

FILED: October 24, 2017
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2443

3:15-cv-03523(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 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)

Defendant-Appellees

ORDER

The Court denies the petition for rehearing and
rehearing en banc. No Judge requested a poll under
Fed. R. App. P. 35 on petition for rehearing en banc.

Entered at direction of the panel Judge Wilkinson,
Judge Niemeyer and Judge Agee

For the Court
/s/ Patricia S. Connor, Clerk

FILED: October 24, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2443

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 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),
Defendants - Appellees.

Appeal from the United States District Court for the
District of South Carolina, at Columbia. Cameron
McGowan Currie, Senior District Judge. (3:15-cv-
03523-CMC)

Submitted: September 7, 2017 Decided: September
20, 2017

Before WILKINSON, NIEMEYER, and AGEE,
Circuit Judges.

PER CURIUM

Rhonda Meisner appeals the district court's orders accepting the
recommendation of the magistrate judge and denying her motion
to remand, denying her motion to recuse and for reconsideration,
accepting the recommendation of the magistrate
judge and granting Defendants' motion to dismiss,

denying her motion to alter or amend the judgment, and taxing costs. We have reviewed the record and find no reversible error. Accordingly, we grant Meisner's motion to file a corrected informal opening brief and affirm for the reasons stated by the district court. *Meisner v. ZymoGenetics, Inc.*, No. 3:15-cv-03523-CMC (D.S.C. Apr. 7, 2016; June 1, 2016; July 27, 2016; Sept. 15, 2016 & Nov. 28, 2016). 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

Affirmed by unpublished per curiam opinion.
Rhonda Meisner, Appellant Pro Se. Ellison F. McCoy,
JACKSON LEWIS PC, Greenville, South Carolina,
for Appellees.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
RHONDA MEISNER
Plaintiff Action No. 3:15-cv-3523-CMC

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)
Defendant-Appellees

ORDER

This matter is before the court on motion of Plaintiff to reconsider the court's order denying Plaintiff's motion for recusal. ECF No. 40 (motion); ECF No. 32 (order).

While Plaintiff has moved to reconsider under Fed. R. Civ. P. 59(e), and both parties address that standard in their briefs, that rule is for alteration or amendment of a judgment or final ruling. Pretrial rulings remain subject to reconsideration by the trial court "and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). While this standard allows the trial court to conduct a *de novo* review of its pretrial rulings, countervailing considerations suggest the court should modify a prior ruling only when the court is convinced that a prior ruling was incorrect or that changes in the record or the stage of the proceeding justify modification. *See generally* Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, 18A Federal Practice and Procedure § 4478.1 (2d ed. as supplemented through 2010) (discussing competing interests). The grounds for review of non-final rulings are not, therefore, as constrained as those applicable to review of judgments. *See generally Saint Annes Devel. Co. v. Trabich*, 443 F. App'x. 829, 832 (4th Cir. 2011) (reversing district court for applying Fed. R. Civ. P. 59(e) standard to non-final ruling); *but see Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005) (suggesting a more constrained standard of review).¹ Although not limited by the Rule 59(e) standard, the court finds that standard instructive as a general guide for considering when modification of a non-final ruling may be appropriate. *See generally Hutchinson v. Staton*, 994 F.2d 1076,

1081 (4th Cir. 1993) (recognizing three limited grounds for relief under Rule 59(e) – (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available earlier; or (3) to correct a clear error of law or prevent manifest injustice – and noting that a party’s mere disagreement with the court’s ruling does not warrant a Rule 59(e) motion). Such motions “may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008) (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.01 (2d ed. 1995)); *Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). As argued, Plaintiff’s motion appears to rest on the first basis for alteration and amendment: an intervening change in controlling law, specifically, the Supreme Court’s ruling in *Williams v. Pennsylvania*. 136 S.Ct. 1899 (2016). Plaintiff argues that this Supreme Court case, regarding recusal of a judge who previously served as a prosecutor over the same defendant who was seeking to have his sentence overturned, mandates that this court recuse itself due to a “significant and personal role in a previous decision that is effected (sic) by the current case.” ECF No. 36 at 2.

However, the *Williams* case is easily distinguishable from the case at bar. First, this court has served in a judicial function at all times during the pendency of the *Meisner* actions (*Meisner I*, C/A No. 3:12-00684-CMC, and the current action). Contrary to Plaintiff’s assertions, the court did not serve as a prosecutor “for all intents and purposes” regarding the metadata issue, and this issue from *Meisner I* will not be relitigated. Plaintiff may not seek recusal simply because she received an unfavorable ruling in this

court in her previous case. *See Belue v. Leventhal*, 640 F.3d 567, 575 (4th Cir. 2011) (“Dissatisfaction with a judge’s views on the merits of a case may present ample grounds for appeal but rarely – if ever – presents a basis for recusal.”); *Liteky v. U.S.*, 510 U.S. 540, 541 (1994) (“[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality recusal motion.”). *Williams* does nothing to alter this proposition.

Instead, *Williams* dealt with a prosecutor who was an advocate for the state in a defendant’s criminal case, then served as a judge on the same defendant’s case upon review. *Williams*, 136 S.Ct. at 1901-02 (“[A] serious question arises as to whether a judge who has served as an *advocate* for the State in the very case the court is now asked to adjudicate would be influenced by an improper, if inadvertent, motive to validate and preserve the result. . .”) (emphasis added). This court did not serve as an advocate for either party in the previous case and did not have a significant personal involvement in *Meisner I*. An affirmation of a previous ruling does not create an impermissible conflict when the court serves the same function in both proceedings and does not play a role in the adversary process. Finally, *Williams* had to do with a criminal case and a constitutional violation of a defendant’s Due Process rights. This is a different standard and method for determining recusal which is not applicable in this civil case.

There has been no intervening change of law affecting Plaintiff’s motion for recusal; therefore, her motion for reconsideration is denied. Plaintiff’s rehashing of previous arguments does not provide an avenue for reconsideration.

IT IS SO ORDERED.

S/Cameron McGowan Currie

Senior District judge

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

RHONDA MEISNER

Plaintiff

Action No. 3:15-cv-3523-CMC

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)

Defendant-Appellees

Opinion and Order on Defendants' Motion to Dismiss
and Motion to Amend Complaint

Through this action, Plaintiff Rhonda Meisner ("Plaintiff") seeks recovery from her former employers, Zymogenetics, Inc. and Zymogenetics, LLC¹; their parent company Bristol Myers Squibb, Inc. ("BMS"); two former employees of Zymogenetics, Tracey Caldarazzo and Jeff Fortino; and John and Jane Does 1-10 (collectively "Defendants"). ECF No. 1, Attachment 1. She alleges breach of contract against Zymogenetics, tortious interference with contract against Tracey Caldarazzo, negligent retention of Caldarazzo (presumably by Zymogenetics), and civil conspiracy against Jeff

Fortino and Bristol Myers Squibb². The matter is before the court on Defendants' Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 8. In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(e), (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 June 2, 2016, the Magistrate Judge issued a Report recommending that Defendants' motion to dismiss be granted. ECF No. 34. Specifically, the Magistrate Judge recommended granting dismissal based on the doctrine of *res judicata* and, in the alternative, based on the statute of limitations.³ 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 June 20, 2016. ECF No. 37. Defendants filed a reply on July 6, 2016. ECF No. 39. Plaintiff was granted permission to file a sur reply, and did so on July 28, 2016⁴. ECF No. 48.

While the Motion to Dismiss was pending, but after the Magistrate Judge issued her Report, Plaintiff filed a Motion to Amend her Complaint. ECF No. 50. Defendants filed a response in opposition on August 29, 2016. ECF No. 51. Plaintiff filed her reply on September 9, 2016. ECF No. 52. As the motion to amend is necessarily intertwined with the motion to dismiss, both will be addressed in this Order.⁵

I. Motion to Dismiss

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).

Discussion Plaintiff presents several objections to the Report, essentially arguing that the Magistrate Judge’s findings regarding her claims were erroneous and that all claims should survive Defendants’ motion to dismiss. The objections are discussed below in turn.

i. Background

Plaintiff first argues that several facts are inconsistent with the previous litigation. She alleges that Defendants are conflating her current slander claim with the one from the first suit, which in fact are two different instances of slander with different legal claims based on the second slander. Plaintiff argues the claims relating to the second slander could not have been brought in the first suit because she was not aware of it until a deposition in Plaintiff’s prior lawsuit in this court, C/A No. 3:12-00684-CMC (“*Meisner I*”). Therefore, Plaintiff argues, *res judicata* does not apply because she did not learn the facts that form the basis of the new claims until after the time

for amendment of her complaint in *Meisner I* had expired.⁶

It is well established that *res judicata* applies not only to causes of action of which Plaintiff was aware, but also to all which arose out of the same transaction as the first suit. *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986) (“For purposes of *res judicata*, it is not necessary to ask if the plaintiff knew of his present claim at the time of the former judgment, for it is the existence of the present claim, not party awareness of it, that controls.”). It is therefore unpersuasive that, at the time *Meisner I* was filed, Plaintiff was unaware of the second alleged slander she assigns to Ms. Caldarazzo. The facts and any associated claims existed at the time of the first suit and Plaintiff learned of the second alleged slander during the pendency of *Meisner I*. Further, Plaintiff raised the facts and issues underlying the instant claims in her opposition to Defendants’ motion for summary judgment in *Meisner I*. Just because the court did not consider these legal claims in the first suit does not mean that Plaintiff may bring them now. Plaintiff’s objections regarding when she became aware of certain claims and her “opportunity to litigate” them are unavailing.

Federal Pleading Standard

Plaintiff’s next objection centers on the federal pleading standard as set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), as she seeks to amend the complaint to meet these standards. However, the Magistrate Judge did not decide the motion to dismiss on the basis that the Complaint did not meet the federal pleading standards; in fact, the Magistrate Judge specifically noted that *pro se* complaints were

to be liberally construed. The Magistrate Judge determined that Plaintiff's claims were barred due to *res judicata*, not because of a failure to meet federal pleading standards.⁷

Res Judicata Plaintiff argues that *res judicata* does not apply to her claims, initially arguing that her first case was dismissed on procedural grounds, so that *res judicata* would not apply, and that South Carolina law, instead of federal law, should apply because her case was initially filed in state court. This court disagrees with both assertions for the reasons stated below and in the Magistrate Judge's Report.

As an initial matter, this court has determined, consistent with the Magistrate Judge's Report, that federal *res judicata* law applies to the *Meisner* suits. While state *res judicata* law may apply when the first action is adjudicated in federal court based on diversity jurisdiction (*see Q Int'l Courier Inc. v. Smoak*, 441 F.3d 214, 218 (4th Cir. 2006)), the first suit here was filed in federal court based on federal question jurisdiction (for Plaintiff's federal discrimination claims). *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) ("For judgments in federal-question cases. . . federal courts participate in developing 'uniform federal rule[s]' of *res judicata*. . .").

In federal courts, for *res judicata* to apply there must be: "1) a final judgment on the merits in a prior suit; 2) an identity of the cause of action in both the earlier and later suit; and 3) an identity of parties or their privies in the two suits." *Pueschel v. United States*, 369 F.3d 345, 354 55 (4th Cir. 2004).

Plaintiff argues that the first prong does not apply because "when the first case is dismissed, based on procedural grounds, then the party is barred from asserting collateral estoppel or *res judicata*." ECF No.

37 at 6, citing *Sealy v. Dodge*, 347 S.E.2d 504 (S.C. 1986). However, not only does that case espouse South Carolina instead of federal law, it is inapplicable because *Mesiner I*'s summary judgment order was a final disposition on the merits. See *Shoup v. Bell & owell Co.*, 872 F.2d 1178 (4th Cir. 1989) ("For purposes of *res judicata*, a summary judgment has always been considered a final disposition on the merits.").

There do not appear to be specific objections regarding the second prong, that of identity of the causes of action, other than those discussed above in the Background section. The court notes that this prong does not require that the claims in the current suit actually be the same as the first suit, only that the claims arise out of the same facts. See *Harnett*, 800 F.2d 1308, 1314 ("The appropriate inquiry is whether the new claim arises out of the same transaction or series of transactions as the claim resolved by the prior judgment. . . . Res judicata precludes the litigation by the plaintiff in a subsequent action of claims 'with respect to all or any part of the transaction, or series of connected transactions, out of which the first arose.'"); *Pueschel*, 369 F.3d at 355-56 ("[T]he doctrine of *res judicata* not only bars claims that were actually litigated in a prior proceeding, but also claims that could have been litigated."). As discussed above, Plaintiff's argued lack of knowledge about the current claims prior to the amendment deadline in *Meisner I* does not bar the imposition of *res judicata*. *Pueschel*, 369 F.3d at 355-56 (citing *Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991)).

Plaintiff also objects regarding the third prong to the determination of party privity. ECF No. 37 at 9. In support of her argument, Plaintiff cites South

Carolina law for contract privity, arguing that a party who is not a party to the contract lacks privity to enforce or breach the contract. However, this argument is misplaced. Privity in the *res judicata* context depends on the relationship between the parties in the first and second lawsuits, and is different from privity of contract. For *res judicata*, privity “is merely a word used to say that the relationship between one a party on the record and another is close enough to include that other within the *res judicata*.” *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 494 (4th Cir. 1981). For a non-party from the first litigation to be in privity with parties from the former litigation, the new party must be “so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved.” *Id.* at 493; *Martin v. American Bancorporation Retirement Plan*, 407 F.3d 643, 651 (4th Cir. 2005).

Next, Plaintiff argues that the Magistrate Judge “did not do an analysis of each claim and instead issued a blanket acceptance of privity which the plaintiff objects to.” ECF No 37 at 11-12. However, as discussed below, this court finds the Magistrate Judge’s explanation of party privity to be sufficient.

As the Magistrate Judge explained in the Report, privity is not necessary for Zymogenetics or Tracey Caldarazzo, as they are both defendants in *Meisner I* and in the current suit. Therefore, the identity of the parties, as required for *res judicata* to apply, is satisfied for those Defendants. The two remaining “new” Defendants (not named in *Meisner I*), BMS and Jeff Fortino, are both in privity with Zymogenetics. Both Zymogenetics entities are wholly-owned subsidiaries of BMS. *See* Compl. at ¶ 6. A relationship between a parent company and a wholly-owned

subsidiary is sufficiently close to justify the application of *res judicata*. *Saudi v. Ship Switzerland, S.A.*, 93 F. App'x 516, 520 (4th Cir. 2004); *Whitehead v. Viacom*, 233 F.Supp.2d 715, 721 (D.Md. 2002), *aff'd sub nom. Whitehead v. Viacom, Inc.*, 63 F.App'x 175 (4th Cir. 2003). Further, BMS's interests are aligned with Zymogenetics, as evidenced by BMS's hiring of Jackson Lewis to represent Zymogenetics in *Meisner I*, a suit in which BMS was not a defendant. *See* Compl. ¶ 105 ("Bristol Myers Squibb Company, Inc. hired Jackson Lewis. . . to represent them in litigation resulting from the termination of Rhonda Meisner.") Similarly, employees and former employees of an entity are in privity with that entity for *res judicata* purposes. *See Kayzakian v. Buck*, 865 F.2d 1258 (Table), 1988 WL 138438, at *2 (4th Cir. 1988) (holding that privity exists where new defendants were "employees, co-workers, or administrators" of the same entity as the defendants in the prior action); *Malcolm v. Bd. of Educ. of the Honeyoye Falls-Lima Central Sch. Dist.*, 506 F. App'x 65, 68 (2d Cir. 2012) (finding privity for "current or former agents or employees" of the entity in the first suit). Defendant Fortino was an employee of Zymogenetics during the time Plaintiff was employed there and when the actions giving rise to this suit took place.⁸ *See* Compl. at ¶ 101 ("Jeff Fortino was the former manager of Rhonda Meisner during her tenure at Zymogenetics.") Defendant Fortino's interests in this suit are necessarily aligned with Zymogenetics' interests as a defendant in the previous suit, as well. Finally, Plaintiff herself agrees that Fortino is in privity with Zymogenetics. *See* ECF No. 37, at 12 ("[I]t is an obvious fact that Mr. Fortino and Zymogenetics, Inc. are in privity with each other in the civil conspiracy claim. . . ."). Therefore, all

parties to the current suit are the same as or in privity with the defendants in *Meisner I*.

All three prongs required for *res judicata* to apply are met in this case. Accordingly, *res judicata* works to bar the current lawsuit. iv. Statute of Limitations/Alternative grounds for dismissal

The Magistrate Judge found that, in the alternative, the claims should be dismissed as outside the statute of limitations. In response, Plaintiff argues that her breach of contract and tortious interference with contract claims are not outside the statute of limitations because she did not discover the breach until depositions were taken in *Meisner I* in 2013. However, Plaintiff was clearly aware of the alleged “slandorous report,” upon which she bases her breach and tortious interference claims at the time of the first suit, because she alleges that the report “was used against Ms. Meisner in her employment relationship with Zymogenetics and was part of the reason to terminate Ms. Meisner’s employment.” Compl. at ¶ 68.

As Plaintiff’s employment with Zymogenetics was terminated in August of 2010 (Compl. at ¶ 10), any claims regarding her employment or termination occurred on or before that date. Therefore, any breach of contract, tortious interference with that contract, or negligent retention necessarily would have had to occur no later than August 2010. Plaintiff did not file suit until July of 2015, well past the three year statute of limitations for breach of contract and tort claims, including tortious interference with contract. *See* S.C. Code Ann. §§ 15-3-530(1), (5).

Plaintiff also argues that her negligent retention claim is not pre-empted by the Workers’ Compensation Act because it is an intentional tort and therefore an

exception to the Act. However, the *negligent* retention of an employee is clearly not an *intentional* tort excepted from the Act. In her sur reply, Plaintiff argues that “the company is vicariously liable for [Caldarazzo’s] actions.” ECF No. 48, at 10. However, Plaintiff alleges negligent retention, not vicarious liability, on behalf of Zymogenetics regarding Candarazzo. Further, it is well established that the Act provides the exclusive remedy for an employee who brings a claim of negligence in hiring, retention, or supervision of a co-employee. *See Sabb v. S.C. State Univ.*, 567 S.E.2d 231, 234 (S.C. 2002); *Addison v. CMH Homes, Inc.*, 47 F.Supp.3d 404, 429 (D.S.C. 2014). As the statute of limitations for the Worker’s Compensation Act is two years (S.C. Code. Ann. § 42-15-40), this claim was filed outside the statute of limitations.⁹

Therefore, Plaintiff’s claims are also subject to dismissal on statute of limitations grounds. II. Motion to Amend

Plaintiff requests permission to amend her Complaint to meet the heightened pleading standards for federal court. ECF No. 50. Federal Rule of Civil Procedure 15(a)(2) states that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice requires.” However, it is well established that leave to amend may be denied “when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile.” *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006); *see also Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597, 603 (4th Cir. 2010) (“[A] district court has discretion to deny a motion to amend a complaint, so long as it does not outright refuse to grant the leave

without any justifying reason.” (citation omitted)). Plaintiff’s proposed Amended Complaint contains further factual allegations against Defendants and one additional legal claim, breach of contract accompanied by a fraudulent act. ECF No. 50-1. Plaintiff argues that this amendment is necessary because of the removal from state to federal court, where her complaint must pass heightened pleading standards to survive a motion to dismiss. However, as noted above, the Magistrate Judge’s Report, and this court’s determination, of the Motion to Dismiss were not based on any problems with the form or sufficiency of the pleading itself. In fact, the Magistrate Judge specifically explained that Plaintiff’s *pro se* Complaint was liberally construed, and decided the motion on a matter of law, not facts (or lack thereof).

Plaintiff’s proposed amendments to her Complaint are futile. As explained above, claims regarding Plaintiff’s employment and actions that occurred during the employment relationship are barred by *res judicata* and/or by the statute of limitations. Plaintiff’s addition of facts and another cause of action serve to strengthen, not weaken, those conclusions, as they further demonstrate that the claims in this complaint arise out of the same facts as the previous suit and therefore that *res judicata* applies. See *Jones v. HSBC Bank USA, N.A.*, 444 F. App’x 640 (4th Cir. 2011) (upholding district court’s denial of leave to amend when *res judicata* applied and therefore amendment would be futile); *Paul v. S. C. Dep’t of Transp.*, No. CA 3:12-1036-CMCPJG, 2013 WL 1182591, at *2 (D.S.C. Mar. 21, 2013) (denying leave to amend as futile because the plaintiff’s claims were barred by *res judicata* and/or the statute of limitations); *Barnett v. Bank of Am., N.A.*, No. CIV.A. RDB-12-0422, 2012 WL

3775763, at *4 (D. Md. Aug. 29, 2012) (“Because this Court concluded that Plaintiff’s claims are barred under the doctrine of *res judicata*, amendment of those same claims does not alter the 2008 Action’s preclusive effect, and the motion for leave to amend will be denied.”). Despite Plaintiff’s argument, Defendants did not acquiesce in the filing of the current suit, as Plaintiff suggests, merely by removing the case. The case Plaintiff cites in support of this proposition, *Beazer East, Inc. v. United States Navy*, No. 96-1736, 1997 WL 173225 (4th Cir. Apr. 11, 1997), is inapposite, as it discusses two claims filed in the same time frame (the second having been filed while the first was pending). Such is not the case here.

In addition, Plaintiff’s motion to amend is also denied due to undue delay that is prejudicial to Defendants. Plaintiff did not file her motion to amend until August 11, 2016 – over two months after the Magistrate Judge issued her Report recommending that Defendants’ long-pending Motion to Dismiss be granted, and over four months after this court denied Plaintiff’s motion to remand, thereby officially exercising jurisdiction over Plaintiff’s claims. Plaintiff contends the court “only recently ruled that it had subject matter jurisdiction and most critically that the state court filed complaint would be evaluated under the federal pleading standards as outlined in *Iqbal* and *Twombly*.” ECF No. 52, at 6. However, the ruling on jurisdiction was over four months prior to Plaintiff’s filing of her motion to amend, and as noted previously, the federal pleading standards are not the reason for the dismissal here. Plaintiff noted that she would file a motion to amend with her objection to the Magistrate Judge’s Report (filed on June 20, 2016); however, she did not

do so until nearly eight weeks later. She offers no explanation for her delay in filing.

While delay alone may not be a sufficient reason to deny leave to amend, in this case, the delay is accompanied by prejudice to Defendants. *See Nat'l Bank of Wash. v. Pearson*, 863 F.2d322, 328 (4th Cir. 1988) ("When accompanied by bad faith on the part of the movant, futility of the proposed amendment, or prejudice to the non-movant, however, undue delay is an appropriate ground for a district court's denial of leave to amend."). Defendants have fully briefed their motion to dismiss, as well as several other motions brought by Plaintiff, prior to this motion to amend, which is based on facts known to Plaintiff at the time of the removal.

To allow the Plaintiff to amend its Complaint at this stage of the proceedings, after the Magistrate Judge has issued a formal recommendation regarding the disposition of a dispositive motion, would not only prejudice the Defendants, who have expended the time and expense of fully briefing a motion to dismiss; it would encourage dilatory practices on the part of plaintiffs in delaying motions for leave to amend until after they have the benefit of a Magistrate Judge's opinion.

Allison Outdoor Advert., LP v. Town of Canton, N.C., No. 1:11CV58, 2012 WL 4061510, at *11 (W.D.N.C. Sept. 14, 2012); *see also Googerdy v. N.C. Agr. and Tech. State Univ.*, 286 F. Supp. 2d 618, 623 (M.D.N.C. 2005).

Therefore, due to futility as well as delay accompanied by prejudice to Defendants, Plaintiff's motion to amend is denied.

III. Conclusion

Based on a *de novo* review of the record, the complaint, the motions and responses, the applicable law, the Report and Recommendation of the Magistrate Judge, and the objections, the court finds that the Report and Recommendation of the Magistrate Judge has correctly concluded

that Plaintiff's claims are barred by *res judicata* or, in the alternative, by the statute of limitations.¹⁰ The Report and Recommendation, therefore, is adopted and incorporated by reference. Defendants' motion to dismiss is granted.¹¹ Plaintiff's motion to amend is denied. Plaintiff's claims are dismissed with prejudice as to Defendants Zymogenetics, Inc., Zymogenetics, LLC, Bristol Myers Squibb, Tracey Caldarazzo, and Jeff Fortino, and without prejudice as to John and Jane Does.

IT IS SO ORDERED.

s/Cameron McGowan Currie

CAMERON MCGOWAN CURRIE Senior United States
District Judge
Columbia, South Carolina
September 15, 2016

Footnotes associated with Order:

¹The court will refer to Zymogenetics, Inc. and Zymogenetics, LLC as "Zymogenetics."

² Formerly included in the civil conspiracy claim were Defendants Jackson Lewis, LLP; Jackson Lewis, PC; and Stephanie Lewis, who were previously dismissed as fraudulently joined. ECF No. 22.

³ Defendants John Does and Jane Does 1-10 are dismissed without prejudice for failure to state a claim. While they are named as agents of Jackson Lewis in the civil conspiracy claim, Jackson Lewis has been dismissed from this case.

Unnamed Defendants are also mentioned in the breach of contract and tortious interference with contract claims as unknown employees at Zymogenetics; however, the Complaint does not identify any actions undertaken by John or Jane Does.

⁴ Plaintiff's deadline for filing her sur reply was July 26, 2016 (fourteen days after entry of the order allowing the sur reply, which was on July 12, 2016). ECF No. 42. However, in an abundance of caution, this court has considered the sur reply when reviewing this Report.

⁵ As the Report had been issued on the Motion to Dismiss, the reference to the Magistrate Judge had been withdrawn by the time the Motion to Amend Complaint was filed. ⁵ As the Report had been issued on the Motion to Dismiss, the reference to the Magistrate Judge had been withdrawn by the time the Motion to Amend Complaint was filed.

⁶ Plaintiff filed a motion to amend her complaint in *Meisner I* to include a second cause of action for slander against Caldarazzo, which is the subject of the breach of contract claim in the instant suit. However, this motion to amend was denied as futile based on the statute of limitations for such a claim. Plaintiff failed to file a motion for leave to amend to add the claims in the instant suit in *Meisner I* when she did learn the facts that form the bases of the new claims. She did, however, raise the issues in her opposition to Defendants' Motion for Summary Judgment.

⁷ See further discussion of the Complaint and Motion to Amend on page 11, *infra*. Assuming *arguendo* that Plaintiff's negligent retention claim was not preempted by the Worker's Compensation act, it would still be filed outside the three year statute of limitations for torts. S.C. Code Ann. §§ 15-3-530 (5).

Rhonda Meisner, C/A. No. 3:15-3523-CMC-PJG
Opinion and Order on
Plaintiff's Motion to Remand

Plaintiff v.

Zymogenetics, Inc., a wholly-owned subsidiary of Bristol Myers Squibb, Inc.; Zymogenetics, LLC, a wholly-owned subsidiary of Zymogenetics, Inc.; Bristol Myers Squibb, Inc.; Tracey 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),
Defendants.

This matter is before the court on Plaintiff's motion to remand to state court. ECF No. 11. Plaintiff filed a pro se complaint in the Court of Common Pleas for Richland County containing state law claims. Defendants removed the case to this court pursuant to 28 U.S.C. § 1446, asserting diversity jurisdiction. ECF No. 1. Although Defendants Jackson Lewis, LLP; Jackson Lewis, PC; and Stephanie Lewis are citizens of South Carolina, so that complete diversity does not exist, Defendants contend that these defendants were fraudulently joined. *Id.*

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(e), DSC, this matter was referred to United States Magistrate Judge Paige J. Gossett for pre-trial proceedings and a Report and Recommendation ("Report"). On March 9, 2016, the Magistrate Judge issued a Report recommending that the motion for remand be denied and that the non-diverse Defendants be dismissed from the action. ECF No. 19. 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 to the Report

on March 28, 2016. ECF No. 21. Defendants did not file objections.

I. 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. See *Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a de novo determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. See 28 U.S.C. § 636(b).

After conducting a de novo review as to the objections made, and considering the record, the applicable law, and the Report and Recommendation of the Magistrate Judge, the court agrees with the Report's recommendation that Plaintiff's motion to remand should be denied and the non-diverse Defendants dismissed from this action. Accordingly, the court adopts the Report for the reasons stated in the Report and as further addressed below.¹ Plaintiff's motion to remand is Denied, and Defendants Stephanie Lewis, Jackson Lewis PC, and Jackson Lewis LLP are hereby dismissed from this action without prejudice.²

II. Discussion

Plaintiff presents ten objections to the Report. The court reviews Plaintiff's objections below.

A. Fraudulent Joinder

Plaintiff's primary objection is that the doctrine of fraudulent joinder is not applicable in this case. To show fraudulent joinder of a party, a 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.” *Hartley v. CSX Transportation, Inc.*, 187 F.3d 422, 424 (4th Cir. 1999). Plaintiff alleges that she has a viable cause of action against Lewis and her firm, the in-state defendants, because South Carolina law permits attorneys to be a part of a civil conspiracy if he or she “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. Ororato*, 457 S.E.2d 601, 602 (S.C. 1995). 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.

Plaintiff avers that the subornation of perjury in Plaintiff’s first filed case on these issues is evidence of a conspiracy in which attorney Lewis was a part; however, this court has already determined that the proffered evidence was not sufficient to “suggest perjury by [Defendant], much less subornation of perjury by defense counsel.” *Meisner v. Zymogenetics, et al.*, C/A No. 3:12 cv-00684-CMC-PJG, 2014 WL 6686791 at *2 (D.S.C. Nov. 25, 2014). Other than Plaintiff’s accusations of perjury, there is no evidence of a civil conspiracy to support a claim against Lewis or her firm (which is sued only because Lewis is its managing member).

Plaintiff cites *Fabian v. Lindsay* in support of her argument that an attorney can be held liable to a third party in the absence of an attorney-client relationship, and claims that the South Carolina Supreme Court should determine whether the facts in her case create an exception to the removal statutes. 765 S.E.2d 132 (S.C. 2014). Plaintiff argues that the Report did not address *Fabian*; however, that was not necessary as it

is easily distinguishable from the case at hand. *Fabian* discusses liability for legal malpractice, which is wholly distinct from a cause of action for civil conspiracy, such as the one alleged here. The court in *Fabian* noted that privity is required for a legal malpractice action, but allowed a cause of action by a third party beneficiary of an estate planning document. *Id.* at 492. The court specified that its holding was limited to estate planning documents and did not encompass other types of legal documents or causes of action. *Fabian* has no bearing on the outcome of the removal or remand of this case.

As the Magistrate Judge noted in the Report, 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. See *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 697 S.E.2d 551 (S.C. 2010); *Pye v. Estate of Fox*, 633 S.E.2d 505, 509 (S.C. 2006). This court has addressed a similar issue where allegations related to actions taken by non-diverse attorney defendants in a previous lawsuit. See *Bertwell v. Allstate Insurance Co.*, C/A No. 0:07-3875-CMC, 2008 WL 304735 (D.S.C. Jan. 31, 2008). In that case, this court dismissed the non-diverse, fraudulently joined defendants, who had been adversaries of the plaintiff in a previous legal action but had taken no actions to further their own personal benefit outside the scope of their representation. *Id.* at 3. As the Report explains, Lewis' 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, and there are no other allegations of actions in furtherance of the conspiracy and outside her representation. Therefore, Plaintiff's claim for civil conspiracy has no possibility that Plaintiff will be able to establish a cause of action

against Lewis and her firm, rendering Lewis and her firm fraudulently joined.

B. Scope of Inquiry

Plaintiff also argues other procedural issues, such as her claim that the Magistrate Judge's Report and Recommendation exceeded the scope of the limited inquiry for removal. However, jurisdiction is a threshold issue that must be determined in order for the case to proceed. Plaintiff's objections later recognize this point, noting that "[t]he [c]ourt has not determined jurisdiction which is required prior to issuing Orders." ECF No. 21 at 5. As this case necessarily involved diversity jurisdiction and allegations of fraudulent joinder, the determination of the capacity and scope of attorney Lewis' relationship with Bristol Myers Squibb was required.

Well-pleaded Complaint Rule

Plaintiff avers that the Report conflicts with the well-pleaded complaint rule. As that rule regards federal question jurisdiction, not diversity jurisdiction, it is not applicable in this case.

Diversity Jurisdiction

Plaintiff argues that the Report did not make an independent determination of diversity jurisdiction for each claim and defendant. Defendants other than Lewis and her firm are diverse from Plaintiff. If the non-diverse defendants are dismissed, the case can go forward in federal court under diversity jurisdiction. The Report made a finding that, because the non-diverse defendants (Lewis and Jackson Lewis) were fraudulently joined, their citizenship is disregarded for jurisdictional purposes and diversity exists. This finding is sufficient to support diversity jurisdiction over the remaining parties.

II. Conclusion

Having conducted a de novo review of the Report, Plaintiff's objections, and underlying motion and memoranda, the court adopts the recommendations of the report other than the time period for Plaintiff's response to Defendants' motion to dismiss. Plaintiff's motion to remand is denied and the non-diverse defendants (Lewis, Jackson Lewis, PC, and Jackson Lewis, LLP) are dismissed without prejudice. Plaintiff is to respond to Defendants' motion to dismiss (ECF No. 8), filed September 9, 2015, within twenty-six days of the entry of this Order. This time period reserves the remaining amount of time provided for response to the motion when it was originally filed. Plaintiff's motion to stay (ECF No. 14) is moot. The court denies Plaintiff's request for a hearing on this issue as it is adequately considered on the briefs.

IT IS SO ORDERED

s/ Cameron McGowan Currie CAMERON MCGOWAN
CURRIE Senior United States District Judge
Columbia, South Carolina
April 7, 2016

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

RHONDA MEISNER

Plaintiff

Action No. 3:15-cv-3523-CMC

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

REPORT AND RECOMMENDATION

The plaintiff, Rhonda Meisner, a self-represented litigant, filed a Complaint in the Court of Common Pleas in Richland County asserting state law claims. The defendants removed the case to federal district court pursuant to 28 U.S.C. § 1446, asserting jurisdiction based upon 28 U.S.C. §1332 and §1441. 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 dismiss (ECF No. 8). Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), Meisner was advised of the summary judgment and dismissal procedure and the possible consequence if she failed to respond adequately to the defendants' motion. (ECF No.9) Meisner ultimately filed a response in opposition to the defedna's' motion (ECF No. 28), to which the defendant replied (ECF No. 31), Having reviewed the parties' submissions, the court finds that the defendant's motion to dismiss should be granted.

BACKGROUND

This action stems from the 2010 termination of Meisner's employment with ZymoGenetics¹ and Meisner's prior lawsuit in this court, C/A No. 3:12-00684- CMC (hereinafter referred to as "Meisner I".)

¹ The court collectively refers to ZymoGeneics, Inc. and ZymoGenetics, LLC as "ZymoGenetics."

In Meisner I, Meisner alleged unlawful discrimination, harassment, and retaliation associated with her employment with, and ultimately her termination from ZymoGenetics; she also raised a claim of slander against Defendant Caldarazzo and a claim under the South Carolina Payment of Wages Act. In the case at bar, Meisner raises the following causes of action: (1) breach of contract against ZymoGenetics; (2) tortious interference with a contract against Defendant Tracey Caldarazzo, (3) negligent retention of Caldarazzo, presumably against ZymoGenetics; and (4) civil conspiracy against Defendant Jeff Fortino and Bristol Myers Squibb, Inc.

The defendants argue that all of Meisner's claims in the instant matter should be dismissed pursuant to the doctrine of *res judicata* specifically, claim preclusion. Alternatively, the defendants argue that Meisner's claim for breach of contract is barred by the statute of limitations and has not been plausibly pled; her claim for tortious interference with a contract is barred by the statute of limitations; her claim negligent retention is barred by the statute of limitations and the South Carolina Workers' Compensation Act; and her claim for civil conspiracy is barred by collateral estoppel and applicable law pertaining to perjury or subornation of perjury.

DISCUSSION

A. Motion to Dismiss Standard

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 plaintiff's complaint. Edwards V. City of

² For a thorough explanation of the prior litigation, see Meisner v. ZymoGenetics, Inc., C/A No. 3:12-cv-00684-CMC-PJG, 2014 WL 4721680 (D.S.C. Sept. 22, 2014).

Goldboro, 178 F.3d 231, 243 (4th Cir. 1999.) To survive a Rule 12 (b)(6) motion, “ffactual allegations must be enough to raise a right to relief above the speculative level.” Bell Atl. Corp V. Twombly, 550 U. W 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), A court may consider “ documents attached or incorporated into the complaint” without converting a motion to dismiss into a motion for summary judgment E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc., 637 F. Ed 435, 448 (4th Cir. 2011). Further “ a court any consider official public records, documents central to plaintiff’s claim, and documents sufficiently referenced to in the complaint so long as authenticity of these documents is not disputed.” ³Witthon v. Fed. Ins. Co., 164 F. App’x 395, 396 97 (4th Cir. 2006)(citing Alt. Engery, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F. 3d 30, 33 (1st Cir. 2001); Phillips v. LCI Intl, Inc., 190 F3. 609, 618 (4th Cir.

³Thus, contrary to Meisner’s arguments, considering the filings and rulings in Meisner I in making this Report and Recommendation does not require the court to convert the defendants motion to dismiss into a motion for summary judgment.

1999)(permitting consideration of extraneous material if such materials are “integral to and explicitly relied on in the complaint”); *Gasner v. Dinwiddie*, 162 F.R.D 280, 282 (E.D. Va. 1995)(permitting district court to take judicial notice of public documents, such as court records, even when the documents are neither referenced by nor integral to plaintiff’s complaint).

In applying this standard, the court observes that it is required to liberally construe *pro se* complaints. *Erickson*, 551 U.S. at 94. Such *pro se* complaints are held to a less stringent standard than those drafted by attorneys, *id.*; *Gordon v. Leeke*, 574 F. 2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Crus v. Beto*, 405 U.S. 319 (1972). When a federal court is evaluating a *pro se* complaint, the plaintiff’s factual allegations are assumed to be true. *Erickson*, 551 U.S. at 93 (citing *Twombly*, 550 U.S. 544, 555-56 (2007)). The mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so; however, a district court may not rewrite a complaint to include claims that were never present, *Barnett v. Hargett*, 174 F. ed 1128 (10th Cir. 1999), construct the plaintiff’s legal arguments for him, *Small V. Endicott*, 998 F.2d 41 (7th Cir. 1993), or “conjure up

questions never squarely presented” to the court, Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985).

B. Res Judicata

“ For the doctrine of re judicata to be applicable, there must be : (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits.” Pueschel v. United States, 369 F. 3d 345, 354-55(4th Cir. 2004).⁴ However, the claims asserted do not have to be identical; rather, the determination “turns on whether the suits and the claims asserted therein ’arise out of the same transaction or series of transactions or the same core of operative facts.” Id. at 355 (quoting Varat Enters, Inc., 81 F. ed 1310, 1316 (4th Cir. 1996). Moreover, “the doctrine of res judiata not only barsclaism that were actually litigated in a prior proceeding, bt also claims that could have been litigated.” Id. at 355-356(citations omitted).

In the instant action, the defendant has demonstrated that all of the lements of res judicata are present. First, the court entered a final judgment on the merits in Meisner I.⁵ See

⁴ Contrary to Meisner’s position that the court should apply South Carolina law in determining whether the doctrine of res judicata bars her claims, the United States Court of Appeals for the Fourth Circuit has held that “[f]ederal law determines the effects under the rules of res judicata of a judgment of a federal court.” Shoup v. Bell& Howell Co., 872 F.2d 1178, 1179(4th Cir. 1989). The judgment at issue in this case is the federal judgment from Meisner I; thus, federal law applies. Meisner has failed to point to any support for her argument to the contrary. Moreover, as noted by the defendant, even if the court applied South Carolina law pertaining to res judicata the would be the same. (See Defs.’ Reply to Mot. To Dismiss at 5 n.5, ECF No. 31 at 5).

⁵ The court may take judicial notice of the content of its own files. See

Shoup, 872 F. 2d at 1181 (noting that a grant of summary judgment “has always been considered a final disposition on the merits” for the purposes of res judicata)(internal quotation marks and citations omitted); see also Machado v. Davis, No. 4:11-1758-KDW, 2012 WL 4051123, at *7 (D.S.C. Sept 13, 2012)(“[T]he fact that the order granting summary judgment is currently pending on appeal does not affect the application of res judicata to the ruling.”)(citations omitted).

Second, as detailed at length in the defendant’s motion to dismiss, the allegations contained in the instant Complaint are nearly identical to, and stem from, the same set of facts that gave rise to Meisner’s claim for relief in the previous civil action against ZymoGenetics and Caldarazzo. (See Defs.’s Mem. Supp. Mot. To Dismiss at 12-17, 21-23, ECF No. 8-1 at 12-17, 21-23.) In the instant action, Meisner’s claims of breach of contract, tortious interference with a contract, and negligent retention all arise out of the same employment relationship as Meisner’s employment claims in Meisner I and therefore satisfy the second element of res judicata as identified above. See, e.g., Harms v United States, No. 91-2627, 1992 WL 203942, at * 7 (4th Cir. Aug. 24, 1992)(holding where “the root of both actions is [the plaintiff’s] allegedly wrongful dismissal, and the allegedly false information disseminated by fellow...employees during an investigation into [the plaintiff’s] conduct,” the same operative facts gave rise to each action, satisfying the requirement of an identity of the

Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989)(“the most frequent use of judicial notice of ascertainable facts is in noticing the content of court records.”).

cause of action in both the earlier and later actions); Machado, 2012 WL 4051123, at*8 (holding where “[b]oth lawsuits concern plaintiff’s belief he was treated unfairly and unlawfully during employment and termination” that Plaintiff’s claims in his prior and current lawsuit satisfied the requirement of an identity of the cause of action). Specifically, as pointed out by the defendants, the claims in both cases include allegations that Caldarazzo “falsely reported inappropriate conduct by Meisner and other female colleagues and that ZymoGenetics failed to investigate these reports and terminated Meisner’s employment without an adequate investigation.” (Defs. ‘Mem. Supp. Mot. To Dismiss at 12, ECF No. 8-1 at 12.) Further, Meisner civil conspiracy claim is based entirely on conduct that she alleges occurred during the proceedings in Meisner I, conduct which she relied upon in opposition to the defendants’ motion for summary judgment in Meisner I. The crux of Meisner’s civil conspiracy claim is that the defendants conspired to submitted false declarations by Defendant Fortino in Meisner I.⁶

⁶ As summarized in the court’s previous Report and Recommendation in the instant case, Meisner similarly argued in Meisner I that the defendants’ motion for summary judgment should be denied based on her allegations that Fortino’s declaration consisted of perjured statements and that defendants’ counsel aided and suborned it. In ruling on the defendants’ motion for summary judgment, the Honorable Cameron McGowna Currie, Senior United States District Judge, specifically noted as follows:

Meisner’s subornation arguments rests primarily if not solely on Fortino’s assertion in his first declaration that he had not “communicated with anyone about this lawsuit other the attorneys handling the case for Defendants. Meisner suggests this statement is false and the falsity was know to counsel because, prior to

Thus, all of the claims presented in the instant Complaint “arise out of the same transaction or series of transactions or the same core of operative facts” and could have been litigated in the prior proceeding. See Pueschel v. United States, 369 F. 3d at 355-356; see also Harnett v. Bilhnan, 800 F.2d 1308, 1314 (4th Cir. 1986)(“Claims may arise out of the same transaction or series of transactions even if they involve different harms or different theories or measure of relief.”); Olmstead v. Amoco Oil Co., 725 F.2d 627, 632 (11th Circ. 1984) (*Res judicata* “extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact.”)(internal quotation marks and citation omitted); Leo v. Garmin Intl, Inc., No. 10-2495-JTM, 2011 WL 1097759, at *2 (D. Kan. Mar. 22, 2011)(holding that *res judicata* applied to the plaintiff’s claims of perjury, obstruction of justice, and “Conducting an Illegal Deposition, “ as all of these claims related directly to the plaintiff’s prior litigation).

execution of his first declaration, Fortino received a call from Amy Maxwell [, another employee with ZymoGenetics], who stated that she was willing to give a deposition to counsel and he apparently did so. Thus, Fortino’s statement that he had not “communicated with anyone about this lawsuit” is not literally true- he did passon a message from a potentialwitness that she was willing to give a deposition. While the phrasing of the declaration is careless, this does not suffice to raise an inference of perjury, much less subornation of perjury, because because Fortino (and his counsel) may have intended the “communication” refer to substantive discussions.

(Meisner I, ECF No. 303 at 4 n. 4.) Meisner’s allegations of civil conspiracy in the instant action appear to rest on these same assertions.

Meisner's arguments that she was not aware of these claims at the time she filed her complaint or even before the deadline to amend her pleadings does not impact the application of res judicata to the claims. As the defendants have discussed,

Actual knowledge of a potential claim is not a requirement for application of the rules of merger and bar, however; rather, the appropriate inquiry is whether the ndw claim arises out of the same transaction or series of transactions as the claim resolved by the prior judgment. For purposes of res judicata, it is not necessary to ask if the plaintiff knew of his present claim at the time of the former judgment, for it is the existence of the present claim, not party awareness of it, that controls.

Harnett, 800 F.2d at 1313 (citation omitted).

Moreover, Meisner never sought leave to amend her complaint in Meisner I to add these claims.⁷

Meisner's remaining arguments directly contradict the above discussed law and are therefore unavailing. The defendants have demonstrated an identity of the causes of action in both the earlier and later suit.

Third, the defendant have demonstrated that there is privity between the parties in Meisner I and the current action. In fact, ZymoGenetics and Tracey Caldarazzo were defendants in Meisner I. The only remaining defendants in the instant action are Jeff Fortino and Bristol Myers Squibb, Inc. both

⁷ Although Meisner filed more than one motion to amend her Complaint during the pendency of Meisner I, she did not seek to add these claims.

of whom are solely named in the civil conspiracy claim. “the concept of privity requires an alignment of interests and not an exact identity of parties.” Weinberger v. ASCII Group, Inc. 50 F.3d 486, 492 (4th Cir. 2007). “[P]rivacy centers on the closeness of the relationship in question.” *Id.* ZymoGenetics, LLC and ZymoGenetics, Inc., are wholly-owned subsidiaries of Bristol Myers Squibb, Inc. and are even identified as such in the caption. Case law provides that a parent company and subsidiary are in privity in such a situation. See, e.g. Whitehead v. Viacom, 233 F.Supp. 2d 715, 721 (D. Md. 2002) (holding a parent company and its wholly-owned subsidiary to be in privity for purposes of res judicata). With regard to Fortino, Meisner points out in her Complaint that Fortino was her manager while she was employed at ZymoGenetics, and her claim stems from allegations that he submitted false declarations in support of ZymoGenetics I Meisner I. In fact Meisner unsuccessfully sought to add Fortino as an individual defendant with regard to her title VII claim in Meisner I (Meisner, I, ECF Nos. 117, 119, & 121.) Finally, as noted above, Meisner raised allegations of perjury which form the basis of her conspiracy claim as a basis to deny the defendant’s motion for summary judgment in Meisner I, and ZymoGenetics, disputed these allegations. Under these circumstances, the court finds that Fortino has a sufficiently close relationship with ZymoGenetics to be in privity with it.⁸

C. Alternative Grounds

⁸ The fact that Fortino was no longer an employee at the time of the alleged conspiracy does not change the court’s analysis. Further, the case law that Meisner relies on in support of her position is inapplicable. (See Defs.’ Reply to Mot. To Dismiss at 13, ECF No.31 at 13.)

Although the entire Complaint is subject to dismissal on the basis of res judicata, the court notes that, as argued by the defendants, Meisner's claims for breach of contract, tortious interference with a contract, and negligent retention are all barred by the statute of limitations as Meisner filed her complaint more than three years after the alleged conduct. See S. C. Code Ann §§15-3-530(1), 15-3-530(5). Meisner has not presented any response to this argument.⁹

RECOMMENDATION

For the foregoing reasons, the court recommends that the defendants' motion to dismiss (ECF No. 8) be granted.

s/Paige J. Gossett

United States Magistrate Judge

June 2, 2016

Columbia, South Carolina

⁹ With regard to Defendants John Does and Jane Does 1-10 (Whose name is unknown or as yet discovered), the court notes that Meisner's Complaint fails to state a claim against these defendants. Within the factual allegations of the Complaint, Meisner identifies them as agents of Jackson Lewis as part of her civil conspiracy claim. However, Jackson Lewis was previously dismissed from the action as there was no possibility Meisner could establish a cause of action against it. Meisner also mentions them in her claims for breach of contract and tortious interference with a contract by simply identifying them as unknown employees at ZymoGenetics. Meisner's Complaint fails to identify any personal actions by Defendants John Does and Jane Does 1-10. Thus in light of this deficiency and the current posture of this action, the court recommends that these defendants be dismissed without prejudice. See Iqbal, 556 U.S. at 678.

RHONDA MEISNER

Plaintiff

Action No. 3:15-cv-3523-CMC

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)
Defendant-Appellees

REPORT AND RECOMMENDATION ON MOTION
TO REMAND

The plaintiff, Rhonda Meisner, a self-represented litigant, filed a Complaint in the Court of Common Pleas in Richland County asserting state law claims. The defendants removed the case to federal district court pursuant to 28 U.S.C. § 1446, asserting jurisdiction based upon 28 U.S.C. § 1332 and § 1441. Although Meisner and Defendants Jackson Lewis LLP; Jackson Lewis, PC; and Stephanie Lewis are citizens of South Carolina, the defendants contend that these defendants were fraudulently joined, enabling the district court to retain jurisdiction and disregard the non-diverse defendants. 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 Meisner's motion to remand (ECF No. 11), to which the defendants responded (ECF No. 13) and Meisner replied (ECF No. 15). Having reviewed the parties'

submissions, the court finds that Meisner's motion to remand should be denied.

BACKGROUND¹

This action stems from the 2010 termination of Meisner's employment with ZymoGenetics² and Meisner's prior lawsuit in this court, C/A No. 3:12-00684-CMC (hereinafter referred to as "Meisner I"). Specifically, in the case at bar, Meisner raises the following causes of action: (1) breach of contract against ZymoGenetics; (2) tortious interference with a contract against Defendant Tracey Caldarazzo; (3) negligent retention of Caldarazzo presumably against ZymoGenetics; and (4) civil conspiracy against Defendants Jeff Fortino, Stephanie Lewis, Jackson Lewis, PC, and Bristol Myers Squibb, Inc. As part of her request for damages, Meisner seeks monetary damages consisting of back pay, front pay, compensation for lost benefits, 401k matches, buyouts, trips, and bonuses together with liquidated damages in an equal amount, as well as pre-judgment and post-judgment interest and actual damages, punitive damages, and attorney's fees against the defendants for the conspiracy.

DISCUSSION

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 may remove 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.³ 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, 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.’ ” Hughes v. 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).

Meisner seeks remand of this case and argues that the defendants cannot meet the burden of demonstrating fraudulent joinder of the non-diverse defendants.⁴ As indicated above, Meisner and Defendants Jackson Lewis LLP; Jackson Lewis, PC; and Stephanie Lewis (the “non-diverse defendants”) are citizens of South Carolina. The defendants allege that the non-diverse defendants were fraudulently joined, enabling the district court to retain jurisdiction and disregard the non-diverse defendants. The only claim that includes the non-diverse defendants is Meisner’s claim for civil conspiracy, which arises out of alleged actions taken by individuals involved in the litigation of Meisner I. In Meisner I, Meisner alleged unlawful discrimination, harassment, and retaliation associated with her employment with, and ultimately her termination from, ZymoGenetics; she also raised a claim of slander against Defendant Caldarazzo and a claim under the South Carolina Payment of Wages Act. Stephanie Lewis, Esquire, an attorney with Jackson Lewis, served as the lead defense attorney in Meisner I, appearing on behalf of Defendants ZymoGenetics and Caldarazzo. In the instant action, Meisner alleges a civil conspiracy claim based on allegations that Lewis submitted false declarations by Jeff Fortino (a former employee of ZymoGenetics and Meisner’s former supervisor) in Meisner I. The court notes that in Meisner I, Meisner similarly argued that the

defendants' motion for summary judgment should be denied based on her allegations that Fortino's declaration consisted of perjured statements and that defendants' counsel aided and suborned it. In ruling on the defendants' motion for summary judgment, the Honorable Cameron McGowan Currie, Senior United States District Judge, specifically noted as follows:

Meisner's subornation argument rests primarily if not solely on Fortino's assertion in his first declaration that he had not "communicated with anyone about this lawsuit other than the attorneys handling the case for Defendants." Meisner suggests this statement is false and the falsity was known to counsel because, prior to execution of his first declaration, Fortino received a call from Amy Maxwell[, another employee with ZymoGenetics], who stated that she was willing to give a deposition on behalf of Defendants. Fortino responded that he would pass that information on to counsel and he apparently did so. Thus, Fortino's statement that he had not "communicated with anyone about this lawsuit" is not literally true—he did pass on a message from a potential witness that she was willing to give a deposition. While the phrasing of the declaration is careless, this does not suffice to raise an inference of perjury, much less subornation of perjury, because Fortino (and his counsel) may have intended the term "communication" to refer to substantive discussions.

(Meisner I, ECF No. 303 at 4 n.4.) Meisner's allegations of civil conspiracy in the instant action appear to rest on these same assertions.

The defendants argue that there is no possibility that Meisner can establish a civil conspiracy claim against the non-diverse defendants because these defendants are immune from liability where they were acting

within the scope of their representation of a client. In South Carolina,

“Generally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” Pye v. Estate of Fox, 633 S.E.2d 505, 509 (S.C. 2006) (quoting Gaar v. N. Myrtle Beach Realty Co., Inc., 339 S.E.2d 887, 889 (S.C. Ct. App. 1986)). Further, an attorney owes no duty to a non-client unless 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, 457 S.E.2d 601, 602 (S.C. 1995).

Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 697 S.E.2d 551, 554 (S.C. 2010).

The defendants assert that “this case comes on precisely the same procedural footing” as that in Bertwell v. Allstate Insurance Co., C/A No. 0:07-3875-CMC, 2008 WL 304735 (D.S.C. Jan. 31, 2008), where the court dismissed the fraudulently joined non-diverse defendant. (Def.’s Resp. Opp’n Mot. to Remand at 7, ECF No. 13 at 7.) Pertinent here, as in Bertwell, the relationship between the plaintiff and the non-diverse defendants was that of “adversaries in the legal process” and the allegations all relate to alleged actions taken by the non-diverse defendants in the prior lawsuit. See Bertwell, 2008 WL 304735, at*1. Meisner’s attempts to distinguish her case from Bertwell by alleging that Defendant Lewis owed a duty as an officer of the court to the court and the parties to the proceedings are unavailing, as the non-diverse defendant attorney in Bertwell would have had a similar alleged duty. Meisner also argues that Fortino was not Defendant Lewis’s client during the time in question, and therefore no attorney client relationship

existed between Fortino and the non-diverse defendants. This argument misses the mark—interviewing Fortino as a witness and obtaining a statement from him in support of motions made on behalf of their client were clearly in furtherance of the non-diverse defendants' representation of Bristol Myers Squibb, Inc. and its subsidiaries. In fact, Meisner's Complaint acknowledges that Defendant Lewis was acting on behalf of Bristol Myers Squibb, Inc. Thus, there are no allegations that the non-diverse defendants acted outside of their role in representing Bristol Myers Squibb, Inc. and they are entitled to immunity.

Accordingly, Meisner does not have "a slight possibility of a right to relief," Hughes, 617 F. App'x at 264-65, or a "glimmer of hope" of succeeding in her claims against the non-diverse defendants. Mayes, 198 F.3d at 466. Therefore, the court finds that the non-diverse defendants were fraudulently joined and their citizenship is disregarded for jurisdictional purposes, resulting in a finding of the existence of diversity jurisdiction under 28 U.S.C. § 1332.

Meisner's remaining arguments suggesting that the removal of the Complaint was procedurally improper are wholly without merit. See United States v. Patel, 879 F.2d 292, 295 (7th Cir. 1989) ("When issues patently lack merit, the reviewing court is not obliged to devote scarce judicial resources to a written discussion of them.").

RECOMMENDATION

For the foregoing reasons, the court recommends that Meisner's motion to remand (ECF No. 11) be denied. If this recommendation is adopted, the court further recommends that the non-diverse defendants be dismissed from this action and that Meisner be directed to file a response to the defendants' pending motion to

dismiss within fourteen days after the district court issues a ruling on Meisner's motion to remand, thus mooted Meisner's motion to stay (ECF No. 14).

Paige J. Gossett

UNITED STATES MAGISTRATE JUDGE

March 9, 2016

Columbia, South Carolina

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

s/Paige J. Gossett

Footnotes associated with the Report and Recommendation

¹ The background includes only the facts necessary to address the motion to remand. For a thorough explanation of the prior litigation, see Meisner v. ZymoGenetics, Inc., C/A No. 3:12-cv00684-CMC-PJG, 2014 WL 4721680 (D.S.C. Sept. 22, 2014).

² The court collectively refers to ZymoGenetics, Inc. and ZymoGenetics, LLC as "ZymoGenetics."

³ It is undisputed that Meisner's Complaint does not raise a federal question. See 28 U.S.C. § 1331.

⁴ Meisner's motion also appears to question whether her Complaint may be construed as satisfying the amount in controversy required for diversity jurisdiction to exist. However, as detailed by the defendants in their notice of removal and in their response in opposition to the motion to remand, the defendants have demonstrated by a preponderance of the evidence that the amount in controversy exceeds \$75,000. (See ECF No. 1 at 5-6; ECF No. 13 at 10-14.) Meisner has failed to present legally sound arguments to challenge the defendants' showing or otherwise unequivocally state that she is seeking less than \$75,000.

RHONDA MEISNER

Plaintiff

Action No. 3:15-cv-3523-CMC

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)
Defendant-Appellees

The plaintiff, Rhonda Meisner respectfully submits the following objections to the Report and Recommendation (hereinafter "R&R") that recommended granting defendant's motion to dismiss on all claims. The plaintiff respectfully renews her objection to the removal action from state court for the reasons outlined in the memorandum in support of motion to remand (ECF NO.11-1) and the reply to the motion to remand. (ECF No.15). As such, the plaintiff objects to the Court's entry of any Order in this case as the plaintiff does not agree that the South Carolina defendants were fraudulently joined and therefore the Court does not have jurisdiction and the complaint should be remanded to state court.

BACKGROUND

As an initial matter, defendants report several facts that are inconsistent with the previous litigation. Because defendants base their claims of collateral estoppel and res judicata on the erroneous recitation of the facts, the facts should be corrected. First, the defendants state the Court considered the breach of contract and breach of contract accompanied by a fraudulent act. (ECF No. 8-1 p. 3 Background) but

see: (ECF No. 257 at p. 30) (ECF No. 289) (ECF No. 303).

- 1) First, there are two reported claims of slander by Tracey Caldarazzo, it is the second claim that is implicated in the current lawsuit, not the claim in the previous litigation. Slander claim #1 against Tracey Caldarazzo was a result of Ms. Caldarazzo telling other employees that Rhonda Meisner had a DUI and while the company was responsible for Ms. Caldarazzo's actions, there was no evidence Zymogenetics was informed of the slander.
- 2) Slander claim #2 was the result of Tracey Caldarazzo's false *and hidden report to the company*. The company did not disclose the false report by Ms. Caldarazzo until after the time to amend the complaint was over. Ms. Caldarazzo reported to the company that Rhonda Meisner had slandered a surgeon, specifically Dr. Claus Brandigi and that Dr. Brandigi was calling for her to be fired. However, during the deposition of Dr. Brandigi, he disclosed for the first time, that this event did not occur and that he had never heard about the report. Here, the company *was informed* of the report by Ms. Caldarazzo as Dr. Brandigi's report to the company was noted as a reason for termination; however, prior to the deposition of Dr. Claus Brandigi and the corporate deponent Ms. Sandi Gray the plaintiff had no way of knowing about the targeted interference by Ms. Caldarazzo. There was also no indication the company did not investigate Ms. Caldarazzo's report and therefore breached Ms. Meisner's employment contract.
- 3) Defendants erroneously alleged a breach of contract claim in Meisner I. Not only was a breach of contract not included in the complaint as alleged by the defendants (ECF No. 8-1 at p. 3 title). The Court

declined to consider the claim of breach of contract and breach of contract accompanied by a fraudulent act claim as a defense to summary judgment which in effect was a denial to exercise supplemental jurisdiction.

Because the grant of a motion for summary judgment pre supposes the plaintiff cannot succeed on any theory, the Court's refusal to consider the breach of contract claim as a defense to summary judgment was a denial of the exercise of supplemental jurisdiction. Without the exercise, the appellate Court did not have jurisdiction because the issue once raised must be ruled on to confer jurisdiction to the appellate court. Therefore, this Court did not rule on the breach of contract claim, the breach of contract accompanied by a fraudulent act, the tortious interference with the contract or the negligent retention claim. The claims were discovered after the time to amend the pleadings and in fact, the 30(b)(6) deponent's deposition excerpts were received *after* discovery had closed. These claims using both the federal standards for res judicata and the state standards for res-judicata are not precluded as the Court did not consider the claims, which is an exception in both the federal and state standards to apply res-judicata and collateral estoppel.

4) The breach of contract, breach of contract accompanied by a fraudulent act and the tortious interference with a contract are governed by the discovery rule under South Carolina law; therefore, in a motion to dismiss, affirmative defenses such as res judicata and statute of limitations must be evident on the face of the complaint. When a claim is governed by the discovery rule, the Court cannot determine the statute of limitations on the face of

the complaint, unless it is readily apparent. Here, the discovery of the breach and the fraudulent act occurred only three days before discovery ended and again after this Court noted the time to amend the complaint had passed.

In a review of its own records to determine res-judicata, a review reveals the district court adopted in full the report and recommendation of the magistrate judge and the magistrate judge declined to consider the claim as a defense to summary judgment. Additionally, this Court ruled the time for amending the complaint expired in 2012 which was before the April 11, 2013 motion to compel hearing before the Honorable Paige Gossett or the production of documents by the defendants in the previous litigation. It can hardly be said there was an opportunity to litigate the claims when the 30 (b) (6) deposition occurred only three days prior to the end of discovery. Additionally, because the motion to amend the complaint to address the second case of slander (which was before the 30(b)(6) deposition) was denied for statute of limitations reasons, the slander issue has not been litigated pursuant to collateral estoppel. South Carolina, as previously argued an issue must be raised ruled on and therefore available for appeal to apply res-judicata. Here, it is not the arguments by the parties at the district court or on appeal that prevents the application of res judicata, it is the rulings by the Court that prevents res-judicata.

**OBJECTIONS TO THE FINDINGS BY THE
MAGISTRATE**

**THE SUFFICIENCY OF THE PLEADINGS TO
THE FEDERAL STANDARD**

The defendants argued the pleadings do not conform to the standards of federal court set out by the *Igbal* and *Twombly* line of cases and the Magistrate Judge agreed in her R&R. The defendant respectfully requests to amend the complaint to meet the federal pleading standards pursuant to *Igbal* and *Twombly* and presents a separate motion to amend simultaneously with these objections. The complaint was originally filed in state court and meets the state pleading standards. Upon removal the federal pleading standards now must be met, as a result the plaintiff respectfully requests the Court to enter an Order allowing amendment to satisfy the pleading standards and to correct deficiencies noted by the Magistrate in the R&R related to unnamed South Carolina defendants.

**THE PLAINTIFF RESPECTFULLY OBJECTS TO
THE COURT'S RES- JUDICATA ANALYSIS**

Identification of the claim and application of res-judicata

The plaintiff notes both the defendant and the Magistrate Judge point to filings by the defendant in defense of summary judgment. It is not the argument of the parties, but the decision of the Court to not accept supplemental jurisdiction of the claims that do not allow the application of res-judicata in this case. The motion to amend for slander, which was denied on procedural grounds, does not preclude the breach of contract claims because the Court declined to consider and therefore accept supplemental jurisdiction of the claim as a defense to summary judgment. When the first case is dismissed, based on procedural grounds, then the party is barred from asserting collateral estoppel or res judicata. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E. 2d 504 (1986). In *Sealy*, the appellants failed to

amend a complaint within the time afforded, and the South Carolina Supreme Court ruled that as long as the complaint was not time barred res judicata did not prevent filing the suit. Here, while the plaintiff discovered the company breached its contract after the time to amend the complaint, the plaintiff did inform the Court the claim was viable. The Court declined to consider the claim, as not properly before the Court.

Additionally, the interpretation of a contract is a legal claim which cannot be conflated to include federal discrimination claims. Additionally, the arguments pointed to by the defendants and accepted by the Magistrate Judge were arguments regarding the contract defenses to summary judgment which were not considered or ruled on by the Magistrate Judge and was adopted in total by the District Judge.

The South Carolina Supreme Court has determined that failure to request an amendment or procedural relief to the pleadings does not extinguish the claim as long as the statute of limitations has not run. When the first case is dismissed, based on procedural grounds, then the party is barred from asserting collateral estoppel or res judicata. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E. 2d 504 (1986). In *Sealy*, the appellants failed to amend a complaint within the time afforded, and the South Carolina Supreme Court ruled that as long as the complaint was not time barred res judicata did not prevent filing the suit. Here, while the plaintiff discovered the company breached its contract after the time to amend the complaint, the plaintiff did inform the Court the claim was viable. The Court declined to exercise supplemental jurisdiction and consider the claim, as not properly before the Court. However,

pursuant to South Carolina law, the claim is still available.

Here, the Court must determine if the procedural laws implicate the substantive laws of South Carolina. There are two clear scenarios where the breach of contract would not be subject to res-judicata (1) if the district court declined to exercise supplemental jurisdiction (which the plaintiff argues the Court did) or (2) if the complaint was originally filed in state court where, according to the fourth circuit, state court rules for res-judicata would apply, which pursuant to South Carolina law would permit the suit.

The plaintiff argues even under the federal res-judicata the claims would be allowed for the following reasons: (1) the plaintiff could not have litigated the claims as the district court declined to consider supplemental jurisdiction and therefore the claims were not available for appeal, even when the plaintiff argued in defense of summary judgment the claims were not time barred pursuant to the discovery rule and amendments could be made up until and even after trial. (2) Ms. Caldarazzo may have been in privity with regard to the slander claim that operates to implicate the fraudulent act by the defendants but cannot be in privity with the defendants for the breach actions because she was not a party to the contract. (3) Defendants reference documents (ECF No. 228, 246, 265, 285) that made arguments in defense of summary judgement and occurred *after* defendant's motion for summary judgment and after the deposition of the critical deponents (ECF No. 216) in the previous case which supports the plaintiff's claims that the breach cause of action and the affiliated actions were not

considered and specifically excluded from consideration by the Court.

SUPPLEMENTAL CONTRACT CLAIMS WERE INITIALLY FILED IN STATE COURT

Here, even though the original complaint was filed in federal court based on violation of federal law and some state law claims, this Court declined to exercise supplemental jurisdiction over the breach of contract claims as a defense to summary judgment. Consequently, the breach of contract, breach of contract accompanied by a fraudulent act and the tortious interference with a contract was originally filed in South Carolina state court.

OBJECTIONS TO THE DETERMINATION OF PRIVACY OF PARTIES TO THE CONTRACT CLAIMS

South Carolina law presumes that a party to a lawsuit who is also not a party to the contract lacks privity to enforce the contract or to breach the contract, therefore there is no privity of parties to the breach of contract claims and tortious interference with a contract claims. See: *Touchberry v. City of Florence*, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). See also: *Holder v. Haskett*, 283 S.C. 247, 251, 321 S.E.2d 192, 194 (Ct. App. 1984). This directly confronts the privity portion of the res-judicata analysis by the defendants. Here, Ms. Caldarazzo is not a party to the breach of contract; however, as an employee for Zymogenetics, Zymogenetics is responsible for her fraudulent acts. It is the fraudulent act that is associated with the breach of contract act coupled with the company's representations and actions. Based on *Touchberry* and *Holder* Ms. Caldarazzo cannot be privity with

Zymogenetics, Inc. or Bristol Myers Squibb, Inc. in these causes of action. Therefore, for res-judicata purposes while Bristol Myers Squibb, Inc. may be in privity to Zymogenetics, Inc. the other defendants associated with the breach of contract accompanied by a fraudulent act and tortious interference i.e. Tracey Caldarazzo is not in privity with either entity as her defenses and the company's defenses are not so closely aligned to be indistinguishable from each other. In fact, the defenses of each defendant are in conflict with the defenses of the other. Ms. Caldarazzo must lay blame on the company for the breach to defend her tortious interference claim and the company must maintain Ms. Caldarazzo was not acting on behalf of the company when she committed her fraudulent acts.

The Magistrate Judge concluded that Tracey Caldarazzo and Jeff Fortino were in privity with Zymogenetics; however, the Magistrate did not do an analysis of each claim and instead issued a blanket acceptance of privity which the plaintiff objects to. With regard to the contract claims this argument fails under well settled South Carolina law for the res-judicata analysis. The former privity between Ms. Caldarazzo and Zymogenetics with regard to the slander claims does not extend to the contract claims. While Ms. Caldarazzo and Zymogenetics interests in the defense of the slander claims may have been so situated as to create privity; such is not the case with the contract claims. In fact, their defenses are averse to each other as the company would no doubt to seek to disavow Ms. Caldarazzo's nefarious acts as her own and disavowing company responsibility, while Ms. Caldarazzo would seek to say her actions did not and should not have affected the company's actions.

Jeff Fortino was not an employee and was unrepresented by Zymogenetics, Inc., Jackson Lewis, LLP and Jackson Lewis, PC in the previous action. The Magistrate Judge suggested Mr. Fortino was in privity with Zymogenetics, Inc. because the plaintiff previously sought to amend the complaint to include him as a defendant; however, this does not prove privity. In fact, if anything the fact that Zymogenetics, Inc. declined to represent Mr. Fortino or provide representation via Jackson Lewis indicates Zymogenetics, Inc. did not consider itself in privity with Mr. Fortino, otherwise they would have provided representation after his employment ended. Additionally, while it is an obvious fact Mr. Fortino and Zymogenetics, Inc. are in privity with each other in the civil conspiracy claim, this privity does not preclude the civil conspiracy claims because the claims did not accrue until after the plaintiff was injured by the acts. In fact, while the Magistrate found the fact that Mr. Fortino was Ms. Meisner's manager during her employment and this was the basis for the privity, this determination is not consistent with the South Carolina Court of Appeals or the Fourth Circuit Court of Appeals. First, a civil conspiracy is not possible against an employee and the employee's company that is because under South Carolina law and the intercorporate conspiracy doctrine, as an agent of the company, Mr. Fortino could not conspire with the company he represented. That is, a company cannot conspire with itself. South Carolina and the Fourth Circuit have accepted this intra-corporate conspiracy doctrine and specifically rejected the "agency theory" the Magistrate Judge put forth in her R&R. In *Cricket Cove Ventures, LLC v. Gilland et. al.* Opinion 4730 filed August 25, 2010, the South

Carolina Court of Appeals specifically rejected the agency theory as opposed to the intra-corporate conspiracy doctrine. The respondents in *Cricket Cove* alleged the conduct arose as part of the principal agency relationship which the court of appeals declined to accept. The South Carolina Court of Appeals found "[I]n *McMillan*, our Supreme Court limited this 'intra-corporate conspiracy' doctrine to persons acting within the scope of their employment. 367 S.C. at 564-65, 626 S.E.2d at 887. Other jurisdictions have similarly limited the doctrine. See *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179 (4th Cir. 2002) ('[T]he intra-corporate immunity doctrine does not apply where a corporate officer has an independent personal stake in achieving the corporation's illegal objectives.'" (quoting *Greenville Pub. Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974))); *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) ("Simply put, under the doctrine, a corporation cannot conspire with its employees, and its employees, when acting in the scope of their employment, cannot conspire among themselves.") (emphasis added); *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987) ("While it is true that a corporation cannot conspire with itself, an intra-corporate conspiracy may be established where individual defendants are also named and those defendants act outside the scope of their employment for personal reasons.").

Here, it is undisputed that Jeff Fortino was no longer an employee of Zymogenetics, Inc. or Bristol Myers Squibb, Inc. when he submitted the declarations. Therefore, Mr. Fortino is not only uninsulated from the conspiracy claims; he forms the basis of the claims because without his participation

'outside of his scope of employment' the conspiracy would fail under the intra-corporate conspiracy doctrine. It is impossible for Mr. Fortino to 'work in his scope of employment' when he is no longer employed. Therefore, it is impossible to reconcile the privity requirements with Mr. Fortino's previous employment and his subsequent post-employment conspiracy actions with the company. If the position of the Magistrate Judge were adopted, any former employee could create privity with its former employer and therefore defeat a civil conspiracy claim simply via their previous agency relationship. A premise South Carolina and the Fourth Circuit rejects.

Additionally, this Court acknowledged that attorneys can be a part of their client's civil conspiracy. As such a determination that there is no evidence, without the benefit of discovery converts the Fed. R. Civ. P. Rule 12 (b) (6) motion to a Fed. R. Civ. P. Rule 56 motion for summary judgment. The plaintiff presents her affidavit and request for discovery pursuant to

THE STATUTE OF LIMITATIONS HAS NOT RUN FOR THE CONTRACT CLAIMS AND THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS MUST BE DETERMINED ON THE FACE OF THE COMPLAINT. PREEMPTION BY THE WCA FOR THE NEGLIGENT RETENTION CLAIMS IS NOT APPLICABLE FOR INTENTIONAL TORTS.

As previously argued, the breach of contract claims and the tortious interference with a contract claim are governed by the discovery rule. *Epstein v. Brown*, Opinion No. 25953 filed March 21, 2003 *Sullivan v. Calhoun*, 117 S. C. 137, 139, 108 The

complaint itself indicates it was not until the deposition of Dr. Claus Brandigi and Sandi Gray (the corporate 30(b)(6) deponent) that the plaintiff was aware of the fraudulent act and the breach of the contract. As such the affirmative defense of statute of limitations cannot be discerned from the complaint. The Magistrate recommended that the negligent retention claim is pre-empted by the Workers compensation act; however, intentional torts is one of the four exceptions to pre-emption under the act as is intentional acts of the employer or the alter ego of the employer.

Therefore, the negligent retention claim should be evaluated pursuant to the discovery rule. A review of the Court's records reflects that the defendants did not produce the investigation files of Carol Murphy until the plaintiff produced the files to the defendant in the summer of 2013. Subsequently the critical depositions of Dr. Claus Brandigi and Sandi Gray occurred in late 2013 (October 28) only three days in advance of the end of discovery.

The Magistrate Judge referred to *Kolon Indus.* For the proposition that the Court could evaluate documents outside of the pleadings; however, the Kolon court also found error when a conversion occurred and the parties did not have a reasonable opportunity for discovery. *E. I du Pont Nemours v. Kolon Indus. Inc.*, 637 F.3d at 448-49 (4th Cir. 2011). However, the district court cannot go beyond these documents on a Rule 12(b)(6) motion without converting the motion into one for summary judgment. Fed. R. Civ. P. 12(b), 12(d), 56. Such a conversion is error where the parties have not had a reasonable opportunity for discovery. *Kolon Indus.*, 637 F.3d at 448-49. Dismissal of a complaint without

the opportunity for discovery violates FRCP Rule 56(d) and should not be allowed.

Because the plaintiff argues the Court did not disavow the consideration of the Fourth Circuit brief which the defendants attached to the motion to dismiss and the brief itself was not integral to the present motion, the 30(b)(6) motion was converted into a motion for summary judgment. As such the plaintiff respectfully request the motion be denied an order for a discovery plan be entered. An affidavit pursuant FRCP Rule 56 (d) outlining the need for discovery is attached as EXHIBIT A.

The plaintiff respectfully requests the Court remand the case to the state court or to another federal magistrate judge and district judge prior to entering an Order in this case. In the alternative, the plaintiff respectfully requests she be afforded the opportunity to amend the complaint to rectify the deficiencies noted by the Magistrate Judge, deny the motion for summary judgment couched as a motion to dismiss and proceed with a scheduling Order.

Respectfully Submitted,
SIGNATURE ON NEXT PAGE

Rhonda Meisner
Pro-se Appellant
Post Office Box 689
pegasus333@icloud.com
June 20, 2016 (803)206-3402

RHONDA MEISNER
Plaintiff Action No. 3:15-cv-3523-CMC
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)
Defendant-Appellees

The Plaintiff, Rhonda Meisner respectfully submits her objections to the Report and Recommendation. The Report and Recommendation recommended to deny the Plaintiff's motion to remand. The Plaintiff respectfully incorporates the arguments for remand to state court (ECF No. 11-1) and the reply to the motion to remand as part of her objections. (ECF No. 15) In addition, the plaintiff makes the additional objections as outlined below.

The removal action was not strictly construed and exceeds the scope of inquiry for jurisdiction in the Report and Recommendation ("R & R") by the Magistrate Judge. The "R & R" made findings of fact and conclusions of law which exceed the scope of the limited inquiry for removal. That is, a determination of the capacity and scope of attorney Lewis' contractual relationship with Bristol Myers Squibb, Inc. was required by the Magistrate in the "R & R". The determination of Ms. Lewis' scope of representation of Bristol Myers Squibb, Inc. was used to determine that Ms. Lewis' (and the other South Carolina defendants') actions (within the scope of their employment) warranted immunity and therefore satisfied the fraudulent joinder doctrine for

exclusion of the in state defendants. (ECF No.19 p. 6). This determination is contrary to the well-settled law for the removal. Additionally, South Carolina law requires attorneys to follow the ethical rules promulgated by the South Carolina Supreme Court when representing their client and performing acts of behalf of the client. *In the Matter of Goodwin*, 279 S.C. 274, 305 S.E. 2d 578 (1983). The ethical rules requires an attorney to follow the rules even when the client's instructions conflict with the rules. The Supreme Court of South Carolina held "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.E.2d 601, 602 (1995)/ Additionally in *Chewning*, the South Carolina Supreme Court said that collaboration by an attorney to present false testimony by a witness is an extrinsic fraud and is actionable by third parties harmed by the fraud. *Chewning v. Ford Motor Co.* 354 S.E. 2d 605 (2003). Again, the cause of action accrued when the plaintiff was damaged. The fraudulent joinder doctrine is not applicable here because South Carolina permits attorneys to be part of a civil conspiracy when the attorney participates in the scheme and therefore, becomes part of the tort. Here, the evidence of the subornation of perjury cannot be conflated with the evidence of the conspiracy because a cause of action for civil conspiracy does not accrue until there is damage to the intended third party target of the civil conspiracy. That is, it is only when the third party is injured does the conspiracy become actionable. Federal courts recognize that perjury or fraudulent

documents without the participation of an attorney is not actionable. *United States v. Throckmorton*, 98 U.S. (8 Otto) 61, 66 (1868). Perjury without the allegation of cooperation by an officer of the court is insufficient to justify collateral attack. *Great Coastal Express v. Int'l Bhd. Of Teamsters*, 675 F. 2d 1349, 1357 (4th Cir. 1982).

Here, the pleadings specifically reference not only Ms. Lewis' involvement but direct the Court to the testimony of Amy Maxwell that the submission of certain documents and the withholding of certain documents was an intentional misrepresentation by Ms. Lewis to the Court. The evidence of the possibility of a conspiracy was presented by a third party deponent. (ECF No. 1-1: pp. 99-111). The Supreme Court of South Carolina acknowledged that the hidden nature of a conspiracy cannot easily be determined. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). It is not fatal to Ms. Lewis' involvement in the conspiracy that she did not have an attorney client relationship with Mr. Fortino and was working on behalf of Bristol Myers Squibb, Inc. because her actions independent of her principal were required to complete the conspiracy. She in fact was not only the link but organized and help perpetrate the submission to the court.

The "R& R" suggests there are no allegations of Stephanie Lewis' involvement outside of her representation of Bristol Myers Squibb, Inc. contrary to the pleadings. (ECF No. 121- 130). The complaint specifically references that Jackson Lewis and Ms. Stephanie Lewis' separate and independent acts in concert with the efforts of Jeff Fortino and Bristol Myers Squibb, Inc. were required to complete the conspiracy. As explained in the motion to remand, this is not the only incident by Ms. Lewis of either

withholding evidence or misrepresenting facts to the Court intentionally. (ECF No. 11-1: pp. 9-14). The Court acknowledged the inconsistency in Mr. Fortino's declaration and other evidence and Ms. Maxwell's testimony makes clear the submissions were intentional.

The "R & R" conflicts with the well-pleaded complaint rule.

The "R & R" did make an independent determination that each claim and defendant satisfied the requirements for diversity jurisdiction.

The "R & R" did not acknowledge the 2014 opinion of the South Carolina Supreme Court that a third party can hold an attorney liable for drafting documents that damaged the third party even when there was no attorney client relationship. *Fabian v. Lindsay*, No. 27460 (S.C. 2014). Here, like in *Fabian*, the cause of action did not accrue until a future determinable act occurred. In *Fabian*, it was the death of the testator, here it was the grant of summary judgment subsequent to the concerted actions of the conspirators. In *Stiles v. Onorato*, the South Carolina Supreme Court held "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.E.2d 601, 602 (1995). The Supreme Court of South Carolina accepted the arguments by the plaintiff in *Fabian* that the document (will) created by the attorneys damaged the plaintiff because only the plaintiff had an interest in the effect of the defective will. The decedent was dead and the trust did not have an interest in the pursuing the authors of the defective

instrument. The Court determined the only entity with interest in holding the drafting attorneys accountable for their actions was the plaintiff, who did not have an attorney client relationship with the attorneys. Here, like in *Fabian*, the only entity with a vested interest in holding the conspirators accountable for their acts is the Plaintiff as the defendants were part and parcel to the conspiracy to mislead the court and the Court itself is neutral to the issue. *Fabian v. Lindsay*, No. 27460 (S.C. 2014). The “R & R” also requests the Court enter an Order to have the plaintiff respond to the defendant’s motion to dismiss within 14 days, the plaintiff objects to this recommendation. The Court has not determined jurisdiction which is required prior to issuing Orders. The defendants submitted the motion to dismiss prior to a determination of jurisdiction, as such the Plaintiff respectfully requests the entire time to respond to the motion to dismiss. .

The Supreme Court of South Carolina is the exclusive court regulating the practice of attorneys within the state. In *Fabian*, the defendants argued they were immune from liability because there was no attorney client relationship with the plaintiff which the Supreme Court rejected. Here, like in *Fabian*, the Plaintiff argues this is a novel question for the South Carolina Supreme Court to answer and an exception to the removal statutes. The plaintiff respectfully requests the federal district court to certify whether an attorney’s participation in the submission of misleading declarations that are known to the attorney to be false prior to the submission to the court creates a cause of action for civil conspiracy due to the attorney’s duties as an officer of the court. E.g. does the attorney’s duties as

an officer of the court extend to adversarial parties when the attorney willfully and knowingly submits false affidavits to a court in violation of the rules of court?

The plaintiff respectfully requests a hearing on the removability of the case and the Plaintiff's motion to remand.

For the above reasons and all references to the record, the Plaintiff Rhonda Meisner requests the case be remanded to the state court because the defendant's notice of removal does not comply with the removal statutes.

Respectfully Submitted,

Rhonda Meisner
Pro-se Appellant
Post Office Box 689
pegasus333@icloud.com
March 25, 2016
(803)206-3402

United States Statutes Relevant to Case
28 U.S.C. §1441 (a) states:

(a)GENERALLY.—

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b)REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—

(1)

In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) the

citizenship of defendants sued under fictitious names shall be disregarded.

(2)

A civil action otherwise removable solely on the basis of the jurisdiction under sections 1332 (a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1445 (c) Non-Removable Actions

A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States

28 U.S.C. § 1446 (a)

(a)GENERALLY.

A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b)REQUIREMENTS; GENERALLY.—

(1)

The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for

relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)

(A)

When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B)

Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C)

If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3)

Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable

South Carolina exceptions to res-judicata and claim preclusion

Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455, 460, 461 (Ct. App. 1997) The Court of Appeals explained:

although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

- (1) Treating the issues as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
- (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
- (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
- (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
- (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
- (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
- (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

APP. 70

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.