UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, *Plaintiff,*	)	Civil Action # 3:03CV0557 (CFD)
v.	)	
AVENTIS PHARMACEUTICALS, INC., *Defendant.*	)	April 4, 2003

MOTION FOR REMAND TO STATE COURT

Plaintiff STATE OF CONNECTICUT respectfully moves, pursuant to 28 U.S.C. §1447 that this matter be remanded to the State of Connecticut Superior Court for the Judicial District of Hartford on the grounds that there is no federal jurisdiction over this matter warranting removal to this court. The reasons for remand are explained in the accompanying memorandum.

ORAL ARGUMENT IS REQUESTED

STATE OF CONNECTICUT

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CERTIFICATION

I hereby certify that a copy of the foregoing MOTION FOR REMAND TO STATE COURT was mailed in accordance with Fed.R.Civ.P. 5(b) on this 4th day of April, 2003, first class postage prepaid to:

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MEMORANDUM IN SUPPORT OF MOTION FOR REMAND TO STATE COURT

INTRODUCTION

The State of Connecticut (the "State") has initiated separate civil actions against several pharmaceutical companies in the State of Connecticut Superior Court for the Judicial District of Hartford.[1] The complaints, which make serious allegations of unlawful and deceptive trade practices by the defendant pharmaceutical companies, assert causes of action exclusively under

[1] The State has commenced were four civil actions in state court. At present, notices of removal of these actions to the United States District Court for the District of Connecticut have been filed on behalf of each of the defendant pharmaceutical companies. These cases currently are captioned as follows: (1) *State of Connecticut v. Aventis Pharmaceuticals, Inc*., #3:03CV0557 (CFD) (D. Conn.); (2) *State of Connecticut v. Dey, Inc., et al*, #3:03CV0572(DJS) (D. Conn.); (3) *State of Connecticut v. GlaxoSmithKline PLC, et al*, #3:03CV0553 (JCH) (D. Conn.); and, (4) *State of Connecticut v. Pharmacia Corporation*, #3:03CV0554 (DJS) (D. Conn.). The State has moved to remand all of these cases to state court for substantially the same reasons and also has moved that these cases be consolidated before a single judge in this Court for the purpose of considering the State's motions to remand all of these actions to state court. Accordingly, for ease of reference, this memorandum refers to each defendant pharmaceutical company named in each civil action collectively as "Defendants."

Conn. Gen. Stat. §§ 42-110m and 42-110o.[2] Relief, sought exclusively under Conn. Gen. Stat. §42-110b(a), includes restitution, injunctive relief and civil penalties.

The complaints allege that the defendants engaged in violations of CUTPA by artificially inflating drug costs incurred by the Connecticut Department of Social Services ("DSS") through the administration of its Medicaid program. The complaints allege that these practices severely harmed Connecticut consumers who are Medicare beneficiaries.

Defendants have filed notices of removal pursuant to 28 U.S.C. § 1441 and have asserted as the exclusive basis for removal federal question jurisdiction under 28 U.S.C. § 1331. For the reasons set forth in the State's motion to remand and in this accompanying memorandum of law, this court should remand these actions to state court.

LEGAL ARGUMENT

I. THIS COURT SHOULD REMAND THESE ACTIONS TO STATE COURT BECAUSE THERE IS NO FEDERAL QUESTION JURISDICTION.

Defendants have removed these actions to this court pursuant to 28 U.S.C. § 1441, which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed" to federal district court. 28 U.S.C. §1441(a). In support of removal, Defendants assert that federal question jurisdiction exists under 28 U.S.C. §1331 which, by its own terms, is limited to "all civil actions arising under the Constitution, laws, or treaties of the United States." According to Defendants, the State's actions, even though premised solely on state-law causes of action, "arise under" federal law because the state law claims are brought on behalf of Connecticut citizens who are beneficiaries of Medicare, a federal

[2] These statutory subsections are part of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a *et seq.* ("CUTPA").

health benefit program, Defendants' arguments for federal jurisdiction on these bases are, quite simply, without merit.

A. THESE ACTIONS DO NOT 'ARISE UNDER' FEDERAL LAW.

A state court defendant may remove a case to federal court only if the plaintiff's claims originally could have been brought there. 28 U.S.C. § 1441 (a); *Barbara v. New York Stock Exch.*, 99 F.3d 49, 53 (2d Cir. 1996). The removal statute thus does not create jurisdiction where it did not already exist.

Defendants claim that these cases fall within the original "federal question" jurisdiction under 28 U.S.C. § 1331, which confers federal jurisdiction upon "all civil actions arising under the Constitution, laws, or treaties of the United States." The sole ground that Defendants purport to assert as the basis for federal question jurisdiction is that a portion of the state law claims involve Medicare beneficiaries.

It is well settled that an action "arises under" federal law when federal law creates the cause of action or when the plaintiff's state law claim embodies, as a necessary element, a substantial issue of disputed federal law. *Merrell Dow Pharmaceutical, Inc. v. Thompson*, 478 U.S. 804, 808-09, 813 (1985); *Gully v. First Nat'l Bank*, 299 U.s. 109, 115 (1936); *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 192-93 (2d Cir. 1987). As the Second Circuit has noted:

> There are two tests under which an action may present a federal question. The first asks whether federal creates the cause of action. If so, federal question jurisdiction exists.… If state law creates the cause of action, the second test asks whether that cause of action poses a *substantial* federal question.

West 14th St. Comm.. Corp., 815 F.2d at 192 (emphasis added.)

"The vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." *Merrell Dow*, 478 U.S.

at 808. The United States Supreme Court has cautioned that the second test for federal question jurisdiction — the existence as a necessary element of a state-law claim, of a substantial, disputed issue of federal law — requires "careful judgments about federal judicial power in an area of uncertain jurisdiction." *Id*. at 814; *Gully*, 299 U.S. at 118. As the Court has recognized, given the prevalence of federal involvement in matters of state affairs, there will be few state claims that do not bear some connection to a provision of federal law:

> [C]ountless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are … necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Gully, 299 U.S. at 118. Thus, "prudence and restraint" are required to insure that the proper limits on the exercise of federal jurisdiction are maintained. *Merrell Dow* 478 U.S. at 810; *see also Franchise Tax Bd. v. Construction Laborers Vacation Trust For Southern California*, 463 U.S. 1, 20-21 (1983). Such care is especially called for in the context of removal, where the Supreme Court has long emphasized that deference to principles of federalism and state autonomy requires strict construction of the removal statute:

> Not only does the language of the [removal statute] evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.… Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941) (internal quotation omitted.) For these reasons, any doubts as to the propriety or removal are to be resolved in favor of remanding the action back to state court.

Thus, "the mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction." *Merrell Dow*, 478 U.S. at 813; *West 14th Street Commercial Corp.*, 815 F.2d at 193. "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gully*, 299 U.S. at 115. Rather, to support federal jurisdiction, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action" *Id.* at 112; *Hodges v. Demchuk*, 866 F. Supp. 730, 732-33 (S.D.N.Y. 1994) ("Removal … is improper unless a federal question is an essential element of a plaintiff's cause of action"). The federal issue must, rather, be the subject of a dispute whose resolution affects the outcome of the lawsuit. *Gully*, 299 U.S. at 113-114; *Merrell Dow*, 478 U.S. at 813.

The involvement of a federal program as a backdrop to a claim arising under state law does not "federalize" that claim and bring it within the jurisdiction of the federal courts. *Gully*, 299 U.S. at 115-18; *Nordlicht v. New York Telephone Co.*, 799 F.2d 859, 861 (2nd Cir. 1986) (no federal jurisdiction over billing dispute related to Federal communications act where billing provisions of Act not applicable to billing disputes at issue); *State of Connecticut v. Philip Morris Inc., et al.*, 396CV1491 (JBA) (D. Conn. October 6, 1996) (copy attached hereto) (no federal jurisdiction over claims against tobacco companies where plaintiff sought reimbursement of Medicaid expenses); *State of Connecticut v. Comcast Cablevision of Middletown, Inc. and Comcast Corporation*, 3:94CV01104/3:94CV01105 (PCD) (D. Conn. December 27, 1995) (copy attached hereto) (no federal jurisdiction over CUTPA action against cable companies even though plaintiffs' complaints made references to federal Cable Television Consumer Protection Act of 1992, 47 U.S.C. § 541 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. § 41 *et*

seq.) In other words, questions of federal law "lurking in the background" are not sufficient for removal.

The United States Supreme Court has made it clear that construction or interpretation of an issue of federal law in connection with a court considering a state law claim may not provide grounds for removal where Congress has not provided a federal cause of action. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 817 (1986). As the Court pointed out, the mere presence of a federal issue as an element in a state cause of action does not automatically create federal question jurisdiction. The absence of a federal remedy is tantamount to a congressional conclusion that the federal element of a state cause of action is insufficient to confer federal jurisdiction. *Merrell Dow*, 478 U.S. at 813 – 814.

B. THE WELL-PLEADED COMPLAINT RULE GOVERNS THE EXISTENCE OF FEDERAL SUBJECT MATTER JURISDICTION.

Even though federal law may present an available ground for recovery, if the plaintiff chooses not to assert that ground, there is no federal jurisdiction. "The plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (footnote omitted); *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir. 1986); *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425, 1430 (2d Cir. 1993).

Federal courts will view the allegations of a complaint through the lens of the "well pleaded complaint rule", which provides that "federal jurisdiction only exists when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.* "The well-pleaded complaint rule confines the search for a basis of federal question jurisdiction to "what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant

may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75-76, 34 S. Ct. 724, 725, 58 L. Ed. 1218 (1914)." *Lupo v. Human Affairs Intern., Inc.* (2nd Cir. 1994). Simply put, a plaintiff is free to avoid federal jurisdiction completely by pleading only state law claims even where a federal claim might be available.

Finally, removal may not be based on federal defenses to state law claims even if the federal defense is anticipated and the primary question at issue in the case. "Where … jurisdiction is asserted by a defendant in a removal petition, it follows that the defendant has the burden of establishing that removal is proper. *See R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2nd Cir. 1979); see also 14A Wright & Miller § 3721, at 209-210 ("[d]efendant always has the burden of establishing that removal is proper.") *United Food Local 919 v. Centermark Properties*, 30 F.3d 298 (2nd Cir. 1994).

C. THE STATE OF CONNECTICUT'S WELL-PLEADED COMPLAINT IS EXPRESSLY AND EXCLUSIVELY BASED ON STATE LAW.

Applying these principals, it is clear that Defendants have not, and cannot, satisfy the requirements of federal question jurisdiction to remove these cases from state court to federal court. Accordingly, remand to state court should be ordered.

Federal law plainly does not create the causes of action asserted in the State's Complaint, and the State can establish the liability of Defendants under each count based on principles of state law. This fact, alone, establishes that the State's claims fall outside the subject matter jurisdiction of this court. As the United States District for the Southern District of New York has succinctly stated:

> Removal … is improper unless a federal question is an essential element of a plaintiff's cause of action, and is apparent on the face of the plaintiff's well-pleaded complaint without reference to the answer or removal petition.

Hodges, 866 F. Supp. at 733 (citing Franchise Tax Bd., 463 U.S. at 13 ("straightforward application of the well-pleaded complaint rule precludes federal court jurisdiction" where state law supplies all elements necessary to establish defendants liability)); *Hunneman Real Estate Corp.*, 860 F. Supp. at 911 (remanding for lack of jurisdiction where, "[i]n order for the plaintiffs to prevail, they do not have to prove or rely on any proposition of federal law.").

Defendants have not alleged, and certainly cannot establish, that federal law is an essential element of the State's claims. Indeed, the State's claims are not dependent on federal law in any respect.

Significantly this court has previously remanded an action brought by the State under CUTPA against a cable television company for engaging in deceptive and unfair trade practices. *State of Connecticut v. Comcast Cablevision of Middletown, Inc.*, 394CV01104 (PCD), December 27, 1994 (Dorsey, J.) (copy attached hereto). In *Comcast*, the court remanded the action because a CUTPA cause of action arises out of state law and does not include any federal issues as a necessary element of the cause of action. Moreover, the court held that remand was required despite the fact that the State's complaint looked in part to federal law in determining that the defendants actions were deceptive or unfair. *Id*. at 4-6.

D. THE STATE OF CONNECTICUT'S COMPLAINT DOES NOT ARISE UNDER THE FEDERAL MEDICARE ACT.

Defendants would have this court believe that the complaint places Medicare at issue. To the contrary, the State does not challenge the validity or development of Medicare in any way. The only thing that is seriously questioned is the practices of pharmaceutical companies in misrepresenting the prices of its drugs, clearly actionable under CUTPA, resulting in substantial harm to the State and to consumers. The State seeks to remedy such unlawful conduct.

At best, Defendants' claim that they have a federal law defense and/or that adjudication of this matter requires some interpretation of federal law. That some federal law provided the setting in which pharmaceutical companies committed their wrongdoing does not in any way change the nature of this case. Nor does it create federal jurisdiction under the applicable statutes and case law.

Moreover, issues concerning important issues of state law should ordinarily be resolved in state courts. In fact, federal courts have recognized that remand is especially appropriate in cases involving the interpretation of state statutes which have been or may need to be interpreted by state courts. *State v. Chicago and North Western R.R. Co.*, 174 F. Supp. 267, 270 (D. Minn. 1958). This is certainly the case here.

The bottom line is that the defendants cannot meet their heavy burden of establishing grounds for removal in this case. The causes of actions pleaded arise exclusively under state law. Any federal issues raised relate to defenses or are otherwise collateral, incidental or otherwise "lurking in the background." Under these circumstances this court should recognize that federal jurisdiction is lacking here, apply the strong presumption against removal here, and remand the matter to state court.

Simply put, these are matters in which a State has commenced a civil action in state court alleging serious wrongdoing in order to vindicate state law. Surely, the State should be able to have these state law regulatory claims adjudicated in its own state court.

II. THE EXISTENCE OF A MULTIDISTRICT LITIGATION PANEL PROCEEDING HAS NO BEARING ON THE JURISDICTIONAL ISSUE THAT NEEDS TO BE DECIDED HERE.

Defendants point out early in their removal papers the existence of a multidistrict litigation panel proceeding ("MDL") currently pending in the U.S. District Court for the District of Massachusetts. *In Re Pharmaceutical Average Wholesale Price Litigation*, MDL 1456. Of

course, whether or not there is an MDL has absolutely no bearing on the fundamental federal jurisdiction question that must be resolved at this point.[3]

Either there is federal jurisdiction here or not. If there is no federal jurisdiction then the case belongs in state court, where it was commenced. Defendants have not cited to any legal authority for the proposition that the existence of an MDL has any bearing on the question of whether federal jurisdiction exists or the need to remand to state court those matters that do not arise under federal law. Since the existence of the MDL has no bearing whatsoever on the jurisdictional issue before the court it simply should not be considered in deciding the motion to remand to state court.

III. CONCLUSION.

For all of the foregoing reasons, this court should conclude that there was no basis to remove this case to federal court since the Complaint does not assert any causes of action arising under federal law. Accordingly, the State's motion for remand to state court should be granted, and this matter should be remanded to the State of Connecticut Superior Court for the Judicial District of Hartford.

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[3] It is also appropriate to note that motions to remand to state court are currently pending in connection with those cases related to the MDL that were removed to federal court. Oral argument was heard on March 7, 2003 which included argument on motions to remand to state court in the following cases brought by States: (1) *State of Montana v. Abbott Labs, Inc., et al.*, D. Mont. Cause No. CV-02-09-H-DWM; (2) *State of Nevada v. Abbott Labs, Inc., et al.*, D. Nev. Cause No. CV-N-02-0080-ECR; (3) *State of Nevada v. American Home Products Corp., et al.*, D. Nev. Cause No. CV-N-02-0202-ECR; and, (4) *State of Minnesota v. Pharmacia Corp.*, D. Minn. Court File No. 02-CV 1779 MJD/JGL. The only judicial decision concerning remand that presently exists in connection with any of the cases related to the MDL is actually a recommended decision by a Magistrate Judge in one matter to remand the proceeding to state

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court. *State of Minnesota v. Pharmacia Corporation*, Civil No. 02-1779 (MJD/JGL) (D. Minn. Sept. 27, 2002) (copy attached).

CERTIFICATION

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR REMAND TO STATE COURT was mailed in accordance with Fed.R.Civ.P. 5(b) on this 4th day of April, 2003, first class postage prepaid to:

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