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

BEAUFORT DIVISION

RICHARD ALEXANDER MURDAUGH, JR.,
Plaintiff,

vs.

BLACKFIN, INC., WARNER BROS. DISCOVERY, INC., WARNER MEDIA ENTERTAINMENT PAGES, INC., CAMPFIRE STUDIOS, INC., THE CINEMART LLC, NETFLIX, INC., GANNETT CO., INC. AND MICHAEL M. DEWITT, JR.,

Defendants.

Case No. 9:24-cv-04914-RMG

WARNER DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO REMAND AND REPLY IN FURTHER SUPPORT OF ALTERNATIVE MOTION TO SEVER

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Plaintiff filed a single brief in which he moved to remand the case and opposed the Warner Defendants' Motion to Sever (ECF 14 ("Motion to Sever")). *See* ECF 41-1 at 1-27 ("Motion to Remand"), 27-35 ("Opposition").[1] The Warner Defendants request the Court deny Plaintiff's Motion to Remand for the reasons discussed herein and in the opposition to the Motion to Remand filed by Defendants Netflix, Inc. and Cinemart LLC (*see* ECF 58 ("Netflix Opposition"))—which the Warner Defendants join and incorporate by reference in full. Alternatively, the Warner Defendants request the Court sever Plaintiff's claims as to them for the reasons stated in the Motion to Sever and herein.[2]

PRELIMINARY STATEMENT

Plaintiff asks this Court to remand all of his claims despite admitting that the only reason he included Michael M. DeWitt, Jr. ("DeWitt") as a defendant is to destroy federal diversity jurisdiction. The Court should deny Plaintiff's attempt to forum shop his claims out of federal court because his Complaint cannot, as a matter of law, state a claim for defamation against Mr. DeWitt. *Infra* Argument § I(A); *see* Netflix Opposition. Plaintiff does not contest that this Court can retain jurisdiction over his claims as to the Warner Defendants even absent fraudulent joinder if it grants their Motion to Sever. *Infra* Argument § I(B). Severance is warranted based on procedural misjoinder because Plaintiff's right to relief as to the Warner Defendants arises from a transaction—the alleged publication of the two Warner Documentaries—entirely different from the one from which the claims as to the Netflix Documentary Defendants arise. *Infra* Argument

[1] This filing adopts the terms as defined in the Motion to Sever, as well as its Factual and Procedural Background Section, no parts of which Plaintiff challenges in his Opposition.

[2] The combined length of this filing and the Netflix Opposition does not exceed the 50 pages that the local rules provide for the Warner Defendants to respond to both the Motion to Remand and Opposition to Severance. *See* Local Civ. Rule 7.05(B) (D.S.C.) (15 for reply and 35 for opposition).

§ II. Plaintiff does not offer any credible argument demonstrating otherwise, and attempts to complicate what should be a straightforward decision fully within this Court's discretion.

ARGUMENT

I. THE COURT SHOULD DENY THE MOTION TO REMAND BECAUSE DIVERSITY JURISDICTION EXISTS.

A. Removal Is Proper Because Plaintiff Fraudulently Joined Mr. DeWitt.

Plaintiff does not deny that he included Mr. DeWitt as a defendant solely as part of a "strategy to defeat federal jurisdiction" to forum shop his case into Hampton County and out of federal court. ECF 41-1 at 8. The law bars Plaintiff from including Mr. DeWitt as a defendant solely for the purposes of destroying diversity jurisdiction where, as here, the Complaint cannot state a claim for defamation against Mr. DeWitt as a matter of law. Netflix Opposition at 12-31. The Court should deny the Motion to Remand for the reasons articulated in the Netflix Opposition.

B. If the Court Grants the Warner Defendants' Alternative Motion to Sever, There Is No Basis To Remand The Severed Claims.

Plaintiff styled his Motion to Remand against the Netflix Documentary Defendants alone and does not contest diversity jurisdiction with respect to the Warner Defendants. *See* ECF 41 at 1; ECF 41-1 at 1. Nor could he. The amount in controversy and citizenship requirements of 28 U.S.C. § 1332 are satisfied with respect to the Warner Defendants. *See* ECF 12; ECF 44; *see also* ECF 1-1 (Complaint) ¶¶ 1, 3, 5, 7 (listing places of incorporation and principal places of business for all of the named Warner Defendants); Dinerstein Decl.[3] If the Court grants the Motion to Sever there is no basis to remand the severed claims.

[3] As explained in the Amended Answers to Local Rule 26.01 Interrogatories, Warner Bros. Discovery, Inc. ("WBD"), Warner Media Entertainment Pages, Inc. ("Warner Media Entertainment") and Campfire Studios, Inc. ("Campfire Studios") are not properly named. ECF 44. HCM, LLC (which is wholly owned by Campfire Film & TV, LLC)—not Campfire Studios—created and produced the Campfire Documentary. WarnerMedia Direct, LLC—not WBD and/or Warner Media Entertainment—distributed the Campfire Documentary and owned its copyright.

II. IF THE COURT DOES NOT FIND FRAUDULENT JOINDER, IT SHOULD FIND PROCEDURAL MISJOINDER AND SEVER PLAINTIFF'S CLAIMS AS TO THE WARNER DEFENDANTS.

A. The Court Should Find That Plaintiff Improperly Joined Claims Against The Warner Defendants And Mr. DeWitt.

Procedural misjoinder exists where, as here, Plaintiff asserts claims against certain defendants that "have no real connection to the claims against other defendants in the same action and were only included in order to defeat diversity jurisdiction and removal." *Thomas v. Tramaine-Frost*, 2017 WL 9287004, at *2 (D.S.C. Jan. 12, 2017), *report and recommendation adopted*, 2017 WL 781071 (D.S.C. Feb. 28, 2017) (citation omitted). There is no dispute that Plaintiff sued Mr. DeWitt solely to defeat diversity jurisdiction and removal (ECF 41-1 at 8), leaving the operative question for this Court whether there is any "real connection" between Plaintiff's claims as to the non-diverse defendant (Mr. Dewitt), on the one hand, and the Warner Defendants, on the other.[4] For the reasons explained in the Motion to Sever, there is no such connection because Plaintiff's claims to relief as to the two sets of defendants do not arise out of the same transaction or occurrence, which leaves "no possibility" that Plaintiff would be able to "properly join the claims" if the case is remanded. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig.*, 2016 WL 7339811, at *6 (D.S.C. Oct. 24, 2016) (emphasis omitted) ("*In re Lipitor*"); ECF

Discovery Digital Ventures, LLC and Discovery Communications, LLC—not WBD and/or Warner Media Entertainment—distributed the Blackfin Documentary on discovery+ and the Investigation Discovery channel, respectively, with the latter owning the copyright. Plaintiff has chosen not to substitute parties, but discovery jurisdiction still would exist even if he did, as the principal places of business for these entities and their members are likewise diverse from Plaintiff. The Warner Defendants waive no rights relating to the improper identification of parties or Plaintiff's delay or refusal with respect to properly naming parties.

[4] While this filing primarily addresses the lack of "real connection" among the Warner Defendants and Mr. DeWitt as the non-diverse defendant, the basis for severance applies equally to the Netflix Documentary Defendants, as Mr. DeWitt's statements are included in the Netflix Documentary and there is no "real connection" or common "transaction or occurrence" as between Plaintiff's claims against the Warner Defendants versus against the Netflix Documentary Defendants.

14 at 10-14.[5] None of the arguments in Plaintiff's Opposition provides any basis for a different conclusion.

1. There is no substantive difference between the South Carolina and Federal joinder rules.

Plaintiff's primary argument is that Rule 20 of South Carolina's Rules of Civil Procedure ("SCRCP")—and not of the Federal Rules of Civil Procedure ("FRCP")—controls the question of procedural misjoinder and that a "dearth" of relevant state case law precludes this Court from applying either to the facts in this case. ECF 41-1 at 29-30, 30 n.8, 35. The Warner Defendants do not concede that there is a "dearth" of state case law about SCRCP 20, or federal cases interpreting it.[6] But if *arguendo* there were an absence of state cases interpreting SCRCP 20(a), it would not matter. When "few South Carolina decisions have interpreted" a state procedural rule, courts "look to federal cases construing their almost identical" ones. *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 585, 819 S.E.2d 142, 145 (Ct. App. 2018) (in context of Rule 21). Reliance on federal courts'

[5] While acknowledging that this Court "adopted" procedural misjoinder in *In re Lipitor*, Plaintiff nonetheless claims that the doctrine may not have "any validity" based on four cases (three from other districts) that all *predated In re Lipitor*. *See* ECF No. 41-1 at 28 n.6. Neither the Opposition nor the pre-*In re Lipitor* cases it cites provides any basis for the Court to reconsider its adoption of the procedural misjoinder doctrine, which other courts in this Circuit also have since applied. *Tramaine-Frost*, 2017 WL 9287004, at *3 (analyzing *In re Lipitor* and applying procedural misjoinder); *City of Huntington v. AmerisourceBergen Drug Corp.*, 2017 WL 3317300, at *3-5 (S.D.W. Va. 2017) (Fourth Circuit authority requires application of procedural misjoinder doctrine); *Cnty. Comm'n of McDowell Cnty. v. McKesson Corp.*, 263 F. Supp. 3d 639, 645-47 (S.D.W. Va. 2017) (same).

[6] *See, e.g.*, *Ellis by Ellis v. Oliver*, 307 S.C. 365, 367, 415 S.E.2d 400, 401 (1992); *Jones v. Rogers Townsend & Thomas, P.C.*, 2022 WL 2966387, at *3 (Ct. App. July 27, 2022); *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 585, 819 S.E.2d 142, 145 (Ct. App. 2018); *Valentine v. Davis*, 319 S.C. 169, 172, 460 S.E.2d 218, 220 (Ct. App. 1995); *Brown v. Solis*, 2017 WL 11139790, at *1 (S.C. C.P. Mar. 24, 2017); *Battersby v. Moorhead*, 2015 WL 13808277, at *3 (S.C. C.P. June 12, 2015); *Jackson v. Doe*, 2013 WL 10257157, at *1 (S.C. C.P. Nov. 01, 2013); *Palmetto Health Alliance v. South Carolina Elec. & Gas Co.*, 2012 WL 12089247, at *2 (S.C. C.P. June 28, 2012); *see also Tramaine-Frost*, 2017 WL 9287004, at *2-3; *Fraser Constr. Co., LLC v. Action Insulation Co.*, 2017 WL 11440831, at *6-7 (D.S.C. Aug. 8, 2017); *Pollock v. Goodwin*, 2008 WL 216381, at *2-3 (D.S.C. Jan. 23, 2008).

interpretation of SCRCP 20(a) is appropriate here because the state and federal rules are substantively identical:

SCRCP 20(a)	FRCP 20(a)
"All persons may join in one action as plaintiffs if they assert *any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action*."	"Persons may join in one action as plaintiffs if: (A) they assert *any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action*."

(emphases added); *Fraser*, 2017 WL 11440831, at *5 n.9 ("South Carolina and federal permissive joinder rules are nearly identical"); *accord* ECF 41-1 at 30 n.8 ("substantially similar").

Plaintiff does not point to any meaningful difference between the two rules on their face or in application. Nor does Plaintiff provide any reason why this Court should not or cannot look to cases interpreting SCRCP 20(a)'s nearly carbon copy federal counterpart, just as other courts in this district have done. *See, e.g.*, *Cramer v. Walley*, 2015 WL 3968155, at *4 (D.S.C. June 30, 2015) (finding misjoinder under Federal Rule 20); *see also Stephens v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.*, 807 F. Supp. 2d 375, 381 n.5; *Hughes v. Sears, Roebuck and Co.*, 2009 WL 2877424, at *4 (N.D. W. Va. Sept. 3, 2009); *McGann v. Mungo*, 287 S.C. 561, 569, 340 S.E.2d 154, 158 (Ct. App. 1986) (relying on Wright & Miller in interpreting South Carolina's Rule 20(a)). Plaintiff also does not cite any case law supporting his assertion that the Court must attempt to "predict" with "certainty how a South Carolina court would apply the current facts to Rule 20's directive." ECF 41-1 at 30 n.8. It is well within the authority of this Court to reach its own conclusion about whether the claims as to the Warner Defendants and Mr. DeWitt arise from "the same transaction, occurrence, or series of transactions or occurrences" as both SCRCP 20(a) and FRCP 20(a) require.

2. Plaintiff admits his claims against the Warner Defendants and Mr. DeWitt arise from different transactions, which is fatal to his attempt to join them.

The Opposition concedes that "Mr. Murdaugh has separate claims against each Defendant" and admits that those claims do not directly arise out of the same transactions. ECF 41-1 at 32-33. Instead, Plaintiff offers an *indirect* theory of the "same transaction or occurrence" standard:

> "Here, the claims against all Defendants arise out of the same series of transactions or occurrences leading to the defamatory acts. The series of occurrences includes the tragic death of Mr. Smith, the rumors that arose in Hampton County shortly after Mr. Smith's death, the crimes of Alex Murdaugh that renewed interest in the circumstances surrounding Mr. Smith's death, and the investigations which followed and ultimately culminated in all Defendants publishing and republishing statements implicating or asserting that Mr. Murdaugh murdered Mr. Smith or was involved in his death."

Id. and 29, 32-33. In other words, he claims a common "series of transactions or occurrences" (Mr. Smith's death and the events surrounding the Murdaugh family) led to separate transactions (the allegedly "defamatory acts"), which in turn gave rise to separate claims. *Id.* at 32-33 ("stems from the same series of events and rumors"). Under Plaintiff's theory of the law, "even if the exact same series of occurrences did not lead to each plaintiff's injuries," joinder is sufficient as long as there is "*some* overlap between the series of occurrences leading to" the injuries. *Id.* at 31 (emphasis in original) (citing *In re Lipitor*, 2016 WL 7339811, at *7).

Plaintiff's theory does not comport with SCRCP 20(a), which requires that all of a plaintiff's "claims must arise out of the same transaction or occurrence." *Ellis*, 307 S.C. at 367, 415 S.E.2d at 401. Plaintiff's indirect transaction theory requires accepting that the underlying Murdaugh events are the relevant "transactions" for purposes of joinder. But the transaction inquiry of SCRCP 20(a) and FRCP 20(a) does not focus on whether two sets of claims are "factually related"—it focuses on whether the same event (the "transaction") triggered *a legal right* to assert both sets of claims. 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1653 (3d ed. 2001) (the same transaction standard looks at

"logically related events entitling a person to institute a legal action against another" (cited at ECF No. 41-1 at 31)).[7] When a plaintiff's claims "are all based on the same series of Defendant's alleged acts and omissions," joinder is appropriate (*In re Lipitor*, 2016 WL 7339811, at *7), but joinder is not appropriate when the "sets of claims are ***legally distinct***, arising from separate transactions or series of transactions." *Pollock*, 2008 WL 216381, at *2 (emphasis added); *see Jackson*, 2013 WL 10257157, at *1 ("cause of action against Defendant John Doe is wholly independent from the causes of action asserted against" another defendant); *Battersby*, 2015 WL 13808277, at *3 (misjoinder where "[p]laintiff counsel admitted at the hearing that the causes of action against the defendants were separate"); *McCoy v. Bazzle*, 2008 WL 4280386, at *5 (D.S.C. Sept. 15, 2008) ("[M]ultiple claims against a single party are fine, but Claim A against Defendant 1 should not be joined with unrelated Claim B against Defendant 2." (citation omitted) (brackets in original)); *Roberson v. Padula*, 2007 WL 4351423, at *7 (D.S.C. Dec. 12, 2007) ("Here, the movant's claims, although factually related, are substantially different from the plaintiff's claims."); *Gregory v. FedEx Ground Package Sys., Inc.*, 2012 WL 2396873, at *11 (E.D. Va. May 9, 2012) ("courts are reluctant to find reasonable relatedness where plaintiffs allege similar harms committed by different actors, at different times, and in different places").[8]

Here, Plaintiff's right to seek relief in connection with the Warner Defendants arises from their allegedly "defamatory acts"—the "publishing and republishing" of statements in the Warner

[7] Plaintiff cites this treatise but ignores this part of its reasoning.

[8] *Brown*, 2017 WL 11139790, at *1 (SCRCP 20 "allows permissive joinder of ***claims*** which arise out of the same transaction or occurrence") (emphasis added); *Ellis*, 307 S.C. at 367, 415 S.E.2d at 401 ("***claims*** must arise out of the same transaction or occurrence") (emphasis added); *accord Valentine*, 319 S.C. at 172, 460 S.E.2d at 220 (procedural misjoinder under SCRCP 20(a) when various plaintiffs attempted to allege "different personal claims" against a single defendant); *Tramaine-Frost*, 2017 WL 9287004, at *3 ("this court, applying South Carolina law, has held that claims against an insurer are 'wholly distinct in character from' negligence claims against an alleged tortfeasor" (quoting *Pollock*, 2008 WL 216381, at *3)).

Documentaries—not the events surrounding the Murdaugh family. Plaintiff would have no right to relief against the Warner Defendants if the Warner Documentaries were never published, *even if* the underlying Murdaugh-related controversies still had occurred. On the other hand, Plaintiff's claims against Mr. DeWitt arise from an entirely different transaction: the publication of Mr. DeWitt's alleged defamatory statements in the Netflix Documentary. Plaintiff's entitlement to institute a legal proceeding regarding the Warner Documentaries arose from an entirely different "transaction" than the one that entitled him regarding the Netflix Documentary. Plaintiff's indirect transaction theory fails because it admits that the alleged misconduct that entitled him to institute litigation against the Warner Defendants is legally distinct from the alleged misconduct from which the claim against Mr. DeWitt arose.

Plaintiff criticizes as too "narrow" the Warner Defendants' interpretation that the law requires that joined claims must "stem from related purported misconduct." ECF 41-1 at 30. Plaintiff claims this Court's opinion in *In re Lipitor* supports his indirect transaction theory that joinder is permitted as long as there is "*some* overlap between the series of occurrences leading to" Plaintiff's injuries. *Id.* at 31 (emphasis in original). *In re Lipitor* considered whether, under Illinois joinder law, multiple plaintiffs could file one suit against the same pharmaceutical company based on allegations that its drug, Lipitor, caused each of them to develop diabetes. *In re Lipitor*, 2016 WL 7339811, at *1, *7. This Court found joinder appropriate because, as referenced above, "while Plaintiffs' prescription, purchase and ingestion of Lipitor are separate transactions, Plaintiffs' ***claims are all based on the same series of Defendant's alleged acts and omissions.***" *Id.* at *7 (emphasis added). In contrast, Plaintiff's claims as to the Warner Defendants on the one hand, and Mr. DeWitt on the other are *not* "based on the same series" of alleged wrongful conduct—they are based on entirely different alleged defamatory acts by entirely different

defendants.[9] The "independent nature of these separate transactions is not enough to inextricably intertwine" Plaintiff's claims against the Warner Defendants and against Mr. DeWitt (and the Netflix Documentary Defendants), and the Court need not engage in any further analysis to find the claims against them are misjoined. *Sanders v. Domingo*, 2022 WL 110243, at *3 (D.S.C. Jan. 11, 2022).

3. Plaintiff's attempt to modify the joinder standard is inconsistent with and unsupported by law.

Unable to argue that all of his claims arise from the same transaction, Plaintiff attempts to turn SCRCP 20(a) and FRCP 20(a) into disjunctive tests whereby the transaction requirement is obviated if the "common questions of law and fact" are of "sufficient importance." ECF 41-1 at 29-30, 33. Plaintiff claims: "the most relevant guidance offered by any South Carolina authority interpreting Rule 20 has only stated that permissive joinder is proper when there are common questions of law and fact of sufficient importance in proportion to the remainder of the action to justify joinder." ECF 41-1 at 29-30, 33 (citing *McGann*, 287 S.C. at 569). *McGann* offered no such guidance. That case dealt with a class of homeowners suing about a particular development project, and the court's decision addressed whether the group of plaintiffs could maintain suit notwithstanding that the amount of "damages sought by the plaintiffs differ[ed]." *McGann*, 287 S.C. at 566, 340 S.E.2d at 157. The case did not relate to, and the decision did not discuss, the

[9] All of the other related authority cited in the Opposition reflects a similar focus on the nature of the legal claims, rather than any underlying factual overlap. *See Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 325 (4th Cir. 2021) (affirming joinder of two Virginia courts in a lawsuit alleging that the wrongful conduct, "delays in access" to court transcripts, "occurred for similar reasons"); *Sanders*, 2022 WL 110243, at *3 (rejecting joinder of claims related to a car accident because the "tort claims arise out of the personal injury and property damage to Plaintiff's car due to the accident" while the "transaction at issue" in the claim against the insurance company "revolves around" a separately negotiated insurance policy such that "the independent nature of these separate transactions is not enough to inextricably intertwine" the two); *Fraser*, 2017 WL 11440831, at *6 (joinder where alleged wrongful conduct, "defective installation of the insulation," was a "central issue in both of the defendants' potential liabilities to plaintiffs").

same transaction prong, let alone hold that common issues moot the transaction requirement if they are "significant" enough. Nor would such a theory comport with the plain language of SCRCP 20(a) and FRCP 20(a), both of which articulate the same "two-part" test for joinder: (1) a right to relief "arising out of the same transaction, occurrence, or series of transactions or occurrences" ***and*** (2) a "question of law or fact common to all plaintiffs." *See Myers v. AT & T Corp.*, 2013 WL 4823282, at *3 (D.S.C. Sept. 9, 2013) (Gergel, J.) ("Rule 20 of Federal Rules of Civil Procedure sets forth a two-part requirement for effectuating the proper joinder of parties . . ."); *Palmetto Health Alliance*, 2012 WL 12089247, at *2 ("both elements" of Rule 20's two-part test "must be met"); *see Battersby*, 2015 WL 13808277, at *3 ("cases make it clear that misjoinder of parties arises when they fail to satisfy any of the conditions of permissive joinder under Rule 20(a)" (citation omitted)). Plaintiff's approach would turn the same transaction prong into a nullity.

Plaintiff's "significance importance" test also is directly contrary to law. Courts in this Circuit have repeatedly held that factual overlap alone is insufficient because, as discussed above, the transaction inquiry requires that all *legal claims* arise out of the same transaction, not mere factual commonalities. *See supra* Argument § II(A)(2); *accord Saval v. BL Ltd.*, 710 F.2d 1027, 1031 (4th Cir. 1983) (affirming misjoinder despite allegation of "similar problems" with the same type of car); *Palmetto Health Alliance*, 2012 WL 12089247, at *2 (misjoinder where applying applicable legal standards will "require a wholly separate analysis"); *Sanders*, 2022 WL 11024, at *3 (severing despite the fact that an "underlying car accident provided the basis" for all of plaintiff's claims); *Clements v. Austin*, 617 F. Supp. 3d, 373, 375, 377 (D.S.C. 2022) (granting severance despite the fact that claims all arose in relation to same "mandatory vaccination policy"); *Black v. Safeco Ins. Co. of Am.*, 2019 WL 4565047, at *3 (D.S.C. Sept. 20, 2019) ("the one common storm" giving rise to claims against two sets of defendants did not establish the "same

transaction or occurrence" requirement); *Tramaine-Frost*, 2017 WL 9287004, at *2 ("this court, applying South Carolina law, has held that claims against an insurer are 'wholly distinct in character from' negligence claims against an alleged tortfeasor, and that the vehicle accident is not a part of the 'transaction' giving rise to the claim against the insurance carrier"); *Forrest v. Charles River Lab'ys*, 2019 WL 13259407, at *2 (D.S.C. Mar. 11, 2019) ("under Rule 20, if the claims arise out of different transactions and do not involve all defendants, joinder should not be allowed") (citation omitted); *Cramer*, 2015 WL 3968155, at *4-5 (severing on basis of no transaction or occurrence alone); *see also* Motion to Sever at 11-12 (citing cases).

Presumably in an attempt to meet his novel "sufficient importance" standard, Plaintiff devotes multiple paragraphs of his Opposition explaining the "numerous questions of law and fact that are common to the claims" against the Warner and Netflix Documentary Defendants. ECF 41-1 at 33-34. Leaving aside that common questions alone are insufficient to permit joinder, Plaintiff's purported common questions of fact and law—whether the statements in each of the documentaries implied Plaintiff murdered Mr. Smith, or were false or privileged (*id.*)—are neither common nor the most "significant" issues in proportion to all of the issues in the cases. Each "act of defamation is a separate tort" as a matter of law that requires individualized, statement-by-statement and contextual analysis, including to determine whether a reasonable person would find the specific statements to be defamatory, false, or privileged as a matter of law. *Hughs v. Royal Energy Res., Inc.*, 2020 WL 6689132, at *3 (D.S.C. Nov. 12, 2020); *Wise v. INVISTA S.Á.R.L.*, 2017 WL 9275298, at *3 (D.S.C. Aug. 31, 2017), *report and recommendation adopted*, 2018 WL 525475 (D.S.C. Jan. 23, 2018) (acknowledging the role of context in adjudicating defamation claims). The answer to those questions will not depend on Plaintiff's own characterization of the alleged defamation, but rather on an individual analysis of *specific statements in each of the separate*

documentaries and in the context of each of the separate documentaries. The importance of these questions is equal to, or lesser than, the other factual and legal questions at issue, especially the state of mind of each of the defendants. *Clements*, 617 F. Supp. 3d at 376 (no joinder of claims regarding the same mandatory vaccination policy because it "would, by necessity, require separate mini-trials, each addressing in detail the highly individualized nature of the decision making").

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Under Plaintiff's theory of the law, a plaintiff could file a single lawsuit against a limitless number of defendants who published content about his family notwithstanding the lack of sufficient connection among legal claims. That is not the law, and Plaintiff does not offer any legal authority supportive of such an expansive reading of the rules of joinder. Nor could he. The rules are not intended to permit a plaintiff to join together disparate claims that stand on their own. *See* Motion to Sever at 19-20; *Saval*, 710 F.2d at 1032 (judicial economy not served, and thus joinder improper where "it is apparent that each appellant's claim stands on its own"); *Roberson*, 2007 WL 4351423, at *7 ("The court has discretion to deny joinder if it determines that the addition of the party under Rule 20 will not foster the objectives of the rule, but will result in prejudice, expense, or delay." (citation omitted)); *Palmetto Health Alliance*, 2012 WL 12089247, at *2 (denying joinder where the claims will "require a wholly separate analysis, yet provide fertile ground for potential jury confusion should these claims arising fro[m] disparate transactions be allowed to proceed in the same case"). The Court should exercise its broad discretion and find the Warner and Netflix Documentary Defendants improperly joined. *See Tramaine-Frost*, 2017 WL 9287004, at *3; *see also Todd v. Cary's Lake Homeowners Ass'n*, 315 F.R.D. 453, 456 (D.S.C. 2016) (broad discretion); *Cramer*, 2015 WL 3968155, at *5 ("virtually unfettered discretion"); *Jones*, 2022 WL 2966387, at *3 (affirming dismissal for misjoinder).

B. This Court Should Exercise Its Discretion Under Rule 21 And Sever Claims As To The Warner Defendants.

Plaintiff does not challenge, and therefore concedes,[10] that severance is warranted if the Court applies Rule 21 and its factors. *Compare* Motion to Sever at 16-20, *with* ECF 41-1 at 28 n.7.[11] Rather than engage with any of the factors, Plaintiff addresses Rule 21 in a single footnote that seems to argue that the Rule is inapplicable in the removal context. ECF 41-1 at 28 n.7. Plaintiff cites no in-circuit law for that proposition, nor does he address the cases from other courts in this district remarking on a trial court's "virtually unfettered discretion in determining whether or not severance is appropriate" and "whether to drop parties from a case to establish diversity between the remaining parties." *Cramer*, 2015 WL 3968155, at *4-6; *Todd*, 315 F.R.D. at 456; *see Sanders*, 2022 WL 110243, at *2; *see also Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988) (discussing case law addressing the severance and remand of a claim against a non-diverse party); Motion to Sever at 8-9, 11-12 (citing cases).[12] This Court would be

[10] *See Schulman v. Axis Surplus Ins. Co.*, 90 F.4th 236, 245 n.5 (4th Cir. 2024) (waived argument); *Grayson Co. v. Agadir Int'l, LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue." (cleaned up)); *Hensley ex rel. North Carolina v. Price*, 876 F.3d 573, 580 n.5 (4th Cir. 2017) ("it is not our job to wade through the record and make arguments for either party" (citation omitted)); *Parkins ex rel. Turner v. South Carolina*, 2022 WL 3644052, at *6 n.7 (D.S.C. Aug. 24, 2022) ("Plaintiffs did not address this argument in their response. As a result, Plaintiffs have conceded this point."); *Cooper v. Kijakazi*, 2022 WL 632949, at *3 (D.S.C. Mar. 4, 2022) (waiver where "Plaintiff's conclusory and undeveloped sentence is without any legal or factual support or argument.").

[11] Any one of the four factors is sufficient to warrant severance: "(1) whether the issues sought to be severed are significantly different from one another; (2) whether the issues require different witnesses and evidence; (3) whether the party opposing severance will be prejudiced; and (4) whether the party requesting severance will be prejudiced if the claims are not severed." Motion to Sever at 16; *see Grayson Consulting, Inc. v. Cathcart*, 2014 WL 1512029, at *2 (D.S.C. Apr. 8, 2014) (severing claims based on last factor alone).

[12] Plaintiff ignores in-circuit cases applying Rule 21 in the removal context and relies instead only on two cases from the Southern District of New York. ECF 41-1 at 28 n.7 (citing *Alvarado v. Sweetgreen, Inc.*, 2024 WL 182761, at *11 n.5 (S.D.N.Y. Jan. 17, 2024) and *Kips Bay Endoscopy Ctr., PLLC v. Travelers Indem.Co.*, 2015 WL 4508739, at *4 (S.D.N.Y. July 24, 2015)). Neither

well within its discretion to exercise the explicit authority Rule 21 provides and sever Plaintiff's claims against the Warner Defendants. *Accord Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989) ("it is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time").

None of the arguments Plaintiff attempts to make, without a single in-circuit citation, changes that result. ECF 41-1 at 28 n.7. The Warner Defendants agree with Plaintiff that Rule 21's "factors are irrelevant to the doctrine of fraudulent misjoinder and whether it is impossible for Mr. Murdaugh to have joined Defendants under Rule 20," *id.*, but that does not render Rule 21 "irrelevant." Rule 21 on its face provides severance as the appropriate remedy for procedural misjoinder, which is met for the reasons discussed above. Motion to Sever at 16-20. Plaintiff also argues that Rule 21 "should be wholly disregarded by the Court" because Rule 21 is "not South Carolina procedural law" and its "factors were not cited by the Court in its analysis" in *In re Lipitor*. *See* ECF 41-1 at 28 n.7. The first argument fails for the same reasons it did as to FRCP 20. *See supra* Argument § II(A)(1); *compare* FRCP 21, *with* SCRCP 21; *see also Battersby*, 2015 WL 13808277, at *3 ("As with Rule 20, the Notes to South Carolina Rule 21 indicate [that] . . .' Rule 21 is the same as the Federal Rule.'"). Regarding *In re Lipitor*, the absence of a Rule 21 analysis does not undermine this Court's authority to grant severance under Rule 21 here, just as it has on many other occasions. *See Buffalo Seafood House LLC v. Republic Servs., Inc.*, 2024 WL

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of those cases interprets Fourth Circuit law nor do they hold that a district court lacks authority to sever under Rule 21 in the removal context. *Kips* recognizes "broad discretion under Rule 21" even though courts in the Second Circuit have chosen not to exercise that discretion when "compelling" reasons "counsel against" its application. 2015 WL 4508739, at *4. The dicta in a footnote that Plaintiff cites from *Alvarado* rejected asserting fraudulent misjoinder altogether. 2024 WL 182761, at *11 n.5. As discussed above, Plaintiff has not provided any reason why this Court should overrule its own decisions adopting procedural misjoinder (*supra* note 5) or the decisions of other courts in this district applying Rule 21 in removal cases.

4608308, at *7-8 (D.S.C. Oct. 28, 2024) (severance based on the four Rule 21 factors); *Cody v. State Farm Fire & Cas. Co.*, 2024 WL 4403862, at *3 (D.S.C. Oct. 4, 2024) (Gergel, J.) (severance would "serve judicial economy and the interests of justice" since each claim would "require different documentary proof," despite "some overlap regarding the factual and legal issues in each case"); *accord Clements*, 617 F. Supp. 3d at 376; *Myers*, 2013 WL 4823282, at *6.[13] *In re Lipitor* nonetheless is helpful because in that opinion this Court explained that it would be "problematic" to require a defendant to seek severance in the state proceeding rather than in the removing federal court. *In re Lipitor*, 2016 WL 7339811, at *3 n.4. None of the arguments Plaintiff makes supports ignoring Rule 21, and the Court can grant the Motion to Sever without analyzing the applicable factors because Plaintiff concedes they warrant severance if Rule 21 applies. *See* Motion to Sever at 16-20.

III. THERE IS NO BASIS TO AWARD PLAINTIFF COSTS AND FEES.

Even if the Court remands and declines to sever, Plaintiff is not entitled to recover attorney's fees and costs. Plaintiff is correct that the United States Supreme Court has held that "absent unusual circumstances, attorney's fees should not be awarded when the removing party has an objectively reasonable basis for removal." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 136 (2005).[14] Plaintiff does not and cannot argue that the Warner Defendants' arguments in favor of removal and severance are not "objectively reasonable" under the standard. *See In re Lipitor*,

[13] The parties in *In re Lipitor* do not appear to have made a Rule 21 argument or addressed its factors, and, generally, "a federal court has no duty to consider arguments or issues that the parties did not address." *See Adams v. U.S. Dep't of Lab.*, 360 F. Supp. 3d 320, 341 (D.S.C. Dec. 18, 2018); Mot. for Summ. J., *In re Lipitor*, ECF 1564; Resp. Mot. for Summ. J., *In re Lipitor*, ECF 1670; Tr. of Mot. Hr'g, *In re Lipitor*, ECF 1727.

[14] Plaintiff does not cite a single case in which a court awarded attorney's fees, and the majority pre-date *Martin*. *See In re Lowe*, 102 F.3d 731, 733 n.2 (4th Cir. 1996) (no fees absent "evidence of bad faith"); *Clipper Air Cargo, Inc. v. Aviation Prod. Int'l, Inc.*, 981 F. Supp. 956, 960 (D.S.C. Nov. 3, 1997) (attempted removal "does not warrant an award of attorney's fees").

2016 WL 7368203, at *5 (remanding but declining to award attorney's fees because there was "an objectively reasonable basis for seeking removal"); *City of Charleston v. Brabham Oil Co., Inc.*, 2023 WL 11867279, at *7 (Gergel, J.) (D.S.C. July 5, 2023) (declining to award attorney's fees); *Maybank v. BB & T Corp.*, 2013 WL 4499227, at *4 (D.S.C. Aug. 20, 2013) (denying attorney's fees upon remand as "Defendants' arguments, though not ultimately persuasive on the issue of fraudulent joinder, were supported by reasonably analogous case law and a reasonable reading of the relevant statutes" and "Defendants' position relied on established South Carolina legal authority").

CONCLUSION

For the foregoing reasons, if this Court rejects the Defendants' fraudulent joinder arguments in relation to Plaintiff's motion to remand, *see* ECF 1, 12, 58, the Warner Defendants respectfully request in the alternative that the Court sever the claims alleged against them from the claims alleged against the Netflix Documentary Defendants and retain the claims against the Warner Defendants pursuant to 28 U.S.C. § 1332(a). Further, this Court should decline to award Plaintiff costs and attorney's fees.

Respectfully submitted,

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Charleston, South Carolina
November 15, 2024

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

Richard Alexander Murdaugh, Jr., Plaintiff, vs. Blackfin, Inc., Warner Bros. Discovery, Inc., Warner Media Entertainment Pages, Inc., Campfire Studios Inc., The Cinemart LLC, Netflix, Inc., Gannett Co., and Michael M. Dewitt, Jr., Defendants.	Civil Action No. 9:24-cv-04914-RMG

DECLARATION OF ROSS M. DINERSTEIN

I, Ross M. Dinerstein, declare, subject to the penalties of perjury pursuant to 28 U.S.C. § 1746, as follows:

1. I am the founder and CEO of Campfire Film & TV, LLC, which is the sole member of HCM, LLC. I submit this declaration in support of the Warner Defendants' Opposition to Plaintiff's Motion to Remand and the Warner Defendants' Reply in Further Support of Alternative Motion to Sever based upon my personal knowledge.

2. HCM, LLC, is a limited liability company organized under the laws of California. The sole member of HCM, LLC, is Campfire Film & TV, LLC, a limited liability company organized under the laws of California. The two members of Campfire Film & TV, LLC, are: (1) myself, domiciled in California; and (2) Wheelhouse Entertainment LLC, a limited liability company organized under the laws of Delaware. The sole member of Wheelhouse Entertainment LLC is Brent Montgomery, domiciled in Connecticut.

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3. The information set forth above was accurate at the time of the filing of Plaintiff's Complaint in the above-captioned action.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 13th November, 2024.

DocuSigned by:
Ross Dinerstein
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Ross M. Dinerstein