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November 11, 2019

The Hon. Jerrold Nadler, Chair
House Judiciary Committee
2141 Rayburn House Office Building
Washington, DC 20515

The Hon. Henry C. “Hank” Johnson, Chair
Subcommittee on Courts, Intellectual
Property, and the Internet
2141 Rayburn House Office Building
Washington, DC 20515

The Hon. Doug Collins, Ranking Member
House Judiciary Committee
2141 Rayburn House Office Building
Washington, DC 20515

The Hon. Martha Roby, Ranking Member
Subcommittee on Courts, Intellectual
Property, and the Internet
2141 Rayburn House Office Building
Washington, DC 20515

RE: Subcommittee on Courts, Intellectual Property, and the Internet
***Hearing on: Examining the Use of Snap Removals to Circumvent the
Forum Defendant Rule***, November 14, 2019

Dear Gentlemen and Madam:

As President of DRI – *The Voice of the Defense Bar*, (DRI) I am submitting this letter on behalf of our organization’s nearly 20,000 individual and corporate members. We ask you to consider our opposition to the notion of altering 28 U.S.C 1441(b)(2) for the purpose of preventing so-called “snap removal,” more appropriately called “pre-service removal.”

Pre-service removal is a process for the removal of a case from a state court to a local federal court under the federal court’s diversity jurisdiction. In order for such a removal to occur, two requirements are necessary. One, the plaintiff is not a citizen of the state where they filed the lawsuit. Two, no local defendant has yet been served before removal is sought. Preventing such removals would subvert the dictates of the Constitution and existing federal statutes.

Article III, Section 2 of the Constitution and 28 U.S.C. § 1332(a)(1) provides that the federal courts have subject-matter jurisdiction over cases involving disputes between “citizens of different states.” It is generally understood that the purpose of giving the federal courts jurisdiction to hear these cases is so that out-of-state litigants will have access to an unbiased federal forum that protects them from unfair advantages or perceived advantages that home-state litigants might enjoy in their local state courts. The denial of this right is the prime intent of those who seek an amendment in their quest to keep lawsuits in supposedly favorable state courts when they rightfully belong in the federal courts.

The purported rationale for amending the statute is to preserve plaintiffs’ choice to file in state courts. This justification is misleading because a federal court sitting in diversity applies the law of the state in which it sits. This doctrine has been firmly established for more than seventy (70) years when the U.S. Supreme Court decided *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The argument that these plaintiffs have the privilege to pursue their claims in their local state courts is further flawed because the issue of pre-service removal only arises when a *plaintiff* elects to file a lawsuit in a state court that is not the *plaintiff’s* home state.

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The beneficiaries of the proposal in question are not traditional plaintiffs who chose to file a lawsuit in their local state court. Instead, the actual beneficiaries are a small group of entrepreneurial plaintiffs who forum shop for a state court that they believe will be most favorable to their case. Additionally, the proposal is little more than an attempt to preserve the questionable plaintiffs' tactic of joining immaterial, local defendants to their lawsuit in order to create a fictitious lack of diversity jurisdiction thereby subverting the defendants' removal of the case to federal court.

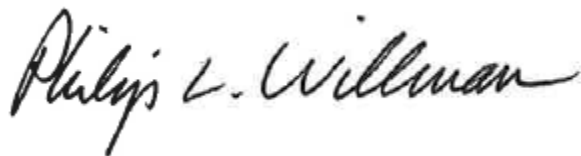
Some are suggesting that courts are divided over the acceptance of the pre-service removal procedure. Traditionally, U.S. District Courts have differed over the removal practice, there is, however, no division among the Courts of Appeal. Two circuits have uniformly applied the language of 28 U.S.C. 1441(b)(2), and both courts have upheld the removals when the in-state defendant had not been served.

In *Gibbons v. Bristol-Myers Squibb Co.*, 919 F. 3d 699 (2nd Circuit, 2019), the court held that a home-state defendant may remove an action filed in state court on the basis of diversity of citizenship as authorized by 28 U.S.C. Section 1441(b)(2).

In *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*, 902 F. 3d 147 (3d Circuit, 2018), the court stated that when federal jurisdiction was premised only on diversity of the parties, *the forum defendant rule applies*. The rule states a civil action, otherwise removable solely on the basis of diversity jurisdiction, cannot be removed if any of the parties in interest are properly joined and served as defendants is a citizen of the state in which such action is brought. According to 28 U.S.C. 1441(b)(2) and the holdings in *Gibbons* and *Encompass*, when a state court complaint meets the requirements for federal diversity jurisdiction, the presence of an in-state (in-forum) defendant only precludes removal where that defendant is properly joined and served.

It is for the foregoing reasons that DRI respectfully requests that the Committee maintain the statutory language and preserve the well-established right of removal of a state lawsuit to federal court when the circumstances dictate. With your permission, we also incorporate by reference the comments and testimony of the Lawyers for Civil Justice and the Federation of Defense and Corporate Counsel. Thank you for considering our commentary.

Sincerely,

A handwritten signature in black ink that reads "Philip L. Willman". The signature is written in a cursive, flowing style.

Philip L. Willman
DRI President