IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-1362

HAROLD HOFFMAN
v.
NORDIC NATURALS, INC.

Petition for Rehearing and Rehearing En Banc

Rehearing is warranted in this appeal because the panel decision skipped an essential step when it bypassed subject-matter jurisdiction to dismiss on claim-preclusion grounds without addressing whether the jurisdictional issue was difficult and the preclusion question was easier.

In *Sinochem International Co. v. Malay International Shipping Corp.*, the Supreme Court explained that, "If . . . a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground." 549 U.S. 422, 436 (2007). "In the mine run of cases, jurisdiction 'will involve no arduous inquiry' and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum 'should impel the federal court to dispose of those issues first.'" *Id.* (internal alterations omitted) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587–88 (1999)). Only when "subject-matter

. . . jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, [does] the court properly take[] the less burdensome course." *Id.*

In this appeal, the Court relied on *Sinochem* to bypass a squarely presented subject-matter-jurisdiction question, but it failed to heed *Sinochem*'s command that jurisdictional bypass is permitted only when the jurisdictional ground cannot be readily determined and the alternative ground is less burdensome. The panel opinion did not address this essential point, and the error is outcome-determinative. This is a mine-run case where subject-matter jurisdiction involved no arduous inquiry: a routine amount-in-controversy finding. And the alternative basis the opinion relied on was more burdensome, not less: numerous legal issues of first impression. The Court invoked *Sinochem* jurisdictional bypass sua sponte, without benefit of briefing by the parties or a district court opinion on the point; much of its analysis of the alternative basis was sua sponte, too. The Court was impelled to decide its subject-matter jurisdiction first, and this error warrants rehearing.

In addition to this clear error, rehearing is warranted for a second reason. The panel opinion — again, sua sponte and without discussion by the parties or the court below — dramatically expands the availability of jurisdictional bypass,

making it available any time the federal court finds any dismissal basis deemed non-merits, no matter how clear it is that the federal court lacks the power to decide the case, and no matter whether the dismissal ends the case. The question of how broadly jurisdictional bypass applies is difficult and unsettled, and this unprecedented holding would encourage improper removal by defendants and upend the limits crafted by Congress on federal-court power to end suits filed in state courts. Rehearing is warranted on this basis as well.

Procedural History

This appeal arises from a class-action consumer suit filed in New Jersey state court. Harold Hoffman alleged that Nordic Naturals, Inc., violated state consumer-protection law by, among other things, deceptively marketing a fish-oil supplement as "pharmaceutical grade." Hoffman filed the suit pro se in state court, and he framed his complaint to defeat federal jurisdiction based on 28 U.S.C. § 1332(d)(2),[1] seeking to ensure that his case would be decided in the forum he chose. Section 1332(d)(2) grants jurisdiction over certain class action suits with an

[1] Section 1332(d) codifies the jurisdictional component of the Class Action Fairness Act (CAFA).

amount in controversy over $5 million, and Hoffman's complaint alleged that the amount in controversy was less than $5 million.[2]

Nordic removed the case to federal court, asserting jurisdiction under § 1332(d), A44, and alleging the amount in controversy was met, A47, 51–55, but supporting that allegation only with a Nordic manager's statement that did not specify any relevant sales value, A59. Nordic then moved to dismiss, asserting that Hoffman's suit was barred by state claim-preclusion law because the same federal court recently had dismissed on the merits a different consumer suit by Hoffman against Nordic; that suit involved the same supplement but not the pharmaceutical-grade-labelling allegation.[3] A64. Believing the amount in controversy was below the $5 million jurisdictional threshold, Hoffman sought limited discovery. A74.

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[2] The opening paragraph of the panel opinion described Hoffman as a "serial *pro se* class action litigant . . . . 'an attorney who has made a habit of filing class actions in which he serves as both the sole class representative and sole class counsel.'" Op. 2–3 (quoting *Hoffman v. Nutraceutical Corp.*, 563 F. App'x 183, 184 (3d Cir. 2014)). While the Court may view pro se class suits with disfavor, New Jersey law does not prohibit them. *See, e.g.*, *In re: Cadillac V8-6-4 Class Action*, 93 N.J. 412, 439–40 (1983) (declining to adopt Third Circuit's per se rule against dual roles, and noting "an attorney might serve as both the counsel and class representative" when "a worthwhile suit might never be brought unless the class representative could also serve as counsel").

In his over 38 years of practice, Hoffman has never been subject to professional discipline. Prior to this appeal, Hoffman has never been sanctioned by any court, for frivolous litigation or any other reason.

[3] The pharmaceutical-grade allegations comprised the first four pages of allegations in the complaint at issue here, and no pharmaceutical-grade allegations

The district court granted Nordic's motion to dismiss with prejudice, over six months after it was filed. A1. It stated that it had jurisdiction pursuant to § 1332(d)(2), that Hoffman's suit was barred by state claim-preclusion law, and, alternatively, that Hoffman's claims lacked merit. The dismissal order noted Hoffman's request for discovery, described Hoffman's complaint as a "poorly disguised attempt" to ensure that the amount in controversy was below the jurisdictional limit, and denied the discovery motion. A13. Nordic moved for sanctions under Fed. R. Civ. P. 11, which the district court denied but stated that Hoffman "is playing a thinly veiled game of forum shopping" that "reek[s] of gamesmanship and may warrant sanctions in the future." SA 108–09.[4]

Hoffman appealed, arguing primarily that the district court had lacked subject-matter jurisdiction. In the precedential opinion now at issue, this Court

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were in the prior suit. While the second suit also re-alleged that the supplement contained an undisclosed dangerous level of a particular ingredient, the panel opinion was incorrect that the two suits involved "virtually identical claims," op. 3.

[4] Although the panel opinion quoted this criticism, op. 6–7, it was unfounded. Plaintiffs are entitled to choose their forums and craft their complaints to protect those choices. *See Sinochem*, 549 U.S. at 436 (noting "the consideration ordinarily accorded the plaintiff's choice of forum"); *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006) ("CAFA does not change the proposition that the plaintiff is the master of her own claim. . . . [T]he plaintiff may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold." (Internal quotation marks omitted)). The panel opinion described Hoffman's narrowed class definition as "artificial," op. 6, but Hoffman did not act improperly when he framed his allegations to ensure they were adjudicated in the forum he chose.

affirmed, bypassing the jurisdictional issue and holding that dismissal was proper under federal or state claim-preclusion law. (Attachment). In a separate order entered the same day, the Court granted Nordic's motion under Fed. R. App. P. 38 for costs and sanctions for filing a frivolous appeal.[5]

After the panel issued its ruling, Hoffman retained undersigned counsel and the Court granted, over Nordic's opposition, a 30-day extension of time through October 28, 2016, to file for rehearing.

Grounds for Rehearing

I. Rehearing is warranted to correct the panel opinion's error in failing to address whether the jurisdictional question was readily determinable.

"'On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). Under limited circumstances, a federal court may bypass subject-matter jurisdiction to dismiss on an alternative threshold ground, but only if the court cannot readily decide the subject-matter-jurisdiction question and the alternative ground is less burdensome. *Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 549 U.S. 422, 436

[5] Hoffman has filed a motion to reconsider the Rule 38 sanctions order for substantially the same reasons he seeks rehearing.

(2007). This limit promotes basic judicial economy, but in removal cases it reflects two other potent values: "sensitivity to state courts' coequal nature" and "the consideration ordinarily accorded the plaintiff's choice of forum." *Id.* at 436; *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587 (1999).

Here, the panel opinion overlooked this required step. If the Court had addressed ready determinability, it would have recognized that bypassing jurisdiction was not the proper course because the subject-matter jurisdiction question was neither arduous nor more difficult than the claim-preclusion question.

The "proper course" — the course the Court was "impel[led]" to take — was to decide subject-matter jurisdiction first unless it found the jurisdictional issue was arduous and could not be readily determined and the alternative threshold issue was less burdensome and weighed heavily in favor of dismissal. *Sinochem*, 549 U.S. at 436 (quoting *Ruhrgas*, 626 at 588). Court after court has refused to bypass jurisdiction without such a showing,[6] or has agreed to bypass only with it.[7]

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[6] *E.g.*, *Abrahamsen v. Conocophillips Co.*, 503 F. App'x 157, 159 (3d Cir. 2010); *Envtl. Conservation Org. v. City of Dallas,* 529 F.3d 519, 252 (5th Cir. 2008); *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 607 n.4 (9th Cir. 2005); *Gadlin v. Sybron Int'l Corp.*, 222 F.3d 797, 799 (10th Cir. 2000).

[7] *E.g.*, *Elec. Privacy Info. Ctr. v. FAA*, 821 F.3d 39, 41 n. 2 (D.C. Cir. 2016); *Niemi v. Lasshofer*, 728 F.3d 1252, 1260 (10th Cir. 2013); *Wolstenholme v. Bartels*, 511 F. App'x 215, 217 (3d Cir. 2013).

Subject-matter jurisdiction was readily determinable. The case presented "no complex question of state law," *Ruhrgas*, 526 U.S. at 588, and no issue of circuit first impression, *Sinochem*, 549 U.S. at 435. No fact-finding was even required, because Nordic had the burden of alleging plausibly that it met the § 1332(d) amount-in-controversy threshold, *Morgan v. Gay*, 471 F.3d 469, 473–76 (3d Cir. 2006), and it failed to do so. The only facts Nordic alleged were the gross sales to distributors (which it did not show was the correct measure of damages[8]) for three products including the one product named in the complaint (without showing that state law prevented Hoffman from limiting his claim to the one product). A53, 59. Even if Nordic's allegations sufficed to create an issue, all the district court had to do was make a garden-variety amount-in-controversy finding applying settled law. *See* Heather Elliott, *The Jurisprudence of Justice Ruth Bader Ginsburg: Jurisdictional Resequencing and Restraint*, 43 New Eng. L. Rev. 725, 745 n.125 (2009) ("[S]ome subject-matter-jurisdiction questions turn on banal factual inquiries that have almost no effect beyond the case at bar. For example, an amount-in-controversy question . . . . It seems unlikely, however, that a court

[8] *See Zeliff v. Sabatino*, 15 N.J. 70, 74 (1954) (stating that in cases involving seller's misrepresentation, measure of harm is the difference between the price paid and either the actual value or the value represented by the seller).

would find this kind of subject-matter jurisdiction question the kind that justifies resequencing."). Determining the amount in controversy here was not arduous.

The claim-preclusion issue, meanwhile, was devilishly hard. Dismissing on that basis forced the Court to brave a minefield of novel legal questions:

- whether to apply federal or state claim-preclusion law. Op. 9–11. This open question was not addressed by the district court and not briefed by the parties. The opinion described this as "an interesting doctrinal question" and a "conflict" which it left unresolved by concluding that the result was the same under either body of law. Op. 11. The opinion reduced its double-analysis burden by stating that the federal and state preclusion *standards* were the same, op. 12, but it never addressed whether New Jersey's *interpretation* of those broad standards was the same, too.
- whether it was appropriate to uphold dismissal on federal claim-preclusion grounds even though Nordic did not raise that affirmative defense in its motion to dismiss. Op. 12 n. 46. The opinion acknowledged in a footnote that Nordic "technically raised a[state-law] defense in its motion to dismiss," but it "construe[d] Nordic's motion as raising a [federal] res judicata defense." *Id.* The Court had no briefing on whether a federal court can reconstrue a state-law defense as a federal-law affirmative defense and then

dismiss on the latter basis, and it cited no authority supporting the move. The opinion justified construing Nordic's motion as having raised the federal defense "because the substantive analysis for purposes of this case is functionally the same." *Id.* Again the Court had no briefing on whether the two defenses in fact applied the same here, and of course no precedent answered that. In fact, the opinion did not separately analyze state law itself, instead just citing prior cases that described the federal and state doctrines as relatives. *Id.*

- whether, under both federal and state claim-preclusion law, a federal dismissal without prejudice converts into a final order, automatically without a motion or order, if the plaintiff is given an opportunity to amend and instead files a new complaint in state court. Op. 13–14. This was another issue of first impression. The federal authority the opinion cited addressed finality only in the context of appealability under 28 U.S.C. § 1291, not federal claim preclusion, and the opinion cited no authority that final-enough-to-appeal is the same as final-enough-to-preclude. Op. 13 n.49. The opinion cited only these federal-law authorities even though Hoffman argued that state law requires an affirmative step to convert a dismissal without prejudice into one with prejudice, Aplt. Br. 22–23.

- whether it was permissible to dismiss the complaint on res judicata grounds under Fed. R. Civ. P. 12(b)(6), even though the basis of the defense did not appear on the face of the complaint. Op. 14–15. The opinion acknowledged the "ordinary requirement" that a court must convert the motion to one for summary judgment and give the parties a chance to present evidence, *id.* (*citing Rycoline Prods., Inc. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir. 1997)), but it deemed the rule inapplicable because it was "unnecessary" here. *Id.* The reason it was unnecessary to give Hoffman an opportunity to present facts that would establish a factual dispute, the opinion stated, was because "there were no factual disputes." Op. 14. It cited no authority supporting an "unnecessary" exception to *Rycoline Products*, let alone that the absence of a factual dispute justified the denial of a chance to establish one. It did not discuss the parties' dispute of fact over whether the two complaints were duplicative. *Compare* Aple. Br. 1, 5, 6, 7, 8, 11, 13, 14, 15, 16, *with* Reply Br. 6–7. And the opinion decided this novel question too sua sponte without a decision below or briefing by the parties.

In the end, the question is not whether the Court's resolution of any of these thorny questions was right or wrong. It is enough that the need to answer them, sua sponte, made deciding the claim-preclusion issue anything but "less burdensome."

Sinochem, 549 U.S. at 436. This case stood *Ruhrgas* on its head: it was the alternative ground that "raise[d] difficult and novel question[]s," while the subject-matter jurisdiction ground was "a straightforward . . . issue presenting no complex question of state law." 526 U.S. at 588. Deciding subject-matter jurisdiction first was the only proper course.

Instead of bypassing subject-matter jurisdiction and dismissing on claim-preclusion grounds, the Court should have remanded to the district court for a ruling on jurisdiction or ordered supplemental briefing on jurisdiction. Rehearing is necessary to correct the error.

II. Rehearing is warranted to decide whether federal courts may bypass substantial challenges to federal subject-matter jurisdiction to dismiss cases on any threshold ground, even one that terminates the case.

In *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), and *Sinochem International Co. v. Malay International Shipping Corp.*, 549 U.S. 422 (2007), the Supreme Court recognized two threshold grounds upon which courts can dismiss a suit without deciding their subject-matter jurisdiction: personal jurisdiction and *forum non conveniens*. Acting sua sponte on appeal in a case where subject-matter jurisdiction was affirmatively disputed, the panel opinion held that jurisdictional bypass is also available to dismiss on claim-preclusion grounds because jurisdictional bypass is available to dismiss on any non-merits ground. Op. 8–9.

This holding goes well beyond *Ruhrgas* and *Sinochem*, and it would encourage abuse of removal by class-action defendants and short-circuit the limits on class removal crafted by Congress. The scope of jurisdictional bypass is a difficult and unsettled question, and the Court should grant rehearing en banc to review it.

Neither *Ruhrgas* nor *Sinochem* requires the panel opinion's broad reading. *Ruhrgas* spoke narrowly, holding only that there is no unyielding jurisdictional hierarchy and that a court does not abuse its discretion when it bypasses a difficult subject-matter-jurisdiction issue to dismiss on an easy personal-jurisdiction ground. 526 U.S. at 578, 588. *Sinochem* was narrower still, limiting its holding to *forum non conveniens*, 549 at 425, 428–29, 436, and noting that dismissal still allowed the case to "be adjudicated elsewhere," with "no genuine risk that the more convenient forum will not take up the case," *id.* at 432, 435. Neither decision ended the case.

Courts have struggled to decide what other threshold grounds, besides the two found in *Ruhrgas* and *Sinochem*, are available for bypass. *See, e.g.*, Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 Fla. L. Rev. 301, 307, 326 (2011). Contrary to the panel opinion, other authorities reject claim preclusion as a ground available for jurisdictional bypass. *See, e.g.*, *id.* at 330; *Yokeno v. Sekiguchi*, 754 F.3d 649, 651 n.2 (9th Cir. 2014) ("Neither the Supreme Court nor we have previously

identified res judicata as [a basis for jurisdictional bypass] and we decline to do so in this case.").

The panel opinion embraced a maximalist view of jurisdictional bypass with only formalistic analysis, without addressing the sweeping negative consequences likely to result from its ruling. First, it "effectively terminated the plaintiff[']s[] case[]."*Chavez v. Dole Food Co.*, No. 13-4144, slip op. at 8 (3d Cir. Sept. 2, 2016) (en banc). "[T]hat outcome is untenable . . . as a matter of basic fairness . . . ." *Id.* at 10.

Second, it would lead to broad abuse of removal. Under the panel opinion's reasoning, a defendant could win dismissal with prejudice in federal court of *any* suit, no matter how clear the absence of federal jurisdiction, so long as the court is persuaded that dismissal is supported by a non-merits ground. When "the case was improperly removed . . . it would be unfair for [the defendant] to benefit from the wrongful removal by having its motion to dismiss decided in a federal forum." *Consol Energy, Inc., v. Berkshire Hathaway*, 252 F. App'x 481, 483 (3d Cir. 2007) (non-precedential). And the menu of threshold grounds arguably available to defendants is extensive: statute of limitations, political question doctrine, *Rooker-Feldman, Younger* abstention, state and federal sovereign immunity, venue, standing, ripeness, mootness, waiver and forfeiture, exhaustion, and class-

certification standards. The panel opinion opens the door for defendants to misuse removal to kill off large numbers of suits, no matter how clear it is that federal courts lack the power to adjudicate them.

Finally, it would undermine the class-action jurisdictional framework established by Congress. Section 1332(d) sets precise limits on federal power to hear class suits filed in state courts, and those limits would lose much of their force if federal courts could ignore subject-matter jurisdiction to end any suit on any ground deemed to be non-merits.

Conclusion

For the foregoing reasons, the Court should grant rehearing and withdraw its opinion; it should order supplemental briefing or, alternatively, remand to the district court to address subject-matter jurisdiction.

Respectfully submitted,

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I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, *i.e.*, the panel's decision is contrary to the decision of the Supreme Court in *Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007), and that this appeal involves a question of exceptional importance, *i.e.,* whether federal courts may bypass substantial challenges to federal subject-matter jurisdiction to terminate cases by dismissing them on any threshold ground.

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Certificate of Service

I served Appellant's petition for rehearing on opposing counsel, Michael R. McDonald, today, October 28, 2016, through this Court's electronic docketing system.

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October 28, 2016

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-1362

HAROLD M. HOFFMAN,
individually and on behalf of those similarly situated,
Appellant

v.

NORDIC NATURALS, INC.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-14-cv-03291)
District Judge: Honorable Susan D. Wigenton

Submitted Under Third Circuit L.A.R. 34.1(a)
February 9, 2016

Before: FUENTES,* KRAUSE, and ROTH, *Circuit Judges*

(Filed: September 14, 2016)

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* Honorable Julio M. Fuentes assumed senior status on July 18, 2016.

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OPINION OF THE COURT

FUENTES, *Circuit Judge*.

Harold M. Hoffman is a serial *pro se* class action litigant from New Jersey who frequently sues under the New Jersey Consumer Fraud Act. In a previous opinion, we noted that Hoffman is "an attorney who has made a habit of filing class actions in which he serves as both the sole class representative and sole class counsel."[1] According to the

[1] *Hoffman v. Nutraceutical Corp.*, 563 F. App'x 183, 184 (3d Cir. 2014); *see, e.g.*, *Hoffman v. Liquid Health Inc.*, No. 14-1838, 2014 WL 2999280 (D.N.J. July 2, 2014); *Hoffman v. DSE Healthcare Sols., LLC*, No. 13-7582, 2014 WL 1155472 (D.N.J. Mar. 21, 2014); *Hoffman v. Lumina Health Prods.,*

record in this case, Hoffman has sued nearly 100 defendants in New Jersey state court in a period of less than four years.[2] These defendants include Target, Whole Foods Market, GNC, Trader Joes, Barleans Organic Oils LLC, Paradise Herbs & Essentials Inc., Honest Tea Inc., Time Warner Cable, American Express, Bio Nutrition Inc., and many more.[3]

In this case, Hoffman chose to sue Nordic Naturals, Inc. for its allegedly false and misleading advertisements for fish oil supplements. Prior to bringing the present action, Hoffman filed a similar lawsuit against Nordic, asserting virtually identical claims based on the same set of facts. The District Court dismissed that first lawsuit for failure to state a claim. The District Court accordingly dismissed this second lawsuit as procedurally barred by the first. For the following reasons, we will affirm.

I.

In August 2012, Harold Hoffman filed a putative class action lawsuit *pro se* against Nordic Naturals in New Jersey state court for violations of the New Jersey Consumer Fraud Act ("*Hoffman I*").[4] He alleged that Nordic misrepresented

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Inc., No. 13-4936, 2013 WL 5773292 (D.N.J. Oct. 24, 2013); *Hoffman v. Nat. Factors Nutritional Prods.*, No. 12-7244, 2013 WL 5467106 (D.N.J. Sept. 30, 2013).

[2] *Hoffman v. Nordic Naturals, Inc.*, No. 2-14-cv-3291, ECF No. 12, Ex. 2.

[3] *See id.*

[4] In *Hoffman I*, Hoffman alleged five claims under the New Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1 *et seq.*: (i) unconscionable commercial practice; (ii) deception;

the "safety, quality, testing, constituent ingredients and purity" of its product "Ultimate Omega," a fatty acid fish oil supplement.[5] Specifically, Hoffman claimed that, contrary to Nordic's product labeling and marketing representations, Ultimate Omega is "tainted by an undisclosed overdose of a potentially harmful ingredient."[6] Thus, according to Hoffman, Nordic's representations that it is committed to delivering the "world's safest" omega oils and has achieved "award-winning" purity levels are false.[7] The putative class consisted of all nationwide purchasers of Ultimate Omega within a six-year period.[8]

Nordic removed *Hoffman I* to federal court pursuant to the Class Action Fairness Act ("CAFA").[9] CAFA gives federal district courts original jurisdiction over class actions in which (i) the aggregate amount in controversy exceeds $5 million, (ii) there are at least 100 members in the putative class, and (iii) there is minimal diversity between the parties.[10] Hoffman filed a motion in the District Court to remand the case back to state court, which the District Court

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(iii) fraud; (iv) false pretense, false promise and/or misrepresentation; and (v) knowing concealment, suppression and/or omission of material facts. Suppl. App. 31-33. He also asserted claims for common law fraud, unjust enrichment, breach of express warranty, and breach of implied warranty of merchantability. *Id.* at 34-39.

[5] *Id.* at 26, ¶ 19.

[6] *Id.*

[7] *Id.* at 22, ¶ 3.

[8] **[*Id.* at 28, ¶ 27.]**

[9] *See* 28 U.S.C. §§ 1441(a), 1453; *id.* § 1332(d).

[10] *Id.* § 1332(d)(2), (d)(5)(b).

denied.[11] Nordic moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).[12] The District Court dismissed *Hoffman I* without prejudice and gave Hoffman leave to file an amended complaint within 30 days.[13]

But rather than file an amended complaint in the District Court, Hoffman filed a new class action lawsuit against Nordic in New Jersey state court within the 30-day window given to amend *Hoffman I*. This second lawsuit ("*Hoffman II*") arose from facts identical to those in *Hoffman I*—Hoffman's purchase of Ultimate Omega in May 2012—and it asserted virtually identical claims under the New Jersey Consumer Fraud Act.[14] But there was one significant difference: the putative class size was substantially smaller. Rather than a class consisting of all nationwide purchasers of all available sizes of Ultimate Omega within a six-year period, the putative class in *Hoffman II* was restricted to New Jersey consumers who purchased only a 60-count bottle of Ultimate Omega (as opposed to a 120-count or 180-count bottle) within a one-year period.[15] The purpose of this change was, it seems, to reduce the amount recoverable and therefore defeat federal jurisdiction.

Undeterred by Hoffman's tactics, Nordic removed *Hoffman II* back to the District Court. Nordic then moved to

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[11] **[Suppl. App. 51-60.]**
[12] **[*See id.* at 61.]**
[13] **[*Id.*]**
[14] In *Hoffman II*, Hoffman alleged the same five claims under the New Jersey Consumer Fraud Act. App. 37-40. He did not raise any common law claims.
[15] **[App. 26.]**

dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), claiming that *Hoffman II* was barred by New Jersey's entire controversy doctrine, which is New Jersey's "application of traditional res judicata principles."[16] In the alternative, Nordic argued that the complaint failed to state a claim under the New Jersey Consumer Fraud Act.[17] Hoffman moved for limited discovery to determine whether subject matter jurisdiction existed under CAFA.[18] He argued that, given the significantly reduced class size in *Hoffman II*, limited discovery would help the court ascertain whether the amount in controversy exceeded the $5 million jurisdictional minimum.[19]

The District Court granted Nordic's motion and dismissed *Hoffman II* with prejudice.[20] It held that the action was procedurally barred under New Jersey's entire controversy doctrine and, in the alternative, that Hoffman's claims under the New Jersey Consumer Fraud Act failed for substantially the same reasons they failed in *Hoffman I*.[21] The District Court then dismissed as moot Hoffman's motion for limited discovery, explaining that Hoffman's artificial narrowing of the putative class was a "poorly disguised

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[16] *Rycoline Prods., Inc. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir. 1997).
[17] **[*See* App. 5.]**
[18] **[App. 74-78.]**
[19] **[*Id.*]**
[20] **[App. 14.]**
[21] **[App. 1-13.]**

attempt" to destroy CAFA jurisdiction.[22] Hoffman appealed to this Court.[23]

II.

Hoffman challenges (1) the District Court's subject matter jurisdiction under CAFA; (2) the District Court's application of New Jersey's entire controversy doctrine; and (3) the District Court's alternative conclusion that the complaint failed to state a claim upon which relief could be granted. We review these issues *de novo*.[24]

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[22] *Hoffman v. Nordic Naturals, Inc.*, No. 14-3291, 2015 WL 179539, at *7 (D.N.J. Jan. 14, 2015).

[23] Nordic claims that Hoffman's appeal was untimely. We disagree. Hoffman's notice of appeal was filed within 30 days of the District Court's order dismissing *Hoffman II*. *See* Fed. R. App. P. 4(a)(1)(A). Accordingly, we will deny Nordic's motion to dismiss for lack of appellate jurisdiction. We have jurisdiction pursuant to 28 U.S.C. § 1291.

[24] *See Ricketti v. Barry*, 775 F.3d 611, 613 (3d Cir. 2015); *Judon v. Travelers Prop. Cas. Co. of Am.*, 773 F.3d 495, 500 (3d Cir. 2014); *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 118 (3d Cir. 2013).

A. Subject Matter Jurisdiction

Hoffman devotes much of his appeal to challenging the District Court's subject matter jurisdiction. According to him, the District Court was required to make jurisdictional findings of fact to ensure that the amount in controversy met the jurisdictional minimum under CAFA. Hoffman is incorrect.

It is true that a federal court may not rule on the merits of an action without first ascertaining whether it has subject matter jurisdiction to do so.[25] But in *Sinochem International Co. v. Malaysia International Shipping Corp.*,[26] the Supreme Court held that a court is not required to establish jurisdiction before dismissing a case on non-merits grounds, since such a dismissal "means that the court will not proceed at all to an adjudication of the cause."[27] In other words, "jurisdiction is vital only if the court proposes to issue a judgment on the merits."[28] In *Sinochem* itself, the district court dismissed the case on the ground of *forum non conveniens*, which the Supreme Court explained is merely "a determination that the merits should be adjudicated elsewhere."[29]

In this case, the District Court dismissed *Hoffman II* on claim preclusion grounds, which is not technically a judgment

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[25] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).
[26] 549 U.S. 422 (2007).
[27] *Id.* at 431 (internal quotation marks omitted).
[28] *Id.* (internal quotation marks omitted).
[29] *Id.* at 432.

on the merits.[30] Rather, claim preclusion is merely "a determination that the merits [have *already* been] adjudicated elsewhere."[31] Indeed, for reasons of fairness, finality, and judicial economy, claim preclusion *prohibits* a court from reaching the merits of a claim. The District Court was therefore permitted to "bypass" the jurisdictional inquiry in favor of a non-merits dismissal on claim preclusion grounds.[32] Accordingly, we reject Hoffman's subject matter jurisdiction challenge on appeal.[33]

B. Claim Preclusion

The District Court operated under the assumption that New Jersey's entire controversy doctrine—"a state rule of procedure that discourages successive litigation concerning

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[30] *See Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948) ("If the doctrine of res judicata is properly applicable . . . the case may be disposed of without reaching the merits of the controversy.").

[31] *Sinochem*, 549 U.S. at 432.

[32] *See Davis Int'l, LLC v. New Start Grp. Corp.*, 488 F.3d 597, 604 (3d Cir. 2007) (holding that, per *Sinochem*, the district court was not required to first establish jurisdiction before dismissing the case on estoppel grounds).

[33] The District Court reached the merits of Hoffman's claims in the alternative, and, per *Sinochem*, was required to establish subject matter jurisdiction before doing so. But the District Court properly held that *Hoffman II* should be dismissed on claim preclusion grounds, and *Sinochem* tells us that we can affirm on that non-merits dismissal without addressing the merits-based dismissal at all.

the same subject matter"[34]—applies in this case. However, in *Paramount Aviation Corp. v. Agusta*,[35] we held that the entire controversy doctrine "is not the right preclusion doctrine for a federal court to apply when prior judgments were not entered by the courts of New Jersey."[36] Upon conducting an extensive *Erie* analysis, we concluded that federal, not New Jersey, claim preclusion principles apply in successive federal diversity actions.[37] That is, when the first judgment is rendered by a federal district court in New Jersey sitting in diversity, as it was here, federal claim preclusion, not New Jersey's entire controversy doctrine, determines whether a successive lawsuit is permissible.[38] Indeed, courts in our Circuit have routinely applied *Paramount Aviation* to reject applying New Jersey's entire controversy doctrine when the first judgment was not rendered by a New Jersey state court.[39]

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[34] *Ricketti*, 775 F.3d at 612.

[35] 178 F.3d 132 (3d Cir. 1999).

[36] *Id.* at 138.

[37] *Id.* at 144-45; *see also Gannon v. Am. Home Prods., Inc.*, 48 A.3d 1094, 1104 (N.J. 2012) (concluding that because the first judgment was rendered by a federal court, it "look[s] to federal law to determine that judgment's preclusive effect" (citing *Paramount*, 178 F.3d at 145)).

[38] *See Paramount*, 178 F.3d at 142 ("New Jersey's main justification for the doctrine, its interest in preserving its judicial resources, is minimized when none of the prior litigation took place in New Jersey state courts.").

[39] *See, e.g.*, *Bach v. McGinty*, No. 12-5853, 2015 WL 1383945, at *2 (D.N.J. Mar. 25, 2015) ("The entire controversy doctrine will preclude claims brought in federal court only if the preclusive judgment came from a New Jersey court . . . ."); *Yantai N. Andre Juice Co. v. Kupperman*,

The Supreme Court's decision in *Semtek International Inc. v. Lockheed Martin Corp.*[40] creates an interesting doctrinal question vis-à-vis *Paramount Aviation*.[41] In *Semtek*, the Supreme Court held that we apply the claim preclusion law "that would be applied by state courts in the State in which [a] federal diversity court sits," unless "the state law is incompatible with federal interests."[42] This seems to suggest that we should apply New Jersey's entire controversy doctrine to judgments rendered by federal diversity courts in New Jersey. Yet *Paramount Aviation* tells us that the entire controversy doctrine is procedural rather than substantive and that, therefore, consistent with *Erie*, we should apply federal claim preclusion principles to federal diversity judgments. We need not resolve this conflict, however, because under either New Jersey or federal claim preclusion principles we come to the same result.[43]

No. 05-CV-1049, 2005 WL 2338854, at *3 (D.N.J. Sept. 23, 2005) ("In this case, the issuing court in 2002 was the United States District Court for the District of New Jersey. Therefore, the New Jersey Entire Controversy Doctrine is inapplicable.").

[40] 531 U.S. 497 (2001).

[41] We recently discussed this issue in *Chavez v. Dole Food Co.*, --- F.3d ---, 2016 WL X, at *Y n.130 (3d Cir. Sept. Z, 2016) (en banc) [placeholder].

[42] *Id.* at 508-09.

[43] This approach is consistent with the approach taken by another panel of this Court when addressing a similar issue. *See McHale v. Kelly*, 527 F. App'x 149, 151-52 (3d Cir. 2013).

"Both New Jersey and federal law apply res judicata or claim preclusion when three circumstances are present: (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action."[44] The third factor "generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims."[45]

All three elements are present here.[46] There is no question that the parties in *Hoffman I* and *Hoffman II* are identical. Likewise, the underlying event giving rise to Hoffman's claims is the same in both cases: Hoffman's exposure to Nordic's advertising for Ultimate Omega and consequent decision to purchase Ultimate Omega in New Jersey in May 2012. Recognizing these similarities, Hoffman seems to argue only that the District Court's dismissal

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[44] *In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008) (internal quotation marks omitted).

[45] *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 277 (3d Cir. 2014) (citations and internal quotations omitted).

[46] We note that although Nordic technically raised an entire controversy defense in its motion to dismiss, because the substantive analysis for purposes of this case is functionally the same, we will construe Nordic's motion as raising a res judicata defense. *See Rycoline Prods.*, 109 F.3d at 886 (describing the entire controversy doctrine and res judicata as "blood relatives"); *Electro-Miniatures Corp. v. Wendon Co.,* 889 F.2d 41, 43 n.5 (3d Cir. 1989) (describing the entire controversy doctrine and res judicata as "inextricably related"). We may affirm on any ground supported by the record. *Hildebrand v. Allegheny Cty.*, 757 F.3d 99, 104 (3d Cir. 2014).

without prejudice of *Hoffman I* was not a "final" judgment. We disagree.

The District Court dismissed *Hoffman I* without prejudice for failure to state a claim – a decision on the merits – and provided Hoffman 30-days' leave to amend.[47] When that 30-day period expired, the District Court's decision became final. Indeed, we have held that a plaintiff can convert a dismissal without prejudice into a final order by "declar[ing] his intention to stand on his complaint."[48] By opting to not amend his complaint in *Hoffman I* within the time frame provided by the District Court, Hoffman elected to "stand on his complaint," thereby converting the District Court's dismissal into a final order.[49] We reject Hoffman's

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[47] For these purposes, a motion for judgment on the pleadings under Rule 12(c) is identical to a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Turbe v. Gov't of V.I.*, 938 F.2d 427, 428 (3d Cir. 1991).

[48] *Borelli v. City of Reading*, 532 F.2d 950, 951-52 (3d Cir. 1976).

[49] *See, e.g.*, *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 31 n.3 (3d Cir. 2011) ("[Plaintiff's] failure to amend his complaint in the time frame allotted by the District Court reflects his intention to stand on his complaint, which renders the District Court's order final . . . ."); *Berke v. Bloch*, 242 F.3d 131, 135 (3d Cir. 2001) (concluding that the plaintiffs' failure to reinstate their action within the 60-day leave given to do so was "akin to standing on their complaint"); *Batoff v. State Farm Ins.*, 977 F.2d 848, 851 n.5 (3d Cir. 1992) ("[B]y failing to move to amend within the 30 days granted by the court, [plaintiff] elected to stand on his complaint. Thus,

contention that his filing of *Hoffman II* evidenced his intention to *not* stand on his complaint in *Hoffman I*. Hoffman cannot plausibly make this argument, which implies that he intended to fix the flaws in *Hoffman I*, while at the same time adamantly maintaining that *Hoffman II* is an entirely different lawsuit based on entirely different claims. If Hoffman had intended to fix the problems in *Hoffman I*, he was required to file an amended complaint in the District Court. Filing a new action in a different court does not prevent the District Court's order from ripening into a final order. Thus, we conclude that all three elements of claim preclusion are satisfied. *Hoffman II* is therefore procedurally barred by *Hoffman I*.

We acknowledge that res judicata is an affirmative defense that typically may not afford the basis for a Rule 12(b)(6) dismissal unless it is "apparent on the face of the complaint."[50] If not apparent, the district court must either deny the 12(b)(6) motion or convert it to a motion for summary judgment and provide both parties an opportunity to present relevant material.[51] The ultimate purpose of this rule is to avoid factual contests at the motion to dismiss stage. However, we find this rule to be inapplicable to the circumstances of this case.

There are no factual disputes here. Moreover, both the District Court and the parties were not only aware of but

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even if the order of dismissal was not final when entered, it became final after 30 days.").

[50] *Rycoline Prods.*, 109 F.3d at 886 (quoting *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978)).

[51] *Id.* at 886-87.

intimately familiar with Hoffman's previous lawsuit, since the same judge adjudicated *Hoffman I* and ruled on those claims. The ordinary requirement that a potential res judicata defense appear "on the face" of *Hoffman II* is unnecessary when the District Court was already aware of *Hoffman I* and indeed entered a final judgment in that case. And, of course, the two pleadings that are before us and were before the District Court – the complaint in *Hoffman I* and the complaint in *Hoffman II* – as well as the judgment in *Hoffman I*, are matters of public record.[52] We therefore find no error in the District Court's decision to look to these records and grant Nordic's 12(b)(6) motion to dismiss.

III.

For the foregoing reasons, we will affirm the District Court's dismissal of *Hoffman II*.

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[52] *See Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record . . . ."); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) ("To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record."); *see also C.H. Robinson Worldwide, Inc. v. Lobrano*, 695 F.3d 758, 764 (8th Cir. 2012) ("Our interpretation of the phrase 'face of the complaint' includes public records and materials embraced by the complaint, and materials attached to the complaint." (citations omitted)).

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15-1362

Harold M. Hoffman,
individually and on behalf of those similarly situated,
Appellant

v.

Nordic Naturals, Inc.

(D.N.J. No. 2-14-cv-03291)

ORDER AMENDING OPINION

At the direction of the Court, the opinion filed on September 14, 2016, is amended to correct footnote 41. The footnote should read:

> We recently discussed this issue in *Chavez v. Dole Food Co., Inc.*, --- F.3d ---, 2016 WL 4578641, at *18 n.130 (3d Cir. Sept. 2, 2016) (en banc).

For the Court,

s/ Marcia M. Waldron
Clerk

Dated: September 15, 2016
CLW/cc: Harold M. Hoffman, Esq.
Michael R. McDonald, Esq.
Jennifer M. Thibodaux, Esq.