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Plaintiff's Motion to Remand Denied: Arguing for Pre-Service Removal under the Plain Language of the Forum-Defendant Rule

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**PLAINTIFF’S MOTION TO REMAND DENIED:
ARGUING FOR PRE-SERVICE REMOVAL UNDER
THE PLAIN LANGUAGE OF THE FORUM-
DEFENDANT RULE**

MATTHEW CURRY*

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I. INTRODUCTION

On December 3, 2007, Judge Carol Higbee of the Superior Court of New Jersey issued a memorandum of decision that stated, “[a] practice has come to the Court’s attention that appears to have the potential to create manifest injustice upon the

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rights of the People of the United States to file in the State Courts cases that traditionally belong in State Courts.”¹ Judge Higbee further characterized the practice in question as a “strategic-end run” around the state courts and contrary to the “long standing understanding of the law.”² She concluded her decision with a promise to “raise the issue on a wider basis . . . with the . . . proper committees of the Supreme Court of the State of New Jersey.”³ The practice that Judge Higbee so strongly denounced has been called pre-service removal.⁴ It is a procedural maneuver utilized by defendants in civil actions and best explained by the following hypothetical lawsuit.

To begin, suppose a citizen of Ohio files a lawsuit against two corporations seeking damages in excess of \$75,000. One corporation is a citizen of New Jersey and the other is a citizen of Delaware. Diversity jurisdiction exists under this scenario because the defendants are not citizens of Ohio and the amount in controversy exceeds the sum of \$75,000.⁵ As such, the federal district courts have original jurisdiction over this action,⁶ which permits the plaintiff to file this lawsuit in federal court. Imagine, however, the plaintiff exercises the option to file this lawsuit in state court. Specifically, this hypothetical corporation files the lawsuit in a state court of New Jersey. Named defendants typically may remove an action from state court to federal court when diversity jurisdiction exists.⁷ There is one exception, however, to that rule.⁸

The exception, known as the forum-defendant rule,⁹ prohibits removal based on diversity jurisdiction when one “of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”¹⁰ It seems then that removal in our hypothetical case would be prohibited because one of the named defendants is a citizen of New Jersey, the forum state. Nevertheless, a closer look at the language of the forum-defendant rule reveals an exception to its applicability. Specifically, the statute requires a “properly joined and served” in-state defendant.¹¹

¹ *In re Bextra/Celebrex*, No. ATL-L-8367-05MT (N.J. Super. Ct. Dec. 03, 2007), available at http://www.judiciary.state.nj.us/mass-tort/archive/bextra-celebrex/MOD_regarding_Track_Assignment_Notice.pdf.

² *Id.*

³ *Id.*

⁴ For a discussion on possible congressional solutions to the issue of pre-service removal, see Jordan Bailey, Comment, *Giving State Courts the Ol' Slip: Should a Defendant Be Allowed to Remove an Otherwise Irremovable Case to Federal Court Solely Because Removal Was Made Before Any Defendant Is Served?*, 42 TEX. TECH L. REV. 181, 200 (2009).

⁵ See 28 U.S.C. § 1332(a) (2006). See also discussion *infra* Part II.A.1.

⁶ See *id.* § 1332(a).

⁷ See *id.* § 1441(a).

⁸ See *id.* § 1441(b).

⁹ See, e.g., *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 858 (N.D. Ohio 2008).

¹⁰ 28 U.S.C. § 1441(b).

¹¹ *Id.*

One could thus argue that removal based on diversity jurisdiction is proper when executed before the plaintiff has “served” the in-state defendant. Moreover, indeed numerous defendants have avoided the forum-defendant rule with that approach.¹² As evidenced by Judge Higbee’s blistering opinion,¹³ however, not all courts agree that pre-service removal is proper. In fact, the issue has resulted in a split among a number of the United States district courts.¹⁴

District courts on one side of the split have authorized pre-service removal because the plain language of the forum-defendant rule only prohibits removal when the in-state defendant has been “served.”¹⁵ Some district courts on the other side of the split have rejected pre-service removal by creating an exception to the applicability of the “properly joined and served” requirement of the forum-defendant rule.¹⁶ Finally, other district courts have rejected pre-service removal by characterizing the maneuver as an absurd result that Congress could not have intended.¹⁷

This Note will examine all sides of the district court split and ultimately argue in favor of the plain language of the forum-defendant rule to permit pre-service removal. Part II of this Note surveys the general removal doctrine, general principles of statutory interpretation, and the history of the absurd-result principle. Part III then discusses the district court split in depth by setting forth the arguments on both sides of the issue. Part IV of this Note contemplates the flawed arguments against pre-service removal. Part V then concludes with a discussion on why the plain language argument in favor of pre-service removal is the appropriate resolution of the district court split.

II. HISTORICAL OVERVIEW

A. *The General Removal Doctrine*

The general removal doctrine is a creature of statute.¹⁸ “It has been a part of American jurisprudence since the execution of the Judiciary Act of 1789.”¹⁹ The general removal statute specifies that “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court.”²⁰ In short, an

¹² See, e.g., cases cited *infra* note 98.

¹³ See *supra* notes 1-3 and accompanying text.

¹⁴ See discussion *infra* Part III.A.

¹⁵ See discussion *infra* Part III.A.2.a.

¹⁶ See discussion *infra* Part III.A.1.a.

¹⁷ See discussion *infra* Part III.A.1.b.

¹⁸ See 28 U.S.C. §§ 1441-52 (2006).

¹⁹ *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 644 (D.N.J. 2008) (citations omitted).

²⁰ 28 U.S.C. § 1441(a).

action may be removed from state court to federal court if it could have originally been filed in federal court.²¹

Two actions commonly removed to federal court are those based on federal question jurisdiction²² and those based on diversity of citizenship.²³ Although the district courts have original jurisdiction under both scenarios,²⁴ section 1441(b) of the general removal statute sets forth separate removal guidelines for each. First, an action removed under federal question jurisdiction, that is, one “founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.”²⁵ In diversity cases, however, section 1441(b) “imposes another condition above the requirements of original diversity jurisdiction.”²⁶ It states “[a]ny other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”²⁷ This provision, also known as the forum-defendant rule,²⁸ precludes removal of a diverse case from state court to federal court when one of the defendants, “properly joined and served,” is a citizen of the state where the action is filed.²⁹ Although there are other statutes that provide the right of removal,³⁰ this Note will focus on removal under diversity jurisdiction and the forum-defendant rule.

1. Diversity Jurisdiction

Diversity jurisdiction exists when “the matter in controversy exceeds the sum or value of \$75,000 . . . and is between . . . citizens of different States.”³¹ The amount in controversy requirement is established by a “fair reading” of the complaint.³² A party’s citizenship is determined by looking at where that party is domiciled, that is, the place where the party resides with “an intention to remain there indefinitely.”³³

²¹ See 32A AM. JUR. 2D *Federal Courts* § 1376 (2010) (citing *City of Chi. v. Int’l Coll. of Surgeons*, 522 U.S. 156 (1997)).

²² See 28 U.S.C. § 1331 (“[T]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

²³ See *id.* § 1332.

²⁴ See *id.* §§ 1331-32.

²⁵ *Id.* § 1441(b).

²⁶ *Bivins v. Novartis Pharm. Corp.*, No. 09-1087, 2009 WL 2496518, at *1 (D.N.J. Aug. 10, 2009).

²⁷ 28 U.S.C. § 1441(b) (2006).

²⁸ See, e.g., *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 858 (N.D. Ohio 2008).

²⁹ See, e.g., *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 935 n.2 (9th Cir. 2006).

³⁰ 16 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE—CIVIL* § 107.02 (3d ed. 2009).

³¹ 28 U.S.C. § 1332(a)(1) (2006).

³² See, e.g., *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 573 (6th Cir. 2001).

³³ *Coury v. Prot.*, 85 F.3d 244, 250 (5th Cir. 1996) (citation omitted).

Corporations have dual citizenship for purposes of diversity jurisdiction and removal.³⁴ A corporation is a citizen of any state where it is incorporated and the state where they have their principal place of business.³⁵ The Supreme Court recently concluded in *Hertz Corp. v. Friend* that the appropriate test for determining a corporation's principal place of business is the "nerve center" test.³⁶ Under that test, a corporation's principal place of business "refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities."³⁷ It noted the "'nerve center' will typically be found at a corporation's headquarters."³⁸

A removing party must still account for the removal prohibition contained in the forum-defendant rule before it can successfully remove a case under diversity jurisdiction. The forum-defendant rule precludes removal when any of the parties in interest "properly joined and served as defendants is a citizen of the State in which such action is brought."³⁹ The rationale behind this rule is straightforward: "[g]iven that the purpose of diversity jurisdiction is to provide litigants with an unbiased forum by protecting out-of-state litigants from local prejudices, it makes no sense to allow an in-state defendant to take advantage of removal."⁴⁰ The removal process thus can begin once the defendant has established that none of the "properly joined and served" defendants is a resident of the forum state.

2. The Removal Process

The process for removal is set forth in 28 U.S.C. § 1446. It states that "[a] defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court . . . [where] such action is pending a notice of removal

³⁴ See 28 U.S.C. § 1332(c)(1) (2006).

³⁵ *Id.*

³⁶ *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010). In *Hertz*, two California residents sued their former employer in state court, alleging violations of California's wage and hour laws. *Id.* at 1186. The defendant corporation sought removal to federal court, claiming that its principal place of business was in New Jersey. *Id.* The Ninth Circuit Court of Appeals affirmed the district court's conclusion that defendant's principal place of business was in California. *Id.* at 1186-87. It relied on the "business activity" test to determine that Hertz was a corporate citizen of California. *Id.* at 1187. The case was remanded to the state courts. *Id.* The Supreme Court granted certiorari emphasizing the need for judicial administration of a jurisdictional statute to remain as simple as possible. *Id.* at 1186.

³⁷ *Id.* at 1186.

³⁸ *Id.*

³⁹ 28 U.S.C. § 1441(b) (2006). It is worth noting that the original removal statute did not contain the "properly joined and served" requirement, which was added in 1948 when Congress enacted Title 28. See discussion *infra* Part III.A.1.b.

⁴⁰ 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE—CIVIL § 107.14 (3d ed. 2009). See also *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 940 (9th Cir. 2006) (observing that "[t]he purpose of diversity jurisdiction is to provide a federal forum for out-of-state litigants where they are free from prejudice in favor of a local litigant," but that "[t]he need for such protection is absent . . . in cases where the defendant is a citizen of the state in which the case is brought." (citation omitted)).

... containing a short and plain statement of the grounds for removal.”⁴¹ Additionally, “[t]he notice of removal of a civil action or proceeding shall be filed within *thirty days* after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading.”⁴²

At one point, courts were uncertain whether receipt of the complaint unattended by formal service was sufficient to start the thirty-day removal period.⁴³ The Supreme Court resolved the issue in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*⁴⁴ There the Court held that formal service of process is required to trigger the thirty-day removal period under section 1446(b).⁴⁵ The Court grounded its holding in the “bedrock principle [that] . . . [a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court’s authority, by formal process.”⁴⁶

The final wrinkle in the removal process emerges when there are multiple defendants to an action. All defendants generally must join in the notice of removal to effectuate that action properly.⁴⁷ Accordingly, a notice of removal is considered procedurally defective and invalid if it fails to include or explain the non-joinder of a codefendant.⁴⁸ This requirement may be satisfied, however, if the defendants that did not join in the notice of removal file a written statement to the court indicating that they consent to removal.⁴⁹ The removing defendant(s) must then give prompt written notice of the procedurally sound removal to all adverse parties and “file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.”⁵⁰

3. Remand and Other Post-Removal Procedures

A district court may engage in a number of procedures after a notice of removal has been filed. First, the district court “may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.”⁵¹ Additionally, “[i]t may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same

⁴¹ 28 U.S.C. § 1446(a).

⁴² *Id.* § 1446(b) (emphasis added).

⁴³ *See* *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

⁴⁴ *Id.*

⁴⁵ *Id.* at 347-48.

⁴⁶ *Id.*

⁴⁷ 16 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE—CIVIL* § 107.41 (Procedures After Removal) (3d ed. 2009) (citing *Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 248 (1900)).

⁴⁸ *Id.* (citing *Home Owners Funding Corp. of Am. v. Allison*, 756 F. Supp. 290, 291 (N.D. Tex. 1991)).

⁴⁹ *Id.* (citing *Burr ex rel. Burr v. Toyota Motor Credit Co.*, 478 F. Supp. 2d 432, 440 (S.D.N.Y. 2006)).

⁵⁰ 28 U.S.C. § 1446(d) (2006).

⁵¹ *Id.* § 1447(a).

to be brought before it by writ of certiorari issued to such State court.”⁵² The most significant post-removal procedure that a district court may engage in, however, is whether to remand the action back to state court.

The provisions for remand are set forth in 28 U.S.C. § 1447(c). The first provision within section 1447(c) is directed at plaintiffs. It specifies, “[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).”⁵³ The second provision within section 1447(c) is directed at the courts. It specifies, “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . . [and] [t]he State court may thereupon proceed with such case.”⁵⁴

The plaintiff ordinarily is the party that moves the court to remand a case.⁵⁵ A plaintiff may make a motion to remand based on a lack of subject matter jurisdiction if the court did not catch this defect on its own.⁵⁶ It is more likely, however, that a plaintiff will move the court to remand the action based on a procedural defect in the removal process.⁵⁷

A procedural defect is any defect other than a lack of subject matter jurisdiction.⁵⁸ An example would be a notice of removal filed after the 30-day time period set forth in section 1446(b).⁵⁹ The failure of all defendants to join in the notice of removal likewise qualifies as a procedural defect.⁶⁰ The removing party bears the burden of proof that removal was proper when a procedural defect is alleged.⁶¹ A court may find itself interpreting the various provisions of the removal doctrine to correctly decide the outcome of a motion to remand. The following section discusses the general principles of statutory interpretation.

B. General Principles of Statutory Interpretation

The courts of the United States are charged with the responsibility of interpreting and applying the laws enacted by Congress.⁶² “When an authoritative written text of the law has been adopted, the particular language of that text is always the starting

⁵² *Id.* § 1447(b).

⁵³ *Id.* § 1447(c).

⁵⁴ *Id.*

⁵⁵ MOORE ET AL., *supra* note 47.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (citing *In re Allstate Ins. Co.*, 8 F.3d 219, 221 (5th Cir. 1993)).

⁵⁹ *Id.* (citing *Wilson v. General Motors Corp.*, 888 F.2d 779, 781 (11th Cir. 1989)).

⁶⁰ *Id.* (citing *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 653-54 (7th Cir. 1998) (failure of all defendants to join in removal is procedural defect)); *see also id.* (citing *Roe v. O'Donohue*, 38 F.3d 298, 301-02 (7th Cir. 1994)).

⁶¹ *Id.* (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)); *see also id.* (citing *Parker v. Brown*, 570 F. Supp. 640, 642 (S.D. Ohio 1983)).

⁶² 73 AM. JUR. 2D *Statutes* § 60 (2010) (citations omitted).

point on any question concerning the application of the law.”⁶³ Where the language of a statute is clear and unambiguous, the courts should give those words their plain meaning in applying that law.⁶⁴ Where statutory language is ambiguous, however, a court may interpret those words in a manner that they believe effectuates the will of the legislature.⁶⁵ In this respect, “courts may examine the object sought to be attained by the statute, laws upon the same or similar subjects, and the consequences of a particular construction.”⁶⁶

At times, a court may be presented with extrinsic aids, such as the legislative history of a statute, to assist with interpretation.⁶⁷ Indeed, the definition of “legislative history” reads, “[t]he background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates. Legislative history is sometimes recorded so that it can later be used to aid in interpreting the statute.”⁶⁸ The Supreme Court recently confronted this issue in *Exxon Mobil Corp. v. Allapattah Services Inc.*⁶⁹

In that case, the Court was required to interpret the language of 28 U.S.C. § 1367 to properly answer “whether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount.”⁷⁰ One side of the dispute argued that the legislative history of section 1367 would show that Congress did not intend to grant supplemental jurisdiction over these additional plaintiffs whose claims do not satisfy the amount-in-controversy requirement. The Court disagreed.

Relying mainly on the text of the statute,⁷¹ the Court held that section 1367 does permit federal courts to exercise supplemental jurisdiction over additional plaintiffs not meeting the minimum amount-in-controversy requirement.⁷² In doing so, the Court set forth its position on the use of extrinsic aids in statutory interpretation when it declared, “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.”⁷³ The Court believed those materials were

⁶³ 2A NORMAN SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45:1 (7th ed. 2009) (citation omitted).

⁶⁴ 73 AM. JUR. 2D *Statutes* § 124 (2010) (citing *Symmes Twp. Bd. of Trustees v. Smyth*, 721 N.E.2d 1057 (Ohio 2000)).

⁶⁵ *See Id.* § 113 (citing *Brown v. Flowe*, 507 S.E.2d 894 (N.C. 1998)).

⁶⁶ *See id.* (citing *U.S. v. James*, 478 U.S. 597 (1986)).

⁶⁷ *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

⁶⁸ BLACK’S LAW DICTIONARY 919 (8th ed. 2004).

⁶⁹ *Exxon*, 545 U.S. 546.

⁷⁰ *Id.* at 549.

⁷¹ In addition to the text, the Court interprets section 1367 in light of other related statutory provisions and its established jurisprudence. *Id.* at 567.

⁷² *Id.* at 549-50.

⁷³ *Id.* at 568.

often unreliable and their use in statutory interpretation can become an “exercise in ‘looking over a crown and picking out your friends.’”⁷⁴

Conversely, some courts have deviated from the plain language rule where a literal application of the words produces a result demonstrably at odds with the intention of its drafters.⁷⁵ This exception, known as the absurd-result principle⁷⁶ or absurdity doctrine,⁷⁷ “authorizes a judge to ignore a statute’s plain words in order to avoid the outcome those words would require in a particular situation.”⁷⁸ In such cases, one argues that “the intention of the drafters, rather than the strict language, controls.”⁷⁹

C. A Brief History of Absurdity

“From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce ‘absurd’ results.”⁸⁰ Even Supreme Court Justice Antonin Scalia, one of the better-known proponents of plain language interpretation,⁸¹ has accepted this principle.⁸² *United States v. Kirby*,⁸³ one of the earliest Supreme Court cases broaching the subject,⁸⁴ is a useful illustration of the principle in action.

In *Kirby*, the grand jury of Gallatin County, Kentucky, issued two indictments against a mail carrier for murder.⁸⁵ The circuit court of that county then issued

⁷⁴ *Id.* (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

⁷⁵ *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). See also SINGER, *supra* note 63, § 46:4 (citation omitted).

⁷⁶ Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994).

⁷⁷ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

⁷⁸ Dougherty, *supra* note 76, at 128.

⁷⁹ See *supra* note 75.

⁸⁰ Manning, *supra* note 77, at 2388 (citing Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 986 (1995)).

⁸¹ See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Guttmann ed., 1997).

⁸² Dougherty, *supra* note 76, at 128 (“[The absurd result principle] enjoys almost universal endorsement, even by those who are most critical of judicial discretion and most insistent that the words of the statute are the only legitimate basis of interpretation.”); see also *id.* (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (rejecting literal interpretation of Federal Rule of Evidence 609(a)(1) because it would produce an absurd result) (other citations omitted)).

⁸³ *United States v. Kirby*, 74 U.S. 482 (1868).

⁸⁴ “The absurd result principle . . . is seen in the jurisprudence of the U.S. Supreme Court as early as 1819.” Dougherty, *supra* note 76, at 135 (citation omitted). *Kirby* was decided in 1868.

⁸⁵ *Kirby*, 74 U.S. at 482.

bench warrants upon those indictments and commanded Kirby, as sheriff of that county, to arrest the mail carrier and bring him before the court to answer the indictments.⁸⁶ Kirby, accompanied by his posse, then entered the steamboat General Buell and arrested the mail carrier.⁸⁷ For their effort, the District Court charged the sheriff and his posse under the ninth section of the act of Congress, of March 3, 1825, which states, “that if any person shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction, for every such offence, pay a fine not exceeding one hundred dollars.”⁸⁸

The issue thus presented was whether the lawful arrest of a mail carrier, under a warrant issued by the local court, was the type of obstruction to the delivery of mail that Congress had intended to prevent when they enacted the statute.⁸⁹ The lower court judges were split on the outcome. Consequently, the case was certified to the Supreme Court for resolution.⁹⁰

The Supreme Court ultimately rejected the literal application of the statute.⁹¹ It reasoned, “[a]ll laws should receive a sensible construction.” Furthermore, it will “be presumed that the legislature intended exceptions to its language . . . [t]he reason of the law in such cases should prevail over its letter.”⁹² The Court concluded:

The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, ‘that whoever drew blood in the streets should be punished with the utmost severity,’ did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—‘for he is not to be hanged because he would not stay to be burnt.’ And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.⁹³

It has been suggested that the examples above from Puffendorf and Plowden, used by the Court to support its holding in *Kirby*, exist as “the nearest thing we have to a legal definition of absurdity.”⁹⁴ Indeed, a troubling aspect of the principle is that

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (citation omitted).

⁸⁹ *Kirby*, 74 U.S. at 482.

⁹⁰ *Id.*

⁹¹ *Id.* at 487.

⁹² *Id.* at 486-87.

⁹³ *Id.* at 487.

⁹⁴ Dougherty, *supra* note 76, at 139.

“[c]ases using or referring to the principle do not define absurdity, nor do they specify the kinds of situations where the principle should be applied.”⁹⁵

III. PRE-SERVICE REMOVAL

A. *The District Court Split*

As noted by district court Judge Dan Aaron Polster, “[t]he procedural and factual circumstances in most, if not all cases [of pre-service removal] are essentially identical.”⁹⁶ Despite that uniformity, the federal district courts have not been uniform or consistent in resolving motions to remand that follow the pre-service removal maneuver.⁹⁷ The issue dividing the district courts is whether a defendant may properly remove a case from state court to federal court based on diversity jurisdiction before the plaintiff serves a named in-state defendant, when it could not do so after service.

Resolving the pre-service removal issue typically turns on how a particular district court interprets the “properly joined and served” language of the forum-defendant rule. Some courts have upheld pre-service removal because—by choosing the “properly joined and served” language—“Congress plainly intended to require service of the complaint . . . to trigger the preclusion of removal by the forum resident defendant in a diversity case.”⁹⁸ Conversely, the courts favoring remand have rejected pre-service removal two ways.⁹⁹

⁹⁵ *Id.* at 128.

⁹⁶ *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 861 (N.D. Ohio 2008).

⁹⁷ *See* cases cited *infra* notes 98, 101-02.

⁹⁸ *See, e.g.*, *Bivins v. Novartis Pharm. Corp.*, No. 09-1087, 2009 WL 2496518 (D.N.J. Aug. 10, 2009); *Carman v. Bayer Corp.*, No. 5:08CV148, 2009 WL 1649715 (N.D. W. Va. June 10, 2009); *Taylor v. Cottrell, Inc.*, No. 4:09CV536, 2009 WL 1657427 (E.D. Mo. June 10, 2009); *Copley v. Wyeth, Inc.*, No. 09-722, 2009 WL 1089663 (E.D. Pa. Apr. 22, 2009); *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263 (M.D. Fla. 2009); *Brake v. Reser’s Fine Foods, Inc.*, No. 4:08CV1879, 2009 WL 213013 (E.D. Mo. Jan. 28, 2009); *Hutchins v. Bayer Corp.*, No. 08-640, 2009 WL 192468 (D. Del. Jan. 23, 2009); *Vitaoe v. Mylan Pharm., Inc.*, No. 1:08cv85, 2008 WL 3540462 (N.D. W. Va. Aug. 13, 2008); *Bolin v. SmithKline Beecham Corp.*, No. 08-60523, 2008 WL 3286973 (S.D. Fla. Aug. 7, 2008); *Valerio v. SmithKline Beecham Corp.*, No. 08-60522, 2008 WL 3286976 (S.D. Fla. Aug. 7, 2008); *In re Fosamax Prod. Liab. Litig.*, MDL No. 1789, 2008 WL 2940560 (S.D.N.Y. July 29, 2008); *Masterson v. Apotex, Corp.*, No. 07-61665, 2008 WL 2047979 (S.D. Fla. May 13, 2008); *Johnson v. Precision Airmotive, LLC*, No. 4:07CV1695, 2007 WL 4289656 (E.D. Mo. Dec. 4, 2007); *Ripley v. Eon Labs Inc.*, 622 F. Supp. 2d 137 (D.N.J. 2007); *Yocham v. Novartis Pharm. Corp.*, No. 07-1810, 2007 WL 2318493 (D.N.J. Aug. 13, 2007); *Cucci v. Edwards*, 510 F. Supp. 2d 479 (C.D. Cal. 2007); *Waldon v. Novartis Pharm. Corp.*, No. C07-01988, 2007 WL 1747128 (N.D. Cal. June 18, 2007); *Thomson v. Novartis Pharm. Corp.*, No. 06-6280, 2007 WL 1521138 (D.N.J. May 22, 2007); *City of Ann Arbor Employees’ Retirement Sys. v. Gecht*, No. C-06-7453, 2007 WL 760568 (N.D. Cal. Mar. 9, 2007); *Frick v. Novartis Pharm. Corp.*, No. Civ. 05-5429, 2006 WL 454360 (D.N.J. Feb. 23, 2006); *Massey v. Cassens & Sons, Inc.*, No. 05-CV-598-DRH, 2006 WL 381943 (S.D. Ill. Feb. 16, 2006); *Vanderwerf v. GlaxoSmithKline, PLC*, No. 05-1315, 2005 WL 6151369 (E.D. Pa. May 5, 2005); *Test Drilling Serv. Co. v. Hanor Co.*, 322 F. Supp. 2d 953 (C.D. Ill. 2003); *Ott v. Consol. Freightways Corp. of Del.*, 213 F. Supp. 2d 662 (S.D. Miss. 2002); *In re Bridgestone/Firestone, Inc.*, 184 F. Supp. 2d 826 (S.D. Ind. 2002); *Wensil v. E.I. Dupont De*

1. Motion to Remand Granted

Two “related but slightly different line[s] of cases”¹⁰⁰ have emerged from the courts favoring remand. While the outcome is the same—the court rejects pre-service removal and grants the plaintiff’s motion to remand back to state court—the reasoning for that outcome differs. Initially, the courts that favored remand, believing they were otherwise bound by the “properly joined and served” language, created a limited exception to that requirement. That exception applied when the notice of removal was filed before the plaintiff had served *any* defendants.¹⁰¹ As the pre-service removal trend gained steam, however, courts favoring remand then turned to the more generally applicable absurd-result argument.¹⁰² Under this theory, pro-remand courts reject pre-service removal because Congress could not have intended that result when it drafted the forum-defendant rule.¹⁰³

a. The No-Defendant-Served Exception

Some district courts have concluded the “properly joined and served” requirement of the forum-defendant rule does not apply when the plaintiff has yet to serve *any* of the named defendants.¹⁰⁴ Thus, the fact that the case was removed before the in-state defendant was “properly joined and served” is irrelevant. Typical of these cases is *Holmstrom v. Harad*.¹⁰⁵

There, the plaintiff filed suit on April 25, 2005 in Illinois state court.¹⁰⁶ In its complaint, it named twenty-eight defendants. Two of the twenty-eight defendants were residents of Illinois, the forum state.¹⁰⁷ On May 5, 2005, counsel for the plaintiff contacted the attorney for one of the named defendants, Peterson, regarding a possible waiver of service.¹⁰⁸ The next day, without further discussion of the

Nemours and Co., 792 F. Supp. 447 (D.S.C. 1992); Republic W. Ins. Co. v. Int’l Ins. Co., 765 F. Supp. 628 (N.D. Cal. 1991).

⁹⁹ See discussion *infra* Parts III.A.1.a-b.

¹⁰⁰ *Ethington*, 575 F. Supp. 2d at 864.

¹⁰¹ See, e.g., *Holmstrom v. Harad*, No. 05-C-2714, 2005 WL 1950672 (N.D. Ill. Aug. 11, 2005); *Recognition Commc’n, Inc. v. Am. Auto. Ass’n, Inc.*, No. 3:97-CV-0945-P, 1998 WL 119528 (N.D. Tex. Mar. 5, 1998).

¹⁰² See, e.g., *Ethington*, 575 F. Supp. 2d 855; *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640 (D.N.J. 2008); *Allen v. GlaxoSmithKline, PLC*, No. 07-5045, 2008 WL 2247067 (E.D. Pa. May 30, 2008); *DeAngelo-Shuayto v. Organon USA Inc.*, No. 07-2923, 2007 WL 4365311 (D.N.J. Dec. 12, 2007); *Fields v. Organon USA Inc.*, No. 07-2922, 2007 WL 4365312 (D.N.J. Dec. 12, 2007); *Vivas v. The Boeing Co.*, 486 F. Supp. 2d 726 (N.D. Ill. 2007).

¹⁰³ See cases cited *supra* note 102.

¹⁰⁴ See, e.g., *Recognition Commc’n, Inc.*, 1998 WL 119528; *Holmstrom*, 2005 WL 1950672.

¹⁰⁵ *Holmstrom*, 2005 WL 1950672.

¹⁰⁶ *Id.* at *1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

waiver, Peterson, a citizen of Ohio, removed the case to federal court under 28 U.S.C. § 1441 and 28 U.S.C. § 1332.¹⁰⁹

On June 6, the plaintiff filed a motion to remand. It argued Peterson's removal, based on diversity jurisdiction, was improper because the presence of the two Illinois defendants triggered the removal prohibition contained in the forum-defendant rule.¹¹⁰ Peterson countered that removal of the case was proper because the two in-state defendants had not been "served" at the time of removal as required by the "properly joined and served" language of the forum-defendant rule.¹¹¹ The court acknowledged the existence of cases where an unserved in-state defendant did not defeat removal.¹¹² In those cases, the plaintiff had served the removing defendants before the notice of removal was filed.¹¹³ In *Holmstrom*, however, the plaintiff had not served *any* of the named defendants at the time of removal.¹¹⁴

The court thus was presented with an issue that had "received little treatment in the federal courts: whether, under section 1441(b), the citizenship of a forum defendant defeats removal when, prior to removal, no defendant has been served or otherwise appeared."¹¹⁵ Answering in the affirmative, the court declared the "joined and served" requirement of the forum-defendant rule aims "to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve."¹¹⁶ It maintained, however, that the protection afforded by this requirement only applies to those non-forum defendants already served at the time of removal:

Once served, a defendant may immediately remove an otherwise removable case without regard to the unserved forum defendant, but the protection afforded by the "joined and served" requirement is wholly unnecessary for an unserved non-forum defendant [since] . . . the non-forum defendant stands on equal footing as the forum-defendant [and] [n]either defendant in that scenario is obligated to appear in court.¹¹⁷

Thus, the citizenship of the unserved in-state defendants defeats removal because the "joined and served" requirement did not apply at that early stage.¹¹⁸

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *Id.* at *2.

¹¹² *Id.* at *1 (citing *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001); *Stan Winston Creatures, Inc. v. Toys "R" Us, Inc.*, 314 F. Supp. 2d 177, 180-81 (S.D.N.Y. 2003); *Ott v. Consol. Freightways Corp.*, 213 F. Supp. 2d 662, 665 (S.D. Miss. 2002); *Maple Leaf Bakery v. Raychem Corp.*, No. 99 C 6948, 1999 WL 1101326, at *1 (N.D. Ill. Nov. 29, 1999)).

¹¹³ *Holmstrom*, 2005 WL 1950672, at *1.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at *2 (citing *Stan Winston Creatures*, 314 F. Supp. 2d at 181).

¹¹⁷ *Holmstrom*, 2005 WL 1950672, at *2 (citing *Murphy Bros. Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350-51 (1999)).

¹¹⁸ *Holmstrom*, 2005 WL 1950672, at *2.

b. The Absurd-Result Argument

The current trend among the courts favoring remand is to reject pre-service removal via the absurd-result principle.¹¹⁹ Under this theory, courts concede that the “properly joined and served” language of the forum-defendant rule permits pre-service removal.¹²⁰ They look past that language, however, to avoid a result that they believe Congress could not have intended.¹²¹ In their view, modern technology, such as electronic docket monitoring, has created a “loophole” in the antiquated language of the statute.¹²² Therefore, ignoring the “properly joined and served” language under these circumstances is justified. Additionally, the absurd-result courts set forth a number of policy arguments in favor of remand.¹²³ A comprehensive example of these cases is *Sullivan v. Novartis Pharmaceuticals*.¹²⁴

In *Sullivan*, the plaintiff, a citizen of Ohio, sued the defendant, Novartis Pharmaceuticals (“Novartis”), in New Jersey state court for alleged injuries caused by using a Novartis product.¹²⁵ Novartis, a citizen of New Jersey, removed the case under diversity jurisdiction to federal court before the plaintiff could effectuate service.¹²⁶ The plaintiff then filed a motion to remand the case back to state court.¹²⁷

The plaintiff argued that removal was improper because the presence of an in-state defendant—Novartis—prohibits removal under the forum-defendant rule.¹²⁸ Novartis argued that the case was properly removed despite the forum-defendant rule because the in-state defendant had not been “served” as the plain language of the rule requires.¹²⁹ The plaintiff argued that “applying the plain meaning of section 1441(b), and allowing Novartis—a forum defendant—to avoid the forum defendant rule merely because it had not yet been served at the time it filed the Notice, would amount to an absurd result, demonstrably at odds with Congressional intent.”¹³⁰ The court found this argument persuasive.

Notwithstanding a split among its own prior decisions on the issue,¹³¹ the federal district court granted the plaintiff’s motion to remand the case back to New Jersey

¹¹⁹ See cases cited *supra* note 98.

¹²⁰ See cases cited *supra* note 98.

¹²¹ See cases cited *supra* note 98.

¹²² See cases cited *supra* note 98.

¹²³ See cases cited *supra* note 98.

¹²⁴ *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640 (D.N.J. 2008).

¹²⁵ *Id.* at 641.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *id.* at 641-42.

¹²⁹ *Id.*

¹³⁰ *Id.* at 642.

¹³¹ *Id.* at 642-43 (“In *Fields v. Organon USA Inc.*, the court addressed precisely this issue, finding that the application of the plain meaning of section 1441(b) led to a result inconsistent with the intent of Congress. The court held that a defendant ‘is subject to the restrictions of section 1441(b) regardless of whether it had been properly served at the time of removal.’

state court.¹³² In doing so, it applied the absurd-result principle. The court thus “look[ed] beyond the language of the statute in order to avoid an absurd and bizarre result, and in order to give effect to the purpose of the forum-defendant rule and the ‘properly joined and served’ language.”¹³³

Crucial to the court’s decision was its belief that “Congress added ‘the properly joined and served’ requirement in order to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.”¹³⁴ The court initially noted that the original removal statute did not contain the “properly joined and served” requirement.¹³⁵ Rather, Congress added it in 1948 when it enacted Title 28.¹³⁶ Accordingly, the court “conducted a thorough examination of the published legislative history regarding the 1948 changes to Title 28, including review of all legislative materials available in the Third Circuit libraries in Newark and Philadelphia and the DC Circuit library in Washington.”¹³⁷ Despite these efforts, it failed to locate a “specific statement from Congress or the advisory Committee on Revision of the Judicial Code . . . regarding the addition of the ‘properly joined and served’ language.”¹³⁸

This lack of congressional guidance,¹³⁹ however, did not discourage the court from reaching its desired conclusion. On the contrary, it asserted that the underlying purpose of the “properly joined and served” language was “abundantly clear in light

Several district courts have come to the opposite conclusion, including this court. In *Frick*, we found that the language of section 1441 was unambiguous, and that there was no clear indication that application of the plain meaning would result in an outcome demonstrably at odds with the will of provision’s drafters.” (citations omitted)).

¹³² *Sullivan*, 575 F. Supp. 2d at 653-54.

¹³³ *Id.* at 643.

¹³⁴ *Id.* at 645. *See also* *Ethington v. Gen Elec. Co.*, 575 F. Supp. 2d 855, 861 (N.D. Ohio 2008) (“Congress intended the ‘joined and served’ part of the forum defendant rule to prevent gamesmanship by plaintiffs, who might name an in-state defendant against whom he or she does not have a valid claim in a complaint filed in state court to defeat otherwise permissible removal by the non-forum defendant.” (citation omitted)); *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003) (“The purpose of the ‘joined and served’ requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not even serve.”).

¹³⁵ *Sullivan*, 575 F. Supp. 2d at 644 (citation omitted).

¹³⁶ *Id.* (citing 28 U.S.C. § 114 (1940); 28 U.S.C. § 1441(b) (1948)).

¹³⁷ *Id.*

¹³⁸ *Id.* (citing 28 U.S.C. § 1441 (1948) reviser’s notes; H.R. Rep. No. 80-308 (1947), as reprinted in 1948 U.S.C.C.S., Special Pamphlet: Title 28 at 1692; S. Rep. No. 80-1559 (1948), as reprinted in 1948 U.S.C.C.S., Special Pamphlet: Title 28 at 1675; Letter from Hon. Albert B. Maris, Circuit Judge, United States Court of Appeals for the Third Circuit, and Chair of the Committee, to Mildrim Thompson, Jr., Esq. (May 10, 1946)).

¹³⁹ *Sullivan* also noted that “the Circuit Courts have provided little guidance on the statutory interpretation of the ‘properly joined and served’ language of section 1441(b), owing to the fact that the orders of district courts made pursuant to section 1441, generally are not reviewable.” *Id.* (citation omitted).

of the historical development of the policy of the remand provisions, the practical application of the 'joined and served' provision by district courts in recent decades, and common sense."¹⁴⁰ Interestingly, the court turned to *Pullman Co. v. Jenkins*,¹⁴¹ a 1939 United States Supreme Court case, to substantiate its position.¹⁴²

In *Pullman*, the Supreme Court stated in dictum "where a non-separable controversy involves a resident defendant . . . the fact that the resident defendant has not been served with process does not justify removal by the non-resident defendant."¹⁴³ The Court reasoned that although a nonresident defendant joined in the action may be prejudiced because the resident defendant may not ever be served, the non-resident defendant should not be entitled to "seize an opportunity to remove the cause before service upon the resident co-defendant is effected."¹⁴⁴ *Sullivan* regarded this discussion as illustrative of the competing policy goals omnipresent in the pre-service removal issue.¹⁴⁵ That is, "whether 'the non-resident defendant may be prejudiced because his co-defendant may not [ever] be served,' and preventing the non-resident defendant from seizing the 'opportunity to remove the cause before service upon the resident co-defendant is effected.'"¹⁴⁶ It concluded that the Supreme Court clearly chose to further the latter policy with its decision in *Pullman*.¹⁴⁷ Thus, the court viewed its futile probe into section 1441(b)'s legislative history as a positive. The dearth of legislative intent signaled that Congress did not add "the properly joined and served" language to reverse the *Pullman* Court's opposition to removal prior to service.¹⁴⁸

Sullivan then set forth several additional arguments in support of its contention that pre-service removal is an absurd result.¹⁴⁹ First, the court argued that conditioning the validity of the forum-defendant rule on a race to see which party can either serve or remove before the other is "absurd on its face"¹⁵⁰ and "serves no conceivable policy goal."¹⁵¹ Next, it believed a plain meaning application would destroy "the plaintiff's rightful position as 'master of his or her complaint.'"¹⁵² The court also worried that defendants "could always avoid the imposition of the forum defendant rule so long as they monitor the court docket and remove the action to

¹⁴⁰ *Id.*

¹⁴¹ *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939).

¹⁴² *Sullivan*, 575 F. Supp. 2d at 644.

¹⁴³ *Pullman*, 305 U.S. at 541.

¹⁴⁴ *Id.*

¹⁴⁵ *Sullivan*, 575 F. Supp. 2d at 644.

¹⁴⁶ *Id.* (quoting *Pullman*, 305 U.S. at 541).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 645.

¹⁴⁹ *See id.* at 645-47.

¹⁵⁰ *Id.* at 645-46.

¹⁵¹ *Id.*

¹⁵² *Id.* at 647.

federal court before the plaintiff can effect service of process.”¹⁵³ This “procedural anomaly,” it argued, threatened to strip the forum-defendant rule of any practical significance.¹⁵⁴ Finally, the court characterized the practice of pre-service removal as a form of defendant “gamesmanship.”¹⁵⁵ Since it was “abundantly clear”¹⁵⁶ that the “properly joined and served” language was added by Congress to prevent plaintiff gamesmanship,¹⁵⁷ it would be demonstrably at odds with congressional intent to then allow “defendants to engage another type of gamesmanship—a hasty filing of a notice of removal” before service of the in-state defendant.¹⁵⁸

2. Motion to Remand Denied

a. *The Plain Language Argument*

Pre-service removal is proper under the plain language argument because the forum-defendant rule, by its text, permits removal of a diverse case when an in-state defendant is not properly joined *and served*.¹⁵⁹ The district courts that favor this argument maintain it is their duty to give conclusive effect to the plain or unambiguous language of any statute.¹⁶⁰ And because these courts find the “properly joined and served” language of the forum-defendant rule unambiguous,¹⁶¹ the plaintiff’s motion to remand the case back to state court is denied. These courts acknowledge the policy arguments against pre-service removal are compelling, but ultimately insufficient to overcome the binding rules of statutory interpretation.¹⁶² *Thomson v. Novartis Pharmaceuticals*¹⁶³ and *Bivins v. Novartis Pharmaceuticals*¹⁶⁴ are two recent examples of the plain language cases.

In *Thomson*, the plaintiffs, residents of Georgia, filed an eight-count complaint against the defendants in the Superior Court of New Jersey on December 19, 2006.¹⁶⁵ The defendants, all affiliates of Novartis Pharmaceuticals Corporation (“Novartis”), maintained their principal place of business in New Jersey.¹⁶⁶ After filing the

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See supra* note 138.

¹⁵⁷ *Sullivan*, 575 F. Supp. 2d at 647.

¹⁵⁸ *Id.*

¹⁵⁹ *See cases cited supra* note 98.

¹⁶⁰ *See cases cited supra* note 98.

¹⁶¹ *See cases cited supra* note 98.

¹⁶² *See cases cited supra* note 98.

¹⁶³ *Thomson v. Novartis Pharm. Corp.*, No. 06-6280, 2007 WL 1521138 (D.N.J. May 22, 2007).

¹⁶⁴ *Bivins v. Novartis Pharm. Corp.*, No. 09-1087, 2009 WL 2496518 (D.N.J. Aug. 10, 2009).

¹⁶⁵ *Thomson*, 2007 WL 1521138, at *1.

¹⁶⁶ *Id.*

lawsuit, the plaintiffs attempted to serve Novartis on December 22, 2006, but the Novartis office was closed.¹⁶⁷ They tried again on four other occasions: December 26, 27, 28, and 29.¹⁶⁸ Each time the plaintiff's process server was denied because nobody was present to accept service on behalf of Novartis due to the fact that the company was closed for the holidays.¹⁶⁹

On December 29, 2006, Novartis removed the action to federal court based on diversity jurisdiction.¹⁷⁰ At that time, the plaintiffs had not served any of the defendants.¹⁷¹ Novartis maintained they were not aware of the plaintiff's attempts to serve process and had received a copy of the complaint on December 28, 2006 from a private docketing service.¹⁷² On January 2, 2007, after the case was removed, the plaintiffs finally served Novartis.¹⁷³

Upon notification that its case had been removed to federal court, the plaintiffs filed a motion to remand, arguing that removal by Novartis, a resident of the forum state, is prohibited by the forum-defendant rule.¹⁷⁴ In addition, because they had not served any of the defendants at the time of removal, the plaintiffs further argued that the court should apply the no-defendant-served exception set forth in *Holmstrom*.¹⁷⁵ Additionally, the plaintiffs raised policy arguments characterizing the practice of pre-service removal as an absurd result.¹⁷⁶ Novartis countered by arguing that a plain reading of the "properly joined and served" language of the forum-defendant rule sanctions removal so long as the resident defendant had not been served at the time of removal.¹⁷⁷

Ruling on the plaintiff's motion to remand, the court asserted that its duty when interpreting statutory language is to "give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."¹⁷⁸ Under this standard, then, the court asserted that pre-

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at *2.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at *3.

¹⁷⁶ *Id.* at *4. Addressing the plaintiff's policy arguments against pre-service removal, the court reasoned:

Plaintiffs do raise colorable policy arguments that it is unjust that a properly joined defendant could monitor state court dockets and remove cases prior to being served, and that it makes little sense to provide a federal forum to an in-state defendant upon removal of a diversity case, since state courts are certainly as adept as federal courts in applying state law.

Id.

¹⁷⁷ *Id.* at *3.

¹⁷⁸ *Id.* at *4 (quotations and citations omitted).

service removal is permitted.¹⁷⁹ It reasoned that the “properly joined and served” language was unambiguous; it plainly requires an in-state defendant to be “served” before removal is prohibited.¹⁸⁰ Furthermore, the court characterized the plaintiffs policy arguments as “colorable” but insufficient to overcome the court’s duty to give meaning to the statute’s plain language.¹⁸¹ The court therefore denied the plaintiff’s motion to remand, holding that Novartis had properly removed the case to federal court.¹⁸²

In its opinion, the *Thomson* court noted, “there is no evidence that Novartis was actively avoiding service.”¹⁸³ This seems to suggest that the plain language argument does have its limits. If a plaintiff were able to prove that a defendant actively avoided service and then removed the case to federal court, the “properly joined and served” language would not protect the defendant. Under those circumstances, the court would likely characterize the outcome as an absurd result and grant the plaintiff’s motion to remand the case back to state court. As mentioned, there was no evidence in *Thomson*, however, that Novartis actively avoided service from the plaintiff.¹⁸⁴

A more recent decision out of the plain language courts is *Bivins v. Novartis Pharmaceuticals*.¹⁸⁵ The procedural and factual circumstances in *Bivins* are almost identical to *Thomson* and all other pre-service removal cases.¹⁸⁶ The *Bivins* case is interesting, however, because both parties relied on earlier decisions from the New Jersey district court to support their respective positions. The plaintiff cited to *Sullivan* as controlling and the defendant relied on *Thomson*.¹⁸⁷

The *Bivins* court, like *Thomson*, found the statutory language of the forum-defendant rule clear and unambiguous.¹⁸⁸ It too held that removal is only prohibited

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Bivins v. Novartis Pharm. Corp.*, No. 09-1087, 2009 WL 2496518 (D.N.J. Aug. 10, 2009).

¹⁸⁶ On March 4, 2009, the plaintiff, a citizen of Texas, filed a lawsuit against Novartis, a corporation with its principal place of business in New Jersey. *Id.* at *1. The complaint was filed in the Superior Court of New Jersey. *Id.* It alleged injuries that resulted from using a Novartis product. *Id.* On March 10, 2009, Novartis removed the case to federal court under diversity jurisdiction before the plaintiff could serve any of the defendants. *Id.* After serving Novartis, the plaintiff moved the court to remand the case back to state court. *Id.* It argued that the presence of an in-state defendant, Novartis, “violated the ‘forum defendant rule’ contained in 28 U.S.C. § 1441(b).” *Id.* The defendant countered with the plain language argument, insisting removal was proper since it was not served at the time of removal. *Id.*

¹⁸⁷ *Id.* at *1 (“Both plaintiff and [Novartis] cite decisions within this District to support their positions.” (citing *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 643-47 (D.N.J. 2008) (finding removal was improper); *Thomson*, 2007 WL 1521138, at *4 (finding removal was proper))).

¹⁸⁸ *Id.* at *2.

when an in-state defendant has been “properly joined and served.”¹⁸⁹ In so doing, the court rejected the holding in *Sullivan*.¹⁹⁰ It was reluctant to look past the plain language of the forum-defendant rule in the “absence of an ‘extraordinary showing of a contrary congressional intent in the legislative history.’”¹⁹¹ Thus, the failure of the *Sullivan* court to show any actual congressional intent in support of its holding was fatal to the plaintiffs in *Bivins*.¹⁹² Accordingly, the court dismissed the plaintiff’s policy arguments as insufficient to overcome the binding rules of statutory interpretation.¹⁹³ *Bivins* concluded, “‘if congress intends a different result, it is up to Congress rather than the courts to fix it.’”¹⁹⁴

The plaintiff in *Bivins* later filed a second motion to remand based on new facts.¹⁹⁵ The new facts presented by the plaintiff were completed service of process on October 12, 2009, 216 days after Novartis filed for removal.¹⁹⁶ The plaintiff argued that removal was now improper under the forum-defendant rule because Novartis was “properly joined and served.”¹⁹⁷ The court stated that it had a duty to “decide a motion to remand upon the facts present at the time the petition for removal from state to federal court is filed.”¹⁹⁸ And because Novartis was not “served” at the time of the petition for removal, the plaintiff “fail[ed] to present any new information that would . . . [provide] a legal or factual basis for finding removal improper.”¹⁹⁹ The court thus rejected the plaintiff’s argument and denied the second motion to remand.²⁰⁰

IV. CRITICIZING THE ARGUMENTS AGAINST PRE-SERVICE REMOVAL

A. Revisiting the No-Defendant-Served Exception

The no-defendant-served exception to pre-service removal is founded on the theory that the “properly joined and served” language was included in the statute to protect non-forum defendants from plaintiffs who defeat diversity jurisdiction by

¹⁸⁹ *Id.* (quoting *Thomson*, 2007 WL 1521138, at *4).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (citing *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998)).

¹⁹² *Id.*

¹⁹³ *Id.* (“Plaintiff also makes the policy argument that courts should not reward defendants who monitor electronic dockets and remove cases before plaintiffs have a chance to serve them. However, these arguments alone are insufficient to overcome the requirement that this Court give meaning to the plain language of the statute.” (internal quotations omitted)).

¹⁹⁴ *Id.* (quoting *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263, 1269-70 (M.D. Fla. 2009)).

¹⁹⁵ *Bivins v. Novartis Pharm. Corp.*, No. 09-1087, 2010 WL 1463035, at *1 (D.N.J. April 12, 2010).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* (citing *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985)).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

fraudulently joining in-state defendants, whom they never actually serve nor intend to proceed against.²⁰¹ Therefore, that language does not apply when the plaintiff has yet to initiate service of process on any of the named defendants. The rationalization for this exception suffers from a number of weaknesses.

First, the actual text of the forum-defendant rule does not support the theory that the “properly joined and served” language only applies under certain circumstances. It simply states that “[a]ny other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”²⁰² Nowhere in this provision does it say or even imply that the applicability of the “properly joined and served” requirement is subject to the condition that the removing party has been served. Furthermore, there is no evidence that Congress intended these words to be dependent upon service of the removing party.²⁰³ Therefore, the courts employing this exception have essentially deleted the “and served” language from the forum-defendant rule.

Additionally, the theory that the “properly joined and served” language was added to prevent fraudulent joinder is founded upon a presumption. Although the words “properly joined” clearly support this argument, there is simply no evidence that Congress intended the “and served” portion as anything other than an additional requirement, exclusive of the joinder requirement.²⁰⁴ It is difficult, then, to accept an interpretation of the forum-defendant rule that ignores certain words contained therein based on an assumption of congressional intent.

Finally, the *Holmstrom* court relied upon the holding in *Murphy Bros.* to illustrate that the in-state defendant and non-forum defendant(s) stand on equal footing since neither has been served.²⁰⁵ In that case, the Supreme Court held that the 30-day removal period does not start running against named defendants until they have been formally served.²⁰⁶ In support of that holding, the Court reasoned that “an individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court’s authority, by formal process.”²⁰⁷ Some plaintiffs in pre-service removal cases have maintained that *Murphy Bros.* established a service prerequisite for removal.²⁰⁸ Under this

²⁰¹ *Bivins v. Novartis Pharm. Corp.*, No. 09-1087, 2009 WL 2496518, at *2 (D.N.J. Aug. 10, 2009).

²⁰² 28 U.S.C. § 1441(b) (2006).

²⁰³ There is no “specific statement from Congress or the advisory Committee on Revision of the Judicial Code . . . regarding the addition of the ‘properly joined and served’ language.” *Sullivan*, 575 F. Supp. 2d at 644 (citations omitted).

²⁰⁴ *Id.*

²⁰⁵ *Holmstrom v. Harad*, No. 05-C-2714, 2005 WL 1950672, at *2 (citing *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999)).

²⁰⁶ *Murphy Bros.*, 526 U.S. at 347-48.

²⁰⁷ *Id.*

²⁰⁸ *See, e.g.*, *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263, 1270 (“Relying on the Supreme Court’s holding in *Murphy Bros.*, Plaintiff contends that Precision LLC’s recipient of the Complaint, presumably from the state court’s docket clerk, did not constitute ‘receipt by the defendant, through service or otherwise, of a copy of the initial pleading,’ thus

argument, pre-service removal is improper because the removing defendant was not yet legally permitted to engage in any form of litigation. Although the *Holmstrom* court stopped short of making that argument itself, that interpretation of the holding in *Murphy Bros.* is not accurate.

The key word in the *Murphy Bros.* holding is the word “obliged.” In this context, “obliged” simply means that a party is not legally required to engage in litigation until formally served. A party may still engage in litigation, however, if it so chooses. Therefore, a defendant can still legally file a notice of removal under section 1446(b) before it is served. The Court therefore stopped short of “superimpos[ing] a service requirement on Section 1446(b)” in *Murphy Bros.*²⁰⁹

As mentioned, the *Holmstrom* court does not explicitly rely on this misconstrued interpretation of *Murphy Bros.*²¹⁰ In any case, the no-defendant-served exception ultimately fails for other reasons. Specifically, it fails because the language of the forum-defendant rule does not support its underlying theory that the “properly joined and served” requirement is dependent upon the foregoing service of the removing defendant and because it is rooted in presumed congressional intent. For these reasons, the district courts should not employ the no-defendant-served exception to avoid pre-service removal.

B. Revisiting the Absurd-Result Argument

The absurd-result argument against pre-service removal also suffers from inherent flaws in its rationalization. First, the argument that a “literal application of [the forum defendant rule] . . . would both produce bizarre results that Congress could not have *intended*, and results that are demonstrably at odds with objectives Congress did not *intend* to effect,”²¹¹ also relies upon presumed congressional intent.²¹² The act of “look[ing] beyond the language of the statute . . . to give effect to the *purpose* of the forum defendant rule and the ‘properly joined and served’ language,”²¹³ likewise is justified by the same unfounded presumption of what Congress intended those words to mean.²¹⁴ The fact remains that there is no concrete evidence to support any theory that Congress added the “properly joined and served” language to the statute other than to preclude diversity jurisdiction removal when an in-state defendant has been “properly joined and served.”²¹⁵ Therefore, district courts should not rely on mere speculation to justify ignoring the plain language of the forum-defendant rule.

precluding . . . removal. According to Plaintiff, Precision must have actually served with a copy of the Complaint and Summons before it could remove.”).

²⁰⁹ *Id.*

²¹⁰ *See Holmstrom*, 2005 WL 1950672, at *2.

²¹¹ *Sullivan*, 575 F. Supp. 2d at 643 (emphasis added).

²¹² *Id.* at 643-44.

²¹³ *Id.* at 643 (emphasis added).

²¹⁴ *See supra* note 203 and accompanying text.

²¹⁵ *See supra* note 203 and accompanying text.

Additionally, some courts favoring remand have found support in the 1939 Supreme Court case *Pullman Co. v. Jenkins*.²¹⁶ They argue this case promulgates the Supreme Court's stance on the issue of pre-service removal.²¹⁷ Specifically, reliance is placed on the *Pullman* Court's reasoning that although a nonresident defendant joined in the action may be prejudiced because the resident defendant may not ever be served, the nonresident defendant should not be entitled to "seize an opportunity to remove the cause before service upon the resident co-defendant is effected."²¹⁸ Despite this seemingly applicable dictum from the *Pullman* case, one court ruling in favor of pre-service removal has argued that these courts have "taken *Pullman* out of context when citing it as supporting or binding precedent for their holdings."²¹⁹ This potential misconstruction of *Pullman* therefore weakens the position that the Supreme Court necessarily is against pre-service removal.

The absurd-result courts also set forth a number of policy arguments to support their characterization of pre-service removal as such. They argue that conditioning the validity of the forum-defendant rule on the timing of service of process serves "no conceivable public policy goal."²²⁰ They also maintain that allowing pre-service removal would "eviscerate the purpose of the forum defendant rule and a plaintiff's well-established right to choice of forum."²²¹ Lastly, these courts characterize pre-service removal as a form of litigant gamesmanship.²²² They argue that Congress added the "properly joined and served" language to the forum-defendant rule to prevent plaintiffs from engaging in gamesmanship by fraudulently joining in-state defendants to defeat diversity jurisdiction.²²³ Therefore, because Congress has already condemned one form of litigant gamesmanship under the forum-defendant rule, allowing pre-service removal, another form of gamesmanship, would be an absurd result.

The absurd-result argument suffers from the fact that prior "[c]ases using or referring to the principle do not define absurdity, nor do they specify the kinds of situations where the principle should be applied."²²⁴ This lack of clarity makes it difficult to draw the line between an absurd result and one that is merely objectionable. Therefore, courts that employ the absurd-result argument do so without having to satisfy a strict standard. Considering the power that this principle

²¹⁶ See discussion *supra* Part III.A.1.b.

²¹⁷ See discussion *supra* Part III.A.1.b.

²¹⁸ *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939).

²¹⁹ Bailey, *supra* note 4, at 200 ("According to *Ott*, the holding of *Pullman* dealt with the principle of complete diversity; other courts since misconstrued *Pullman* to be a preventative measure against improper joinder by requiring service upon a forum defendant in order to trigger the limitation of § 1441(b)." (citing *Ott*, 213 F. Supp. 2d at 664-65)).

²²⁰ *Sullivan*, 575 F. Supp. 2d at 645-46.

²²¹ *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 861-63 (N.D. Ohio 2008).

²²² See discussion *supra* Part III.A.1.b.

²²³ See discussion *supra* Part III.A.1.b.

²²⁴ Dougherty, *supra* note 76, at 128.

carries,²²⁵ it is debatable whether the standard should be so lenient. As such, pre-service removal, while potentially objectionable, might not rise to the level of outrage that would warrant the use of the absurd-result principle. To support this conclusion, it is worth revisiting the outcome in *United States v. Kirby*.²²⁶

In that case, a sheriff was charged for violating a statute that proscribed any activity obstructing the delivery of mail when it arrested a mailman who was indicted for murder.²²⁷ It was clear to the Court that Congress could not have intended to include that particular result in the statute.²²⁸ Otherwise, mailmen would be free to commit crimes because no sheriff would want to risk arresting them for fear of violating the statute. *Kirby* cited to other examples of absurd results to analogize its own conclusion. For instance, “‘that whoever drew blood in the streets should be punished with the utmost severity,’ did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit.”²²⁹ Furthermore, “‘that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—‘for he is not to be hanged because he would not stay to be burnt.’”²³⁰

The results above were all wildly unreasonable and illogical. Moreover, an innocent person in each situation would have been incarcerated and deprived of their freedoms without the operation of the absurd-result principle. Conversely, pre-service removal does not result in the criminal detention of an innocent person. Rather, it deprives a plaintiff from litigating their case in state court. While this right is no doubt important, it is questionable whether it warrants the use of the absurd-result principle. Perhaps if the behavior by the defendant were a bit more egregious, such as actively avoiding service from the plaintiff before removing,²³¹ then use of the principle would be justified. Accordingly, the district courts facing this issue in the future would be better served by allowing Congress to remedy this result if it sees fit. Otherwise, the standard for employing the principle is further relaxed and we could see an increase in the frequency of judges reading particular words out of a statute. Under that scenario, separation of powers issues could arise with accusations of judges legislating from the bench.

V. ARGUING FOR PRE-SERVICE REMOVAL

The plain language argument in favor of pre-service removal, unlike those against it, rests on straightforward reasoning. First, the general rules of statutory interpretation maintain that where the language of a statute is clear and unambiguous, the courts should give those words their plain meaning when applying

²²⁵ The absurd-result principle allows judges to “deviate from even the clearest statutory text when a given application would otherwise produce ‘absurd’ results.” Manning, *supra* note 77, at 2388. See Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 986 (1995).

²²⁶ See discussion *supra* Part II.C.

²²⁷ See *United States v. Kirby*, 74 U.S. 482 (1868).

²²⁸ *Id.* at 483.

²²⁹ *Id.* at 487.

²³⁰ *Id.*

²³¹ See discussion *supra* Part III.A.2.a.

that law.²³² Blacks Law Dictionary defines the term “ambiguity” as “[a]n uncertainty of meaning or intention, as in a contractual term or statutory provision.”²³³ To argue that the term “served,” as used in the context of the forum-defendant rule, is susceptible to “uncertainty of meaning or intention” does not hold up.

Congress, by adding the words “properly joined and served” to the forum-defendant rule, arguably chose to condition the applicability of the removal prohibition contained therein upon proper joinder *and* service of the in-state defendant. Furthermore, there is no evidence that Congress, in its legislative history or otherwise, intended the service requirement to apply only under certain circumstances.²³⁴ Thus, the plain meaning of those words must be conclusive. Moreover, allowing pre-service removal under the plain language of the forum-defendant rule is a result consistent with the Supreme Court’s position on statutory interpretation as set forth in *Exxon v. Allapatah*.²³⁵

Concededly, pre-service removal is a loophole that has emerged as a result of antiquated statutory language drafted at a time when electronic docket monitoring and other modern methods of case-notification were not foreseeable. However, that fact alone does not make pre-service removal an absurd result. Consequently, courts should not be permitted to modify the forum-defendant rule by eliminating the words “and served” from its text. As the Supreme Court declared in *Exxon*, “if Congress intends a different result, it is up to Congress rather than the courts to fix it.”²³⁶

VI. CONCLUSION

On its face, a dispute over whether a case is litigated in state court or federal court seems trivial. One might also characterize the pre-service removal dispute as wasteful of judicial resources. Nevertheless, a closer look at the effects removal can have on the outcome of a case reveals the importance of this issue. For instance, one article suggested that by removal, “defeats the plaintiff’s forum advantage . . . [by] dislodging the plaintiff’s lawyer from a familiar and favored forum . . . reversing the various biases, costs and other kinds of inconveniences, disparities in court quality, and differences in procedural law that led the plaintiff to prefer state court.”²³⁷ Additionally, the statistics show that win rates for plaintiffs in removed cases are very low.²³⁸ Therefore, the outcome of a motion to remand will, at the very least,

²³² 73 AM. JUR. 2D *Statutes* § 124 (2010) (citing *Symmes Twp. Bd. of Trs. v. Smyth*, 721 N.E.2d 1057 (Ohio 2000)).

²³³ BLACK’S LAW DICTIONARY 88 (8th Ed. 2004).

²³⁴ See *supra* note 203 and accompanying text.

²³⁵ “As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568. See also discussion *supra* Part II.B.

²³⁶ *Bivins v. Novartis Pharm. Corp.*, No. 09-1087, 2009 WL 2496518, at *2 (quoting *Exxon*, 545 U.S. at 565).

²³⁷ Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 599 (1998).

²³⁸ Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119, 182 (2006) (“However, plaintiff success rates for removed cases are so low (at roughly

modify “the parties’ respective postures for settlement negotiations . . . if the motion to remand is denied, when plaintiffs may suddenly find themselves with a weak case for recovery.”²³⁹

Litigants on both sides ultimately would stand to benefit from the guidance of the appellate courts on this issue. That guidance, however, is far off because “orders remanding cases are ordinarily not reviewable on appeal,”²⁴⁰ and “orders denying motions to remand aren’t reviewable until a judgment is entered, which may not happen for years, if ever.”²⁴¹ The district courts therefore should alleviate some of the confusion surrounding this issue by reaching a consistent and proper resolution. For the reasons set forth above, allowing pre-service removal under the plain language of the forum-defendant rule is the proper resolution of this issue.

34%)”); *id.* (citing Clermont & Eisenberg, *supra* note 237, at 581 (“Plaintiffs’ win rates in removed cases are very low, compared to cases brought originally in federal court and to state cases. For example, our data reveal that the win rate in original diversity cases is 71%, but in removed diversity cases it is only 34%.”))).

²³⁹ Richardson, *supra* note 238, at 182-83.

²⁴⁰ See 28 U.S.C. § 1447 (2006).

²⁴¹ *Pre-Service Removals: They Keep on Coming*, DRUG AND DEVICE LAW (May 11, 2009, 8:00 AM), <http://druganddevicelaw.blogspot.com>.