UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT v. GLAXOSMITHKLINE, PLC, D/B/A GLAXOSMITHKLINE GLAXO WELLCOME, INC., D/B/A GLAXOSMITHKLINE, AND SMITHKLINE BEECHAM CORPORATION, D/B/A GLAXOSMITHKLINE	**MASTER DOCKET #** **Civil Action # 3:03CV0553 (JCH)** **ALL CASES** Civil Action # 3:03CV0553 (JCH) May 2, 2003
STATE OF CONNECTICUT v. PHARMACIA CORPORATION	Civil Action # 3:03CV0554 (JCH) May 2, 2003
STATE OF CONNECTICUT v. AVENTIS PHARMACEUTICALS, INC.	Civil Action # 3:03CV0557 (JCH) May 2, 2003
STATE OF CONNECTICUT v. DEY, INC., ROXANE LABORATORIES, INC., WARRICK PHARMACEUTICALS CORPORATION, SCHERING-PLOUGH CORPORATION, AND SCHERING CORPORATION	Civil Action # 3:03CV0572 (JCH) May 2, 2003

REPLY MEMORANDUM IN SUPPORT OF
MOTIONS FOR REMAND TO STATE COURT

Defendants have failed to meet their burden of demonstrating that the State of Connecticut's ("State") state law claims, which were commenced in state court, were properly removed to federal court. Accordingly, this court should promptly remand these cases to state court.

I. THESE CASES SHOULD BE REMANDED TO CONNECTICUT STATE COURT BECAUSE THIS COURT LACKS FEDERAL JURISDICTION OVER THESE STATE CLAIMS.

Whether this court has jurisdiction over the State's claims is the threshold issue that must be resolved before these cases may proceed any further. It is well settled that federal courts are courts of limited jurisdiction. The Second Circuit recently has emphasized the critical importance of determining whether subject matter jurisdiction exists before a case moves one step further:

> … [S]ubject matter jurisdiction remains an unwaivable sine qua non for the exercise of federal judicial power, *Curley v. Brignoli, Curley & Roberts Associates* , 915 F.2d 81, 83 (2d Cir. 1990). We have recently observed that, jurisdiction is not a game, and that, [a]s the Supreme Court has made abundantly clear, it is one of the fundamental tenets of our Constitution that only some cases may be brought in federal court. *E.R. Squibb & Sons, Inc. v . Accident & Cas. Ins. Co*., 160 F.3d 925, 929 (2d Cir. 1998). We cannot avoid addressing the threshold question of jurisdiction simply because our finding that federal litigation does not exist threatens to prove burdensome and costly, or because it may undermine an expensive and substantially completed litigation. *Squibb*, 160 F.2d at 929-30.

Herrick Co. v. SCS Communications, Inc., 251 F.3d 315, 321-22 (2nd Cir.1999).

The party asserting jurisdiction — Defendants in these cases — has the burden of establishing jurisdiction. *Foy v. Pratt & Whitney Group*, 127 F.3d 229 (2d Cir. 1997). "Where, as here, jurisdiction is asserted by a defendant in a removal petition, it follows that the defendant has the burden of establishing that removal is proper." *United Food & Commercial Workers Union, Local 919, AFL-CIO v. Centermark Properties Meriden Square, Inc*., 30 F.2d 298, 302 (2d Cir. 1994). Defendants must overcome the presumption that this matter is properly in state

court and any questions concerning the existence of federal jurisdiction should be resolved in favor of state court jurisdiction. *Macro v. Independent Health Assoc., Inc.,* 180 F.Supp.2d 427, 431 (W.D.N.Y. 2001). Statutes authorizing removal to federal court are strictly construed. *Macro*, 180 F.Supp.2d at 431 (*citing Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941)); *Horowitz v. Marlton Oncology, P.C.,* 116 F.Supp.2d 551 (D.N.J. 1999); *State of New York v. Lutheran Center for the Aging, Inc.,* 957 F.Supp. 393 (E.D.N.Y. 1997); *In re matter of 17,325 Liters of Liquor*, 918 F.Supp.51 (N.D.N.Y. 1996).

The above principles have special significance in light of the fact the removed cases at issue were commenced by the State of Connecticut in a Connecticut state court. As the U.S. Supreme Court has noted, "considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 22, 103 S.Ct. 2841 (1983).

For the reasons set forth below, as well as in the State of Connecticut's memorandum in support of its motions to remand, this court should conclude that federal question removal jurisdiction does not apply to these cases. Accordingly, the motions for remand to state court should be granted.

II. DEFENDANTS HAVE FAILED TO IDENTIFY A FEDERAL QUESTION OVERCOMING THE STRONG PRESUMPTION IN FAVOR OF STATE COURT JURISDICTION.

In their brief, Defendants clearly acknowledge that the State of Connecticut's complaints contain no express federal claims. Defendants' Brief, p. 1. Similarly, the State of Connecticut's complaints do not challenge the validity of any federal law or regulation. Nevertheless, Defendants contend that the complaints present a substantial federal question. The core of Defendants' argument is that the interpretation and application of federal law concerning

Medicare is somehow an "essential" element of the State's causes of action.[1] This contention lacks merit.

A. THE STATE OF CONNECTICUT'S COMPLAINT DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

Whether federal jurisdiction exists is determined by the contents of the complaint. *See e.g. Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 118 S. Ct. 921 (1998). "[A] federal question must appear on the face of the complaint, and … the plaintiff may, by eschewing claims based on federal law, choose to have the case heard in state court." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99, 107 S. Ct. 2425 (1987).

A case only arises under federal law if federal law creates the cause of action or if "the vindication of a right under state law necessarily turns on some construction of federal law." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229 (1986) (*quoting Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 9 n. 5, 103 S. Ct. 2841 (1983)).[2]

In evaluating whether a federal question is an essential element of the state law claim for the purpose of determining whether or not federal jurisdiction exists, the court is to consider the nature of the plaintiff's claims, not the federal or state character of the underlying program. *See State of New York v. Lutheran Center for the Aging, Inc.*, 957 F. Supp. 393 (E.D.N.Y. 1997)

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[1]None of the removal papers filed by any of the defendants claim that Medicaid, which also forms part of the background of the State's claims, provides a basis for removal. Nor does Defendants' brief in opposition to the State of Connecticut's motions to remand. Indeed, Defendants explicitly point out *inter alia* at page 11 of their brief that the use of "AWP" by Medicaid is a function of state law. This is tantamount to Defendants' acknowledgement that the claims in these cases which involve Medicaid do not provide a basis for removal.

[2] The Court in *Merrell Dow* expressly cautioned that the quoted language from Franchise Tax Bd. "must be read with caution" to avoid sweeping into the ambit of the federal court cases in which the federal question is ancillary to the state claim. *Merrell Dow*, 478 U.S. at 809. "[T]he

(removal improper where claim based on state law requiring Medicaid provider to submit claims to Medicare before submitting them to Medicaid); *see generally*, *VenaCare U.S.A., Inc. v. Alternative Health Group Ltd.*, 1995 U.S. Dist. LEXIS 3736, at *5 (E.D. La. 1995) (copy attached) (although the Social Security Act was a pervasive statutory scheme, there were no substantial and disputed questions of federal law that were a necessary element of state law claims, warranting remand to state court).

B. FEDERAL COURTS HAVE HELD THAT CAUSES OF ACTION ASSERTED UNDER STATE CONSUMER PROTECTION LAWS DO NOT PROVIDE A BASIS FOR EXERCISING FEDERAL JURISDICTION.

This court should be mindful that the causes of action in these cases are all causes of action under the Connecticut Unfair Trade Practices Act ("CUTPA"). It is irrelevant to the nature of these causes of action that the harm to Medicare beneficiaries arises against the backdrop of the Medicare program. Price misrepresentations that cause consumers to over pay for drugs are straightforward consumer protection claims and are not different in any material way from misrepresentations that result in overpayments for any other type of consumer product. The claims would be the same if the consumers overpaid for vacuum cleaners based on misrepresentations of the price of the product. *See, e.g.*, *Regina Corp. v. FTC*, 322 F.2d 765 (3d Cir. 1963).

A state law claim does not "turn on some construction of federal law" merely because federal law clarifies or adds meaning to the state-created right being vindicated. *Merrell Dow*, 478 U.S. at 808. This court has previously concluded that causes of action asserted under state consumer protection laws claims did not "arise under" federal law. *State of Connecticut v. Comcast Cablevision of Middletown, Inc. and Comcast Corporation*, 3:94CV01104/

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mere presence of a federal issue in a state cause of action does not automatically confer federal-

3:94CV01105 (PCD) (D. Conn. – December 27, 1995); *Loussides v. America Online, Inc.*, 175 F.Supp.2d 211, 214 (D.Conn. 2001).

Defendants assert in their brief that the well-reasoned precedents of the Second Circuit in *Nordlicht v. New York Telephone Co.,* 799 F.2d 859 (2d Cir. 1986) and of this court in *State of Connecticut v. Philip Morris, Inc., et al.*, 3:96CV1491 (D. Conn. October 6, 1996), are distinguishable from the present case and therefore are inapposite. Although it is true that each of these cases was brought against a factual context distinct from the present case, the jurisdictional defect was the same: Simply put, the plaintiff's claims did not implicate any substantial federal question as an essential element of any cause of action warranting removal to federal court.

This court's decision in *Loussides v. America Online, Inc.*, 175 F.Supp.2d 211, 214 (D.Conn. 2001), involved a CUTPA cause of action premised upon violations of the federal Telephone Disclosure and Dispute Resolution Act ("TDDRA"). This court, in *Loussides,* clearly concluded that the claims asserted under state consumer protection statutes did not "arise under" federal statutes, even though the violation of federal law was the heart of the state law claim in that case. The right being vindicated in that case was a state law created right to be free from economic harm.[3] 175 F.Supp.2d at 214. This court noted:

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question jurisdiction. *Merrell Dow*, 478 U.S. at 813.

[3] The District Court in *Loussides* also noted: "Numerous other courts have found federal question jurisdiction lacking for claims under state consumer protection statutes alleging violations of federal consumer protection laws. *See, e.g., Kentucky ex rel. Gorman*, 881 F.Supp. 285 at 288-89; *Illinois ex rel. Burris v. Comcast Cable*, 1994 U.S. Dist. LEXIS 12802, 1994 WL 502008, *4-5 (N.D. Ill. Sept. 12, 1994); *Mid America Title Co. v. Chicago Title Ins. Co.*, 1989 U.S. Dist. LEXIS 4198, 1989 WL 39780 (N.D. Ill. April 18, 1989); *cf. Dean v. American General Finance, Inc.*, 191 B.R. 463, 466-67 (M.D. Ala. 1996) (finding no federal question jurisdiction when plaintiff's state law fraud claim was based on a violation of the FTC Act); *Austin v. American General Finance, Inc.* 900 F.Supp. 396, 398-99 (M.D. Ala. 1995) (same); *Vermont v. Oncar Communications*, 166 F.R.D. 313, 318 (D. Vt. 1996) (finding no federal question jurisdiction

> *The standards for determining CUTPA liability do not depend on federal law*. The factors to be considered in determining whether an act or practice violates CUTPA are: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers, competitors, or other businesspersons. *Hartford Elec. Supply Co. v. Allen-Bradley Co., Inc*. 736 A.2d 824, 843, 250 Conn. 334, 368 (1999). All three criteria need not be met to support a finding of unfairness. *See id*. A violation of CUTPA may be established by showing either an actual deceptive practice or a practice amounting to a violation of public policy. *Web Press Services Corp. v. New London Motors, Inc*., 525 A.2d 57, 64, 203 Conn. 342, 355 (1987).

Loussides v. American Online, Inc., 175 F.Supp.2d 211, 213 n.2 (D.Conn. 2001) (emphasis added)

It was clear to this court in *Loussides* that: "Misleading representations can constitute deceptive acts or practices under CUTPA. See *Southington Sav. Bank v. Rodgers*, 668 A.2d 733, 736, 40 Conn. App. 23 (1995). Accordingly, plaintiffs' reliance on the alleged violation of the [federal] TDDRA is not essential to their success on the CUTPA claim." 175 F.Supp.2d at 214. This conclusion led this court in *Loussides* to remand the case to state court. Other federal courts have reached the same conclusion in litigation arising under state consumer protection laws. Defendants have not articulated a compelling reason for a different result here.

D. THAT MEDICARE FORMS THE BACKDROP AGAINST WHICH STATE LAW CLAIMS OF HARM TO MEDICARE BENEFICIARIES WILL BE EVALUATED DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION WARRANTING REMOVAL.

Defendants spend many pages of their brief describing the background and history of AWP being used as the basis for drug reimbursement rates under Medicare. The exhaustive history serves no apparent purpose other than to seek to distract this court from the real issue of jurisdiction presently before the court. In a struggle to identify a basis for removal, Defendants

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when complaint alleged as alternative bases for a violation of Vermont Consumer Fraud Act either violation of FCC guidelines or commission of unfair practices as defined by the state statute)." 175 F.Supp.2d at 214.

try to redirect the focus of these case from Defendants' own illegal conduct in violation of state law to the breadth and scope of the Medicare program. This court should not lose sight of the fact that the portion of the complaints involving Medicare beneficiaries allege *false reporting* of AWPs that results in significant harm to such beneficiaries. It is this harm that the State of Connecticut seeks to vindicate under state law in state court.

Defendants actually admit in their brief that there is a difference between AWP, the price that Medicare requires to be reported to determine the co-payments of Medicare beneficiaries, and the actual prices that Defendants pay to acquire these drugs. Defendants' Brief, p. 6. Incredibly, Defendants, while acknowledging this "spread", argue that there is nothing wrong with it. Even more incredibly, Defendants assert that federal law allows it. Defendants' lengthy argument (set forth in pages 5 – 10 of their brief) completely fails to identify any substantial federal issue by its description of the Medicare program.

The Medicare program's use of AWP in pricing is set forth in 42 C.F.R. §405.517, which provides, *inter alia*, that "[p]ayment for a drug is based on … 95 per cent of the national average wholesale price of the drug.…" Neither this regulation nor any other Medicare statute or regulation defines AWP. Nor does this regulation or any other Medicare statute or regulation dictate how defendants are to set the prices for their products. Certainly, federal law does sanction or justify Defendants' illegal price reporting practices in any way. Rather, it simply states that the Medicare program will use average wholesale price as the basis for reimbursing providers.

Clearly, a single sentence in a federal regulation stating that the Medicare program uses AWP cannot and does not create a substantial federal question warranting removal to federal court. Although Defendants try to cloak themselves in this regulation, and in the Medicare

program in general, neither this regulation nor the Medicare program itself regulate how the Defendants price their drugs. In fact, 42 C.F.R. § 405.517 does not require defendants to report the AWPs of their drugs nor does it even mention drug companies.[4] Rather it underscores the false and deceptive nature of Defendants' conduct in misrepresenting the prices of their drugs which is actionable under Connecticut law.[5]

The dispute here is not about *whether* AWP is or should be used, which is the subject of the federal regulation, but rather *how* the defendants illegally manipulate the AWP that is reported, as distinguished from their real average wholesale prices, for their own pecuniary gain. This issue does not in any way implicate the validity of any federal law or regulation. Similarly, the State of Connecticut is not attacking or disputing any federal law, regulation or standard. Defendants do not, and indeed cannot, cite to anything in federal law which requires or allows it to report inflated AWPs of their drugs. As Defendants acknowledge at page 10 of their brief, this case is about the legality of Defendants' *reporting* of the AWP for certain of their drugs.

The relief sought by the State would stop Defendants from fraudulently inflating its reported AWPs. It would not, however, in any way interfere with the Medicare program use of AWP as a component in its reimbursement mechanism or in any other way. Simply put, there is nothing in federal law that authorized Defendants to lie about their prices. Accordingly,

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[4]In fact, drug companies go to great lengths to ensure that their prices are not regulated by the federal government or anyone else. *E.g., Statement of Alan F. Holmer, President, Pharmaceutical Research and Manufacturers of America (PhRMA),* June 13, 2000, found at www. Phrma.org/press/newsreleases/2000-06-13.9.phtml (urging the rejection of "government price control bills in all their various forms.…).

[5] To look at just one example of this, Defendants actually make the shocking argument at page 14 of its brief that reporting inflated AWPs are justified because otherwise doctors would not make a sufficient profit. Drug companies are not allowed to manipulate drug reimbursement mechanisms so that the drug companies can unilaterally determine doctors profits in order to increase market shares for drug companies. Of course, the defendants fail to mention that doctors

Defendants' argument that the federal Medicare regulation concerning the use of AWP somehow federalizes the State's claims under state law is utterly without merit. *See McCallister v. Purdue Pharma L.P.*, 164 F.Supp.2d 783 (S.D.W.V. 2001) (rejecting drug companies' argument that consumer claims attacked federal law).

C. Defendants' Attempt To Characterize Some of Their Arguments in Defense of Their Improper Conduct as a Part of the Cause of Action Should be Rejected.

At best, Defendants' lengthy recitation of the history of the Medicare program presents an argument that may be raised as a defense to the claims in these cases. Despite their claims to the contrary, Defendants rely on their explanation of federal law as a defense to the State's allegations under state law that they have engaged in deceptive and fraudulent drug pricing practices. This they cannot do: It is well settled that a federal defense does not provide a proper basis for removal.

III. 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.

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

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also receive fees for administering chemotherapy drugs in addition to the windfall profits the

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.

IV. CONCLUSION.

For all of the foregoing reasons, as well as for the reasons set forth in the State's main brief in support of the motions to remand, this court should conclude that federal question removal jurisdiction is lacking. Accordingly, the motions to remand to state court should be granted.

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doctors receive due to the spread created by the defendants' artificially inflated AWPs.

CERTIFICATION

I hereby certify that a copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF MOTIONS FOR REMAND TO STATE COURT was mailed in accordance with Fed.R.Civ.P. 5(b) on this 2nd day of May, 2003, first class postage prepaid to:

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