

No. 21-983

In the
Supreme Court of the United States

Rhonda Meisner
Plaintiff

v.

Zymogenetics, Inc.; a wholly owned subsidiary of
Bristol Myers Squibb, Inc.;
Zymogenetics, LLC, a wholly owned subsidiary of
Zymogenetics, Inc., Bristol Myers Squibb, Inc.;
Tracey Calderazzo; Jeff Fortino; Stephanie Lewis,
Individually; Stephanie Lewis in her capacity as
managing principal of Jackson Lewis, LLP;
Stephanie Lewis, in her capacity as managing
principal of Jackson Lewis, PC; Ellison McCoy,
individually; Ellison McCoy in his capacity as office
litigation manager of Jackson Lewis, PC; John and
Jane Does (1-10) (whose name is not yet known or is
yet to be determined
Defendants)

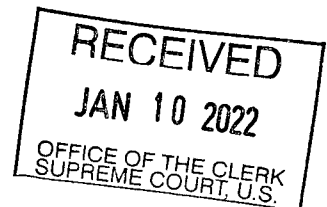
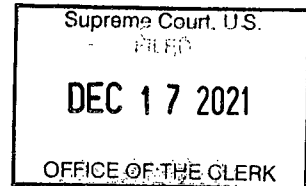
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

December 10, 2021

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ORIGINAL



Questions Presented

1. Does diversity jurisdiction exist when the sole member of a named Limited Liability Company defendant, is its incorporated parent company?
2. Whether attorneys that withhold articles of organization, for a limited liability company defendant, for the purpose of obtaining federal court jurisdiction, when diversity jurisdiction is lacking, are properly named defendants?

Parties to the Proceedings

The Petitioner is: Rhonda Meisner, an Individual

Defendants:

Zymogenetics, Inc. is a corporation that is wholly- owned
subsidiary of Bristol Myers Squibb, Inc.

Zymogenetics, LLC is a Non-Corporate Artificial entity
organized under Delaware law, with its sole member listed
as Zymogenetics, Inc.

Bristol Myers Squibb, Inc. is a corporation.

Tracey Calderazzo is an Individual.

Jeff Fortino is an Individual.

Stephanie Lewis is an Individual.

Stephanie Lewis in her capacity as managing principal of
Jackson Lewis, LLP, is an Individual.

Stephanie Lewis, in her capacity as managing principal of
Jackson Lewis, PC.

Ellison McCoy is an Individual.

Ellison McCoy in his capacity as office litigation manager of
Jackson Lewis, PC is an Individual.

John and Jane Does (1-10) (whose name is not yet known or
is yet to be determined Defendants) are unknown.

Public Disclosure

Pursuant to Rule 29.6 The Petitioner is an individual

Related Cases in this Court

Meisner v. Zymogenetics, Inc. et. al. No. 19-CV-01555-CMC

District of South Carolina Judgement entered June 4, 2019

Meisner v. Zymogenetics, Inc. et al. No. 20-1228 Fourth

Circuit Court of Appeals Pet. For Rehearing Den. Sept 21,

2021 affirmed by unpublished opinion.

Meisner v. Zymogenetics, Inc. et al Supreme Court Cert.

Denied

Meisner v. Zymogenetics, Inc. No. 15-CV- 03583-CMC

District of South Carolina Judgment entered April 7, 2016

Meisner v. Zymogenetics, Inc. No 16-2443 Fourth Circuit

Court of Appeals Sept. 20, 2017

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IV. Petition for a Writ of Certiorari

Your Petitioner, Rhonda Meisner prays this Honorable Court will grant her Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to (1) require compliance with this Court's resolution of the circuit split, in the manner diversity jurisdiction, is determined for limited liability companies and (2) to exercise this Court's supervisory power over officers of the court that recite incorrect citizenship allegations, in its removal documents and withhold articles of organization, for a limited liability company, for the improper purpose of gaining entry to the federal courts, when complete diversity jurisdiction does not exist.

V. Opinions Below

The United States Court of Appeals for the Fourth Circuit denied the petition for rehearing and rehearing *en banc* on September 21, 2021. This appeal is filed, within 90 days of that order. On July 22, 2021, the United States Court of Appeals affirmed by unpublished opinion, the District of South Carolina's orders of Nov. 25, 2019 & Jan. 23, 2020). The District Court adopted the recommendations of the magistrate judge which found diversity jurisdiction was present, finding Zymogenetics, LLC had the same citizenship as Zymogenetics, Inc. and the South Carolina defendants were fraudulently joined on the basis of attorney immunity doctrine.

VI. Jurisdiction

Jurisdiction of this Court:

The United States Court of Appeals for the Fourth Circuit denied the Petition for Rehearing on September 21, 2021, and this Petition for a Writ of Certiorari is filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)

Jurisdiction of the Fourth Circuit Court of Appeals

The United States Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 to review final decisions of the United States District Court. The Petitioner avers diversity of citizenship jurisdiction was lacking.

VII. Constitutional Provisions

Article III Section 2

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

28 U.S.C. §1332

(a)The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—(1) citizens of different States.

VIII. Statement of the Case

- a. In *Americold*, this Honorable Court, explained the *definition* of “members” in an artificial entity where the citizenship of any “non-corporate artificial entity” is determined by considering all the entity’s “members” which include, at minimum, its shareholders. *Id.* at 1180-1181 (2016)(citing *Carden v. Arkoma Associates*, 494 U.S.185 (1990) For Diversity Jurisdiction to exist the parties must demonstrate the plaintiffs were “citizens of different States” than the

defendants. *Strawbridge v. Curtiss*, 3 Cranch 267 (1806).

This Court's unanimous opinion, in *Americold*, refused to remove the doctrinal wall between incorporated entities and non-corporate artificial entities created by state statute. *Americold slip op.* at 6. Congress allowed non-corporate artificial entities to use the *Hertz* test in CAFA claims. 28 U.S.C. §1332 (d)(10) where the *Hertz* test is applied to the members of unincorporated entities. *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010). Because congress specifically gave access to the federal courts in CAFA claims, but not for other non-corporate entities outside of CAFA, it is clear, as this Court determined, in *Americold*, Congress did not intend to extend the *Hertz* test, absent the CAFA claims. The district court assumed jurisdiction based on diversity of citizenship, pursuant to 28 U.S.C. §1332 (a)(1) and 1441(b). The District Court's denial of remand was based on its interpretation of the *Carden* rule and ruled the South Carolina defendants were fraudulently joined. The panel affirmed. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990)).

This case presents the questions (1) when limited liability companies have as its single member an incorporated stock company, does the citizenship of the incorporated entity or its beneficial owners rule e.g., the stockholders? If the stockholder's citizenship controls then (2) are attorneys responsible for the misrepresented citizenship allegations as plead in their removal documents or are they shielded by the attorney immunity doctrine for their actions, and are fraudulently joined, as subsequent defendants.

VII. Reasons to Grant the Petition

First, and foremost, the rules regarding entry into the Federal Courts via diversity jurisdiction should be uniform

regardless of where a litigant lives or any other factor to prevent unequal application of Federal Law.

Second, this Court, in its supervisory status, should consider summary disposition and remand when the facts regarding diversity jurisdiction conflict with this Court's recently explained definition of "member" being the beneficial owner of the incorporated entity.

Finally, this Court in its supervisory status should admonish attorneys and allow for relief when an attorney withholds documents that evidence diversity destroying "membership" in the non-corporate artificial entity.

Federal courts are courts of limited jurisdiction, "constrained to exercise only the authority conferred by Article III of the Constitution and affirmatively granted by federal statute." In re Bulldog Trucking, Inc., 147 F.3d 347, 352 (4th Cir. 1998). There is no dispute that federal subject matter jurisdiction based on a federal question is absent, in this case. The defendants removed the state court filed complaint based on diversity of citizenship. As such, the Court is obligated to inquire as to its authority to act strictly based on the facts regarding diversity of citizenship.

The District Court made such an inquiry as it related to the South Carolina attorney defendants and found them fraudulently joined because they were shielded by the attorney immunity doctrine. However, the District Court failed to analyze the Zymogenetics, LLC defendant pursuant to the *Americold* holding, and instead applied the Zymogenetics, Inc's citizenship allegations to the non-corporate artificial entity. Having provided the articles of organization for the first time, the District Court should have remanded the case to state court. Instead, the District Court grafted the citizenship allegations of Zymogenetics, LLC's upstream incorporated parent company onto the limited liability defendant. It is the age-old story of the chicken and the egg. Diversity Jurisdiction did not exist at the time the lawsuit was filed and at the time the lawsuit

was removed to federal court based on the Zymogenetics, LLC defendant.

The District Court's denial of remand was based on its interpretation of the *Carden* rule and ruled the South Carolina defendants were fraudulently joined. The panel affirmed. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990)). The appellant avers the Panel's interpretation of the *Carden* Rule was incomplete based on the 10th Circuit's explanation of the citizenship analysis for non-corporate artificial entities, like Zymogenetics, LLC and the United States Supreme Court's adoption of the 10th Circuit's analysis for non-corporate artificial entities. *ConAgra Foods, Inc. v. Americold Logistics, LLC*, 776 F. 3d 1175, 1182 (2015). One Tenth Circuit District Court observed in *Traffas* "the complaint's allegations that various Biomet LLCs are wholly owned subsidiaries do not permit the court to conclude that plaintiff and defendants are diverse for purposes of subject matter jurisdiction," because it is membership, not ownership, which is critical for determining the citizenship of a limited liability company. *Traffas v. Biomet, Inc.* No. 19-2115-DDC-JPO, 2020 WL 1467313, at *2(D. Kan. Mar.26,2020)(collecting cases).

The South Carolina District Court in this case opined "the allegation of impropriety rests on the fundamentally-flawed legal premise that an LLC that has a corporation as a member is a citizen of every state in which a shareholder of the corporation is a citizen." 3:19-cv=01555-CMC Date filed 11/25/19 Entry No. 32 p. 9:15-19. This "fundamentally flawed" argument, as advanced by the Petitioner, in her Motion to Remand, is in fact, the central question before this Honorable Court, which the Petitioner maintains this Court has already answered in *Americold*. In *Americold*, the Court defined "member" as the beneficial owners of the artificial entity e.g., the shareholders of Zymogenetics, Inc. *Americold Realty Trust v. ConAgra Foods, Inc.* 577 U.S.____(2016).

The Fourth Circuit, affirmed by unpublished opinion, the South Carolina District Court's decision that determined diversity jurisdiction was present because the members of the Limited Liability Company were the same as its corporate parent, and the South Carolina Defendants were fraudulently joined, ignoring this Court's determination of the definition of "member" in *Americold*. *Id.*

The determination of diversity jurisdiction directly conflicts, with this Court's resolution of the previous circuit split where some circuits extended corporate citizenship allegations to limited liability companies. The Second, Ninth, Tenth, and Eleventh, circuits utilize the beneficial owner analysis as adopted by this Honorable Supreme Court, in its "membership" analysis as determined by this Court in *Americold*.

As the Petitioner argued in her Petition for rehearing, the panel's determination is also in conflict with the First Circuit's decision in *Pramco, LLC* where the First Circuit determined the citizenship of a limited liability company is "determined by the citizenship of all its members." *Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 54 (1st Cir. 2006) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990)). Likewise, the First Circuit declined to accept jurisdiction for a case where citizenship was not established by affirmative pleadings and pled diversity of citizenship, in the negative. *D.B. ZWIRN SPECIAL OPPORTUNITIES FUND, L.P., v. Mehrotra*, No. 11-1172 (1st Cir. 2011).

The Fourth Circuit continues to apply the citizenship allegations of incorporated entities to non-corporate artificial entities, like other Circuits did, pre-*Americold*. This misapplication of citizenship allegations continues to blur the lines between corporate entities and non-corporate artificial entities and thereby grant access to the federal

courts via diversity jurisdiction to non-corporate artificial entities, where the parties are not diverse.

For the first time, the defendants provided the articles of organization of the limited liability company Zymogenetics, LLC, that they previously withheld which evidenced the single member of the Limited Liability Company was and is in fact, its incorporated parent entity, as previously suspected. The petitioner avers this fact is diversity destroying, based on this Court's holding in *Americold*. Importantly, the attorneys for Zymogenetics, LLC recited that Zymogenetics, LLC had the same citizenship as its parent company, in its removal documents, at the same time their firm published an article highlighting the *Americold* decision on the firm's website, as destroying diversity jurisdiction. Instead of defending the case in state court, the defendants filed false and misleading citizenship allegations for the improper purpose of gaining federal subject matter jurisdiction, via diversity of citizenship, that they knew did not exist.

The defendants, for the first time, provided the articles of organization for Zymogenetics, LLC, which is a Delaware, limited liability company based on Delaware's Limited Liability Company Act. The Act provides membership for "persons" in a limited liability company and the Act describes a person below:

Title II Chapter 18 § 18-101 Definitions
[Effective until Aug. 1, 2019]

(11) "Member" means a person who is admitted to a limited liability company as a member as provided in § 18-301 of this title.(12) "Person" means a natural person, partnership (whether general or limited), limited liability company, trust (including a common law trust, business trust, statutory

trust, voting trust or any other form of trust), estate, association (including any group, organization, co-tenancy, plan, board, council or committee), corporation, government (including a country, state, county or any other governmental subdivision, agency or instrumentality), custodian, nominee or any other individual or entity (or series thereof) in its own or any representative capacity, in each case, whether domestic or foreign.

Title III Chapter 18 § 18-302. Classes and voting.

(a) A limited liability company agreement may provide for classes or groups of members having such relative rights, powers and duties as the limited liability company agreement may provide, and may make provision for the future creation in the manner provided in the limited liability company agreement of additional classes or groups of members having such relative rights,

powers and duties
as may from time to
time be established,
including rights,
powers and duties
senior to existing
classes and groups
of members.

(d) Unless otherwise
provided in a limited
liability company
agreement,
meetings of
members may be
held by means of
conference telephone
or other
communications
equipment by means
of which all persons
participating in the
meeting can hear
each other, and
participation in a
meeting pursuant to
this
subsection shall
constitute presence
in person at the
meeting.

Just as this Honorable Court determined in
Americold, the Delaware Limited Liability Act provided
for members to be individuals...corporations and further
provided that the member that is a corporation is
represented by the humans that make up the

corporation because it refers to meetings in its laws that can be in person or remote. It is axiomatic that only “people” can meet lending credence to this Court’s determination that for artificial entities that have corporations as its members, it is the beneficial owners or the people that make up the corporations that comprise “all the members” for purposes of diversity jurisdiction.

- b. There is no Fraudulent Joinder of the South Carolina Attorney Defendants because South Carolina recognizes extrinsic fraud when an attorney assists his client’s fraud by withholding documents and making misrepresentations to the Court.

South Carolina law specifically provides a remedy for attorney involvement in misrepresenting facts to a tribunal. As such, the local attorneys cannot be dismissed from an extrinsic fraud claims in which they are named defendants, particularly when the claims involve an attorney’s duty as an officer of the court such as here when the attorneys are the ones filing the notice of removal with the knowledge that complete diversity does not exist. The South Carolina Supreme Court also said an attorney can be liable for his acts with regard to third parties if the attorney owes a duty to third parties as is the case here because Ms. Lewis’ was acting as an officer of the Court and this duty extends to all parties to the action to uphold the integrity of the judicial process. *Stiles v. Onorato*. 318 S.C. 297, 300, 457 S.E. 2d 601, 602

(1995). Rule 11 SCRPC provides an additional basis for requiring officers of the Court to present information factually correct which extends to all parties to the proceedings.

Rule 11 (b) provides...by presenting to a court any pleading, written motion, or other paper . . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief . . . (1) it is not being presented for any improper purpose . . . [and] (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery Fed. R. Civ. P. 11 (b).

Because South Carolina law provides a basis for relief when attorneys participate in their client's fraud, there is no fraudulent joinder of the South Carolina attorneys. *Chewning v Ford Motor Company*, 579 S.E. 2d 605(S.C. 2003)

Finally, just as this Honorable Court found in *New Hampshire v. Maine*, judicial estoppel does not apply to this case. That is because the first time the Defendant's were before this Honorable U.S. Supreme Court the jurisdictional allegations were simply conclusory without the provision of the articles of organization that evidenced Zymogenetics, LLC, as the Petitioner suspected was not diverse based on its single member being a multi-national corporation with shareholders in every state. This Court has corrected the misapprehension that it is the beneficial owners of a limited liability company and not simply the Corporation named as the member. The defendant's seeking to gain an advantage for their misleading removal statements should not be allowed to do so. This is particularly true because South Carolina provides for an

independent tort in equity for withholding documents and making inaccurate representations to the court. *New Hampshire v. Maine*, 542 U.S. 742 (2001). Finally, it is clear that if Subject Matter jurisdiction was not present in the first instance, there was no valid court order, such as to violate the (policy of validity). It makes sense that certainly while there should be an end to litigation via conclusion (policy of res judicata) that policy should not benefit those that stand to gain by misrepresentations to the courts, regardless of the stage of proceedings. In this case, the first state court case was removed and dismissed. As such, there has never been a complete trial on the merits, so that *Res Judicata* applies.

XI. CONCLUSION

For the Above Reasons, the Petitioner respectfully requests this Honorable Court to grant the Petition for a Writ of Certiorari and summarily remand the case back to the Richland County Clerk of Court.

Respectfully Submitted,



December 10, 2021

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