No. _________

In the

Supreme Court of the United States

RHONDA MEISNER, Petitioner

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 AS A MEMBER OF JACKSON LEWIS, PC, GREENVILLE; JACKSON LEWIS, LLP, GREENVILLE; JACKSON LEWIS, PC; JOHN DOES AND JANE DOES 1-10 (WHOSE NAME IS UNKNOWN OR AS YET DISCOVERED)

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

PETITION FOR A WRIT OF CERTIORARI

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This Honorable Court recently settled the dispute for determining the citizenship of entities other than humans and corporations and determined in *Americold Realty Trust* "While humans and corporations can assert their own citizenship, other entities take the citizenship of their members." *Americold Realty Trust v. ConAgra Foods, Inc.*, No. 14-1382, 2016 U.S. LEXIS 1652 (U.S. Mar. 7, 2016).

In *Carden*, this Honorable Court interpreted Congress' use of the word "corporation" in 28 U.S. Code § 1332 (c)(1) as not applying to unincorporated partnerships, such as, limited liability partnerships (LLP's) for the purposes of determining the citizenship, of the entity. For unincorporated partnerships (LLP's), this Court determined the citizenship of the partnership is the citizenship of each of the partners. *Carden v Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990).

QUESTIONS PRESENTED

1. Whether the Fourth Circuit properly retained jurisdiction over a removed case when the petitioner filed a motion to remand within thirty days that alleged fatal defects in the appellee's notice of removal pursuant to 28 U.S.C. 1447(c).

2. To reconcile Erie, Byrd, and Semtek can a plaintiff rely on state res-judicata laws when the slander claims implicated in the res-judicata analysis were based on supplemental jurisdiction pursuant to 28 U.S.C. §1367?

3. Did the Fourth Circuit err when it dismissed the case pursuant to Rule 12 (b)(6).

4. Did the Fourth Circuit properly deny the motion for recusal?

Parties to the Proceedings:
List of Parties

1. The petitioner Rhonda Meisner is an individual.
2. Zymogenetics, LLC is a non-corporate artificial entity that is wholly owned by Zymogenetics, Inc and Bristol Myers Squibb, Inc.
3. Zymogenetics, Inc., is a corporation that is wholly owned by Bristol Myers Squibb, Inc.
4. Bristol Myers Squibb, Inc. is a corporation.
5. Jeff Fortino, is an individual.
6. Tracey Caldarazzo, is an individual.
7. Stephanie E. Lewis, is an individual implicated in her individual capacity and her capacity as member of Jackson Lewis, PC and Jackson Lewis, LLP.
8. Jackson Lewis, LLP is a non-corporate artificial partnership.
9. Jackson Lewis, PC, is a professional corporation.
10. John and Jane Does (1-10) represents individuals or companies whose name is unknown or yet discovered.

Corporate Disclosure
Pursuant to Rule 29.6 the petitioner is an individual.

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This Honorable Court recently settled the dispute for determining the citizenship of entities other than humans and corporations and determined "While humans and corporations can assert their own citizenship, other entities take the citizenship of their members." *Americold Realty Trust v. ConAgra Foods, Inc.*, No. 14-1382, 2016 U.S. LEXIS 1652 (U.S. Mar. 7, 2016).

The citizenship of the circuit court fails unless jurisdiction appears in the pleadings or elsewhere in the record. *Gracė v. American Central Insurance Company,* 109 U.S. 278, 109 U.S. 283 (1883).

In *Carden*, this Honorable Court interpreted Congress' use of the word "corporation" in 28 U.S. Code § 1332 (c)(1) as not applying to unincorporated partnerships, such as, limited liability partnerships (LLP's) for the purposes of determining the citizenship, of the entity. For unincorporated partnerships (LLP's), this Court determined the citizenship of the partnership is the citizenship of each of the partners. *Carden v Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990).

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1. Whether the Fourth Circuit properly retained jurisdiction over a removed case when the petitioner filed a motion to remand within thirty days that alleged fatal defects in the appellee's notice of removal pleadings pursuant to 28 U.S.C. 1447(c).

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analysis was based on supplemental jurisdiction pursuant to 28 U.S.C. §1367?

3. Did the Fourth Circuit err when it dismissed the case pursuant to 12(b)(6).

4. Did the Fourth Circuit properly deny the motion for recusal?

Your petitioner prays this Honorable Supreme Court will grant her petition for certiorari (1) to review the Fourth Circuit's departure from this Court's rulings that require "non-corporate artificial entities" to affirmatively plead the citizenship of its members to prove federal diversity jurisdiction. (2) to review the Fourth Circuit's stamp of approval that allowed a flawed notice of removal to retain jurisdiction. (3) to reconcile *Erie*, *Byrd*, and *Semtek* and determine whether a plaintiff can rely on state res-judicata analyses when the sentinel case begins in federal court and has both federal and state claims, but the sentinel claim was based on supplemental jurisdiction.(4) To resolve a circuit split on whether res-judicata is substantive or procedural and therefore should always use state res-judicata analysis when the sentinel claim is a state law claim regardless of whether the claim begins in federal or state court. (4) Finally, to review whether the district court judge should have recused herself when metadata attached to substantive documents from the United States Magistrate Judge indicated the documents originated at the offices of the appellee-defendants and Orders were entered prior to deadline for response by the appellee defendants.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit denied the petition for re-hearing and for rehearing *en banc* on October 24, 2017. This petition is filed within ninety days of the entry of the Order denying the petition for re-hearing. On September 20, 2017, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's Orders of Apr. 7, 2016; June 1, 2016; July 27, 2016; Sept. 15, 2016 & Nov. 28, 2016 to the respondents that accepted the recommendation of the magistrate judge and denied the motion to remand, denied the motion to recuse and for reconsideration, accepted the recommendation of the magistrate judge and granted Defendants' motion to dismiss, denied her motion to alter or amend the judgment, and taxed costs on all claims. The Order of the appellate opinion can be found at *Meisner v. Zymogenetics, Inc. et al,* 2016 No. 2443 The Order of the district court Meisner *v. Zymogenetics, Inc.,* 2015 3:15 cv 03523-CMC-PJG.

JURISDICTION OF THIS COURT

The United States Court of Appeals for the Fourth Circuit denied the petition for re-hearing and re-hearing en- banc on October 24, 2017. This petition for a writ of certiorari has been filed within 90 days of that Order. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254 (1).

JURISDICTION OF THE FOURTH CIRCUIT

The Fourth Circuit Court of Appeals had jurisdiction to review the appeal from the South Carolina district court pursuant to 28 U.S.C. § 1291. The petitioner denies both the Fourth Circuit and the District Court had jurisdiction pursuant to 28 U.S.C. 1332 Diversity of Citizenship.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The petitioner avers the removing defendants have not met their burden of proving federal jurisdiction in the removal notice or elsewhere in the record. Not since *Pierson v. Post* has "capture" been a more resounding theme in litigation. Removing defendants, without intervention from this Court, have effectively created a new Local South Carolina Rule for determining jurisdiction.

This Court, in its supervisory role, should issue a summary disposition and remand order to dissuade further use of any such created state Local Rule. The petitioner requests this Honorable United States Supreme Court to grant certiorari and instill faith in the court system, after all, there are significant federalism issues that affect all plaintiffs involuntarily removed to the federal forum, having filed their complaint in state court. Summary disposition will send a message to all removing defendants "plead properly or proceed promptly back to state court."

This Court, has determined "Whether, and which, artificial entities other than corporations are entitled to be considered "citizens" for diversity purposes are complex questions best left to Congress to decide." *Cannon Manufacturing Co. V. Cudahy Packing Co.*, 267 U.S. 333, 45 S. Ct 250, 69 L. Ed. 634(1925). Pp 494 U.S. 196-197.

If this Honorable Court made the decision to defer to Congress for the determination of the citizenship of "non- corporate artificial entities" certainly a common law Local Rule that conflicts with this Court's holding should not stand.

The petitioner also request this Court answer a novel question that may reconcile *Erie*, *Byrd* and *Semtek*, for removed cases. The petitioner avers that state res-judicata laws should be used when the sentinel case has both federal and state claims, but the implicated claim is a state law claim considered under 28 U.S.C. 1367, supplemental jurisdiction. Because jurisdictional inquiries affect untold numbers of state court plaintiffs across the country, the petitioner humbly requests the court to issue a writ of certiorari.

BACKGROUND

This is a South Carolina state court filed complaint that alleges strictly state claims for breach of contract, breach of contract accompanied by a fraudulent act, civil conspiracy and negligent retention, which was removed to federal court. The civil conspiracy claim alleges that the appellee-defendant attorney, Stephanie Lewis participated, as an officer of the court, in submitting known false and misleading declarations to the federal district court, in a previous case with some of the same parties. The submitted documents caused special harm to the petitioner as alleged in the complaint.

After the appellee-defendants were granted summary judgment in the first case, in part due to the submitted declarations, the petitioner found metadata attached to substantive documents that reflected both the Report and Recommendation by the United States Magistrate Judge and the Denial of the Motion to Amend the Complaint were authored to some unknown degree by the appellee-defendants, but definitely originated at the offices of the appellee-defendants, Stephanie Lewis, Jackson Lewis, LLP, and Jackson Lewis, PC.[1]

Electronic data, if not removed, attaches to every document filed and indicates the author and the computer of origin. In effect, the metadata is a silent witness as to who authors the document and how often the document is edited. This evidence is subsequently protected by the pacer system and cannot be manipulated after submission.

The previous case had both federal claims and state law claims considered under 28 U.S.C. § 1367, supplemental jurisdiction. The breach of contract claim, the breach of contract accompanied by a fraudulent act, tortious interference with a business contract and the negligent retention claim in the case before the Court is based on and related to the second slander by Appellee-defendant Tracey Caldarazzo, which was not considered by the district court in the first case. In the previous case, the appellee-defendant Tracey Caldarazzo was an individual defendant in a different incidence of slander of the petitioner.

The first slander claim by the individual defendant Tracey Caldarazzo, in the initial case was considered under supplemental jurisdiction because it was a state law claim against a diverse citizen of Maryland. Importantly, in the first case there were both federal claims and diversity of citizenship claims.

Summary judgment was granted to the appellee-defendants on all causes of action in the first cause of action by the district court. After the

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[1]. 3:12-cv-000684-CMC-PJG (ECF No.322-332)

conclusion of the first case and while still on appeal, the petitioner noted metadata attached to documents that indicated the Report and Recommendation and the Denial of the Motion to Amend the Complaint originated at the appellee-defendant's offices. This case was subsequently filed, and the appellee-defendants removed the case back to federal court and to the same team of judges.

The petitioner filed a motion to remand the complaint back to state court within thirty days of the removal and cited defects in the notice of removal, incomplete diversity, and that the cause was not removable. The Fourth Circuit affirmed the District Court's dismissal and this petition for certiorari follows.

ARGUMENT

The Appellees-Defendant's Notice of Removal is Defective.

The petitioner timely filed a motion to remand and noted *some* of the defects in the notice of removal. The notice did not include the required state court filings, alleged inaccurate service of process facts for Zymogenetics, LLC, Zymogenetics, Inc. and Jackson Lewis, LLP and did not evidence complete diversity.

The Notice of Removal does not make the requisite citizenship allegations for diversity jurisdiction.

"It is well established that, for purposes of federal jurisdiction diversity of citizenship, an LLC is not a corporation, and thus is not considered a citizen of its state of incorporation and principal place of business, but instead shares the citizenship of its members." *Americold Realty Trust v. ConAgra Foods,* *Inc.*, No. 14-1382, 2016 U.S. LEXIS 1652 (U.S. Mar. 7, 2016).

"Absent unusual circumstances, a party seeking to invoke diversity jurisdiction should be able to allege affirmatively the actual citizenship of the relevant parties." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001).

The ninth circuit observed, an allegation as to where an LLC resides, is licensed, or has a principal place of business will not properly invoke the court's jurisdiction. *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1085 (9th Cir. 2014) (defendant LLCs improperly stated for jurisdiction purposes, as if they were corporations, where they had their principal place of business and under whose laws they were organized).

Here, the appellee-defendants combine Zymogenetics, Inc. and Zymogentics, LLC into one entity and use the citizenship allegations of the "corporation" for the "non-corporate artificial entity". The Magistrate Judge then adopted the same pleading combination in her Report and Recommendation that denied the motion to remand.[2] This district court in its de-novo review declined to correct the flawed jurisdictional allegations and the Fourth Circuit affirmed. This Court has not previously allowed this shared jurisdictional pleading approach between separate legal entities that are separately named in the complaint.

The allegations in the state filed complaint are insufficient to establish diversity jurisdiction.

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[2] 3:15-cv-03523-PJG-CMC (ECF No. 19 p. 2 n.2)

Neither the state court filed complaint,[3] nor the appellee's notice of removal, affirmatively alleged the citizenship of Zymogenetics, LLC's members prior to judgment and therefore violates this Court's exception to the incomplete diversity at removal as held in *Caterpillar v Lewis* because the citizenship of the members of Zymogenetics, LLC was never alleged prior to judgment. *Caterpillar Incorporated v. Lewis*, 519 U.S. 61, 68 (1996).

Instead of alleging the citizenship of the members of Zymogenetics, LLC, appellees lumped Zymogenetics, Inc. and Zymogenetics, LLC together and adopted the citizenship allegations of its "corporation" parents.

The petitioner avers the notice of removal is defective because the notice of removal conflates the citizenship allegations of the "corporation" with the citizenship allegations of the "non-corporate artificial entity" which this Court determined in *Carden* to be improper. *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). *Americold Realty Trust v. ConAgra Foods, Inc.*, No. 14-1382, 2016 U.S. LEXIS 1652 (U.S. Mar. 7, 2016).

The citizenship allegations in the state court are found in paragraph four of the state filed complaint.[4] Paragraph four of the state filed complaint reads in part

"Defendants Zymogenetics, LLC is a wholly owned subsidiary of Zymogenetics, Inc., and both are wholly owned subsidiaries of Bristol Myers Squibb Company, Inc. and are Washington *Corporations*, with its principal place of business in Seattle, WA...

[3] 3:15-cv-03523-PJG-CMC (ECF No. 1-1).
[4]3:15-cv-03523-PJG-CMC (ECF No. 1 Notice of Removal, p. 5 n. 4)

Defendants Zymogenetics, Inc. may be served with process at CT Corporation 505 Union Ave SE suite 120 Olympia, WA 98501 and Zymogenetics, LLC may be served with process at CT Corporation 2 Office Park Court suite 103 Columbia, SC 29223. (emphasis on the word corporation added by petitioner.)

The Fourth Circuit, in contravention of this Court's determination in *Carden*, that the citizenship allegations of "corporations" *do not apply* to "non-corporate artificial entities" allowed the removing appellees to adopt and apply the citizenship allegations of the "corporation" to the "non-corporate artificial entity." (emphasis by petitioner)

The state court filed complaint does not allege the citizenship of the members of Zymogenetics, LLC and it is therefore, insufficient to establish federal diversity jurisdiction. A court must consider all well-pleaded allegations in the complaint as true. *Albright v. Oliver*, 510 U.S. 266, 268 (1994). Because the jurisdictional allegations do not plead the citizenship of the members of Zymogenetics, LLC, the appellees cannot rely on the jurisdictional allegations in the state court filed complaint.

While removing defendants, like all other federal litigants are not be required to search for *unnamed* potential diversity destroying parties, they are required to affirmatively allege the citizenship of *named* defendants. *Lincoln Property Company v. Roche*, 546 U.S. 81, 88 (2005). (*emphasis added by the petitioner.*)

Here, Zymogenetics, LLC is a separately named and properly served defendant that requires a "non-corporate artificial entity" jurisdictional allegation, which according to this Court's precedent, is the citizenship of all its members. The removing appellee-defendants ignored this Court's binding precedents and in the notice of removal pled, "defendants Zymogenetics, LLC and Zymogenetics, Inc. will be referred to *collectively* as "Zymogenetics" unless it is necessary to distinguish between the two entities."[5]

The petitioner argues the Fourth Circuit should have required, in a removal action, for the appellees-defendants to recite the members of Zymgenetics, LLC and its members. The appellees-defendant's negative assertion, at the appellate level, that Zymogenetics, LLC is not a citizen of South Carolina is not sufficient to invoke diversity jurisdiction because diversity has not been proved prior to judgment. *Caterpillar Incorporated v. Lewis*, 519 U.S. 61, 68 (1996), an affirmative pleading of the entity's citizenship is required.

For example, based on the appellees *negative* assertion that Zymogenetics, LLC is not a citizen of South Carolina, the members of Zymogenetics, LLC *could* include a "Corporation" member, such as Bristol Myers Squibb, Inc. or the Medicines Company which acquired assets and employees of Zymogenetics, LLC during two separate acquisitions.[6] This Court has held that a "corporation" member of a "non-corporate artificial entity" would include all of the shareholders of the corporation, which could include South Carolina shareholders, potentially including the petitioner herself, as a stockholder.

The appellees contention that "the members are not citizens of the state of South Carolina" would

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[5] 3:15-cv-03523-PJG-CMC (ECF No. 1 Notice of Removal, p.1.n. 1.)

[6] 3:12-cv-000684-CMC-PJG (ECF 117 p. 6:6-12).

be partially accurate because a corporation is a citizen of its state of incorporation and nerve center, both of which could be outside South Carolina. So, as the appellees claim, technically speaking the "corporation" is a citizen of the state of incorporation and its nerve center. *Hertz Corp. v. Friend*, 130 S. Ct. 1181(2010).

This determination is inconsistent with this Court's rulings in *Carden* and *Americold Logistics, LLC* and with *Caterpillar Incorporated v. Lewis* because there is no evidence diversity existed at the time the lawsuit was filed, removed or judgment was entered.

The members *could* include a diverse United States Citizen living abroad which would destroy diversity because the citizen would be "stateless" due to the fact he is not a domiciliary of any state. 28 U.S.C. §1332 (a)(1) (2-4); *Mas v Perry*, 22 Ill. 489 F.2d 1396 (5th Cir. 1974). If the limited liability company has no members at all at least one court found the LLC stateless and therefore it destroyed diversity. *Connect U v. Zuckerberg* 482 F. Supp. 2d 3 (D. Mass 2007)

Just like in *Americold Realty Trust*, there is *no* evidence in the record of the citizenship of the members of Zymogenetics, LLC. There is just an assertion, at the appellate level that Zymogenetics, LLC is "not a citizen of South Carolina". This Court has never allowed negative statements to establish jurisdiction for the reasons referenced above. A federal court should confirm it has jurisdiction at each phase of the litigation and to dismiss the claim if it lacks jurisdiction. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997).

The notice of removal made inaccurate statements regarding service of process and failed to attach the state court filed documents that included the affidavits of service of process pursuant to 28 U.S.C. § 1446 (a).

The removal notice, which was signed pursuant to Rule 11 contradicted the service of process affidavit papers filed in the state court. The removal notices alleged Zymogenetics, LLC, Zymogenetics, Inc. and Jackson Lewis, LLP had not yet been served with service of process and lumped Zymogenetics, Inc. and Zymogenetics, LLC together.[7]

The affidavits for service of process were filed in the state court and proved the defendants had been served with the lawsuit prior to the submission of the notice of removal, contrary to the representations of the appellee-defendants in the removal notice.

The appellees, in their response to the motion to remand, attached the state court filings and proved that all defendants been served and therefore, proved the notice of removal alleged inaccurate facts.[8] It is not only the fact the papers were not attached, more importantly, it is the misrepresentations of service of process facts and the inaccurate jurisdictional claims in the notice of removal, that makes the notice fatally flawed.

Instead, appellees asserted that Fourth Circuit precedent allowed them to use the allegations in the state court filed complaint to establish diversity.[9]

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[7] 3:15-cv-03523-CMC-PJG (ECF 1:p. 5 ¶ 5).

[8] 3:15-cv-03523-PJG-CMC (ECF No.13-1)

[9] 3:15-cv-03523-CMC-PJG (ECF 14 n. 7)

D. The circuit court determined the negligent retention claim is governed by South Carolina Workers Compensation laws.

The petitioner argues 28 U.S.C. § 1445 (c) deprives the federal court of subject matter jurisdiction over the remaining state claims when the removal is based on diversity jurisdiction pursuant to 28 U.S.C. § 1332.

A defendant may remove a state court action to federal court if the federal court has original jurisdiction and Congress has not specifically prohibited removal. 28 U.S.C. 1441 (a).
Pursuant to 28 U.S.C. 1445 (c) a civil action in any state court arising under the workman's compensation laws of that state may not be removed to any district court of the United States.

28 U.S.C. § 1441(c) allows for severance and partial remand for those cases that enter the federal court under federal question jurisdiction and is only for claims "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1441(c)(1)(A). There is no such "sever and remand" available for cases removed pursuant to diversity jurisdiction; therefore, the petitioner avers the entire case is not removable.

Whether a claim arises under a state's workers' compensation law is a question of federal law. *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 705 (1972).

In the Order of Dismissal, the South Carolina district court ruled, "Further it is well established that the Act is the exclusive remedy for an employee who brings a claim of negligence in hiring, retention, or supervision of a co-employee."

Sabb v. S.C. State Univ., 567 S.E. 2d 231, 234 (S.C. 2002.)

Once the district court ruled the claim was governed by South Carolina Worker's Compensation Act and the Fourth Circuit affirmed this determination, at a minimum the negligent retention claim should have been remanded. Therefore, the petitioner avers, at least this claim, and potentially the entire case, was not available for removal pursuant to this Court's ruling in *Caterpillar v. Williams* or 28 U.S.C. 1445 (c). As this Court ruled: "only state court actions that could have originally been filed in federal court are available to be removed. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L.Ed.2d 318 (1987) (affirming remand to state court).

South Carolina State Worker's Compensation cases are not available to be filed in federal court and therefore are not available for removal.

As this Court determined in *Arbaugh*, Federal courts have an independent obligation to ensure they do not exceed the scope of their jurisdiction. *Arbaugh*, 546 U.S. at 514. A party can object to subject matter jurisdiction, at any time. Subject matter refers to the particular type of case available to be heard by a court.

Here, Congress specifically excepted removal of cases that arise under the State Workmen's Compensation laws in 28 U.S.C. §1445 (c). As such, a party may move to dismiss the case even after judgment because the trial court lacked subject matter jurisdiction. *Arbaugh*, at 508. *Arbaugh v. Y.H Corp. d/b/a the Moonlight Café*, 546 U.S. 500 (2006).

Here, in a removal action, the Fourth Circuit should have remanded this case back to the state court from which it came or at a minimum remanded the negligent retention claim when the district court ruled the claim was governed by the South Carolina State Workmen's Compensation Act.

There is no fraudulent joinder when the claim against the non-diverse defendants is recognized by the state and there is independent evidence of participation in the tort and liability on the part of the appellee-defendant.

The test for fraudulent joinder, in a removal action, is whether there is *any possibility* the South Carolina appellee-defendants could be liable to the petitioner-plaintiff for their part in the conspiracy with their clients. First, and more common, the "no possibility" standard is defined as whether the plaintiff has "arguably a reasonable basis" on which to recover against the non-diverse defendant under state law. See *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) ("'If there is 'arguably a reasonable basis for predicting that the state law might impose liability on the facts involved,' then there is no fraudulent joinder.'") (quoting *Badon v. RJR Nabisco Inc.*, 236 F.3d 282, 286 (5th Cir. 2001) (quoting *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 816 (5th Cir. 1993))). Otherwise, the "no possibility" standard is defined as "absolutely no possibility" of recovery against the non-diverse defendants. See *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999) (holding that, to establish fraudulent joinder, the removing defendant must establish that "there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the non-diverse defendant in state court").

"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 v. Am. Towers, LLC*, 781 F.3d 693, 704 (4th Cir. 2015) (internal quotation marks omitted). "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 v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999).

The party seeking removal must determine either (1) there is no possibility that the plaintiff can establish a cause of action against the defendant or (2) outright fraud in the pleading of the jurisdictional facts. *Mayes v. Rapoport*, 198 F. 3d 457, 460 (4^{th} Cir. 1999).

South Carolina law specifically provides that an attorney is part of their client's civil conspiracy, when the attorney's actions are *an independent and vital link* in the conspiracy chain and where the attorney breaches an independent duty to a third party or commits a fraud on the Court. *Chewning v. Ford Motor Co.*, 345 S.C. 28, 550 S.E. 2d 584 (Ct. App. 1991); *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S. 2d 601, 602 (1995)(*emphasis by appellant*).

First, South Carolina law provides that an attorney can be part of their client's civil conspiracy *if the attorney acts on his own accord or acts outside of the scope of representation.* (*emphasis added by petitioner*).

However, the South Carolina Supreme Court has also ruled that "an attorney *may be held liable* for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client," *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S. 2d 601, 602 (1995)(*emphasis by appellant*).

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); *see also Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) ("Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another."); *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage."). The crux of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common plan. *Vaught*, 300 S.C. at 208, 387 S.E. 2d at 95.

An action for civil conspiracy is viable under South Carolina law even though no unlawful means were used. *LaMotte v. Punch Line*, 296 S.C. 66,70 370 S.E. 2d 711, 713 (1998); *Lee*, 289 S.C. at 11, 344 S.E. 2d at 382.

The appellee defendants did not allege outright fraud in the pleadings.

The appellees did not allege fraud in naming them as a defendant; therefore, to establish fraudulent joinder the appellees must prove that there is no possibility of recovery against the defendants.

Application of an affirmative defense should not be considered in a fraudulent joinder analysis when the state recognizes the cause of action against the non-diverse defendant.

Here, the district court ruled:

"Plaintiff's civil conspiracy claim cannot survive against attorney Lewis and her firm, as attorneys are immune from liability *if they are acting within the scope of representation* of a client... actions here of interviewing a witness and obtaining his statement in support of motions made on behalf of her client were undoubtedly within her scope of representation".[10]

The petitioner counters, it is the "if" that transforms the district court's ruling from a jurisdictional inquiry to a decision on the merits.

The contract of engagement between appellee-defendant Lewis and Bristol Myers Squibb, Inc. is not in the record.

The contract between appellee-defendant Lewis and Zymogenetics, Inc., Zymogenetics, LLC and Bristol Myers Squibb, Inc. is not in the record therefore, there can be no determination that appellee-defendant Lewis was working within her scope of employment.

The determination that appellee-defendant Lewis was working within the scope of her employment is a determination on the merits of the case. Pursuant to the second restatement of torts, for

[10] 3:15-cv-03523-CMC-PJG (ECF No. 22 p.5.)

an attorney to avoid liability for "working within the scope of engagement" the attorney, cannot participate in the tort. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

The South Carolina Supreme Court concluded attorneys could be liable for civil conspiracy with their clients in certain circumstances. *Stiles v. Onorato,* 318 S.C. 297, 300, 457 S. 2d 601, 602 (1995)

Appellee-defendant Stephanie Lewis represented to the Court in April of 2013 that she had asked whether Tracey Caldarazzo or Jeff Fortino spoke with anyone other than attorneys about the previous case and she stated they did not.

However, in the videotaped testimony of Amy Maxwell on July 25, 2013, Ms. Maxwell testified not only did Ms. Maxwell speak with Mr. Fortino about giving a deposition in the case in February, *she also spoke with appellee-defendant Stephanie Lewis.* This goes far beyond a discovery violation and into the realm of material misrepresentation to the Court, particularly when appellee-defendant Jackson Lewis, PC then updated the interrogatories to admit that Mr. Fortino spoke with Ms. Amy Maxwell. This correction occurred only after the information was disclosed during the videotaped deposition.

One of several misrepresentations in open court by appellee-defendant Stephanie Lewis to the Court is recounted below during the April 11, 2013 hearing before the Honorable Paige Gossett.

Ms. Lewis: So, I have spoken to Tracey and Jeff, and I'm not aware of any conversation that they had about the case, other than with attorneys.

Court: All right. So, I think I hear you saying that the answer is there aren't any.

Ms. Lewis: Other than--

Court:Other than what's privileged or--

Ms. Lewis: That's my understanding

Court:Okay. Well, Mr. Bowens, I can't make them produce something that they don't have.

Mr. Bowens: I understand that, Your Honor, that explanation was not what I got from their response.

Court:Okay.

Mr. Bowens: If their position is there are no other conversations that people had, then that's their answer, we'll have to go with that.

Court: All right. *Well, she stood here in open court and told the court that that's the answer on behalf of Zymogenetics, so I think we can move on.* And that one, I guess, is moot. (ECF No. 50 p.10-12) emphasis added by Plaintiff.

Here, appellee-defendant Stephanie Lewis represented to the Court that she specifically asked Mr. Fortino if he had spoken with anyone about the case and he said no. Ms. Amy Maxwell, a hostile witness, testified she spoke not only to Mr. Fortino, but also specifically to appellee-defendant Attorney Stephanie Lewis about giving a deposition in the case which was almost two months before the representations to the contrary in open court.

Appellee- defendant Stephanie Lewis told the Court that she was not representing Jeff Fortino; therefore, there was no attorney client relationship with Mr. Fortino at the time of she drafted, sent to Mr. Fortino for execution and then subsequently filed with the district court her misrepresentations to the Court. Appellee-defendant Stephanie Lewis also argued to the Court (and Amy Maxwell confirmed in her testimony) that Jeff Fortino did not work for

Bristol Myers Squibb, Inc, but instead worked for the Medicines Company in Feb or March of 2013.[11] Mr. Fortino, was therefore, a third party to Bristol Myers Squibb, Inc. and both Zymogenetics defendants and capable of participating in a conspiracy.

Additionally, after the close of the first case, metadata attached to substantive recommendation documents by the United States Magistrate Judge indicated the documents originated at appellee-defendant Stephanie Lewis' computers. Importantly, there has never been any discovery related to the civil conspiracy claim, but evidence of the conspiracy to submit false declarations, documents drafted by the appellee-defendants, and make false representations of facts in open court exists nevertheless.

The Court, in this case, went beyond the limited jurisdictional inquiry and adopted the appellee-defendant's position that they could not be held liable for their actions as an attorney in the course of the representation of their clients. While this is certainly an affirmative defense, a decision that the appellees acted within the scope of representation when the contract of engagement is not in evidence and there has been no discovery in the case indicates the Court exceeded its jurisdictional inquiry and decided on the merits of the case.

Second, the previous ruling by the District Court that Jeff Fortino did not commit perjury and that therefore, attorney Lewis did not suborn perjury is not dispositive of the civil conspiracy claims against them. Both the Magistrate Judge, the District Judge, and anyone else that reviewed the evidence, noted the

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[11] 3:12-cv-000684-CMC (ECF No. 50 p 10:23-25;11-12).

inconsistency and falsity of the representations to the Court.[12]

Even if her clients instructed appellee-defendant Stephanie Lewis to orchestrate and submit known false declarations into evidence, as an officer of the Court, she knew or should have known this was improper and should have declined their invitation or instruction. Instead, she made the volitional decision to participate in the drafting and submission of the declarations.

The complaint adequately alleges appellee-defendant Stephanie Lewis breached her duty as an officer of the Court which is an independent duty of her duties in the representation of her client and as such, she is independently liable for her critical role in the conspiracy to submit inaccurate and false declarations to the Court and make false representation, to injure the petitioner.

The appellant avers South Carolina law specifically provides that an attorney is part of their client's civil conspiracy, such as in this case, when the attorney's actions are *an independent and vital link* in the conspiracy chain and where the attorney breaches an independent duty to a third party or commits a fraud on the Court. *Chewning v. Ford Motor Co.*, 345 S.C. 28, 550 S.E. 2d 584 (Ct. App. 1991); *Stiles v. Onorato,* 318 S.C. 297, 300, 457 S. 2d 601, 602 (1995) (*emphasis by petitioner*).

Whether appellee-defendant attorney Lewis' actions were outside the scope of her representation, is a question of law and fact that should not be reviewed as part of the federal Court's diversity analysis. Importantly, the civil conspiracy claim did not accrue until there was actual damage as a result

[12] 3:12-cv-000684-CMC-PJG (ECF No. 11 pp. 9-11).

of the conspiracy which was after the case. This is also the same time the petitioner found metadata on substantive court documents that originated at the offices of the appellee-defendants.

"'[E] xtrinsic fraud' refers to frauds collateral or external to the matter tried such as . . . misleading acts which prevent the movant from presenting all of his case or deprives one of the opportunity to be heard.'" *Lightsey & Flanagan,* supra, at 486; see also *Hilton Head Ctr., Inc. v. Pub. Serv. Comm'n,* 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987) ('Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.')." *Chewning, supra.*

Complaint Alone rule for federal question cases should be used in a fraudulent joinder analysis.

This Court has long held for federal question cases, the complaint alone should be reviewed to determine whether the plaintiff has alleged a federal question in the controversy. "[T]he controversy must be disclosed upon the face of the complaint, unaided by the answer, or by the petition for removal." *Gully v. First Nat. Bank,* 299 U.S. 109, 112-13, 57 S. Ct. 96, 97-98, 81 Led. 70 (1936). *Pinney v. Nokia, Inc.*, 402 F. 3d 430, 445-46 (4th Cir.2005)(Remanding case to state court since "[t]he district court went beyond this restricted inquiry and in effect anticipated (1) that [defendant] would raise the affirmative defense that the state law claims are preempted...and (2) that the ....plaintiffs would be called upon to rebut that defense the cases could be decided, the court concluded, only by resolving whether the claims are preempted by [federal law or standards]."

The petitioner avers "the complaint alone" rule that this Court defined for federal question jurisdiction, should be used to determine fraudulent joinder in diversity jurisdiction cases.

Here, once the district court ruled,

"Although the case law is clear that an attorney may be held liable for civil conspiracy in some circumstances, there is simply no such evidence in this case." This is a determination on the merits of the case. Case law encourages federal judges to remand cases with questionable jurisdiction that require rulings on the merits. *A.M. Tobacco Co.,* 168 F.3d. at 411(11th Cir. 1999).

II. State res-judicata analysis should be used because the slander claims in the previous lawsuit were considered by the Court pursuant to 28 U.S.C. § 1367.

A. Federal and State res-judicata is an affirmative defense that should be apparent on the face of the complaint.

Federal res-judicata is an affirmative defense that must be apparent on the face of the complaint and the circuits are split on whether res judicata is substantive or procedural.[13]

[13] Compare *Gasbarra v. Park-Ohio Indus.*, 665 F. 2d 119 (7th Cir. 1981); *Gatzemeyer v. Vogel*, 589 F. 2d 360 (8th Cir. 1978); *Hartmann v. Time, Inc.* 166 F.2d 127 (3d Cir. 1948) (all holding the state law controls). In *Hunt v Liberty Lobby, Inc.*, 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum); *Kern v. Hettinger*, 303 F.2d 333 (2d Cir. 1962) (all holding federal law controls). See also *Degnan, Federalized Res Judicata*, 85 Yale L.J. 741, 769 (1976) (supporting the view that federal law should control); 1A J. Moore & B. Ward, Moore's Federal Practice \ 0.311 [2], at 3182 (2d ed. 1983) (stating that state rules of claim preclusion and federal rules of issue preclusion should control); analysis by 45 U. Chi. L. Rev. 323 1977-1978, David Currie, author.

The first issue the defendants raise in their motion to dismiss is that res judicata should apply to this case.

Res judicata is an affirmative defense that must be evident on the face of the complaint. *Rycoline Prod's. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir. 1997)). There are rare circumstances where the facts are sufficient to rule on an affirmative defense are alleged in the complaint and therefore can be decided in a motion to dismiss filed under Fed. R. Civ. P. Rule 12 (b) (6). This only occurs when all of the facts "clearly appear [ ] on the face of the complaint". *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993) (emphasis added); accord Desser v. Woods, 296 A.2d 586, 591 (Md. 1972).

Here, not only did the defendants dispute which slander case was the sentinel claim for the res-judicata defense, the second slander claim was not considered by the district court.

If the case referenced for res judicata begins in federal court, federal res judicata rules apply. If the case begins in the state court, Federal Courts must use 28 U.S. C. § 1738 (2012) and apply the law of the state in which the judgment was rendered to determine, if the state court claim is precluded *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005). This Court modified this rule in *Semtek* and decided that if the case began in federal court, but was based on diversity of citizenship, the state's laws for res-judicata would be used. *Semtek International Corporation v. Lockheed Martin*, 531 U.S. 437 (2001). This Court held in *Semtek*:

> Since in diversity cases state, rather than federal, substantive law is at issue, there is no need for a uniform federal

> rule; and nationwide uniformity is better served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court. Any other rule would produce the sort of forum shopping and inequitable administration of the laws that Erie seeks to avoid. While the federal reference to state law will not obtain in situations in which the state law is incompatible with federal interests, no such conflict exists here. Pp. 9–12.

Semtek International Corporation v. Lockheed Martin, 531 U.S. 437 (2001).

Usually, new facts give rise to a new cause of action. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955). This is the case here. As the Honorable Cameron Currie noted in her Order of September 22, 2014, the ability to amend the complaint was not extended past July 7, 2012, according to the scheduling orders.[14] As the defendants note, a Court can review its own record for the purposes of res judicata. The deposition of Dr. Claus Brandigi occurred in fall of 2013. The deposition of the corporate 30 (b)(6) deponent, Sandy Jones, occurred in Seattle, Washington in October of 2013, a few days before discovery ended on October 30, 2013. The claims or issues were therefore, not before the Court, or considered in the adjudication of the other claims because an amendment to add the second slander was not made.

"To establish a res judicata defense, a party must establish: (1) a final judgment on the merits in a prior

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[14] 3:12-cv-00684-CMC-PJG (ECF No. 288 p. 6)

suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997) (internal quotation marks omitted), cert. denied, 118 S. Ct. 1512 (1998).

In addition to the formal rules two other considerations have been considered by the Fourth Circuit. Whether the party knew or should have known of its claim at the time of the first action and whether the court that ruled in the first action was an effective forum to litigate the relevant claims. *Grausz v. Englander*, 321 F.3d 467, 473-4 (4th Cir. 2003).

All of the claims in this lawsuit were not part of the previous action and indeed were discovered shortly before the end of discovery (3 days). The civil conspiracy had not yet accrued.

Third party interference with an employment contract is actionable, when discovered, separate and apart from other claims and is a different cause of action and claim. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F. 3d 393, 530 (3d Cir. 1998); *Michalson v. Exxon Research and Eng'g Co.*, 808 F. 2d 1004 (3d Cir. 1987).

Also, the parties are not identical in the first case. While some of the parties are the same, this case includes as defendants Jeff Fortino, a declarant in the first case and Tracey Caldarazzo[15] as not only individual defendants, but as agents of Zymogenetics.

[15] Ms. Caldarazzo was a named defendant for the first incidence of slander which occurred after the plaintiff left the employment of Zymogenetics, LLC and Zymogenetics, Inc. When the case was filed the plaintiff had no way of knowing of Ms. Caldarazzo's interference with her contract until the deposition of Dr. Claus Brandigi and the October of 2013 deposition of the corporate 30(b)(6) deponent, Ms. Sandy Gray.

The privity between the company, the individual and the contract of employment with the plaintiff, must be analyzed for claim preclusion purpose as each of the defendants has independent interests that divide their privity. Neither Tracey Caldarazzo nor Jeff Fortino was named as individual defendants in the previous suit for interference with the plaintiff's contract.

The individuals, and the individuals as agents for the company have different claims and defenses some of which might be adverse to each other and adverse to the company, therefore, the privity of parties and claims must be resolved as part of the res judicata analysis. *Kentucky v. Graham*, 473 U.S. 159, 165-67, 105 S. Ct. 3099, 87 L. Ed 2d 114 (1985) (internal quotation marks omitted). Therefore, under the standards for federal res judicata, the claims are not barred.

Substantive Rights of the Plaintiff in Removed cases should be considered.

When a case is removed from state court, an analysis should be done to ensure that substantive rights of the plaintiff are not violated when the state's res judicata analysis varies and may have a different outcome, from the federal courts analysis. This creates an unequal protection of the plaintiff's rights under the law.

The circuits are split on whether res judicata is substantive or procedural.[16] The defendants argue

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[16] Compare *Gasbarra v. Park-Ohio Indus.*, 665 F. 2d 119 (7th Cir. 1981); *Gatzemeyer v. Vogel*, 589 F. 2d 360 (8th Cir. 1978); *Hartmann v. Time, Inc.* 166 F.2d 127 (3d Cir. 1948) (all holding the state law controls). In *Hunt v Liberty Lobby, Inc.*, 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum); *Kern v. Hettinger*, 303 F.2d 333 (2d Cir. 1962) (all holding federal law controls). See also

the federal standards for res judicata should apply based on Fourth Circuit precedent and because the referenced previous lawsuit was filed in federal court.[17] The plaintiff argues South Carolina rules for res judicata apply because the application may involve substantive rights which changes the analysis from procedural to substantive and the state has a substantial interest in allowing its citizen recovery from the bad acts of others, particularly when a fraudulent act is involved. *Byrd v Blue Ridge Rural Electric Coop., Inc.,* 356 U.S. 525, 78 S.Ct. 893, 2 L. Ed 2d 953 (1958).

When Federal and State Claims exist in the sentinel res-judicata case regardless of whether the sentinel case began in federal or state court, as this Court held in *Semtek*, if substantive, the res-judicata analysis should be done using State res- judicata laws to reconcile *Erie*, *Byrd*, and *Semtek*.

The circuits are split on whether res judicata is substantive or procedural.[18] The defendants argue

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Degnan, Federalized Res Judicata, 85 Yale L.J. 741, 769 (1976) (supporting the view that federal law should control); 1A J. Moore & B. Ward, Moore's Federal Practice \ 0.311 [2], at 3182 (2d ed. 1983) (stating that state rules of claim preclusion and federal rules of issue preclusion should control); analysis by 45 U. Chi. L. Rev. 323 1977-1978, David Currie, author.

[17] ECF No. 8-1 pp.12-13.

[18] Compare *Gasbarra v. Park-Ohio Indus.*, 665 F. 2d 119 (7th Cir. 1981); *Gatzemeyer v. Vogel*, 589 F. 2d 360 (8th Cir. 1978); *Hartmann v. Time, Inc.* 166 F.2d 127 (3d Cir. 1948) (all holding the state law controls). In *Hunt v Liberty Lobby, Inc.*, 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum); *Kern v. Hettinger*, 303 F.2d 333 (2d Cir. 1962) (all holding federal law controls). See also *Degnan, Federalized Res Judicata*, 85 Yale L.J. 741, 769 (1976) (supporting the view that federal law should control); 1A J. Moore & B. Ward, Moore's Federal Practice \ 0.311 [2], at 3182 (2d ed. 1983) (stating that state rules of claim preclusion and

the federal standards for res judicata should apply based on Fourth Circuit precedent and because the referenced previous lawsuit was filed in federal court.[19]

South Carolina Standards for Res Judicata

Because South Carolina, in *Pye*, adopted the second restatement of judgments section 28, and in *Beall* adopted section 29 and both contain several exceptions to the application of res judicata the res judicata analysis is substantive and therefore should use state res-judicata analysis.

Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455, 460, 461 (Ct. App. 1997); *Beall v. Doe*, 281 S.C. at 371, 315 S.E.2d at 190-91 The circumstances to which considerations should be given include those enumerated in § 28.

An analysis, by the Court, should be made as to whether applying federal res judicata law invades the substantive rights of the plaintiff because South Carolina law interpreting res judicata is substantially different than federal law. The standard for a motion to dismiss based on res judicata and offensive collateral estoppel, under Federal law and under South Carolina law, should be evaluated.[20] *Byrd v. Blue Ridge Rural Electric Coop., Inc.*, 356 U.S. 525, 78 S. Ct.893, 2 L. Ed 2d 953 (1958).

The Motion to Dismiss was converted into a motion for summary judgment without the benefit of discovery.

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federal rules of issue preclusion should control); analysis by 45 U. Chi. L. Rev. 323 1977-1978, David Currie, author.

[19] ECF No. 8-1 pp.12-13.

[20] ECF No. 8-1 p. 9; but see: *Spence v Spence*, 368 S.C. 106, 116 628 S.E. 2d 869 874 (2006).

Appellee- defendants attached 78 pages of deposition testimony, some of which was not considered in the first case, to the filed motion to dismiss, for the Court's consideration, effectively changing the motion to dismiss to a motion for summary judgment.

Under South Carolina law Rule 12 (b)(6); A defendant may move to dismiss a complaint based on a plaintiff's failure to plead. *Spence v Spence*, 368 S.C. 106, 116 628 S.E. 2d 869 874 (2006). The grant of a 12(b)(6) motion, in South Carolina, must be based entirely on the allegations in the complaint. *Id.* However, federal law allows review of documents without the conversion of a Rule 12 (b)(6) motion into a motion for summary judgment. See *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007)

In South Carolina, if any material outside the pleading is considered by the court, the motion to dismiss is converted into a motion for summary judgment. *McDonnell v. The Consolidated School Dist. Of Aiken*, 315 S.C. 487, 489, 445 S.E. 2d 639,639 n. 2 (1994). The defendants have suggested the Court evaluate and indeed use material outside of the pleadings or the first case filings to determine the sufficiency of the claims. Because state law converts a motion to dismiss to a motion for summary judgment and federal law does not, a federal court, in a removal action sitting in diversity should use South Carolina law as both a motion to dismiss and a motion for summary judgment involve substantive rights. Additionally, a motion for summary judgment cannot be granted under South Carolina law, prior to discovery. The Supreme Court of South Carolina has explained that the proof needed to defeat the summary judgment motion is a "mere scintilla" of evidence as explained in *Hancock*: only a scintilla of evidence is required to defeat summary judgment where the pre-ponderance of evidence standard is used. *Hancock v. Mid-South Management Co., Inc.*, 370 S.C. 131, 634 S.E.2d 12 (Ct. App. 2006).

Whether there are triable issues of fact, the evidence must be viewed in the light most favorable to the non-moving party. *Koester v Carolina Rental Ctr*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "[s]ummary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is dispute as to the conclusion to be drawn from those facts.'" *Gignilliat v. Gignilliat, Savitz & Bettis,* L.L.P., 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) (quoting Brockbank, 341 S.C. at 378, 534 S.E.2d at 692).

This means that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Id. Doe Ex Rel. Doe v. Batson*, 548 S.E. 2d 854 (S.C. 2001). Here, just as in *Doe*, there has been no discovery based on the defendant's motion for summary judgment, couched as a motion to dismiss.

The Fourth Circuit should have found the district court should have recused herself and the Magistrate Judge when metadata was found attached to substantive documents and the district court entered judgment prior to the time the appellee-defendants had to respond to filings.[21]

The petitioner is out of words (word count) but not out of hope that this Honorable Court will enforce the

[21] 3:12-cv-000684-CMC-PJG (ECF No. 22-32)

Supreme law of the land and remand this case back to state court with costs and attorneys fees taxed to the defendants.

Respectfully Submitted,
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January 17, 2017

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