

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**MICHAEL A. MILLETT, et al.,** )  
 )  
 **Plaintiffs** )  
 )  
 **v.** )  
 )  
 **ATLANTIC RICHFIELD COMPANY,** )  
 **et al.,** )  
 )  
 **Defendants** )

**Docket No. 98-367-P-H**

**RECOMMENDED DECISION ON PLAINTIFFS' MOTION TO REMAND**

The plaintiffs, Michael A. Millett, Deborah L. Millett, Cathy Lemar and Richard Lemar,<sup>1</sup> move for remand of this putative class action to the Maine Superior Court (Cumberland County), from which it was removed in accordance with a notice of removal based on the diversity jurisdiction of this court under 28 U.S.C. § 1332 filed by defendants ARCO Chemical Company and Lyondell Chemical Company dated October 29, 1998. Docket No. 1. An amended notice of removal dated November 2, 1998 (Docket No. 5) has been filed, and the remaining named defendants, Atlantic Richfield Company (Docket No. 2), Oxygenated Fuels Association (Docket No. 4), Maine Petroleum

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<sup>1</sup> The defendants apparently take the position that Cathy Lemar and Richard Lemar were not appropriately added as plaintiffs when the plaintiffs filed their first amended complaint just before the defendants removed this action from the Maine Superior Court (Cumberland County) to this court. This issue is not relevant to resolution of the motion to remand and I will not address it further.

Association<sup>2</sup> (Docket No. 6), Patricia W. Aho (Docket No. 22) and Nancy J. Balter (Docket No. 18), have joined in the notice of removal. Discovery limited to jurisdictional issues has been conducted. I recommend that the court grant the motion to remand.<sup>3</sup>

### **I. Factual Background**

A diversity action is removable only if two conditions are met: the suit must be within the court's original jurisdiction, *see* 28 U.S.C. § 1441(a), and therefore must satisfy the requirements of 28 U.S.C. § 1332, and no defendant can be a citizen of the state in which the plaintiff filed the action, *see* 28 U.S.C. § 1441(b). The plaintiffs have moved to remand this action on the grounds that complete diversity of citizenship between the plaintiffs and the defendants, as required by 28 U.S.C. § 1332(a), does not exist, because defendants Aho and the Maine Petroleum Association are citizens of Maine as are the plaintiffs, and that the amount in controversy does not exceed \$75,000 per plaintiff, also as required by section 1332(a). Plaintiffs' Motion to Remand (Docket No. 17) at 1.

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<sup>2</sup> This defendant contends that it should be called American Petroleum Institute. Joinder in Notice of Removal (Docket No. 6). For reasons that follow, it is not necessary nor appropriate that this court resolve this issue at this time.

<sup>3</sup> Also pending are the following motions: Atlantic Richfield's motion to dismiss (Docket No. 7); Patricia W. Aho's motion to dismiss (Docket No. 22); Nancy J. Balter's motion to dismiss (Docket No. 25); the plaintiffs' motion for leave to file an amended complaint (Docket No. 39); and a motion by all defendants for oral argument on the motion to remand (Docket No. 54). I am satisfied that the written submissions of the parties adequately address the issues raised by the motion to remand and therefore deny the request for oral argument. If the court adopts my recommendation that the motion to remand be granted, the motions to dismiss would most appropriately be determined by the state court. *See Lane v. Champion Int'l Corp.*, 827 F. Supp. 701, 704-05 (S.D.Ala. 1993). It is not necessary for this court to reach the plaintiffs' motion for leave further to amend their complaint in order to resolve the motion to remand, and for that reason that motion should also be determined by the state court. Accordingly, I do not consider motions other than the motion to remand.

The defendants respond that the plaintiffs failed to comply with M. R. Civ. P. 21 when they purported to add Aho as a defendant in the state-court action in an amended complaint filed before the notice of removal was filed, but on the same day, and that this court therefore may not consider Aho, an admitted resident of Maine, as a party defendant for purposes of its diversity-of-citizenship analysis; that the Maine Petroleum Association is actually a division of the American Petroleum Institute, a District of Columbia corporation with a principal place of business in the District of Columbia, and therefore is not a citizen of Maine in any sense; and that the amount claimed by plaintiff Michael Millett exceeds \$75,000, and, in the alternative, that the financial impact of the injunctive relief sought by the plaintiffs, even if allocated among the individual plaintiffs, will exceed the jurisdictional minimum. Objection and Incorporated Memorandum of Law of Defendant American Petroleum Institute in Opposition to Plaintiffs' Motion to Remand, etc. ("API's Objection") (Docket No. 49) at 7-13; Objection and Incorporated Memorandum of Law of Defendants ARCO Chemical Company and Lyondell Chemical Company in Response to Plaintiffs' Motion to Remand, etc. ("ARCO's Objection") (Docket No. 50) at 2-6. The plaintiffs also contend that remand is required because the amended notice of removal does not include any reference to the status of Aho or the Maine Petroleum Association as grounds for removal, Supplemental Motion and Memorandum of Law in Support of Plaintiffs' Motion to Remand ("Plaintiffs' Supplemental Motion") (Docket No. 44)<sup>4</sup> at 3-6, and that this court may not consider the question whether Aho was properly joined as a party in the state court, *id.* at 6-10.

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<sup>4</sup> The plaintiffs' filing of a supplemental memorandum of law in support of their motion to dismiss in this case is due at least in part to the defendants' decision, announced to the court at a hearing on January 29, 1999 that they would not pursue the claim, raised in the amended notice of removal, that the joinder of Aho was fraudulent. Transcript of Hearing on Discovery Dispute, January 29, 1999 (Docket No. 38), at 21-24.

The initial complaint in this action was filed in the Maine Superior Court (Cumberland County) on or about October 7, 1998. Notice of Removal (Docket No. 1) ¶ 1. On October 29, 1998 the plaintiffs filed their first amended complaint (Docket No. 5A), Amended Notice of Removal (Docket No. 5) ¶¶ 3-5, before any responsive pleadings had been filed and without seeking leave of court, in which they added as named plaintiffs Cathy Lemar and Richard Lemar and as a defendant Patricia W. Aho, Plaintiffs' Supplemental Motion at 2. Later that day, defendants ARCO and Lyondell filed their initial notice of removal. Docket No. 1; Amended Notice of Removal ¶¶ 3-5. In the first amended complaint, Aho is alleged to be a resident of Maine. First Amended Complaint ¶ 15. The Millett plaintiffs are alleged to be residents of Maine. *Id.* ¶ 8. The residence of the Lemar plaintiffs is not alleged. The named plaintiffs state that they bring this case as a class action on behalf of "all Maine property owners whose private water supplies are contaminated by a gasoline additive called methyl tertiary-butyl ether or MTBE." *Id.* ¶ 1. The first amended complaint seeks relief under 14 M.R.S.A. § 221 for sale of a defective or unreasonably dangerous product (Count I); equitable and injunctive relief under 5 M.R.S.A. § 207 for fraud and unfair sales practices (Count II); damages for negligence (Count III), negligent misrepresentation (Count IV), "strict product liability" (Count V), "absolute liability for ultra-hazardous activity" (Count VI), and unjust enrichment (Count VII); and punitive damages (Count VIII). The injunctive relief sought is more specifically described to include a court order establishing a fund for sampling and analysis of water from all private household water supplies in Maine, a court order requiring the defendants to issue warnings to and fund "corrective public education" for Maine consumers concerning MTBE, and imposition of a constructive trust upon profits received by the defendants from the sale of MTBE or gasoline containing MTBE. *Id.* at 24.

Rule 15(a) of the Maine Rules of Civil Procedure provides, in relevant part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Rule 21 of the Maine Rules of Civil Procedure provides, in full:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

The defendant must initially plead facts in the notice of removal that are legally sufficient to justify a removal. Where the plaintiff has put the truth of the defendant's factual allegations in controversy — whether by prior pleading or by motion — the defendant bears the burden of persuading the federal court that the allegations are true and that the removal was proper. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98 (1921); *see Coventry Sewage Assoc. v. Dworkin Realty Co.*, 71 F.3d 1, 4 (1st Cir. 1995) (party invoking jurisdiction of federal court has burden of proving its existence).

## **II. Discussion**

### **A. Sufficiency of the Amended Notice of Removal**

The plaintiffs contend that the amended notice of removal is fatally deficient because it fails to mention specifically the position now taken by the defendants: that Aho was not properly joined as a defendant in the state court action and therefore may not be considered in this court's analysis of the question whether diversity jurisdiction exists in this case. The notice of removal is governed

by 28 U.S.C. § 1446, which provides in relevant part:

(a) A defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal . . .

(b) The notice of removal or 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 setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served upon the defendant, whichever period is shorter.

This statute must be strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941); *see Winters Gov't Sec. Corp. v. NAFI Employees Credit Union*, 449 F. Supp. 239, 241 (S.D.Fla. 1978) (case law requires strict compliance with statutory procedure for removal).

The original notice of removal filed in this case asserts that the controversy is “wholly between citizens of different states, as defined in 28 U.S.C. § 1332(a)(1),”<sup>5</sup> Notice of Removal ¶ 7; that the amount of damages for each named plaintiff, should the plaintiffs prevail, “is not, to a legal certainty, less than \$75,001, exclusive of interest and costs,” *id.* ¶ 5; and that defendant Maine Petroleum Association “is not a separate legal entity” but rather “an internal division of the American Petroleum Institute,” *id.* ¶ 3.

The amended notice of removal, filed four days later, includes the same assertions and adds that “none of the Defendants properly joined in this action maintains a principal place of business

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<sup>5</sup> That statute provides, in relevant part: “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between — (1) citizens of different States.”

in Maine, is incorporated in Maine, or is otherwise a citizen of Maine,” Amended Notice of Removal ¶ 8; “no properly joined individual Defendant is a citizen of Maine,” *id.* ¶ 10; and “Plaintiffs’ belated joinder of Aho as a named Defendant can and should be disregarded as fraudulent for purposes of ascertaining the presence of diversity,” *id.* ¶ 12. The amended notice of removal contains no specific assertion concerning the means by which the plaintiffs attempted to join Aho as a defendant in the state court action. The defendants have not attempted to amend the notice of removal further.

Any doubts regarding compliance with removal provisions must be resolved in favor of remanding the case to state court. *Hayduk v. United Parcel Serv., Inc.*, 930 F. Supp. 584, 592 (S.D.Fla. 1996); *Bellone v. Roxbury Homes, Inc.*, 748 F. Supp. 434, 436 (W.D.Va. 1990). Amendment of removal notices after the statutory deadlines have passed is allowed only to “set out more specifically the grounds for removal that already have been stated, albeit imperfectly, in the original notice.” 14C C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3733 at 358 (3d ed. 1998). Completely new grounds for removal jurisdiction may not be added and “missing allegations may not be furnished.” *Id.* at 358-61. A defendant cannot argue a new substantive ground as a basis for removal in opposing a plaintiff’s motion to remand. *Wyant v. National R. R. Passenger Corp.*, 881 F. Supp. 919, 924-25 (S.D.N.Y. 1995). Here, the defendants contend that, while the amended notice of removal does not mention the plaintiffs’ alleged failure to comply with M. R. Civ. P. 21 as grounds for ignoring Aho’s citizenship in evaluating the court’s diversity jurisdiction, the general allegations that “properly joined” defendants are not citizens of Maine must be interpreted favorably to them as necessarily including the specific allegation that Aho was not properly joined in the state court. Contrary to the plaintiffs’ position, a completely new ground for removal jurisdiction would be an allegation that a federal question existed, not an

allegation that a particular named defendant did not destroy diversity jurisdiction for a different or additional reason. *See, e.g., Gafford v. General Elec. Co.*, 997 F.2d 150, 164 (6th Cir. 1993); *Wyant*, 881 F. Supp. at 924-25.

Wright, Miller and Cooper suggest that “it should be sufficient if the court is provided the facts from which removal jurisdiction can be determined. Thus, the same liberal rules employed in testing the sufficiency of a pleading should apply to appraising the sufficiency of a defendant’s notice of removal.” 14C C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3733 at 356 (3d 3d. 1998) (footnote omitted); *see also Wormley v. Southern Pac. Transp. Co.*, 863 F. Supp. 382, 384 (E.D.Tex. 1994) and cases cited therein; *but see Winters*, 449 F. Supp. at 243 (failure to allege citizenship of one defendant and legal status of another in notice of removal requires remand). In the First Circuit, a district court assessing the sufficiency of a complaint in connection with a motion to dismiss for failure to state a claim upon which relief may be granted must “take the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

Applying this pleading standard to the allegations of the amended notice of removal, extending the defendants every reasonable inference in their favor, I cannot say that it appears to a certainty that the defendants could not establish diversity jurisdiction under the set of facts upon which they now rely. While a very generous perspective is necessary, it is reasonable to infer from the allegations of the amended notice of removal that some reason other than fraudulent joinder to

disregard the presence of Aho in the first amended complaint for purposes of diversity jurisdiction may exist. While the allegations in the amended notice of removal are minimal in this regard, that is all that is required, and the plaintiffs are not entitled to remand on the basis of a defect in the amended notice of removal. *See generally Kingman v. Sears, Roebuck & Co.*, 526 F. Supp. 1182, 1185 (D. Me. 1981).

### **B. Failure to Comply with M. R. Civ. P. 21**

Assuming *arguendo* that defendant Maine Petroleum Institute is in fact an internal division of the American Petroleum Institute and therefore not a citizen of Maine whose presence as a defendant in this action would destroy diversity, it is still necessary that the defendants establish that the plaintiffs' failure to seek leave from the state court to add Aho as a defendant, even though their amended complaint naming her was filed before any responsive pleadings were filed, means that this court may not consider her as a defendant for purposes of evaluating its diversity jurisdiction.<sup>6</sup> As a citizen of Maine, Aho's presence as a defendant in this action would otherwise destroy that jurisdiction.

When diversity of citizenship is the asserted basis for removal, the necessary diversity must exist both at the time the action was initially filed in state court and at the time removal is sought. *Kinney v. Columbia Sav. & Loan Ass'n*, 191 U.S. 78, 81 (1903); *Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996). Accordingly, if Aho's citizenship at the time this action was removed may be

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<sup>6</sup> Most of the case law cited by the defendants in support of their argument on this point deals with attempts by plaintiffs to add nondiverse defendants after removal has been accomplished. *E.g.*, *Gum v. General Elec. Co.*, 5 F.Supp.2d 412, 414 (S.D.W.Va. 1998); *Ascension Enter., Inc. v. Allied Signal, Inc.*, 969 F. Supp. 359, 361 (M.D.La. 1997). Such attempts are controlled by a separate statute, 28 U.S.C. § 1447(e), making case law concerning them of little or no value for evaluation of the purported addition of a nondiverse defendant before removal takes place.

considered by this court, the action must be remanded because complete diversity did not exist at the time of removal.

The plaintiffs first argue that this court may not consider anything beyond the fact that Aho appears as a named defendant in the first amended complaint, which was filed before the notice of removal was filed, because the question whether she was appropriately added as a party under M. R. Civ. P. 15 and 21 is a matter of state law reserved to the state's courts. Plaintiff's Supplemental Motion at 6-10; Plaintiffs' Reply to All Defendants' Objections and Memoranda in Opposition to Plaintiffs' Motions for Remand and to Amend ("Plaintiffs' Reply") (Docket No. 53) at 2-5. The defendants respond merely by asserting that state rules of civil procedure govern until removal is effected, citing *Robinson v. Dean Witter Reynolds, Inc.*, 129 F.R.D. 15, 19-20 (D. Mass. 1989). API's Objection at 11 n.7; ARCO's Objection at 4. They contend that *Cushing v. Cohen*, 420 A.2d 919, 927 n.7 (Me. 1980), establishes as a matter of law that a defendant may be added only pursuant to Rule 21 even when the addition is sought during the period when Rule 15(a) allows an amendment to the complaint as of right. API Objection at 12; ARCO Objection at 5. ARCO also relies on *Qualey v. Fulton*, 422 A.2d 773, 774 n.1 (Me. 1980). ARCO Objection at 5 n.9.

In *Robinson*, a judge of the Massachusetts federal district court concluded that the First Circuit, if presented with the question, most likely would hold that Fed. R. Civ. P. 11 "does not provide for retroactive liability based upon a litigant's or counsel's signature on a paper filed in state court" before removal of the action to federal court. 129 F.R.D. at 20. While the court also stated that federal Rule 11 "does . . . apply the moment an action is removed to federal court," *id.*, the holding is clearly limited to the facts of the case. A holding that a federal court may not impose sanctions for violation of a federal rule based on actions taken in state court before the action is

removed to federal court is quite different from a statement that the federal court must decide how a state's courts would apply its rules to a given factual situation and then apply that conclusion in order to determine its own jurisdiction in a removed case, which is the defendants' position here.

The plaintiffs point to language in *Sheets*, where the petitioner-defendant relied in part on state law to argue that the plaintiff could not remove the action to federal court merely because it was the "defendant" on a counterclaim. 313 U.S. at 103-04. The Court stated that

it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.

*Id.* at 104 (citations omitted), quoted with approval in *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 705 (1972). *See also Able v. Upjohn Co.*, 829 F.2d 1330, 1333 n.2 (4th Cir. 1987) (argument that named defendant was improperly joined under state law and therefore could be disregarded for purposes of removal rejected; "[c]onstruction of the removal statutes is purely a matter of federal law"), and *Maine Ass'n of Interdependent Neighborhoods v. Commissioner, Maine Dep't of Human Servs.*, 876 F.2d 1051, 1055 (1st Cir. 1989) ("Maine procedural law is a matter for the Maine state courts to decide;" fact that federal court believes certain legal result unlikely as matter of state law not sufficient grounds for reading exception into statutory language of 28 U.S.C. § 1447(c), governing remand).

Case law dealing with removal of state-court cases in which named defendants whose presence would destroy diversity have not yet been served is consistent with the Supreme Court's

emphasis on the federal statutory criteria and disregard of state law. *E.g.*, *Pullman Co. v. Jenkins*, 305 U.S. 534, 540 (1939) (failure to serve resident defendant does not justify removal); *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 883 (5th Cir. 1998) (existence of diversity must be determined from fact of citizenship of named parties, not from fact of service; citing cases); *Jackson v. Bank One*, 952 F. Supp. 734, 735 (M.D.Ala. 1996) (unserved defendant cannot be disregarded for purposes of existence of diversity jurisdiction on removal). *See also* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3723 at 585-87 (3d ed. 1998). This situation appears directly analogous to that in which a named defendant may not have been properly joined under state procedural rules. In each case, the named defendant might not yet be a proper party before the state court, but the federal court to which the action has been removed may not consider that fact in the case of the unserved defendant when deciding whether it has diversity jurisdiction. The defendants have suggested no persuasive reason why a defendant added without leave of court should be treated differently.<sup>7</sup>

In this regard, it is significant that M. R. Civ. P. 21 provides, without qualification, that “[m]isjoinder of parties is not ground for dismissal of an action.” An attempt to join a defendant, like Aho, before any responsive pleading had been filed, even if found by the Maine courts to be a misjoinder under Rule 21, could presumably be easily remedied by seeking leave of court to do so, particularly at this early point in the proceedings. *See, e.g.*, *Karsten Mfg. Corp. v. United States Golf*

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<sup>7</sup> To the extent that the defendants rely on 28 U.S.C. § 1441(b), specifically that sentence which provides: “Any [civil] action [of which the district courts have original jurisdiction other than one founded on a claim arising under the Constitution, treaties or laws of the United States] 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,” the case law makes clear that this subsection comes into play only when diversity jurisdiction on removal under section 1441(a) has been established. *E.g.*, *Burke v. Humana Ins. Co.*, 932 F. Supp. 274, 275 (M.D.Ala. 1996). That is not the case here.

*Ass'n*, 728 F. Supp. 1429, 1432 (D. Ariz. 1990).

In any event, I conclude that the question whether the Maine courts would find the plaintiffs' attempt to add Aho as a defendant to this action before the notice of removal was filed to be ineffective under M. R. Civ. P. 21, even though it appears to be allowed by M. R. Civ. P. 15(a), is one which this court need not attempt to resolve in order to determine that diversity jurisdiction under section 1332 does not exist in this case due to the presence of Aho, a citizen of Maine, as a non-diverse party.<sup>8</sup> In the absence of fraudulent joinder, a federal district court to which an action is removed takes the named parties as they are at the time of removal for purposes of determining its diversity jurisdiction, without considering whether they are appropriately named as parties under state law. *Able*, 829 F.2d at 1333 n.2.<sup>9</sup>

Even if the court were to reach the merits of the state-law question, the result here would be

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<sup>8</sup> To the extent that the defendants argue that the presence of Aho as a named defendant should be disregarded by this court because her employer, whether the Maine Petroleum Association or the American Petroleum Institute, would be liable for any of the statements or actions alleged in the amended complaint, API's Objection at 8, that contention is irrelevant to consideration of the question whether joinder of Aho was proper. *See Chicago, Rock Island & Pac. Ry. Co. v. Dowell*, 229 U.S. 102, 112-14 (1913).

<sup>9</sup> Defendants ARCO and Lyondell rely on this court's opinion in *Gentle v. Lamb-Weston, Inc.*, 302 F. Supp. 161 (D. Me. 1969), to support their argument that the plaintiffs' addition of Aho as a defendant must be disregarded because it represents an attempt to manipulate the pleadings in order to defeat their right to a federal forum. ARCO's Objection at 12. In *Gentle*, the plaintiffs assigned a 1% interest in their claims to a resident of the state in which the defendant was incorporated, with the expressed intention of defeating diversity jurisdiction in federal court. 302 F.Supp. at 162 & n.3. That ploy is more akin to fraudulent joinder of a defendant than mere adding of a defendant without leave of court before a responsive pleading is filed where no claim of fraudulent joinder is pursued. In addition, the only evidence of such an intent offered by these defendants is the filing of the amended complaint "on the morning of the date Defendants would have removed or otherwise responded," ARCO's Objection at 8, without any suggestion that the plaintiffs were aware that filing of a removal petition was imminent. The defendants have failed to carry their burden of proof on this issue.

the same. Neither of the Maine cases upon which the defendants rely requires a finding that Aho was not a named defendant at the time of removal. In *Qualey*, the Law Court specifically refrained from ruling on the question whether substitution of a defendant could be accomplished under M. R. Civ. P. 21 or 25 without leave of court, noting that the question was not raised by the parties and that the absence of such an order “does not impinge on the enforceability of the court’s judgment.” 422 A.2d at 774 n.1. There is no indication in the reported opinion that the substitution occurred within the period otherwise allowed by Rule 15(a), so the case cannot be assumed in any event to be sufficiently similar to the facts of the instant case to be of any guidance if the Law Court had addressed the issue.

In *Cushing*, the plaintiffs sued the state attorney general, the state forest commissioner, the director of the Bureau of Public Lands, and the commissioner of the Department of Conservation, seeking a judgment concerning timber rights on certain public lands. 420 A.2d at 925. Two years after the initial complaint was filed, the defendants filed a counterclaim in which they identified the “defendants” and “counterclaimants” as all of the defendants named by the plaintiffs and the State of Maine. *Id.* at 926. The defendants had earlier filed a motion to dismiss the complaint on the ground of sovereign immunity. *Id.* at 924. The notice of appeal filed by the defendants did not name the state as a party. *Id.* at 927 n.6. Noting that “the record leaves in doubt whether the State of Maine would be bound by a judgment entered in this proceeding,” the Law Court held that “[a]lthough a formal court order may not always be necessary to allow one who has not been named by plaintiffs as a party defendant to become a party as a ‘counterclaimant,’ we think such formal action is necessary in the circumstances of this case.” *Id.* at 927 (citation omitted). The accompanying footnote provides the language upon which the defendants in this action rely. After quoting M.R.Civ.P., the Law Court states:

Although the issue is not definitively settled, there is solid case law interpreting the parallel Federal Rule 21 to require leave of court to add additional parties to an action. Addition of parties by ex parte amendment of the pleadings, even when such amendments are allowed as a matter of right before a responsive pleading is served pursuant to Rule 15(a) of the Maine Rules of Civil Procedure, is disfavored and a court order under the more specific provision of Rule 21 is preferred. Particularly in a case such as the one now before us, involving a question of sovereign immunity, a clear and formal understanding of the status of the State of Maine as a party is necessary.

*Id.* at 927 n.7 (citations omitted). There is no indication in the opinion that the addition of the State of Maine as a party, if it occurred at all, took place within the time limits of Rule 15(a), so that portion of the footnote may only be considered *dictum*. The Law Court remanded the case for a entry of a formal order making the state a party to the action, if the trial court found the state to be an indispensable party. *Id.* at 927-28.

As the plaintiffs point out, the “solid” federal case law to which the Law Court refers has become considerably less “solid” on this issue in the years since 1980. Only one federal circuit court of appeals has joined the one cited by the Law Court in support of its statement that proceeding under Rule 21 is preferable to proceeding under Rule 15(a) when adding a party during the period in which amendment of pleadings as of right is allowed. *Williams v. United States Postal Serv.*, 873 F.2d 1069, 1072 n.1 (7th Cir. 1989). At least three circuits take the opposing view. *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 31 F.3d 1015, 1018-19 (10th Cir. 1994); *Washington v. New York City Bd. of Estimate*, 709 F.2d 792, 795 (2d Cir. 1983); *McClellan v. Mississippi Power & Light Co.*, 526 F.2d 870, 872-73 (5th Cir. 1976), *mod. in part on other grounds* 545 F.2d 919, 922-33 (5th Cir. 1977). Wright, Miller & Kane take no position on the issue, 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1479 at 569-71 (2d ed. 1990), while Professor

Moore's treatise favors "reject[ing] the notion that a motion to amend is required to add or drop parties before the filing of a responsive pleading," 3 J. Moore, *Moore's Federal Practice* § 15.16[1] at 15-54 (3d ed. 1998). Far too many district court opinions on this issue have been reported since 1980 to list here.

In any event, it is not necessary for this court to predict whether the Law Court would change its view that the addition of a party by motion under Rule 21 is preferable to the naming of an additional party in an amended pleading filed under Rule 15(a) because *Cushing* is readily distinguishable from this action. As previously noted, the attempted addition of the state as a party in *Cushing*, if it occurred at all, did not necessarily take place during a period in which Rule 15(a) would have provided the defendants with a right to amend their pleadings. Any holding in *Cushing* was limited to the circumstances of that case, and specifically to a factual situation in which a party not named as a defendant is added as a counterclaimant, when the court does not expressly approve or recognize the addition of that party. 420 A.2d at 927.<sup>10</sup> *Cushing* also dealt with a case which had proceeded to judgment without resolution of the issue of the status of the state as a party; here, the issue of Aho's status has been raised at the initiation of the proceedings. Finally, the remedy provided in *Cushing* was a remand to the trial court, which was directed to determine whether the

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<sup>10</sup> In this regard, it is significant that the Law Court in *Cushing* distinguished *Casco Bank & Trust Co. v. Cloutier*, 398 A.2d 1224, 1226 (Me. 1979), in which a defendant's naming of his wife as a counterclaimant without obtaining leave of court, after which the plaintiff added the wife as a named defendant, also apparently without leave of court, was held to be sufficient, on the ground that the trial court "had been *specifically* aware of this joinder and could be taken to have approved it by his decision of a subsequent motion for summary judgment." 420 A.2d at 927 (emphasis in original). In the instant case, this court is specifically aware of the joinder of Aho, and it is reasonable to conclude that the state court, had the case remained there, would have been so aware. The confusion about the state's status as a party that dominates the Law Court's discussion in *Cushing* is not present in this case with respect to Aho.

state was an indispensable party and, if so, to enter a “formal order which will assure that the State of Maine is made a party to the action, thereby to be bound by any judgment entered.” 420 A.2d at 928. Here, it would be anomalous to deny the plaintiffs their chosen forum based on the possibility, unlikely at best, that the state court would not only find that they were required to seek its approval before adding Aho as a party before any responsive pleadings had been filed but also that, due to their failure to do so, they could not include Aho as a defendant in the state court action.<sup>11</sup> I can only conclude that the defendants here have failed to carry their burden on the question whether, under Maine law, Aho was a party defendant at the time of removal, were this court ever to reach that issue. *See generally Pepsico, Inc. v. Wendy’s Int’l, Inc.*, 118 F.R.D. 38, 43-44 (S.D.N.Y. 1987) (New York law).

My conclusion that the presence of Aho as a named defendant in the first amended complaint makes it impossible to establish diversity jurisdiction in this court renders moot the parties’ arguments concerning the presence or absence of the required amount in controversy that is an additional element of this court’s diversity jurisdiction under section 1332.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the plaintiffs’ motion to remand be **GRANTED** and that this action accordingly be remanded to the Maine Superior Court (Cumberland County).

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<sup>11</sup> To the extent that this question is one of substantive state law, the general rule is that all uncertainties in such law must be resolved in the light most favorable to the nonremoving party, *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997) (claim of fraudulent joinder); *In re Rodriguez*, 79 F.3d 467, 469 (5th Cir. 1996) (same); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) (same),

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 2nd day of April, 1999.*

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*David M. Cohen  
United States Magistrate Judge*