

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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People of the State of New York, :
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 Plaintiffs, :
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 v. : Case No. 05-cv-0872 (NAM/DRH)
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 Pharmacia Corp., :
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 Defendant. :
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People of the State of New York, :
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 Plaintiffs, :
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 v. : Case No. 05-cv-0873 (NAM/DRH)
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 Aventis Pharmaceuticals Inc., :
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 Defendant. :
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People of the State of New York, :
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 Plaintiffs, :
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 v. : Case No. 05-cv-0874 (NAM/DRH)
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 GlaxoSmithKline, P.L.C., et al., :
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 Defendants. :
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MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF'S MOTIONS TO REMAND

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PRELIMINARY STATEMENT

Plaintiff, the People of the State of New York, submits this memorandum of law in support of its motions, brought on by Order to Show Cause, to remand these cases to the Supreme Court of the State of New York, Albany County, pursuant to 28 U.S.C. § 1447.¹ This removal, defendants' *second* in these cases since they were filed in 2003, borders on the frivolous: It is untimely, and nothing has occurred to restart the clock; defendants cannot relitigate the removal issues they lost two years ago; and the recent Supreme Court case on which defendants rely did not change the law or confer subject matter jurisdiction over these actions. There is no need to delay further the resolution of the People's claims, and this Court should therefore decide plaintiff's motions and remand these cases to state court.

INTRODUCTION

The People of the State of New York, by the Attorney General, initiated virtually identical actions in February 2003 in the New York Supreme Court, Albany County, against three pharmaceutical manufacturers, Pharmacia Corporation, Aventis Pharmaceuticals Inc. and GlaxoSmithKline, P.L.C.² Defendants removed each case to federal court in March 2003. The

¹Plaintiff has submitted an identical memorandum of law in support of its motion to remand each of the above-captioned cases. The Court consolidated these actions for pre-trial purposes. (The stipulation, so-ordered on August 2, 2005, is attached as Exhibit D to the Affirmation of Matthew Barbaro ["Barbaro Aff."].)

²In *People of the State of New York v. GlaxoSmithKline, P.L.C., et al.*, the only remaining defendant is SmithKline Beecham Corp. [Order, June 1, 2004. Exhibit KK to Barbaro Aff.]

three cases were transferred to an on-going multidistrict litigation in the District of Massachusetts before the Honorable Patti B. Saris (“MDL”), which remanded them on September 30, 2003. Each defendant has again removed its case to this Court stating that it relies on the same grounds asserted for the initial removal and citing only an intervening Supreme Court decision, *Grable & Sons Metal Prod., Inc. v. Darue Engineering, Inc.* (“*Grable*”), 545 U.S. ___, 125 S. Ct. 2363 (June 13, 2005), as the information from which “it [could] first be ascertained that the case is one which is or has become removable.” 28 U.S.C. § 1446(b). Between the original remand and the instant removal, the state court dismissed three of plaintiff’s claims, leaving two intact, thus presenting this Court with a narrowed set of facts that support the two remaining claims.

As of the date of the current removal, plaintiff’s only remaining claims assert that the defendant pharmaceutical manufacturers engaged in deceptive practices in violation of New York General Business Law (“GBL”) § 349 and in repeated and persistent fraud in violation of New York Executive (“Exec.”) Law § 63(12). The complaints’ factual allegations that establish the elements of these claims are that each defendant reported false commercial information that it knew would be used to determine the amount various groups spent for the defendant’s drugs. The complaints cite Medicare beneficiaries and the New York Medicaid and EPIC (Elderly Pharmaceutical Insurance Coverage) programs as payers whose drug costs were inflated by defendants’ illegal conduct. Plaintiff’s actions seek injunctive relief to end defendants’ deceptive and fraudulent practices, as well as restitution for specified groups of victims, civil penalties and damages.

Defendants’ removal of these cases is completely without merit. First, the Supreme Court’s decision in a wholly unrelated case is not an “order or other paper” that can trigger removal years after the summons and complaint were served. Second, defendants’ removal is

untimely because they assert no new grounds, and the second removal is nothing more than a feeble attempt to obtain judicial review of the earlier decision rejecting their arguments, a type of review Congress has specifically barred. 28 U.S.C. § 1447(d). Third, plaintiff's state-law claims do not raise any federal questions, substantial or otherwise. Finally, the Court does not have "arising under" jurisdiction over plaintiff's state-law deceptive practices claims because such jurisdiction is inconsistent "with Congress' intended division of labor between state and federal courts." *Grable*, 125 S. Ct. at 2371. Defendants are wrong on both their procedural and substantive arguments, and the Court must remand these actions.

PLAINTIFF'S CLAIMS

The Court's judgment of whether plaintiff's state-law claims raise a substantial federal question must be based on the complaints as they existed on the date of removal, which was July 13, 2005, and on the factual allegations that support these claims.³ *E.g.*, *Metro Ford Truck Sales*, 145 F.3d 320, 326-27 (5th Cir. 1998); *United Food & Commercial Workers Union, Local 919, AFL-CIO v. Centermark Properties Meriden Square, Inc.* ("*United Food and Commercial Workers*"), 30 F.3d 298, 301 (2d Cir. 1994). This is not to suggest that any of plaintiff's original claims gave rise to federal jurisdiction, which they did not. Additionally, defendants have asserted federal "arising under" jurisdiction only with respect to the claim for restitution for Medicare beneficiaries (not for the Medicaid or EPIC programs). Plaintiff, therefore, addresses

³On June 1, 2004, the state Supreme Court, dismissed the claims asserted under the following: N.Y. Social Services Law § 145-b and Exec. Law § 63(12) for obtaining Medicaid or EPIC funds by false statements; 18 N.Y.C.R.R. § 515.2(b)(5) and Exec. Law § 63(12) for Medicaid kickbacks and fraud; and Penal Law § 180.00 and Exec. Law § 63(12) for commercial bribery. (Exhibit F to Barbaro Aff.) Yet, in their Notices of Removal, defendants recited all of the claims and types of relief originally included in plaintiff's complaint and cited factual allegations that are not essential elements of the two claims that remain in these cases.

only its claims for deceptive practices and persistent and repeated fraud under GBL § 349 and Exec. Law § 63(12) as they affect Medicare beneficiaries.

Plaintiff alleges that each defendant reports pricing information to national drug price publishing services (collectively “price reporting services”). The price reporting service then publishes an average wholesale price for each drug by adding a standard markup to the pricing information the defendant transmitted to it. Defendants are fully aware of how their pricing information is used to determine the published average wholesale price and that this published average wholesale price is used to reimburse for the cost of the drug by various health care systems, including Medicare Part B (“Medicare”). (Complaints: Pharmacia, ¶¶ 15-17, 19; Aventis and SmithKline Beecham (“GSK”), ¶¶ 15-18, 20. Exhibits A, B and C to Barbaro Aff.)

Medicare Part B is a voluntary federal health insurance program. It covers a small number of drugs provided on an out-patient basis, principally those administered by physicians during an office visit to treat cancer. Until recently, the federal Medicare statute, which defendants assert creates a federal question in these cases, specified that health care providers and pharmacies would be reimbursed for the cost of purchasing covered drugs at the lower of the actual acquisition cost or 95 percent of average wholesale price. 42 U.S.C. § 1395u(o). (This section of the Medicare statute as it existed when the complaints were filed is attached as Exhibit G to the Barbaro Aff.) Medicare beneficiaries pay 20 percent of the reimbursement amount as co-insurance. (Complaints: ¶¶ 8-10.)

Plaintiff’s complaints allege that each defendant reports pricing information to the price reporting services that “bears no relationship either to the price middlemen pay [the defendant] or to the price physicians, other healthcare providers and pharmacists actually pay to purchase these drugs. . . . [Each defendant] reports these false, misleading and deceptive amounts which it knows

will be used to determine a false, misleading and deceptive average wholesale price.”⁴

(Complaints: Pharmacia, ¶ 21; Aventis and GSK, ¶ 22.) When private Medicare carriers use the false, misleading and deceptive published average wholesale prices to calculate the reimbursement amount for defendants’ Medicare-covered drugs, individual beneficiaries, who pay 20 percent of the inflated amount, become victims of the defendants’ deceptive and fraudulent reports of pricing information.

The plaintiff does not need to show actual deception, reliance or injury to prove a violation of GBL § 349 or Exec. Law § 63(12). (See discussion *infra* at 16-17.) It only needs to show that the defendants’ reports of wholesale pricing information to the price reporting services do not reflect or even approximate the actual prices paid to wholesalers. These claims focus on whether the pricing information defendants report undermines an “honest market place” where “trust,” and not deception, prevails, not on the impact this information has on those who use it. *E.g.*, *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.* (“*Oswego Laborers*”), 85 N.Y.2d 20, 26 (1995); *People ex rel. Spitzer v. Telehublink Corp.*, 301 A.D.2d 1006, 1010 (3d Dep’t 2003).

DEFENDANTS’ REMOVAL NOTICES

Defendants served their notices of removal on July 13, 2005, nearly two-and-a-half years after they were served with the summonses and complaints in these actions. This is the second time defendants have removed these three actions, the first ending in a remand based on a lack of subject matter jurisdiction. (MDL Order entered September 30, 2003, Exhibit H to Barbaro Aff., relying on MDL Order entered June 11, 2003, remanding Minnesota’s cases, Exhibit I to Barbaro

⁴The ellipsis denotes an allegation that the defendants “knowingly” make these reports. Intent is not an element of a GBL § 349 or Exec. Law § 63(12) claim, see discussion *infra* at 16-17. It is, however, an element of some of the dismissed claims.

Aff.) Each defendant states in its removal notice that it premised the prior removal “on the same grounds as it has done so here.” (Notices of Removal (2005): ¶ 5, attached as Exhibits J, K and L to Barbaro Aff.) As defendants acknowledge, the only newly discovered information since the cases were remanded is the Supreme Court’s recent *Grable* decision. This unrelated decision does not support removal now or ever.

In both 2003 and 2005, defendants asserted 29 U.S.C. § 1441, *et seq.* as the basis for removal, referring only to “arising under” jurisdiction. 28 U.S.C. § 1331. Although the complaints allege only state-law causes of action, defendants incorrectly argue that the state-law claims raise “substantial” federal questions in that the state-law fraud claims asserted on behalf of Medicare beneficiaries necessarily depend on an interpretation of “average wholesale price” under the federal Medicare law and regulations.

Defendants specifically assert that Judge Saris erred in remanding these cases the first time because, based on the First Circuit’s interpretation of *Merrell Dow Pharmaceuticals, Inc. v. Thompson* (“*Merrell Dow*”), 478 U.S. 804, 106 S. Ct. 3229 (1986), she premised her order entirely on the absence of a federal private right of action to enforce the Medicare statute. (Notices of Removal: Pharmacia and GSK, ¶ 10; Aventis, ¶ 6.) Defendants then incorrectly state that *Grable* held that state-law claims which raise a substantial federal question can be removed “*regardless*” of whether there is a federal private cause of action and that this ruling is in direct conflict with the decision in *Merrell Dow*. (Notices of Removal: Pharmacia and GSK, ¶ 11; Aventis, ¶ 7. Emphasis added.)

Defendants have missed the mark on every point they need to establish to justify removal, and this Court does not have subject matter jurisdiction over these actions.

ARGUMENT

BECAUSE THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OF THE PLAINTIFF'S CLAIMS, THESE CASES MUST BE REMANDED TO NEW YORK STATE COURT.

Federal courts are courts of limited jurisdiction, and the party asserting jurisdiction -- the defendant in this case -- has the burden of establishing subject matter 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*, 30 F.3d at 301. The defendant, therefore, must overcome the presumption that this matter is properly in state court, and any questions concerning the existence of federal jurisdiction must 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). Federal removal statutes, moreover, are strictly construed. *Macro*, 180 F. Supp. 2d at 431 (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941)); *State 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).

There are especially compelling reasons to take a cautious approach to finding federal-question jurisdiction in the instant cases, which were initiated by the Attorney General of the State of New York on behalf of the People of the State. The Supreme Court has stated that, “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* (“*Franchise Tax*”), 463 U.S. 1, 22, 103 S. Ct. 2841 (1983). No rule creates a basis for federal-question subject matter jurisdiction in these cases, let alone “demands” that the federal court retain jurisdiction.

A. Defendant’s Notice of Removal is Untimely

A Decision in a Subsequent Unrelated Case Is Not an “Other Paper” Under 28 U.S.C. §1446(b), and Therefore Defendants’ Removal Is Untimely.

Defendants’ second Notice of Removal is untimely pursuant to 28 U.S.C. § 1446(b), which requires a defendant to file a notice of removal within thirty days after the receipt of the initial pleading. For cases not initially removable, the statute provides an exception:

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . . .

28 U.S.C. § 1446(b) (emphasis added).

Relying on this provision, defendants set forth a tortuous argument as to why their removal is timely: defendants maintain that the decision in *Grable*, 125 S. Ct. at 2363, “makes clear that Judge Saris’ previous removal decision . . . was incorrect,” because, applying *Merrell Dow*, she remanded solely based on the absence of a federal cause of action in the Medicare statute. (Notices of Removal: Pharmacia and GSK, ¶¶ 11; Aventis, ¶ 7.) Defendants then reason that their second removal should be considered timely, arguing that *Grable*’s clarification of previous Supreme Court case law on federal question jurisdiction, particularly *Merrell Dow*, is an “other paper from which it may first be ascertained’ that this case is removable.” (Notices of Removal: Pharmacia and GSK, ¶¶ 11-12; Aventis, ¶¶ 7-8.) This argument fails on many levels, the primary reason being that numerous courts have held that a subsequent court decision in an unrelated case does not constitute an “other paper,” and thus is not a basis for removal.⁵

⁵Under defendants’ theory, removal would be timely for every case that was remanded for lack of § 1331 jurisdiction before the Supreme Court’s decision in *Grable*, as well as those cases currently pending in state court that were not removed in the first place because the federal

(continued...)

In *Johansen v. Employee Benefit Claims, Inc.*, 668 F. Supp. 1294 (D. Minn. 1987), for example, the plaintiffs brought a state court action for recovery of employee benefits. The defendants removed the action and asserted that the removal was timely under § 1446(b) because they had filed their petition for removal within thirty days of two Supreme Court decisions which allegedly made the plaintiffs' claims completely preempted by ERISA. *Id.* at 1295. The district court rejected their claim that the Supreme Court decisions constituted an “other paper” within the meaning of § 1446(b), and concluded that the defendants had not timely removed the action. *Id.* at 1296-97. The court explained that the phrase “or other paper” refers to documents generated within the state court litigation itself, and that this construction has been universally followed. *Id.* To hold otherwise, the court said, would “subject all state court litigation to the specter of impending interruption and a concomitant waste of judicial resources.” *Id.* at 1297 (*citing O'Bryan v. Chandler*, 496 F.2d 403, 412 (10th Cir.), *cert. denied*, 419 U.S. 986 (1974)).

Similarly, in *Hollenbeck v. Burroughs Corporation*, 664 F. Supp. 280 (E.D. Mich. 1987), the plaintiff filed an action setting forth a state-law claim of age discrimination, and the defendant removed the action approximately nine months later asserting that the claim was completely preempted by ERISA. *Id.* at 281. The defendant argued that it had timely removed the action because its claim of ERISA complete preemption had only been recently developed by a Supreme Court decision, and that such decision constituted an “other paper” under § 1446(b). *Id.* The court rejected the defendant's argument, reasoning that § 1446(b)'s “other paper” clause “conditions removability on voluntary actions of a plaintiff, rather than factors beyond a plaintiff's control.” *Id.* See also *Morsani v. Major League Baseball*, 79 F. Supp. 2d 1331, 1333 (M.D. Fla.

⁵(...continued)
statutes placed at issue by the state-law claims did not provide a private right of action.

1999) (§1446(b) refers only to an “‘other paper’ that arises within the case for which removal is sought. The plain language of the statute, referring to the ‘receipt by the defendant, through service or otherwise,’ implies the occurrence of an event within the proceeding itself.”); *Sclafani v. Ins. Co. of N. A.*, 671 F. Supp. 364, 365 (D. Md. 1987) (“other paper” does not include a subsequent court decision in an unrelated case defining the bases for removal (*citing AVCO Corp. (Lycoming Div.) v. Local 1010 of the International Union*, 287 F. Supp. 132 (D. Conn. 1968)); *Holiday v. Travelers Ins. Co. (“Holiday”)*, 666 F. Supp. 1286, 1289-90 (W.D. Ark. 1987) (two Supreme Court decisions did not constitute “other paper” because “other paper” was “meant to cover papers or actions of the party that appear in or are part of the proceedings in the case in which removal is sought but would not have been considered an amended pleading, order or motion.”)

Based on this overwhelming authority, a subsequent decision of a court in an unrelated case, such as *Grable*, is not an “other paper,” and therefore not a proper basis for removal.

The Cases Upon Which Defendants Rely Are Inapposite.

The cases cited by the defendants do not support their arguments. The only case cited by defendants as direct support, *Smith v. Burroughs Corp.*, 670 F. Supp. 740 (E.D. Mich. 1987), is anomalous. In *Smith*, the defendant removed plaintiff’s wrongful discharge action, arguing such removal was timely due to a decision by the Supreme Court that changed the law. *Id.* at 741. The court allowed removal, because, unlike the case at bar, the Supreme Court decision explicitly overruled the case that had previously forbidden removal. *Id.*

A subsequent decision from the Eastern District of Michigan refused to follow *Smith*, finding that the *Smith* case “stand[s] alone.” *Kocaj v. Chrysler Corp. (“Kocaj”)*, 794 F. Supp. 234, 237 (E.D. Mich. 1992) (the plain language of 28 U.S.C. § 1446(b) is that the “other paper” is

a paper in the state court action received by the defendant); *see also Phillips v. Allstate Ins. Co.*, 702 F. Supp. 1466, 1468, n.2 (C.D. Cal. 1989) (“there are not two lines of authority . . . [the *Smith* case] seems to stand alone.”) These courts explained that the error in *Smith* derived from its reliance on *Warren Bros. Co. v. Community Building*, 386 F. Supp. 656 (D.N.C. 1974), although *Warren Bros. Co.* did not deal with issues that were before the *Smith* court. *Kocaj*, 794 F. Supp. at 237 (*citing Phillips* 702 F. Supp. at 1468, n.2).

The only case cited as indirect support for defendants’ assertion that removal was timely is *Davis v. Time Ins. Co.*, 698 F. Supp. 1317 (S.D. Miss. 1988). The *Davis* decision held that the court could not remand plaintiff’s case until the plaintiff amended certain sections of its pleadings. *Id.* at 1323. In reaching this holding, the court discussed, in *dicta*, another case that had been removed, and noted that the judge in that case determined that subsequent case law changed the character of the instant litigation so as to make it a new suit. *Id.* at 1322. In the case at bar, *Grable* does not alter the character of the litigation in any way. At best, the *Grable* decision merely clarifies the holding of earlier Supreme Court case law. (See footnote 6, *infra.*) In addition, *Davis*, like *Smith*, has been rejected by other courts. *See Morsani*, 79 F. Supp. 2d at 1333 n.6 (declining to follow *Davis*, stating that a “compelling majority of courts, however, have not found the [Supreme Court decisions at issue] to constitute an ‘order or other paper’ pursuant to 28 U.S.C. § 1446(b)”)(citations omitted).

Defendants’ Second Removal Is Based On Grounds They Previously Asserted, and the MDL Court’s Rejection of These Arguments Is Not Reviewable.

In addition to the widely accepted principle that a subsequent court decision in an unrelated case does not constitute an “other paper,” defendants’ removals are flawed for a separate reason: defendants previously removed these cases, unsuccessfully, on the same grounds as they

assert in their current Notices of Removal and that decision cannot be reviewed. 28 U.S.C. § 1447(d).

Although defendants assert that the *Grable* decision is an “other paper from which it may first be ascertained” that there is a basis for removal, they also concede they are removing the case on the same grounds as they did before. (Notices of Removal: ¶ 5.) As a result, defendants cannot plausibly argue that *Grable* first alerted them to the possibility of removal, and they cannot take advantage of the exception in § 1446(b). Indeed, in support of their removal arguments, defendants have consistently relied on *Franchise Tax* in addition to *Grable*. They also relied on *Franchise Tax* in the previous removal, illustrating that their grounds for asserting federal jurisdiction have not changed.

Grable also cannot be considered the first indication of removability because it merely applies the holding of *Merrell Dow* to a quiet title action arising out of a federal tax seizure and sale; it does not create any new right to federal jurisdiction.⁶ See *In re Zyprexa Products Liability Litigation*, 2005 U.S. Dist. LEXIS 13204, *13-14 (S.D.N.Y. July 1, 2005) (*Grable* did not overrule *Merrell Dow*, and the Supreme Court “stated that *Merrell Dow* was not to the contrary of its holding in *Grable*, 125 S. Ct. at 2365 [sic]” 2369); see generally *Holiday*, 666 F. Supp. at 1289 (Supreme Court opinion clarifies ERISA law, it does not “create” new law).

Defendants are in effect seeking review of the previous removal decision, which they allege was “incorrect.” (Notices of Removal: Pharmacia and GSK, ¶ 11; Aventis, ¶ 7.) Such

⁶*Grable* demonstrated repeatedly that *Merrell Dow* did not hold that the absence of a federal cause of action in the federal statute in question necessarily precludes removal based on “arising under” jurisdiction. *Grable* also did not overturn *Merrell Dow*. E.g., 125 S. Ct. at 2370 (the Court in *Merrell Dow* “did not mean to make a federal right of action mandatory”); *id.* (“The Court [in *Merrell Dow*] saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat”); at 2371 (“*Merrell Dow*’s analysis thus fits within the framework of examining the importance of having a federal forum for the [federal] issue, and the consistency of such a forum with Congress’ intended division of labor between state and federal courts”).

review is unavailable to defendants. 28 U.S.C. § 1447(d). It is irrelevant whether Judge Saris was right or wrong in her decision to remand the case. Once a case has been remanded, a district judge is without power to take any further action. *In re La Providencia Dev. Corp.*, 406 F.2d 251, 252-53 (1st Cir. 1969). This is true no matter how erroneous the remand decision was. “The district court has one shot, right or wrong.” *Id.* at 253. “This is not only in the interest of judicial economy, but out of respect for the state court and in recognition of principles of comity. The action must not ricochet back and forth depending upon the most recent determination of a federal court.” *Id.* at 252.

The principles discussed in *La Providencia* have been applied to cases considering whether a defendant’s second removal is timely. In *Morsani*, 79 F. Supp. 2d at 1332, for example, the defendants attempted to remove the case a second time on the basis of a recent Supreme Court decision that rejected the thirty-day receipt rule upon which the first remand was based. The court disagreed, and held that the new court decision “neither revives a long-deceased removal right nor creates a new one.” *Id.* at 1334. The court also noted that:

A peculiar irony of the defendants' position is that they essentially ask this Court to revisit a prior order that was not reviewable on appeal. See 28 U.S.C. § 1447(d). The defendants claim to enjoy a resurrected right of removal notwithstanding the fact that, even if Judge Kovachevich had remanded incorrectly in 1993 (that is, contrary to the then-prevailing law), the defendants were without an opportunity to appeal and were irreparably remanded--right or wrong.

Id. at n.9.

Likewise, in *Combs v. American Red Cross*, Civ. No. 92-805-FR, 1992 U.S. Dist. LEXIS 17559 at *3 (D. Or. Nov. 16, 1992), the defendant removed the case for the second time, on the same grounds as it removed the case previously, relying on a Supreme Court decision that expressly granted the Red Cross the right to remove the case. The court held that a subsequent court decision was not an “other paper” for purposes of removal. *Id.* at *6. In addition, the

district court quoted favorably from a similar case in the same court, which recognized that the previous remand was successful, and “‘having once remanded this action, this court cannot now assert jurisdiction.’” *Id.* (quoting *Jones v. American Red Cross*, Civil No. 92-806-JE, 1992 WL 565224, at *3-5 (D. Or. Aug. 31, 1992)). Because remand orders based on 28 U.S.C. 1447(c) are unreviewable “on appeal or otherwise” under 28 U.S.C. 1447(d), the court held that the “‘second removal petition based on the same grounds does not ‘reinvest’ the court’s jurisdiction.’” *Combs*, U.S. Dist. LEXIS 17559, at *7 (citation omitted).⁷ Similarly, defendants in the case at bar cannot seek review of the previous removal decision in the guise of removing the case because the *Grable* decision allegedly creates some new right of removal.

B. Even If the Current Removal Is Procedurally Permissible, *Grable* Does Not Change the Standard for Federal Question Jurisdiction, and Remand Is Mandated.

If defendants surmount the procedural barriers to their removal of plaintiff’s cases, the Court must still remand them. Under *Grable* and *Merrell Dow*, “arising under” jurisdiction exists when a removed state-law claim raises a federal question that is “substantial,” but “only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331.” *Grable*, 125 S. Ct. at 2367.

Defendants have the burden of demonstrating each of these elements.

⁷ Other Red Cross cases have been decided differently than *Combs*, such as *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993), but *Doe* permitted removal on very narrow circumstances -- the post-remand Supreme Court decision that was the basis for the Red Cross’ second removal directly applied to the same defendants and included the same factual and legal issues. Indeed, this Supreme Court decision expressly stated that it applied to other pending cases to which the Red Cross was a party and authorized the Red Cross to remove any state-law action it was currently defending. *Id.* at 201-202. In such a situation, the Court of Appeals deemed the subsequent decision an order, not an “other paper.” *Id.*; see also *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 267 (5th Cir. 2001).

Plaintiff's Claims Do Not Raise a Federal Question

As plaintiff has limited itself to state-law causes of action, these cases can “arise under” the Medicare statute and confer jurisdiction on the federal court pursuant to 28 U.S.C. § 1331 only if “the vindication of a right under state law necessarily turn[s] on some construction of federal law.” *Merrell Dow* 478 U.S. at 808 (quoting *Franchise Tax*, 463 U.S. at 9). Plaintiff’s claim that defendants engaged in deceptive practices and repeated and persistent fraud in violation of GBL § 349 and Exec. Law § 63(12) do not depend on the construction of the Medicare statute.⁸

There is essentially only one published average wholesale price for each unique drug product, although it is reported by several publishers and can vary insignificantly across publications. This dollar amount is used by private and public payers and other entities (such as Pharmacy Benefit Managers). The complaints allege that New York Medicaid and EPIC, as well as Medicare, use published average wholesale price. And it cannot be disputed that other states use this standard for their health insurance programs. (*See, e.g.*, MDL Order remanding Minnesota’s case, Exhibit I to Barbaro Aff., at 6.)

If, as defendants suggest, the Court cannot determine whether they have engaged in deceptive and fraudulent practices without ascertaining what average wholesale price means in the Medicare statute, then equally valid questions are what the New York Legislature, the Minnesota Legislature and all other private and public entities that use average wholesale price for any purpose meant by this phrase when they adopted it. But this is untenable because *there is only one average wholesale price* for each unique drug product, and defendants *make only one*

⁸Defendants cite Judge Saris’ decision that a state cannot recover for its Medicare beneficiaries unless it proves the defendant inflated the average wholesale price as that term is used in the Medicare statute and regulations. (Notices of Removal: Pharmacia and GSK, ¶ 7; Aventis, ¶ 16.) The ruling has no significance to the instant cases because, unlike New York’s extant claims, Minnesota’s claims were not limited to ones in which intent, reliance and actual deception are irrelevant. See discussion immediately following this footnote.

representation that yields each published average wholesale price. Thus, under defendants' theory, its representation of pricing information to the price reporting services might be deceptive in Minnesota but not in New York even if the state causes of action have the same elements. This reasoning assumes that the understanding and reaction of the users of average wholesale price determine whether deception or repeated and persistent fraud exists. This is not true in New York.

It is well settled that GBL § 349 and Exec. Law § 63(12) do not require proof of reliance, actual deception or intent to defraud. *See, e.g., People v. General Electric Co., Inc.* (“*General Electric*”), 302 A.D.2d 314, 315, 756 N.Y.S.2d 520 (1st Dep’t 2003); *People v. Apple Health and Sports Club, Ltd.*, 206 A.D.2d 266, 267, 613 N.Y.S.2d 868 (1st Dep’t 1994), *appeal denied*, 84 N.Y.2d 1004 (1994); *State v. Ford Motor Co.*, 136 A.D.2d 154, 158, 526 N.Y.S.2d 637 (3d Dep’t 1988), *aff’d*, 74 N.Y.2d 495, 548 N.E.2d 906, 549 N.Y.S.2d 368 (1989); *Oswego Laborers*, 85 N.Y.2d at 26; *People v. Condor Pontiac, Cadillac, Buick and GMC Trucks, Inc.*, 2003 N.Y. Misc. LEXIS 881 at *12 (Sup. Ct. Greene Co. July 3, 2003). Instead of focusing on the effect a statement has on an individual, Exec. Law § 63(12) is violated if the act “has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud,” *General Electric*, 302 A.D.2d at 314, or “could be characterized as dishonest or misleading.” *E.g., People v. Concert Connection, Ltd.*, 211 A.D.2d 310, 320, 629 N.Y.S.2d 254 (2d Dept. 1995).⁹ A GBL § 349 claim requires a showing that the defendant has engaged “in an act or practice that is deceptive or misleading in a material way.” *General Electric*, 302 A.D.2d at 315; *Gaidon v. Guardian Life Ins. Co. of America*, 94 N.Y.2d 330, 344, 725 N.E.2d 598, 704 N.Y.S.2d 177 (1999).

⁹“Fraud” is defined by N.Y. Exec. Law § 63(12) as including “any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions.”

The focus of the plaintiff's claims is on the defendants' reports to price reporting services of wholesale prices that have no relationship to prices actually paid to wholesalers. These reports are commercial statements, the purpose of which is irrelevant to plaintiff's § 349 or § 63(12) claim,¹⁰ as are the expectations of the various organizations that use the average wholesale prices derived from defendants' reports. It does not require an interpretation of the Medicare statute (or any other contract or statutory provision that uses average wholesale price) to determine whether defendants' reports of pricing information "ha[ve] the capacity or tendency to deceive, or create[] an atmosphere conducive to fraud" (§ 63(12) standard) or are "deceptive or misleading in a material way" (§ 349 standard).¹¹ See *Finance and Trading Ltd. v. Rhodia S.A.* ("*Finance and Trading*"), 2004 U.S. Dist. LEXIS 24148, *21 (S.D.N.Y. November 30, 2004) (in remanding state common law tort claims based on misrepresentations made in prospectuses filed with the SEC, the court stated, "The right plaintiffs say they wish to vindicate is the right not to be lied to in a fashion that [creates the state-law cause of action], a right possessed by all New York residents, not the narrower right not to be lied to in connection with a securities transaction regulated by federal law."). Thus, plaintiff's remaining claims do not raise a federal question.

¹⁰Plaintiff's allegations that defendants inflated their average wholesale prices to create a spread and thereby increase their sales pertained to the commercial bribery claim, which was dismissed, not to the GBL § 349 and Exec. Law § 63(12) claims.

¹¹Defendants' reports to the price reporting services are no different than misrepresentations made about the price of any other consumer good. E.g., *Federated Nationwide Wholesalers Service v. FTC*, 398 F.2d 253, 257 (2d Cir. 1968) (misrepresenting that seller was offering merchandise for sale at "wholesale," "low wholesale," and "lowest wholesale" prices was a deceptive practice); *Banks v. Consumer Home Mortg., Inc.*, 2003 U.S. Dist. LEXIS 8230 at *40 (E.D.N.Y. Mar 28, 2003) (inducing plaintiffs to purchase property at an inflated price stated a claim for deceptive practices under GBL § 349); *Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 54, 760 N.E.2d 1274, 735 N.Y.S.2d 479 (2001) (selling homes at inflated prices constituted a deceptive practice under New York City's deceptive practices law); *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330 (1999) (misrepresenting the amount of premiums to be paid on life insurance policies stated a claim under GBL § 349); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963) (calling a price a "list price" is deceptive if no one ever paid it).

If Plaintiff's Claims Raise a Federal Question, It Is Not "Substantial."

Assuming, *arguendo*, defendants' erroneous view of plaintiff's claims prevails and the court finds it must interpret average wholesale price as used in the Medicare statute, the Court must still remand these cases. This question is not "substantial" as that term is used in determining "arising under" jurisdiction.

As noted above, in *Merrell Dow*, the Court held a federal question is "substantial" when "the vindication of a right under state law necessarily turn[s] on some construction of federal law." 478 U.S. at 808 (*quoting Franchise Tax*, 463 U.S. at 9). But in *Merrell Dow*, the Court warned that the quoted language "must be read with caution," *id.* at 809, so as to avoid sweeping into the federal court's ambit cases in which the federal question is ancillary to the state claim. Indeed, "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction," *id.* at 813, because 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" in order to create federal-question jurisdiction when none appears from the face of the complaint. *Franchise Tax*, 463 U.S. at 10-11 (emphasis supplied) (*quoting Gully v. First National Bank in Meridian*, 299 U.S. 109, 112 (1936)). *Grable* did not change these principles.

The claim in *Merrell Dow* alleged that the plaintiff had been injured by the defendant's violation of the misbranding prohibition of the federal Food, Drug and Cosmetic Act and that this breach of the federally created duty gave rise to state-law tort liability. *Grable*, 125 S. Ct. at 2370-71. The Court found that the federal interest in achieving a uniform interpretation of the obligations imposed on pharmaceutical manufacturers not to misbrand prescription drugs was insufficiently "substantial" to support federal jurisdiction over the state-law tort claim. It was undisputed in *Merrell Dow* that the trial court would have to interpret and apply the federal

standard for misbranding in order to determine whether the defendant had breached its duty, which only existed due to the federal statute.

The Second Circuit has applied this standard to find a substantial federal question that supports “arising under” jurisdiction only where “the state action simply provides the vehicle for ‘the vindication of *rights and . . . relationships* created by federal law.’” *Donovan v. Rothman*, 106 F. Supp. 2d 513, 517 (S.D.N.Y. 2000) (ellipsis in original, emphasis added) (*quoting W. 14th St. Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 193 (2d Cir. 1987)); *Finance and Trading*, 2004 U.S. Dist. LEXIS, at *19-20. The court must look at whether the state claim “is rooted in violations of federal law, which favors a finding that federal jurisdiction exists.” *D’Alessio v. New York Stock Exchange, Inc.* (“*D’Alessio*”), 258 F.3d 93, 101-102 (2d Cir. 2001) (federal jurisdiction found where state law claims based on conspiracy to violate federal securities law and failure to fulfill federal statutory duties). *See Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 54-55 (2d Cir. 1996) (no federal jurisdiction because the federal Exchange Act did not require the stock exchange to enforce the particular internal exchange rule at issue) (*see discussion of Barbara in D’Alessio*, 258 F.3d at 100-02); *see generally Phelan v. Life Ins. Co. of Georgia, Inc.*, 1995 U.S. Dist. LEXIS 4515 at *36 (S.D. Ala. 1995) (no federal jurisdiction where the duty to explain Medigap insurance coverage was created by the circumstances of the parties’ relationship, not the Social Security Act).

The complaints in the instant cases do not assert that defendants’ deceptive conduct violated any federal law, as was the case in *D’Alessio*. The federal “rights and . . . relationships” required by *Donovan* are similarly lacking. The Medicare statute imposes no obligation on defendants to report pricing information to the price reporting services or to anyone else. Nor does the federal statute create any relationship between the defendant manufacturers and the Medicare beneficiaries or the Medicare program itself concerning the reporting or meaning of

average wholesale price. As in *Merrell Dow*, there is no particularized federal interest in achieving a uniform federal interpretation of whether defendants' representations of pricing information to a private company are deceptive. Thus, under *Merrell Dow* and the Second Circuit's test, plaintiffs' claims do not raise a substantial federal question.

Allowing Removal in the Instant Cases Would Disrupt Congress' Intended Division of Labor Between Federal and State Courts.

Even if the instant cases raise a substantial federal question, which they do not, *Grable* requires the Court to make a separate inquiry into whether Congress intended federal jurisdiction to extend to the type of case that is before the court. 125 S. Ct. at 2367 (a negative finding on congressional intent is a "veto" to federal jurisdiction even if a substantial federal question exists). The congressional intent at issue is Congress' "judgment about the sound division of labor between the state and federal courts governing the application of § 1331." *Id.*; 125 S. Ct. at 2371 (the court must find "consistency of such a [federal] forum with Congress' intended division of labor between state and federal courts").

The Court in *Grable* began its analysis by emphasizing that the defendant "was entitled to remove the . . . action if [the plaintiff] could have brought it in federal district court originally, as a civil action 'arising under the Constitution, laws, or treaties of the United States.'" 125 S. Ct. at 2366 (citations omitted). For federal "arising under" jurisdiction to exist for removal purposes, it must also exist for "original filings." 125 S. Ct. at 2370.

To assess whether Congress intended to extend federal jurisdiction to a case that does not assert a federal cause of action, the court must look at the contextual clues that reveal whether Congress intended the federal courts to hear the type of claim in which the substantial federal question is embedded. 125 S. Ct. at 2370. The contextual clues cited by the Court in *Grable* are whether Congress provided a federal private cause of action to vindicate the federal right or

interest (which the plaintiff has foregone, possibly to select a state forum, which it is entitled to do, *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99, 107 S. Ct. 2425 (1987)), and whether the state remedies for violation of the federally created interest are preempted. 125 S. Ct. at 2370. As part of this analysis, the court must also evaluate how extending federal jurisdiction to the type of action at issue would affect the volume of cases filed originally or removed to federal court. 125 S. Ct. at 2370-71. The latter factor does not reflect a concern about opening the floodgates; it bears on whether the absence of a private right of action and preemption are significant considerations in the analysis of Congress' intent. 125 S. Ct. at 2370-71. It is unlikely that Congress intends to open the federal courthouse to a large number of cases traditionally heard in state court when it does not make that intention clear by creating a private federal cause of action.

The *Grable* decision focuses on the distinctions between the indicators of congressional intent in *Merrell Dow*, where Congress was found not to have intended federal jurisdiction to exist, and in *Grable* itself, where federal jurisdiction was found to exist. *Grable* characterized *Merrell Dow* as belonging to the category of tort cases involving "state claims resting on federal mislabeling and other statutory violations." 125 S. Ct. at 2370. See *Thomas v. Friends Rehab. Program, Inc.*, 2005 U.S. Dist. LEXIS 13762, *7 (E.D. Pa. July 11, 2005) (under *Grable*, a state-law negligence claim that cites a federal statute to establish a defendant's duty to the plaintiff [is] the classic example of what does *not* raise a federal question" (emphasis in original)). In *Merrell Dow*, there was no private right of action or preemption, and extending federal jurisdiction would "have heralded a potentially enormous shift of traditionally state cases into federal court," both through removal and as original filings. *Grable*, 125 S. Ct. at 2370-71.

Grable, on the other hand, involved a quiet title action that arose out of a federal tax-deficiency seizure and sale. In contrast to the large volume of tort actions the Court anticipated would be diverted to federal court in *Merrell Dow*, "it will be the rare state quiet title case that

raises a contested matter of federal law, [and] federal jurisdiction to resolve disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor.” 125 S. Ct. at 2368. The Court also noted a history of the exercise of federal jurisdiction in quiet title actions involving substantial federal questions. *Id.*

The instant cases are far closer to *Merrell Dow* than to *Grable*. There is no federal private right of action or preemption in the Medicare statute that would provide a remedy for the claims asserted in these actions. But the Court’s assessment of the “contextual clues” cannot end with the Medicare statute. The purpose of the analysis is to divine congressional intent concerning whether federal jurisdiction exists to hear a particular type of case. In *Merrell Dow* and similar cases, it was the “garden variety tort case” in which the duty that was allegedly breached arose out of federal law. *Grable*, 125 S. Ct. at 2370. The instant cases assert claims under state deceptive practices statutes that reach the same type of conduct and provide similar remedies to those available under the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45, et seq. The FTC Act is, therefore, a significant source of insight into whether Congress intended federal courts to hear deceptive practice claims in which the deceptiveness of the alleged conduct is affected by federal law (which, despite the defendants’ argument to the contrary, is not the case here).

The FTC Act neither provides a private cause of action¹² nor preempts state deceptive practices statutes like GBL § 349 or Exec. Law § 63(12).¹³ The absence of a private cause of

¹²*E.g.*, *American Airlines v. Christensen*, 967 F.2d 410 (10th Cir. 1992); *Sandoz Pharmaceuticals, Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222 (3d Cir. 1990); *Alfred Dunhill, Ltd. v. Interstate Cigar Co., Inc.*, 499 F.2d 232 (2d Cir. 1974); *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973); *Loussides v. America Online, Inc.*, 175 F. Supp. 2d 211 (D. Conn. 2001); *Cobos v. Adelphi University*, 179 F.R.D. 381 (E.D.N.Y. 1998).

¹³“State prohibitions of unfair or deceptive trade practices are not preempted *unless* they conflict (continued...)”

action and preemption are of great significance here because of the deluge of state deceptive practices cases that would be eligible to be brought initially, or removed, to federal court. Most states have “little FTC Acts,” like GBL § 349 and its companion Exec. Law § 63(12).¹⁴ Many of these statutes, including GBL § 349(h), provide a private right of action that can be brought by any injured consumer. And many of the claims brought under these little FTC Acts involve questions of federal law, some of them “substantial.” *See, e.g. Loussides v. America Online, Inc.*, 175 F. Supp. 2d 211, 214 (D. Conn. 2001) (“Numerous other courts have found federal question jurisdiction lacking for claims under state consumer protection statutes alleging violations of federal consumer protection laws.) It is, therefore, highly unlikely that Congress would have intended to allow state deceptive practices claims to be brought in federal court, even if they raise substantial federal questions, without providing a federal cause of action.

A court’s finding that Congress did not intend federal jurisdiction to extend to a type of case is a “veto” of such jurisdiction even when a substantial federal question exists. *Grable*, 125 S. Ct. at 2367. Based on the contextual clues that there is no federal private right of action or preemption, and that there is the portent of a huge shift of traditionally state court cases to the federal system, it is clear that Congress did not intend federal courts to hear little FTC Act cases like the three before this Court. This Court must, therefore, remand plaintiff’s cases to state court.

¹³(...continued)

with an express FTC rule. [Citation omitted.] Indeed, the Agency has long *encouraged* use of overlapping state deceptive practices statutes because problems in the marketplace exceed the Agency’s enforcement capabilities.” *United States v. Philip Morris, Inc.*, 263 F. Supp. 2d 72, 78 (D. D.C. 2003) (emphasis in original). *Accord, e.g., Kellogg Co. v. Mattox*, 763 F. Supp. 1369, 1380 (N.D. Tex. 1991); *Holiday Magic, Inc. v. Warren*, 357 F. Supp. 20, 28 (E.D. Wis. 1973), *rev’d on other gnds* 497 F.2d 637 (7th Cir. 1974). *See generally Motor Vehicles Mfgs Ass’n of US v. Abrams*, 899 F.2d 1315 (2d Cir. 1990) (New York Lemon Law is not preempted by FTC regulations).

¹⁴Executive Law § 63(12) is interpreted as being parallel to GBL § 349 and reaching the same types of conduct. *State v. Colorado State Christian College*, 76 Misc. 2d 50, 54, 482 N.Y.S.2d 497 (Sup. Ct. N.Y. Co. 1973).

C. The Court Should Decide Plaintiff's Motions Without Delay.

Defendants suggest that this Court need not decide plaintiff's remand motions, because, they argue, the case will be transferred to the MDL, and Judge Saris will again decide whether a federal court has jurisdiction over these actions. This is an improper suggestion in the absence of a motion to stay proceedings.

Even more to the point is the total vacuity of defendants' procedural and substantive arguments supporting removal. Their reasoning fails at every turn of the analysis, and there simply is no justification for again postponing, possibly for months, a decision on plaintiff's straightforward entitlement to a state forum. Defendants are not only shopping for a federal forum, they are shopping for a specific federal judge. The interplay between the requirements for federal jurisdiction and the unique elements of plaintiff's state-law claims, which do not include intent, reliance or actual deception, strongly favors an individuated consideration best conducted by this Court. The Court should not delay action on plaintiff's motions pending the outcome of defendants' attempt to once again transfer this case to the MDL.

D. The Plaintiff is Entitled to Costs and Expenses, Including Attorneys' Fees, Incurred Due to the Defendants' Removal of these Actions.

"An order remanding [a] case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). To award expenses, the Court need not find that the removal was undertaken in bad faith. *Morgan Guaranty Trust Co. of New York v. Republic of Palau*, 971 F.2d 917, 923-24 (2d Cir. 1992). The Court has substantial discretion in determining whether to award expenses and costs and may do so based on the lack of subject matter jurisdiction and the inappropriateness of the removal. *See Tenner v. Zurek*, 168 F.3d 328 (7th Cir. 1998); *Mattice v. ITT Hartford Ins. Group*, 837 F. Supp.

499 (N.D.N.Y. 1993); *see also Wallace v. Wiedenbeck*, 985 F. Supp. 288 (N.D.N.Y. 1998)
(proper case for award; Court found removal contrary to weight of authority).

Defendants' removal of these cases is wholly without merit. It violates the procedural requirements of 28 U.S.C. §§ 1446(b) and 1447(d) and does not assert even a colorable basis for federal subject matter jurisdiction in these cases. Plaintiff should not have twice been put to the expense -- and suffered the delay -- occasioned by the defendants' indefensible removal notices. This is, therefore, an appropriate case for the Court to require the defendants to pay the plaintiff's costs and expenses, including attorneys' fees, incurred in opposing the removal.

CONCLUSION

For the reasons set forth above, the plaintiff requests that this Court remand these actions to the Supreme Court of the State of New York, County of Albany; require the defendants to pay the plaintiff's costs and expenses, including attorneys' fees, incurred in connection with the removal and remand motion; and grant all other appropriate relief.

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August 4, 2005

Respectfully submitted,

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