FILED: September 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1228
(3:19-cv-01555-CMC)

RHONDA MEISNER
Plaintiff – Appellant
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 CALDARAZZO; JEFF FORTINO; STEPHANIE LEWIS, individually, and in her capacity as managing principal of Jackson Lewis, PC; ELLISON MCCOY, individually, and in his capacity as office litigation manager of Jackson Lewis PC
Defendants – Appellees
And
JOHN DOE, whose identity and name is not yet known or is yet to be determined; JANE DOE, whose identity and name is not yet known or is yet to be determined
Defendants

O R D E R

The court denies the petition for rehearing and

rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc. Entered at the direction of the panel: Judge Wilkinson, Senior Judge Shedd, and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 20-1228

RHONDA MEISNER,

Plaintiff - Appellant,

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.; TRACEYCALDARAZZO;JEFF FORTINO; STEPHANIE LEWIS, individually, and in her capacity as managing principal of Jackson Lewis, PC; ELLISON MCCOY, individually, and in his capacity as office litigation manager of Jackson Lewis PC,

Defendants - Appellees,

and

JOHN DOE, whose identity and name is not yet known or is yet to be determined; JANE DOE, whose identity and name is not yet known or is yet to be determined,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at

Columbia. Cameron McGowan Currie, Senior District Judge. (3:19-cv-01555-CMC)
Submitted: July 16, 2021

Before WILKINSON and KEENAN, Circuit Judges, and SHEDD, Senior Circuit Judge. affirmed by unpublished per curiam opinion.

Rhonda Meisner, Appellant Pro Se. Ellison F. McCoy, JACKSON LEWIS PC, Greenville, South Carolina, for Appellees.
Unpublished opinions are not binding precedent in this circuit.
PER CURIAM: Rhonda Meisner appeals the district court's order accepting the recommendation of the magistrate judge, denying Meisner's motion to remand her civil action to state court, and granting Defendants' motion to dismiss. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Meisner v. Zymogenetics, Inc.*, No. 3:19-cv-01555-CMC (D.S.C. Nov. 25, 2019 & Jan. 23, 2020). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Rhonda Meisner,

Plaintiff,

v.

Zymogenetics,Inc.;Zymogenetics,LLC; BristolMyersSquibb,Inc.;Tracey Caldarazzo; Jeff Fortino; Stephanie Lewis, *individually, in her capacity as managing principal of Jackson Lewis, LLP, and in her capacity as managing principal of Jackson Lewis, P.C.*; Ellison McCoy, *individually and in his capacity as office litigation manager of Jackson Lewis P.C.*; John Doe 1-10; Jane Doe 1-10,

Defendants.

C/A. No. 3:19-1555-CMC-PJG

Opinion and Order Adopting Report and Recommendation on motion to remand (ECF No. 15) and motion to dismiss (ECF No. 5) and addressing motion for sanctions (ECF No. 6)

Through this action, Plaintiff Rhonda Meisner ("Plaintiff") seeks recovery for claims arising out of her prior employment and two earlier cases related to that employment: *Meisner v. Zymogenetics, Inc.*, C/A No. 3:12-684-CMC ("*Meisner I*"); and *Meisner v. Zymogenetics, Inc.*, C/A No. 3:15-3523-CMC ("*Meisner II*").[1] Like *Meisner II*, the present action ("*Meisner III*") originated in state court and was removed based on the assertion of diversity jurisdiction. Also like *Meisner II*, whether diversity exists depends, in part, on arguments non-diverse Defendants (attorneys who provided representation in the prior cases) were fraudulently joined. The matter is before the court on Plaintiff's motion to remand (ECF No. 15) and Defendants' motions to dismiss (ECF No. 5) and for sanctions (ECF No. 6). For reasons explained below, the motion to remand is denied, the motion to dismiss is granted, and the motion for sanctions is granted in part and denied in

part. In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(g), D.S.C., this matter was referred to United States Magistrate Judge Paige J. Gossett for pre-trial proceedings and a Report and Recommendation ("Report"). On August 29, 2019, the Magistrate Judge issued a Report recommending Plaintiff's motion to remand be denied and Defendants' motion to dismiss be granted. ECF No. 26. The Report declined to make a recommendation on the motion for sanctions. *Id.* at 12 n.4.

The Magistrate Judge advised the parties of the procedures and requirements for filing objections to the Report and the serious consequences if they failed to do so. Plaintiff filed objections on September 12, 2019. ECF No. 29. Defendants filed a reply on September 26, 2019. ECF No. 30. The matter is now ripe for resolution. After de novo review of Plaintiff's objections, the court agrees with the recommendations in the Report and the analysis as supplemented in this Order.[2] Accordingly, the court adopts and incorporates the Report by reference, denies Plaintiff's motion to remand, and grants Defendants' motion to dismiss. *See* Discussion §§ I-III. The court grants the motion for sanctions to the extent it seeks attorneys' fees and expenses and denies it in other respects, albeit with a warning the court may enter a pre-filing injunction should the sanction of attorneys' fees and expenses fail to deter Plaintiff from pursuing further duplicative, frivolous, or vexatious litigation relating to issues addressed in *Meisner I, II,* or *III. See* Discussion § IV.

STANDARD

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a de novo

determination of those portions of the Report to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1). The court reviews only for clear error in the absence of an objection. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (stating that "in the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'") (quoting Fed. R. Civ. P. 72 advisory committee's note).

I. Challenges to Removal Procedure

To the extent Plaintiff's objections suggest possible procedural defects in removal, they are time-barred because her motion to remand was filed more than thirty days after removal. *See* 28 U.S.C § 1447(c) ("A motion to remand . . . on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal."); ECF No. 1 (notice of removal filed May 29, 2019); ECF No. 15 (motion to remand filed July 8, 2019). Plaintiff also fails to suggest any non-frivolous procedural deficiency. For example, whether Jackson Lewis P.C. was served is irrelevant as it is not named as a Defendant. Likewise,

Defendants were not obligated to file proofs of service as such documents are not "served" on them. *See* 28 U.S.C. § 1446(a) (requiring removing party to file "copies of all process, pleadings and orders *served upon him or them*" (emphasis added)). Finally, a failure to attach all state-court

filings required to be attached can be cured. *E.g.* 14C Charles Alan Wright et al., Federal Practice and Procedure § 3733 (4th ed.) (explaining failure to file all state court papers with the notice of removal is "curable in the federal court"). Plaintiff's objections, therefore, fail to the extent based on alleged procedural deficiencies.

II. Fraudulent Joinder of Attorney Defendants

While she offers no actual argument, Plaintiff's objections suggest disagreement with the recommendation the court find the non-diverse, attorney Defendants were fraudulently joined. The court has reviewed the Report's analysis of this issue de novo and agrees with both the analysis and recommendation. *See* Report at 5-10. The court, therefore, adopts and incorporates the Report's fraudulent joinder analysis.

III. Dismissal of Claims Against Diverse Defendants

Plaintiff's objections also suggest disagreement with the recommendation her claims be dismissed because they are precluded by the decision in *Meisner II.* These objections are overruled for reasons explained below. **Recommendation.** The Report agrees with Defendants' argument "Meisner's claims are precluded by the previous litigation in Meisner II." ECF No. 26 at 11. It notes "[t]he issues raised by Meisner . . . were previously rejected . . . in an Opinion and Order denying Meisner's motion to vacate in Meisner II[,]" which "specifically rejected Meisner's argument about the citizenship
of the corporate defendants." *Id.* Based on that Opinion and Order, the Report concludes Meisner"fails to plausibly allege that the defendants injured her by lying or misrepresenting the citizenship of the corporate defendants."Present Complaint. In her present complaint, Plaintiff alleges "[t]his action is the result
of previous litigation between the parties." ECF No. 1-1 at 13 (Complaint ¶ 11). She further

alleges one of the attorney Defendants "conspired, collaborated, and jointly acted with a witness" in *Meisner I* to submit "false and perjured declarations." *Id.* ¶ 12. Plaintiff also alleges that, while *Meisner I* was on appeal, she discovered that an order entered by the Magistrate Judge included computer metadata which suggested the order was drafted by counsel. *Id.* ¶ 13, 14.

Based in part on her discovery of the metadata and other concerns with the *Meisner I* proceedings, Plaintiff filed her second case (*Meisner II*) in state court "to address the extrinsic fraud, civil conspiracy, as well as other state causes of action that were not previously presented or litigated" in *Meisner I*. *Id.* ¶ 15. Defendants removed *Meisner II* to federal court based, in part, on a claim "Zymogenetics, LLC, had the same citizenship as Zymogenetics, Inc." and both were diverse from Plaintiff, a point Defendants repeated in opposing Plaintiff's subsequent motion toremand in *Meisner II*. *Id.* ¶¶ 20, 25. After *Meisner II* was "closed" Plaintiff "found evidence in the form of South Carolina Secretary of State filings" that, in her view, indicated counsel's representations in *Meisner II* regarding Zymogenetics, LLC's citizenship were fraudulent. *Id.* ¶¶ 26-29. Plaintiff alleges she was damaged by these false representations. *Id.* ¶ 30.Based on these allegations, Plaintiff asserts a cause of action for extrinsic fraud, which relies in part on Rule 11 of the *South Carolina* Rules of Civil Procedure. *Id.* ¶¶ 31-54. The alleged fraud consists of the assertion (in *federal court* removal papers) that Zymogenetics, LLC was diverse from Plaintiff when counsel "had direct knowledge" that it "was not diverse from the Plaintiff." *Id.* ¶ 48. Plaintiff alleges this assertion misled the Magistrate and District Judges

"which caused the Court to issue judgments, decrees, and rulings in favor of the defendants, *when the federal Court did not have jurisdiction*." *Id.* ¶ 53 (emphasis added); *see also id.* ¶ 54 ("The fraudulent notice of removal filed by the

defendants caused the federal court to be misled and make rulings in favor of the defendants to which the defendants had no right[.]").

Plaintiff also asserts an "Independent Action in Equity" based on the same allegations. *Id.* ¶¶ 55-59. Though founded in equity, she seeks *damages* under this claim for both "incremental damage from the fraudulent filings [and] *also for the original claims in the underlying lawsuit.*" *Id.* ¶ 57 (emphasis added); *see also id.* ¶ 58 (alleging federal court "was either misled by [counsel or] knew that jurisdiction did not exist and joined with the defendants in the scheme to deny [Plaintiff her] court of choice"); *id.* ¶ 59 (incorporating "original complaint and causes of action").

Plaintiff's third and final cause of action asserts a claim for abuse of process based on the same factual allegations. *Id.* ¶¶ 60-73. This cause of action rests on the same central allegations: that Defendants falsely represented Zymogenetic LLC's citizenship in removal papers, thereby "denying [Plaintiff] her right to her choice of court" and causing her to incur related incremental expenses in having to litigate the matter in federal court. *Id.* ¶ 73.

Discussion. As the summary above reveals, Plaintiff's current complaint seeks relief for two categories of alleged wrongs: (1) litigation-related actions primarily in *Meisner II* including, most critically, actions for which Plaintiff sought relief in her motion to vacate the judgment in *Meisner II*; and (2) employment-related actions for which Plaintiff sought relief in *Meisner I* and *Meisner II*. Recovery on the second category necessarily depends on proof of the first: that alleged litigation misconduct by counsel and improper exercise of jurisdiction by the court deprived Plaintiff of her right to proceed in state court as to the underlying claims (second

category). For reasons explained below, both categories of claim are barred by res judicata.

The decisions in *Meisner I* and *Meisner II* are final.[4] Consequently, claims that were or could have been asserted in those actions are subject to claim preclusion. *See Montana v. United States*, 440 U.S. 147, 153-54 (1979) (holding collateral estoppel and res judicata are "central to the purpose for which civil courts have been established[,]" which is "the conclusive resolution of disputes within their jurisdictions"). As the Court explained, "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.*; *see also Plum Creek Dev. Co. v. City of Conway*, 512 S.E.2d 106, 108 (S.C. 1999) ("Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." (internal marks and alterations omitted)).[5] Thus, claims based on allegations within the first category of alleged wrongs(employment-related actions) are barred by res judicata because they were or could have been raised in *Meisner I* and *Meisner II*. [6]Res Judicata also bars Plaintiff from raising the second category of alleged wrongs(litigation-related actions in *Meisner I* and *Meisner II*). *See Weldon v. United States*, 70 F.3d 1, 5 (2d Cir. 1995) ("the very grounds on which [plaintiff] claims fraud upon the court—the government's alleged misrepresentation and misconduct—were raised or should have been raised by [plaintiff] during the pendency of the earlier case, . . . whether prior to judgment or afterwards,

by way of a motion for reconsideration or petition for rehearing Thus res judicata barred this independent action to void the judgment." (internal citations and marks omitted)). Not only could Plaintiff have raised any concerns with litigation conduct in prior litigation, she in fact did so including through her motion to vacate in *Meisner II*, which was filed several months prior tothis action. *See Meisner II*, ECF No. 76 (motion to vacate filed December 28, 2018); *Meisner III*, ECF No. 1-1 (state court complaint filed April 5, 2019).

Even if not barred by res judicata, the alleged misconduct relating to removal of *Meisner II* fails to state a claim for the same reasons the court denied Plaintiff's motion to vacate. As explained in the Order denying the motion to vacate (*Meisner II*, ECF No. 79) and subsequent Order partially granting a motion to alter or amend the Order denying the motion to vacate (*Meisner II*, ECF No. 83), 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. *Meisner II*, ECF No. 79 at 2, 3; ECF No. 83 at 4, 5.

In any event, whatever criticisms Plaintiff may have of this court's jurisdictional rulings and Defendants' related actions, they cannot be remedied through a separate legal action. *E.g.*, *Cooper v. Productive Transp. Servs.*, 147 F.3d 347, 352 (4th Cir. 1998) ("[F]ederal courts have the authority to determine whether they have jurisdiction, and their determinations of such questions while open to direct review, may not be assailed collaterally." (internal quotation marks omitted)).

Accordingly, the court adopts the recommendation of the Report, for reasons stated therein and as supplemented above, and dismisses all claims with prejudice.

IV. Sanctions

Defendants seek sanctions based on the court's inherent powers rather than based on Rule

11 of the Federal Rules of Civil Procedure. ECF No. 6. Sanctions sought include: (1) a pre-litigation injunction; and (2) an award of attorneys' fees and costs. *Id.* Defendants argue a monetary sanction alone is not likely to deter Plaintiff from continuing to file duplicative cases and advance frivolous arguments because she has yet to pay costs awarded in *Meisner I* and *Meisner II.* ECF No.6-1 at 8 (referring to unpaid awards of over $14,000 in costs in prior litigation): see also *Meisner I,* ECF No. 305 (awarding costs of $13,927.73); *Meisner II,* ECF No. 66(awarding costs of $400) Defendants also sought sanctions in Meisner II for Plaintiff's motion to alter and amend the Order denying her motion to vacate judgment. Meisner II, ECF No. 82 at 5-7. The court denied this request for sanctions despite finding Plaintiff "offer[ed] nothing but frivolous arguments on the substantive ruling." Meisner II, ECF No. 83 at 5 (explaining "the underlying motion to vacate ...was entirely unsuccessful and rested on what may be fairly characterized as a frivolous legal argument regarding the citizenship of an LLC" and the motion to alter and amend was "successful only in removing dicta from the challenged order"). The court nonetheless, warned Plaintiff it "may award sanctions up to the amount of Defendants' costs and attorneys' fees incurred in responding to *any further motions* on this issue as well as other sanctions sought by Defendants should the court find a future motion or other filing frivolous in whole or in part." *Id.* (Order entered July 30, 2019) (emphasis added). The Report in this action referred to the then-recent denial of sanctions in *Meisner II*

in declining to address sanctions. *Meisner III*, ECF No. 26 at 12 n.4 (concluding that, in light of the ruling in *Meisner II*, "the decision whether to award sanctions . . . is more properly left to the district judge).

In their response to Plaintiff's objections to the Report, Defendants argue sanctions are warranted at least for Plaintiff's *objections* in light of the court's discussion of sanctions in *Meisner III*, ECF No. 83. Defendants assert Plaintiff's objections are "filled with frivolous assertions and contentions[,]" including continued arguments relating to jurisdiction that the court rejected in its orders denying Plaintiff's motions to vacate and to alter or amend (*Meisner II*, ECF Nos. 79, 83). *See* ECF No. 30 at 13 (incorporating arguments from memorandum in support of motion for sanctions, ECF No. 6, and seeking relief including a pre-filing injunction).

Sanctions are warranted. The court agrees Plaintiff's objections (filed September 12, 2019) are frivolous, especially to the extent they advance arguments the court rejected in the most recent orders in *Meisner II*. *See Meisner II,* ECF Nos. 79, 83 (entered June 4, 2019 and July 30, 2019). Plaintiff's reliance on multiple, conclusory assertions of error exacerbates rather than excuses the frivolousness of her objections because it imposes additional burdens on Defendants (and the court) to attempt to determine Plaintiff's intent and address *potential* rather than clearly articulated arguments.

latter of which was resolved based on a finding it was precluded by *Meisner I.* To the extent Plaintiff believed improper litigation conduct in *Meisner II* warranted vacating or reopening *Meisner II*, her proper course was a post-judgment motion in that action (which she pursued but which failed). By bringing a separate action seeking the same relief, Plaintiff unnecessarily and improperly duplicated proceedings. Thus, sanctions are warranted not only for Plaintiff's objections but for her pursuit of this action.

It follows that the court's decision not to sanction Plaintiff for her motion to alter and amend the Order denying her motion to vacate judgment in Meisner II does not preclude sanctions for her pursuit of this action. This is, most critically, because the present action is an improper collateral attack on the prior judgment in *Meisner II* and, in various respects, a third attempt to litigate matters raised in *Meisner I.* Moreover, for reasons explained in Meisner II, ECF Nos. 79 and 93, the core argument on which this action depends (that this court was misled as to the existence of jurisdiction) relies on a fundamentally-flawed premise regarding citizenship of an LLC. Even if the premis was not fundamentally-flawed, it is one Plaintiff could have advanced in prior litigation because the fact Zymogenetics, LLC has a corporation as an upstream member was a fact Plaintiff herself alleged in her Complaint in Meisner II and which was never disputed. See Meisner II, ECF No. 5 (alleging Zymogenetics, LLC is a "wholly owned subsidiary of Zymogenetics, Inc. and both are wholly owned subsidiaries of Bristol Myers Squibb co. Inc.) The court, therefore, concludes sanctions are warranted for Plaintiff's pursuit of this action including but not limited to her pursuit of objections that are foreclosed by the two most recent orders in *Meisner II* (ECF Nos. 79, 83). The more difficult question is what sanction is appropriate.

Monetary sanction. At a minimum, a monetary sanction representing all or a significant portion of Defendants' attorneys' fees and reasonable expenses (including but not limited to"costs" recoverable through a bill of costs) is appropriate. For reasons explained above, the court will not limit this sanction to fees and expenses incurred in responding to Plaintiff's objections. The impropriety of bringing a separate action is exacerbated by Plaintiff's overlapping pursuit of essentially the same relief through her post-judgment motions in *Meisner II.* The court will exclude attorneys' fees and expenses incurred in responding to Plaintiff's motion to remand

including additional briefing requested by the Magistrate Judge.[7]

Procedure for fee application. Defendants shall file an application for attorneys' fees and expenses together with supporting materials within fourteen days of entry of this order. Plaintiff shall be allowed fourteen days after service of Defendants' application to file a response. Defendants shall be allowed seven days after service of any response to file a reply. Any response should address only the propriety of the *amount* sought. Plaintiff may not reargue whether an award consisting of attorneys' fees and costs is appropriate.

Non-monetary sanction. In light of Plaintiff's failure to pay costs awarded in *Meisner I* and *Meisner II*, the court also considers whether a monetary sanction is adequate. In this regard, the court is primarily concerned with whether a monetary sanction will deter further duplicative and frivolous filings, whether in *Meisner I, II,* or *III*, or some new action.

As Defendants explain in their opening memorandum, the court may enter a pre-filing injunction in exigent circumstances. ECF No. 6-1 at 5, 6 (*citing Cromer v. Kraft Foods N. Am., Inc.*, 390 F. 3d 812 (4th Cir. 2004)). *Cromer* provides that pre-filing injunctions "should not in any way limit a litigants access to the courts absent exigent circumstances, such as a litigant's continuous abuse of the judicial process by filing meritless and repetitive actions." See Cromer, 390 F.3d at 817-818 (internal quotation marks and citation omitted). Factors to be considered include: "(1) the party's history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of the alternative sanctions." Cromer,390 F.3d at 818 (citation omitted).

Despite filing a memorandum opposing sanctions, Plaintiff does not address either these factors or the propriety of a pre-filing injunction. She, instead, argues generally that sanctions are not warranted (ECF No. 14 at 1-3) and specifically, though cursorily, argues against an award of attorneys' fees (*id.* at 3). The latter argument notes the court requested further briefing on an issue relating to the existence of jurisdiction. *Id.* at 3. Plaintiff also requests a hearing if the court "determines sanctions may be available." *Id.* at 5.

The court finds several of the *Cromer* factors support a pre-filing injunction. First, Plaintiff has now filed three lawsuits directly or indirectly seeking recovery for claims arising from her employment with one or more Defendants. In two of those actions, Plaintiff raised allegations of litigation misconduct either in the Complaint or through post-judgment motions. Issues relating to the alleged misconduct have been repeatedly raised and rejected, including in Plaintiff's appeal of *Meisner II* and subsequent motion to vacate. The alleged litigation misconduct is the central premise on which Plaintiff's claims in this action depend.

Second, the court finds Plaintiff had no good faith basis for pursuing the present litigation because a separate lawsuit is not the proper means for challenging litigation misconduct or the court's jurisdiction. Further, Plaintiff's own action in seeking relief for the same conduct by post judgment motion in Meisner II demonstrate a subjective understanding of the proper course. Third, Plaintiff has imposed an undue burden on the courts and opposing parties through her filings, most critically through her contemporaneous pursuit of this action and her motion to vacate in *Meisner II.* On this point, it is notable that a number of arguments raised in *Meisner III* were raised and rejected (both in this court and on appeal) in *Meisner II* and *Meisner II* was held to be precluded by *Meisner I.*

The last factor is whether alternative sanctions are likely to deter similar conduct. Defendants make a plausible argument that monetary sanctions alone are not sufficient because Plaintiff has not paid prior awards of costs. Defendants do not, however, argue or demonstrate that they have sought and been unable to collect the awarded costs. Further, the court has not previously entered a sanction award, monetary or otherwise.

Under these circumstances, the court finds some but not all Cromer factors support a pre-filing injunction. Most critically, while there is some indication Plaintiff may not be deterred from filing further duplicative or vexatious litigation by a sanction consisting of attorneys' fees and expenses, that premise has not been tested. Given the extraordinary nature of such a sanction, the court declines to enter a pre-filing injunction at this time. The court will seriously entertain a pre-filing injnction should Plaintiff pursue further motions or other litigation relating to the allegations in Meisner I, II, or III or related litigation conduct. This ruling neither precludes Plaintiff from her right to appeal this decision, nor forecloses sanctions should an appeal be found frivolous.

For reasons set forth above, Plaintiff's motion to remand is denied, Defendants' motion to dismiss is granted, and Defendants' motion for sanctions is granted in part. The parties are directed to address the proper amount of the fee and expense award under the schedule (and limitations) set forth above. See *supra* Discussion § IV (setting schedule and excluding fees and expenses incurred in responding to motion to remand). The action is dismissed. Dismissal is with prejudice except as to the Jane and John Doe Defendants who are dismissed without prejudice. Entry of judgment shall be deferred until the court rules on the amount of attorneys' fees and expenses to be awarded as a sanction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Rhonda Meisner,
Plaintiff,

v.

Zymogenetics, Inc.; Zymogenetics, LLC; Bristol Myers Squibb, Inc; Tracey Caldarazzo; Jeff Fortino; Stephanie Lewis, *individually, in her capacity as managing principal of Jackson Lewis, LLP, and in her capacity as managing principal of Jackson Lewis, P.C.*; Ellison McCoy, *individually, and in his capacity as office litigation manager of Jackson Lewis, P.C.*; John Doe 1-10; Jane Doe 1-10,

Defendants.

) C/A No. 3:19-1555-CMC-PJG

) REPORT AND RECOMMENDATION

The plaintiff, Rhonda Meisner, who is self-represented, filed this civil action in the Richland County Court of Common Pleas. The defendants removed this action based on their assertion that the non-diverse defendants (Attorneys Lewis and McCoy) should be disregarded for jurisdictional purposes based on the doctrine of fraudulent joinder. By order filed June 27, 2019, the court directed briefing on this jurisdictional issue. This matter is before the court pursuant to 28 U.S.C. § 636(b)and Local Civil Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on the defendants' motion to dismiss and motion for sanctions (ECF No. 5 & 6) and Meisner's motion to remand (ECF No. 15). Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Meisner

of the summary judgment and dismissal procedures and the possible consequences if she failed to respond adequately to the defendants' motion. (ECF No. 9.) Having reviewed the parties'submissions (ECF Nos. 19, 20, 21, 23, & 24) and the applicable law, the court finds that it has jurisdiction over this action, but that Meisner's case should be dismissed.

BACKGROUND

The long and winding road that has led the parties and the court to the instant lawsuit has been exhaustively described in prior orders of the court in previous litigation between the parties and need not be detailed here. See Meisner v. Zymogenetics, Inc., C/A No. 3:12-684-CMC (ECF No. 257 at 2-4; ECF No. 288 at 2-3); C/A No. 3:15-3523-CMC (ECF No. 19 at 2; ECF No. 34 at 2; ECF No. 53 at 4-5). The following background is sufficient for resolution of the jurisdictional issue and the parties' motions. In 2012, Meisner sued her former employers and a co-worker alleging employment discrimination, among other claims ("Meisner I," C/A No. 3:12-684-CMC). The court ultimately granted summary judgment to the defendants. The United States Court of Appeals for the Fourth Circuit affirmed and the United States Supreme Court denied certiorari. Meisner v. Zymogenetics, Inc., C/A No. 3:12-684-CMC, 2014 WL 4721680 (D.S.C., Sept. 22, 2014), aff'd, 612

F. App'x 182 (4th Cir. 2015), cert. denied, 136 S. Ct. 1461 (2016).

Subsequently, Meisner filed an action in state court ("Meisner II," C/A No. 3:15-3523-CMC) in 2015 alleging that her former corporate defendant employers, Calderazzo, Fortino, and their attorney and the attorney's law firm in Meisner I committed fraud on the court by presenting false testimony by Jeff Fortino in

Meisner I. The defendants removed the case to federal court, which assumed jurisdiction because it found that the attorney defendant and law firm, who were not diverse in citizenship from Meisner, were fraudulently joined. Meisner v. Zymogenetics, Inc., C/A No. 3:15-3523-CMC, 2016 WL 1375711 (D.S.C. Apr. 7, 2016), 2019 WL 2358968 (D.S.C. June 4, 2019). The Fourth Circuit upheld the district court's finding and the United States Supreme Court denied certiorari. Meisner v. Zymogenetics, Inc., 697 F. App'x 218 (4th Cir. 2017), cert. denied, 138 S. Ct. 1610 (2018). Following the Supreme Court's denial of certiorari, Meisner filed a motion pursuant to Rule 60(b) in the district court seeking to vacate the district court's order. The district court denied her motion, concluding that Meisner's additional contention that the corporate employer defendants were also not diverse lacked any legal basis. Meisner II, (ECF Nos. 79 & 83).

Meisner filed another lawsuit in state court—the instant action—against the diverse corporate defendants and two of its attorneys ("Meisner III"). This time Meisner's Complaint alleges fraud based on the defendants' jurisdictional representations regarding the corporate defendants' citizenship. In short, Meisner contends that the Meisner III defendants lied or materially misrepresented the citizenship of the corporate defendants by failing to account for the citizenship of each of their shareholders. Her Complaint asserts, apparently against all defendants, claims for extrinsic fraud and abuse of process as well as an unspecified claim based in equity. The defendants removed the case again based on diversity of citizenship, again alleging fraudulent joinder of the attorney defendants, Lewis and McCoy.

DISCUSSION

A.Jurisdiction

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). Accordingly, a federal court is required, *sua sponte*, to determine if a valid basis for its jurisdiction exists, "and to dismiss the action if no such ground appears." Id. at 352; see also Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Although the absence of subject matter jurisdiction may be raised at any time during the case, determining jurisdiction at the outset of the litigation is the most efficient procedure. Lovern v. Edwards, 190 F.3d 648, 654 (4th Cir. 1999).The party seeking removal has the burden of establishing federal subject matter jurisdiction. Hoschar v. Appalachian Power Co., 739 F.3d 163, 169 (4th Cir. 2014). State court defendants mayremove to federal district court a civil action over which the district courts have original subject matter jurisdiction. 28 U.S.C. § 1441(a). "Removal must be strictly construed, and 'if federal jurisdiction is doubtful, a remand to state court is necessary.' " Hughes v. Wells Fargo Bank, N.A., 617 F. App'x 261, 264-65 (4th Cir. 2015) (quoting Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004) (*per curiam*)). Pursuant to 28 U.S.C. § 1332(a)(1), federal subject matter jurisdiction

exists if the amount in controversy exceeds $75,000 and the suit is between citizens of different states.[1] 28 U.S.C. § 1332(a)(1). Diversity jurisdiction requires that the parties be completely diverse, meaning the plaintiff cannot be a citizen of the same state as any defendant. See Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89 (2005). However, many circuit courts, including the Fourth Circuit, have recognized an exception to the complete diversity rule. The fraudulent joinder doctrine "effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby

retain jurisdiction." Johnson v. Am. Towers, LLC, 781 F.3d 693, 704 (4th Cir. 2015) (quoting Mayes v. Rapoport, 198 F.3d 457, 461 (4th Cir. 1999))."The party alleging fraudulent joinder bears a heavy burden—it must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff's favor." Johnson, 781 F.3d at 704 (quoting Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir. 1999)). To establish fraudulent joinder, the removing party must demonstrate either "outright fraud in the plaintiff's pleading of jurisdictional facts or that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court." Id. (emphasis in original). "This standard is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." Hartley, 187 F.3d at 424. "To defeat an allegation of fraudulent joinder, the plaintiff need establish 'only a slight possibility of a right to relief.' " Hughesv. Wells Fargo Bank, N.A., 617 F. App'x 261, 264-65 (4th Cir. 2015) (quoting Mayes, 198 F.3d at 464); see also Mayes, 198 F.3d at 466 (stating that a plaintiff must show only a "glimmer of hope" of succeeding against the non-diverse defendants). "Further, in determining whether an attempted joinder is fraudulent, the court is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis of joinder by any means available." Mayes, 198 F.3d at 464 (internal quotation marks and citations omitted).

Here, the court easily concludes that the non-diverse attorney defendants are fraudulently joined because they are immune from suit; in fact, the court previously held so in the similar procedural posture of Meisner II. See Meisner v. Zymogenetics, Inc., C/A No. 3:15-3523-CMC,2016 WL 1375711 (D.S.C. Apr. 7, 2016). Nonetheless, some courts have recognized an exception to the fraudulent joinder doctrine that at first blush appeared to potentially apply here.[2]In Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568,

574-76 (5th Cir. 2004), the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, held that "when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant."

Smallwood, 385 F.3d at 571. In such a case, the entire action must be remanded to state court. Id. The Smallwood Court found that because the in-state defendant's preemption defense applied equally to the claims brought against the out-of-state defendants, the doctrine of fraudulent joinder did not apply; the case simply lacked merit. Relying on Cheasapeake & O.R. Co. v. Cockrell, 232 U.S. 146 (1914), the Fifth Circuit determined that the doctrine of fraudulent joinder was therefore inapplicable. Smallwood, 385 F.3d at 575.Other courts have accepted this reasoning that a "common defense" or "common defect" precludes application of the doctrine of fraudulent joinder and requires a remand. See, e.g., Waltonv. Bayer Corp., 643 F.3d 994, 1001-02 (7th Cir. 2011); Hunter v. Philip Morris USA, 582 F.3d 1039, 1044-45 (9th Cir. 2009); Boyer v. Snap-On Tools Corp., 913 F.2d 108, 112-13 (3d Cir. 1990); McDowell Pharm., Inc. v. W. Va. CVS Pharm., LLC, C/A No. 1:11-cv-606, 2012 WL 2192167, at5-6 (S.D. W. Va. June 14, 2012); Riverdale Baptist Church v. Certainteed Corp., 349 F. Supp. 2d 943, 952 (D. Md. 2004). However, others jurists and commentators have criticized or noted limitations to it. Smallwood, 385 F.3d at 577 (Jolly, J., dissenting, joined by J. Jones, J. Smith, J.Barksdale, J. Garza, J. Clement, and J. Prado); see also 13F Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3641.1 (3d ed. Apr. 2019) (reviewing the "Smallwood cases"); E. Farish Percy, Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder, 91 Iowa L. Rev. 189, 230-39 (2005) (providing a thorough review and critique of the common defense and defect exception).

The Fourth Circuit has not expressly adopted the common defense exception to the doctrine of fraudulent joinder, although, as noted above, some courts within the circuit have applied it. Assuming without deciding that the Fourth Circuit would utilize it, the court nonetheless concludes that it does not apply to the case at bar because the defense upon which the non-diverse defendants rely—attorney immunity—does not equally and necessarily dispose of the diverse defendants' liability.

Despite her argument to the contrary in her brief, Meisner's Complaint clearly seeks to assert claims against the diverse defendants themselves. (Compare Pl.'s Brief at 7-8, ECF No. 20 with Compl. ¶¶ 66, 67, 71, 73, ECF No. 1-1 at 21-22.) Unlike the cases she relies upon in her brief, here the resolution of the immunity defense raised by the non-diverse attorney defendants does not necessarily absolve the diverse corporate defendants from liability. Even if the non-diverse attorney defendants are immune from suit, the diverse corporate defendants could conceivably be held liable for the alleged actions of their agents. Cf. Boone v. Citigroup, Inc., 416 F.3d 382, 391-92 (5th Cir.2005) (finding that although all the defendants asserted statute of limitations defenses, the application of that defense differed among the defendants due to factual distinctions implicating

tolling, so the assertion of the common defense did not equally dispose of the claims against all defendants); Reese v. ICF Emergency Mgmt. Servs., Inc., L.L.C., 684 F. Supp. 2d 793, 806 (M.D. La. 2010) (finding the reasons the plaintiff's claims against the non-diverse defendants were foreclosed did not necessarily dispose of the claims of the other defendants, and thus, the common defense exception did not apply). As stated by the Boone Court in its discussion of Smallwood, "It bears emphasizing that Smallwood [385 F.3d at 576 (5th Cir. 2004)] applies *'only* in that limited range of cases where the allegation of improper [or fraudulent] joinder rests *only* on a showing that there is no reasonable basis for predicting that state law

would allow recovery against the in-state defendant and *that* showing is *equally* dispositive of *all* defendants.' " Boone, 416 F.3d at 389-90 (quoting Smallwood, 385 F.3d at 576 (5th Cir. 2004)). Here, while the non-diverse attorney defendants are immune, the diverse corporate defendants cannot invoke that particular defense, as they may potentially be held liable for the actions of their agents even if those agents individually are shielded by immunity. See e.g. Gaar v. N. Myrtle Beach Realty Co., Inc., 339 S.E.2d 887, 889 (S.C. Ct. App. 1986) (recognizing that while an attorney may not be liable for malicious prosecution, such a claim may be properly brought against the party to the original action). The immunity defense is unique to the non-diverse defendants. Thus, the defense of the in-state attorney defendants does not equally and necessarily compel dismissal of all claims against all diverse defendants. Compare Boone, 416 F.3d at 391 with Cockrell, 232 U.S. at 153 (rejecting defendant railroad's fraudulent joinder argument because it was based on the assertion that the employees were not negligent, which "went to the merits of the action as an entirety, and not to the joinder"). Moreover, the fact that the diverse defendants and non-diverse defendants may share other defenses, such as the legal defense of preclusion or a factual defense that the alleged actions were not fraudulent, does not require application of the common defense exception to the fraudulent joinder doctrine. See Boone, 416 F.3d at 391 (stating that the common defense exception would apply only if "the showing which foreclosed the appellants' claims against the non-diverse defendants" also foreclosed all of their claims against the diverse defendants); cf. McDonald v. Union Nat't Life Ins. Co., 307 F. Supp. 2d 831, 835 (S.D. Miss. 2004) ("[I]f a 'common defense' is the *only ground asserted by the defendant(s) for fraudulent joinder*, then the case must be remanded to state court.") (emphasis added); In re New Eng. Mut. Life Ins. Co. Sales Litig., 324 F. Supp. 2d 288, 306 (D. Mass. 2004) (finding that the arguments offered by

the non-diverse defendant *to prove fraudulent joinder* simultaneously showed that "no case could be made against the diverse defendant, and thus, the common defense exception applied); McDowell Pharmacy Inc. v. W. Va. CVS Pharmacy, LLC, C/A No. 1:11-cv-606, 2012 WL 2192167, at *5 (S.D. W. Va. June 14, 2012) ("[R]emoval of a state claim is impermissible when the *legal theory upon which the defendant's claim of fraudulent joinder is predicated* is a common defense that equally disposes of all defendants to the suit.") (emphasis added); see also Smallwood, 385 F.3d at 579 n.6 (Jolly, J., dissenting) (noting that under the majority's reasoning the common defense exception would not apply where there are multiple defenses available to the non-diverse defendants, some of which are shared by the diverse defendants, but the fraudulent joinder argument is based only on a non-common defense); Bertwellv. Allstate Ins. Co., C/A No. 0:07-3875-CMC, 2008 WL 304735 (D.S.C. Jan. 31, 2008) (finding fraudulent joinder of non-diverse attorney where the plaintiff alleged that the defendant client and attorney together engaged in fraud and other torts and the defendant attorney asserted fraudulent joinder because he was immune).

The instant case is more like Bertwell and Boone than Smallwood and Cockrell. Thus, the so-called "common defense" exception does not apply here, and the non-diverse defendants are fraudulently (or improperly) joined for the same reasons explained in Meisner II. The court therefore has jurisdiction over this matter pursuant to 28 U.S.C. § 1332.[3]

B. Motion to Dismiss

Having determined that the court has subject matter jurisdiction over this removal action, the court turns to the defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) examines the legal sufficiency of the facts alleged on the face of the complaint.

Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). A claim is facially plausible when the factual content allows the court to reasonably infer that the defendant is liable for the misconduct alleged. Id. When considering a motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint. Erickson v. Pardus, 551 U.S. 89, 94 (2007). The court "may also consider documents attached to the complaint, see Fed. R. Civ. P. 10(c), as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (citing Blankenship v. Manchin, 471 F.3d 523, 526 n.1 (4th Cir. 2006)).Further, while the federal court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Erickson, 551 U.S. 89, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387(4th Cir. 1990).The defendants argue, among other things, that Meisner's claims are precluded by the previous litigation in Meisner II. The court agrees. The issues raised by Meisner in this matter were previously rejected by Judge Currie in an Opinion and Order denying Meisner's motion to vacate in Meisner II (ECF No. 79 at 2-3 n.2). Judge Currie specifically rejected Meisner's argument about the citizenship of the corporate defendants. The court incorporates that analysis by reference here. Thus, Meisner is precluded from relitigating the issue in this matter. See

Sedlack v. Braswell Servs. Grp., Inc., 134 F.3d 219, 224 (4th Cir. 1998). Consequently, Meisner fails to plausibly allege that the defendants injured her by lying or misrepresenting the citizenship of the corporate defendants, and this matter should be dismissed pursuant to Rule 12(b)(6).

RECOMMENDATION

Based on the foregoing, Meisner's motion to remand should be denied (ECF No. 15) and the defendants' motion to dismiss should be granted (ECF No. 5).[4]

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE
August 29, 2019
Columbia, South Carolina

The parties' attention is directed to the important notice on the next page.

FOOTNOTES ASSOCIATED WITH ORDER ADOPTING REPORT AND RECOMMENDATION

1.The history of the prior litigation is summarized in prior orders in those cases and will not be repeated here. *See, e.g.*, *Meisner I*, ECF Nos. 257 at 2-4, 288 at 2-3; *Meisner II*, ECF Nos. 19 at 2, 34 at 2, 53 at 4-5. Defendants also provide a useful summary of the prior cases and comparison to the allegations in this action in their memorandum in support of dismissal. *See* ECF

No. 5-1 at
2-6, 12, 13.

2. For reasons argued by Defendants, it is doubtful Plaintiff's objections are sufficiently specific
to warrant de novo review. The court has, nonetheless, conducted a de novo review of the Report.
may enter a pre-filing injunction should the sanction of attorneys' fees and expenses fail to deter Plaintiff from pursuing further duplicative, frivolous, or vexatious litigation relating to issues addressed in *Meisner I, II,* or *III. See* Discussion § IV.

3. These allegations and arguments are essentially the same as those Plaintiff relied on in her unsuccessful motion to vacate the judgment in *Meisner II. See Meisner II,* ECF Nos. 76, 78, 79,
83.

4. As noted in the Report, both *Meisner I* and *Meisner II* were affirmed on appeal. Plaintiff sought and was denied certiorari in both cases. ECF No. 26 at 2, 3.
5. Federal common law determines the preclusive effect of a prior judgment of a federal court sitting in diversity and federal common law applies the relevant state's law of res judicata unless such law "is incompatible with federal interests." *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001).
6 *Meisner II,* itself, was resolved largely based on the preclusive effect of *Meisner I. See Meisner II,* ECF Nos. 34 at 4-9, 53 at 5-9.

7 The issue on which briefing was requested related to the propriety of removal. For present purposes, the court assumes without deciding that this request supports an inference Plaintiff's pursuit of remand was non-frivolous, though ultimately unsuccessful. The requested briefing did not relate to the viability of Plaintiff's present claims, which are clearly precluded by res judicata (regardless of the court in which they are pursued).

FOOTNOTES ASSOCIATED WITH THE REPORT AND RECOMMENDATION

[1] It is undisputed that Meisner's Complaint does not raise a federal question. See 28 U.S.C. § 1331.

2. This jurisdictional concern prompted the court to direct briefing from the parties. (ECF Nos. 11, 20, & 21.)

[3] Further, because the other basis for remand argued by Meisner in her motion lacks legal merit for the reasons articulated by the Honorable Cameron McGowan Currie, Senior United States District Judge, in her order filed on June 4, 2019 (Meisner II, ECF Nos. 79, 83), Meisner's motion to remand should be denied.

MOTION TO REMAND

The removal action filed by the defendants is defective and does not comply with 28 U.S. C. 1441(b) (2) or 28 U.S.C. 1446 (a).

I. THE REMOVAL BY THE DEFENDANTS IS DEFECTIVE

Section 1446 (a) requires that a removing party file together with its notice of removal " a copy of all process pleadings, and orders served upon such defendants in [the state court] actions. *Andalusia Enterprises, Inc., v. Evanston Ins. Co., 487* F. Supp. 2d 1290, 1300 (N.D. 2007) (remanding action because, among other reasons, the removing party failed to include in the notice of removal copies of the summonses served on the defendant.)

II. VIOLATION OF RULE 11(b) IN THE REMOVAL PAPERS

Rule 11(b) specifically authorizes courts to impose sanctions for misrepresentations. It requires attorneys to submit a filing in good faith and without knowledge of the falsity of its contents. 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). Here, the evidence supports that Jackson Lewis, PC was properly served via the United States Postal Service registered to its agent for service of process on June 24,2019.

If a court "determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Here, the defendants did not file everything included in the state court filings including, but not limited to the proof of service of process on file, for each individual defendant with the state court, as required for removal. Also, the notice of removal states that "to date, no other defendant has been served with a summons and complaint."

This assertion is false, Jackson Lewis, PC was served the summons and complaint and signed for by its agent for service of process located at 317 Ruth Vista

Road Lexington, SC 29073 on May 24, 2019. This is the second time the defendants have misrepresented which defendants have been served service of process in a removal document associated with these parties. The summons and complaint are process pleadings that were served on the defendant's registered agent. A copy of the registered return receipt was filed with the State Court on May 24, 2019.1 Had the defendants attached all the state court filed papers this fact would have been evident. Not only was the evidence of the service of process that was filed with the state court not attached to the notice of removal, but defendants blatantly misrepresented that Jackson Lewis, PC had not been served. As the litigation manager for Jackson Lewis, PC Ellison McCoy was certainly notified by the registered agent as was Stephanie Lewis the managing principal of the Jackson Lewis, PC Greenville office.The plaintiff attributes one possible motive for the misrepresentation, in the removal documents, is to shield the contract between Jackson Lewis, PC and its client Bristol Myers Squibb Company. However, The new section 1446 has codified the judicially created "rule of unanimity" by providing "all defendants that have been properly joined and served must consent to the removal of the action." 28 U.S.C. § 1446 (2) (A) (2012); see also *City of Cleveland v. Ameriquest Mort. Sec. Inc.,* 615 F.3d 496, 501 (6th Cir. 2010) (describing the judicially created "rule of unanimity"). The defendants simultaneously argue all defendants have not been served and all

served defendants agree. The defendants are aware all defendants have been properly served and cannot hold as a place holder the other defendants' rights for removal by erroneously arguing they have not yet been served.

Finally, the Fourth Circuit has recently decided, in an en banc decision, that removal and remand filings can be reviewed even after remand of the case, if the filings contain fraudulent pleadings that have misrepresented facts related to invoking the federal courts jurisdiction.

III. LACK OF SUBJECT MATTER JURISDICTION

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.

Here, like the United States Supreme Court found in *Americold,* it is the shareholders/beneficiaries of Bristol Myers Squibb Company that composes "all its

members" for the purposes of a diversity of citizenship analysis. *Americold Realty Trust v. ConAgra Foods,Inc., 577 U.S.* (2016).

The United States Supreme Court, prior to the *Americold* decision had not previously defined "members" of an artificial entity. The Tenth Circuit that first heard the *Americold* Case determined:
the citizenship of any "non-corporate artificial entity" is determined by considering all of the entity's "members," which include, at minimum, its shareholders. *Id.,* at 1180-1181 (citing *Carden v. Arkoma Associates,* 494 U. S.185 (1990))'Bristol Myers Squibb Company acquired Zymogenetics, Inc. via acquisition by its subsidiary Zeus, Inc. in 2010.
As there was no record of the citizenship of Americold's
shareholders, the court concluded that the parties failed to demonstrate that the plaintiffs were "citizens of different States" than the defendants. See *Strawbridge v. Curtiss,* 3 Cranch 267 (1806)
The United States Supreme Court affirmed the Tenth Circuit and clarified the definition of members.

In *Americold,* the Supreme Court determined for artificial entities, like Zymogenetics, LLC, for a limited liability company, "members" include all the members that make up the company, including its shareholders. Zymogenetics, LLC has only one member which is Zymogenetics, Inc.

previously publicly traded as ZGEN (now Bristol Myers Squibb Company). Like the Supreme Court determined in *Americold* when artificial entities are sued, their members include all the "members" which include the shareholders of the member company e.g. the stockholders of Bristol Myers Squibb Company.

The Delaware Limited Liability Company Act provides for "members" participation in the form of natural persons such as the United States Supreme Court found was the "members" in partnerships, joint stock companies, trusts, etc. As previously argued, the United States Supreme Court determined that members that are joint stock companies, the members include the stockholders of the company.

IV. THERE IS NO FRAUDULENT JOINDER

Defendants have removed the case from state court, claiming fraudulent joinder. Therefore, it is the defendant's burden to prove the joinder was fraudulent. The plaintiff disputes this fact based on the allegations in the complaint and the filings by the defendants. The allegations in the State Court complaint include a claim of extrinsic fraud and abuse of process both of which were perpetrated by the defendant attorneys

which also includes an employee of Bristol Myers Squibb Company.

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 claim 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).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). For the reasons above and all references to the record, the plaintiff respectfully requests the Court to remand this action back to state court.

Respectfully Submitted,

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FOOTNOTES ASSOCIATED WITH MOTION TO REMAND

1 EXHIBIT A Registered Agent for Jackson Lewis, PC signed for the summons and complaint. Ellison McCoy, as the manager of the litigation division should have been notified of the receipt. Likewise, Stephanie Lewis and the managing member of Jackson Lewis, PC should also have been notified of the service of process. It is unclear why the defendants stated, "no other defendant has been served." A professional Corporation with a registered agent is properly served when they accept registered mail.

2. 'Bristol Myers Squibb Company acquired Zymogenetics, Inc. via acquisition by its subsidiary Zeus, Inc. in 2010.