IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERDINAND BENJAMIN, Individually and as the Personal Representative of the **ESTATE OF ENOCK BENJAMIN**, deceased, *Plaintiff*,	:	**CIVIL ACTION**
v.	:	
	:	**No. 2:20-cv-2594-JP**
JBS S.A., **JBS USA FOOD COMPANY**, **JBS USA HOLDINGS, INC.**, **JBS SOUDERTON, INC.**, and **PILGRIM'S PRIDE CORPORATION**, *Defendants*.	:	

ORDER

AND NOW, this _____ day of _____, 2020, upon consideration of Plaintiff's Motion to Remand (Docket No. 16) and all documents filed in connection therewith, **IT IS HEREBY ORDERED** as follows:

1. Plaintiff's Motion to Remand is **GRANTED** with prejudice.

2. This matter is **REMANDED** to the Court of Common Pleas of Philadelphia County.

3. The Clerk of the Court shall **CLOSE** this matter.

BY THE COURT:

_____
John R. Padova, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERDINAND BENJAMIN, Individually and as the Personal Representative of the **ESTATE OF ENOCK BENJAMIN**, deceased,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
	:	**No. 2:20-cv-2594-JP**
JBS S.A.,	:	
JBS USA FOOD COMPANY,	:	
JBS USA HOLDINGS, INC.,	:	
JBS SOUDERTON, INC., and	:	
PILGRIM'S PRIDE CORPORATION,	:	
Defendants.	:	

PLAINTIFF'S MOTION TO REMAND

Plaintiff, Ferdinand Benjamin, individually and as the Personal Representative of the Estate of Enock Benjamin, hereby moves to remand this civil action to the Common Pleas Court of Philadelphia County with prejudice. In support of this motion, Plaintiff relies upon the accompanying Memorandum of Law, which is hereby incorporated herein in by reference.

Pursuant to 28 U.S.C. § 1447(c), and for the reasons set forth in the brief in support filed contemporaneously herewith, Plaintiff respectfully requests this Honorable Court rejects the Notice of Removal filed by defendant, JBS USA Food Company (*see* Doc. No. 1). Defendant, JBS USA Food Company, cannot satisfy its' burden to prove that the Court maintains jurisdiction over this civil action pursuant to: (a) diversity jurisdiction (28 U.S.C. § 1332); (b) fraudulent joinder; nor (c) federal question jurisdiction (28 U.S.C. § 1331).

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant this Motion and enter an Order in the form accompanying this Motion to remand this matter to Philadelphia County.

Respectfully submitted,

BY: ***/s/ rjm9362***

ROBERT J. MONGELUZZI; ID No. 36283
STEVEN G. WIGRIZER, ID No. 30369
JEFFREY P. GOODMAN; ID No. 309433
JASON S. WEISS; ID No. 310446

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Attorneys for Plaintiff, Ferdinand Benjamin, individually and as the Personal Representative of The Estate of Enock Benjamin, deceased

dated: June 29, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERDINAND BENJAMIN, Individually and as the Personal Representative of the **ESTATE OF ENOCK BENJAMIN**, deceased,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
	:	**No. 2:20-cv-2594-JP**
JBS S.A.,	:	
JBS USA FOOD COMPANY,	:	
JBS USA HOLDINGS, INC.,	:	
JBS SOUDERTON, INC., and	:	
PILGRIM'S PRIDE CORPORATION,	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND

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I. INTRODUCTION

In their desperation to avoid the Philadelphia County Court of Common Pleas, where this matter is properly venued, defendant has filed a meritless Notice of Removal, in which defendants ask this Court to resolve factual disputes that they created in their favor. As discussed below, this is not permitted based upon the law or the facts of this case.

On April 3, 2020, Enock Benjamin died of respiratory failure caused by COVID-19. Mr. Benjamin contracted the virus while working in shockingly unsafe conditions at the JBS beef production plant located in Souderton, PA.

On May 7, 2020, the Estate of Enock Benjamin filed a wrongful death and survival action in Philadelphia County against JBS S.A., JBS USA Holdings, Inc., JBS USA Food Company, JBS Souderton, Inc., and Pilgrim's Pride Corporation (hereinafter collectively as the "JBS Defendants" or "JBS").

On June 2, 2020, JBS USA Food Company filed a Notice of Removal which claimed diversity jurisdiction because Plaintiff improperly named defendants. JBS asserted that Plaintiff had fraudulently joined JBS Souderton, Inc., a Pennsylvania resident, because the JBS Defendants allege that entity was Mr. Benjamin's employer. In addition, JBS repeatedly chastised Plaintiff for naming JBS USA Holdings, Inc., an entity that the JBS Defendants allege ceased to exist in 2015.

On June 15, 2020, Plaintiff received a letter that stripped JBS of any semblance of credibility. Specifically, Plaintiff received a denial of Workers' Compensation Benefits from Mr. Benjamin's employer: *JBS USA Holdings, Inc.*:

EMPLOYER

Name JBS USA Holdings, Inc.

Address 249 ALLENTOWN RD

Address

City/Town SOUDERTON State PA ZIP 18964

County

Telephone 9705066887 FEIN 201413756

(See *Denial of Workers' Compensation Benefits for Enock Benjamin*, attached hereto as "Ex. A.")

Thus, this document demonstrates that both of defendants' arguments are wrong. First, JBS Souderton, Inc. is not Plaintiff's employer, it is actually JBS USA Holdings, Inc. This is reflected in sample denial letters obtained by Plaintiff's counsel. (See *Sample Workers' Compensation Documents for Souderton Employees Listing JBS USA Holdings, Inc. as the Employer*, attached hereto as "Ex. B; Ex. C; Ex. D.")

Second, as the above makes clear, JBS USA Holdings, Inc. did not cease to exist in 2015. At a minimum, factual disputes exist on both of these points which entitles Plaintiff to discovery and render defendants claim of "fraudulent joinder" utterly inappropriate. The only way for JBS to establish diversity jurisdiction was to claim that JBS Souderton, Inc. was an improper defendant. Now, JBS's own governmental filing makes that *impossible*. Instead, the vast majority of JBS's diversity jurisdiction and fraudulent joinder arguments are rendered entirely without merit.[1]

[1] It should be pointed out that JBS filed a second denial of Workers' Compensation Benefits for Enock Benjamin that listed JBS Souderton, Inc. as the employer on June 19, 2020. It is unclear why the second denial letter which listed JBS Souderton, Inc. was filed. This was clearly a break from the pattern and practice of JBS to list JBS USA Holdings, Inc. as the employer of workers at the Souderton facility. (Ex. B; Ex. C.; Ex. D.) It is also clear that there is a genuine issue of material fact as to who Mr. Benjamin's employer was. It is also possible that JBS *knew* that properly listing JBS USA Holdings, Inc. on Mr. Benjamin's denial, as they had for other Souderton workers previously, would completely undermine their Notice of Removal in this case. (Ex. A; Ex. B; Ex. C; Ex. D.)

What remains of JBS' arguments related to diversity jurisdiction are now toothless. The legal standard for a Motion for Remand does not even permit this Court to reach the substantive decisions necessary to support JBS' position on Plaintiff's intentional tort claims. Moreover, JBS fails to even acknowledge a major theme of Plaintiff's comprehensive and detailed pleading, which is that the JBS Defendants placed profits over safety in a manner that demonstrated a reckless disregard for the rights and safety of others, including Enock Benjamin. .

JBS's federal question argument is also specious and desperate. Mr. Benjamin died on April 3, 2020. President Trump's "Food Chain Supply Order" did not occur until April 28, 2020 and – to the extent it can be considered more than a proclamation – ***contains no mention whatsoever of retroactivity***. Accordingly, there is entirely no merit to arguing that such an Order gives this Court federal question jurisdiction over the events which led to Mr. Benjamin's death.

For these reasons, and all the reasons that follow, JBS has fallen woefully short of proving its burden that this Court maintains diversity jurisdiction, federal question jurisdiction, or that the doctrine of fraudulent joiner applies to this action. To the contrary, this Court should remand this matter to Philadelphia County where jurisdiction is proper.

II. QUESTIONS PRESENTED

1. Whether this matter should be remanded when JBS failed to establish the existence of existence of diversity jurisdiction?

   Suggested Answer: YES.

2. Whether this matter should be remanded when there is no fraudulent joinder of JBS Souderton, Inc.?

   Suggested Answer: YES.

3. Whether this matter should be remanded when JBS failed to establish the existence of federal question jurisdiction?

   Suggested Answer: YES.

III. STATEMENT OF RELEVANT FACTS

At all relevant times prior to his death, Enock Benjamin was a resident of Philadelphia, Pennsylvania. (See *Plaintiff's Complaint*, attached hereto as "Ex. E" at ¶ 113.) Mr. Benjamin worked as a union steward at the JBS beef production plant in Souderton, PA. (Ex. E at ¶ 3.) JBS, a multinational corporation, is the world's largest meat processor. (Ex. E at ¶ 41.) The Souderton, PA location has approximately 1,400 employees. (Ex. E at ¶ 49.)

On January 21, 2020, the United States reported its first case of the novel coronavirus. (Ex. E at ¶ 18.) Nine days later, the United States reported its first case of COVID-19 acquired via "community spread" which means "that people have been infected with the virus in an area, including some who are not sure how or where they became infected." (Ex. E at ¶¶ 20-21.)

On January 31, 2020, the World Health Organization declared COVID-19 a "public health emergency of international concern." (Ex. E at ¶ 22.)

On March 9, 2020, OSHA and the CDC published federal guidance for workplace safety during the pandemic which, as is *commonly known*, recommended distancing of workers at least six (6) feet and the use of Personal Protective Equipment ("PPE") for workers. (Ex. E at ¶¶ 23-25; 58.) By this time, the virus was already present at the Souderton plant. (Ex. E at ¶ 57.)

However, throughout the entire month of March, the JBS Defendants failed to enforce safe distancing or provide PPE to workers at the beef production plant located in Souderton, PA. (Ex. E at ¶¶ 26-27.) Beef production plants are "notoriously dangerous" work environments that present unique safety issues because of the proximity within which employees work ("elbow-to-elbow") using cutting tools in a challenging environment. (Ex. E at ¶¶ 28-29.)

Instead of making the safety of their workers paramount, the culture at the Souderton plant resulted in workers coming to work sick in March of 2020 for fear of losing their job if they missed multiple days of work. (Ex. E at ¶ 56.) Instead of acknowledging the danger posed

by COVID-19 to the workers in the Souderton plant, the JBS Defendants informed the workers that individuals were out with the flu – not the pandemic. (Ex. E at ¶ 61.) In fact, despite learning of the first positive test at the facility in early March 2020, the JBS Defendants failed to change its policies and procedures that month. (Ex. E at ¶ 62.)

To the contrary, due to increased business demands in March 2020, a "Saturday Kill" was added at the Souderton plan to meet increased business opportunity. (Ex. E at ¶ 63.) JBS has a "work while sick" policy and did not even require workers experiencing COVID-19 symptoms to report their illness to their superiors. (Ex. E at ¶¶ 79-80.) Workers at the Souderton plant were outspoken about the lack of safety equipment provided, complained about the lack of masks, and were worried about bringing COVID-19 home to their families. (Ex. E at ¶¶ 73-75.) By the end of March 2020, panic was setting in with the workers of the Souderton plant:

> 67. One union steward described publicly described the conditions in the plant prior to the shut down as follows:
>
> ***"Before this closure, people had started to panic. Social distancing was limited. Employees didn't cover their mouths. In meatpacking plants, workers are piled up on top of one another, often touching because there are so many of us. Many decided to stay at home on leave because they were afraid of becoming infected or of spreading the coronavirus to their families."***

(Ex. E at ¶ 67.)

On March 27, 2020, Enock Benjamin left the Souderton plant after experiencing COVID-19 symptoms. (Ex. E at ¶ 93.) As of this date, workers at the Souderton plant were still ***required*** to work within 6 feet of one another, workers were not provided PPE materials, and workers were not required to wear masks. (Ex. E at ¶¶ 89-91.) By this date a number of Mr. Benjamin's co-workers had already become infected. (Ex. E at ¶ 92.)

On March 30, 2020, JBS USA stated publicly that it was "temporarily" reducing production at the Souderton plant after several senior management team members displayed flu-

like symptoms: "The JBS Souderton, Pa., beef production facility has temporarily reduced production because several senior management team members have displayed flu-like symptoms." (Ex. E at ¶ 70.)

By April 2, 2020, there were *at least* nineteen (19) workers that were confirmed to test positively at the Souderton plant. (Ex. E at ¶ 76.) Based upon JBS USA's public statements, this represented a 400% of positive test results increase in only two (2) days following the plant's shutdown. (Ex. E at ¶ 71.) The true numbers of workers at Souderton that were infected with COVID-19 is unknown because JBS – to this day – (a) does not test workers; and (b) does not publicly release statistics of positive tests. (Ex. E at ¶¶ 104-110.)

On April 3, 2020, Enock Benjamin died of respiratory failure caused by the pandemic virus, COVID-19. (Ex. E at ¶ 2; see also *Death Certificate*, attached hereto as "Ex. H.") Mr. Benjamin's death was predictable and preventable, but instead the JBS Defendants' actions demonstrated a knowing and intentional mindset to sacrifice the health of Mr. Benjamin and other for its' own corporate greed. (Ex. E at ¶ 103.)

On May 7, 2020, this wrongful death and survival action was initiated in the Common Pleas Court of Philadelphia County. (Ex. E.) Plaintiff sued several entities in JBS' corporate hierarchy involved in the operation of the Souderton Plant, including: JBS S.A., JBS USA Food Company, JBS USA Holdings, Inc., Pilgrim Pride Corporation, and JBS Souderton, Inc. (Ex. E at ¶¶ 114-141; 148-153.) JBS *admits* that JBS Souderton, Inc. is a Pennsylvania Corporation with its principal place of business in Pennsylvania. (Docket No. 1 at ¶ 33.)

The Complaint contains one hundred and ninety-five (195) paragraphs over thirty-two (32) pages which provide clear notice of the claims against the JBS Defendants. (Ex. E.) The very first paragraph of the Complaint makes two points very clear: (1) Plaintiff alleges that JBS'

tortious conduct is beyond ordinary negligence; and (2) that Plaintiff is asserting that JBS placed profits over safety:

COMPLAINT – CIVIL ACTION

Introduction

1. This wrongful death and survival action concerns the negligent, reckless, and outrageous conduct of JBS, the largest beef processing company in the world, because it elected to pursue profits over safety during a global pandemic.

(Ex. E at ¶ 1.)

Specifically, Plaintiff's wrongful death and survival action asserts causes of action sounding in intentional torts and negligence against the JBS Defendants. (Ex. E at ¶¶ 147-156; 157-167; 168-186.) However, any attorney can review the "Introduction" and comprehend the basis for Plaintiff's claims:

6. Enock Benjamin's death was the predictable and preventable result of the JBS Defendants' decisions to ignore worker safety.

7. The JBS Defendants ignored federal guidance and put plant workers in the crosshairs of a global pandemic.

8. Despite the known risks regarding COVID-19, prior to shutting down the plant on March 30, 2020, the JBS Defendants: (1) failed to provide sufficient personal protective equipment; (2) forced workers to work in close proximity; (3) forced workers to use cramped and crowded work areas, break areas, restrooms, and hallways; (4) discouraged workers from taking sick leave in a manner that had sick workers in fear of losing their jobs; and (5) failed to properly provide testing and monitoring for individuals who have may have been exposed to the virus that causes COVID-19.

9. Instead, at the Souderton facility where Mr. Benjamin worked, JBS increased production during March 2020, adding a "Saturday Kill" to capitalize on increased demand caused by public panic purchases of ground meat.

10. During this critical timeframe in March 2020, Mr. Benjamin contracted COVID-19 while working at JBS Souderton because the JBS Defendants inexplicably failed to take proper safety precautions to protect workers.

11. By keeping the Souderton plant open without providing the proper and recommended safety precautions, JBS intentionally misrepresented the safety of the facility.

12. By choosing profits over safety, JBS demonstrated a reckless disregard to the rights and safety of others, including Enock Benjamin.

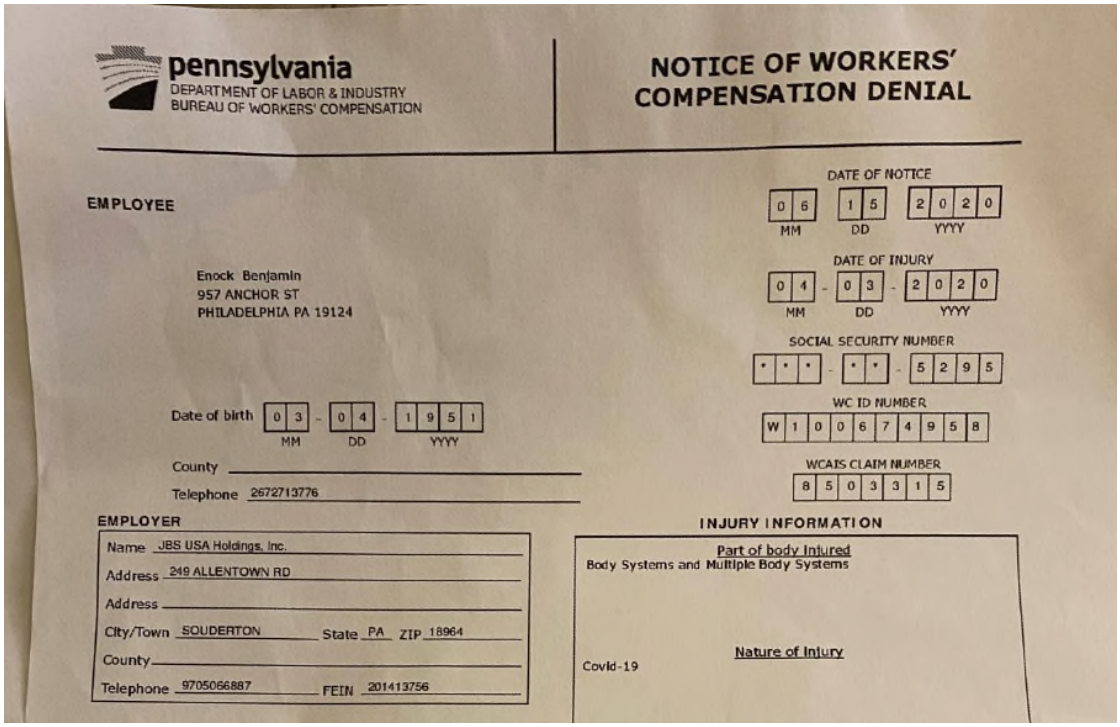
(Ex. E at ¶¶ 6-12.)

On May 18, 2020, JBS held its "Earnings Conference Call" for the first quarter of 2020. (See *Earnings Call Announcement*, attached hereto as "Ex. F.") The JBS Defendants provided shareholders with a PowerPoint that was subsequently made publicly available. (See *JBS 2020 Q1 Earnings Slideshow*, attached hereto as "Ex. G.")

It turns out that, despite COVID-related plant closures across the country during that quarter, domestic JBS entities had a *tremendously* profitable start to 2020. (Ex. G at 19-21.) In fact, JBS had a domestic net revenue of nearly Ten Billion Dollars ($10,000,000,000.00). (Ex. G at 12, 19-21.) Discovery will reveal whether there was truly a meat shortage in March 2020 that justified the obvious safety risks to workers that were ignored by JBS' complete lack of safety mechanisms instituted to protect individuals from spread of the pandemic.

On June 2, 2020, defendant, JBS USA Food Company filed a Notice of Removal, and removed this action from the Court of Common Pleas of Philadelphia County to this Court. (Docket No. 1.)

On June 15, 2020, the JBS Defendants sent the family of Enock Benjamin a Notice of Workers' Compensation Denial. (Ex. A.) That document clearly lists Mr. Benjamin's employer as defendant, JBS USA Holdings, Inc.:



pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
BUREAU OF WORKERS' COMPENSATION

NOTICE OF WORKERS' COMPENSATION DENIAL

EMPLOYEE

Enock Benjamin
957 ANCHOR ST
PHILADELPHIA PA 19124

Date of birth 03 - 04 - 1951 (MM - DD - YYYY)

County

Telephone 2672713776

DATE OF NOTICE 06 - 15 - 2020 (MM - DD - YYYY)

DATE OF INJURY 04 - 03 - 2020 (MM - DD - YYYY)

SOCIAL SECURITY NUMBER ***-**-5295

WC ID NUMBER W10067495 8

WCAIS CLAIM NUMBER 8503315

EMPLOYER

Name JBS USA Holdings, Inc.
Address 249 ALLENTOWN RD
Address
City/Town SOUDERTON State PA ZIP 18964
County
Telephone 9705066887 FEIN 201413756

INJURY INFORMATION

Part of body Injured
Body Systems and Multiple Body Systems

Nature of Injury
Covid-19

(Ex. A.)

On June 17, 2020, the JBS Defendants filed a separate Motion to Dismiss Plaintiff's Complaint in its' entirety.[2]

[2] For the reasons set forth herein, it is hereby requested that this Motion for Remand be ruled upon prior to this Court reviewing JBS' Motion to Dismiss. This Court has routinely determined that subject matter jurisdiction must be established as a threshold matter prior to ruling on the merits of a Rule 12(b)(6) motion. See, e.g., Ahern v. BJ's Wholesale Club, 2020 WL 1308216 at *3 (E.D.P.A. March 18, 2020) (citing 5B Wright and A. Miler, Federal Practice and Procedure § 1350, n.39 (2009)) ("While Defendants' argument may be appropriate for a Rule 12(b)(6) motion to dismiss analysis, that issue cannot be considered until I determine whether I have subject-matter jurisdiction over this case. In order to discern whether jurisdiction exists, I must consider whether Defendants have met their more difficult burden of not just proving that the claim against Breslin are implausible under a 12(b)(6) standard, but that the claims are not 'colorable' such that Breslin was 'fraudulently joined' as a defendant. Only if Defendants prove fraudulent joinder may I disregard Breslin's citizenship and exercise diversity jurisdiction over this case.")

IV. LEGAL ARGUMENT

A. Legal Standard.

Removal to Federal Court is governed by 28 U.S.C. § 1441, which sets forth which actions may be removed. Pursuant to 28 U.S.C. § 1441(a), the general rule for removal is:

> 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.

The Notice of Removal filed by JBS USA Food Company is a relative kitchen sink, and purports to rely upon 28 U.S.C. §§ 1331, 1332, 1441, 1446, and the doctrine of fraudulent joinder. (Docket No. 1 at 2.)

The removal statutes are to be "strictly construed against removal and all doubts should be resolved in favor of remand." Boyer v. Snap-on Tools, Corp., 913 F.2d 108, 111 (3d Cir. 1990); see also Batoff v. State Farm Ins. Co., 977 F.2d 848, 851, 854 (3d Cir. 1992). Removal is restricted to instances in which the statutes clearly permit it and, to this end, the Court is required to resolve all doubts in favor of remand. Id.

The removing party bears the burden of demonstrating that the district court has jurisdiction. Samuel-Bassett v. KIA Motors Am., Inc., 357 F.3d 392, 396 (3d Cir. 2004). "The defendant's right to remove and the plaintiff's right to choose the forum are not equal, and uncertainties are resolved in favor of remand." 16 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 107.05 (3d ed. 2003) (internal cross-reference omitted); Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987) ("the removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand.").

If there is *any doubt* as to the propriety of removal, that case should not be removed to federal court. Brown v. Francis, 75 F.3d 860, 865 (3d Cir. 1996) (citing Boyer, 913 F.2d at 111

(3d Cir. 1990)); see also Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1995)). Further, for purposes of this motion, averments of fact contained within Plaintiff's Complaint must be accepted at true. In re Briscoe, 448 F.3d 201, 217 (3d Cir. 2006); see also Batoff, 977 F.2d at 851-52 (holding that for purposes of an allegation of fraud "the district court must assume as true all factual allegations of the complaint.")

District courts have original jurisdiction of all claims arising under the Constitution, laws or treaties of the United States. 28 U.S.C. § 1331. However, if plaintiff's case could not have been filed originally in federal court, then removal under 28 U.S.C. § 1441 is improper. *See* Roxbury Condo. Assoc., Inc. v. Anthony S. Cupo Agency, 316 F.3d 224, 227 (3d Cir. 2003). Moreover, Courts should strictly construe the removal statutes and "'all doubts should be resolved in favor of remand.'" Boyer, 913 F.2d at 111 (quoting Steel Valley Auth, 809 F.2d at 1010).

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case must be remanded to state court. 28 U.S.C. § 1447(c).

B. Plaintiff and JBS Souderton, Inc. are both residents of Pennsylvania and, therefore, there is no diversity jurisdiction.

Diversity simply does not exist in this action. A natural person is deemed to be a citizen of the state where he is domiciled. Swiger v. Allegheny Energy, Inc., 540 F.3d 179, 182 (3d Cir. 2008). As JBS USA admits in its' Notice of Removal, **JBS Souderton, Inc. and Plaintiff are both residents of Pennsylvania**. (Docket No. 1 at ¶ 33; see also Ex. E at ¶¶ 113, 126.)

The diversity statute requires complete diversity of citizenship; a district court cannot exercise diversity jurisdiction if one of the plaintiffs shares the same state citizenship as any one of the defendants. See, IFC Interconsult, AG v. Safeguard Int'l Partners, LLC, 438 F.3d 298, 303 (3d Cir. 2006); Development Finance Corp. v. Alpha Housing & Health Care, Inc., 54 F.3d

156, 158 (3d Cir. 1995) (citing, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1906)). In lawsuits that involve multiple defendants, where at least one defendant is a citizen of the forum state, 28 U.S.C. § 1441(b) prohibits removal, "because the likelihood of local bias against all defendants is too remote to warrant removal." Miller v. Piper Aircraft, Inc., 2009 U.S. Dist. LEXIS 32451, *20 (E.D. Pa. April 15, 2009).

"A party's citizenship is determined by [his/]her domicile, and 'the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning." Washington v. Hovensa LLC, 652 F.3d 340, 344 (3d Cir. 2011) (citing McCann v. Newman Irrevocable Trust, 458 F.3d 281, 286 (3d Cir. 2006). The party asserting diversity "retains the burden of proving that diversity of citizenship exists by a preponderance of the evidence." Id. (internal citations omitted).

The JBS Defendants have the burden of proving that diversity jurisdiction exists by a preponderance of the evidence. Since there is no diversity between Plaintiff and JBS Souderton, Inc., this is an impossible task. As a result, JBS USA asked this Court to *ignore* JBS Souderton, Inc. when conducting a diversity jurisdictional analysis:

> 33. Defendant JBS Souderton, Inc. is a Pennsylvania corporation with its principal place of business in Pennsylvania (*id.* ¶ 126), but the Court should disregard JBS Souderton, Inc.'s citizenship for jurisdictional purposes because Plaintiff fraudulently joined JBS Souderton, Inc. *See* Section III.B, *infra*.[3]

(Docket No. 1 at ¶ 33.)

However, Plaintiff has asserted valid and legally sufficient claims against JBS Souderton, Inc. This is because factual disputes exist over whether JBS Souderton, Inc. is truly Plaintiff's employer, this rending Plaintiff's negligence claim entirely proper and not barred by the

[3] The remainder of JBS' diversity argument relates to *proving* that the amount in controversy exceeds $75,000.00. Plaintiff does not dispute that the case is worth more than $75,000.00.

Workers' Compensation Act. Grant v. Riverside Corp., 364 Pa. 593, 528 A.2d 962 (1987). Second, Plaintiff has properly pled claims sound in intentional torts against JBS Souderton, Inc., which, if proven, are an exception to the immunity provisions of the Workers' Compensation Act. Martin v. Lancaster Battery Co., 606 A.2d 444, 447-48 (Pa. 1991).

C. JBS Souderton, Inc. was not fraudulently joined.

1. Plaintiff has asserted a valid claim sounding in negligence against JBS Souderton, Inc.

While the JBS Defendants advance several arguments for removal, the one that operates as the backbone of all the others is the assertion that Plaintiff fraudulently joined JBS Souderton, Inc. However, much like the rest of JBS' arguments, this allegation lacks merit.

Fraudulent joinder is the principle that the "fraudulent" addition of a non-diverse defendant cannot be used defeat the right of removal. Frank v. E.S.P.N., 708 F. Supp. 693, 694 (W.D. Pa. 1989). "Fraudulent joinder" is considered "a term of art" and ultimately, the actual intent or motive of joinder is immaterial to the analysis for the purposes of remand. Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 189, 52 S. Ct. 84, 87, 76 L.Ed. 233 (1931).

A defendant raising the issue of "fraudulent joinder" must demonstrate that claims alleged against the non-diverse defendant could not possibly impose liability under the applicable state law and the facts alleged. Buchanan v. Delaware Valley News, 571 F.Supp. 868, 870 (E.D.Pa.1983); Newman v. Forward Lands, Inc., 418 F.Supp. 134, 136 (E.D.Pa.1976). Stated differently, the Plaintiff's cause of action cannot be "colorable," 14 WRIGHT & MILLER § 3723; assert an "arguably reasonable basis" for imposing liability, Tedder v. F.M.C. Corp., 590 F.2d 115, 117 (5th Cir.1979); or "conceivably" allow recovery. Dailey v. Elicker, 447 F.Supp. 436, 438 (D.Colo.1978).

"In other words, a finding of fraudulent joinder is usually reserved for situations where recovery from the non-diverse defendant is a **clear legal impossibility**." West v. Marriott Hotel Servs., Inc., No. 10–4130, 2010 WL 4343540, *3 (E.D.Pa. Nov. 2, 2010) (emphasis added). "Joinder is fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment." In re Briscoe, 448 F.3d at 217 (quoting Batoff, 977 F.2d at 851-52). Thus, the fraudulent joinder analysis contains both objective and subjective components. However, "if there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court…." Id. Thus, unless the claims against the non-diverse defendant could be deemed "wholly insubstantial and frivolous" the claims against the resident-defendant cannot be considered fraudulent. Id. at 218.

Plaintiff's Complaint sets forth a *very* detailed claim of negligence against JBS Souderton, Inc. (Ex. E at ¶¶ 147-156.) It does not even appear from the Notice of Removal that JBS is contesting this point.[4] In fact, the only argument that JBS makes related to Plaintiff's negligence claim is factually inaccurate. JBS asserts that "Plaintiff fails to allege when, where or how Enock Benjamin allegedly became infected with COVID-19[.]" (Docket No. 1 at ¶ 8.) As is set forth above in Plaintiff's Statement of Material Facts, JBS is flatly wrong in that assertion. However, instead of rehashing the Complaint, it is easier to point to JBS' own filing *in this case* from only two weeks later which shows the absurdity of their assertion:

occurred within the scope of employment. Here, Plaintiff alleges that his now-deceased father, Enock Benjamin, contracted COVID-19 through his employment with JBS Souderton. Because

[4] Plaintiff reserves the right to supplement this filing should JBS attack the legal sufficiency of the negligence claim against JBS Souderton, Inc. in response to this motion.

(Docket No. 15 at 1.)

2008, Enock Benjamin started working at the JBS Plant in Souderton, PA.").) Plaintiff also alleges Enock Benjamin contracted COVID-19 "while working" at JBS Souderton. (*Id.* at ¶ 10.) Notably,

(Docket No. 15 at 4.)

Those sentences are located in JBS' Motion to Dismiss and represent only the second-most glaring example of how JBS's own governmental filings operate to undermine their Notice of Removal. The most glaring example of how JBS undermined their own removal was their unilateral submission and denial of Mr. Benjamin's Workers' Compensation benefits – a document that eviscerated any semblance of credibility to the fraudulent joinder argument.

The real substance of the JBS Defendants' arguments related to JBS Souderton, Inc. can be summarized as follows: JBS Souderton, Inc. was Mr. Benjamin's employer and, therefore, the only action that can be brought against JBS Souderton, Inc. is for Workers' Compensation. However, thirteen (13) days after JBS USA Food Company removed this case from Philadelphia County the JBS Defendants provided the Estate of Enock Benjamin with a denial of the Workers' Compensation application that it unilaterally submitted. (Ex. A.) That governmental filing *clearly* lists JBS USA Holdings, Inc. as Mr. Benjamin's employer:


EMPLOYER

Name JBS USA Holdings, Inc.

Address 249 ALLENTOWN RD

Address

City/Town SOUDERTON State PA ZIP 18964

County

Telephone 9705066887 FEIN 201413756

(Ex. A.)[5]

Notably, as of June 18, 2020, JBS filed this exact notice and other Workers Compensation documents listing JBS USA Holdings, Inc. as the employer for each and every worker who sustains a work related injury while at work at the Souderton plant:

Answer
Petition Number: **PET-8298644-1-1**

Claimant/Employee: [redacted]	Defendant/Employer: JBS USA Holdings, Inc.
WCAIS Claim Number: [redacted]	Date of Injury: 2/4/2019

ANSWER TO PETITION TO/FOR (LIBC-377)

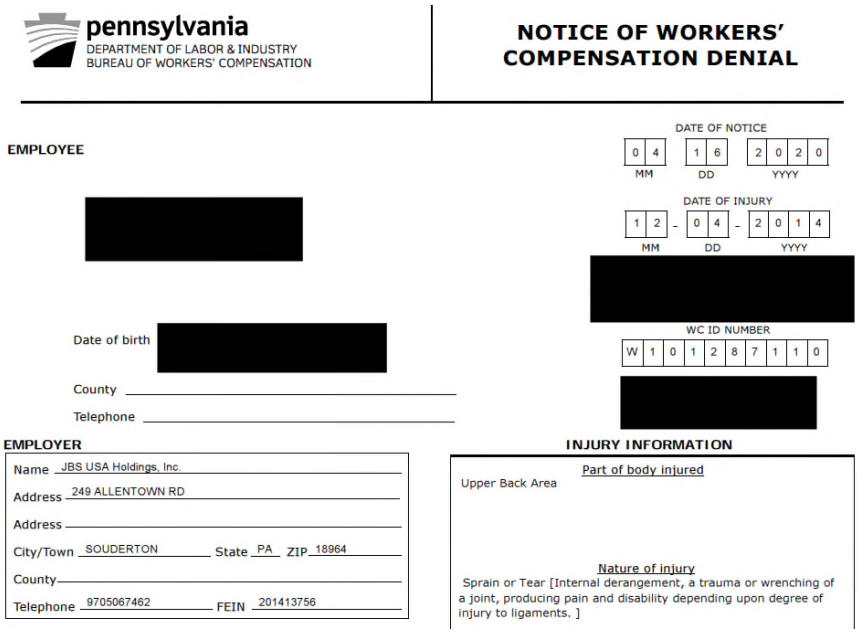
This document presents the Answer that was received by the Workers' Compensation Office of Adjudication.

Answer Information:

Date Submitted:	11/15/2019

(Ex. B.)

[5] It should be noted that a search of the Federal EIN number listed by JBS in its' denial of Workers' Compensation Benefits to the Estate of Enock Benjamin linked to an entity named "Jbs Usa Holding Lux S.Á.r.l." (See *EIN Search Results,* attached hereto as "Ex. I.") This is the same name of the entity that JBS USA Holdings was converted into according to attachments to JBS' Notice of Removal. (Docket No. 1 at Ex. D, pgs. 4-5.) However, at the very minimum, whatever the correct name of the entity is, it was still "also known as" or "doing business as" JBS USA Holdings, Inc., as of June 15, 2020 when the entity unilaterally submitted and denied Workers' Compensation Benefits to Mr. Benjamin's Estate. This represents precisely the type of situation that is usually addressed collegially between counsel with a Stipulation to Amend to insure the correct corporate entity is named. Instead, JBS' Notice of Removal chastised Plaintiff's counsel for naming JBS USA Holdings, Inc. on several occasions in an attempt to make Plaintiff's filing appear sloppy. Defense counsel should have reviewed their own clients documents before making such accusations.



pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
BUREAU OF WORKERS' COMPENSATION

NOTICE OF WORKERS' COMPENSATION DENIAL

EMPLOYEE

[redacted]

Date of birth [redacted]

County

Telephone

DATE OF NOTICE 04 (MM) 16 (DD) 2020 (YYYY)

DATE OF INJURY 12 (MM) - 04 (DD) - 2014 (YYYY)

[redacted]

WC ID NUMBER W10128711 0

[redacted]

EMPLOYER

Name JBS USA Holdings, Inc.
Address 249 ALLENTOWN RD
Address
City/Town SOUDERTON State PA ZIP 18964
County
Telephone 9705067462 FEIN 201413756

INJURY INFORMATION

Part of body injured
Upper Back Area

Nature of injury
Sprain or Tear [Internal derangement, a trauma or wrenching of a joint, producing pain and disability depending upon degree of injury to ligaments.]

(Ex. C.)[6]

While it is true that JBS has submitted additional documentation that *could* indicate that JBS Souderton, Inc. was Mr. Benjamin's employer – it is also true that the Workers' Compensation denial, listing JBS USA Holdings, Inc. as the employer, *creates a genuine issue of material fact*. Accordingly, based upon their own filings, JBS has effectively prevented this Court from reaching a decision as to which entity was Mr. Benjamin's employer. This Court addressed this type of factual dispute in the context of a fraudulent joinder analysis in Yellen v. Teledne Continental Motors, Inc., as follows:

> A removing defendant may support its notice of removal with evidence outside the pleadings, including such supporting documents as affidavits and deposition transcripts, in defendant's attempt to satisfy its burden of establishing fraudulent joinder. The limited piercing [of the complaint] does not mean that the federal court will pre-try, as a matter of course, doubtful issues of fact to determine removability; the issue must be

[6] As previously mentioned, two days after filing their Motion to Dismiss in this action, JBS filed a second denied petition for Mr. Benjamin that listed JBS Souderton, Inc. as the employer. There was no explanation for why this occurred, or in the alternative, why JBS USA Holdings, Inc. was listed as the employer on the initial denial letter and all other public filings related to workers at the Souderton facility as of June 18, 2020. (Ex. A; Ex. B; Ex. C; Ex. D.) At the very minimum, there exists a genuine issue of material fact as to whom actually was Enock Benjamin's employer that was created by JBS' own governmental filings.

> capable of summary determination and be proven with complete certainty.

(Yellen v. Teledne Cont'l Motors, Inc., 832 F. Supp. 2d 490, 503 (E.D. Pa. 2011) (internal citations omitted).)

Moreover, the exclusivity provision of the Pennsylvania Workers' Compensation Act, 77 P.S. § 481, provides that "the liability of **an employer** under this act shall be exclusive and in place of any and all other liability to such **employees**." 77 P.S. § 481(a) (emphasis added). This provision is not to be applied broadly, as Pennsylvania's Superior Court has explained:

> The Workmen's Compensation Act, which was designated to extend benefits to the worker, should not be causally converted into a shield behind which negligent employers may seek refuge.

(Grant v. Riverside Corp., 364 Pa. 593, 528 A.2d 962 (Pa. 1987), quoting Stipanovich v. Westinghouse Electric Co., 210 Pa. Super. 98, 231 A.2d 894, 898 (Pa. Super. 1967).

Generally, the Workers' Compensation Act provides immunity for an employer and limits recovery for injured employees to the Worker's Compensation Act where: 1) There is an employer-employee relationship; 2) the injury alleged arose in the course of employment; and 3) the employer accepts of responsibility for payment of Worker's Compensation benefits under the Act. 77 Pa. C.S.A. 481, *et. seq.*; Heckendorn v. Consol. Rail Corp., 293 Pa. Super. 474, 482, 439 A.2d 674, 678 (Pa. Super. 1981), aff'd, 502 Pa. 101, 465 A.2d 609 (Pa. 1983).

Based upon JBS' own representations both to this Court and to the Workers' Compensation Board, it cannot be stated with certainty which entity was actually Mr. Benjamin's employer. In addition, JBS is expressly rejecting responsibility for payment. As a result, it cannot be stated that Plaintiff's negligence claim against JBS Souderton, Inc. is barred by the Workers' Compensation Act nor that JBS Souderton, a Pennsylvania entity, was fraudulently joined.

Moreover, the Pennsylvania Supreme Court has made it clear that "in Pennsylvania a parent corporation and its subsidiary **must be regarded as separate entities in regards to the Workmen's Compensation Act**." Kiehl v. Action Manufacturing Co., 517 Pa. 183, 187 (1987) (emphasis added). Where a subsidiary meets the Workers Compensation Act's definition of an employer and receives immunity against claims by injured employees under the Act, the parent corporation which created the "corporate veil" separating the entities cannot electively pierce that veil to share in the immunity. Id. at p. 191.

In Kiehl, the Supreme Court specifically considered "whether a parent corporation is entitled to immunity (pursuant to the Pennsylvania Workmen's Compensation Act) . . . from a third party suit brought against the parent corporation by an employee of its wholly owned subsidiary corporation". Id. at p. 184. The court held that the parent was not entitled to immunity and the two factory workers injured in an explosion, who received Workers' Compensation benefits from their employer, a wholly owned subsidiary, could pursue their negligence claim against the parent company. Id.

Corporations cannot choose which protections afforded by the "corporate veil" they claim and which they reject. The Kiehl court held that where a parent corporation creates a subsidiary with its own corporate status, the two stand as a distinct legal entities, with concomitant benefits and liabilities:

> [I]n this case, we refuse to pierce the corporate veil at the request of the creator of the veil. To do so would permit a parent company to assert itself as an immune unit if sued by an employee of any of its subsidiaries for independent acts of negligence, and protect itself as a separate entity if sued by a member of the general public for the same conduct.

(Id. at p. 191 – 192 (citing Schenley Distillers v. United States, 326 U.S. 432 (1946); Copperweld v. Independence Tube Corp., 467 U.S. 752 (1984)).)

It is well established that in this Commonwealth, **that when a parent company exerts such control over its subsidiary and the subsidiary's employees, the parent company owes a separate duty to the Plaintiff.** Id. When comparing JBS's Notice of Remand with its' governmental filings in Workers Compensation cases it is *impossible* to conclusively determine the relationship between JBS Holdings, Inc. and JBS Souderton, Inc. with respect to parent/subsidiary responsibility and/or employer status at this time. (Docket No. 1; Ex. A; Ex. B; Ex. C; Ex. D.),

As a result, discovery will be necessary to determine who the *actual* employer is so that the rights of each defendant can be properly assessed. It is clear that the JBS Defendants want that entity to be JBS Souderton, so that they could desperately attempt to avoid Philadelphia County as a properly chosen venue. It is also clear that JBS USA Holdings, Inc. was listed by JBS as the employer of workers at the Souderton plant for *years* prior to the filing of a Notice of Removal in this case. In either event, it cannot be determined at this time which of these entities can argue that it was entitled to the protections of the Workers' Compensation Act, or in the alternative which entity is owed an independent duty to Plaintiff. Regardless of the ultimate outcome of that assessment, the JBS Defendants cannot escape the implication of their own governmental filings nor can they satisfy their burden on this issue.

Based upon this argument, the Court need read no further. The existence of factual disputes regarding the identity of Plaintiff's employer (i.e. JBS USA Holdings, Inc. or JBS Souderton, Inc.) renders Plaintiff's Complaint and the joinder of both entities non-fraudulent.

Thus, Plaintiff's negligence claims are proper and warrant discovery (and trial) in Plaintiff's chosen forum.

2. Plaintiff's claims sounding in misrepresentation are an exception to the exclusivity provision of the Workers' Compensation Act.

Even assuming *arguendo* that this Court were able, on this record, to determine who Mr. Benjamin's employer was *and* determined that it was JBS Souderton, Inc. – that Pennsylvania entity was still properly named. This is because an exeption to the Workers' Compensaion Act exists when an employer misrepresents the safety of its facility that causes death and serious injury. The allegations contained in Plaintiff's Complaint sufficiently prove the tort of misrepresentation at the infancy stage of this litigation.

The Pennsylvania Supreme Court found an exception to the Workers' Compensation Act when an employer actively misleads employees already suffering from a workplace hazard. Martin v. Lancaster Battery Co., 606 A.2d 444, 447-48 (Pa. 1991).

In Martin, the plaintiff worked for the defendant, who manufactured automotive/truck wet storage batteries. Id. at 445. The manufacturing process resulted in employees, such as the plaintiff, being exposed to lead dust and fumes. Id. Safety regulations required testing on a regular basis for lead content in the blood. Id. at 445-46. The part owner and manager of the defendant oversaw and administered the blood testing and willfully and intentionally withheld the plaintiff's results. Id. at 446. The plaintiff was subsequently diagnosed with among other things, chronic lead toxicity and the severity of plaintiff's condition would have been substantially reduced had the defendant accurately reported the lead levels in his blood. Id.

After acknowledging and distinguishing the decision in Poyser v. Newman & Co., 522 A.2d 548 (Pa. 1987), the Court stated:

> The employee herein alleged fraudulent misrepresentation on the part of his employer as causing the delay which aggravated a work-related injury. He is not seeking compensation for the work-related injury itself in this action. Clearly when the Legislature enacted the Workmen's Compensation Act in this Commonwealth, it could not have intended to

> insulate employers from liability for the type of flagrant misconduct at issue herein by limiting liability to the coverage provided by the Workmen's Compensation Act. There is a difference between employers who tolerate workplace conditions that will result in a certain number of injuries or illnesses and those who actively mislead employees already suffering as the victims of workplace hazards, thereby precluding such employees from limiting their contact with the hazard and from receiving prompt medical attention and care.

(Id. at 447-48 (emphasis added.)

The *Martin* exception has been limited and applied narrowly, applying only when both prongs of the *Martin* exception exist. Kostryckyi v. Pentron Lab. Techs., LLC, 52 A.3d 333, 339 (Pa. Super. 2012); Wendler v. Design Decorators, Inc., 768 A.2d 1172, 1176 (Pa. Super. 2001); Snyder v. Specialty Glass Prods., 658 A.2d 366, 371 (Pa. Super. 1995); and Santiago v. Pennsylvania Nat'l Mut. Casualty Ins. Co., 613 A.2d 1235, 1241 (Pa. Super. 1992).

Upon review of a claim of fraudulent joinder, "the district court must focus on the Plaintiffs' complaint at the time the petition for removal was filed. In so ruling, the district court must assume as true all factual allegations of the complaint." In re Briscoe, 448 F.3d at 217 (quoting Batoff, 977 F.2d at 851-52). Further, the district court must "resolve any uncertainties as to the current state of the controlling substantive law in favor of the plaintiff." Id.

As detailed above, Plaintiff has set forth a significant factual basis for its claims sounding in misrepresentation against the JBS Defendants, including JBS Souderton and JBS USA Holdings, Inc. The record reveals that, in the midst of the pandemic, the JBS Defendants misrepresented the safety of the Souderton plant in order to profit off of the increased demand for beef in the marketplace. Individuals were told that their co-workers who looked to be demonstrating COVID-19 symptoms, actually had the flu. Workers' jobs were threatened when they wanted to take sick days. The Souderton plant added a "Saturday Kill" in March 2020 to produce more products at a time when the rest of the state was in observation of a stay-at-home

order. The workers at the Souderton plant were not provided masks, PPE materials, and were not placed in an environment where social distancing was even attempted.

Plaintiff's counsel was diligent in bringing these allegations. As the Complaint makes clear, numerous interviews were conducted with plant workers concerning the conditions at the plant before the litigation was filed. (Ex. E at ¶¶ 89-93.)

In effect, the Souderton plant was an incubation chamber for COVID-19, and thiswas known and reported to JBS management publicly during the time period in which Mr. Benjamin contracted the virus at work. Instead of protecting workers, the JBS Defendants, including JBS Souderton, pushed these individuals to work additional hours or fear losing their jobs and lied about the safety of the plant.

Moreover, the instant case is distinguishable from Poyser, which is heavily relied upon by JBS. In Poyser, the Pennsylvania Supreme Court held that the Workers' Compensation Act precluded a recovery when the employee's injury was caused by the employer's willful and wanton disregard for the employee's safety by the employer's fraudulent misrepresentation of the safety conditions **to federal safety inspectors**. Poyser, 522 A.2d at 548-550.

Here, the misrepresentation of safety was made directly **to Enock Benjamin** and the rest of the workers at the Souderton plant who were led to believe that the facility was a safe place to work and that their co-workers were suffering from the flu, and not COVID-19.

Despite knowing of the hazard and knowing that employees were at a substantial risk of injury, including death, the JBS Defendants kept the Souderton plant open and operational through March 2020 causing Enock Benjamin's death. This is unlike any other case, as this was not a hazard that was a normal and an everyday part of the Souderton workers' jobs – it was a global pandemic. There exists a reasonable record for a jury to conclude that the JBS Defendants

placed profits over safety and misrepresented the safety of the plant while leaving it open with no safety mechanisms in place during a global pandemic.

Therefore, due to the extreme, egregious, intentional and outrageous conduct of the JBS Defendants, Plaintiff asserts that an application of the Martin exception and a finding that Plaintiff's misrepresentation claims are not barred by the Workers' Compensation Act is appropriate and thus JBS Souderton, Inc. (or in the alternative JBS USA Holdings, Inc.) was necessarily not fraudulently joined. .

Further, a district court must be particularly careful not to step "from the threshold jurisdictional issue into a decision on the merits." Boyer, 913 F.2d at 112; see also Batoff, 977 F.2d at 852. "Assuming a district court can 'pierce the pleadings' to determine whether a plaintiff has asserted a colorable claim against the non-diverse defendant, 'that inquiry is far different from the summary judgment type inquiry'". In re Briscoe, 448 F.3d at 218 (quoting Boyer, 913 F.2d at 112). Further, "[t]he court may not find that the non-diverse parties were fraudulently joined based on its view of the merits…." Id. "Such a determination must be left to the state court." Id.

Accepting the allegations in Plaintiff's Complaint as true, the actions of JBS are of such an outrageous nature so as to support a verdict for fraudulent and/or intentional misrepresentation. There is more than enough evidence to find that JBS misrepresented the safety of the plant to Enock Benjamin, who relied upon the representations of the JBS Defendants, and that those fraudulent and intentional misrepresentations led to his death while the JBS Defendants placed profits over safety. If discovery tells a different story, than JBS is free to seek a Court ruling at the appropriate time. However, at this stage, Plaintiff's Complaint contains far more than is required to proceed on the claim against Mr. Benjamin's employer,

whether that entity is ultimately determined to be JBS Souderton, JBS USA Holdings, or a presently unknown entity.

Accordingly, Plaintiff's claims sounding in misrepresentation are an exception to the Workers' Compensation exclusivity provision, and as such, the existence of said claims prevents a finding that JBS Souderton was fraudulently joined to this litigation.

D. This case should be remanded because Plaintiff does not raise a federal question.

Plaintiff's claims are exclusively state law tort claims. JBS' arguments related to federal question jurisdiction are specious **and desperate**. JBS's erroneously claims that President Trump's April 28, 2020 "Food Chain Supply Order" gives the Court federal question jurisdiction. In the alternative, JBS submits what amounts to unsupported conjecture that the mere mention of OSHA and/or CDC guidance in Plaintiff's Complaint necessarily invokes federal question. As explained below, both of these assertions are wrong.

First, President Trump's "Food Chain Supply Order" did not occur until twenty-five (25) days *after the death of Enock Benjamin* and contains no indicia whatsoever of an attempt for retroactivity. The "Food Supply Chain Order" is not a statute and takes no affirmative steps other than authorizing the Secretary of Agriculture to do what is necessary with respect to beef production plants. (See *Food Chain Supply Order*, attached hereto as "Ex. J.") The fact that JBS's Notice of Removal fails to point out that the Food Chain Supply Order occurred *nearly a month* following the actions which led to Enock Benjamin contracting COVID-19 is disingenuous and deceptive. (Docket No. 1.)

Second, Plaintiff's Complaint points out the March 9, 2020 federal guidance offered by OSHA and CDC *to prove that the JBS Defendants were on notice of the dangers and precautions needed to protect their workers*. Plaintiff's did not file claims sounding in violations of any

federal statute and, instead, deliberately filed state law tort claims that do not raise a federal question. Under defendants' theory, every personal injury case in the country which arises out of a workplace accident would be subject to federal question jurisdiction because inevitably, there is discussion of OSHA violations in each and every one of those cases. Every motor vehicle case would also have federal question jurisdiction since it involves vehicles whose safety is regulated by federal agencies and speed limits promulgated consistent with federal standards. Of course, this argument is absurd and utterly without merit.

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). An independent corollary accompanies this rule when the preemptive force of a federal statute "is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim". Stellar v. Allied Signal, Inc., 98 F.Supp.3d 790, 795 (E.D. Pa. Apr. 15, 2015) (citing Caterpillar, 482 U.S. at 392). This concept—"complete preemption"—provides that any such claim is transformed, for jurisdictional purposes, and necessarily arises under federal law. Id. (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 23 (1983)).

The mere presence of a federal question in a defense's argument, however, does not overcome the policies embodied in the well-pleaded complaint rule. Caterpillar, 482 U.S. at 398-99. There is a clear distinction between preemption as a defense to a state law claim and complete preemption as a basis for federal question jurisdiction. Id. A unanimous Supreme Court declared "[t]he plaintiff is the master of the complaint, that a federal question must appear

on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause of action heard in state court." Id.

It is difficult to express the frustration that JBS' federal question argument causes with respect to President Trump's Food Chain Supply Order. (Ex. G.) To begin with, Plaintiff's Complaint does not mention the President's proclamation, which hadn't even occurred at the time of Mr. Benjamin's death. Second, there is no evidence presented whatsoever that the proclamation that was made on April 28, 2020 had anything to do with the actions taken by the JBS Defendants at the Souderton plant in March of 2020. It would be impossible for that to have occurred unless the JBS Defendants knew that President Trump was going to make his April 28, 2020 Order, yet closed the Souderton Plant for the first two weeks of April anyway. Further, it is unclear what aspect of the Food Chain Supply Order that the JBS Defendants are even asserting has an impact on this litigation without retroactive application.

Authorizing the Secretary of Agriculture, to take necessary steps to insure that the country's meat supply is uninterrupted on April 28, 2020 has nothing to do with what occurred in the final weeks of March in Souderton, PA. There is nothing in the Food Chain Supply Order that states it was acceptable for the JBS Defendants to threaten workers' jobs if they called out sick with COVID-19 symptoms, that it was acceptable for JBS not to establish a policy to wear face masks, or that it was acceptable for JBS not to provide PPE materials if it considered its' workers to be essential in March 2020. There is nothing in President Trump's Proclamation that suggested it was acceptable to add a Saturday kill so that domestic entities could export enough meat *internationally* during the first quarter of 2020 to generate over Three Billion Dollars of net revenue. To the contrary, the record suggests that JBS capitalized on public fear and panic purchasing to generate staggeringly high net revenue figures without showing a single care to the

dangers posed to workers by forcing them to work in unsafe conditions. The timeline of events matters and simply because JBS intentionally omits it from their filing doesn't mean this Court can ignore it. JBS has failed to proffer any reasonable connection between the Food Supply Order and Plaintiff's Complaint. J also failed to explain how their conduct in March 2020 was guided by an Executive Order that wasn't made until the end of April 2020.

Finally, JBS's argument that the references to OSHA and the CDC in Plaintiff's Complaint give rise to federal question jurisdiction is in direct contradiction to well-established Pennsylvania law. The guidance offered by OSHA and CDC to beef production plants on March 9, 2020 is being used as evidence as to the standard of care. Plaintiff is not charging them under any OSHA or CDC regulation. There is no common right of action created by OSHA or the CDC nor does this case turn on whether any federal guidance was violated. This is precisely why the role of OSHA and/or ANSI violations in jury instructions was squarely addressed in Wood v. Smith, 495 A.2d 601 (Pa. Super 1985), when the Superior Court held that "Proof of the violation of a statute or ordinance is permissible, not as conclusive proof of negligence, but as evidence to be considered with all other evidence in the case." This concept was similarly adopted in Pennsylvania's Standard Civil Jury Instructions. See *Pa. SSJI (Civ.) 13.110*, attached hereto as "Ex. H.")

Accordingly, it is clear that Plaintiff's claims do not raise a federal question and that this matter should be remanded to Philadelphia County.

V. CONCLUSION

Defendants have fallen woefully short of satisfying their burden to prove that removal to this Court was proper based upon diversity jurisdiction, the doctrine of fraudulent joinder, or federal question jurisdiction. Instead, for all of the reasons stated herein, this Court should remand this matter back to where jurisdiction is proper, the Common Pleas Court of Philadelphia County.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant this Motion and enter an Order in the accompanying form to remand this matter to Philadelphia County.

Respectfully submitted,

BY: ***/s/ rjm9362***

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Attorneys for Plaintiff, Ferdinand Benjamin, individually and as the Personal Representative of The Estate of Enock Benjamin, deceased

dated: June 29, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FERDINAND BENJAMIN, Individually and as the Personal Representative of the **ESTATE OF ENOCK BENJAMIN**, deceased, *Plaintiff,*	:	**CIVIL ACTION**
v.	:	
	:	**No. 2:20-cv-2594-JP**
JBS S.A., **JBS USA FOOD COMPANY**, **JBS USA HOLDINGS, INC.**, **JBS SOUDERTON, INC.**, and **PILGRIM'S PRIDE CORPORATION**, *Defendants.*	:	

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Plaintiff's Motion to Remand to be served via the Court's CM/ECF system on the following:

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BY: ***/s/ Robert J. Mongeluzzi***
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dated: June 29, 2020