IN SEARCH OF A DISPOSITIVE ANSWER ON WHETHER REMAND IS DISPOSITIVE

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I. INTRODUCTION

The first battle in complex commercial litigation is often fought over removal and remand. Corporate defendants generally believe that federal courts are a more efficient and sympathetic venue than state courts, and will thus generally pursue removal whenever possible. In contrast, Plaintiffs generally fight to keep lawsuits in state court because

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of their familiarity with local practice and the local judiciary.[1] Although these beliefs were likely developed through experience and anecdotal evidence, studies have identified a "removal effect" that causes a "precipitous drop in the plaintiffs' win rate" in cases that are removed to federal court.[2] As if this impact on the ultimate issue of liability was not enough, the importance of a district court's decision on remand is further emphasized by the finality of its decision, which is generally not reviewable on appeal.[3]

Magistrate judges are increasingly being asked to resolve these disputes and decide remand motions. However, there is a split within the federal courts over whether these decisions are within the authority of magistrate judges to "hear and determine." Nearly every district court has treated remand as nondispositive and thus within the scope of this authority, but all four circuit courts that have confronted the issue have deemed remand dispositive and thus beyond the scope of a magistrate's authority. Although seemingly trivial, the difference is significant because district courts review magistrate judges' findings on dispositive motions under a *de novo* standard, while nondispositive motions receive the less stringent review only for clear error of law.[4] As a result, litigants in circuits where such motions are treated as dispositive are effectively afforded two chances to make the case for removal—once to the magistrate judge and again to the district court judge on *de novo* review—while those in circuits where remand motions are treated as nondispositive will be left with no similar recourse. Because removal is viewed as being largely outcome determinative, resolving this split and applying a uniform standard of review to these decisions is crucial.

This article seeks to explore the split between the district courts and the circuit courts over whether remand is dispositive or nondispositive, and in the process, provide an interesting peek into the history of magistrate judges and the expanding role that these judges (before whom

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[1] *E.g.*, RICHARD G. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE 235 (2d ed. 1997) ("Commonly, the defendants will remove a case . . . for the same reasons many plaintiffs invoked that jurisdiction—to avoid possible bias of a local state court with its locally elected judge.")

[2] 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, 593 (1998) (reviewing data collected from 1978-1991 and concluding that plaintiffs' "overall win rate in federal cases is 57.9%, but in the subset of those cases that have been removed, the win rate is only 36.77%.").

[3] 28 U.S.C. § 1447(d) (2006) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except [for civil rights cases].").

[4] Federal Magistrates Act, 28 U.S.C.A. § 636(b)(1)(a) (West 2005); FED R. CIV. P. 72(a).

practitioners increasingly find themselves during litigation) will play in the future. The first part of this article explores the history of magistrate judges and the expansion of their authority to resolve a wide variety of issues historically handled by district court judges. The second part explores the split between the district courts and the circuit courts. The third part suggests that remand motions should be within a magistrate judge's authority to "hear and determine" in light of the nature of remand, the historical role magistrate judges have played and the steady attempts by both the district courts (for whose benefit the magistrate judges were created) and Congress (who created the position) to broaden the scope of magistrate judges' authority.

II. A BRIEF HISTORY OF MAGISTRATE JUDGES AND THEIR AUTHORITY

Magistrate judges[5] are "creatures of statute," and their jurisdiction thus extends only as far as the authority granted to them by Congress.[6] Any attempt to define the limits of their jurisdiction must therefore begin by analyzing the language of the Federal Magistrates Act ("the Act") and the intent of Congress when it created enacted the Act. "Cognizant of the dictates of Article III, which require that only judges with tenure and salary protection conduct core judicial business, Congress [] precluded magistrate [judges] from issuing orders that 'determine[] with finality the duties of the parties.'"[7] Stated differently, while Congress permitted magistrate judges to hear all matters unconnected to issues litigated at trial,[8] only Article III judges are permitted to perform "inherently judicial" tasks.[9] Consistent with these concerns, the Act permits magistrate judges to "hear and determine" all pretrial matters,[10] except for eight specific dispositive matters for which they can only submit "proposed findings of fact and recommendations" to the district court for *de novo* review.[11] Remand is not included in the list of eight dispositive matters that are beyond the authority of magistrate judges to "hear and

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[5] The formal title of the new judicial officers created by Congress in 1968 was originally United States Magistrate. It remained this way until Congress changed the name to United States Magistrate Judge in the Judicial Improvements Act of 1990. For the sake of consistency, "magistrate judge" is used throughout this article.

[6] *E.g.*, NLRB v. A-Plus Roofing, Inc., 39 F.3d 1410, 1415 (9th Cir.1994) ("[F]ederal magistrates are creatures of statute, and so is their jurisdiction. We cannot augment it; we cannot ask them to do something Congress has not authorized them to do.").

[7] Campbell v. IBM, 912 F. Supp. 116, 118 (D.N.J. 1996) (citing N.L.R.B. v. Frazier, 966 F.2d 812 (3d Cir. 1992)).

[8] United States v. Flaherty, 668 F.2d 566, 585 (1st Cir. 1981).

[9] Glidden Co. v. Zdanok, 370 U.S. 530, 549 (1962).

[10] 28 U.S.C.A. § 636(b)(1)(A) (West 2006).

[11] 28 U.S.C.A. § 636(b)(1)(B) (West 2006).

determine." While this is an important factor in analyzing whether remand is beyond the scope of a magistrate judge's authority, it is not dispositive. Rather, to fully understand the issue and the context in which it arises requires some understanding of both the evolution of the Act, FED. R. CIV. P. 72, which was enacted to implement certain amendments to the Act, and the steady expansion of the authority with which magistrate judges have been entrusted by Congress.

A. THE FEDERAL MAGISTRATES ACT[12]

In 1968, Congress enacted the Federal Magistrates Act, 28 U.S.C. §§ 631-639 (1968), and established the position of federal magistrate judge to upgrade and expand the United States Commissioner system that had existed in the federal courts since 1793.[13] "The Act grew from Congress' recognition that a multitude of new statutes and regulations had created an avalanche of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance."[14] The new judicial position was thus created to act as an adjunct to district court judges and help alleviate the burden imposed on them by ever expanding caseloads in the federal courts.

In the years since the Act was first passed into law, Congress has generally afforded district courts leeway to experiment with different uses for magistrate judges and has periodically amended the Act to codify the techniques developed by enterprising courts.[15] It is in this spirit that district courts have increasingly permitted magistrate judges to adjudicate a growing number of substantive, pretrial matters, including removal and remand.

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[12] This section is not intended to be an exhaustive history of the Federal Magistrates Act, but is instead focused on the development of the Act as it relates to the expanding authority of magistrate judges, and specifically, the authority of magistrate judges to hear and determine remand motions. For a more detailed explanation of the changing role of magistrate judges over the years, *see, e.g.*: Philip M. Pro, *Measured Progress: The Evolution And Administration Of The Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503 (1995); *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (June 1993) (prepared by the Magistrate Judges Division of the Administrative Office of the United States Courts; Christopher Smith, From U.S. Magistrates to U.S. Magistrate Judges, 75 Judicature 210, 211 (1992); Note, *Article III Constraints And The Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023 (1979).

[13] *E.g.*, United States v. Maresca, 266 F. 713, 719–20 (S.D.N.Y 1920).

[14] Mathews v. Weber, 423 U.S. 261, 267 (1976).

[15] Note, *supra* note 12, at 1028 ("[M]uch of the post-1968 legislation has either systematized magistrate reference techniques pioneered by innovative district courts or removed case-law and legislative obstacles to their further development.").

The United States Commissioner System that Congress sought to replace in 1968 traced its origins to the early days of the United States. While the title of "Commissioner" was only created in 1896, Congress had, as early as 1793, authorized the federal circuit courts to appoint "discreet persons learned in the law" to take bail and perform certain other ministerial functions.[16] From this "seed," the position and authority of the Commissioners grew steadily through the 1800s and early 1900s.[17] Nonetheless, however useful these Commissioners may have been to the district courts, their shortcomings became obvious as the judiciary matured and the caseload of the federal courts expanded. Commissioners received no formal training from the federal judiciary and had no official staff, clerks, or offices.[18] They were paid under an "anachronistic fee system" that was based on the "nature and number" of matters they handled.[19] They were not prohibited from having a "direct" and "substantial" pecuniary interest in the matters they were adjudicating.[20] Finally, and perhaps most strikingly, there was no requirement that Commissioners be lawyers or even trained in the law, even though they were often "called upon to apply some of the most sophisticated rules of constitutional law—rules that the best attorneys and judges are hard pressed to apply correctly."[21]

By 1965, these shortcomings became too obvious to ignore and Congress began holding hearings to examine the roles Commissioners played and to attempt to improve the system. From these hearings, two conflicting proposals emerged. The first would have effectively eliminated the office and required district court judges to assume the responsibilities previously undertaken by the Commissioners.[22] The second, which was "overwhelmingly favored" by Congress,[23] was to reform the system rather than abandon it altogether:

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[16] *Maresca*, 266 F. at 719–20.

[17] *Id*. at 720.

[18] H.R. REP. NO. 90–1629 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4256 (noting that "[a]ll but a handful of Commissioners—those with full time appointments, who are prohibited from practicing law—must meet the expenses of their office from their own resources" and identifying the "lack of any effective administrative apparatus within the judiciary" to assist or train Commissioners).

[19] *Id.* In addition to being complicated, the fee system was capped at $10,500 per year, thus making it difficult to "attract the best men for the job" because the "busiest Commissioners [were] grossly underpaid."

[20] *Id.*

[21] *Id.*

[22] *Id.* at 4257; *see also* Hon Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part Two: The Third Branch Reacts*" 81 AM. BANKR. L.J.. 165, 168 (2007).

[23] Mund, *supra* note 22, at 168.

> Although the present U.S. Commissioner system is in many ways defective it is neither practical nor desirable simply to abolish the Commissioner system and transfer the functions now performed by that office to the U.S. district court judges, who are already overburdened by their present duties . . . .[24]

Accordingly, Congress sought to create an "upgraded system of judicial officers" and increase the "scope of the responsibilities that can be discharged by that office," with the ultimate goal being to increase the "overall efficiency of the federal judiciary."[25]

The 1968 Act was thus an attempt by Congress to "update and make more effective a system that [was not] altered basically for over a century, and to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers."[26] The Act rectified the shortcomings in the Commissioner system by giving magistrate judges a fixed term of office, eliminating the outdated and conflict-ridden fee system, and requiring that all magistrate judges be licensed attorneys.[27] Congress also codified the authority of magistrate judges to exercise all powers formerly exercised by the Commissioners, and empowered them to try a wide variety of additional matters with the consent of the parties.[28]

Congress also authorized magistrate judges to perform "additional duties" assigned by the district courts provided these duties were "not inconsistent with the Constitution and laws of the United States."[29] Congress intended to leave open ended the "additional duties" with which these new judicial officers could be tasked. The reason for this was twofold. First, Congress was apprehensive about the magistrate judges system, with many members questioning the wisdom and constitutionality of the new position it had created, particularly to the extent that it might allow district judges to improperly delegate to magistrate judges duties reserved to Article III judges.[30] Second, and more relevant for our purposes, Congress intended that the district court judges would experiment with the assignment of "additional duties" to magistrate judges to suit the needs of the district courts.[31] As discussed below, these concerns resurface in the debate over whether magistrate

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[24] H.R. REP. NO. 90-1629 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4257.
[25] *Id.*
[26] *Id.* at 4255.
[27] *Id.*
[28] *Id.* at 4253–54.
[29] H.R. REP. NO. 90-1629 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4269
[30] *Id.* at 4269.
[31] *Id.* at 4253–62.

judges can "hear and determine" remand motions, with those opposed to the practice citing Article III concerns, and those in favor arguing that district judges should be permitted to experiment by allowing magistrate judges to issue remand orders.

As originally drafted, the Act included three examples of such "additional duties" that could be handled by magistrate judges—to serve as special masters in civil lawsuits, to assist with pretrial discovery matters, and to conduct preliminary review of applications for post-trial relief—but made clear that this list was not exhaustive. Nonetheless, this intention was misapprehended by the Supreme Court in the first case in which it had occasion to review the Act. In *Wingo v. Wedding*, the Court ruled that magistrate judges could not preside over habeas corpus proceedings because nothing in the text or legislative history of the Act indicated that Congress intended to change the requirement that Article III judges preside over such proceedings, nor did the Act specifically prescribe such a practice.[32] In dissent, Justice Burger (joined by Justice White) criticized the majority for having ignored the stated purpose of Congress when it enacted the Act—to permit district judges to utilize magistrate judges to relieve the burden on the district courts.[33] Justice Burger closed his dissenting opinion by indicating that the Court had "construed [the Act] contrary to clear legislative intent" and suggested that it was now "for the Congress to act to restate its intentions if its declared objectives are to be carried out in the discretion of a judge of the district court."[34]

Congress took Justice Burger's advice and, in 1976, amended the Act to "clarify and further define the additional duties which may be assigned to a United States Magistrate [Judge]."[35] Among other things, the magistrate judges' duties were expanded to include the ability to "hear and determine any pretrial matter" subject only to review and reconsideration by a district court if a magistrate judge's ruling was "clearly erroneous or contrary to law."[36] However, Congress excluded eight specific motions from this expanded authority, including motions:

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[32] Wingo v. Wedding, 418 U.S. 461, 468, 470 (1974), *superseded by statute*, 28 U.S.C. § 636(b), *as recognized in* Gomez v. United States, 490 U.S. 858 (1989). The Court did not reach the issue of whether permitting magistrate judges to preside over habeas corpus proceedings would be "consistent" with the Constitution. As is its practice, the Court read the language of the statute narrowly so as to avoid reaching the constitutional issue. *Id.* at 467 n. 4.

[33] *Id.* at 475–76.

[34] *Id.* at 487.

[35] H.R. REP. NO. 94-1609 (1976) *reprinted in* 1976 U.S.C.C.A.N 6162; *see also Gomez*, 490 U.S. at 867.

[36] 28 U.S.C. § 636(b)(1)(A) (2006).

(1) for injunctive relief; (2) for judgment on the pleadings; (3) for summary judgment; (4) to dismiss or quash an indictment or information made by the defendant; (5) to suppress evidence in a criminal case; (6) to dismiss or to permit maintenance of a class action; (7) to dismiss for failure to state a claim upon which relief can be granted, and (8) to involuntarily dismiss an action.[37] For these matters, magistrate judges were permitted to conduct evidentiary hearings and recommend dispositions, but the district court was required to "make a de novo determination"[38] of any portion of the recommendation objected to by one of the parties.

Congress was compelled to amend the Act in response to *Wingo* and another Supreme Court decision, *Mathews v. Weber*,[39] which interpreted the Act narrowly as permitting district judges to assign to magistrate judges only those duties specifically set forth in the Act. Congress rejected this interpretation as being inconsistent with one of the foundational purposes of the Act, which was to allow district judges the flexibility to utilize magistrate judges in whatever manner best allowed the district judges to devote more time to the "actual trial of cases" and the writing of opinions:[40]

> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters."
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> If district judges are willing to experiment with the assignment to magistrates of other functions in the aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties.[41]

While this freedom was ultimately constrained by the requirement that any duties assigned to a magistrate judge not be "inconsistent with the Constitution or the laws of the United States,"[42] Congress made clear

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[37] 28 U.S.C. § 636(b)(1)(A).

[38] The term *de novo* signifies that the magistrate judge's findings are not protected by the clearly erroneous doctrine, but does not necessarily require the district court judge to conduct a second evidentiary hearing. United States v. Raddatz, 447 U.S. 667 (1980).

[39] *Mathews v. Weber*, 423 U.S. 261 (1976).

[40] *Id.* at 272 n.7 (quoting S. REP. NO. 92-1065, at 3 (1972)); *see also* McCarthy v. Bronson, 500 U.S. 136, 142 (1981).

[41] H.R. REP. NO. 94-1609 at 12.

[42] *Id.*

with its 1976 amendments to the Act that it did not intend to dictate to district court judges the best uses of magistrate judges within these broad constraints.

Congress again amended the Act in 1979. By this time, Congressional doubts about the utility and ability of magistrate judges had subsided and Congress recognized that the magistrate system "[played] an integral and important role in the Federal judicial system."[43] Accordingly, "Congress enlarged the magistrate's jurisdiction over civil and criminal trials, codifying some of the experiments conducted under the Act's additional duties clause."[44] Among other things, the 1979 amendments permitted a magistrate judge, with the consent of the parties, to conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case and required the district judge to notify the parties of this opportunity.[45] Thus, with the 1976 and 1979 amendments, Congress enlarged the jurisdiction and expanded the authority of magistrate judges to conform to the prevailing practices in the various district courts.

Finally, in 1990 Congress amended the Act to formally change the title of the magistrates' position from United States Magistrate to United States Magistrate Judge.[46] The change was enacted to correct the many "practical problems" created because "lawyers did not accord the subordinate judicial officers with appropriate deference and respect."[47] Congress felt the name change was needed to "help educate attorneys and litigants about the magistrate judges' status as authoritative judicial officers within the federal courts."[48] Though largely symbolic, this name change marks the end of a process that saw the position of magistrate judge rise from one that Congress viewed with caution and guarded optimism to full-fledged "judicial officers."

B. Federal Rule of Civil Procedure 72

FED R. CIV. P. 72 was enacted in 1983 to implement the 1976 amendments to the Act.[49] Prior to the enactment of Rule 72, there had been no uniform, federal rules governing either the procedures district courts were to follow when referring matters to magistrate judges or the

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[43] H.R, REP. NO. 96-287 at 5 (1979).
[44] *Id.*
[45] 28 U.S.C.A. § 636(c)(1).
[46] Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990).
[47] Smith, *supra* note 12.
[48] *Id.* at 212.
[49] FED R. CIV. P. 72 advisory committee's note.

procedures magistrate judges were to follow in carrying out their duties.[50] Congress essentially left it to the individual district courts to develop local rules on these issues, but this approach ultimately proved unworkable because local rules, when enacted at all, were often inaccessible and inconsistent across jurisdictions.[51] Accordingly Congress enacted FED. R. CIV. P. 72 to resolve these discrepancies, establish uniform standards, and provide guidance to district courts and magistrate judges alike.[52]

Rule 72(a) governs "nondispositive matters," and provides that magistrate judges may "hear and determine" any such matters and "enter into the record a written order setting forth the disposition of the matter." Rule 72(b) governs "dispositive motions," and provides that magistrate judges may only conduct evidentiary hearings into such matters and "enter into the record a recommendation for disposition of the matter."[53] Under either subsection, the parties have 10 days to "serve and file" objections to the magistrate judge's decision with the district court, and the district court maintains the ultimate authority to "modify or set aside any portions of the magistrate judge's" that it finds objectionable.[54] However, consistent with the terms of the Act, Rule 72 mandates that a magistrate judge's order issued on a nondispositive matter is reviewed by the district court under the highly-deferential "clearly erroneous or contrary to law" standard,[55] while the "report and recommendation" from the magistrate judge on a dispositive matter is reviewed *de novo* by the district court.[56]

While Rule 72 divides pretrial motions into "dispositive" and "nondispositive" matters, neither these terms nor the distinction they create appears in the Act. Instead, the Act permits magistrate judges to "hear and determine any pretrial matter" with the exception of the eight motions identified in subsection 636(b)(1)(B). This apparent inconsistency has caused some confusion among courts and commentators over how certain motions should be classified for

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[50] *See* 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3067 (2d ed. 1997); *see also* 28 U.S.C.A. § 636(b)(4) ("Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.").

[51] *See* WRIGHT ET AL., *supra* note 50; § 636(b)(4).

[52] In addition to Rule 72, Congress also enacted Rules 73–76 to establish the procedures to be followed by district courts and magistrate judges when matters are referred to the magistrate judges for trial on consent of the parties. *See* FED R. CIV. P. 73-76.

[53] FED R. CIV. P. 72.

[54] *Id*.

[55] FED R. CIV. P. 72(a).

[56] FED R. CIV. P. 72(b).

purposes of determining the appropriate level of review by the district court. Under one view, the terms "dispositive" and "nondispositive" are interpreted as being "synonymous with the statute's language" and thus the "dispositive" motions for which de novo review is required are only those eight specific motions listed in subsection 636(b)(1)(B).[57] Under the competing view, "dispositive" motions are not limited to these eight motions, but include "at the very least, the eight motions listed in the statute" along with any other motions that are "dispositive of a claim or defense of a party."[58] As discussed below, this dispute—which is essentially over whether the list of eight motions in section 636(b)(1)(B) is exhaustive or illustrative—animates the split between the district courts and the circuit courts over whether magistrate judges can "hear and determine" remand motions.

III. THE SPLIT

Unlike a traditional "split" in the federal courts, where different circuits disagree over an issue, all the circuit courts that have confronted the issue discussed in this article have concluded that remand is a matter that is beyond the authority of a magistrate judge to "hear and determine." However, district courts have consistently rejected this approach, and have continued to permit magistrate judges to "hear and determine" remand motions subject only to review for clear error of law, even after the contrary trend in the circuit courts became clear.[59] Thus, though unorthodox, the "split" discussed below is no less important,

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[57] *E.g.*, Meier v. Premier Wine & Spirits, Inc., 371 F. Supp. 2d 239, 242–43 (E.D.N.Y. 2005) ("Rule 72's references to 'dispositive' and 'nondispositive' orders is intended to be synonymous with the statute's language."); Adkins v. Mid-American Growers, Inc., 143 F.R.D. 171, 175 n.3, 176 (N.D. Ill. 1992) ("'Dispositive' is merely a term used to describe the motions listed in subsection 636(b)(1)(A) . . . . The terms 'dispositive' and 'nondispositive' in Rule 72 do not create categories separate from the statute which Rule 72 implements.").

[58] WRIGHT ET AL., *supra* note 50, at 332–38. In support of this conclusion, Wright and Miller note that proponents of the 1976 revisions to the Federal Magistrates Act divided pretrial activities into dispositive and nondispositive matters when debating the revisions. *Id.*; *see also* H.R. REP. NO. 94–1609 (1976) ("The bill provides for different procedures depending upon whether the proceeding involves a matter preliminary to trial or a motion which is dispositive of the action."). These characterizations—which are inherently assumed to be broader than what was ultimately included in the Act—were purportedly motivated by Congress's concerns that non-Article III judges might "ultimately determine" matters dispositive of a case. WRIGHT ET AL., *supra* note 50, at 334. Wright and Miller further support their position by noting that various courts that applied the Act prior to the enactment of Rule 72 generally did not limit the matters for which *de novo* review was applied to only those eight motions identified in the Act. *Id.* at 334–36.

[59] Obviously this has not been the case in district courts within the Second, Third, Sixth or Tenth Circuits, where the circuit courts have spoken on the issue.

particularly to the extent that it reveals the different ways the federal trial courts and federal appeals courts view the role of magistrate judges and the overall management of the ever-growing case loads of the district courts.

Nearly every district court that has confronted the issue has concluded that remand motions are nondispositive and can be determined by magistrate judges subject only to review by the district court for clear error of law.[60] Most of these courts arrived at this conclusion through a strict reading of both the Act and Rule 72 that focuses on: (1) remand not being included in the list of matters identified in the Section 636 (b)(1)(B) as being beyond the authority of magistrate judges to "hear and determine" with limited review from the district court; and (2) remand not being dispositive for purposes of Rule 72 because it is not the functional equivalent of any of the dispositive motions contained in section 636(b)(1)(A).

For certain district courts, resolving the issue of whether remand orders should be subject to "clearly erroneous" or *de novo* review is a simple matter of reading the Act. For these courts, the list of eight motions included in section 636(b)(1)(A) is exhaustive.[61] Because remand is not included on the list, it does not require such demanding scrutiny and can instead be reviewed only for clear error of law. As one district court in the Southern District of Texas noted:

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[60] *E.g.*, Franklin v. Homewood, No. 07-TMP-006-S, 2007 WL 1804411, at * 2–4 (N.D. Ala. June 21, 2007); Wachovia Bank, N.A., v. Deutsche Bank Trust Co. Americas, 397 F. Supp. 698, 700–02 (W.D.N.C. 2005); Johnson v. Wyeth, 313 F. Supp. 2d 1272, 1273–75 (N.D. Ala. 2004); Vogel v. U.S. Office Prods. Co., 56 F. Supp. 2d 859, 861–63 (W.D. Mich. 1999), *rev'd* 258 F.3d 509, 514–17 (6th Cir. 2001); Campbell v. IBM, 912 F. Supp. 116, 118–19 (D.N.J. 1996); Young v. James, 168 F.R.D. 24, 26–27 (E.D. Va. 1996); Delta Dental of R.I. v. Blue Cross & Blue Shield of N.J., 942 F. Supp. 740, 743–46 (D.R.I. 1996); DeCastro v. AWACS, Inc., 940 F. Supp. 692, 694–96 (D.N.J. 1996); Vaquillas Ranch Co. v. Texaco Exploration, 844 F. Supp. 1156, 1160–63 (S.D. Tex. 1994); Banbury v. Omnitrition Intern., Inc., 818 F. Supp. 276, 279 (D. Minn. 1993); City of Jackson v. Lakeland Lounge of Jackson, Inc., 147 F.R.D. 122, 123–24 (S.D. Miss. 1993); White v. State Farm Mut. Auto. Ins. Co., 153 F.R.D. 639, 642–43 (D. Neb. 1993); Holt v. Tonawanda Coke Corp., 802 F. Supp. 866, 868 (W.D.N.Y. 1991); Doe v. American Red Cross, 763 F. Supp. 1084, 1085 (D. Or. 1991); McDonough v. Blue Cross of Northeastern Pa., 131 F.R.D. 467, 472 (W.D. Pa. 1990); Acme Electric Corp. v. Sigma Instruments, Inc., 121 F.R.D. 26, 28 (W.D.N.Y. 1988); North Jersey Savings & Loan Association v. Fidelity and Deposit Company of Maryland, 125 F.R.D. 96, 98–99 (D.N.J. 1988); Hitachi Cable Am., Inc. v. Wines, No. 85-4265, 1986 WL 2135, at *2 (D.N.J. Feb. 14, 1986); Jacobsen v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 594 F. Supp. 583, 586 (D. Maine 1984); *see also* Searcy v. Knostman, 155 B.R. 699, 702 (Bankr. S.D. Miss. 1993); *but see* Giangola v. Walt Disney, 753 F. Supp. 148 (D.N.J. 1990); Long v. Lockheed Missles & Space Co., 783 F. Supp. 249, 250 (D.S.C. 1992).

[61] *See e.g.*, *Johnson*, 313 F. Supp. 2d at 1273; *Vaquillas Ranch*, 844 F. Supp. at 1162; *Adkins*, 143 F.R.D. at 175 n.3, 176; *North Jersey Savings & Loan*, 125 F.R.D. at 98; *Jacobsen*, 594 F. Supp. at 586.

> This Court finds persuasive the reasoning and analysis of those authorities holding that the term "dispositive" refers to the list of motions that a magistrate judge may not determine found in §636(b)(1)(A). . . . Building on that foundation, this Court also believes that the listing found in §636(b)(1)(A) is exhaustive and reflects Congress' intent that only those motions that are listed be construed as dispositive and thus outside the power of a magistrate judge to determine.[62]

For these courts, a strict reading of the Act is required in order to conform to Congress's intent: "Congress had the opportunity to include in that list any motion which it considered to be dispositive, and it did not include motions to remand."[63] Moreover, according to courts that take this narrow view of the Act, this interpretation reinforces the original purposes behind the Act and the steady expansion of magistrate judges' authority, which was to "relieve the district courts of certain subordinate duties that often distract the courts from more important matters."[64]

Other district courts view the fact that remand is not one of the matters specifically mentioned in Section 636(b)(1)(A) as relevant to the analysis but not by itself determinative of the issue.[65] These courts focus more on the nature of remand and whether it is the functional equivalent of the motions included in Section 636(b)(1)(A) and should thus be considered "dispositive" under Rule 72 and subject to a higher level of review by district courts. While this approach is the same one followed in the Second, Third, Sixth, and Tenth circuit decisions discussed below,

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[62] *Vaquillas Ranch*, 844 F. Supp. at 1162; see *also Johnson*, 313 F. Supp. 2d at 1273 ("If Congress had wanted to place remand of removed cases beyond the 'hear and determine' authority of magistrate judges, it could should and would have listed is as one of the matters expressly excluded from that authority."); North Jersey Savings & Loan, 125 F.R.D. at 98 ("A motion to remand for improper removal is not listed [in Section 636(b)(1)(A)], and is therefore subject to 'final' determination by a magistrate."); Jacobsen, 594 F. Supp. at 586 (holding that remand was not one of the eight "excepted actions" identified in Section 636 (b)(1)(A) and thus the appropriate standard of review to be applied to such motions was "clearly erroneous or contrary to law"); *cf Adkins*, 143 F.R.D. at 176 (Rule 11 sanctions motion) ("'Dispositive' is merely a term used to describe the motions listed in subsection 636(b)(1)(A) . . . . The terms 'dispositive' and 'nondispositive' in Rule 72 do not create categories separate from the statute which Rule 72 implements.").

[63] *Id.*

[64] *Id.* (quoting Peretz v. United States, 501 U.S. 923 (1991)).

[65] *Campbell*, 912 F. Supp. at 119 ("That remand is not specifically mentioned in § 636(b)(1)(A) is relevant (although not critical) to the Court's analysis.").

the result arrived at by the district courts is the opposite of the one arrived at by the circuit courts.

The district courts that have adopted this approach have almost universally determined that remand is not like the motions identified in section 636(b)(1)(A), and should not be considered dispositive, because remand does not resolve any claims, defenses, or substantive rights, but instead merely transfers a lawsuit to a different forum.[66] Unlike many of the motions identified in section 636(b)(1)(A)—e.g., motions for judgment on the pleadings, for summary judgment, to dismiss for failure to state a claim, or to involuntarily dismiss an action—remand "decides only the question of whether there is a proper basis for federal jurisdiction to support removal."[67] As a district court in the District of Nebraska noted:

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[66] *See, e.g.*, *Franklin*, 2007 WL 1804411 at * 3 ("Granting or denying a motion for remand does not bring about a final determination of a case: the case will simply be remanded for determination by a state court or remain in federal court. Therefore, ruling on a motion to remand is not a dispositive determination."); *Vogel*, 56 F. Supp. 2d at 863 ("[A] motion for remand does not address the substance of a party's claims or defenses . . . . While . . . remand forecloses the maintenance of the action in a federal forum, this Court does not believe that use of a particular forum should be identified as a claim or defense of either party."); *Delta Dental*, 942 F. Supp. at 746 (holding that motions to proceed in forma pauperis and to strike pleadings have a "sense of finality" that remand motions lack because remand still allows the parties to "assert all claims and defenses" in state court); *Campbell*, 912 F. Supp. at 119 (holding that remand motions are nondispositive, in part because, they "merely transfer the action to a different forum rather than finally resolving the substantive rights and obligations of the parties"); *City of Jackson*, 147 F.R.D. at 124 ("The motion to remand does not reach the merits of the underlying dispute but instead decides only the questions of whether removal to the federal court was proper. The parties remain free to litigate the merits of the case following the disposition of the motion, whether in state or federal court."); *Holt*, 802 F. Supp. at 868 ("A motion to remand is not dispositive since a decision on the motion decides only the question of whether there is a proper basis for federal jurisdiction to support removal, and neither reaches nor determines the merits of a plaintiff's claim . . . ."); *McDonough*, 131 F.R.D. at 472 ("Remand merely determines that the litigation shall take place in state court rather than federal court; thus we are authorized to enter final order remanding the matter to state court."); *cf* Robinson v. Eng, 148 F.R.D. 635, 640 (D. Neb. 1993) (motion for Rule 11 sanction) ("Congress clearly has not chosen to categorize as 'dispositive' any ruling that resolves an issue. Rather, it is only those rulings which finally resolve a party's 'claim or defense' which are considered 'dispositive' within the meaning of § 636(b) and FED. R. CIV. P. 72."); *but see* Haag v. Hartford Life and Accident Ins. Co., 188 F. Supp. 2d 1135, 1136 (D. Minn. 2002); *Giangola*, 753 F. Supp. at 152 (holding that "a remand order is the equivalent of a dismissal" and that "no issue is so accurately described as dispositive as a determination which will destroy or uphold the Court's jurisdiction); Long v. Lockheed Missiles and Space Company, Inc., 783 F. Supp. 249, 250 (D.S.C. 1992) ("The analysis of the court in Giangola is the preferred approach to this case because it combines both the statutory language with the practical effects of a dismissal from federal court.").

[67] *Franklin*, 2007 WL 1804411 at * 3.

> [A]n order of remand to a state court is not an order similar to those adjudicative functions [reserved for Article III judges], for two reasons: first, a remand order does not terminate the litigation; and, second, it does not dispose of the pending claim. The claim at issue in this case . . . will continue to be litigated in the state courts; the order of remand will not alter the parties' opportunity to advocate their positions or to be ably heard in a court of law. Nor should remanding the case change in any way the outcome of that claim on the merits.[68]

Tellingly, district courts outside of the Second, Third, Sixth, and Tenth Circuits have continued to adopt this interpretation of Rule 72 even in the face of the unanimous rejection of the approach by the these circuit courts.[69] For these district courts, a motion, such as one to remand

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[68] *White*, 153 F.R.D. at 643.

[69] As a district court in the Western District of New York recently noted, prior to the Second Circuit taking up the issue:

> I respectfully disagree with [the analysis employed by the Third, Sixth, and Tenth Circuits] for two reasons. . . . First . . . [t]he [Federal Magistrates Act's] plain language [] permits a magistrate to hear and determine a pretrial motion for remand under § 1447 . . . . Second, even assuming that a magistrate lacks authority to issue a 'dispositive' order not listed in §636(b)(1)(A), a remand order, unlike an order of dismissal, is not dispositive. A dismissal ends a lawsuit. The disappointed litigant may succeed in resuscitating his claim in another forum, but only by commencing a new lawsuit, because the dismissal order was dispositive of the original action. An order of remand is not the functional equivalent. It neither disposes of the merits of a party's claim nor terminates the party's ability to seek such a disposition; most importantly, it in no way ends the litigation, not even conditionally. To the contrary, a remand order guarantees that a pending lawsuit will continue, albeit in a different forum. Indeed, a remand to state court under 28 U.S.C. § 1447 of an action previously removed to federal court under 28 U.S.C. § 1441 is in an important sense precisely the opposite of an order of dismissal: whereas the latter ends the parties' lawsuit altogether, the former restores it to its original status as an active case in a state court.

Meier, 371 F. Supp. 2d at 243. Although somewhat less direct, other district courts have also rejected the circuit courts' approach to the issue:

> Dispositive means "bringing about a final determination." [citing Black's Law Dictionary]. Therefore the plain language of Rule 72 is concerned only with whether a matter brings about a final determination of a party's claims or defenses; and if a matter does not "'resolve the substantive claims for relief alleged in the pleadings,' it is a nondispositive order." A motion to remand, like a motion related to venue, is concerned

a lawsuit to state court, which does not bring about a final determination of any claims or issues, cannot be dispositive for purposes of Rule 72.

As noted above, while nearly every district court faced with the issue has determined that remand motions are nondispositive and can be heard and determined by magistrate judges, all four of the circuit courts that have considered the issue have come to the opposite conclusion, holding that remand motions are dispositive and magistrate judges can only provide a "report and recommendation" to the district court judge.[70] In the first of these decisions, *In re U.S. Healthcare*,[71] the Third Circuit set forth the reasoning that would later be followed by the Second, Sixth, and Tenth Circuits, but rejected by the majority of district courts, including some within the purview of these circuit courts. The Third Circuit began by describing the "sharp distinction" in magistrate judges' authority in connection with dispositive and nondispositive motions.[72] Moreover, the court acknowledged that Congress did not include remand motions on the list of dispositive motions that could not be adjudicated by magistrate judges and thus, by its terms, the Federal Magistrates Act did not preclude a magistrate judge from determining a remand motion.[73] Nonetheless, the court concluded, in language that would be echoed by its sister courts in later opinions, that the list of eight specific motions set forth in Section 636(b)(1)(B) was not exhaustive and that a remand motion was the "functional equivalent" of the motions included on this list because it "conclusively terminates the matter in the federal court against the will of the party who removed the case."[74] In support of its opinion, the court analogized to a situation where a plaintiff files parallel state and federal court lawsuits:

> We do not think that anyone would argue seriously that a magistrate judge, without consent of the parties, could hear and determine a motion to dismiss the federal action predicated on an absence of subject

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> only with which court will hear the claims and defenses not with resolving the merits of those claims and defenses. Therefore, as a remand order does not resolve or dispose of the case, "the judge need only determine if the magistrate's order is 'clearly erroneous or contrary to law.'"

Wachovia Bank, 397 F. Supp. at 701–02.

[70] *See* Williams v. Beemiller, Inc., 527 F.3d 259, 264–66 (2d Cir. 2008); Vogel v. U.S. Office Prods. Co., 258 F.3d 509, 514–17 (6th Cir. 2001); First Union Mortg. Corp. v. Smith, 229 F.3d 992, 994–97 (10th Cir. 2000); In re U.S. Healthcare, 159 F.3d 142, 145–46 (3d Cir. 1998).

[71] *In re U.S. Healthcare,* 159 F.3d 142, 147.

[72] *Id.* at 145.

[73] *Id.*

[74] *Id.*

> matter jurisdiction, on the theory that the motion is nondispositive because a parallel action is pending in the state court. Yet in a practical sense an order of remand predicated on a lack of subject matter jurisdiction is no less dispositive than an order of dismissal in the circumstances we describe as both orders have the exact same effect by permitting the case to proceed in the state rather than the federal court.[75]

Ultimately, the court concluded that "Congress never intended to vest the power in a non-Article III judge to determine the fundamental question of whether a case could proceed in a federal court."[76]

While the issue before the Third Circuit was one of first impression for the federal circuit courts at the time, the court acknowledged that the District Court for the District of New Jersey had reached the issue and had concluded that remand motions were nondispositive.[77] The court rejected the district court's reasoning, despite observing that the court had "surveyed district court cases and concluded that 'the vast majority of the district courts within [the District of New Jersey] and elsewhere that have confronted this issue have held that a motion to remand is 'nondispositive,' and therefore, can be determined by a magistrate judge by final order."[78] Based on its survey of the available case law, the district court concluded that remand motions were nondispositive because: (1) they were not included on the list of dispositive motions specifically carved out of the magistrate judges authority in the Act; and (2) remand did not "dispose of a claim or defense," but merely "transfers a case" from federal court to state court.[79] The Third Circuit summarily rejected these conclusions, holding instead that remand orders are dispositive of "all claims and defenses" because they "banish the entire case from the federal court" and again compared the decision to remand a case with one to dismiss a federal action for lack of subject matter jurisdiction where a parallel proceeding was pending in state court.[80]

The Second, Sixth, and Tenth Circuits largely tracked the Third Circuit's reasoning in deciding that remand motions are dispositive for

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[75] *In re U.S. Healthcare*, 159 F.3d at 145–46.
[76] *Id.* at 146.
[77] *Id.* (citing DeCastro v. AWACS, 940 F. Supp. 692, 695 (D.N.J. 1996).
[78] *Id.*
[79] *Id.*
[80] *In re U.S.Healthcare*, 159 F.3d at 146.

purposes of a magistrate judge's authority.[81] All three courts concluded that: (1) the list of eight dispositive motions included in the Act is illustrative, not exhaustive;[82] (2) the term "dispositive" in Rule 72 is not limited to claims and defenses;[83] and (3) a remand order is the "functional equivalent" of an involuntary dismissal for lack of subject matter jurisdiction because it "banishes" the lawsuit from federal court, and thus cannot be resolved by a magistrate judge.[84]

As noted above, despite the unanimity among the circuit courts on whether remand is dispositive, district courts that have confronted the issue in the wake of *In re U.S. Healthcare*, *Vogel*, *First Union*, and *Beemiller* have rejected their rationale and continued to deem such motions nondispositive and thus within a magistrate judge's authority to "hear and determine" subject only to review for clear error of law.[85] Each of these courts acknowledged the "split" in the federal courts but ultimately adopted the approach taken by the district courts:

> This court finds the reasoning of [courts in our own district], as well as the reasoning of other district courts, more persuasive that that of the Third, Sixth, and Tenth Circuits and determines that a motion to remand is a nondispositive issue and within the authority of a magistrate judge.[86]

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[81] *See Williams*, 527 F.3d at 264–66; *Vogel*, 258 F.3d at 514–17; *First Union*, 229 F.3d at 994–96.

[82] *See Williams*, 527 F.3d at 265; *Vogel*, 258 F.3d at 514–15; *First Union*, 229 F.3d at 996.

[83] *Id.*

[84] *See Williams*, 527 F.3d at 266 ("Because a § 1447(c) remand order 'determines the fundamental question of whether a case could proceed in a federal court, it is indistinguishable from a motion to dismiss the action from federal court based a lack of subject matter jurisdiction for the purpose of [the Federal Magistrates Act]'") (internal citation omitted); *see also Vogel*, 258 F.3d at 517 ("[W]e apply a functional equivalency test to see if a particular motion has the same practical effect as a recognized dispositive motion. Applying that test, and adopting the analysis of the Third and Tenth Circuits, we too find that a remand order is the functional equivalent of an order to dismiss."); *First Union*, 229 F.3d at 996 ("A remand order is a final decision in the sense that it is 'dispositive of all the claims in the case as it banishes the entire case from the federal court" . . . It is thus very similar in effect to an involuntary dismissal . . . for lack of subject matter jurisdiction."). As noted in *supra*, note 40 a small minority of district courts have followed this same rationale.

[85] *E.g.*, *Franklin*, 2007 WL 1804411 at ** 2–3; *Wachovia*, 397 F. Supp. 2d at 700–03; *Meier*, 371 F. Supp. 2d at 241–44; *Johnson*, 313 F. Supp. 2d at 1273–75.

[86] *See Franklin*, 2007 WL 1804411 at * 2; *see also Wachovia*, 397 F. Supp. 2d at 701, 702 (noting that there is "trouble at each step of [the] process" employed by the circuit courts, "finding Vogel and First Union unpersuasive," before holding that a "magistrate judge may hear and determine a motion to remand, subject only to 'clearly erroneous or clear error of law' review by a district court"); *Johnson*, 313 F. Supp. 2d at

This explicit rejection of countervailing circuit court authority, albeit non-binding authority, is telling. What it reveals is an apparent desire on the part of district courts to permit magistrate judges to "hear and determine" remand motions. As discussed below, this is ultimately the better reasoned approach because it adheres more closely to both the letter and the spirit of the Federal Magistrates Act, which was created, at least in part, to permit the district courts to experiment with the responsibilities delegated to magistrate judges in order to effectively manage their ever-increasing caseload and "increase the overall efficiency of the federal judiciary."[87]

IV. ANALYSIS

A. The Plain Language Of The Federal Magistrates Act Permits Magistrate Judges To "Hear And Determine" Remand Motions

"The starting point for the interpretation of a statute is always its language."[88] This "preeminent canon of statutory interpretation" requires that we "presume that the legislature says in a statute what it means and means in a statute what it says."[89] As a result, any inquiry into the meaning of a statute "begins with the statutory text, and ends there as well if the text is unambiguous."[90] In this case, the legislative will regarding the scope of a magistrate judge's mandate was expressed in unambiguous terms in Congress's vesting in magistrate judges the authority to "hear and determine *any* pretrial matter" except for a list of eight *specific* motions.[91] Remand is not included in this list. As a result, the clear language of the Act supports the conclusion that magistrate judges should be permitted to "hear and determine" remand motions.

Congress was unequivocal in the language it chose to use when revising the Act to broaden the scope of magistrate judges' authority except in connection with certain specific motions. As one district court noted: "Congress would be hard-pressed to use language more clearly indicating its intent to create an exhaustive list that "any . . . except."[92] Had Congress intended to exclude remand from the scope of a magistrate

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1273 ("This court finds the reasoning of the above-cited district courts more persuasive that the reasoning of the above-captioned courts of appeal.").

[87] *Wachovia*, 397 F. Supp. 2d at 702.

[88] Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989).

[89] BedRoc, Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) (citing Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253–254(1992)).

[90] *Id.*

[91] 28 U.S.C. 636(b)(1)(A) (emphasis added).

[92] *Wachovia*, 397 F. Supp. 2d 698 (emphasis omitted).

judges' authority, it "could, should, and would" have done so.[93] "Because Congress explicitly set out matters that are not within the authority of a magistrate judge and because remand is not among them, a decision regarding remand is a valid authority of a magistrate judge."[94]

If there was any doubt about whether Congress intended the list of motions included in Section 636(b)(1)(A) to be exhaustive or illustrative, it is resolved by the legislative history surrounding the 1976 Amendments to the Act. Both the House and Senate Committee Reports that accompanied those Amendments included language evidencing Congress's clear intent that only certain, specific motions would be placed beyond the authority of magistrate judges.[95] For instance, the House Committee Report, which identified the 1976 Amendments as being designed to "clarify and further define the additional duties which may be assigned" to a magistrate judge, draws a distinction between a broad category of pretrial motions that a magistrate judge can "hear and determine," and "certain dispositive motions" for which a magistrate judge can only provide a report and recommendation to the district judge.[96] The point is made even more clearly later on in the House Report:

> [C]ertain motions which are dispositive of the litigation are specifically excepted from the magistrate's power . . . to "hear and determine." These excepted motions are:
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> (1) A motion for injunctive relief;
>
> (2) A motion for judgment on the pleadings;
>
> (3) A motion for summary judgment;
>
> (4) A motion to dismiss or quash an indictment made by defendant;
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> (5) A motion to suppress evidence in a criminal case;
>
> (6) A motion to dismiss for failure to state a claim upon which relief can be granted; and

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[93] *Johnson*, 313 F. Supp. 2d at 1273 ("If Congress had wanted to place remand of removed cases beyond the 'hear and determine' authority of magistrate judges, it could, should, and would have listed it as one of the matters expressly excluded from that authority. Despite several amendments to the Federal Magistrates Act over the years, Congress has not seen fit to insert such a limitation in magistrate judge authority."); *see also Franklin*, 2007 WL 1804411.

[94] Franklin, 2007 WL 1804411 at * 3 (emphasis in original).

[95] *See* H.R. REP. NO. 94-1609, 617–71.

[96] *Id.*

> (7) A motion to involuntarily dismiss an action for failure to comply with an order of the court.[97]

Thus, Congress not only indicated that only certain dispositive motions should be subject to de novo review, not all dispositive motions, but also identified those "certain" motions. The House and Senate Reports make clear that Congress intended that the motions identified in Section 636(a)(1)(B)—regardless of whether they are characterized as "dispositive" or "excepted"—were intended to be an exhaustive list of the motions that fell beyond the scope of a magistrate judge's authority. Because remand is not on the list, it should not be seen as being beyond the power of a magistrate judge to "hear and determine."

Reading the Act to permit magistrate judges to "hear and determine" remand motions is not only consistent with the plain language of the Act, but also accords with the canon of *expressio unius est exclusio alterius*. Under this principle of statutory construction, the express inclusion of certain items on a list implies the exclusion of other items not included on the list.[98] Congress's express inclusion of eight specific motions that are beyond a magistrate judge's authority implies that magistrate judges are permitted to "hear and determine" any motions not included on the list. While the Supreme Court has noted that this canon "does not apply to every statutory listing or grouping,"[99] it does apply in situations, such as this one, where there is evidence that "the items not mentioned were excluded by deliberate choice, not inadvertence."[100] Here, this evidence exists in the text of the Act, the

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[97] *Id.* Note that the House Report included in the list of "excepted motions" a motion for involuntarily dismissal "for failure to comply with an order of the court," whereas the final version of the Act was less specific in its reference to motions "to involuntarily dismiss an action." This appears to cut against the position adopted by the Third Circuit in *In re U.S. Healthcare*, and subsequently followed by the Second, Sixth, and Tenth Circuits, that a remand motion is akin to a motion to involuntarily dismiss an action for lack of subject matter jurisdiction, as it appears that Congress intended the "involuntary dismissal" exception to be more narrow than these courts believe it to be.

[98] BLACK'S LAW DICTIONARY 620–21 (8th ed. 2004).

[99] Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003).

[100] *Id.* (citing United States v. Vonn, 535 U.S. 55, 65 (2002)). Although beyond the scope of this article, Justice Scalia criticized the majority decision in Barnhart for suggesting that the *expressio unius est exclusio alterius* doctrine does not apply unless it appears that Congress considered the specific items excluded from a list:

> It is also an absurd limitation, since it means that the more unimaginable an unlisted item is, the more likely it is not to be excluded. Does this new maxim mean, for example, that exceptions to the hearsay rule beyond those set forth in the Federal Rules of Evidence must be recognized if it is unlikely that Congress (or perhaps the Rules committee) "considered" those unnamed exceptions? Our cases do not support such a proposition. There is no more reason to make a "case

exclusive nature of which is reinforced by the clear statements of Congressional intent set forth in the Congressional Reports accompanying the Act.[101]

As noted above, the Second, Third, Sixth, and Tenth Circuits looked beyond the plain language of the Act and Rule 72 to determine that remand was the "functional equivalent" of the dispositive motions listed in section 636(b)(1)(A) and thus entitled to de novo review by the district courts.[102] This approach arose out of a belief that reading the list as exhaustive might create Article III issues by permitting magistrate judges to "exercise final decision making authority" over dispositive motions not included on the list.[103] These concerns are misplaced, however, because district courts always maintain "final decision making authority" over matters heard by magistrate judges, regardless of whether such motions are characterized as dispositive or nondispositive. The only difference is the standard that is applied by district courts to their review of "certain dispositive matters" that are identified in section 636(b)(1)(A).

Congress never intended to vest magistrate judges with the authority to issue final orders that would be immune from review by the district courts. In fact, Congress intended that district courts would maintain final control over matters handled by magistrate judges, beginning with the requirement that district courts choose which matters—dispositive and nondispositive—to designate to magistrate judges and continuing to final review of magistrate judges' decisions.[104]

> unprovided for" exception to the clear import of an exclusive listing than there is to make such an exception to any other clear textual disposition. In a way, therefore, the Court's treatment of this issue has ample precedent-in those many wrongly decided cases that replace what the legislature said with what courts think the legislature would have said (i.e., in the judges' estimation should have said) if it had only "considered" unanticipated consequences of what it did say (of which the courts disapprove).

Id. at 180–81 (Scalia, J. dissenting) (emphasis in original) (citations omitted).

[101] *Contra* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 80 (2002) (doctrine of *expressio unius est exclusio alterius* does not apply where "expansive phrasing" used by Congress—identifying consequences that "may include" a list of certain options—"points directly away from . . . exclusive specification") (emphasis added).

[102] *In re U.S. Healthcare*, 159 F.3d at 145–46; *First Union*, 229 F.3d at 995–96; *Vogel*, 258 F.3d at 515–26; *Williams*, 527 F.3d at 264–65.

[103] *First Union*, 229 F.3d at 996 (quoting Ocelot Oil Corp v. Sparrow Indus., 847 F.2d 1458, 1463 (10th Cir. 1988)); *see also*, *In re U.S. Healthcare*, 159 F.3d at 145 ("In considering this issue, we point out that we must take into account the 'potential for Art. III constraints in permitting a magistrate to make decisions on dispositive motions.'").

[104] 28 U.S.C. § 636(c)(1) ("[A] full-time United States . . . [magistrate judge] or a part-time United States . . . [magistrate judge] who serves as a full-time judicial officer

The Act and FED. R. CIV. P.72, collectively permit the district court to "reconsider" any "pretrial matter"[105] and "modify or set aside any portion of [a] magistrate judge's order [that is] found to be clearly erroneous or contrary to law."[106]This intention was further clarified by Congress in the Reports that accompanied the 1976 amendments to the Federal Magistrates Act:

> The [Act] provides for different procedures depending upon whether the proceeding involves a matter preliminary to trial or a motion which is dispositive of the action. In either case, the order or the recommendation of the magistrate judge is subject to final review by a judge of the court.[107]

Thus, Congress acknowledged the Article III concerns relied upon by the circuit courts in support of the position that the list of motions identified in section 636(b)(1)(A) is illustrative instead of exhaustive, and addressed those concerns by requiring that "final decision making authority" remain with the district courts.[108] As a result, these constitutional concerns do not support reading additional dispositive motions into the list of "certain dispositive motions" for which de novo review by the district court is required under the Act or Rule 72.

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may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves."); *Raddatz*, 447 U.S. at 685–86 (Blackmun, J. concurring) (noting that the district court is always "waiting in the wings, fully able to correct errors" and thus failing to "perceive the threat to the judicial power or the independence of the judicial decision making that underlies Art. III.").

[105] 28 U.S.C. § 636(b)(1)(A).

[106] FED. R. CIV. P. 72(a).

[107] H.R. REP. NO. 94-609, 6162 (emphasis added)

[108] *E.g.*, *Johnson*, 313 F. Supp. 2d at 1273 ("As long as the remand order secures [the right of review or reconsideration by a district court judge], there is certainly no constitutional infirmity, much less any policy reason, precluding the vesting of remand authority in magistrate judges."). In *Johnson*, the U.S. District Court for the Northern District of Alabama noted that, in both *In re U.S. Healthcare* and *Vogel*, there was no opportunity for the parties to seek review by the district courts of the magistrate judges remand orders because the terms of the magistrates' orders foreclosed any such review. *Id.* at 1273 n. 1. As the *Johnson* court noted: "[I]mmediate remand clearly does raise constitutional concerns about maintaining the Article III judge's duty to oversee the work of the magistrate judge." *Id*. However, no such concerns are presented where there is the opportunity for review of a magistrate judge's order by a district court judge. By contrast, bankruptcy court judges, who are also non-Article III judges, are permitted to enter final orders that are not subject to automatic review by district courts in the manner that magistrate judges' orders (or recommendations) are reviewed, and this practice has survived constitutional scrutiny. *E.g.*, FED R. BANKR. P. 8001, 8002.

B. Remand Motions Are Not Dispositive Because They Do Not Resolve Any Claims Or Defenses.

Black's Law Dictionary defines "dispositive" as "bringing about a final determination."[109] Based on this definition, numerous district courts have concluded that remand is not dispositive because it does not bring about a final determination of any claims or defenses in a case, but instead simply determines whether those claims and defenses will be adjudicated in state or federal court.[110] As the District Court for the Western District of New York has noted:

> [A] remand order, unlike an order of dismissal, is not dispositive. A dismissal ends a lawsuit . . . An order of remand is not the functional equivalent. It neither disposes of the merits of a party's claim nor terminates the party's ability to seek such a disposition; most importantly, it in no way ends the litigation, not even conditionally. To the contrary, a remand order guarantees that a pending lawsuit will continue, albeit in a different forum. Indeed, a remand to state court under 28 U.S.C. § 1441 is in an important sense precisely the opposite of an order of dismissal: whereas the latter ends the parties' lawsuit altogether, the former restores it to its original status as an active case in state court.[111]

Stated differently, remand does not resolve any substantive issues between the parties and does not end the litigation, thus it cannot be said to "bring about a final determination" of the dispute in a manner similar to the other motions listed in section 636(b)(1)(A). Even commentators who do not interpret the list of motions enumerated in section 636(b)(1)(A) to be exhaustive nonetheless agree that remand is not dispositive because it does not resolve the claims or defenses of the parties: "the desire of a party to proceed in federal court cannot reasonably be considered a claim, and therefore rulings on motions to remand removed cases should not be considered dispositive."[112]

The legislative history of the Act further supports this reading of the term "dispositive," and is more consistent with Congressional intent

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[109] BLACK'S LAW DICTIONARY 505 (8th ed. 2004).

[110] *See supra* note 66; *see also* Niedermeier v. Office of Baucus, 153 F. Supp. 2d 23, 26 (D.D.C. 2001) (defining a dispositive motion as "a motion that, if granted, would result either in the determination of a particular claim on the merits or elimination of such a claim from the case.").

[111] *Meier*, 371 F. Supp. 2d at 243.

[112] 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3068.2 (p. 340) (2d ed. 1997).

than the contrary reading adopted by the Second, Third, Sixth, and Tenth Circuits. As set forth in the House Report that accompanied the 1976 amendments to the Act, Congress only intended to remove from the scope of a magistrate judge's authority "certain motions" that were "dispositive of the litigation" or "dispositive of the matter."[113] As noted above, remand is not dispositive of the litigation or the matter because it does not resolve any substantive issues related to any claims or defenses at issue, but instead simply forces the parties to litigate these issues in state court rather than federal court.

In addition to being more true to the meaning of the term dispositive and the letter and spirit of the Act, characterizing remand as nondispositive is also consistent with the practical implications of remand. On remand, a lawsuit returns to the state court in the same posture that it existed the moment before the remand order was entered. Any pleadings that were filed between removal and remand are adopted by the state court,[114] and any unresolved motions filed while the case was in federal court are transferred to the state court for resolution.[115] It is as if the case file simply gets handed back to the state court, updated with whatever pleadings and motions were filed in federal court. In this regard, remand is substantively indistinguishable from a motion to transfer venue, which is undoubtedly within the scope of a magistrate's authority to "hear and determine." As such, it is not dispositive as that term is commonly understood.

This reading of the plain language of the Act and Rule 72 is further buttressed by the fact that several jurisdictions have adopted local rules to define "dispositive motions," and none of them have characterized remand as dispositive.[116] For instance, the local rules for the District of Nebraska define "dispositive matters" as those excepted by 28 U.S.C. 636(b)(1)(A).[117] Rules like this one and similar ones enacted in other jurisdictions effectively codify the decisions of the overwhelming majority of district courts that the term "dispositive," should be limited

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[113] H.R. REP. NO. 94-1609, at 6162, 6170–71.

[114] *E.g.*, Edward Hansen, Inc. v. Kearny Post Office Associates, 166 N.J. Super. 161, 170 (N.J. Super. Ct. Ch. Div. 1979) ("[T]he adoption of the pleadings would result in the post-remand procedure in this court mirroring as nearly as possible the post-removal procedure in the federal court . . . . Adoption of the federal pleadings would result in this court's renewing its jurisdiction with the case in exactly the same posture as when it was remanded from the federal court.").

[115] *E.g.*, Delgado v. Shell Oil, 890 F. Supp 1324, 1350 n.54 (S.D. Tex 1995) ("Because these cases will be remanded, any unaddressed pending motion in these cases must be addressed to the state courts.").

[116] *E.g.*, D. NEB. L. CIV. R. 72.2(a); W.D. MICH. L. CIV. R.R. 7.2, 7.3; E.D. TEX L. CIV. R. app B; *see also* CT. INT'L TRADE R. 7(g).

[117] D. NEB. L. CIV. R. 72.2(a).

consistent with the list of "certain dispositive motions" identified in the Act.

The circuit courts have rejected this analysis and have instead suggested that remand is the "functional equivalent" of a motion for involuntary dismissal for lack of subject matter jurisdiction because both motions "banish" the case from the federal courts.[118] This reasoning was the lynchpin of the *In re U.S. Healthcare* decision and has been relied upon by the Second, Sixth, and Tenth Circuits in adopting the Third Circuit's reasoning and conclusion. However, this analogy is ultimately unpersuasive because dismissal for lack of subject matter jurisdiction is not an "adjudication on the merits" under the Federal Rules of Civil Procedure, and thus, like remand, is not dispositive of an action.[119] As the District Court for the Western District of North Carolina has observed:

> In the absence of three specific situations—one of which is lack of subject matter jurisdiction—an involuntary dismissal under Federal Rule of Civil Procedure 41(b) is claim dispositive . . . . Therefore, it is no surprise that involuntary dismissals were included in the § 636(b)(1)(A) list, alongside motions for summary judgment, motions under Rule 12(b)(6), and motions for judgment on the pleadings. The fact that Congress did not exclude the three exceptions to the usual "adjudication upon the merits" of Rule 41(b) when creating the § 636(b)(1)(A) list is no basis to conclude that remand orders should likewise be beyond the "hear and determine" power of a magistrate judge.[120]

The analogy to motions to dismiss for lack of subject matter jurisdiction actually supports the conclusion that remand is not the "functional equivalent" of the dispositive motions included in section 636(b)(1)(A). Like motions to dismiss for lack of subject matter jurisdiction, remand does not bar the future litigation of the issues involved in the lawsuit on *res judicata* or collateral estoppel grounds.[121]

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[118] *Williams*, 527 F.3d at 266; *First Union*, 229 F.3d at 995–96; *Vogel*, 258 F.3d at 515–16; *In re U.S. Healthcare*, 159 F.3d at 145–46.

[119] FED. R. CIV. P. 41(b).

[120] *Wachovia*, 397 F. Supp. at 702; *see also Young*, 168 F.R.D. at 27 ("Involuntary dismissals [] are governed by Rule 41(b) of the Federal Rules of Civil Procedure, which provides that "a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction . . . operates as an adjudication upon the merits. Therefore, under this section, dismissals for lack of subject matter jurisdiction are not considered to be final decisions of a party's claims.").

[121] 18A CHARLES A WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4436, n.1 (2d ed. 2002) ("There is little mystery about the

Thus, to the extent that remand is even comparable to a motion to dismiss for lack of subject matter jurisdiction, the comparison actually supports the notion that remand is not dispositive because, unlike the dispositive motion identified in Section 636(b)(1)(A), remand is not a final adjudication on the merits of a claim or defense.

C. Permitting Magistrate Judges To "Hear And Determine" Remand Motion Is Consistent With Congressional Intent.

As noted above, Congress has steadily expanded the scope of magistrate judges' authority in an effort to "increase the overall efficiency of the federal judiciary,"[122] and has done so primarily by "vesting magistrate judges with sufficient authority to . . . assist effectively in managing the heavy caseload borne by the district courts."[123] To this end, Congress intended to leave district judges free to "experiment with the assignment to magistrates of other functions in the aid of the business of the courts," in order to increase the "time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties.[124] The Act and Rule 72 must be read consistent with these intentions. Permitting magistrate judges to "hear and determine" remand motions furthers this intent. In contrast, the approach adopted by the Second, Third, Sixth, and Tenth Circuits is the type of narrow, non-pragmatic interpretation that Congress has repeatedly rejected.

On the flip side, there is a danger not only in narrowing the types of motions magistrate judges are permitted to "hear and determine," but also in adding to the list of matters that district courts must review *de novo*. As a court in the District Court for the Northern District of Alabama recently noted:

> If too many motions are added to the list of those which a magistrate judge may not determine, the purpose of the magistrate judge system is defeated and they become little more than super briefing

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res judicata effects of a judgment that dismisses an action for lack of subject-matter or personal jurisdiction or for improper venue. Civil Rule 41(b) provides that a dismissal for lack of jurisdiction or improper venue does not operate as an adjudication upon the merits."); *contra* Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1461–62 (10th Cir. 1988) (striking of pleadings with prejudice as sanction for discovery violation was comparable to motion for involuntary dismissal under Section 636(B)(1)(A) because it "has the effect of dismissing [plaintiff's] action, contrary to [plaintiff's] wishes, and operates as *res judicata.*").

[122] *Wachovia*, 397 F. Supp. 2d at 702.

[123] *Johnson*, 313 F. Supp. 2d at 1274.

[124] H. R. REP. NO. 94-1609 at 6172.

> clerks, writing recommendations that the district court must review de novo. The district courts are thus relieved of little, if any, of their case load and an entire level of the federal judiciary is relieved of its ability to assist in managing that case load . . . . [I]f magistrate judges were not empowered to decide motions which resolve issues, they "would not have authority to 'hear and determine' much of what dominates their dockets on a daily basis."[125]

The district court for the District of Nebraska echoed this sentiment, albeit in the context of a magistrate judge's ability to order Rule 11 sanctions, cautioning that only those "rulings which finally resolve a party's 'claim or defense,'" should be considered dispositive or else the usefulness of the magistrate judge to the district court will be significantly curtailed:

> Indeed, if this were the case magistrate judges would not have authority to "hear and determine" much of what dominates their dockets on a daily basis. Magistrate judges in this court, and undoubtedly many other district courts, routinely enter orders which have the effect of disposing of many litigation issues. For instance, magistrate judges enter: (1) orders denying requests to proceed *in forma pauperis*; (2) progression orders setting discovery deadlines and trial dates; (3) orders granting and denying discovery motions; (4) orders denying motions to join additional parties; (5) orders denying motions to amend for purposes of adding a claim or defense; (6) orders striking pleadings for failure to comply with FED. R. CIV. P. 8; (7) orders striking exhibits or witnesses for failure to comply with the court's progression order under FED. R. CIV. P. 16; (8) preclusion orders prohibiting the use of certain exhibits or testimony at trial as a discovery sanction under Rule 37; (9) protective orders under FED. R. CIV. P. 26(c); (10) orders transferring cases to other districts or to the Panel on Multi District Litigation; (11) orders voluntarily dismissing claims or entire actions; and (12) garnishment orders pursuant FED. R. CIV. P. 69. Of course, this list is not intended to be exhaustive and certainly there are a host of additional orders

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[125] *Vaquillas Ranch*, 844 F. Supp. at 1162–63 (citations omitted); *see also Matthews*, 423 U.S. at 268 (refusing to relegate magistrate judges to the role of "super-notaries").

> routinely and properly entered by magistrate judges which dispose of litigation issues.[126]

Accordingly, if magistrate judges are to continue to be a useful and effective "lower tier of judicial officers" as Congress intended, they must be permitted to "hear and determine" remand motions.

V. CONCLUSION

If district court judges can be seen as voting through their decisions on this issue, then the results appear clear that they believe that permitting magistrate judges to "hear and decide" remand motions would "aid in the business of the courts" and "improve the overall efficiency" of the federal judicial system. Given that magistrate judges were created by Congress to assist district judges, this unanimity provides strong support for the notion that the "experiment" of using magistrate judges to "hear and determine" remand motions should be endorsed by the courts and, if necessary, Congress when it next addresses the Act. Ultimately, in light of the split between the district courts and the circuit courts regarding the ability of magistrate judges to "hear and determine" remand motions, there is once again a need to heed the advice of Justices Burger and White in the *Wingo* decision and "act to restate its intentions if its declared objectives are to be carried out in the discretion of a judge of the district court." Until this happens, magistrate judges should be permitted to "hear and determine" remand motions, and the next circuit court faced with the task of defining the scope of a magistrate judge's authority to "hear and determine" such motions should adhere more closely to the letter and spirit of the Act when deciding the issue.

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[126] 148 F.R.D. at 640 n.9.