatively, "Defendants"). Pending before the Court are the following: (1) each Defendant's separate Motion to dismiss Plaintiff's Complaint, wherein Plaintiff alleges a claim for "wrongful termination, without real just cause, by Covenant of Good Faith (and fair dealing) Exception"; and (2) Plaintiff's Motion for Reconsideration of a prior Court Order that denied her request for remand. For the reasons expressed herein, Defendants' Motions to Dismiss are **GRANTED**, and Plaintiff's Motion for reconsideration is **DENIED**.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The following facts are drawn from the Complaint and are assumed to be true for the purpose of this Motion.1 On August 15, 2016, Plaintiff received a formal written job offer from

1 I note that the Plaintiff attaches voluminous exhibits to the Complaint, including various signed agreements, that this Court can consider on a Motion to dismiss. Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014) ("To decide a motion to dismiss, courts generally consider only the

Sunovion for a position as a Therapeutic Specialist (the "Letter Offer"). Complaint ("Compl."), Ex. B. The Letter Offer, which Plaintiff signed and accepted on that same date, included information about compensation and training associated with the position of a Therapeutic Specialist. Id. In addition, the first page of the Letter Offer explained that Plaintiff would be hired on an at-will basis: "[p]lease note that neither this letter nor any other materials constitute a contract of employment with Sunovion; your employment with Sunovion will be on an at-will basis." Id.

On August 24, 2016, Plaintiff signed an "Invention, Non-Disclosure, Restricted Activity and Personal Conduct Agreement" (the "NDA"). The NDA contained a non-compete clause, and various terms and provisions that Plaintiff was required to adhere to during the course of her tenure at Sunovion. Id. Moreover, the NDA reiterated Plaintiff's at-will status under a section entitled "No Employment Contract": "I understand that this Agreement, alone or in conjunction with any other document agreement whether written or oral, does not constitute a contract of employment and does not imply that [my] employment will continue for any period of time." Id.

As a Therapeutic Specialist, Plaintiff conducted "customer engagement" telephone calls, and sold pharmaceutical products to consumers who resided in New Brunswick, New Jersey. Id., Ex. B. In performing these tasks, Plaintiff alleges that she was required to meet sales quotas each quarter, and Sunovion assessed her performance based on data that it received from IQVIA. Id. at I, 13. While she worked at Sunovion, Plaintiff alleges that she maintained "acceptable goal attainment percentages," ranging from "80%" to "over 85%." Id. at 2. Nevertheless, Plaintiff avers that her manager, Jenna Yackish ("Ms. Yackish"), placed her on a performance

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allegations contained in the complaint, exhibits attached to the complaint and matters of public record.").

improvement plan ("PIP") for failing to reach 100% of her quotas for eight consecutive quarters.2 Id. at 13.

The PIP was implemented with a timeline that spanned from October 24, 2018 to January 8, 2019. Id., Ex., B. However, the plan's first paragraph informed Plaintiff that, "[a]t any time either during or after the PIP's conclusion . . . management may make a decision about your continued employment, up to and including termination[.]" Id. Moreover, a similar warning was contained in the last section of the plan, under the heading "Consequences of Continued NonPerformance": "[f]ailure to comply with the expectations [herein] and to sustain this performance . . . may result in further disciplinary action, up to and including termination. All employment at Sunovion is at will. Employees are subject to discharge at any time with or without cause or notice." Id.

While the PIP was in effect, Ms. Yackish held progress "updates" with Plaintiff once a week. Id. at 17. During their meetings, Plaintiff alleges that Ms. Yackish made the following statements which are characterized as "oral agreements" in the Complaint: "[w]e don't want to let you go"; "[w]e want you to succeed"; "I want you to succeed"; "[d]o you want this. If you do then I want this for you"; "[t]his is going to be your quarter, I can feel it"; "I want this for you"; "[t]he PIP can be extended"; "[t]he PIP doesn't necessarily mean termination. It can always be extended if you still don't make goal." Id. Despite these encouraging remarks, however, according to Plaintiff, Ms. Yackish "shut[] [her] down" on "field rides" and "debat[ed] Plaintiff's action[s] toward success." Id. Thereafter, Plaintiff alleges that she was terminated

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2 An Exhibit attached to the Complaint indicates that Plaintiff fell short of her sales goals, as she attained the following percentages during the first eight quarters of her tenure at Sunovion: 97.75%; 79.73%; 89.19%; 93.52%; 99.05%; 84.91%; 84.33%; 87.57%. See Compl., Ex. B.

from Sunovion on January 4, 2019, before "the documented PIP end date" on January 9, 2019. Id. at 5.

Prior to her termination, Plaintiff alleges that she raised a concern about the calculation of her sales quotas to Sunovion. Id. at 4, 16. In particular, according to Plaintiff, she informed Sunovion that her geographic market, i.e., New Brunswick is a "long-standing, unchanged" region with a "conforming footprint," unlike other cities in the tri-state area which, for example, had "undergone multiple realignment shifts in footprint" that "affect the formula settings for sales history, market potential, and volumes[.]" Id. at 4. For reasons that are unclear from the Complaint, Plaintiff alleges that these geographical differences had an impact on her performance. Id. at 4, 16. However, Plaintiff states that Sunovion investigated these alleged matters, and concluded that the quota calculations for her geographic market were, in fact, accurate.

Separate and apart from Sunovion's own alleged miscalculations, Plaintiff alleges that it received inaccurate statistical data from IQVIA that impacted Sunovion's assessment of her job performance. Id. at II-IV. In particular, Plaintiff alleges that on January 4, 2019, Sunovion held a conference call with its "salesforce" to explain that IQVIA had furnished inaccurate data to Sunovion during the prior two years. Id. at II, 6. However, rather than discuss these alleged issues with her, Plaintiff alleges that Sunovion placed her on a PIP with the intention of terminating her, "to avoid . . . addressing how IQVIA['s] negligent reporting and other Sunovion miscalculations" impacted her performance in her assigned market of New Brunswick. Id. at IIIIV, 3.

On January 11, 2019, Plaintiff filed a Complaint in the Superior Court of New Jersey, Law Division, Monmouth County, asserting a claim for "wrongful termination, without real just

cause, by Covenant of Food Faith (and fair dealing) Exception," against Sunovion and IQVIA. On February 15, 2019, Defendants removed that case to this Court, on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1441(a). On February 22, 2019, Plaintiff filed a motion to remand that this Court denied, finding that Defendants' removal of this action was proper. On October 3, 2019, Plaintiff moved for reconsideration of the Court's prior remand denial Order. On October 11, 2019, Defendants filed separate motions to dismiss Plaintiff's Complaint for the failure to state a viable cause of action. I first address Plaintiff's motion for reconsideration.

II. MOTION FOR RECONSIDERATION

In the prior Order, the Court denied Plaintiff's motion to remand for lack of diversity, finding that Defendants had satisfied their burden of establishing complete diversity, on the basis of sworn certifications that each submitted. Indeed, in those certifications, Defendants attested as follows: (1) Sunovion is incorporated in Delaware, with its principal place of business in Massachusetts; and (2) IQVIA, too, is a Delaware corporation that maintains "dual corporate headquarters" in Connecticut and North Carolina, and the "key business leaders" for the "business at issue" are employed in Pennsylvania. In moving for reconsideration, Plaintiff argues that the Court overlooked various documents which reveal that IQVIA maintains a principal place of business, or a "nerve center," in this State.

Fed. R. Civ. P. 59(e) and Local Civil Rule 7.1 govern motions for reconsideration. In particular, pursuant to Local Civil Rule 7.1(i), a litigant that is moving for reconsideration is required to "set[] forth concisely the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked[.]" L. Civ. R. 7.1(i). Moreover, motions for reconsideration are considered "extremely limited procedural vehicle[s]." Resorts Int'l v. Greate Bay Hotel & Casino, 830 F. Supp. 826, 831 (D.N.J. 1992); see also Leja v. Schmidt Mfg., 743 F.

Supp. 2d 444, 456 (D.N.J. 2010). Indeed, requests seeking reconsideration "are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence." Blystone v. Horn, 664 F.3d 397, 415 (3d Cir. 2011) (citing Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc., 602 F.3d 237, 251 (3d Cir. 2010)); see also N. River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995).

A "judgment may be altered or amended [only] if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Blystone, 664 F.3d at 415 (quotations omitted). "A party seeking reconsideration must show more than a disagreement with the Court's decision, and 'recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.'" G-69 v. Degnan, 748 F. Supp. 274, 275 (D.N.J. 1990) (citations omitted). That is, "a motion for reconsideration should not provide the parties with an opportunity for a second bite at the apple." Tischio v. Bontex, Inc., 16 F. Supp. 2d 511, 533 (D.N.J. 1998). Rather, a difference of opinion with the court's decision should be dealt with through the appellate process. Florham Park Chevron, Inc. v. Chevron U.S.A., Inc., 680 F. Supp. 159, 162 (D.N.J. 1998).

In seeking reconsideration, Plaintiff disputes the Court's previous finding of complete diversity, and argues that IQVIA is a New Jersey citizen. As a threshold matter, however, I note that Plaintiff does not advance valid grounds for reconsideration, such as a change in law, new evidence, or manifest error. Instead, she relies upon the same documents that this Court

considered and rejected in the previous Order. Therefore, while Plaintiff's request can be denied on these grounds alone, see Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co., 744 F. Supp. 1311, 1314 (D.N.J. 1990) (explaining that "[a] motion for reconsideration is improper when it is used to ask the Court to rethink what is had already thought through—rightly or wrongly") (internal quotations and citation omitted), the consideration of Plaintiff's new arguments would not otherwise change the outcome of this action. For Plaintiff's benefit, I will once again explain my rulings.

As explained in the previous Order, to establish jurisdiction under 28 U.S.C. § 1332(a), the amount in controversy must exceed $75,000, and there must be complete diversity of citizenship among the adverse parties. As to the latter requirement, each plaintiff must be a citizen of a different state from each defendant. See Owen Equip. and Erection Co. v. Kroger, 437 U.S. 365 (1978). Courts determine the citizenship of a corporation on the basis of the company's "place of incorporation" and its "principal place of business." See 28 U.S.C. §1332(c)(1). Moreover, a corporation's principal place of business is its "nerve center," or the location from which "a corporation's high level officers direct, control, and coordinate the corporation's activities." Hertz Corp. v. Friend, 559 U.S. 77, 80, 93 (2010) (explaining that, "in practice [the nerve center] should normally be the place where the corporation maintains its headquarters . . . . "); see also Brooks-McCollum v. State Farm Ins. Co., 376 Fed. Appx. 217, 219 (3d Cir. 2010).

Here, as in her previous remand motion, Plaintiff attaches "New Jersey Business Gateway" status reports for IQVIA and IQVIA Medical Communications and Consulting, Inc. ("IQMCC"), a non-defendant. In particular, the report for IQVIA shows that it is registered as a "Foreign Profit Corporation" in this State, with a "Home Jurisdiction" of Delaware. Moreover,

the IQVIA report lists two separate addresses, including an out-of-state "Main Business Address" in Connecticut, and a "Principal Business Address" in New Jersey. In addition, and unlike the documents for IQVIA, the IQMCC report specifies a "Domestic Profit Corporation" registration status, with a New Jersey "Home Jurisdiction" and "Main Business Address." Based on these records, Plaintiff again contends that IQVIA operates a principal place or business in New Jersey. In that connection, because she resides in this State, Plaintiff maintains that the Court erred in finding that the parties to this action are diverse. However, Plaintiff's position lacks merit.

At most, Plaintiff has shown that IQVIA maintains an office in this State in adherence to the regulations governing foreign corporate entities. See N.J.S.A. § 14A:4-1(1). However, as I explained in the previous Order, registering as a "Foreign Profit Corporation" to conduct business in this State does not suffice to establish New Jersey citizenship. See e.g., Display Works, LLC v. Bartley, 182 F. Supp. 3d 166, 179 (D.N.J. 2016) (holding that "New Jersey's registration and service statutes do not constitute consent to general jurisdiction[.]"); McClung v. 3M Co., No. 16-2301, 2018 U.S. Dist. LEXIS 220393, at *12 (D.N.J. July 5, 2018) (finding that the "mere registration of a business does not amount to consent to general jurisdiction in New Jersey."); Boswell v. Cable Servs. Co., No. 16-4498, 2017 U.S. Dist. LEXIS 100708, at *14 (D.N.J. June 29, 2017) (concluding that the defendant's "registration to do business in New Jersey does not mean it consented to general jurisdiction in New Jersey."). Thus, to the extent that Plaintiff raises this position, these grounds fail to provide an appropriate basis for reconsideration.

Moreover, Plaintiff's reliance on the "Domestic Profit Corporation" registration status for IQMCC is misplaced. Indeed, because IQMCC is not named as a defendant in this action, its

state of incorporation is irrelevant for jurisdictional purposes. And, regardless of whether some kind of affiliation exists, in contrast to Plaintiff's position, the Court cannot find that IQVIA operates a principal place of business in this State, based on the mere presence of a related corporation such as IQMCC. See Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 643 (3d Cir. 1991) ("[T]here is a presumption that a corporation, even when it is a wholly owned subsidiary of another, is a separate entity."). Rather, imputing IQMCC's principal place of business to IQVIA, as Plaintiff purports to do, requires her to demonstrate that the entities are alter egos. However, Plaintiff has not conducted the required fact intensive examination**3** to support such a finding, either in her initial remand motion or in the current reconsideration motion. Thus, IQMCC's presence in this State, too, fails to provide proper grounds for reconsideration.**4**

3 The Third Circuit has set forth several factors in determining whether entities are alter egos, including: "gross undercapitalization . . . 'failure to observe corporate formalities, nonpayment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders.'" Bd. of Trs. v. Foodtown, Inc., 296 F.3d 164, 172 (3d Cir. 2002) (citation omitted). Rather than address each of these elements, Plaintiff emphasizes that IQVIA and IQMCC share a corporate executive named Eric Sherbert. However, as I explained in the previous Order, an overlapping board of directors, with nothing more, does not suffice to establish a corporate alter ego. See United States v. Bestfoods, 524 U.S. 51, 69 (1998) ("It is a well-established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership."); see also Leo v. Kerr-McGee, No. 93-1107, 1996 U.S. Dist. LEXIS 6698, at *6 (D.N.J. May 10, 1996) ("A significant degree of overlap between directors and officers of a parent and its subsidiary does not establish an alter ego relationship.").

4 As explained in greater detail below, even if IQVIA operates a principal place of business in this State, Plaintiff's failure to assert connections between IQVIA and her wrongful termination, particularly since there are a dearth of factual allegations as to IQVIA, support the fact that Plaintiff has fraudulently joined IQVIA in this action. See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 302 (2d Cir. 2004) ("The doctrine of fraudulent joinder is meant to prevent plaintiffs from joining non-diverse parties in an effort to defeat federal [diversity] jurisdiction."); see, e.g., Sussman v. Capital One, N.A., 14-01945, 2014 U.S. Dist.

Accordingly, the Court's findings in the prior remand Order remain unchanged. I proceed to address whether Plaintiff has alleged a cognizable wrongful termination claim against Sunovion and IQVIA.

III. MOTION TO DISMISS

A. Standard of Review

Under Fed. R. Civ. P. 12(b)(6), a complaint can be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In reviewing a dismissal motion, courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Phillips v. Cnty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (citation and quotations omitted). Under this standard, the factual allegations set forth in a complaint "must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Indeed, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "[A] complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009).

However, Rule 12(b)(6) only requires a "short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Twombly, 550 U.S. at 555. The complaint must include "enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts

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LEXIS 151866, at *19 (D.N.J. Oct. 24, 2014) (finding fraudulent joinder where there were "simply no allegations" in the plaintiff's complaint to substantiate a claim against a named defendant). In that connection, IQVIA's citizenship could be disregarded for diversity purposes.

to raise a reasonable expectation that discovery will reveal evidence of the necessary element." Phillips, 515 F.3d at 234 (citation and quotations omitted); Covington v. Int'l Ass'n of Approved Basketball Officials, 710 F.3d 114, 118 (3d Cir. 2013) ("[A] claimant does not have to set out in detail the facts upon which he bases his claim. The pleading standard is not akin to a probability requirement; to survive a motion to dismiss, a complaint merely has to state a plausible claim for relief.") (quotations and citations omitted).

In sum, under the current pleading regime, when a court considers a dismissal motion, three sequential steps must be taken: first, "it must take note of the elements the plaintiff must plead to state a claim." Connelly v. Lane Constr. Corp., 809 F.3d 780, 787 (3d Cir. 2016) (citation, quotations, and brackets omitted). Next, the court "should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth." Id. (citations and quotations omitted). Lastly, "when there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. (citations, quotations and brackets omitted); Robinson v. Family Dollar, Inc., 679 Fed. Appx. 126, 132 (3d Cir. 2017).

B. SUNOVION

i. Wrongful Termination

In the Complaint, Plaintiff asserts a claim for "wrongful termination, without real just cause, by Covenant of Good Faith (and fair dealing) Exception."[5] See Compl. In support, Plaintiff avers that "[t]he covenant of good faith means that the employer and employee have to

5 In her opposition brief, Plaintiff confirms that her wrongful termination claim is pled in contract, not tort. Plaintiff's Opp., at 1 ("Plaintiff entered original complaint for wrongful termination by Covenant of Good Faith (and Fair Dealing) Exception as per New Jersey state law."). In addition, on the "Civil Case Information Statement" that accompanies her Complaint, Plaintiff identifies this action as arising under common law, as opposed to the "Conscientious Employees Protection Act" or Law Against Discrimination LAD." See Notice of Removal, Exhibit A.

be fair and forthright with each other, and employers must have 'just cause' to fire someone." Plaintiff's Opp., at 10. Despite these obligations, Plaintiff argues that Sunovion created "a new rule under new management" to "fabricate[]" a reason for her termination. Id. However, despite acknowledging that her "poor performance" and "missed" sales quotas were based on inaccurate data from IQVIA, Sunovion, Plaintiff contends, did not recalculate her performance measures, and instead, terminated her without "legitimate just cause." Id. at 10, 14-16.

At the outset, I cannot discern whether Plaintiff has alleged two separate causes of action in the Complaint. Indeed, Plaintiff appears to assert a wrongful termination claim, because, according to her, she was discharged from Sunovion without just cause. In addition, as a separate and independent basis, Plaintiff seems to allege that Sunovion breached the covenant of good faith and fair dealing by fabricating a basis for her termination. Nevertheless, even if the Court, out of an abundance of caution, construed Plaintiff's Complaint to plead two different causes of action, both claims fail for the same reason—she has not alleged the existence of an express or implied contractual obligation that Sunovion violated.

Under New Jersey law, it is axiomatic that "employment is presumed to be 'at will' unless an employment contract states otherwise." Varrallo v. Hammond, Inc., 94 F.3d 842, 845 (3d Cir. 1996) (citing Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 396 (1994)); see Witkowski, 136 N.J. at 397 ("An employment relationship remains terminable at the will of either an employer or employee, unless an agreement exists that provides otherwise."); McCrone v. Acme Mkts., 561 Fed. Appx. 169, 172 (3d Cir. 2014) ("While exceptions to this doctrine do exist, [t]oday, both employers and employees commonly and reasonably expect employment to be atwill, unless specifically stated in explicit, contractual terms.") (quotations and citation omitted).6

6 For purposes of completeness, I note that there are certain legislative and judicial exceptions to the at-will rule, neither of which Plaintiff has alleged here. For example, an

In an at-will relationship, a worker can be terminated "for good reason, bad reason, or no reason at all." Witkowski, 136 N.J. at 397 (citing English v. College of Medicine & Dentistry, 73 N.J. 20, 23 (1977)); see Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 191 (1988) ("An employer can fire an at-will employee for no specific reason or simply because an employee is bothering the boss.").

In the absence of an express agreement, a plaintiff can assert a wrongful termination claim on the basis of an implied contract. For instance, in Woolley v. Hoffmann-La Roche, 99 N.J. 284, 285 (1985), the NJ Supreme Court held that barring "a clear and prominent disclaimer," a handbook or manual can create an "implied promise" to refrain from terminating an employee unless just cause exists. Id. at 285-86. The Court explained that an actionable breach can arise from an at-will termination when an employer hires an employee without an "individual employment contract," and "widely distribute[s,] among a large workforce," a handbook that includes "definite and comprehensive" provisions regarding "job security." Id. at 294, 302; see Witkowski, 136 N.J. at 396. Such provisions, the Court held, include those which list specific examples of "terminable offenses," or designate "a set of detailed procedures" to implement before an employee is discharged. See Woolley, 99 N.J. at 308; see Witkowski, 136 N.J. at 394.

In addition to corporate-wide policies, a verbal promise or representation to an individual employee can serve as grounds for an implied contract. For example, in Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276 (1988), the plaintiff was hired on an at-will basis. Id. However, after the

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employer cannot discharge "a worker for a discriminatory reason." Witkowski, 136 N.J. at 398 (citing N.J.S.A. 10:5-1 to -28). In addition, "an employer may not fire an employee if the 'discharge is contrary to a clear mandate of public policy[.]'" Id. (quoting Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 73 (1980)); see also Pierce, 84 N.J. at 73 ("[E]mployers will know that unless they act contrary to public policy, they may discharge employees at will for any reason.").

plaintiff attempted to resign and accepted another job offer, his supervisor promised to refrain from firing the plaintiff without cause, if the plaintiff continued to work for his current organization. Id. at 280. Despite agreeing, the plaintiff was discharged about four months later, following which he filed a wrongful termination suit on the basis of a verbal contract. Id. at 283. In considering the plaintiff's claims, the Court recognized the "enforceability of an oral contract of employment," and held that a cause of action arising therefrom "should be analyzed by those contractual principles that apply when the claim is one that an oral employment contract exists." Id. at 288 (citing Shiddell v. Electro Rust-Proofing Corp., 34 N.J. Super. 278, 290 (App. Div.1954)).

Here, the factual allegations in the Complaint fail to establish that an employment contract exists between Plaintiff and her employer. Indeed, a review of the exhibits to the Complaint reveals that Plaintiff, in two separate agreements, acknowledged her at-will status in explicit terms. First, on August 15, 2016, before she began her tenure as a Therapeutic Specialist, Plaintiff executed a Letter Offer from Sunovion that included the following language on the first page: "[p]lease note that neither this letter nor any other materials constitute a contract of employment with Sunovion; your employment with Sunovion will be on an at will basis." Compl., Ex. B. Less than two weeks later, on August 24, 2016, Plaintiff acknowledged her atwill status for a second time in a binding NDA. In fact, under a section entitled "No Employment Contract," the NDA contained an explicit disclaimer which provided: "I understand that this Agreement, alone or in conjunction with any other document or agreement whether written or oral, does not constitute a contract of employment and does not imply that my employment will continue for any period of time." Id. Thus, Plaintiff has not alleged the existence of an express agreement that would require cause for her termination.

In addition, Plaintiff has not pled that an implied agreement existed that would have altered her at-will status at Sunovion. Although the New Jersey Supreme Court has recognized that an implied contract can arise from a handbook or a verbal promise, neither are alleged in the Complaint. For instance, Plaintiff does not assert that Sunovion circulated a handbook throughout its workforce that included, for example, a list of "terminable offenses," or designated "a set of detailed [disciplinary] procedures" that could be construed to require just cause before she was discharged. Rather, Plaintiff claims that she was placed on a PIP and that Sunovion "terminated Plaintiff earlier than the documented PIP end date." Compl., 5. However, the allegations of such a program, as a result of Plaintiff's "performance concerns," do not amount to an agreement that modified her at-will status. Indeed, the PIP, attached to the Complaint, reiterates in its first and last paragraphs Plaintiff's at-will status, and warned that she could be terminated while the plan was in effect: "[at] any time either during or after the PIP's conclusion . . . employment is at will or management may make a decision about your continued employment, up to and including termination from the company." Compl., Ex. B. As such, Plaintiff has not pled factual allegations to conclude that she was fired in breach of an implied contract.

Moreover, the alleged "oral agreements" in the Complaint do not suffice to create an implied contract. In particular, the pleadings assert that Ms. Yackish made the following remarks during Plaintiff's tenure at Sunovion: "[w]e don't want to let you go"; "[w]e want you to succeed"; "I want you to succeed"; "[d]o you want this. If you do then I want this for you"; "[t]his is going to be your quarter, I can feel it"; "I want this for you"; "[t]he PIP can be extended"; "[t]he PIP doesn't necessarily mean termination. It can always be extended if you still don't make goal." Id. However, these alleged statements differ from those at issue in Shebar,

wherein the at-will plaintiff rejected a job offer, because his supervisor assured him that he would not be fired without just cause, if he continued his employment. In contrast, the alleged "oral agreements" that Plaintiff has referenced in her Complaint, here, present nothing more than encouraging remarks that do not suffice to create an enforceable oral contract between Plaintiff and Sunovion. See e.g., Bell v. KA Indus. Servs., LLC, 567 F. Supp. 2d 701, 710 (D.N.J. 2008) (dismissing a Shebar claim where the plaintiff did not allege "facts that if proven true, would support a conclusion that the implied contract was supported by consideration.").

However, even if Plaintiff alleged the existence of an implied agreement, the fact that Plaintiff has acknowledged, on multiple occasions, that she was an at-will employee dooms her implied contract claims. For example, the Third Circuit's decision in Radwan. v. Beecham Laboratories, Div. of Beecham, Inc., 850 F.2d 147 (3d. Cir. 1998) illustrates this point. In that case, the plaintiff alleged that certain provisions in his handbook created an implied promise that was breached, when he was discharged without just cause. Id. at 148. However, the Third Circuit rejected the plaintiff's claims, finding that his "employment application" included an express provision that set forth his at-will status, stating: "I understand and agree that my employment is for no definite period and may, regardless of the date of payment of my wages and salary, be terminated at any time without previous notice." Id. at 148-149. Indeed, because the plaintiff accepted "a term of employment providing without qualification that he could be terminated at any time without previous notice," the Third Circuit explained that "he could hardly have any reasonable expectation that [his] manual granted him the right only to be discharged for cause." Id. at 150.

Like the employee in Radwan, Plaintiff, here, acknowledged her at-will status in two separate agreements, including the Letter Offer and the NDA. Thus, because Plaintiff's "tenure

was specifically dealt with in writing when [she] was hired," she could not reasonably believe that, for example, a handbook or a similar resource modified her at-will status. Id.; see, e.g., Schlichtig v. Inacom Corp., 271 F. Supp. 2d 597, 606 (D.N.J. 2003) (rejecting a breach of an implied contract claim, where the plaintiff, prior to the commencement of his employment, signed a contract stating that he "could be 'terminated with or without cause or notice at any time.'"); McDermott v. Chilton Co., 938 F. Supp. 240, 245 (D.N.J. 1995) (finding the plaintiff's breach of an implied contract claim failed, because the plaintiff signed an "application form" when he started working that read "I specifically agree that my employment may be terminated, with or without cause or notice, at any time at the option of either the Company or myself."); D'Alessandro v. Variable Annuity Life Ins. Co., 89-2052, 1990 U.S. Dist. LEXIS 16092, at *4, 10 (D.N.J. Nov. 20, 1990) (holding that a "standard practice memoranda" that the defendants distributed throughout the workforce did not create an enforceable agreement, because the plaintiff executed a contract that stated that it could "be terminated by either party for any reason").

In sum, Plaintiff has not sufficiently alleged that her job at Sunovion was anything other than an at-will employment.7 Nor has she pled that Sunovion discharged her in breach of an express of verbal implied contract. Therefore, because the Complaint describes northing more than an at-will relationship, Plaintiff's wrongful termination claim arising from Sunovion's

7 Plaintiff's opposition attaches an unsigned Severance Agreement that she received from Sunovion. The terms of the Agreement contain a general release provision that encompasses claims arising under "the implied obligation of good faith and fair dealing; or any express, implied, oral, or written contract." Pl.'s Opp., at 2. Moreover, according to Plaintiff, the general release provision in the Severance Agreement demonstrates Sunovion's "admitted acknowledgment relating to a contract and contract obligations for plaintiff['s] employment." Pl.'s Opp., at 3. However, Plaintiff's position is without merit. Indeed, the general release provision in the Severance Agreement does not establish that an employment contract existed between her and Sunovion, particularly since, as explained supra, Plaintiff executed two separate agreements, including the Letter Offer and NDA, which set forth her at-will status in explicit terms.

alleged failure to establish cause is dismissed. See, e.g., Day v. Wells Fargo & Co., No. 17-6237, 2018 U.S. Dist. LEXIS 66807, at *14 (D.N.J. April 20, 2018) ("In short, the Court concludes that a plaintiff cannot plead an action under the common law of New Jersey for wrongful discharge in breach of an implied term of an employment contract in the absence of an employment contract."). I next address Plaintiff's allegations as to the alleged breach of the covenant of good faith and fair dealing.

ii. The Covenant of good faith and fair dealing.

In New Jersey, contracting parties are "bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224 (2005). While the concept of good faith is difficult to define in precise terms, "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party[.]" Wilson v. Amerada Hess Corp., 168 N.J. 236, 245 (2001). To allege such a claim, a plaintiff must assert: "(1) a contract exists between the plaintiff and the defendant; (2) the plaintiff performed under the terms of the contract . . . ; (3) the defendant engaged in conduct, apart from its contractual obligations, without good faith and for the purpose of depriving the plaintiff of the rights and benefits under the contract; and (4) the defendant's conduct caused the plaintiff to suffer injury, damage, loss or harm." Wade v. Kessler Inst., 343 N.J. Super. 338, 347 (App. Div. 2001).

As such, a claim based on a "[b]reach of the implied covenant of good faith and fair dealing is not a free-standing cause of action; such a covenant is an implied covenant of a contract." Luongo v. Vill. Supermarket, Inc., 261 F. Supp. 3d 520, 532 (D.N.J. 2017) (emphasis in original); Wade v. Kessler Inst., 172 N.J. 327, 345 (2002) ("To the extent plaintiff contends

that a breach of the implied covenant may arise absent an express or implied contract, that contention finds no support in our case law. In that respect, we agree with the court below that an implied contract must be found before the jury could find that the implied covenant of good faith and fair dealing had been breached."); Noye v. Hoffmann-La Roche Inc., 238 N.J. Super. 430, 433 (App. Div. 1990) ("In the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing.") (citing McQuitty v. General Dynamics Corp., 204 N.J. Super. 514, 519-20 (App.Div.1985)); see also Varrallo v. Hammond Inc., 94 F.3d 842, 848 (3d Cir. 1996).

Here, because Plaintiff has not alleged the existence of an express or implied contract, she cannot assert a wrongful termination claim based on Sunovion's purported breach of the implied covenant; indeed, a breach of the implied covenant cannot occur in the absence of a contractual agreement. See Schlichtig v. Inacom Corp., 271 F. Supp. 2d 597, 606 (D.N.J. 2003) ("[B]ecause the Court has concluded that the terms of this employee manual could not have given rise to an implied contract of employment, it necessarily follows that the manual's provisions do not contain an implied covenant of good faith and fair dealing."); Barone v. Leukemia Society of America, 42 F. Supp. 2d 452, 457 (D.N.J. 1998) ("In the absence of a contract, there is no implied covenant of good faith and fair dealing which might be used as a basis for finding a right to continued employment."); McDermott, 938 F. Supp. at ("Under New Jersey law, an implied covenant of good faith and fair dealing may not be invoked to restrict the authority of employers to fire at-will employees."); Argush v. LPL Fin. LLC, No. 13-7821, 2014 U.S. Dist. LEXIS 107148, at *10 (D.N.J. Aug. 5, 2014) ("[I]t is well settled that the implied term of fair dealing will not work to constrain an employer's discretion to terminate an at-will employee.") (quotations and citations omitted); Alessandro, 1990 U.S. Dist. LEXIS 16092, at

*14 ("New Jersey courts have uniformly 'rejected the proposition that there is an implied covenant of good faith and fair dealing between an employer and employee in an at-will situation.'").

C. IQVIA

IQVIA challenges the pleadings under Fed. R. Civ. P. 8(a)(2). Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To meet the pleading requirements of Rule 8(a)(2) in multiple defendant actions, such as the one here, "the complaint must clearly specify the claims with which each individual defendant is charged." Kounelis v. Sherrer, No. 04-4714, 2005 U.S. Dist. LEXIS 20070, at *11 (D.N.J. Sept. 6, 2005); see Major Tours, Inc. v. Colorel, 720 F. Supp. 2d 587, 604 (D.N.J. 2010) ("Because the Complaint involves multiple claims and multiple defendants, the Court must carefully determine whether the Complaint provides each defendant with the requisite notice required by Rule 8 for each claim, and whether the claim itself presents a plausible basis for relief."); Pushkin v. Nussbaum, No. 12-0324, 2014 U.S. Dist. LEXIS 52349, at *14 (D.N.J. April 15, 2014) ("Rule 8(a) . . . 'requires that a complaint against multiple defendants indicate clearly the defendants against whom relief is sought and the basis upon which the relief is sought against the particular defendants.'") (quoting Poling v. K. Hovnanian Enterprises, 99 F. Supp. 2d 502, 517-18 (D.N.J. 2000)).

Here, the factual allegations in the Complaint do not assert a viable claim against IQVIA. For instance, the first paragraph of the pleadings state that the instant action arises not from the alleged conduct of IQVIA—a corporation that Plaintiff does not work for—but from Sunovion's purported "wrongful termination, without real just cause by Covenant of Good Faith (and fair dealing) Exception . . . ." Compl., pg. 1-2. In addition, throughout the Complaint, Plaintiff

alleges Sunovion's failure to establish "just cause" for her discharge, and the bad-faith conduct that Sunovion exhibited towards Plaintiff, in breach of the implied convent of good faith and fair dealing. Indeed, time and time again, the pleadings state that Plaintiff was harmed as a result of Sunovion's alleged conduct, with no mention of a specific, actionable wrongdoing that IQVIA performed. In fact, Plaintiff pleads no factual allegations that IQVIA should be held liable for her alleged wrongful termination. Rather, as to IQVIA, the Complaint alleges that IQVIA supplied certain data to Sunovion, which Sunovion then used to assess the performance of its workers. Id. at I. However, Plaintiff cannot assert a wrongful termination claim against IQVIA on the basis of its business relationship with Sunovion.8 Therefore, IQVIA is dismissed as a defendant to this action.

Nonetheless, I note that the pleadings include passing references to IQVIA's alleged "negligent reporting." Id. at II-IV. Assuming that Plaintiff is asserting a claim for negligence against IQVIA, that cause of action cannot stand. To assert such a claim, a litigant must allege four elements: "(1) [a] duty of care, (2) [a] breach of [that] duty, (3) proximate cause, and (4) actual damages[.]" Brunson v. Affinity Federal Credit Union, 199 N.J. 381, 400 (2009) (quotations and citations omitted). Here, because no relationship whatsoever is pled between Plaintiff and IQVIA, she has not alleged the first element of a negligence claim. See NCP Litig. Trust v. KPMG LLP, 187 N.J. 353, 901 (2006) ("Ultimately, the duty owed to another is defined by the relationship between the parties."); see also Willekes v. Serengeti Trading Co., No. 13- 7498, 2016 U.S. Dist. LEXIS 129404, *49-50 (D.N.J. Sept. 21, 2016) ("In determining the

8 I note that, even if Plaintiff asserts that IQVIA is liable for her alleged wrongful termination, her claim still fails. Indeed, it is axiomatic that an at-will employee's wrongful termination claim lies against his or her employer. See Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 191-192 (1988) ("[A] terminated at-will employee has a cause of action against the employer for wrongful termination . . . . ") (citing Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980)).

existence of a duty of care . . . [t]he relationship between the parties is itself a critical factor."); Magnum LTL, Inc. v. CIT Group/Bus. Credit, Inc., No. 08-5345, 2009 U.S. Dist. LEXIS 32340, at *4 (D.N.J. Apr. 16, 2009) ("Based on the Complaint, no relationship between [the plaintiff] and [the defendant] exists. Lacking such a relationship, [the plaintiff] cannot establish a duty of care, a breach of that duty, or any other of the . . . necessary elements for a negligence claim."). Thus, to the extent such a claim has been plead, Plaintiff's negligence cause of action is dismissed.

Moreover, in contrast to Plaintiff's contentions, IQVIA is not a "necessary party." Compl., pg. 2. Rule 19(a), which governs the joinder of indispensible persons, provides that parties are required to be joined in an action when: "(A) in that person's absence, the court cannot accord complete relief among existing parties . . . . " Fed. R. Civ. P. 19(a). "Under Rule 19(a)(1), the Court must consider whether—in the absence of an un-joined party—complete relief can be granted to the persons already parties to the lawsuit." Huber v. Taylor, 532 F.3d 237, 248 (3d Cir. 2008). Here, Plaintiff claims that she was terminated without "legitimate just cause," as a result of Sunovion's alleged conduct—no other harms are identified in the Complaint. Moreover, the pleadings do not assert that IQVIA is somehow responsible for Plaintiff's alleged wrongful termination from Sunovion; Plaintiff has not asserted that she works for IQVIA, or that IQVIA was involved in the decision making process that lead to Plaintiff's termination from Sunovion. Therefore, based on the pleadings, the relief which Plaintiff seeks for the alleged wrongdoing in the Complaint can only be obtained from Sunovion, her employer.

Having determined that Plaintiff has not alleged a plausible claim against IQVIA, and that Sunovion is the only appropriate defendant in this action, IQVIA is dismissed from this lawsuit.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motions to dismiss are **GRANTED**, and Plaintiff's Motion for reconsideration is **DENIED**. Plaintiff's claims are dismissed with prejudice.

DATED: May 18, 2020

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GINA RUSSOMANNO	:	
Plaintiff,	:	Civil Action No.: 19-5945 (FLW)
vs.	:	
SUNOVION PHARMACEUTICALS and IQVIA INC.,	:	**ORDER**
Defendants,	:	

THIS MATTER having been opened to the Court by Ivan R. Novich, Esq., and Dana B. Klinges, Esq., counsel for Defendants Sunovion Pharmaceuticals Inc. and IQVIA Inc. ("Defendants"), respectively, on separate Motions to dismiss the Complaint of pro se Plaintiff Gina Russomanno ("Plaintiff"); it appearing that Plaintiff opposes the Motions and moves for reconsideration of the Court's prior Order that denied her request for remand; it appearing that the Court having considered the parties' submissions in connection with the Motions pursuant to Fed. R. Civ. P. 78, for the reasons set forth in the Opinion filed on this date, and for good cause shown;

IT IS on this 18th day of May, 2020,

ORDERED that Defendants' Motions to Dismiss are **GRANTED**, and Plaintiff's Motion for reconsideration is **DENIED**; and it is further

ORDERED that Plaintiff's claims are dismissed with prejudice.

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GINA RUSSOMANNO	:	
Plaintiff,	:	Civil Action No.: 20-12336 (FLW)
vs.	:	**OPINION**
DAN DUGAN, et al,	:	
Defendants,	:	

WOLFSON, Chief Judge:

Plaintiff Gina Russomanno ("Plaintiff"), proceeding pro se, brings this employment action against her former employer Sunovion Pharmaceuticals, Inc. ("Sunovion" or the Company) and Dan Dugan, Jenna Yackish, Trevor Volz, and Erik Weeden ("Individual Defendants") (Sunovion and Individual Defendants, collectively, "Defendants"), who are directors and officers of Sunovion, alleging that they discriminated against her based on age, familial status, and conservative belief, which resulted in her discharge from the Company. Defendants move to dismiss Plaintiff's claims as barred by the doctrine of res judicata, and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Plaintiff opposes the motion.

For the reasons set forth below, Defendant's motion is **GRANTED.**

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

For the purposes of this motion, the relevant facts are derived from Plaintiff's Amended Complaint ("Am. Compl.") and assumed as true.

Plaintiff began her employment at Sunovion in 2016. Am. Compl. p. 20.[1] Plaintiff alleges that during her time at Sunovion she "suffered Disparate Treatment to Similarly situated employees in the following ways: Sales bucket changes, zip code geography changes and realignments, Leadership Roles and Advocate Roles; Insights Council, Pharmacy Consultant, Optum Rx Advocate, PIP Threats and implementation, (all specific to colleagues: Cheryl Bozinis, Bernie McDade, Debra Camp-Frye, Courtney Jograj, Craig Agrusti, and others with similar background experience in similarly situated roles and all hired just 'after' the plaintiff by the same Regional Business Manager, Jeffrey Aromando)." Id. at p. 5. During Plaintiff's employment, Sunovion's directors and officers allegedly implemented a new policy ("the 8-Quarter Rule"), which applied only to Plaintiff's sales team. Id. at p. 4. Pursuant to the 8-Quarter Rule, any salesperson who had not reached 100% of his or her sales goal during one of the previous eight fiscal quarters, would be placed on a Performance Improvement Plan ("PIP"). Id. at p. 8, 27. Plaintiff alleges that Defendants manipulated the sales quotas reporting "to positively impact sales results in favor [of] certain 'chosen' sales representatives," and to disadvantage Plaintiff. Id. at 29. As a result, Plaintiff was purportedly placed on a PIP beginning in October 2018, and then terminated on January 4, 2019. Id. at p. 2, 20.

Plaintiff further alleges that the 8-Quarter Rule, which led to Plaintiff's placement on a PIP and her eventual termination, were merely pretexts for Sunovion's discriminatory behavior. Specifically, Plaintiff alleges that "her age, race and creeds became focus factors for removing her from employment," and that she was the "only representative on the nine-member Philadelphia team with separate marital and familial status that differed by singlehood with no caregiving/ dependent responsibility." Id. at p. 23. In that regard, Plaintiff identifies specific employees who

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1 Plaintiff's Amended Complaint does not include consecutively numbered paragraphs, accordingly, this Opinion references page numbers, rather than paragraphs.

were purportedly protected from being placed on a PIP through the use of "inaccurate, inflated sales numbers." Id. at p. 9-13, 14-16, 22-25. Plaintiff alleges that each of those employees was otherwise similarly situated to her but, each differed from her based on age, gender, marital status, creed, and race, and as a result, Defendants afforded them preferential treatment.

A. Plaintiff's Prior Lawsuit

In 2019, prior to initiating the current lawsuit, Plaintiff filed suit against Sunovion. See Russomanno v. Sunovion Pharm., Inc., No. 19-5945 (FLW) ("Russomano I").2 There, like in the present matter, Plaintiff alleged that while employed at Sunovion, she was placed on a PIP after failing to achieve 100% of her sales goals for eight consecutive quarters, and that she was subsequently terminated. Id. at 3-4. Plaintiff further alleged that there were reporting issues with the sales quotas, and geographical differences between her and other teammates which negatively impacted her performance. Id. at 4. In that lawsuit, Plaintiff asserted a cause of action for "wrongful termination, without real just cause, by Covenant of Good Faith (and fair dealing) Exception." Id. at 4. On May 18, 2020, I dismissed Plaintiff's Complaint with prejudice, holding that Plaintiff's employment was "at-will" and therefore, Plaintiff could not assert a wrongful termination claim. Id. at 17-18. Moreover, I concluded that since Plaintiff had not "alleged the existence of an express or implied contract, she [could not] assert a wrongful termination claim based on Sunovion's purported breach of the implied covenant." Id. at 19.

Three months after the dismissal of Russomano I, on July 31, 2020, Plaintiff filed the instant lawsuit against Defendants in New Jersey state court. Defendants, subsequently, removed

2 The facts regarding Plaintiff's prior lawsuit are taken from this Court's opinion in that matter. See Russomano I, 19-5945, ECF No. 61, Opinion (May 18, 2020); see also Toscano v. Connecticut General Life Ins. Co., 288 F. App'x. 36 (3d Cir. 2008) ("The defense of claim preclusion, however, may be raised and adjudicated on a motion to dismiss and the court can take notice of all facts necessary for the decision. Specifically, a court may take judicial notice of the record from a previous court proceeding between the parties." (internal citations omitted)).

the matter to this Court, and Plaintiff sought leave to amend her complaint. On December 11, 2020, Plaintiff filed her Amended Complaint alleging violations of the New Jersey Law Against Discrimination ("NJLAD"), Title VII of the Civil Rights Act of 1964 ("Title VII), the Age Discrimination in Employment Act ("ADEA"), the Equal Pay Act of 1963, and the Diane B. Allen Equal Pay Act.3 Defendants now move to dismiss all of Plaintiff's claims.

II. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(6)

In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) (internal quotation marks and citation omitted). While Federal Rule of Civil Procedure 8(a) does not require that a complaint contain detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citation omitted). Thus, to survive a Rule 12(b)(6) motion to dismiss, the Complaint must contain sufficient factual allegations to raise a plaintiff's right to relief above the speculative level, so that a claim "is plausible on its face." Id. at 570; Phillips v. Cty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008). "A claim has facial plausibility when the plaintiff pleads factual content that allows

3 Plaintiff also alleges violations of the "Protecting Older Workers against Discrimination Act (HR 1230)." Am. Compl., p. 2. In her opposition brief, Plaintiff concedes that she "had overlooked that this legislation had not yet passed." Pl. Br. at 28-29. Plaintiff cannot assert a claim based on pending legislation; accordingly, that claim is dismissed.

the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

To determine whether a plaintiff has met the facial plausibility standard mandated by Twombly and Iqbal, courts within this Circuit engage in a three-step progression. Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010). First, the court must "outline the elements a plaintiff must plead to state a claim for relief." Bistrian v. Levi, 696 F.3d 352, 365 (3d Cir. 2012). Next, the Court "peel[s] away those allegations that are no more than conclusions and thus not entitled to the assumption of trust. Id. Finally, where "there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

III. ANALYSIS

A. Res Judicata

Res judicata "encompasses two preclusion concepts—issue preclusion, which forecloses litigation of a litigated and decided matter often referred to as direct or collateral estoppel, and claim preclusion, which disallows litigation of a matter that has never been litigated but which should have been presented in an earlier suit." Simoni v. Luciani, 872 F. Supp. 2d 382, 387–88 (D.N.J. 2012) (quoting Bierley v. Dombrowski, 309 F. App'x. 594, 596-97 (3d Cir. 2009)). Claim preclusion gives a judgment "preclusive effect" by "foreclosing litigation of matters that should have been raised in an earlier suit." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n. 1 (1984).

A party seeking to invoke claim preclusion must establish three elements: "'(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action.'" Strunk v. Wells Fargo Bank, N.A., 614 F. App'x. 586, 588 (3d Cir. 2015) (quoting Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d

Cir. 1991)). The Third Circuit has advised that this test should not be applied "mechanically" and instead, courts should "'focus on the central purpose of the doctrine, to require a plaintiff to present all claims arising out [of] the same occurrence in a single suit.'" Sheridan v. NGK Metals Corp., 609 F.3d 239, 260 (3d Cir. 2010) (quoting Churchill v. Star Enterprises, 183 F.3d 184, 194 (3d Cir. 1999)). Requiring plaintiffs to present all claims arising out of the same occurrence in a single suit is designed to "avoid piecemeal litigation and conserve judicial resources." Id. at 260.

Here, Defendants argue that Plaintiff's claims are barred under the doctrine of res judicata because all three elements warranting claim preclusion are present. ECF No. 34, Def. MTD 20- 23, Def. Br. 21-23. First, Russomano I was dismissed with prejudice for failure to state a claim. Id. Second, this matter involves the same parties as the prior matter, Plaintiff and Sunovion, and the Individual Defendants, as Sunovion employees, are in privity with Sunovion. Id. Third, both the present matter and Russomano I involve the same underlying harms: Plaintiff's termination after she was placed on the PIP. Id.

In response, Plaintiff argues that res judicata does not apply because "[a]nti-discrimination is a wholly separate policy matter and principle of law which was not directly or substantially of principle issue in the previous case." ECF No. 43-1, Pl. Opp. Br. at 24.4 Moreover, Plaintiff asserts that "[r]es judicata is applicable under the entire controversy doctrine which applies to judgements issued by New Jersey state courts" and here, "the doctrine does not apply because Russomano I was removed to federal court." Id. at 24-25. Plaintiff highlights that "the Third Circuit has recently held that the entire controversy doctrine would not apply to a judgment entered

4 Plaintiff filed several different versions of her brief in opposition to Defendants' motion to dismiss. See ECF Nos. 35, 38, 42, and 43. However, Plaintiff acknowledged that all three opposition briefs "are all actually 'duplicative' of one another (and not 'body' amended as it would appear). The only changes made for these docket items were in reference to the date/time of docket entry." See ECF No. 48, Pl. Letter. Accordingly, the Court relies on ECF No. 43, Plaintiff's most recently filed opposition brief, for her arguments on this motion.

by a federal court in New Jersey" and therefore, "[r]es [j]udcata does not apply and the defense is invalid." Id.

As an initial matter, Plaintiff is correct that the entire controversy doctrine does not apply where the prior judgment was entered by a federal court, rather than a New Jersey state court. See Paramount Aviation Corp. v. Agusta, 178 F.3d 132 (3d Cir. 1999) (explaining that the entire controversy doctrine "is not the right preclusion doctrine for a federal court to apply when prior judgments were not entered by the courts of New Jersey"); see Simoni, 872 F. Supp. 2d at 389 ("While the entire controversy doctrine is applied by federal courts interpreting a prior state court decision . . . it does not apply to a federal court's interpretation of a prior federal decision. Federal preclusion law determines that question"). However, Plaintiff erroneously conflates that principle with the doctrine of res judicata, a separate, albeit related, federal doctrine. Indeed, the entire controversy doctrine is "New Jersey's specific, and idiosyncratic, application of traditional res judicata principles." Ricketti v. Barry, 775 F.3d 611, 613 (3d Cir. 2015) (quoting Rycoline Prods., Inc. v. C & W Unlimited, 109 F.3d 883, 886 (3d Cir. 1997)) (internal quotations omitted). In that regard, the entire controversy doctrine may only be raised as an affirmative defense in federal courts when there was a previous state court action involving the same transaction. Ricketti, 775 F.3d at 613 (emphasis added); Yantai N. Andre Juice Co. v. Kupperman, No. 05-1049, 2005 WL 2338854, at *3 (D.N.J. Sept. 23, 2005) ("In this case, the issuing court in 2002 was the United States District Court for the District of New Jersey. Therefore, the New Jersey Entire Controversy Doctrine is inapplicable."). However, Defendants, here, are not relying on the entire controversy doctrine, but rather, res judicata – a general claim preclusion principle which applies in federal courts, regardless of which court rendered the judgment. See Hoffman v. Nordic Nats., Inc., 837 F.3d 272, 278 (3d Cir. 2016) ("when the first judgment is rendered by a federal district court in New Jersey sitting in diversity, as it was here, federal claim preclusion, not New Jersey's entire

controversy doctrine, determines whether a successive lawsuit is permissible."). Having found that Defendants are permitted to rely on the doctrine of res judicata, I, now, assess its application to this matter.

First, I find that this Court's May 18, 2020 Order dismissing Russomano I with prejudice clearly constitutes a final judgment on the merits. See Simoni, 872 F. Supp. 2d at 390 ("Dismissal for failure to state a claim serves as a final judgment on the merits."); Gimenez v. Morgan Stanley DW, Inc., 202 F. App'x. 583, 584 (3d Cir.2006) ("A dismissal that is specifically rendered 'with prejudice' qualifies as an adjudication on the merits and thus carries preclusive effect"). Plaintiff's claims in that matter were adjudicated on the merits, and were not dismissed for lack of jurisdiction or another procedural infirmity. See Costello v. United States, 365 U.S. 265, 285(1961) ("If the first suit was dismissed for .... a want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."); Shih– Liang Chen v. Township of Fairfield, 354 F. App'x. 656, 659 (3d Cir. 2009) (noting that dismissals based on "lack of jurisdiction, improper venue or failure to join a party" are not adjudications on the merits) (citing Fed. R. Civ. P. 41(b)).

Second, I find that this matter involves the same parties as Russomano I. Plaintiff and Sunovion are parties to both suits, and clearly satisfy the requirements for that prong of the res judicata analysis. However, in this action, Plaintiff has also named Dan Dugan, Jenna Yackish, Trevor Volz, and Erik Weeden as defendants, each of whom is a Sunovion employee. The Third Circuit has explained that claim preclusion "may be invoked against a plaintiff who has previously asserted essentially the same claim against different defendants where there is a close or significant relationship between successive defendants." Lubrizol, 929 F.2d at 966 (quoting Gambocz v. Yelencsics, 468 F.2d 837, 841 (3d Cir. 1972)). Where there is an employee-employer relationship between defendants, that is generally sufficient to satisfy the privity requirement. See e.g., Gupta

v. Wipro Ltd., 749 F. App'x 94, 96 (3d Cir. 2018) ("Although Gupta did not name Wipro's president as a defendant in the 2014 action, the close and significant relationship between those two defendants satisfies the privity requirement."); Jackson v. Dow Chem. Co., 902 F. Supp. 2d 658, 671 (E.D. Pa. 2012) (finding that employees sued for acts arising from the course of the employment "have the sort of close and significant relationship with their employers that has been found to justify preclusion"). Accordingly, I find that the addition of the Individual Defendants does not preclude a finding that this matter involves the "same parties," because the Individual Defendants are in privity with Suonvion.

Third, I find that the claims asserted in this matter are based on the same underlying events as Russomano I, and therefore, constitute the same claims. Courts in this Circuit "take a 'broad view' of what constitutes the same cause of action." Sheridan, 609 F.3d at 261. To that end, courts "look toward the 'essential similarity of the underlying events giving rise to the various legal claims.'" Lubrizol, 929 F.2d at 963 (quoting Davis v. U.S. Steel Supply, Div. of U.S. Steel Corp., 688 F.2d 166, 171 (3d Cir. 1982)). Specifically, courts analyze "(1) whether the acts complained of and the demand for relief are the same ...; (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same ...; and (4) whether the material facts alleged are the same." U.S. v. Athlone Industries, Inc., 746 F.2d 977, 984 (3d Cir. 1984). "It is not dispositive that a plaintiff asserts a different theory of recovery or seeks different relief in the two actions." Blunt, 767 F.3d at 277 (internal quotation marks and citation omitted); Lubrizol, 929 F.2d at 963 ("A mere difference in the theory of recovery is not dispositive.").

In this matter, Plaintiff asserts various statutory employment discrimination claims related to her termination under state and federal law; in Russomano I, Plaintiff alleged a wrongful termination claim based on contract principles. The claims in this matter and in Plaintiff's prior

action are not identical, but they stem from the same set of facts regarding Plaintiff's placement on the PIP and her eventual termination. Hence, Plaintiff's discrimination claims should have been raised in the prior action, because they arise from the same set of facts as the wrongful termination claim already adjudicated in Russomano I. See Matrix Distributors, Inc. v. Nat'l Ass'n of Boards of Pharmacy, No. 18-17462, 2020 WL 7090688, at *4 (D.N.J. Dec. 4, 2020) (finding that although the legal theories in two lawsuits were not identical, they nonetheless, involved "the same claim' because [they] involve[d] a 'common nucleus of operative facts'"). Significantly, the events supporting Plaintiff's discrimination claims had already occurred at the time she filed Russomano I. Gupta v. Wipro Ltd., 749 F. App'x 94, 97 (3d Cir. 2018) (affirming district court's finding that two lawsuits were based on the same cause of action, even where plaintiff raised new claims in the second action, claims arose from the same employment relationship and "because the facts supporting those claims existed during and immediately after Gupta's employment at Wipro – which occurred between 2003 and 2006, and again briefly in 2008 – the claims could have been brought in the 2014 action"). This is not an instance where the allegedly discriminatory conduct giving rise to Plaintiff's claims, here, occurred after she filed her prior lawsuit; indeed, all of the factual underpinnings alleged in the instant Amended Complaint – with the exception of the information regarding Plaintiff's similarly situated colleagues – were included in Plaintiff's prior Complaint. Although Plaintiff's theory of recovery is different, Plaintiff's instant claims indisputably arise out of the same employment relationship and involve the same wrongful acts – her termination and the events surrounding it– at issue in her prior lawsuit. See Harding v. Duquesne Light Co., No. CIV. 95-589, 1995 WL 916926, at *3 (W.D. Pa. Aug. 4, 1995) (finding that two suits were "identical" for claim preclusion purposes where the first suit alleged "breach of contract" and violations of a state wage payment law, stemming from plaintiff's termination and second suit alleged violations of the Americans with Disabilities Act and state discrimination

statues stemming from plaintiff's termination). In that regard, litigation of the instant matter would certainly involve the same witnesses and documentary evidence at play in Russomano I, including a review of the sales quota data, Plaintiff's PIP, and testimony from her supervisors. Accordingly, I find that all three requirements for claim preclusion are satisfied, and Plaintiff's Complaint is dismissed.**5**

Generally, dismissal of a complaint with prejudice is appropriate if amendment would be ... futile." Bankwell Bank v. Bray Entertainment, Inc., No. 20-49, 2021 WL 211583, at *2 (D.N.J. Jan. 21, 2021). "An amendment is futile if it is frivolous or advances a claim or defense that is legally insufficient on its face." Lombreglia v. Sunbeam Prod., Inc., No. 20-0332, 2021 WL 118932, at *5 (D.N.J. Jan. 13, 2021). Because Plaintiff's claims are barred under the doctrine of res judicata I find that any further amendment would be futile and dismiss Plaintiff's Complaint with prejudice.**6** See Kolodzij v. Borough of Hasbrouck Heights, No. 18-CV-00481, 2021 WL

5 Moreover, I note that even if Plaintiff's Title VII and ADEA claims were not barred by the claim preclusion doctrine, I would, nonetheless, dismiss those claims because Plaintiff has not exhausted her administrative remedies. Slingland v. Donahue, 542 F. App'x 189, 193 (3d Cir. 2013) (holding Title VII and ADEA claims require administrative exhaustion). Both statutes require employees to timely file a charge with the Equal Employment Opportunity Commission ("EEOC"), as a pre-requisite to filing a discrimination action. See 42 U.S.C. § 2000e-5(e) (requiring plaintiff to file a timely charge with the EEOC within 180 days after the alleged unlawful practice, or within 300 days if the plaintiff initiates proceedings in a state agency); 29 U.S.C. § 626(d)(1) (A-B) (requiring plaintiff to file a timely charge with the EEOC within 180 days after the alleged unlawful practice, or within 300 days if the plaintiff initiates proceedings in a state agency). Plaintiff has not alleged that she timely field a charge with the EEOC, and thus, has not exhausted her administrative remedies. Allen v. New Jersey, Pub. Def., No. 16-8661, 2017 WL 3086371, at *9 (D.N.J. July 20, 2017) (dismissing plaintiff's Title VII claims because "paintiff has failed to allege in his Complaint that he timely filed his charge of discrimination with the EEOC with respect to the instant claims"); Edwards v. Bay State Mill. Co., No. 10 -5309, 2012 WL 3133800, at *2 (D.N.J. July 30, 2012) (dismissing plaintiff's ADEA claim for failure to timely file a charge with the EEOC). Moreover, Plaintiff was terminated in January 2019, more than two years ago, and the time period for filing such an EEOC charge has presumably expired, absent the application of any potentially applicable tolling doctrines.

6 Defendants have also requested that, in the event this Court found dismissal appropriate, this Court require Plaintiff to seek leave of Court before filing any further lawsuits against

753885, at *4 (D.N.J. Feb. 26, 2021) (dismissing plaintiff's complaint with prejudice based on claim preclusion grounds).

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss is **GRANTED**, because Plaintiff's claims are barred under the claim preclusion doctrine.

Date: May 4, 2021

/s/ Freda L. Wolfson
Hon. Freda L. Wolfson
U.S. Chief District Judge

Defendants. Def. Br. at 23. Defendant's request is denied; however, Plaintiff is forewarned that the Court may grant such injunctive relief or impose sanctions, pursuant to the All Writs Act, if Plaintiff files further frivolous lawsuits. See Gupta v. Wipro Ltd., 765 F. App'x 648, 650 (3d Cir. 2019) ("Under the All Writs Act, 28 U.S.C. § 1651(a), District Courts can impose filing injunctions on litigants who have engaged in abusive, groundless, and vexatious litigation.").

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GINA RUSSOMANNO	:	
Plaintiff,	:	Civil Action No.: 20-12336 (FLW)
vs.	:	**ORDER**
DAN DUGAN, et al,	:	
Defendants,	:	

THIS MATTER having been opened to the Court by Ivan R. Novich, Esq., counsel for Defendants Sunovion Pharmaceuticals, Inc. and Dan Dugan, Jenna Yackish, Trevor Volz, and Erik Weeden (collectively, "Defendants") on a Motion to Dismiss the Amended Complaint, filed by pro se plaintiff Gina Russomanno ("Plaintiff"), pursuant to Federal Rule of Civil Procedure 12(b)(6); it appearing that Plaintiff opposes the motion; the Court having considered the submissions of the parties without oral argument, pursuant to Fed. R. Civ. P. 78; for the reasons set forth in the Opinion filed on this date, and for good cause shown,

IT IS on this 4th day of May, 2021,

ORDERED that Defendants' Motion to Dismiss the Amended Complaint [ECF No. 34] is

GRANTED; and it is further

ORDERED that Plaintiff's claims are dismissed with prejudice and the Clerk of the Court is directed to close this case

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2004

GINA RUSSOMANNO,

Appellant

v.

DAN DUGAN; JENNA YACKISH; TREVOR VOLTZ; ERIC WEEDON; SUNOVION PHARMACEUTICALS, INC

On Appeal from the United States District Court for the District of New Jersey
(D.C. Civil Action No. 3-20-cv-12336)
District Judge: Honorable Freda L. Wolfson

Submitted Pursuant to Third Circuit LAR 34.1(a)

August 26, 2021

Before: **AMBRO, PORTER** and **SCIRICA**, Circuit Judges

(Opinion filed September 8, 2021)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Pro se appellant Gina Russomanno appeals from the District Court's order granting the defendants' motion to dismiss her complaint. For the following reasons, we will affirm.

I.

Russomanno worked in a sales role for Sunovion Pharmaceuticals, Inc. from 2016 until she was terminated in January 2019. She alleges that she was placed on a Performance Improvement Plan prior to her termination pursuant to a newly implemented policy that required any salespersons who did not reach 100% of their sales goals during any of the previous eight fiscal quarters to be placed on such a plan. She alleges that the policy was a pretext for discrimination, especially in light of documented inaccuracies in sales data.

In January 2019, Russomanno filed a first lawsuit against Sunovion and another company for wrongful termination. The defendants in that suit removed the case from the Superior Court of New Jersey to federal court. In May 2020, the District Court granted the defendants' motion to dismiss with prejudice. Russomanno did not appeal.

In July 2020, Russomanno filed this lawsuit against Sunovion and four of its employees and directors in the Superior Court of New Jersey.1 These defendants also

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1 It is not clear whether Russomanno intended that another Sunovion executive, Jeffrey Aromando, be added as a defendant in her amended complaint. Regardless, Aromando was never served and never appeared, and the possibility that she wished to include him

removed to federal court. Russomanno then filed an amended complaint identifying claims for alleged discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act of 1967 ("ADEA"), the Equal Pay Act of 1963, the New Jersey Law Against Discrimination ("NJLAD"), and New Jersey's Diane B. Allen Equal Pay Act. 2 See 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 623; 29 U.S.C. § 206(d); N.J. Stat. Ann. 10:5-12. The District Court granted the defendants' motion to dismiss with prejudice based on res judicata. Russomanno appeals.3

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as a defendant does not affect our jurisdiction. See United States v. Studivant, 529 F.2d 673, 674 n.2 (3d Cir. 1976).

2 Russomanno also outlined a claim based on a proposed federal act, but later conceded that the bill remained pending in Congress. The District Court properly dismissed the claim on that basis. Opinion 4 n.3, ECF No. 49.

3 In her reply brief, Russomanno asks that we disregard the defendants' brief as overlong and untimely. It is neither. Under Federal Rule of Appellate Procedure 32, a brief is acceptable if it complies with either the page limitation of Rule 32(a)(7)(A) or the typevolume limitation of Rule 32(a)(7)(B). The defendants' counsel accurately certified that their brief complied with the type-volume limitation. Def.'s Br. 34, 3d Cir. ECF No. 11.

The defendants' brief was timely filed pursuant to the Briefing and Scheduling Order and Federal Rule of Appellate Procedure 26. The Order required that the defendants' brief be filed and served within 30 days of service of Russomanno's brief. 3d Cir. ECF No. 4 at 1. Russomanno filed and served her brief on June 4, 2021, by first class mail. Under these circumstances, Rule 26(c) applies and "3 days are added" to the defendants' time to respond "after the period would otherwise expire under 26(a)." Fed. R. App. P. 26(c). Here, the 30 days would have otherwise expired under Rule 26(a) on July 6. Under Rule 26(c), three days are added beyond that date and the defendants timely filed their brief on July 8

II.

We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the application of res judicata. See Elkadrawy v. Vanguard Grp., 584 F.3d 169, 172 (3d Cir. 2009). We review de novo a District Court's determination that amendment would be futile. U.S. ex rel. Schumann v. AstraZeneca Pharms. L.P., 769 F.3d 837, 849 (3d Cir. 2014).

"Res judicata, also known as claim preclusion, bars a party from initiating a second suit against the same adversary based on the same 'cause of action' as the first suit." Duhaney v. Attorney Gen. of U.S., 621 F.3d 340, 347 (3d Cir. 2010). A party seeking to invoke res judicata must establish three elements: "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action." Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991). "In evaluating whether those elements exist, we do not proceed mechanically, 'but focus on the central purpose of the doctrine, to require a plaintiff to present all claims arising out of the same occurrence in a single suit.'" Davis v. Wells Fargo, 824 F.3d 333, 341 (3d Cir. 2016) (quoting Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 277 (3d Cir. 2014)). To avoid piecemeal litigation, "[t]he doctrine of res judicata bars not only claims that were brought in a previous action, but also claims that could have been brought." In re Mullarkey, 536 F.3d 215, 225 (3d Cir. 2008).

III.

Russomanno does not (and cannot) meaningfully dispute that her prior lawsuit resulted in a final judgment on the merits, but she contests the two remaining elements of res judicata.4 To determine whether both lawsuits are based on the same cause of action, we look not to "the specific legal theory invoked," but to the "essential similarity of the underlying events giving rise to the various legal claims." Sheridan v. NGK Metals Corp., 609 F.3d 239, 260 (3d Cir. 2010) (quoting United States v. Athlone Indus., Inc., 746 F.2d 977, 983-84 (3d Cir. 1984)). We consider the following factors: "(1) whether the acts complained of and the demand for relief are the same . . . ; (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same . . . ; and (4) whether the material facts alleged are the same." Id. (quoting Athlone, 746 F.2d at 984). Because these are factors rather than strict requirements, "[a] mere difference in the theory of recovery is not dispositive." Lubrizol, 929 F.2d at 963; see Athlone, 746 F.2d at 984.

While Russomanno's first suit was grounded in contract principles and this action is based on federal and state anti-discrimination statutes, the underlying acts and material facts that she alleged, and the evidence that she would need to prove her claims, are

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4 "A dismissal with prejudice 'operates as an adjudication on the merits,' so it ordinarily precludes future claims." Papera v. Pa. Quarried Bluestone Co., 948 F.3d 607, 610 (3d Cir. 2020) (quoting Landon v. Hunt, 977 F.2d 829, 832-33 (3d Cir. 1992)).

overwhelmingly alike. In both lawsuits, Russomanno complained of the circumstances surrounding her placement on a Performance Improvement Plan and subsequent termination. Given this essential similarity, this case involves the same cause of action as Russomanno's first action. See Sheridan, 609 F.3d at 239; Cieszkowska v. Gray Line New York, 295 F.3d 204, 206 (2d Cir. 2002) (per curiam) (determining that an employee's wrongful discharge and national origin discrimination suits involved the same factual predicate for res judicata purposes); cf. Brzostowski v. Laidlaw Waste Sys., Inc., 49 F.3d 337, 339 (7th Cir. 1995) (noting previous holding that res judicata bars an employee's breach of contract action arising from the same events as a prior age discrimination suit).5

Russomanno argues that she could not have brought her discrimination claims in the first lawsuit because those claims are informed by a line in one of Sunovion's filings

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5 Russomanno contends that New Jersey's entire controversy doctrine would not bar her suit, relying on our decision in Bennun v. Rutgers State University. 941 F.2d 154, 163 (3d Cir. 1991), abrogated on other grounds by St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515–16 (1993). While she admits that the entire controversy doctrine does not apply here, she reasons that because that doctrine is broader and "more preclusive than" res judicata, Kozyra v. Allen, 973 F.2d 1110, 1112 (3d Cir. 1992), res judicata cannot bar what the entire controversy doctrine permits. That transitive logic is questionable, and our Bennun decision did not adopt the principle that Russomanno invokes. While the District Court in that case "held the entire controversy doctrine did not foreclose any of Bennun's federal actions because" his earlier state lawsuit "sought relief relating solely to the employment agreement and not as to protection of Bennun's [c]onstitutional and [c]ivil rights," we did not endorse that reasoning and expressly relied "on a different rationale" not applicable here. Bennun, 941 F.2d at 163 (internal quotation marks omitted).

in that action. Within a statement of facts, Sunovion, citing Russomanno's complaint, stated that after she was "placed in a new sales territory with different management," her "new management implemented" the eight-quarter policy. Sunovion's Mem. of Law in Supp. of Mot. to Dismiss 2, Russomanno v. Sunovion, D.N.J. 3:19-cv-05945, ECF No. 33. Russomanno interprets this as "testimony" that the eight-quarter policy was limited to her regional sales team, rather than the entire Sunovion sales department. She alleges that she was previously unaware of that limitation, which she argues is key to her discrimination claims because the effect of the policy was thus limited to the few members of her team with sufficient tenure.

We do not appear to have addressed in a precedential opinion whether newly discovered evidence can constitute an exception to res judicata. But other courts have recognized such an exception only where the newly discovered evidence was either fraudulently concealed or could not have been discovered with due diligence. See, e.g., L-Tec Electronics Corp. v. Cougar Elec. Org., Inc., 198 F.3d 85, 88 (2d Cir. 1999). Here, Russomanno relies on her debatable interpretation of a line in a legal brief as new evidence. While Russomanno reassessed her previous assumption about the scope of the policy, she has not shown that the defendants concealed the nature of the policy or that she investigated with due diligence. Furthermore, Russomanno expressly alleged in the first lawsuit that the eight-quarter policy had been applied in a discriminatory manner. Suppl. App'x 151. While she may view the allegations in her new complaint as stronger

and more complete, she could have brought discrimination claims in her first action. See Mullarkey, 536 F.3d at 225; Elkadrawy, 584 F.3d at 174 (explaining that allegations of "several new and discrete discriminatory events" did prevent application of res judicata).

Turning to the remaining element of res judicata, the identity of the parties, Russomanno named Sunovion as a defendant in both suits. The District Court determined that the individual defendants were in privity with Sunovion. Privity is "merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the res judicata." E.E.O.C. v. U.S. Steel Corp., 921 F.2d 489, 493 (3d Cir. 1990) (quoting Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir. 1950) (Goodrich, J., concurring)); see Taylor v. Sturgell, 553 U.S. 880, 894 n.8 (2008). "[A] lesser degree of privity is required for a new defendant to benefit from claim preclusion than for a plaintiff to bind a new defendant in a later action." Lubrizol, 929 F.2d at 966. "[R]es judicata may be invoked against a plaintiff who has previously asserted essentially the same claim against different defendants where there is a close or significant relationship between successive defendants." Gambocz v. Yelencsics, 468 F.2d 837, 841 (3d Cir. 1972). Here, the allegations against the individual defendants exclusively concern matters within the course of their employment with Sunovion that were the subject of the Russomanno's first action. In these circumstances, the relationship is sufficiently close and significant for the individual defendants to invoke res judicata. See Lubrizol Corp. v. Exxon Corp., 871

F.2d 1279, 1288 (5th Cir. 1989) (explaining that most federal circuits have concluded that employer-employee relationships may ground a claim preclusion defense under similar circumstances).**6**

Res judicata thus bars Russomanno's claims, and the District Court did not err in determining that amendment would be futile. See Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002). We need not reach the other issues discussed by the District Court and the parties.

IV.

Accordingly, we will affirm the judgment of the District Court.**7**

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6 Russomanno notes that the NJLAD provides for individual liability for aiding and abetting of violations and implies that the individual defendants therefore cannot invoke res judicata. We disagree. A difference in the theory of liability does not necessarily alter the close relationship between the defendants. And Russomanno's aiding and abetting claims are deeply intertwined with her claims against Sunovion. See Failla v. City of Passaic, 146 F.3d 149, 159 (3d Cir. 1998) ("[I]t is fundamental to aiding and abetting liability that the aider and abettor acted in relation to a principal."); Tarr v. Ciasulli, 853 A.2d 921, 929 (N.J. 2004).

7 To the extent that Russomanno requested relief in her "Notice of Petition for Review," 3d Cir. ECF No. 10, the request is denied.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2004

GINA RUSSOMANNO,

Appellant

v.

DAN DUGAN; JENNA YACKISH; TREVOR VOLTZ; ERIC WEEDON; SUNOVION PHARMACEUTICALS, INC

On Appeal from the United States District Court for the District of New Jersey
(D.C. Civil Action No. 3-20-cv-12336)
District Judge: Honorable Freda L. Wolfson

Submitted Pursuant to Third Circuit LAR 34.1(a)

August 26, 2021

Before: **AMBRO**, **PORTER** and **SCIRICA**, Circuit Judges

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JUDGEMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on August 26, 2021. On consideration whereof, it is now hereby

ORDERED and **ADJUDGED** by this Court that the judgment of the District Court entered May 4, 2021, be and the same is hereby affirmed. Costs taxed against the appellant. All the above in accordance with the opinion of this Court.

ATTEST:

/s/ Patricia S. Dodszuweit
Clerk

Dated: September 8, 2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2004

GINA RUSSOMANNO,
Appellant

v.

DAN DUGAN; JENNA YACKISH; TREVOR VOLTZ; ERIC WEEDON; SUNOVION PHARMACEUTICALS, INC

(D.N.J. Civ. No. 3-20-cv-12336)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and SCIRICA* , Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

* Judge Scirica's vote is limited to panel rehearing only.

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/Anthony J. Scirica
Circuit Judge

Date: October 15, 2021
Lmr//cc: Gina Russomanno
Ivan R. Novich

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2004

GINA RUSSOMANNO,

Appellant

v.

DAN DUGAN; JENNA YACKISH; TREVOR VOLTZ; ERIC WEEDON; SUNOVION PHARMACEUTICALS, INC

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District Judge: Honorable Freda L. Wolfson

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Before: AMBRO, PORTER and SCIRICA, Circuit Judges

JUDGMENT

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ORDERED and **ADJUDGED** by this Court that the judgment of the District Court entered May 4, 2021, be and the same is hereby affirmed. Costs taxed against the appellant. All the above in accordance with the opinion of this Court.

ATTEST:
/s/ Patricia S. Dodszuweit
Clerk

Dated: September 8, 2021

SEAL
Certified as a true copy in
lieu of a formal mandate on
October 25, 2021

Teste, *Patricia S. Dodszuweit*
U.S. Court of Appeals
for the Third Circuit