

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
:
:
BUGSBY PROPERTY LLC,
:
:
Plaintiff,
:
:
vs. :
:
ALEXANDRIA REAL ESTATE EQUITIES,
:
INC. and JOEL S. MARCUS,
:
Defendants. :
:
:
-----X

Case No. 1:19-cv-9290 (VEC)

Oral Argument Requested

**DEFENDANTS’ MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO DISMISS PLAINTIFF’S COMPLAINT**

GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: 212.351.4000

*Attorneys for Defendants Alexandria Real Estate
Equities, Inc. and Joel S. Marcus*

Dated: New York, New York
November 12, 2019

TABLE OF CONTENTS

Page

BACKGROUND..... 3

 I. Summary Of Allegations 3

 II. Procedural History 6

ARGUMENT 8

 I. Bugsby Is Collaterally Estopped From Pursuing This Case In New York..... 8

 II. The Complaint Should Be Dismissed Under 28 U.S.C. § 1359 For Lack Of Subject Matter Jurisdiction. 11

 III. The Complaint Must Be Dismissed Because Steven Marcus Is A Necessary And Indispensable Party Whose Joinder Would Destroy Diversity..... 14

 IV. The Complaint Should Be Dismissed For Lack Of Personal Jurisdiction..... 18

 V. The Complaint Fails To State A Claim Against Defendants For Quantum Meruit..... 21

 VI. The Court Should Abstain From Exercising Jurisdiction Under *Colorado River*..... 24

 VII. The Complaint Should Be Dismissed Under Rule 17(b) For Lack Of Capacity. 25

CONCLUSION..... 26

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>22 Gramercy Park, LLC v. Michael Haverland Architect, P.C.</i> , 170 A.D.3d 535 (1st Dep’t 2019)	22
<i>In re Alcon S’holder Litig.</i> , 719 F. Supp. 2d 263 (S.D.N.Y. 2010).....	11
<i>Ali v. Mukasey</i> , 529 F.3d 478 (2d Cir. 2008).....	8
<i>Alix v. McKinsey & Co., Inc.</i> , 2019 WL 3889855 (S.D.N.Y. Aug. 19, 2019).....	13
<i>AMNEX, Inc. v. Rowland</i> , 25 F. Supp. 2d 238 (S.D.N.Y. 1998).....	24, 25
<i>Arias Santos v. LATAM Airlines Grp. S.A.</i> , 2019 WL 1745778 (S.D.N.Y. Apr. 17, 2019).....	10
<i>Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of N.Y.</i> , 762 F.2d 205 (2d Cir. 1985).....	25
<i>Ashcroft v. Iqbal</i> , 129 S. Ct. 1937 (2009).....	23
<i>Best Van Lines, Inc. v. Walker</i> , 490 F.3d 239 (2d Cir. 2007).....	19
<i>BlackRock, Inc. v. Schroders PLC</i> , 2007 WL 1573933 (S.D.N.Y. May 30, 2007)	11
<i>Bozell Grp., Inc. v. Carpet Co-Op of Am. Ass’n, Inc.</i> , 2000 WL 1523282 (S.D.N.Y. Oct. 11, 2000).....	20
<i>Brown v. Lockheed Martin Corp.</i> , 814 F.3d 619 (2d Cir. 2016).....	18
<i>Bugsby Property LLC v. Alexandria Real Estate Equities, Inc.</i> , No. 650795/2019.....	6
<i>Canaday v. Koch</i> , 608 F. Supp. 1460 (S.D.N.Y. 1985).....	24
<i>Castillo Grand LLC v. Sheraton Operating Corp.</i> , 2009 WL 4667104 (S.D.N.Y. Dec. 9, 2009)	2, 13

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<i>Casville Invs., Ltd. v. Kates</i> , 2013 WL 3465816 (S.D.N.Y. July 8, 2013).....	21
<i>Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.</i> , 70 N.Y.2d 382 (1987).....	21
<i>Colorado River Water Conservation District v. United States</i> , 424 U.S. 800 (1976).....	24, 25
<i>Cortec Indus. Inc. v. Sum Holding L.P.</i> , 949 F.2d 42 (2d Cir. 1991).....	21, 23
<i>Daimler AG v. Bauman</i> , 571 U.S. 117 (2014).....	18
<i>Dart-Barnett Operating Co., LLC v. Esperada Texas, LP</i> , 2008 WL 4056783 (W.D. Mich. Aug. 26, 2008).....	11
<i>In re Del Valle Ruiz</i> , 342 F. Supp. 3d 448 (S.D.N.Y. 2018).....	19
<i>Dubov v. Lewis</i> , 2019 WL 1060652 (S.D.N.Y. Mar. 6, 2019).....	23
<i>Eastman Kodak Co. v. Asia Optical Co., Inc.</i> , 2012 WL 2148198 (S.D.N.Y. June 13, 2012).....	9
<i>Ente Nazionale Idrocarburi v. Prudential Sec. Grp., Inc.</i> , 744 F. Supp. 450 (S.D.N.Y. 1990).....	17
<i>Errico v. Stryker Corp.</i> , 281 F.R.D. 182 (S.D.N.Y. 2012).....	17
<i>Fagioli S.p.A. v. Gen. Elec. Co.</i> , 2014 WL 12768461 (S.D.N.Y. Nov. 25, 2014).....	14, 16
<i>First Union Nat’l Bank v. Paribas</i> , 135 F. Supp. 2d 443 (S.D.N.Y. 2001).....	10
<i>Force v. Facebook, Inc.</i> , 934 F.3d 53 (2d Cir. 2019).....	12
<i>Garcia v. Tamir</i> , 1999 WL 587902 (S.D.N.Y. Aug. 4, 1999).....	25

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<i>Glob. Disc. Travel Servs., LLC v. Trans World Airlines, Inc.</i> , 960 F. Supp. 701 (S.D.N.Y. 1997).....	15, 17
<i>Glob. Fin. Corp. v. Triarc Corp.</i> , 93 N.Y.2d 525 (1999).....	3, 24
<i>Gordian Grp., LLC v. Syringa Exploration, Inc.</i> , 168 F. Supp. 3d 575 (S.D.N.Y. 2016).....	20
<i>Gucci Am., Inc. v. Weixing Li</i> , 768 F.3d 122 (2d Cir. 2014).....	19
<i>Gustavia Home, LLC v. 10586 Flatlands 1 Realty Corp.</i> , 2019 WL 2056700 (E.D.N.Y. Mar. 31, 2019).....	13
<i>Herrick Co., Inc. v. SCS Commc'ns, Inc.</i> , 251 F.3d 315 (2d Cir. 2001).....	2, 7, 12
<i>I. Meyer Pincus & Assocs. P.C. v. Oppenheimer & Co.</i> , 936 F.2d 759 (2d Cir.1991).....	21
<i>Iacovacci v. Monticciolo</i> , 2019 WL 2074584 (S.D.N.Y. May 9, 2019)	3, 24
<i>Interventure 77 Hudson LLC v. Falcon Real Estate Inv. Co., LP</i> , 172 A.D.3d 481 (1st Dep't 2019)	24
<i>Iragorri v. United Techs. Corp.</i> , 274 F.3d 65 (2d Cir. 2001).....	10
<i>Johnson v. Ward</i> , 4 N.Y.3d 516 (2005)	19
<i>Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.</i> , 956 F. Supp. 1131 (S.D.N.Y. 1997).....	21
<i>Kirch v. Liberty Media Corp.</i> , 2006 WL 3247363 (S.D.N.Y. Nov. 8, 2006).....	10, 11
<i>LaFleur v. Whitman</i> , 300 F.3d 256 (2d Cir. 2002).....	8
<i>Lee v. Kim</i> , 1998 WL 20003 (S.D.N.Y. Jan. 20, 2008)	2

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<i>Leibowitz v. Cornell Univ.</i> , 584 F.3d 487 (2d Cir. 2009).....	3
<i>LightSquared Inc. v. Deere & Co.</i> , 2015 WL 585655 (S.D.N.Y. Feb. 5, 2015).....	22
<i>Machat v. Sklar</i> , 1997 WL 599384 (S.D.N.Y. Sept. 29, 1997).....	25
<i>Manney v. Intergroove Tontrager Vertriebs GMBH</i> , 2011 WL 6026507 (E.D.N.Y. Nov. 30, 2011).....	3, 25
<i>Morrison v. Nat’l Australia Bank Ltd.</i> , 547 F.3d 167 (2d Cir. 2008).....	12
<i>Moscato v. MDM Grp., Inc.</i> , 2008 WL 2971674 (S.D.N.Y. July 31, 2008).....	8, 9
<i>New Canaan Capital Mgm’t, LLC v. Ozado Partners LLC</i> , 2017 WL 1157153 (S.D.N.Y. Mar. 25, 2017).....	12
<i>Newman-Green, Inc. v. Alfonso-Larrain</i> , 490 U.S. 826 (1989).....	13
<i>Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.</i> , 20 F.3d 987 (9th Cir. 1994).....	14
<i>Parker v. Blauvelt Volunteer Fire Co.</i> , 93 N.Y.2d 343 (1999).....	8
<i>Peters v. UBS AG</i> , 2014 WL 148631 (S.D.N.Y. Jan. 15, 2014).....	2, 8, 9, 10, 11
<i>Phoenix Ancient Art, S.A. v. J Paul Getty Tr.</i> , 2018 WL 1605985 (S.D.N.Y. Mar. 29, 2018).....	19
<i>Pine Run Props., Inc. v. Pine Run Ltd.</i> , 1991 WL 280719 (S.D.N.Y. Dec. 26, 1991).....	11
<i>Pollux Holding Ltd. v. Chase Manhattan Bank</i> , 329 F.3d 64 (2d Cir. 2003).....	11
<i>Prudential Oil Corp. v. Phillips Petroleum Co.</i> , 546 F.2d 469 (2d Cir. 1976).....	12, 13

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<i>SAA-A, Inc. v. Morgan Stanley Dean Witter & Co.</i> , 281 A.D.2d 201 (1st Dep’t 2001)	21
<i>Shamis v. Ambassador Factors Corp.</i> , 1997 WL 473577 (S.D.N.Y. Aug. 18, 1997).....	13, 14
<i>Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.</i> , 549 U.S. 422 (2007).....	11
<i>Soumayah v. Minnelli</i> , 41 A.D.3d 390 (1st Dep’t 2007)	22
<i>Starr Indem. & Liab. Co. v. Brightstar Corp.</i> , 324 F. Supp. 3d 421 (S.D.N.Y. 2018).....	11
<i>Taormina v. Thrifty Car Rental</i> , 2016 WL 7392214 (S.D.N.Y. Dec. 21, 2016)	19
<i>Tasini v. AOL, Inc.</i> , 851 F. Supp. 2d 734 (S.D.N.Y.).....	23
<i>Troma Entm’t, Inc. v. Centennial Pictures Inc.</i> , 729 F.3d 215 (2d Cir. 2013).....	18
<i>Visión en Análisis y Estrategia, S.A. de C.V. v. Andersen</i> , 2015 WL 4510772 (S.D.N.Y. July 24, 2015)	15, 16, 17
<i>Williams v. Beemiller, Inc.</i> , 33 N.Y.3d 523 (2019)	18

Statutes

10 Del. C. § 8106	3, 24
28 U.S.C. § 1359.....	2, 11, 12, 13
Cal. Civ. Proc. Code § 339	10

Rules

CPLR § 202.....	24
Fed. R. Civ. P. 12.....	<i>passim</i>
Fed. R. Civ. P. 17	25

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
Fed. R. Civ. P. 19.....	14, 16, 17, 18

PRELIMINARY STATEMENT

This case is a copycat of one already dismissed in New York state court, but instead of going to California, where these same parties are already litigating related claims, new counsel is trying to make a federal case of it here in the S.D.N.Y., in a desperate attempt to avoid California’s statute of limitations bar. For a host of reasons—including collateral estoppel, lack of federal jurisdiction, and abstention, among others—this latest litigation gambit fails on its face and warrants immediate dismissal.

This lawsuit pits son against father in a tragic dispute that has torn this family apart. The son, Steven Marcus, who has struggled financially despite long-time family support, is now using his shell company, Plaintiff Bugsby Property LLC (“Bugsby”), to front his latest vexatious lawsuit against his father, Joel Marcus, and the successful real estate development company, Alexandria Real Estate Equities, Inc. (“Alexandria”), that Joel built and runs. Steven, through Bugsby, now claims credit for Alexandria’s success and seeks compensation for it, despite having agreed years ago that he would be “paid” “no compensation . . . in connection with” any “advice” that he gave the company. Ex. 1 at Ex. C (attaching the parties’ Confidential Information and Nondisclosure Agreement (“CNDA”)).¹ In reality, though, Bugsby’s claims are not only baseless; they are also barred on multiple independent grounds.

First and foremost, Steven and Bugsby *already litigated and lost* this same case in New York State Supreme Court (“Bugsby’s State Action,” or the “State Action”). In Steven and Bugsby’s State Action, Justice O. Peter Sherwood determined that “*New York is an inconvenient forum,*” and that these claims should be litigated in “California Superior Court in Los Angeles,” where these same parties are already litigating related claims. *See* Ex. 2 at 6 (emphasis added).

¹ All Exhibits refer to those attached to the Declaration of Randy M. Mastro, dated November 12, 2019.

Indeed, Justice Sherwood dismissed Bugsby's claims "on the condition that [Defendants] consent to amendment of the complaint for declaratory relief which is pending in" that California state court, *id.*—which would resolve the same issues Bugsby has now raised again here—and Defendants promptly obliged, *see* Ex. 3. Nevertheless, just days after entry of judgment in the State Action, *see* Ex. 4, in an effort to avoid a fatal statute of limitations bar in California, Bugsby engaged in the worst kind of "forum shopping" and filed a substantively identical complaint before this Court. Because Bugsby's claims against these same Defendants, based on "the same 'essential' facts," were previously dismissed on *forum non conveniens* grounds, Bugsby "is collaterally estopped from revisiting the New York State Supreme Court's decision[]" and bringing this Complaint here. *Peters v. UBS AG*, 2014 WL 148631, at *3–4, *6 (S.D.N.Y. Jan. 15, 2014), *aff'd* 588 F. App'x 57 (2d Cir. 2014); *see* Fed. R. Civ. P. 12(b)(6).

Nor is there any basis here for the exercise of federal jurisdiction, which Bugsby purports to lodge on diversity grounds. Steven, whose alleged "advisory services" to Defendants in 2013, Compl. ¶ 40, are the subject of this dispute, is a "U.S. citizen[] who [is] domiciled abroad," and, thus, a stateless citizen who "destroys diversity." *Herrick Co., Inc. v. SCS Commc'ns, Inc.*, 251 F.3d 315, 322 (2d Cir. 2001). In a transparent attempt to evade this fatal jurisdictional defect, new counsel has now omitted Steven as a party and apparently "reorganiz[ed] [Bugsby's] ownership structure" to remove him as a "member"—on paper at least—for the purpose "of changing the LLC's citizenship for diversity purposes." *Castillo Grand LLC v. Sheraton Operating Corp.*, 2009 WL 4667104, at *4 (S.D.N.Y. Dec. 9, 2009). The Court should reject Bugsby's ham-handed attempt "to manufacture federal diversity jurisdiction," in violation of 28 U.S.C. § 1359. *Id.* Moreover, dismissal is warranted because Steven is "an indispensable party to this action" who "has not been joined," and his "joinder would destroy diversity." *Lee v. Kim*, 1998 WL 20003, at

*6 (S.D.N.Y. Jan. 20, 2008). Furthermore, because these “same parties” are engaged in “parallel state-court litigation” in California concerning “substantially the same issue” as the dispute here, the Court should dismiss this action under the *Colorado River* abstention doctrine. *Iacovacci v. Monticciolo*, 2019 WL 2074584, at *3–4 (S.D.N.Y. May 9, 2019).

This Complaint is also barred on several other independent grounds. For example, the Complaint fails to establish personal jurisdiction over either Defendant in New York and, therefore, must be dismissed, pursuant to Rule 12(b)(2). And while this Court need not reach the merits, Bugsby’s claims are also subject to dismissal for failure to state a claim, pursuant to Rule 12(b)(6). Bugsby’s claims are doomed by a contemporaneous contract—which, incredibly, is never even mentioned in the Complaint, but of which the Court can take judicial notice—providing that “no compensation” would be “paid” by Alexandria for any of Steven’s “advice.” See CNDA at Preamble, ¶ 20. Nor does the Complaint sufficiently allege, as it must, a “reasonable expectation of compensation.” *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 509 (2d Cir. 2009).² Finally, Bugsby lacks “legal capacity to sue” under Federal Rule of Civil Procedure 17(b), as it is not registered to do business under N.Y. Bus. Corp. § 1312(a). See *Manney v. Intergroove Tontrager Vertriebs GMBH*, 2011 WL 6026507, at *7 (E.D.N.Y. Nov. 30, 2011).

For all of these independent reasons, this Court should now dismiss Plaintiff Bugsby’s Complaint, with prejudice, in its entirety.

BACKGROUND

I. Summary Of Allegations

Nearly six years after the fact, Bugsby alleges that it is entitled to *more than \$100 million*

² Bugsby’s claims are also time-barred. Under New York’s borrowing statute, “[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss.” *Glob. Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529 (1999). Bugsby is a Delaware LLC, Compl. ¶ 5, and in Delaware, claims for quantum meruit are subject to a three-year limitations period, 10 Del. C. § 8106. Here, that period elapsed years ago.

in exchange for certain “advice” purportedly provided to Defendants over a few weeks in late 2013. Compl. ¶¶ 1, 98, 103. Bugsby alleges that Joel had “approached Steven Marcus over the 2013 Thanksgiving holiday to request help from Bugsby (of which Steven was and is the Manager),” and Bugsby agreed to provide “advisory services” to Joel and Alexandria. *Id.* ¶¶ 35, 40. Over a few weeks “[i]n late November and December 2013,” Bugsby supposedly “performed its own primary research” and prepared its “recommendation deck,” which “memorialized Bugsby’s work” and contained the “Bugsby Blueprint.” *Id.* ¶¶ 41, 56; *see id.* Ex. A. Bugsby claims that it sent its “recommendation deck” to “select members of [Alexandria’s] management, including Joel,” on December 7, 2013. *Id.* ¶ 56. Bugsby does not allege that it performed any additional work on the “Bugsby Blueprint” after December 7, 2013.

On the face of the Complaint, this case lacks a meaningful connection to New York. None of the parties is domiciled here: Alexandria is a Maryland corporation “with its principal place of business in Pasadena, California,” *id.* ¶ 8, “Joel is “domiciled in California,” *id.* ¶ 21, and Bugsby is a Delaware LLC whose “sole member is a citizen of France,” *id.* ¶¶ 5, 7. The Complaint is littered with irrelevant references to New York, including that Alexandria “issues” securities “listed on the NYSE,” *id.* ¶ 16; Alexandria is an “acquirer, developer and operator of New York real property,” *id.* ¶ 13; Joel travels to New York and has “personally contributed nearly \$20,000” to New York politicians, *id.* ¶¶ 22, 24; and Joel owned “real property” in New York “[i]n late 2013,” *id.* ¶ 25. Yet these alleged contacts with New York, largely copied from Steven’s affidavit in the State Action, *see* Ex. 6, in no way relate to Defendants’ supposed wrongdoing in failing to compensate Bugsby. Rather, the events out of which Bugsby’s quantum meruit claims arose occurred primarily outside of New York. Joel purportedly “solicited” Steven to “provide advisory services” in California, Ex. 6 ¶¶ 4–6, and the CNDA was negotiated and executed in California,

Ex. 9 (Aff. of G. Dean) ¶ 8. Although Bugsby allegedly attended an Alexandria “Investor Day presentation” in New York on December 4, 2013, and a meeting with certain investment bankers in New York on December 19, 2013, to discuss Bugsby’s “ideas”—ideas that Bugsby purportedly had already provided in its “recommendation deck,” *see* Compl. ¶¶ 56, 66–68—Bugsby does not aver that it performed any work either during or after that meeting, claiming instead that the December 7, 2013 draft PowerPoint “memorialized Bugsby’s work,” *id.* ¶ 56.

Bugsby further claims that, “[b]etween 2015 and 2017,” Alexandria “partnered with TIAA in a program of joint ventures” that allegedly “formed the transactional climax of Project Affirmed.” *Id.* ¶ 85. But at the earliest, that was more than a year after Bugsby’s preparation of its “recommendation deck,” with no further work having been performed. *Id.* ¶ 56. Moreover, Bugsby fails to allege that any of the ensuing negotiations occurred in New York, and the various “joint venture” investments that supposedly resulted from those negotiations involved exclusively non-New York properties. *Id.* ¶ 85 (listing properties in Massachusetts and California).

Bugsby asserts quantum meruit claims against Alexandria and Joel, alleging “entitle[ment] . . . to the reasonable fair market value of its services”—supposedly more than \$100 million—in preparing the “recommendation deck.” *Id.* ¶¶ 56, 100, 103, 108. Bugsby’s claims are meritless, including because Steven, Bugsby’s “Manager,” *id.* ¶ 35, executed a contemporaneous agreement confirming “no compensation” would be paid “in connection with” his “advice,” CNDA at Preamble, ¶ 20. The CNDA also provides that it is to be “governed by and construed in accordance with the laws of *California*,” that “[a]ny disputes under [the CNDA] may be brought in the state courts and the Federal courts located in Los Angeles County, *California*,” and that “the parties hereby consent to the personal jurisdiction and venue of these courts.” *Id.* ¶ 12 (emphases added).

II. Procedural History

A. Bugsby And Steven Marcus Sue Defendants In New York State Court.

On February 7, 2019, Bugsby and Steven filed an action against Joel and Alexandria in the Commercial Division of the New York Supreme Court, New York County. *See Bugsby Property LLC v. Alexandria Real Estate Equities, Inc.*, No. 650795/2019. In the State Action, Bugsby and Steven similarly alleged that they had provided “strategic advice” to Defendants over “four weeks in November and December 2013,” and compiled their “full recommendation” into a PowerPoint presentation that Steven sent to Defendants on December 7, 2013. Ex. 1 ¶¶ 1, 26, 32. Steven and Bugsby brought quantum meruit and fraud claims against Defendants, seeking \$12 million as the “market value of the[ir] services.” *Id.* ¶¶ 74–90.

B. Defendants Sue Bugsby And Steven In The Proper Forum—California.

On the same day that Bugsby and Steven filed the State Action, Defendants filed a declaratory judgment action (the “California Action”) in the Superior Court of the State of California, County of Los Angeles—where both Defendants reside, and where the parties had “consent[ed] to . . . personal jurisdiction and venue” under the CNDA, CNDA ¶ 12. *See* Ex. 5 (California State Complaint). In the California Action, Alexandria and Joel seek a declaration that, *inter alia*, “the agreement between the parties is valid”; the parties’ “agreement is contained entirely in the CNDA”; “the only compensation owed to Steven was the right to promote his work”; and “no monetary compensation is or was owed to Steven or Bugsby.” Ex. 5 ¶ 53. The California Action has been proceeding for more than nine months, and the parties are currently engaged in discovery. The California Action will resolve the issues raised here.

C. The State Action Is Dismissed On *Forum Non Conveniens* Grounds, In Favor of Litigating In California.

On May 24, 2019, Defendants moved to dismiss the State Action, primarily on *forum non*

conveniens grounds.³ Bugsby’s State Action, Dkts. 15, 47. On June 4, 2019, Bugsby and Steven opposed, arguing, *inter alia*, that “New York is a convenient forum.” Bugsby’s State Action, Dkt. 25, at 8–13. On August 5, 2019, following extensive oral argument regarding the *forum non conveniens* issue on July 30, Justice Sherwood dismissed Bugsby’s State Action “under CPLR 327(a),” “on the ground that New York is an inconvenient forum.” Ex. 2 at 6. Justice Sherwood expressly conditioned dismissal on Defendants’ “consent to amendment of the complaint for declaratory relief which is pending in the California Superior Court in Los Angeles,” to allow Bugsby and Steven to bring their counterclaims there. *Id.* On September 20, 2019, Defendants filed Proof of Compliance, confirming their “consent,” Ex. 3, and on October 3, 2019, judgment in the State Action was entered in Defendants’ favor, Ex. 4.

Just five days after judgment was entered, Bugsby filed this Complaint asserting the same claims for quantum meruit against the same Defendants. The Complaint omits any reference to the dispositive CNDA—which Bugsby and Steven had attached to their Amended Complaint in the State Action (“the State Amended Complaint”) and have been litigating for months in the California Action. Further, due to Steven’s status as a stateless citizen who “destroys diversity,” *Herrick Co.*, 251 F.3d at 322, Steven is not named as a plaintiff here and apparently is no longer a “member” of Bugsby, Ex. 1 ¶ 11; Ex. 6 ¶ 1. And while the State Amended Complaint alleged that the “market value of [Bugsby’s] services” was “in excess of \$12 million,” Ex. 1 ¶¶ 65, 70, the Complaint shockingly asserts that “the reasonable fair market value of” the same alleged services exceeds \$100 million, Compl. ¶¶ 103, 108.

³ Defendants also moved to dismiss for lack of personal jurisdiction; on the ground that “another action” is “pending between the same parties for the same cause of action” in California; on statute of limitations grounds; for Bugsby’s lack of capacity to sue; and for failure to state a claim. Bugsby’s State Action, Dkts. 15, 47.

ARGUMENT

I. Bugsby Is Collaterally Estopped From Pursuing This Case In New York.

Justice Sherwood held that New York is an “inconvenient forum” and that dismissal of Bugsby’s claims on *forum non conveniens* grounds was warranted. Ex. 2 at 6.⁴ “Plaintiff is bound by the New York State Supreme Court’s dismissal of [its] prior action for *forum non conveniens*,” which mandates dismissal of its follow-on action in this forum on those same grounds. *Peters*, 2014 WL 148631, at *3. It is settled that “an issue of law or fact actually litigated and decided by a court of competent jurisdiction in a prior action”—here, whether New York is a proper forum for this action relating to “advisory services” that Steven and Bugsby purportedly provided to Alexandria (a Maryland corporation with “its principal place of business in Pasadena, California”), and Joel (who is “domiciled in California”), Compl. ¶¶ 8, 21, 40, pursuant to a CNDA that is “governed by and construed in accordance with the laws of California,” CNDA ¶ 12—“may not be relitigated in a subsequent suit between the same parties or their privies.” *Ali v. Mukasey*, 529 F.3d 478, 489 (2d Cir. 2008). This Court “must apply the collateral estoppel rules of the state”—New York—“that rendered a prior judgment.” *LaFleur v. Whitman*, 300 F.3d 256, 271 (2d Cir. 2002). Under New York law, collateral estoppel “applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action.” *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999). Those elements are readily satisfied.

A. The Supreme Court Already Decided The *Forum Non Conveniens* Issue.

It is evident that the “same essential facts are presented in this case as in the State action.”

⁴ Because Bugsby “did not appeal the order, and the time to appeal has now expired,” Justice Sherwood’s decision is unquestionably a “valid and final judgment” with preclusive effect. *Moscato v. MDM Grp., Inc.*, 2008 WL 2971674, at *4 (S.D.N.Y. July 31, 2008).

Peters, 2014 WL 148631, at *3. Both proceedings were filed against the same Defendants, Alexandria and Joel, and Bugsby’s pleadings in both matters are substantively identical. Specifically, in both actions, Bugsby alleged that it “provide[d] advisory services” to Defendants, “with the aim of producing a blueprint for a new capital strategy to improve [Alexandria’s] share price.” Compl. ¶ 40; Ex. 1 ¶ 25. Bugsby claims it was “never compensated” for that work, and brings quantum meruit claims to recover the “reasonable” value of its services. Compl. ¶¶ 89, 99–108; Ex. 1 ¶ 46, 74–83.

In the State Action, there “is no doubt that the issue of *forum non conveniens* was actually litigated and decided.” *Peters*, 2014 WL 148631, at *3. Defendants moved to dismiss primarily on *forum non conveniens* grounds, which ultimately “formed the sole basis for the [court’s] decision.” *Id.* Indeed, Defendants’ motion to dismiss the State Amended Complaint was “granted under CPLR 327(a),” the New York State provision of *forum non conveniens*, which Justice Sherwood stated was “the focus” of his decision. Ex. 2 at 1; *see id.* at 6 (dismissing “on the ground that “New York is an inconvenient forum”). Bugsby also had a “full and fair opportunity to litigate the issue of *forum non conveniens* in the State action,” *Peters*, 2014 WL 148631, at *4, as evidenced by Bugsby’s “opposition brief addressing” the issue, *Moscato*, 2008 WL 2971674, at *4, and by lengthy oral argument regarding *forum non conveniens*, *see* Ex. 7 (July 30, 2019 Hearing Tr.) at 6:21–11:7, 12:24–23:22, 26:17–31:24, 45:24–48:1. Finally, the Supreme Court expressly “addressed [Bugsby’s] arguments in its order dismissing the action.” *Moscato*, 2008 WL 2971674, at *4. That proceeding was “full and fair,” and Bugsby—which bears the “burden” on this issue—cannot establish otherwise. *Eastman Kodak Co. v. Asia Optical Co., Inc.*, 2012 WL 2148198, at *4 (S.D.N.Y. June 13, 2012).

B. The *Forum Non Conveniens* Analysis Here Is Identical To The Issue Decided In Bugsby’s State Action.

The “issues presented in the State action are identical to the issues before this Court,” and thus, the “*forum non conveniens* analysis would involve application of the same legal standard as applied in the state action.” *Peters*, 2014 WL 148631, at *3; see *First Union Nat’l Bank v. Paribas*, 135 F. Supp. 2d 443, 448 n.13 (S.D.N.Y. 2001) (“[T]he New York law of *forum non conveniens* is virtually identical to the federal law . . .”). In deciding whether to dismiss on *forum non conveniens* grounds, courts (i) “determine[] the degree of deference properly accorded the plaintiff’s choice of forum,” (ii) consider whether the proposed “alternative forum” is “adequate to adjudicate the parties’ dispute,” and (iii) “balance[] the private and public interests implicated in the choice of forum.” *Arias Santos v. LATAM Airlines Grp. S.A.*, 2019 WL 1745778, at *2 (S.D.N.Y. Apr. 17, 2019). These factors “militat[e] in favor of dismissal” of the Complaint “on *forum non conveniens* grounds.” *Kirch v. Liberty Media Corp.*, 2006 WL 3247363, at *9 (S.D.N.Y. Nov. 8, 2006).

First, Bugsby’s “choice of forum” is entitled to minimal deference. As an initial matter, New York is not Bugsby’s home forum. Further, Bugsby’s choice of forum is owed even “less deference” because it “was motivated by forum-shopping reasons.” *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001). After the Supreme Court determined that New York is an “inconvenient forum” and indicated that Bugsby should bring its claims in California, Ex. 2 at 6, Bugsby instead re-filed its claims in this Court, apparently seeking to avoid a fatal statute of limitations bar in California, see Cal. Civ. Proc. Code § 339 (two-year statute of limitations for quantum meruit). Bugsby’s choice of forum should thus be afforded “minimal” deference. *Kirch*, 2006 WL 3247363, at *4 (“plaintiffs’ choice of forum” was owed “minimal” deference where “a major motivation” was “to take advantage of the substantive and procedural benefits of this

forum”); *BlackRock, Inc. v. Schroders PLC*, 2007 WL 1573933, at *6 (S.D.N.Y. May 30, 2007).⁵

Second, California is clearly an “adequate” alternative forum because “defendants are amenable to service of process there” and “it permits litigation of the subject matter of the dispute.” *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2d Cir. 2003). Defendants are residents of California, and Justice Sherwood already determined that “California is an adequate alternative forum,” in part because of the “pending related litigation” there. Ex. 2 at 4, 6.

Third, for the reasons articulated by the Supreme Court, the “balance of public and private interests” favors dismissal. *Kirch*, 2006 WL 3247363, at *7–8. This case “presents choice of law questions with California law appearing to apply,” and the key events underlying Bugsby’s claims—Defendants’ alleged “request for Steven Marcus’ help” and the execution of the CNDA (“the only written contract here”)—occurred outside of New York. Ex. 2 at 6.⁶ This Court’s *forum non conveniens* analysis would involve weighing the same facts as the Supreme Court, and would yield the same result. Bugsby is thus “collaterally estopped from revisiting the New York State Supreme Court’s decision[] on *forum non conveniens*.” *Peters*, 2014 WL 148631, at *6.

II. The Complaint Should Be Dismissed Under 28 U.S.C. § 1359 For Lack Of Subject Matter Jurisdiction.

The Complaint must also be dismissed for lack of subject matter jurisdiction because

⁵ This Court’s “deference” to Bugsby’s choice of forum is also “diminished [because] the core operative facts upon which the litigation is brought bear little connection” to New York. *In re Alcon S’holder Litig.*, 719 F. Supp. 2d 263, 269 (S.D.N.Y. 2010). Indeed, not a single party is domiciled or resides in New York, and as the Supreme Court determined, Bugsby’s claims “lack[] a substantial nexus with New York.” Ex. 2 at 6.

⁶ Transfer under 28 U.S.C. § 1404 would be inappropriate because the “more convenient forum” is California state court, “not another federal court.” *Dart-Barnett Operating Co., LLC v. Esperada Texas, LP*, 2008 WL 4056783, at *3 (W.D. Mich. Aug. 26, 2008) (dismissing in light of pending litigation in “[t]he Texas state court”); see *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007) (“The common-law doctrine of *forum non conveniens* has continuing application . . . where a state or territorial court serves litigational convenience best.”). Further, under § 1404, transfer is only permissible where the action “might have been brought” in the first place in the transferee court. *Starr Indem. & Liab. Co. v. Brightstar Corp.*, 324 F. Supp. 3d 421, 431 (S.D.N.Y. 2018). But here, for “the same reasons that this Court lacks subject matter jurisdiction,” see *infra*, Sections II–III, a transferee court “would also lack subject matter jurisdiction.” *Pine Run Props., Inc. v. Pine Run Ltd.*, 1991 WL 280719, at *11 (S.D.N.Y. Dec. 26, 1991) (dismissing, rather than transferring).

Steven “improperly” and “collusively” “assign[ed]” his membership interest in Bugsby “to invoke the jurisdiction of” this Court. 28 U.S.C. § 1359; *see Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469, 474 (2d Cir. 1976). In the Second Circuit, § 1359 is “construed broadly [so as] to bar any improper attempt to create federal diversity jurisdiction.” *Id.* at 475.

In a sworn affidavit in the State Action dated June 4, 2019, Steven attested that Bugsby was a “multi-member” LLC, of which he was the “managing member.” Ex. 6 ¶¶ 1, 3.⁷ For purposes of diversity jurisdiction, “[a] limited liability company is a citizen of every state of which any of its members is a citizen.” *New Canaan Capital Mgm’t, LLC v. Ozado Partners LLC*, 2017 WL 1157153, at *4 (S.D.N.Y. Mar. 25, 2017). Because Steven is “a United States citizen and a United Kingdom permanent resident,” Ex. 1 ¶ 11, he is a United States citizen “domiciled abroad” and thus a “stateless” person, which renders him “neither [a] citizen[] of any state of the United States nor [a] citizen[] . . . of a foreign state.” *Force v. Facebook, Inc.*, 934 F.3d 53, 74–75 (2d Cir. 2019). It is “well-established” that federal courts may not exercise diversity “jurisdiction over a suit” to which “stateless” persons “are parties.” *Id.* Steven’s membership in Bugsby would thus “destroy[] diversity.” *See Herrick Co.*, 251 F.3d at 22.

In an attempt to avoid this result—and to “manufacture” diversity jurisdiction—Steven has apparently “assign[ed]” his membership interest in Bugsby, in violation of § 1359. *Prudential Oil*, 546 F.2d at 476. Although Steven attested “under penalty of perjury” in June 2019 that Bugsby is a “multi-member LLC” of which he was the “managing member,” Ex. 6 ¶¶ 1, 3, the Complaint alleges that Bugsby is now a “single member” LLC whose “sole member is a citizen of France”—*i.e.*, not Steven, Compl. ¶¶ 5, 7. Accordingly, between June and October 2019, Steven apparently

⁷ Steven’s affidavit was submitted in support of Steven and Bugsby’s Opposition to Defendants’ Motion to Dismiss the State Amended Complaint. *See* Ex. 6. “In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1),” this Court “may consider evidence outside the pleadings.” *Morrison v. Nat’l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008).

assigned his interest in Bugsby to his life partner (and mother of his two children), rendering it a “single-member” LLC, Compl. ¶ 5, to ensure that Bugsby would not have a “jurisdictional spoiler”—*i.e.*, a stateless member, *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 830 (1989). This “sham transaction[.]” deprives this Court of jurisdiction. *Castillo Grand*, 2009 WL 4667104, at *2–7 (holding that § 1359 barred jurisdiction where LLC “attempted to eliminate the indirect ownership interests” of non-diverse members to “creat[e] federal diversity jurisdiction”).

Where, as here, an assignment is effected among entities and individuals with “close ties,” such as “corporate entities and their directors, officers, and significant shareholders,” there is a “presumption” of collusion under § 1359. *Alix v. McKinsey & Co., Inc.*, 2019 WL 3889855, at *9 (S.D.N.Y. Aug. 19, 2019). To overcome this presumption, Bugsby would have to “offer[] evidence that the transfer was made for a legitimate business purpose unconnected with the creation of diversity jurisdiction.” *Prudential Oil*, 546 F.2d at 476. But no “legitimate business purpose” explains Steven’s assignment of his interest in Bugsby. *Id.* First, the “timing” of Steven’s assignment is “suspect.” *Gustavia Home, LLC v. 10586 Flatlands 1 Realty Corp.*, 2019 WL 2056700, at *7 (E.D.N.Y. Mar. 31, 2019). Based on Steven’s affidavit in the State Action, Steven apparently assigned his interest shortly before Bugsby’s “complaint [was] filed”—at some point between June and October 2019—which “indicat[es] that the assignment was entered into for the purpose of manufacturing jurisdiction.” *Shamis v. Ambassador Factors Corp.*, 1997 WL 473577, at *11 (S.D.N.Y. Aug. 18, 1997). Additionally, Bugsby has identified “Steven Marcus” as the only “person[] who” has “ever provided services on behalf of Bugsby,” *see* Ex. 12 (Bugsby’s Responses to Special Interrogatories, served in the California Action) at 15–16, and neither the

Complaint nor any filing in Bugsby’s State Action alleges otherwise.⁸

The “manner in which [Bugsby] has handled other litigation” similarly underscores that the assignment was made for “the purpose of obtaining a federal forum.” *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 992 (9th Cir. 1994). In the State Action, Steven and Bugsby asserted quantum meruit claims based on the same allegations advanced here. Just five days after entry of judgment dismissing the State Action, Bugsby filed this case, omitting Steven as a plaintiff, and after having removed him as a member—even though Bugsby is “led by Steven Marcus,” and Steven allegedly performed the “advisory services” at issue in both Bugsby’s State Action and this action. Compl. ¶¶ 35–36, 39, 45, 49, 54–55, 66. Further, while no longer a member, Steven remains “the Manager” of Bugsby, *id.* ¶ 35, and therefore the person responsible for Bugsby’s decision to file the instant litigation.⁹ Steven thus has a “continuing interest” in this matter and “strategic” control over the “course of the litigation,” demonstrating that his assignment was “made in order to obtain jurisdiction.” *Shamis*, 1997 WL 473577, at *10.

III. The Complaint Must Be Dismissed Because Steven Marcus Is A Necessary And Indispensable Party Whose Joinder Would Destroy Diversity.

Even if the Court declined to dismiss based on Bugsby’s “manufactured” diversity jurisdiction, the Court should do so under Rule 12(b)(7) for failure to join Steven, a “necessary and indispensable party” under Rule 19. *Fagioli S.p.A. v. Gen. Elec. Co.*, 2014 WL 12768461, at

⁸ Although Bugsby’s discovery responses in the California Action state that Steven transferred his membership interest to his partner in June 2017, Ex. 12 at 15, that is contradicted by Steven’s sworn affidavit from June 2019, in which he attested under “penalty of perjury” that he was “the Managing Member” of Bugsby, Ex. 6 ¶ 1 (emphasis added), and that Bugsby was “a multi-member” LLC, *id.* ¶ 3. Of note, despite numerous requests in the California Action for any documents evidencing Bugsby’s membership, Bugsby has refused to produce any. In any event, even if Steven *had* transferred his membership interest in June 2017, the fact that the transferee has not, according to Bugsby itself, “ever provided services on behalf of Bugsby,” Ex. 12 at 15–16, despite supposedly being its only member for more than two years, further demonstrates that “the assignment was entered into for the purpose of manufacturing jurisdiction,” *Shamis*, 1997 WL 473577, at *11.

⁹ Indeed, on October 22, 2019, on behalf of Bugsby, Steven sent—from his Bugsby email account—a letter to Defendants’ counsel concerning this litigation. Mastro Decl. ¶ 15.

*6 (S.D.N.Y. Nov. 25, 2014). Steven’s conduct is “directly implicated” throughout the Complaint. *Visión en Análisis y Estrategia, S.A. de C.V. v. Andersen*, 2015 WL 4510772, at *5 (S.D.N.Y. July 24, 2015). Yet Steven’s absence as a plaintiff is not merely an oversight: his presence in this lawsuit would destroy diversity jurisdiction, *see supra*, Section II. In other words, Bugsby’s failure to include Steven “amount[s] to a blatant attempt at forum shopping.” *Glob. Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 709–10 (S.D.N.Y. 1997).

Indeed, as Steven and Bugsby’s State Amended Complaint demonstrates, actions attributed in the Complaint to “Bugsby” must be read to include “Steven.” A side-by-side comparison of Bugsby’s two pleadings reveals that they tell the exact same story, and that *Steven* actually did everything that Bugsby is now alleged to have done. As alleged in the State Amended Complaint:

In late 2013, **Plaintiff Steven Marcus, through his company Plaintiff Bugsby**, provided strategic advice to ARE, one of the nation’s largest real estate investment trusts (“REITs”). The advice became the cornerstone of a long-term share price turnaround at ARE and was even given an internal code name, “Project Affirmed.” . . . **Yet Steven Marcus and Bugsby** were never fairly compensated for creating Project Affirmed. Instead, ARE’s CEO and later Executive Chairman Joel Marcus – Steven Marcus’s father – fraudulently appropriated **Steven Marcus’s** advice and passed it along to ARE as his own.

Ex. 1 ¶ 1 (emphasis added). Those sentences also summarize the Complaint in this action, except Bugsby now omits Steven’s name: “**Bugsby** created, recommended and provided to Defendants a complete and fundamental solution to ARE” and “**Bugsby** was never compensated,” Compl. ¶ 1.

The State Amended Complaint equally credited Steven and Bugsby for their expertise and attributes the relevant conduct to both parties. In the State Amended Complaint, it was “Bugsby, **led by Steven Marcus**” who “had become well regarded by private-market focused real estate investors and investment bankers.” *See* Ex. 1 ¶ 23 (emphasis added). Here, though, it is “Bugsby [who] had become well-regarded by private market focused real estate investors and investment bankers.” Compl. ¶ 38. And in describing the purported advice, the State Amended Complaint alleged that “Bugsby **and Steven Marcus** agreed to provide advisory services to both Joel Marcus

and ARE,” Ex. 1 ¶ 25 (emphasis added), while here, only “Bugsby” supposedly “agreed to provide advisory services to both Joel Marcus and [Alexandria],” Compl. ¶ 40.¹⁰

Under Rule 19, the Court must determine whether Steven, as an absent party, is “necessary” under Rule 19(a), and if so, if “joinder is not feasible,” whether Steven is “indispensable” under Rule 19(b), mandating dismissal. *Fagioli*, 2014 WL 12768461, at *1. Here, Steven is both “necessary” and “indispensable.” First, to determine whether a party is “necessary,” the Court considers three factors: (1) whether the Court can “accord complete relief” in the absence of the non-party; (2) whether the non-party’s absence will “impair or impede [its] ability to protect [its] interest”; and (3) whether the existing parties would be subject to “double, multiple, or otherwise inconsistent obligations.” Fed. R. Civ. P. 19(a)(1). Here, Steven’s absence exposes the parties to the risk of “double, multiple, or otherwise inconsistent obligations.” *Id.* Concurrent litigation concerning whether Steven and/or Bugsby are owed any amounts in connection with their purported “advice” is pending in California. Further, where, as here, resolution of a claim “would require [defining] a non-party’s rights under a contract, it is likely that the nonparty is necessary under Rule 19(a).” *Visión*, 2015 WL 4510772, at *5. The “fact that” Steven Marcus “is a party to a contract in dispute”—the CNDA—thus “weighs in favor of including [him] as a necessary party to this action.” *Id.*¹¹ Nor can the Court “accord complete relief” to *Defendants* if Steven, the man behind Bugsby, and the plaintiff who brought the *exact same claims* in the State Action for compensation for Steven and Bugsby’s purported “advice,” is not present. Fed. R. Civ. P. 19(a)(1).

¹⁰ Not only has Plaintiff dropped nearly all references to Steven in an attempt to disguise his involvement, but in addition, conduct that the State Action plaintiffs had uniquely ascribed to Steven is now exclusively attributed to Bugsby. In the State Amended Complaint, for example, it was “Steven” who spent “several intense weeks” researching and preparing in order to present ARE with a solution in November 2013. Ex. 1 ¶ 8. Here, in contrast, Plaintiff alleges that, “[i]n late November and December 2013, . . . Bugsby pulled together its views of the causes of ARE’s stagnation, and prescribed a cure.” Compl. ¶ 41.

¹¹ In deciding a motion to dismiss pursuant to Rule 12(b)(7), “the Court may consider documents and facts outside the pleadings.” *Fagioli*, 2014 WL 12768461, at *1.

Furthermore, because “the joinder of [Steven] would destroy the jurisdictional predicate for this lawsuit,” *Ente Nazionale Idrocarburi v. Prudential Sec. Grp., Inc.*, 744 F. Supp. 450, 458 (S.D.N.Y. 1990)—assuming one even exists—the Court cannot proceed without him. Rule 19(b) identifies four factors to guide the Court’s discretion in dismissing on the grounds that a “necessary” party is also “indispensable”: “(1) the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person’s absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.” Fed. R. Civ. P. 19(b).

Here, Defendants would face “prejudice” in Steven’s “absence” because any judgment “would not bar identical claims by” Steven. *Global Discount*, 960 F. Supp. at 710. “A judgment in this case” also would “prejudice” Steven, “and the prejudice cannot be avoided,” because the Complaint directly implicates Steven’s conduct, and “it is likely that this Court will make findings with respect to [Steven] without [his] participation.” *Visión*, 2015 WL 4510772, at *6. Nor would a judgment rendered in Steven’s absence be “adequate,” considering the “public stake in settling disputes by wholes, whenever possible.” *Errico v. Stryker Corp.*, 281 F.R.D. 182, 191 (S.D.N.Y. 2012). The State Amended Complaint alleges that Steven supposedly is also entitled to compensation for his “advisory services,” Ex. 1 ¶¶ 25, 73, 83, which suggests that this “absent party” is “likely to sue” existing parties and creates a “high” “probability of piecemeal litigation,” *Errico*, 281 F.R.D. at 191. Further, if the action is “dismissed for nonjoinder,” Bugsby will have an “adequate remedy.” *Id.* There is “currently an action pending” in California between Bugsby and Defendants, and Bugsby could seek relief there, *Global Discount*, 960 F. Supp. at 709—just

as Justice Sherwood instructed, *see* Ex. 2 at 6. In fact, Defendants expressly “consent[ed]” to Bugsby filing its claims in the California Action. Ex. 3. Steven is thus an “indispensable” party, and dismissal under Rule 19 is warranted.

IV. The Complaint Should Be Dismissed For Lack Of Personal Jurisdiction.

Dismissal is also warranted because Bugsby has failed to meet its “burden of demonstrating personal jurisdiction over” Defendants. *Troma Entm’t, Inc. v. Centennial Pictures Inc.*, 729 F.3d 215, 217 (2d Cir. 2013). Under New York law, a court “may not exercise personal jurisdiction over a non-domiciliary unless” “the action is permissible under the long-arm statute” and “comports with due process.” *Williams v. Beemiller, Inc.*, 33 N.Y.3d 523, 528 (2019). Bugsby’s allegations regarding Joel and Alexandria fall short of these requirements.

A. This Court Does Not Have General Jurisdiction Over Either Defendant.

Joel is not subject to general jurisdiction in New York. “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile,” *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014), and Joel is indisputably “domiciled in California.” Compl. ¶ 21; Ex. 8 (Aff. of J. Marcus) ¶ 4. Nor is Alexandria subject to general jurisdiction here. A corporation is not subject to general jurisdiction in a forum “other than its formal place of incorporation or principal place of business,” except in the “exceptional case” where its contacts with the forum are so “continuous and systematic” as to render it “essentially at home” there. *Daimler*, 571 U.S. at 138–39 & n.19. Alexandria is a Maryland corporation with its principal place of business in California, Compl. ¶ 8, and is not “essentially at home” in New York. In examining “the extent of a corporation’s contacts in a state for general jurisdiction purposes,” courts “must assess the company’s local activity not in isolation, but *in the context of the company’s overall activity*” nationwide. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016) (emphasis in original). Although Bugsby alleges that Alexandria is “an active and persistent acquirer, developer

and operator of New York real property,” Compl. ¶ 13, Alexandria’s real estate holdings in New York “comprise less than 10 percent of Alexandria’s total holdings,” Ex. 9 ¶ 6, which is insufficient to render Alexandria “at home” in New York. *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014); *see, e.g., Taormina v. Thrifty Car Rental*, 2016 WL 7392214, at *5 (S.D.N.Y. Dec. 21, 2016) (Caproni, J.) (concluding that Hertz’s 200 offices and locations in New York “do not present the ‘exceptional case’ that would give rise to general jurisdiction”).¹²

B. This Court Does Not Have Specific Jurisdiction Over Either Defendant.

Neither Joel nor Alexandria is subject to specific jurisdiction under CPLR 302(a)(1), which applies where “(i) a defendant transacted business within the state and (ii) the cause of action arose from that transaction of business.” *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005).

Defendants’ alleged forum-related activities boil down to meetings on two days in December 2013: Alexandria’s Investor Day on December 4, 2013, Compl. ¶ 45, and supposed meetings with JP Morgan and Goldman Sachs on December 19, 2013, *id.* ¶¶ 66–67, 69. At best, those meetings are tangential. For a claim to “arise[] out of” the transaction of business, there must be “a ‘substantial nexus’ between the transaction of business and the cause of action alleged.” *Phoenix Ancient Art, S.A. v. J Paul Getty Tr.*, 2018 WL 1605985, at *13 (S.D.N.Y. Mar. 29, 2018). “A connection that is ‘merely coincidental’ is insufficient to support jurisdiction” under § 302(a)(1). *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 249 (2d Cir. 2007). Bugsby’s quantum meruit claims are predicated on Defendants’ alleged improper failure to compensate Bugsby for

¹² Nor do Bugsby’s scattershot allegations of Alexandria’s other contacts with New York—including that Alexandria “issues” securities “listed on the NYSE,” “holds its quarterly earnings calls from” New York, “regularly convenes its Board of Directors” in New York, and “annually hosts its ‘Summit’ industry gathering” in New York, Compl. ¶¶ 15–19—show that Alexandria is “at home” in New York. Courts have explicitly deemed “such contacts . . . not enough” to confer general jurisdiction. *In re Del Valle Ruiz*, 342 F. Supp. 3d 448, 456–47 (S.D.N.Y. 2018) (declining to exercise general jurisdiction over foreign corporation that “maintains branches in New York City,” “manages \$14.9 billion in assets” in New York, “is listed on the New York Stock Exchange,” “holds some of their meetings in New York,” and “has made New York a focal point for [their] investors”).

its purported “advisory services.” Compl. ¶ 40. Joel purportedly “solicited” Bugsby to “provide advisory services” in *California*. Ex. 6 ¶¶ 4–6; *see* Compl. ¶ 35. The “services” provided supposedly consisted of Bugsby’s work in preparing its “December 7” “recommendation deck outlining the Bugsby Blueprint,” Compl. ¶ 56, not any of the meetings that supposedly took place in New York.¹³ Indeed, as Steven attested in Bugsby’s State Action, the “full recommendation deck” was “finalized” as of December 7, 2013. Ex. 6, ¶ 13.

Even if the New York meetings were a “link[] in the chain of events leading to” Bugsby’s claims, that is not sufficient to support jurisdiction under 302(a)(1). *Bozell Grp., Inc. v. Carpet Co-Op of Am. Ass’n, Inc.*, 2000 WL 1523282, at *7 (S.D.N.Y. Oct. 11, 2000) (concluding that “even if” New York meetings “were ‘important’ to [defendant’s] overall business strategy,” they did not confer jurisdiction). Bugsby acknowledges that, as of Investor Day, Bugsby was still “refining” its recommendations and had neither prepared nor delivered its “recommendation deck” to Defendants. Compl. ¶¶ 49–50, 56. Bugsby subsequently “sent its recommendation deck,” which “memorialized Bugsby’s work,” to Defendants, on December 7, 2013. *Id.* ¶ 56. Bugsby does not allege that it performed any additional work for Defendants. On December 19, 2013, nearly two weeks *after* Bugsby completed “the Bugsby Blueprint deck,” the parties attended meetings in New York in which Bugsby allegedly “la[id] out its ideas” from “the Bugsby Blueprint.” *Id.* ¶¶ 67–68. Bugsby does not allege that it performed work during (or after) the December 19 meetings, and those meetings in no way relate to Defendants’ alleged wrongdoing in failing to compensate Bugsby. Accordingly, these meetings are not “substantively significant”

¹³ Even if Bugsby “performed” *its* “work” in New York, its “unilateral activities” “cannot support a finding of personal jurisdiction” over Defendants. *Gordian Grp., LLC v. Syringa Exploration, Inc.*, 168 F. Supp. 3d 575, 589 (S.D.N.Y. 2016) (rejecting plaintiff’s argument that jurisdiction exists because it “performed its obligations under the Agreement almost exclusively in New York” and “Defendant accepted the benefits of [its] services”).

to Bugsby’s quantum meruit claims and do not “confer personal jurisdiction” under 302(a)(1). *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 956 F. Supp. 1131, 1135–36 (S.D.N.Y. 1997).¹⁴

V. The Complaint Fails To State A Claim Against Defendants For Quantum Meruit.

Apart from its fatal jurisdictional and procedural flaws, the Complaint also fails to state a claim for quantum meruit, and this action must be dismissed pursuant to Rule 12(b)(6).

A. Bugsby’s Claim Is Barred By The CNDA.

Bugsby’s surgical pleading—avoiding any references to the CNDA—does not prevent this Court from considering the CNDA on a motion to dismiss under Rule 12(b)(6). *See Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47–48 (2d Cir. 1991); *see also I. Meyer Pincus & Assocs. P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir.1991) (explaining that a plaintiff may not “evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the [document] to the complaint or to incorporate it by reference”).

Because the purported “advice” was governed by the CNDA, “recovery in quasi contract for events arising out of the same subject matter”—those at issue here—is “preclude[d]” under New York law. *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987); *SAA-A, Inc. v. Morgan Stanley Dean Witter & Co.*, 281 A.D.2d 201, 203 (1st Dep’t 2001) (“[W]here there is an express contract no recovery can be had on a theory of implied contract.”). Even if Bugsby, which did not sign the CNDA, Ex. 1 ¶ 57, were indeed an independent entity, the CNDA nevertheless would preclude Bugsby’s claims for quantum meruit because the CNDA governed

¹⁴ Nor do Bugsby’s allegations that, two to four years after the events at issue—between 2015 and 2017—Alexandria entered into joint ventures with an investor “headquartered and domiciled in Manhattan, NY” and a “New York . . . financial advisor” support personal jurisdiction. Compl. ¶¶ 83–85. Bugsby’s quantum meruit claims “do not arise from” that business transaction. *Casville Invs., Ltd. v. Kates*, 2013 WL 3465816, at *8 (S.D.N.Y. July 8, 2013). Indeed, as the Supreme Court noted in dismissing the near-identical quantum meruit claims in the State Action, the joint ventures in “Project Affirmed [are] not the subject of this litigation.” Ex. 2 at 6. Bugsby’s claims instead “relate to the alleged failure of Joel and/or Alexandria” to “pay for services rendered,” and although “[s]aid services were about Project Affirmed,” “that fact is mere background.” *Id.*

the entire subject matter of “strategic advice to be provided to Alexandria with respect to certain potential programmatic joint ventures, code named ‘Project Affirmed,’” CNDA Preamble. *See, e.g., 22 Gramercy Park, LLC v. Michael Haverland Architect, P.C.*, 170 A.D.3d 535, 536–37 (1st Dep’t 2019) (precluding quasi-contractual claims in light of “express contract governing the subject matter,” without regard for whether plaintiff was a signatory).

B. Bugsby Fails To Allege A Reasonable Expectation Of Compensation.

Apart from the fundamental issue that a party cannot maintain a claim for quantum meruit where, as here, a written agreement covers the work in question, Bugsby’s claim is independently barred under Rule 12(b)(6) because, in three principal respects, the Complaint fails to adequately allege a “reasonable expectation of compensation,” *Soumayah v. Minnelli*, 41 A.D.3d 390, 392 (1st Dep’t 2007), for services Bugsby allegedly provided over the course of a few weeks in 2013, Compl. ¶¶ 35–56 (alleging that Bugsby began its work during “2013 Thanksgiving holiday” and “sent its recommendation deck” that “memorialized [its] work” on December 7, 2013).

First, while Bugsby asserts that it “performed the services” alleged in the Complaint “with the expectation of compensation in exchange for the services,” *id.* ¶ 106, Bugsby only vaguely alludes to a “promise” of expectation, without ever stating when or by whom any promise was made, *see id.* ¶ 63 (claiming Defendants “promised Bugsby remuneration at the outset”); *id.* ¶ 98 (“ARE and Joel Marcus reneged on a promise to provide what was due.”). Those vague references, without more, are “not sufficiently definite or concrete as plausibly to be binding upon Defendants,” *LightSquared Inc. v. Deere & Co.*, 2015 WL 585655, at *10 (S.D.N.Y. Feb. 5, 2015), particularly in light of the parties’ contemporaneous agreement that Steven and Bugsby, his alter ego, would receive “no compensation” for this project. CNDA ¶ 20; *see also* Ex. 5 ¶ 44 (email from Steven confirming that he provided that “advice” “without expectation of anything other than appreciation”). Nothing in the Complaint supports the allegation that Bugsby performed the work

at issue with any “expectation of compensation other than exposure” in exchange for the short-term advisory services it allegedly provided to Defendants. *Tasini v. AOL, Inc.*, 851 F. Supp. 2d 734, 740 (S.D.N.Y.), *aff’d* 505 F. App’x 45 (2d Cir. 2012). Accordingly, Bugsby’s reference to an unspecified “promise” is not “sufficient factual matter” to “state a claim to relief that is plausible on its face,” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Second, Bugsby’s claim to have had an “expectation of compensation” is belied by its contemporaneous awareness of Alexandria’s “Related Persons Policy,” which Bugsby *attached to its pleading* in the State Action but which is conspicuously absent from the Complaint here.¹⁵ *See* Ex. 1 at Ex. B. As Bugsby explained in the State Action, “ARE’s 2009 policy,” which has been *publicly available* since at least April 2010, Mastro Decl. ¶ 12; Ex. 10 ¶ 7, “requires independent board ratification of transactions with family or ‘related persons’ that are on market terms and to the benefit of ARE.” Ex. 1 ¶ 53.¹⁶ Thus, there is no dispute that, absent such “independent . . . ratification,” Alexandria *could not* have paid Bugsby or Steven for any alleged work in 2013. Bugsby has never alleged that Alexandria’s “independent board” would have “ratif[ied]” paying him, Ex. 1 ¶ 53, and therefore cannot claim any “expectation of compensation.”¹⁷

Third, Bugsby has “fail[ed] . . . to . . . establish the reasonable value of [its] services.” *Dubov v. Lewis*, 2019 WL 1060652, at *5 (S.D.N.Y. Mar. 6, 2019) (dismissing for “fail[ure] . . . to adequately plead a claim for quantum meruit”). While Bugsby outlandishly claims that the “reasonable fair market value of the services” it purportedly performed for Alexandria “exceed[s]

¹⁵ As with the CNDA, the Court may consider the Related Persons Policy because Bugsby plainly “had notice” of the policy, and the policy is another document that is “integral to is claim,” and that Bugsby “most wanted to avoid.” *Cortec Indus. Inc.*, 949 F.2d at 44.

¹⁶ Bugsby also acknowledged that Joel mentioned the Related Persons Policy when explaining that Alexandria had “a specific policy against hiring family.” Ex. 1 ¶ 52.

¹⁷ Bugsby alleges that Steven’s experience with Alexandria in 2008 “set a clear precedent regarding market-based remuneration.” Compl. ¶ 37. As the Complaint confirms, however, Steven was *not paid* at that time. *Id.* In addition, that experience pre-dates “ARE’s 2009 policy,” Ex. 1 ¶ 53, and at that time, Bugsby did not even exist.

\$68.7 million,” Compl. ¶ 103, and that the “reasonable value” of services supposedly provided to Joel “exceed[s] \$33.6 million,” *id.* ¶ 108, the Complaint is devoid of any allegation relating to how the value of a few weeks of work could credibly top \$100 million. Further exposing the absurdity of Bugsby’s claim, Bugsby and Steven recently alleged, in Bugsby’s State Action, that the “market value” of these *same services* was \$12 million, which itself strains credulity. Ex. 1 ¶ 65.¹⁸

VI. The Court Should Abstain From Exercising Jurisdiction Under *Colorado River*.

The parallel and ongoing litigation in California independently warrants dismissal under the abstention doctrine set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The two cases are “parallel” because “substantially the same parties are contemporaneously litigating substantially the same issue” in another forum. *Iacovacci*, 2019 WL 2074584, at *4. In fact, every party to this action is a party to the California Action, and the issues are “the same.” *See AMNEX, Inc. v. Rowland*, 25 F. Supp. 2d 238, 243 (S.D.N.Y. 1998) (the “core issues” are the same “whether raised as affirmative defenses or as affirmative claims”).

Because the two matters are “parallel,” the Court must look to the six *Colorado River* factors to determine whether abstention is warranted. *Id.* at 244. Not a single factor weighs in favor of this Court retaining jurisdiction. This Court is indisputably “an inconvenient forum for this case,” *id.* at 244–45, as Justice Sherwood already determined, Ex. 2 at 6. Further, the threat of “piecemeal litigation” is real, particularly in light of Bugsby’s blatant “forum shopping” in this Court, “to avoid going through normal state channels.” *Canaday v. Koch*, 608 F. Supp. 1460, 1470

¹⁸ Bugsby’s claims are also time-barred. Under New York’s borrowing statute, CPLR § 202, “a cause of action accrue[s]” in “the place of injury,” which for a “purely economic” injury “usually is where the plaintiff resides and sustains the economic impact of the loss.” *Glob. Fin.*, 93 N.Y.2d at 528–29. Bugsby is a Delaware LLC, Compl. ¶ 5, so “for purposes of the borrowing statute,” Bugsby’s “residence” is “Delaware, [its] state of incorporation.” *Interventure 77 Hudson LLC v. Falcon Real Estate Inv. Co., LP*, 172 A.D.3d 481 (1st Dep’t 2019). Bugsby is thus subject to Delaware’s three-year limitations period for claims for quantum meruit. *See* 10 Del. C. § 8106. Because Bugsby allegedly performed work in “November and December 2013,” Compl. ¶ 41, at the latest its claims were barred by January 1, 2017, long before either this case or the State Action was filed.

(S.D.N.Y. 1985). The “order in which jurisdiction was obtained” also favors abstention, as the California Action predates this case by “eight months” and is “actively progressing” in discovery. *AMNEX*, 25 F. Supp. 2d at 245. The California Action would “adequately protect the rights [Bugsby] is seeking to vindicate,” *id.* at 246, as Justice Sherwood determined, because Defendants have consented to Bugsby and Steven bringing their claims as counterclaims there, Ex. 3. Finally, this action “present[s] only issues of state . . . law,” which further “tips the scale toward” abstention. *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of N.Y.*, 762 F.2d 205, 211 (2d Cir. 1985).

The “vexatious, reactive, and duplicative” nature of this proceeding also strongly weighs in favor of abstention. *Machat v. Sklar*, 1997 WL 599384, at *9 (S.D.N.Y. Sept. 29, 1997). Bugsby has “blatant[ly] attempt[ed] to manipulate the concurrent system of jurisdiction” by re-litigating issues already decided by the Supreme Court and engaging in sham transactions to manufacture diversity jurisdiction, which further “tip[s] the balance away from this court’s exercise of jurisdiction.” *Garcia v. Tamir*, 1999 WL 587902, at *8 (S.D.N.Y. Aug. 4, 1999).

VII. The Complaint Should Be Dismissed Under Rule 17(b) For Lack Of Capacity.

Bugsby alleges that its “primary business address” is in New York. Compl. ¶ 6. Yet Bugsby is not registered to do business in New York under N.Y. Corp. Bus. Law § 1312(a). Mastro Decl. ¶ 13; *see* Ex. 11. Thus, Bugsby lacks “legal capacity to sue,” *see* Fed. R. Civ. P. 17(b), which precludes it from filing suit in this Court where “jurisdiction rests on diversity.” *Manney*, 2011 WL 6026507, at *7.¹⁹

¹⁹ On October 24, 2019, Defendants served a Rule 11 letter apprising Plaintiff’s counsel that his “Complaint ignores a host of well-settled legal principles and authorities foreclosing Plaintiff’s claims,” including Plaintiff’s “failure to register to do business under N.Y. Bus. Corp. § 1312(a).” In response, Plaintiff’s counsel claimed that Bugsby filed an “Application for Authority” in September 2019 and that “the process is not completed.” *See* Mastro Decl. ¶ 16. This is the second time, however, that Bugsby has filed an action in New York without having been registered to do business; in fact, Defendants noted this same defect in Bugsby’s New York State Action five months ago. State Action, Dkt. 47 at 8. In any event, the mere “submi[ssion]” of an Application for Authority in no way establishes that Bugsby has “authority” to “maintain any action . . . in this state.” *See Manney*, 2011 WL 6026507 at *7.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint with prejudice.

Dated: New York, New York
November 12, 2019

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Randy M. Mastro _____

Randy M. Mastro
Jennifer H. Rearden
Jessica C. Benvenisty
Nathan C. Strauss
Grace E. Hart

200 Park Avenue
New York, NY 10166-0193
(212) 351-4000
RMastro@gibsondunn.com

*Attorneys for Defendants Alexandria Real
Estate Equities, Inc. and Joel S. Marcus*