IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOYOLA

Case No. 7:13-cv-01311-DAE-MJB

Todd Bruno,

Plaintiff,

v.

Charles H. Rose, III,

Defendant.

Plaintiff's Memorandum of Law in Support of Plaintiff's Motion to Remand to State Court

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QUESTIONS PRESENTED

I. Did Rose retain his pre-incarceration domicile of Loyola when he (1) bought a Loyola home, (2) rented a Loyola mailbox, and (3) maintained Loyola voting rights?

II. Did Rose timely file his Notice of Removal when Bruno properly served him process using a reasonably calculated method of service?

STATEMENT OF JURISDICTION

Plaintiff asserts that this Court does not have subject matter jurisdiction of this suit due to a lack of diversity between the parties and failure by the Defendant to timely file his notice for removal. To the extent that any jurisdiction exists, 28 U.S.C. §§ 1446 and 1447 apply.

STATEMENT OF FACTS

Claim for Relief: Todd Bruno drove down Loyola's Gandy Boulevard on June 1, 2012. (Compl.¶ 4.) He intended to take the exit ramp that would put him on Interstate 275. (Compl.¶ 4.) But Bruno never got on I-275. (Compl.¶ 11.) Another car driven by Charles Rose cut sharply in front of Bruno from another lane in an apparent late attempt to make the I-275 exit. (Compl.¶ 10.) Rose forced Bruno off the road; Bruno's vehicle overturned. (Compl.¶ 11.) Bruno suffered injuries and medical costs of $75,000. (Compl.¶ 11.) Consequently, Bruno filed a claim for

relief in the Twenty-First Judicial Circuit of Pinellas County, in the state of Loyola. (Compl. filed May 13, 2013.)

Domicile: At the time Bruno filed and served the Complaint, Rose was incarcerated in the Stetson state prison. (Stip. of Fact ¶ 5(j).) Due to the centrality of this fact, the factual circumstances of Rose's domicile status preceding and following his surrender to the Stetson state prison are indispensable to determining the jurisdiction of this Court.

Rose and his ex-wife divorced in 2009. (Stip. of Fact ¶ 5(a).) In that same year, his ex-wife and only child moved from Georgia to Loyola. (Stip. of Fact ¶ 5(a)-(b).) Rose also moved from Georgia to Loyola in 2010, purchasing a home in the same town as his daughter and ex-wife. (Stip. of Fact ¶ 5(d).) Rose then signed a five-year lease for a strip-mall store, registered a vehicle, and rented a mailbox—all of which occurred in Loyola. (Stip. of Fact ¶ 5(e)-(g).) At some point in the future, Rose began living in Stetson for a period of several months, including at the time of the car wreck, which is the basis of this suit. (Stip. of Fact ¶ 5(i).)

Within approximately thirty days of the wreck, Rose was incarcerated in the Stetson state prison to serve a fourteen-month sentence for actions arising out of Stetson. (Stip. of Fact ¶ 5(j).) While in prison, Rose remarried and acquired a twenty-year lease on land in Stetson with his new wife. (Stip. of Fact ¶ 5(k)-(l).)

Though he is detained in Stetson, Rose only possesses voting rights under the state laws of Loyola. (Stip. of Fact ¶ 6.)

Timeliness of Removal: Equally indispensable to determining the jurisdiction of this Court is the factual circumstances surrounding the time Rose received formal notice of the suit so as to begin the thirty-day removal period. Bruno's process server delivered service unto the custody of the prison on May 13, 2013. (Aff. of Robert Sherwin ¶ 10.) The Stetson state prison then presented service to Rose's cell the following morning, May 14, 2013. (Aff. of Robert Sherwin ¶ 10.)

The prison asserts that Inmate #007, Charlie Rose, III, signed and dated the notice on May 14, 2013. (Aff. of Robert Sherwin ¶ 12.) Rose's cellmate, Charles Rosenthal, claims that he—not Rose—signed for the documents while Rose was away. (Aff. of Charles Rosenthal ¶ 8.) Rosenthal also asserts that he did not relay the documents to Rose until several days later; a date Rose asserts was on or around May 18, 2013. (Aff. of Charles Rosenthal ¶ 12-13; Notice of Removal ¶ 2.)

SUMMARY OF THE ARGUMENT

Domicile is Proper in Loyola: Determining an individual's domicile involves both a physical and mental component—a physical presence in the state and a mental intent to remain there indefinitely. The analysis becomes more complex, however, when that individual is a prisoner. The general rule is that a prisoner retains his pre-incarceration domicile. In this case, an inspection of the

facts reveals that Rose possessed both a physical and mental intent to remain in Loyola before his imprisonment. Therefore, due to his status as a Stetson state inmate, Rose presumptively maintains his Loyola citizenship.

Several courts hold that a prisoner may rebut this presumption of domicile. A successful rebuttal requires a prisoner to make a showing of facts indicating a bona fide intent to change domicile to the place of imprisonment. Notably, after an extensive legal search by counsel, not a single court has ever found a successful rebuttal of the presumption. Rose neither presents this Court with any truly exceptional circumstances nor raises a substantial question as to change his domicile to Stetson. As a result, this Court should find that Rose maintains domicile in Loyola, thereby divesting this Court of diversity jurisdiction.

Motion to Remove was Untimely: Rose failed to file his Notice of Removal within thirty days of service of process. The timeline for removal begins upon receipt of the complaint through service or otherwise. Bruno properly served the Stetson state prison, which acted as Rose's designated agent to receive process. Rose chose to sign a waiver that contractually waived his right to be present when the prison receives his legal mail; therefore, he appointed the prison to receive his legal mail, including service of process. Moreover, as a prisoner with limited freedoms, Rose has an agency relationship with the prison because of its control over his access to the general public.

In the alternative, even if service of process did not perfect, Bruno relied on a reasonably calculated method to serve Rose. Bruno hand delivered the complaint and the summons to the prison personnel and relied on the prison to comply with its internal legal mail procedures in its delivery. While there is a dispute as to whom the prison delivered the documents, this Court should resolve any ambiguities in favor of remand and hold that remand is appropriate.

DISCUSSION

I. This Court should grant Plaintiff's Motion to Remand because Rose was a citizen of Loyola at the time Bruno filed his claim, thereby eliminating diversity between the parties and effectively divesting this Court of jurisdiction.

Federal jurisdiction based on diversity of citizenship requires complete diversity between the parties. *See* 28 U.S.C.A. § 1332(a)(1) (West 2012). The party seeking to invoke the jurisdiction of the federal court bears the onus of proving such jurisdiction. *See McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). Historically, federal courts determine the existence of federal diversity jurisdiction at the time the parties commence the action. *See Keene Corp. v. United States,* 508 U.S. 200, 207 (1993) (quoting *Mollan v. Torrance,* 22 U.S. 537, 539 (1824)). "A civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3.

As such, establishing the jurisdiction of this Court does not rest upon the shoulders of Bruno. *See Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010). Rather,

Rose bears the burden of proof and must "allege facts sufficient to raise a substantial question about [his] intention to acquire a new domicile." *Jones v. Hadican*, 552 F.2d 249, 251 (8th Cir. 1977). Therefore, this Court should determine Rose's citizenship based upon his domicile at the time Bruno filed this suit, May 13, 2013.[1] (Compl. p. 3.)

In order to establish a domicile, a person must reside within that state, as well as, possess intent to remain in that state indefinitely—thus, domicile involves a physical and mental component. *See Mitchell v. United States*, 88 U.S. 350, 353 (1874) ("To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there."); *Janzen v. Goos*, 302 F.2d 421, 425 (8th Cir. 1962). Factors that have historically represented this intent include, but are not limited to, the following:

> [C]urrent residence; voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations; place of employment or business; driver's license and automobile registration; [and] payment of taxes.

Garcia Perez v. Santaella, 364 F.3d 348, 351 (1st Cir. 2004); Note, *Evidentiary Factors in the Determination of Domicil*, 61 Harv. L. Rev.1232, 1232-40 (1948).

[1] Due to the lack of a court clerk's date-and-time stamp, this brief assumes the Complaint was filed with the court on the date of submittal.

The difficulty in determining Rose's domiciliary status, however, is the fact that he was a prisoner at the time Bruno filed this suit. (Stip. of Fact ¶ 5(j).) This detail alters the perspective from which this Court should analyze domicile. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 cmt. a (1971) ("Acquisition of a domicile of choice requires some free exercise of the will on the part of the person involved. An act done by him under physical compulsion or because of criminal or comparable sanctions will be legally ineffective for this purpose."). Consequently, as an inmate of the Stetson state prison, Rose's domicile before imprisonment presumptively remains his domicile upon release. *See Stifel v. Hopkins*, 477 F.2d 1116, 1127 (6th Cir. 1973).

A. Due to his status as a prisoner, Rose presumptively retains his Loyola citizenship.

Federal courts have long accepted the theory that determining a party's domicile centers around two parallel principles—choice and the freedom thereof. *See, e.g.*, *Neuberger v. United States*, 13 F.2d 541, 542 (2d Cir. 1926); *United States v. Stabler*, 169 F.2d 995, 998 (3d Cir. 1948); *Wendel v. Hoffman*, 24 F. Supp. 63, 65 (D.N.J. 1938).

Prisoners, however, do not enjoy such a freedom. *See Meachum v. Fano,* 427 U.S. 215, 224 (1976). Prisoners lack liberty, a notion upon which the concept of domicile hinges. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 (1969) ("A person does not acquire a domicile of choice by his presence in a place under

physical or legal compulsion."); Harrison Tweed & Christopher S. Sargent, *Death and Taxes are Certain—But What of Domicile*, 53 HARV. L. REV. 68 (1939). Most notably, Justice Story stated, "[R]esidence in a place, to produce a change of domicile, must be voluntary. If, therefore, it be constraint or involuntarily, as by banishment, arrest, or imprisonment, the antecedent domicile of the party remains." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 47, at 46 (1834). That is, due to this lack of free will, a prisoner retains the domicile he maintained at the commencement of the imprisonment. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 cmt. c (1971) ("it is impossible for a person to acquire a domicile in the jail in which he is incarcerated."); *United States v. Gronich*, 211 F. 548, 550 (W.D. Wash. 1914).

For these reasons, the law presumes that Rose retains his pre-incarceration domicile. *See Hall v. Curran*, 599 F.3d 70, 72 (1st Cir. 2010). This analysis, then, first requires a determination of Rose's domicile before imprisonment. *See Jones,* 552 F.2d at 251; *Edick v. Poznanski*, 6 F. Supp. 2d 666, 669 (W.D. Mich. 1998). Applying the factors of domicile to this case, Rose evinced both a physical presence and mental intent to remain in Loyola prior to his imprisonment through the following undisputed facts:[2]

[2] This diagram represents facts offered by the parties' Stipulations of Fact, pp. 1-2.

State of Loyola
• Purchased and owns a home • Owns a state-registered automobile • Signed a five-year lease for a store in a strip mall • Rents a mailbox • Maintains voting rights

Though "[n]o single factor is dispositive, and the analysis focuses not simply on the number of contacts with the purported domicile, but also on their substantive nature." *Garcia Perez*, 364 F.3d at 351 (citing *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 12 (1st Cir.1991). For example, the right to vote in a state is a "weighty factor" when determining domicile. *Melendez-Garcia v. Sanchez*, 629 F.3d 25, 41 (1st Cir. 2010). Even more so, voting rights can inherently create a presumption of domicile in that particular state. *See Messick v. Southern Penn. Bus Co.*, 59 F.Supp. 799, 801 (E.D. Penn. 1945).

Additionally, Rose's signing of the five-year lease of a store evidences his intention to do business, work, or maintain employment in Loyola. *Garcia Perez*, 364 F.3d at 351. Perhaps most importantly, Rose purchased a home in Loyola in the same state and town as his ex-wife and daughter soon after their departure from

Georgia. (Stip. of Fact ¶ 5(e)-(d).) This act demonstrates an intention to remain where his family resides—another important indicator in the determination of domicile. *See Messick*, 59 F.Supp. at 801.

These factors intuitively demonstrate Rose's domicile in Loyola. *See Mitchell*, 88 U.S. at 352 (stating that the term domicile, at its ordinary core, means the place of a person's home). As a result, Loyola is the state of citizenship Rose presumptively retains during his time in the Stetson state prison. *See Stifel*, 477 F.2d at 1127. Bruno respectively requests that this Court find Rose as a citizen of Loyola and accordingly remand this action due to a lack of diversity between the parties.

B. To the extent that Rose may rebut this presumption, he failed to sufficiently demonstrate a bona fide intent to remain in Stetson so as to attain diverse citizenship.

Several circuit courts hold that a party can rebut the presumption of a prisoner's domicile. *See Stifel*, 477 F.2d at 1127; *Jones*, 552 F.2d at 251; *Housand v. Heiman*, 594 F.2d 923, 925 n.5 (2d Cir. 1979); *Denlinger v. Brennan*, 87 F.3d 214, 216 (7th Cir. 1996). In order to rebut this presumption, the prisoner must make a showing of facts indicating a bona fide intent to change domicile to the place of imprisonment. *See Jones*, 552 F.2d at 251 (additionally requiring "facts sufficient to raise a substantial question about the prisoner's intention to acquire a new domicile.").

What threshold a court requires to rebut this presumption or constitute a bona fide intent, however, is not clearly identifiable. *See Stifel*, 477 F.2d at 1126-27. This ambiguity is supported by counsel's extensive review of applicable federal cases, all of which fail to reveal a single instance of a prisoner-defendant successfully rebutting the presumption of a prisoner's domicile. *See, e.g.*, *Hall*, 599 F.3d at 72; *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir. 1991); *Ownby v. Cohen*, 19 F. Supp. 2d 558, 563 (W.D. Va. 1998); *Scott v. Sonnet, Sale & Kuehne*, 989 F. Supp. 542, 543 (S.D.N.Y. 1998).

Bona fide, in its literal definition, means "in good faith." BLACK'S LAW DICTIONARY 81 (4th pocket ed. 2011). The Sixth Circuit in *Stifel* offered a few guiding, yet ambiguous, factors to determine a bona fide intention, including: the weight of the person's assertions of intent; the manner in which the person orders his personal affairs; and any other evidence relevant to determining whether the person acquired the requisite intent to change his domicile. 477 F.2d at 1126-27.

Courts also agree that a showing of a bona fide intent requires more than mere conclusory statements or "unsubstantiated declarations" to rebut the presumption. *Poucher v. Intercounty Appliance Corp*., 336 F. Supp. 2d 251, 254 (E.D.N.Y. 2004). To be sure, a prisoner demonstrating a bona fide intent must present "truly exceptional circumstances which would justify a finding that he has acquired a new domicile." *Jones,* 552 F.2d at 251.

In this case, Rose failed to present this Court with any truly exceptional circumstances. To rebut the presumption of domicile, Rose's strongest argument of the facts includes: (1) he lived in Stetson for several months before the car wreck, and (2) took out a twenty-year lease on a piece of land in Stetson with his new wife. (Stip. of Fact ¶ 5(i)-(l).) At a closer analysis, these facts do not give rise to a showing of the necessary intent. *See Robinson v. Brown & Williamson Tobacco Corp.*, 909 F. Supp. 824, 825 (D. Colo. 1995) (requiring more than a "safe assumption" that jurisdiction probably exists).

First, Rose's presence in Stetson does not generate a bona fide intention. *See Sun Printing & Publ'g Ass'n v. Edwards*, 194 U.S. 377, 383 (1904). (Stip. of Fact ¶ 5(i).) The Supreme Court long ago recognized the principle that mere residency is not enough to create domicile. *See id*. Rather, residency must accompany the person's intent to remain in the state indefinitely. *See Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996); *Krasnov v. Dinan*, 465 F.2d 1298, 1300 (3d Cir. 1972). Rose's physical presence in Stetson, regardless of his length of stay, is not enough to create a new domicile. *See Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974).

Second, the lease in Stetson does not raise a substantial question as to the domicile of Rose. *See Jones,* 552 F.2d at 251. Because the timing of this act is currently unknown, the issue presents a two-fold analysis. (Stip. of Fact ¶ 5 (l).) If Rose acquired the lease *after* the filing of the Complaint, then Rose is a citizen of

Loyola and the inquiry ends. *See Slaughter v. Toye Bros. Yellow Cab Co.*, 359 F.2d 954, 956 (5th Cir. 1966) ("[A] change of citizenship occurring after the commencement of the action would not affect jurisdiction or the absence of it.").

If, on the other hand, Rose acquired the lease *before* the filing of the Complaint, then this act is but one factor to rebut the presumption. *See Coury*, 85 F.3d at 251 ("In the determination of domicile, no single factor is determinative."). Under a totality of the circumstances approach, the sole fact of this twenty-year lease does not outweigh the numerous facts demonstrating a Loyola citizenship. *See Cassens v. Cassens*, 430 F. Supp. 2d 830, 834 (S.D. Ill. 2006). Moreover, Rose bears the burden to prove the contrary. *See Samuel-Bassett v. KIA Motors Am., Inc.,* 357 F.3d 392, 396 (3d Cir. 2004).

Rose neither presents this Court with any truly exceptional circumstances nor raises a substantial question as to his domicile. *See Jones,* 552 F.2d at 251. Therefore, this Court should remand this action by a finding a lack of diversity between the parties due to Rose's Loyola citizenship.

II. This Court should grant Plaintiff's Motion to Remand because Rose filed his Notice of Removal five days after the timeline for removal expired.

When a defendant receives the summons and complaint together, "the [30–day period for removal runs at once." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999); 28 U.S.C.A. § 1446(b) (West 2011). Thus, while Rose bears the burden of establishing that he properly removed this case, Bruno

need only establish that he properly served Rose on May 13, 2013. *See* 28 U.S.C.A. 1446(b); *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.,* 374 F.3d 1020, 1022 (11th Cir. 2004).

Bruno perfected service of process on May 13, 2013, in two ways. First, he served the complaint and the summons on the prison, which acted as an agent for Rose. (Aff. of Robert Sherwin ¶ 8; Ex. A p. 2.) Second, Bruno relied on a method reasonably calculated to reach Rose. *See Dusenbery v. U.S.*, 534 U.S. 161, 168 (2002). Additionally, when determining removal jurisdiction "all uncertainties as to removal jurisdiction are to be resolved in favor of remand." *Russell Corp. v. Am. Home Assur. Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001). Thus, even if this Court doubts that Rose was properly served, the uncertainty requires remand. *See Id.*

A. The timeline for removal began when Bruno perfected service on May 13, 2013, because the prison acted as Rose's agent for service of process.

The "thirty-day [time] period for removal begins at once when a defendant is served both the complaint and the summons at the same time." *Murphy Bros., Inc.*, 526 U.S. at 354. Thus, an analysis of service is necessary to determine the removal timeline. *See* 28 § U.S.C.A. 1446(b). Because Loyola adopted the Federal Rules of Civil Procedure as its state law for service of process, parties have three options to effectively serve process: personal service, residential service, or service through an agent. FED. R. CIV. P. 4(e)(2). In this case, the defendant was in prison, which

rendered personal and residential service impossible. (Stip. of Fact ¶ 5(j).) As a result, the plaintiff narrows this issue to service through an agent.

Loyola's state law for serving a summons allows a party to serve another party by "delivering a copy of [the complaint and the summons] to an agent authorized by appointment or by law to receive service of process." FED. R. CIV. P 4(e)(2)(c). An individual can appoint an agent explicitly or the relationship can be implied through conduct. *See In re Focus Media Inc.*, 387 F.3d 1077, 1082 (9th Cir. 2004); *Blair v. City of Worcester*, 522 F.3d 105, 114 (1st Cir. 2008) (finding proper service on an agent based upon a defendant's conduct and relationship with the person served even when defendant submitted an affidavit that he had not appointed the person a plaintiff served as his agent.)

Bruno appointed the prison his agent to receive service of process in two ways. First, Rose gave the prison actual authority to receive service of process for him. (Aff. of Robert Sherwin ¶ 8.) Rose served his time in the Stetson state prison in Indian River County. (Stip. of Fact. 5(j).) As an inmate, Rose chose to sign a document that waived his right to "in-person inspection of his legal mail." (Aff. of Robert Sherwin ¶ 8.) The prison provided Rose a copy of its mail policy that defined legal mail to include service of process. (Ex. A p. 1.) As a result, Rose signed a document explicitly appointing the prison to receive and open all of his legal mail, including service of process. *See Blair*, 522 F.3d at 114. (Ex. A p. 1-2.)

Second, Rose appointed the prison as his agent via conduct because as a prisoner, Rose is subject to the prison's control. *See generally Bell v. Wolfish,* 441 U.S. 520 (1979). At the time of service, Rose relied on the prison for all of his daily activities. *Id.* Rose's imprisonment rendered the prison officials his agents to accept service of process because as a prisoner, he surrendered his freedom to join the general public and receive service of process. (Stip. of Fact ¶ 5(j).) As a result of Rose's conduct and explicit waiver of rights, he appointed the prison officials to receive service of process on his behalf; therefore, Bruno properly perfected service. *See* FED. R. CIV. P. 4 (e)(2)(c). (Aff. of Robert Sherwin ¶ 10.)

B. Bruno perfected service on May 13, 2013, when he relied on a reasonably calculated method of service.

When evaluating an alleged defect in providing proper notice, courts consider whether the serving party relied on a method "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Dusenbery*, 534 U.S. at 168. (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *Grannis v. Ordean*, 234 U.S. 385, 397 (1914); *Roller v. Holly*, 176 U.S. 398, 409 (1900). While the reasonably calculated standard should provide notice, the standard requires likelihood—not certainty. *Whiting v. United States*, 231 F.3d 70, 76 (1st Cir. 2000).

In *Dusenbery*, the Supreme Court applied the reasonably calculated standard to a case involving the United States government providing notice of a forfeiture hearing to a prisoner through certified mail. *Dusenbery*, 534 U.S. at 168. The prison's process of accepting mail included an employee signing the certified mail receipt, logging the mail, and then delivering the mail to the inmate. *Id.* at 165-66. The Court held that the law does not require actual notice (in this case the prisoner did not actually receive notice), and that "the criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements." *Id.* at 170-71 (*quoting Mullane*, 339 U.S. at 314).

Additionally, courts hold that plaintiffs should not be punished when the failure to properly serve a defendant is attributable to government personnel who improperly performed their duties. *See Lindsey v. U.S. R.R. Ret. Bd.,* 101 F.3d 444, 446 (5th Cir. 1996). As a result, a plaintiff should be able to depend on government personnel to properly serve process when the plaintiff relies on a reasonably calculated means. *See Dusenbery*, 534 U.S. at 168; *Lindsey,* 101 F.3d at 446.

Similar to *Dusenbery*, Bruno relied on a reasonably calculated method of service. 534 U.S. at 173. While the FBI relied on certified mail, Bruno took additional precaution and hand delivered the complaint and the summons to the jail. *See id.* at 169; (Aff. of Robert Sherwin ¶ 10.) Bruno relied on a prison official to sign for the documents and then dispatched those documents to the prisoner

using a prison employee, just as the FBI did in *Dusenbery*. 534 U.S. at 168; (Aff. of Robert Sherwin ¶ 9-12.)

The main difference lies in the notice component. In *Dusenbery*, the prisoner never received notice, but in this case, Rose received the documents and actual notice of the suit. (Aff. of Robert Sherwin¶ 11; Def.'s Notice of Removal ¶ 2.) Rose claims his cellmate, Rosenthal, delayed notice by five days; however, the Warden states—and the prison records confirm—that Rose signed and dated the receipt May 14, 2013. (Aff. of Charles Rosenthal ¶ 8, Aff. of Robert Sherwin ¶ 12.) Accordingly, just as the FBI in *Dusenbery* relied on the prison's internal mail delivery to provide proper notice, Bruno relied on the prison to provide proper notice. 534 U.S. at 168. Moreover, conflict facts, such as these, weigh in favor of remand. *See Russell Corp.*, 264 F.3d at 1050; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Bruno relied on a reasonably calculated method to provide proper notice to Rose through service of process and the prison's internal delivery system. *See Dusenbery*, 534 U.S. at 168. Rose's actual notice of the complaint is irrelevant; the standard only requires Bruno to rely on a method of service that would likely reach Rose. *See Whiting*, 231 F.3d at 76. As a result, Bruno should not be held liable for any alleged mistake made by the prison. This Court should find that Rose

effectuated proper notice through service on May 13, 2013, rendering his Notice of Removal untimely.

CONCLUSION

This Court does not maintain subject matter jurisdiction over this case due to a lack of complete diversity and Rose's untimely Notice of Removal. Rose presumptively retained his pre-incarcerated domicile of Loyola and failed to show a bona fide intent so as to acquire domicile in Stetson. Furthermore, even though Bruno relied on a reasonably calculated method of service, Rose failed to file his Notice of Removal within the thirty day time period. Bruno prays this Court to grant Rose's Motion to Remand and hold jurisdiction in this Court improper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served via hand-delivery on all attorneys of record on this the 6th day of September, 2013:

/s1331
1331