

Plaintiff's remand motion should be denied. This lawsuit is one of dozens of pharmaceutical average wholesale price ("AWP") actions that have been pending since 2001. Many of those cases involve state law claims virtually identical to those asserted by plaintiff here. Beginning in 2002, the Judicial Panel on Multidistrict Litigation ("JPML") has transferred more than thirty such cases, including similar cases brought by other state attorneys general, to the Honorable Judge Patti B. Saris in Boston for consolidated and coordinated pre-trial proceedings in federal court there. *See generally In re: Pharmaceutical Industry Average Wholesale Pricing Litigation*, MDL 1456 (D. Mass.).

Like the many other AWP actions, this case also belongs in federal court. Plaintiff's state law claims seek recovery of certain Medicare-related payments made by the state's Medicaid program and on behalf of Wisconsin Medicare beneficiaries. These claims depend on the meaning of "AWP" under the federal Medicare statute and regulations, thus raising a substantial question of federal law that gives rise to federal jurisdiction. When this case was initially filed, defendants could not have removed this action in good faith because of a previous ruling by Judge Saris in a virtually identical case involving state law claims brought by other state attorneys general. *See State of Montana v. Abbott Labs.*, 266 F. Supp. 2d 250, 256 (D. Mass. 2003). Applying First Circuit precedent that was binding on her, Judge Saris ruled that even though state law claims like plaintiff's seeking recovery for co-payments on behalf of its Medicare beneficiaries present a substantial federal question, such claims were not removable under *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986), because the Medicare statute creates no private cause of action. *Montana*, 266 F. Supp. 2d at 256. Had defendants removed this case when it was filed, the JPML would have transferred the case to Judge Saris, and she would have been bound by the law in her circuit and her prior decisions to

remand the case. Seventh Circuit precedent similarly held that a state law claim based on federal law could not give rise to federal jurisdiction unless the federal statute created a private cause of action. *See Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994) (“Under *Merrell Dow*, therefore ‘if federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a “substantial” federal question.’”) (citation omitted).

In June, the Supreme Court rejected the First and Seventh Circuits’ interpretation of *Merrell Dow*, and held that a state law claim requiring the interpretation of a federal statute can create federal jurisdiction, even though the federal statute at issue does not create a private cause of action. *See Grable & Sons Metal Prods., Inc. v. Darue Eng’g. & Mfr.*, 125 S. Ct. 2363 (2005). The *Grable* decision thus eliminated the barrier to removing this case that existed in the First and Seventh Circuits. Within thirty days of receiving the *Grable* decision, defendants removed this and ten other similar cases pursuant to 28 U.S.C. § 1446(b), which allows actions that were not removable when originally filed to be removed within thirty days of receiving an “order or other paper from which it may first be ascertained that the case is one which is or has become removable.”

Plaintiff’s argument that removal was untimely should be rejected. The plain language of section 1446(b) and persuasive case law confirm that an intervening Supreme Court decision such as *Grable* constitutes an “order or other paper” that triggers the right to remove. Because defendants removed within thirty days of receiving the *Grable* decision, removal was timely.

There is similarly no merit to plaintiff’s alternative argument that removal should be denied because *Grable* made no change to controlling law. In holding that there is no “private cause of action” requirement for removal, *Grable* explicitly resolved a split in the circuits on this

issue. In doing so it eliminated the sole ground on which Judge Saris had remanded identical claims (and on which this Court would have been obligated to remand) and for the first time made the instant case removable.

Finally, plaintiff's state law claims fall squarely within this Court's federal question jurisdiction. Though emphasizing that it has pled "purely state law claims,"¹ plaintiff has clearly asserted claims that depend on the meaning of AWP under the federal Medicare law, thus presenting a substantial federal question that gives rise to federal question jurisdiction. Specifically, on behalf of its Medicare beneficiaries, plaintiff seeks to recover expenditures for Medicare Part B co-payments that were set on the basis of AWP. Judge Saris has already ruled that such state law claims require the interpretation of AWP under the federal Medicare statute, and thus present a federal question. *See Montana*, 266 F. Supp. 2d at 255. That conclusion is squarely in accord with the Supreme Court's recent decision in *Grable*. *See* 125 S. Ct. at 2368.

Although plaintiff's remand motion should be denied, defendants urge the Court to defer ruling on that issue to Judge Saris. In an order dated August 4, 2005, the Court directed the parties to complete their briefing on plaintiff's remand motion. Once that is completed, the Court will have before it two fully-briefed motions: plaintiff's remand motion, and defendants' motion to stay the Court's ruling on plaintiff's remand motion. In a decision that has been followed by many courts (including this one),² Judge Adelman outlined a three-step process for deciding whether to defer a decision on the remand motion and let the MDL court decide the jurisdictional issue. *See Meyers v. Bayer AE*, 143 F. Supp. 2d 1044 (E.D. Wis. 2001). This case

¹ State of Wisconsin's Memorandum in Support of Motion to Remand ("Pl. Remand Mem.") 1.

² *See Wisconsin v. Abbott Labs.*, Case No. 04-C-477-C, 2004 WL 2055717 (W.D. Wis. Sept. 9, 2004) (remanding instant case to state court based on lack of diversity jurisdiction).

fits precisely within the *Meyers* criteria for a stay: (i) defendants' jurisdictional argument is substantial and complex; (ii) there are ten other cases that present the identical issue; and (iii) the interests of judicial economy and consistency of decision will be served by permitting this case to go to the MDL court, and plaintiff will not be prejudiced by the brief delay involved in transfer.

STATEMENT OF THE CASE

A. Role of "AWP" Under Federal Medicare Statute for Drug Reimbursement

The federal Medicare program provides health insurance to individuals age 65 and older and to other qualifying individuals. *See* 42 U.S.C. §§ 1395-1395pp. The Medicare program is administered by the Center for Medicare and Medicaid Services ("CMS"), a branch of the Department of Health and Human Services ("HHS"). Congress has authorized the Secretary of HHS to promulgate regulations setting limits on the levels of costs that Medicare will reimburse. *See Montana*, 266 F. Supp. 2d at 252.

Part B of Medicare covers, *inter alia*, certain categories of outpatient drugs, including physician-administered drugs ("Covered Drugs"). *See* 42 U.S.C. § 1395k(a)(1). Part B generally covers 80 percent of the allowable amount for a particular medical service or pharmaceutical. 42 U.S.C. § 1395l(o). The beneficiary must cover the remaining 20 percent as a co-payment. Covered Drugs dispensed before January 1, 2004, were reimbursed at "the lower of the actual charge on the Medicare claim for benefits or 95 percent of the national average wholesale price of the drug or biological." 42 C.F.R. § 405.517(b); 42 U.S.C. § 1395u(o) (setting reimbursement rate at 95 percent for Covered Drugs "furnished before January 1, 2004"). *See also Montana*, 266 F. Supp. 2d at 252-53 (discussing relationship between federal

Medicare statute and AWP).³ Although the federal Medicare statute based reimbursements for Medicare Part B drugs on AWP for many years, neither the statute nor its implementing regulations defined the term or established a process by which AWP are set. *See Montana*, 266 F. Supp. 2d at 252-53.

The Medicaid program is a joint state-federal program that provides medical care, including in many cases coverage for prescription drugs, to a state's indigent population. *See generally* 42 U.S.C. §§ 1396-1396v. State Medicaid programs reimburse pharmacists and other providers for dispensing drugs. *See* 42 U.S.C. § 1396a(a)(54). State Medicaid programs also cover some of the health care costs of Medicare beneficiaries who also qualify for Medicaid benefits ("dual eligibles"). *See* 42 U.S.C. § 1396a(a)(10)(E). This assistance often includes covering part or all of the 20 percent co-payment that "dual eligible" individuals must pay for Medicare Covered Drugs. *See* 42 U.S.C. § 1396a(a)(10)(G). The amount of these co-payments thus depends on the meaning of the term AWP under the federal Medicare statute.

B. The Wisconsin Action

On June 3, 2004, the State of Wisconsin filed its Complaint in the Circuit Court for Dane County, against dozens of pharmaceutical manufacturers. On July 14, 2004, the defendants removed the action to the Court based on its diversity jurisdiction, the only basis for jurisdiction available in good faith to defendants at the time. *See* Part II, *infra*. On October 5, 2004, the Court remanded the action to the state court. On November 1, 2004, Plaintiff filed an amended complaint ("Amended Complaint").

³ As of January 1, 2005, the reimbursement formula for Medicare Part B Covered Drugs no longer depends on "AWP". *See* 42 U.S.C. § 1395u(o)(1)(C). For purposes of plaintiff's Complaint, the relevant reimbursement formula for Medicare Part B benefits was the one described above, which was in effect for drugs dispensed before January 1, 2004.

The Amended Complaint alleges that each defendant drug manufacturer caused Wisconsin's Medicaid program to overpay for pharmaceutical products by reporting inflated AWP and other pricing information on which Wisconsin's Medicaid program bases its reimbursement rates for prescription drugs. Am. Compl. ¶¶ 57-61. In particular, the Amended Complaint alleges that for Wisconsin Medicaid beneficiaries who are also qualified to receive federal Medicare benefits, Wisconsin Medicaid pays the Medicare beneficiaries' 20 percent co-payment under Medicare Part B, which until recently was based on AWP. *Id.* ¶¶ 62-66; *see also* 42 U.S.C. § 1395l(a); 1395u(o). Plaintiff further alleges that by reporting inflated AWP pricing information, each defendant has caused the Wisconsin Medicaid program to make inflated Medicare co-payments for dual eligibles. Am. Compl. ¶ 1 Plaintiff seeks to recover the amounts that it allegedly overpaid for such Medicare co-payments. *Id.* In addition, plaintiff alleges that defendants' reporting of inflated AWP caused Wisconsin's Medicare beneficiaries to make inflated Medicare Part B co-payments. *Id.* ¶¶ 1. Suing in its *parens patriae* capacity, plaintiff seeks to recover those allegedly inflated payments on behalf of its Medicare beneficiaries. *Id.* ¶¶ 1, 66, 74, 79, 83, 88. Plaintiff asserts claims for false advertising, deceptive practices, antitrust violations, medical assistance fraud, and unjust enrichment and seeks various legal and equitable remedies. *Id.* ¶¶ 76-97.

Defendants removed this case on July 13, 2005, within thirty days of their receipt of the Supreme Court's decision in *Grable*, which made this lawsuit removable for the first time. Pursuant to MDL Rule 7.5(e), defendants filed a Notice of Related Action ("Tag-Along Notice") with the JPML on July 15, 2005,⁴ designating this case as a related action to the other AWP

⁴ An amended tag-along notice was filed on July 18, 2005.

cases that have already been transferred to the AWP MDL. The JPML issued a conditional transfer order (“CTO”) on August 9.⁵ Absent objection, the CTO will become final and the case will be transferred to the AWP MDL fifteen days later on August 24. *See* MDL Rule 7.4.

C. The Multidistrict Litigation Proceeding

Plaintiff’s claims are virtually identical to claims brought in dozens of other AWP cases around the country – including cases brought by other states – that have already been transferred to the AWP MDL pending before Judge Saris. In April 2002, the JPML transferred sixteen then-pending AWP cases to Judge Saris for coordinated or consolidated pretrial proceedings because “[c]entralization of all actions . . . in the District of Massachusetts will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation [and] avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.” *See In re: Immunex Corp. Average Wholesale Price Litig.*, 201 F. Supp. 2d 1378, 1380 (J.P.M.L. 2002). Since April 2002, the JPML has transferred thirty-four AWP cases to Judge Saris.⁶

Among the actions that were transferred to the AWP MDL were four cases brought by the States of Minnesota, Montana and Nevada.⁷ Like the Wisconsin action, those cases alleged that the defendants violated state statutes and state common law by reporting inflated AWPs and thereby increasing the amount of Medicare Part B co-payments. Like Wisconsin, those states also sought to recover such payments on behalf of their Medicare

⁵ *See In re Pharma. Indus. Average Wholesale Price Litig.* MDL 1456, CTO-25 (J.P.M.L. Aug. 9, 2005) (Ex. 1).

⁶ *See generally* Defendants Memorandum in Support of Motion to Stay Consideration of Plaintiff’s Motion to Remand at 8 & n.7 (“Def. Stay Mot.”).

⁷ Nevada filed two separate suits, each substantively identical but against different defendants.

beneficiaries. All four cases were originally filed in state courts, but defendants removed them on the ground that the state law claims asserted raised a substantial federal question with respect to the meaning of AWP under the federal Medicare statute and regulations. *See Montana*, 266 F. Supp. 2d at 254-55.

Judge Saris found that state law *parens patriae* claims seeking to recover Medicare co-payments on behalf of a state's Medicare beneficiaries, such as those asserted by plaintiff here, present a federal question because they "require a determination of whether the AWPs reported by [defendant] comport with the meaning of AWP under the Medicare statute." *Montana*, 266 F. Supp. 2d at 255. Specifically, she concluded that "proof of a discrepancy between the AWPs reported by" defendants and "the meaning of AWP under the Medicare statute" is "an essential element" of plaintiffs' state law claims. *Id.* Judge Saris further observed that claims requiring "[t]he adjudication of ... the terms 'average wholesale price' in the Medicare statute" implicate an important federal interest because they "could have broad implications for Medicare reimbursements and co-payments." *Id.*

Despite her conclusion that state law claims that depend on the federal Medicare statute raise a federal question, Judge Saris ruled that removal of such claims was barred because that statute did not create a federal private cause of action. *See id.* at 256 ("Under *Merrell Dow*, where a state-law claim includes as a necessary element the violation of a federal statute, the federal statute must provide a private remedy for violation of that standard, for federal-question jurisdiction to obtain."). Judge Saris recognized that there was a split in the circuits over whether a statutory cause of action was a prerequisite to federal question jurisdiction. *See id.* at 256-57. Because the absence of a private cause of action under the Medicare statute was dispositive

under First Circuit precedent, Judge Saris remanded the Minnesota lawsuit.⁸ On a motion to reconsider, Judge Saris again ruled that she was bound by the First Circuit's interpretation of *Merrell Dow*. See *Minnesota v. Pharmacia Corp.*, 278 F. Supp. 2d 101, 103 (D. Mass. 2003).⁹

On June 13, 2005, the Supreme Court held in *Grable* that a federal statute need not create a private cause of action in order for a state law claim requiring the interpretation of that federal statute to give rise to federal jurisdiction. See 125 S. Ct. at 2370. (“*Merrell Dow* cannot be read ... [to convert] a federal cause of action from a sufficient condition for federal-question jurisdiction into a necessary one.”) (footnote omitted). *Grable* thus eliminated the reason Judge Saris had remanded the Minnesota action. Within thirty days of receiving the *Grable* decision, defendants removed this case and ten other similar AWP cases pending in courts around the country. All of these cases are awaiting transfer to the AWP MDL.¹⁰ Upon transfer to the AWP MDL, these cases will afford Judge Saris the opportunity to determine whether they are removable in light of the Supreme Court's subsequent decision in *Grable*.

⁸ Judge Saris found alternative grounds for federal jurisdiction in the Montana case and one of the Nevada cases. See *State of Montana v. Abbott Labs.*, 266 F. Supp. 2d 250, 257-60 (D. Mass. 2003). The other Nevada suit was remanded because one defendant did not timely consent to removal. *Id.* at 260-63.

⁹ Relying on these decisions, Judge Saris subsequently remanded seven suits brought by the States of Connecticut and New York. *State of Connecticut v. GlaxoSmithKline plc, et al.*, Civ. No. 01-12257-PBS (D. Mass. Sept. 30, 2003).

¹⁰ As defendants explained in their motion to stay proceedings on plaintiff's remand motion, ten district courts in prior AWP lawsuits issued stays and declined to rule on remand motions pending potential transfer to Judge Saris. See Def. Stay Mot. 8-9. There are special and compelling circumstances why Judge Saris, who has been handling the AWP litigation for more than three years, should be permitted to address the remand motion that has been filed in this case. Having already decided that state law claims to recover Medicare co-payments present a substantial federal question, Judge Saris is uniquely situated to decide whether under *Grable* there is federal jurisdiction in the recently removed cases. See *id.* at 10-12.

ARGUMENT

Removal is an important statutory right that Congress has expressly granted to defendants in specified classes of cases. Despite plaintiff's rhetoric about its right to choose its forum and "strict construction" of the removal statute, courts and commentators alike have recognized that "if the requirements of the removal statute are met, the right to remove is absolute." 16 James W. Moore, et al., *Moore's Federal Practice and Procedure* § 107.05 at 107-25 (3d ed. 2000); see also *Kortum v. Raffles Holdings Ltd.*, No. 01 C 9236, 2002 WL 31455994, at *3 (N.D. Ill. Oct. 30, 2002) ("Where removal is permissible, the defendant possesses an important statutory right to transfer the case to a federal forum."). Accordingly, a federal court should "be cautious about remand, lest it erroneously deprive a defendant of the right to a federal forum." *Hunter v. Greenwood Trust Co.*, 856 F. Supp. 207, 211 (D.N.J. 1992) (quoting 14A Charles A. Wright et al., *Federal Practice & Procedure* § 3721, at 218-19 (2d ed. 1985)). As we demonstrate below, plaintiff has not identified sufficient grounds to deny defendants their statutory right to a federal forum.

I. DEFENDANTS' REMOVAL WAS TIMELY BECAUSE THE SUPREME COURT'S DECISION IN *GRABLE* IS AN "OTHER PAPER" UNDER SECTION 1446(b).

Defendants timely removed plaintiff's action to federal court. Under the federal removal statute, a case that was not removable at the time it was filed can later be removed within thirty days of receiving an "order or other paper" from which it can first be ascertained that the case has become removable. See 28 U.S.C. § 1446(b). Plaintiff apparently agrees that this case was not initially removable, Pl. Remand Mem. 9, but contends that removal was untimely because the *Grable* decision did not qualify as an "order or other paper" that triggered defendants' right to remove. Specifically, plaintiff cites to authority holding that the term "order or other paper" in section 1446(b) is limited to orders and papers that are generated "within the

case for which removal is sought.” *Id.* at 4. However, both the plain language of section 1446(b) and persuasive case law construing the statute reject this view, and confirm that the *Grable* decision constituted an “order or other paper” that gave defendants an additional thirty days to remove this case. The contrary district court decisions from other jurisdictions on which plaintiff relies are neither authoritative nor persuasive and they should not be followed.

A. The Plain Language Of Section 1446(b) Confirms That A Supreme Court Decision Can Trigger A Defendant’s Right To Remove.

The plain language of Section 1446(b) supports defendants’ view and cannot be squared with the “order-or-paper-within-the-state-court-proceeding” limitation urged by plaintiff.

The relevant provision reads:

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*, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b) (second paragraph) (emphasis added).

By its terms, Section 1446(b) imposes two express limits on a defendant’s right to invoke this thirty-day removal provision after receiving an “order or other paper”: (i) the “order or other paper” must be one “from which it may *first be ascertained*” that the case has become removable, and (ii) the provision may not be invoked in a diversity case that has been pending for more than a year. *Id.* Both requirements are satisfied here. Though plaintiff contends otherwise, the Supreme Court’s decision in *Grable* was the first document from which it could be ascertained that this case was removable, as we detail in Part II below. And because removal is predicated on the presence of a substantial federal question, not diversity, the statute’s one-

year limitation in diversity cases does not apply. Defendants' removal notice was therefore proper under the plain language of the statute.

Beyond these two limits, the statute is silent about the circumstances in which non-removable actions may subsequently be removed. Plaintiff, however, would read into section 1446(b)'s express limitations a further *implicit* limitation that restricts the term "order or other paper" to one that was generated within the specific state proceeding to be removed. Pl. Remand Mem. 4. The short answer to this argument is that Congress did not write the statute that way. When a party's interpretation of a statute "depends upon the addition of words to a statutory provision which is complete as it stands, [a]doption of [that] view would require amendment rather than construction, and it must be rejected . . ." *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463 (1987).¹¹ Had Congress intended to limit the removal right in this way, it could have accomplished this simply by adding, after the words "order or other paper," the phrase "that is generated within the state court proceeding," or similar language. But Congress imposed no such limitation on this important statutory right, and the rule that the removal statute be construed narrowly does not give a court license to "reword the statute to make it read this way." *Sasser*, 126 F. Supp. 2d at 1376; see *17th Street Assoc. v. Markel Int'l Ins. Co.*, 373 F. Supp. 2d 584, ___ (E.D. Va. 2005) ("[F]ederal courts must not interpret removal statutes [] so strictly as to overwhelm the very right that they are intended to confer and the federal interests that they were designed to protect").¹² Doing so would be

¹¹ See *Sasser v. Ford Motor Co.*, 126 F. Supp. 2d 1333, 1336 (M.D. Ala. 2001) ("If Congress had wanted [the one-year limitation on removal of diversity cases in] § 1446(b) to be claim or party specific, it could have worded the provision to make it so. . . . Because Congress did not do this, the court should not reword the statute to make it read this way.").

¹² "The duty 'to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation.'" *17th Street Assoc. v. Markel Int'l Ins. Co.*, 373 F. Supp. 2d (continued...)

particularly inappropriate here, because where Congress enumerates express limitations on the scope of statutory language, as it did in section 1446(b), additional limitations should not be implied. *See generally* 2A Norman J. Singer, Sutherland Statutes and Statutory Construction §§ 47:11, 47:23 (6th ed. 2005).

B. Federal Courts Have Held That A Controlling Court Decision Can Trigger The Right To Remove Under Section 1446(b), And Have Not Accepted Plaintiff's View That An "Order Or Other Paper" Must Be Generated In The Underlying State Litigation.

Plaintiff's remand motion skims past the removal statute's language and instead focuses on a handful of (mostly dated) district court decisions construing the statute. *See* Pl. Remand Mem. 3-4. We explain in Part I.C. why the district court decisions cited by plaintiff are not persuasive. But we first address the central premise of plaintiff's timeliness argument. According to plaintiff, "*it is universally the rule that a new Supreme Court decision does not restart the removal period.*" *See* Pl. Stay Mem. 5 (emphasis added); *see also* Pl. Remand Mem. 4 ("Rejection of the notion that a recently decided Supreme Court decision triggers a new removal period has been universal."). That assertion misstates the law and is refuted by a number of decisions, including the two appellate decisions to consider the issue.

In a leading decision addressing this issue, the Third Circuit considered whether a defendant could remove a state court case under section 1446(b) within thirty days of receiving a copy of a Supreme Court decision in a different case that clarified, for the first time, that the state court case was removable. *See Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993).

Defendant Red Cross had initially removed the case based on a "sue or be sued" provision in its federal statutory charter, but the federal district court concluded that this provision did not create

584, ___ (E.D. Va. 2005) (quoting *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.)).

federal jurisdiction and remanded the case. A short time later, however, the Supreme Court held, in a different proceeding involving the Red Cross, that the “sue or be sued” provision in the Red Cross charter did in fact give rise to federal jurisdiction.¹³ Within thirty days of receiving the Supreme Court’s decision, the Red Cross removed the *Red Cross* case for a second time, arguing that the intervening Supreme Court decision was an “order” under section 1446(b). The Third Circuit agreed. It held that because the Supreme Court decision clarified that the *Red Cross* case was removable, that decision had triggered the defendant’s thirty-day removal clock under the second paragraph of section 1446(b), and removal based on the intervening Supreme Court decision was therefore proper. *Id.* at 202-03.

The Fifth Circuit has also decided “[t]he question whether a decision in an unrelated case can serve as the basis for removal under § 1446(b).” *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 266 (5th Cir. 2001). In *Green*, defendants sought removal on the ground that the lone non-diverse defendant had been fraudulently joined, but the federal district court remanded after ruling that the plaintiffs had a viable state law claim against the non-diverse defendant. After the remand, the Fifth Circuit ruled in a different case that the state law claim at issue was preempted by federal law – confirming, as the defendants had originally contended, that the case was in fact removable. Within thirty days of receiving that decision, the defendants removed the *Green* case for a second time on the ground that the intervening judicial decision was an “order or other paper” under section 1446(b). Adopting the Third Circuit’s reasoning in *Red Cross*, 274 F.3d at 267-68, the Fifth Circuit concluded that because the intervening decision from another case clarified, for the first time, that the *Green* case was removable, the defendants

¹³ See *American Nat’l Red Cross v. S.G.*, 505 U.S. 247 (1992).

had properly removed under section 1446(b) within thirty days of receiving that decision. *Id.* See also *Young v. Chubb Group of Ins. Cos.*, 295 F. Supp. 2d 806, 807-08 (N.D. Ohio 2003) (following *Red Cross* and *Green* in holding that an intervening decision in a different case is an order under section 1446(b)).

Red Cross and *Green* thus reject both premises of plaintiff's timeliness argument. First, they make clear that an "order or other paper" need not be generated in the underlying state proceeding in order to trigger the removal right under section 1446(b). Second, they confirm that an intervening judicial decision in a different case that renders a non-removable case removable can constitute an "order or other paper" under section 1446(b).

Plaintiff asserts that this case should be viewed differently because the defendants in *Red Cross* and *Green* were also parties to the intervening judicial decisions that triggered the removal right. See Pl. Stay Mem. 6 n.1; Pl. Remand Mem. 4. This fact does not undermine the point that *Red Cross* and *Green* completely reject the contention that the order or other paper must be generated in the suit that is removed. While the decisions in *Red Cross* and *Green* addressed the facts that were before them, where the parties were the same, those cases plainly establish that § 1446(b) is not confined to cases where the order or other paper is generated in the action that is removed, as plaintiff contends. *Red Cross* and *Green* instead demonstrate that an event outside the case that is removed can trigger the right to removal. Moreover, both courts made clear that the "same defendant" consideration was relevant only to their interpretation of the term "order," because "order" was the only term they were construing. See *Red Cross*, 14 F.3d at 201-02 ("we are construing only the term 'order' as set forth in section 1446(b)"); *Green* 274 F.3d at 268 (same). The two cases neither endorsed a "same defendant" limitation on the broader term "other paper," nor held that removal is inappropriate in a case like this, where the

intervening judicial decision removes the barrier to removal that existed at the time the case was filed.

Rather, as several district courts have confirmed, the phrase “order or other paper” applies in the circumstances present here, where a decision in an unrelated case permits a defendant to ascertain, for the first time, that a case has become removable. In *Davis v. Time Ins. Co.*, 698 F. Supp. 1317 (S.D. Miss. 1988), the court denied a motion to remand, noting that there is “no difference between a situation where an amended complaint adds a new federal question and one where a recent United States Supreme Court decision invigorates a pleading with federal character. In both instances, a federal basis is supplied where previously none was.” *Id.* at 1322 (quoting *Perkins v. Time Ins. Co.*, No. H87-101(W) (S.D. Miss. July 29, 1988)). Similarly, in *Smith v. Burroughs*, 670 F. Supp. 740 (E.D. Mich. 1987), the defendant removed a state court action after a Supreme Court decision in an unrelated case clarified that the claims were removable. Focusing on the plain language of the statute, the court observed that section 1446(b) “on its face indicates that it covers virtually any situation in which an action not initially removable later becomes removable.” *Id.* at 741. The court accordingly held that removal based on the intervening Supreme Court decision was proper.¹⁴ Likewise, in *Winningkoff v. American Cyanamid*, No. Civ. A. 99-3077, 2000 WL 235648 (E.D. La. Mar. 1, 2000), the court held that a defendant properly removed a case after the Louisiana Supreme Court clarified, in an unrelated

¹⁴ A different judge on the same court held otherwise in *Kocaj v. Chrysler Corp.*, 794 F. Supp. 234, 237 (E.D. Mich. 1992) (concluding that a document must be generated in the underlying state court action in order to give rise to removal under section 1446(b)). *Kocaj* reflects a disagreement between two co-equal judges on the same court concerning the interpretation of a statute. As demonstrated in the text, the rationale in the contrary *Kocaj* opinion was subsequently rejected by the Third and Fifth Circuits in *Red Cross and Green*, which held that the right to remove can be triggered by a decision in a different case. See also Section I.C, *infra*.

case, that the claims at issue were removable. Applying *Red Cross*, the court concluded that “the Louisiana Supreme Court’s decision . . . was an ‘order’ from which the Defendants first ascertained that the case was re-removable.” *Id.* at *4. In each of these cases, the removing defendant was not a party to the appellate case that opened the door to removal.

Although plaintiff disparages these cases as a misguided minority, they in fact are consistent with the two relevant appellate decisions in *Red Cross* and *Green*. Furthermore, they employed a straightforward, plain language approach that was faithful to the text of the statute to conclude that a controlling appellate decision in another case can constitute an “order or other paper” under section 1446(b). The premise of plaintiff’s timeliness argument – that “it is universally the rule that a new Supreme Court decision does not restart the removal period” – is fiction. Pl. Stay Mem. 5.

C. The Contrary District Court Decisions Relied On By Plaintiff Are Neither Authoritative Nor Persuasive.

Plaintiff relies on several district court cases from other jurisdictions in support of its argument that a controlling Supreme Court decision cannot be an “order or other paper” under section 1446(b). *See* Pl. Remand Mem. 3-4.¹⁵ Most of those district court decisions were decided without the benefit of the Fifth Circuit’s decision in *Green* and the Third Circuit’s decision in *Red Cross*. Because the reasoning of those earlier district court decisions has effectively been repudiated by the appellate decisions in *Red Cross* and *Green*, they should not be followed here.

¹⁵ Plaintiff cites four district court decisions in its brief, and then directs the Court to cases that are contained in a footnote of one of the four cited cases, some of which are not cited in plaintiff’s brief. *See* Pl. Remand Mem. 4. We address all of these cases.

First, the principal rationale underlying those district court decisions has been rejected by the Third and Fifth Circuit decisions that have addressed this issue. Most of the cited cases incorrectly imposed the extra-textual interpretation of section 1446(b) that an “order or other paper” must be generated within the underlying state court proceeding.¹⁶ As discussed above, that constricted reading finds no support in the text of the statute and is in direct conflict with the decisions in *Red Cross* and *Green*, which sustained removal on the basis of decisions that were not generated in the underlying state court proceedings. The district court cases to the contrary cited in plaintiff’s brief are neither authoritative nor persuasive and should not be followed.

Second, many of the district court cases relied on by plaintiff erroneously reasoned that only a “voluntary act” by a plaintiff can create a removal right under section 1446(b).¹⁷ The “voluntary/involuntary act” rule, as Wright & Miller explain, is a court-made rule of procedure in federal diversity cases:

¹⁶ See *Kocaj*, 794 F. Supp. at 237 (document must be “a paper in the state court action”); *Johansen v. Employee Benefit Claims, Inc.*, 668 F. Supp. 1294, 1296 (D. Minn. 1987) (endorsing view that document must be “generated within the state court litigation itself”); *Gruner v. Blakeman*, 517 F. Supp. 357, 361 (D. Conn. 1981) (the phrase order or other paper “relates only to papers filed in the action itself”) (internal quotation omitted); *Lozano v. GPE Controls*, 859 F. Supp. 1036, 1038 (S.D. Tex. 1994) (section 1446(b) applies only to “papers that are generated within the specific state proceeding which has been removed”); *Avco Corp. v. Local 1010 of the Int’l Union*, 287 F. Supp. 132, 133 (D. Conn. 1968) (removal right only triggered by “papers filed in the action itself”); *Morsani v. Major League Baseball*, 79 F. Supp. 2d 1331, 1333 (M.D. Fla. 1999) (same); *Ervin v. Stagecoach Moving & Storage*, No. Civ. A. 3:04 CV 0535-D, 2004 WL 1253401 (N.D. Tex. June 8, 2004) (“[t]he ‘other paper’ provision of § 1446(b) has been applied by many courts only to papers filed in the case”) (internal quotation omitted).

¹⁷ See *Hollenbeck v. Burroughs Corp.*, 664 F. Supp. 280, 281 (E.D. Mich. 1987) (section 1446(b) “conditions removability on voluntary actions of a plaintiff”); *Holiday v. Travelers Ins. Co.*, 666 F. Supp. 1286, 1290 (W.D. Ark. 1987) (endorsing view that “the change of circumstances rendering the case removable must be something that was voluntarily done by the plaintiff”) (citation omitted); *Morsani*, 79 F. Supp. 2d at 1333 & n.5.

Under the “voluntary/involuntary” rule, if a jurisdictional spoiler is dismissed from the case by the voluntary act of the plaintiff then the case becomes removable, but if the dismissal is a result of either the defendant’s or the court’s acting against the wish of the plaintiff then the case cannot be removed.

19A Charles A. Wright et al., *Fed. Prac. & Proc. Juris. App. Fed. Jud. Code Revision* pt. III Rptr. note C (2004). The “voluntary/involuntary” rule has no application here. As the reference to “dismiss[al]” of a “jurisdictional spoiler” implies, this rule applies only to diversity cases, not to cases such as this where federal jurisdiction is based on the presence of a federal question. Applying that rule here would in any event be flatly inconsistent with *Red Cross* and *Green*, where the intervening judicial decisions in other cases that provided the basis for removal under section 1446(b) were in no respect the product a “voluntary act” by the plaintiffs in the state cases being removed.

Finally, several of the cases cited by plaintiff are distinguishable because they involved grounds of decision that are not present here. For example, some cases addressed situations where removal was untimely because the claims at issue were removable when initially filed.¹⁸ In those cases, removal was untimely because the claims were not “initially non-removable” as is required to invoke section 1446(b). Here, in contrast, this case was not removable when it was filed, due to the pre-*Grable* precedent in the First and Seventh Circuits. In another case, a court acknowledged the view held by some courts that “a decision of the United States Supreme Court in an unrelated case constitutes or may constitute an ‘order or other

¹⁸ See *Holiday*, 666 F. Supp. at 1289 (“[T]his court believes that the cases at bar were originally removable. Therefore, defendant’s petitions for removal are untimely”); *Scalfani*, 671 F. Supp. at 365 (holding that nothing prevented defendant from removing on the same ground when the complaint was first filed); *Lozano*, 859 F. Supp. at 1038 ([D]efendants were “clearly aware” of the disputed ground for removal “when they were initially served with the complaint.”).

paper’ for purposes of determining when a case becomes removable,” but concluded that an FCC decision could not trigger a new removal right.¹⁹ Still other decisions cited by plaintiff concluded that the Supreme Court decision at issue did not change or clarify the law in a way that made the case removable.²⁰ The Supreme Court’s recent decision in *Grable*, however, made clear that Judge Saris’s previous removal decision in the *State of Montana* action had been incorrect.

II. **GRABLE PROVIDED THE FIRST GOOD FAITH BASIS TO REMOVE THIS CASE.**

Plaintiff asserts that even if the *Grable* decision is an “order or other paper” under section 1446(b), removal was still improper because *Grable* did not change controlling law or “undermine[]” the Supreme Court’s holding in *Merrell Dow* or Judge Saris’s holding in *Montana*, Pl. Remand Mem. 5-9, implying that it is not a paper “from which it may first be ascertained that the case is one which is or has become removable.” 42 U.S.C. § 1446(b). According to plaintiff, “*Grable* is simply a footnote to *Merrell Dow*” and holds “only that in [the] certain unique and limited context[]” of a state law quiet title action that turned on the

¹⁹ See *Metropolitan Dade County v. TCI TKR of S. Florida, Inc.*, 936 F. Supp. 958, 959 (S.D. Fla. 1996).

²⁰ See *Hollenbeck*, 664 F. Supp. at 281-82 (ruling that plaintiff’s complaint did not raise a removable federal claim even when construed under the new Supreme Court decision at issue). Cf. *Morsani*, 79 F. Supp. 2d at 1334 n.8 (stating that the intervening Supreme Court decision “creates no new or renewed right or removal” but rather “refines a method for the computation of time pursuant to Section 1446(b)”). The *Morsani* footnote, which plaintiff directs the Court to, see Pl. Remand Mem. 4, also references an appellate decision that was decided on different grounds entirely. See *Morsani*, 79 F. Supp. 2d at 1333 (citing *O’Bryan v. Chandler*, 496 F.2d 403 (10th Cir. 1974)). However, the U.S. Department of Justice filed an amicus brief in that case arguing that an unrelated Supreme Court decision, handed down while *O’Bryan* was pending, rendered the case removable under the “order or other paper” provision of section 1446(b). See *id.* at 408. That is precisely the point that defendants make here. Finally, *Hamilton v. United Healthcare of Louisiana*, Nos. Civ. A 01-585, 03-2212, 03-2213, 2003 WL 22779081 (E.D. La. Nov. 21, 2003) improperly extended the “same defendant” limitation on the term “order” and applied it to the separate term “other paper.”

interpretation of federal tax law, “the absence of a federal remedy does not preclude removal.” *Id.* 8; *see also id.* at 6-8 (arguing that *Grable* should be limited to its facts). The Supreme Court, however, did more than simply consider whether federal jurisdiction existed over a state law quiet title action; it granted certiorari in *Grable* “on the jurisdictional question alone” in order to “resolve a split among the Courts of Appeals on whether *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, always requires a federal cause of action as a condition for exercising federal-question jurisdiction.” *Grable*, 125 S. Ct. at 2366.

In light of the unique posture of the instant case, the Supreme Court’s resolution of this jurisdictional question – over which the circuits were split – created the new ground for removal here. Plaintiff misleadingly describes Judge Saris as having held that “there was no independent federal cause of action and that the possible need to interpret the federal Medicaid [sic] regulations, without more, did not provide federal question jurisdiction.” Pl. Remand Mem. 6-7. In fact, Judge Saris ruled that state law claims such as plaintiff’s that depended on the meaning of AWP under the Medicare statute presented a federal question. In considering earlier remand motions of three states involving virtually identical claims as those brought by plaintiff here, Judge Saris held that a “discrepancy between the AWP’s reported by [defendants] and the meaning of AWP under the Medicare statute” was an “essential element” of the state law claims and thus “present[ed] a federal question.” *Montana*, 266 F. Supp. 2d at 255.

Yet despite the presence of a federal question, Judge Saris ruled that these claims did not support federal jurisdiction because she was constrained by First Circuit precedent that “[u]nder *Merrell Dow*, where a state-law claim includes as a necessary element the violation of a federal statute, the federal statute must provide a private remedy for violation of that standard, for federal-question jurisdiction to obtain.” *Id.* at 256 (citation omitted); *see id.* at 255-56

(explaining that the court was “bound by the Supreme Court’s decision in *Merrell Dow*” and First Circuit decisions applying *Merrell Dow*). In denying defendants’ motion for reconsideration, Judge Saris reiterated her view that *parens patriae* claims by a State to recover certain co-payments on behalf of its Medicare beneficiaries were properly remanded because “[w]hile circuit caselaw is not unanimous on the sweep of *Merrell Dow*, the First Circuit and a number of other courts read *Merrell Dow* as an instruction to remand state-law claims like Minnesota’s, where the right to relief depends on the application of a federal statute that does not provide a private remedy.” *Minnesota*, 278 F. Supp. 2d at 103.²¹

As a result, at the time this case was filed, Judge Saris, who presides over the AWP MDL, had definitively ruled that state law claims, like plaintiff’s here, to recover certain Medicare payments that depended on the meaning of AWP were not removable, even though they presented a federal question. *See Montana*, 266 F. Supp. 2d at 255; *Minnesota*, 270 F. Supp. 2d at 102-03. Had this case been removed when filed, defendants’ counsel would have been required to notify the JPML,²² and the JPML would have transferred the case to Judge Saris, as it has done with every other AWP case on which the Panel had ruled. Judge Saris then would have remanded the case, as she had already twice ruled that such claims are not removable under First Circuit precedent interpreting *Merrell Dow*. Indeed, under the Seventh Circuit’s pre-*Grable* precedent, which also held that a state law claim based on federal law could not give rise to federal jurisdiction unless the federal statute created a private remedy, the case might have

²¹ The Defendants in the *Montana* proceeding were unable to appeal Judge Saris’ decision because, under 28 U.S.C. § 1447(d), a district court’s order remanding a case to state court is not appealable.

²² *See* JPML rule 7.5(e) (“Any party or counsel in actions previously transferred under Section 1407 . . . **shall promptly notify** the Clerk of the Panel of any potential “tag-along” actions in which that party is also named or in which that counsel appears.”) (emphasis added).

been remanded before it was transferred to the AWP MDL court. *See Seinfeld*, 39 F.3d at 764.

Under these circumstances, defendants plainly could not have removed this case in good faith when it was first filed.

The Supreme Court's decision in *Grable* made it clear, however, that the First and Seventh Circuits were on the losing side of the circuit split that *Grable* resolved. It is now clear that *Merrell Dow* does not require a federal cause of action as a necessary condition for asserting federal jurisdiction over state law claims that depend on federal law. *See Grable*, 125 S. Ct. at 2369-70 ("*Merrell Dow* cannot be read [as a] whole as . . . converting a federal cause of action from a sufficient condition for federal question jurisdiction into a necessary one."). Thus, plaintiff's assertion that *Grable* "does not vitiate" Judge Saris's decision, Pl. Remand Mem. 6, is clearly wrong.²³ *Grable* rejected the very ground on which Judge Saris was constrained to deny federal question jurisdiction over state law claims that, like plaintiff's here, seek to recover Medicare Part B payments that depend on the meaning of AWP. *Grable* eliminated the sole barrier to removal, because the Supreme Court has made clear that the presence of a substantial federal question is sufficient to confer federal jurisdiction over a plaintiff's state law claims. *Grable* similarly removes the barrier to removal that previously existed in the Seventh Circuit under *Seinfeld*.

²³ Likewise, plaintiff's argument that *Grable* does not "vitate" the Court's earlier decision to remand this case is misplaced. Pl. Remand Mem. 5-6. Defendants are not arguing that *Grable* has somehow created diversity jurisdiction but that it has created a new basis for removal that did not exist at the time defendants first attempted to remove this case to federal court.

III. PLAINTIFF'S STATE LAW CLAIMS TO RECOVER CERTAIN MEDICARE-RELATED PAYMENTS PRESENT A SUBSTANTIAL FEDERAL QUESTION GIVING RISE TO FEDERAL QUESTION JURISDICTION.

Plaintiff contends that “no federal claim is asserted” in its complaint that could give rise to federal question jurisdiction. Pl. Remand Mem. 5, 8. That argument has already been rejected in the AWP MDL. When considering virtually identical *parens patriae* claims brought by Minnesota, Judge Saris correctly held that “an essential element” of such state law claims “is proof of a discrepancy between AWPs reported by [the defendant] and the meaning of AWP under the Medicare statute” that “presents a federal question.” *Montana*, 266 F. Supp. 2d at 255.

Plaintiff's insistence that its claims are solely based on state law is not convincing. Pl. Remand Mem. 5-6. State law claims “arise under” federal law “where the vindication of a right under state law necessarily turn[s] on some construction of federal law.” *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) (citation omitted); *see also County Collector of Winnebago v. O'Brien*, 96 F.3d 890, 896 (7th Cir. 1996) (federal question jurisdiction exists over state law claims if “some substantial, disputed question of federal law is a necessary element” of the state law claim) (citing *Franchise Tax Bd.*). A federal issue is “essential” if that issue is “actually disputed and substantial,” and is one that a “federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Grable*, 125 S. Ct. at 2368. Plaintiff ignores the federal question analysis entirely and instead tries to sidestep the relationship between its state law claims and the Medicare statute by asserting that *Grable* held that “state tort claims are not removable even if they depend on a federal statute.” Pl. Remand Mem. 8. This blanket assertion is incorrect. Under *Grable*, federal jurisdiction is proper when “a state law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without

disturbing any congressionally approved balance of federal and state judicial responsibilities.”

125 S. Ct. at 2368. As demonstrated below, plaintiff’s state-law AWP claims satisfy this test.

A. The Meaning Of AWP Under The Federal Medicare Statute Is An “Essential Element” Of Plaintiff’s State Law Claims That Is “Actually Disputed And Substantial.”

Plaintiff’s state law claims to recover certain Medicare-related payments depend on a federal issue that is an “essential element” of those claims because it is “actually disputed and substantial.” *Grable*, 125 S. Ct. at 2368. A federal issue “really and substantially involves a dispute or controversy respecting the validity, construction, or effect of [federal] law” when “the claim will be supported if the federal law is given one construction or effect and defeated if it is given another.” *Dunlap v. G&L Holding Group Inc.*, 381 F.3d 1285, 1290 (11th Cir. 2004) (citations omitted). As Judge Saris previously concluded, an “essential element” of state law AWP claims is “proof of a discrepancy between AWP’s reported” by defendants and “the meaning of AWP under the Medicare statute.” *See Montana*, 266 F. Supp. 2d at 255. The same holds true for plaintiff’s claims to recover Medicare Part B co-payments for its Medicaid program and on behalf of its Medicare beneficiaries, both of which derive entirely from the allegation that these co-payments were inflated because defendants reported AWP’s that were allegedly higher than what is allowed under the Medicare statute. *See Grable*, 125 S. Ct. at 2368 (finding federal tax law an “essential element” of state law claim for which the “meaning of the federal statute is actually in dispute.”).

Plaintiff sidesteps these issues by asserting that *Grable* held that “state tort claims are not removable even if they depend on a federal statute.” Pl. Remand Mem. 8. This assertion

is unfounded and mischaracterizes *Grable*.²⁴ As is made clear by the passage from *Grable* that plaintiff itself quotes to support this position, *Grable* drew a distinction between state law claims that depend on a disputed question of federal law, which do give rise to federal question jurisdiction, and those in which a violation of a federal law serves as a rebuttable presumption to liability under state law, which do not confer jurisdiction. *Grable*, 125 S. Ct. at 2371.²⁵ In this case, however, plaintiff is not asserting a violation of the federal Medicare statute as a rebuttable presumption of liability under state law; rather, the meaning of the term “AWP” in federal law is actually in dispute. *See Montana*, 266 F. Supp. 2d at 255 (finding “discrepancy between AWP’s reported” by defendant and the term’s “meaning under the Medicare statute” to present a “federal question”).

²⁴ Two courts recently relied on *Grable* to find federal jurisdiction when the state law claim involved the interpretation of a federal regulatory regime very similar to the circumstances presented by plaintiff’s state law claims. *See Municipality of San Juan v. Corporación Para El Fomento Económico De Law Ciudad Capital*, No. 04-2303, 2005 WL 1644942, at *4 n.6 (1st Cir. July 14, 2005) (finding that federal question jurisdiction was proper over state law claims that depend on a state agency’s “adherence to the intricate and detailed set of federal [housing] regulatory requirements, and the funds at issue are federal grant monies.”); *In re: Zyprexa Prod. Liab. Litig.*, Nos. 04-MD-01596 (JBW), 05-CV-01455 (JBW), 2005 WL 1561346, at *2 (E.D.N.Y. July 1, 2005) (recognizing that, after *Grable*, in state law suits against pharmaceutical companies involving the operation of the Medicaid program, “the substantial federal funding provisions involved and the allegations about the violation of federal law” can give rise to federal question jurisdiction).

²⁵ The court in *Thomas v. Friends Rehabilitation Prog., Inc.*, No. Civ. A. 04-4288, 2005 WL 1625054 (E.D. Pa. July 11, 2005), on which plaintiff relies for further support, drew the same distinction. *Id.* at *3 (reaffirming that state negligence claims for which the violation of a federal statute is *prima facie* evidence of negligence are “the classic example” of a claim that, absent a private cause of action in the federal law, would disrupt the balance between federal and state judicial responsibilities). Thus, it too does not apply to the circumstances of this case, where the state law claims depend on dispute over the meaning of a federal statute.

B. There Is A “Strong Federal Interest” In The Uniform Interpretation Of The Term “AWP” In The Federal Medicare Statute.

Federal question jurisdiction is particularly warranted in this case because there is a substantial federal interest in the uniform interpretation of the meaning of “AWP” in the federal Medicare statute. “Where the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest, justifying the exercise of jurisdiction by federal courts.” *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir. 1996) (citation omitted); *see also Grable*, 125 S. Ct. at 2367 (a substantial federal question depends on “a serious federal interest in claiming the advantages thought to be inherent in a federal forum.”). Plaintiff fails to address this point.

In this case, the federal interest in the uniform interpretation of the Medicare statute is paramount.²⁶ If this case is remanded and a state court judge is required to define AWP for purposes of this case, there is a grave risk that AWP will be interpreted differently in the other cases. Although AWP no longer is used in the Medicare program, it continues to be used in many state Medicaid programs, including Wisconsin’s program, which are financed in large part with federal funds.²⁷ Thus, inconsistent decisions on the meaning of AWP in the various cases would sow confusion in the administration of the federally supported Medicaid programs in all states. *See In re: Zyprexa Prod. Liab. Litig.*, Nos. 04-MD-01596 (JBW), 05-CV-01455

²⁶ The substantial federal interest in the uniform interpretation of the Medicare statute also counsels in favor of deferring a ruling on plaintiff’s remand motion pending transfer to the MDL proceeding in Boston. As described in defendants’ motion to stay, Judge Saris has already spent over three years grappling with the factual and legal intricacies of these issues and the meaning of AWP under the Medicare Act. *See* Def. Stay Mot. 11-12.

²⁷ For example, in Wisconsin, the federal government currently pays 58% of the cost of the State’s Medicaid program. *See* 68 Fed. Reg. 67,676, 67,677 (Dec. 3, 2003).

(JBW), 2005 WL 1561346, at *2 (E.D.N.Y. July 1, 2005) (recognizing that “the substantial federal funding provisions involved [in Medicaid programs] and the allegations about the violation of federal law” warrant federal jurisdiction). In analogous circumstances, other federal courts have concluded that the importance of a uniform application of a federal standard supports a finding of federal question jurisdiction. *Grable*, 125 S. Ct. at 2368; *Ormet Corp.*, 98 F.3d at 807; *Municipality of San Juan v. Corporación Para El Fomento Económico De Law Ciudad Capital*, No. 04-2303, 2005 WL 1644942, at *4 n.6 (1st Cir. July 14, 2005) (finding jurisdiction over state law claims based on federal housing regulations because, *inter alia*, they implicated a federal interest appropriate for a federal forum to resolve).

C. Federal Jurisdiction Over Plaintiff’s State Law Claims To Recover Certain Medicare-Related Payments Will Not Alter The “Balance Of Federal And State Judicial Responsibilities.”

Finally, exercising federal jurisdiction here will in no way disrupt “the sound division of labor between state and federal courts governing the application” of that jurisdiction. *Grable*, 125 S. Ct. at 2367; *see also Municipality of San Juan*, 2005 WL 1644942, at *4 n.6. The AWP MDL court already exercises jurisdiction over state law claims very similar to plaintiff’s Medicare-related state law *parens patriae* claims, as well as many other related claims. *See, e.g., Montana*, 266 F. Supp. 2d at 260, 263 (exercising supplemental jurisdiction over AWP-based state law claims brought by Montana and Nevada). Allowing plaintiff’s state law claims to be considered by the same federal court therefore would not “disturb[] any congressionally approved balance of federal and state judicial responsibilities.” *Grable*, 125 S. Ct. at 2368 (finding federal jurisdiction warranted when “resolv[ing] genuine disagreement over federal [law] ... provisions will portend only a microscopic effect on the federal-state division of labor”).

IV. THE COURT SHOULD STAY ITS DECISION ON PLAINTIFF'S REMAND MOTION.

In its August 4, 2005 order, the Court declined to defer briefing on plaintiff's remand motion, and directed the parties to complete that briefing in accordance with the schedule that was issued by the clerk. Accordingly, the Court will soon be presented with fully-briefed motions (i) to remand and (ii) to defer a ruling on the motion to remand.

In a widely followed decision, the United States District Court for the Eastern District of Wisconsin set out an analytical framework for cases where a court has before it both a motion to remand and a motion to stay pending transfer to the MDL court. *Meyers v. Bayer AE*, 143 F. Supp. 2d 1044 (E.D. Wis. 2001). First, the court should "make a preliminary assessment of the jurisdictional issue." *Id.* at 1048. Second, if the jurisdictional issue "appears factually or legally difficult," the court should determine whether identical or similar jurisdictional issues have been raised in other cases that have been or may be transferred to the MDL proceeding. *Id.* at 1049. Third, if those circumstances are present, the court should weigh "the judicial economy gained and the hardship to the moving party avoided by granting the stay against the harm to the non-moving party." *Id.*²⁸

²⁸ See *Moton v. Bayer Corp.*, Civ. No. 05-0310-WSM, 2005 WL 1653731 at 2 n.5 (S.D. Ala., July 8, 2005) (collecting cases following the *Meyers* analysis). Staying a decision on the jurisdictional issue pending transfer to the MDL before deciding plaintiff's motion to remand is well within the Court's discretion. See *Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999) ("There is an array of non-merits questions that we may decide in any order. . . . There is no unyielding jurisdictional hierarchy" for deciding competing motions to transfer and motion to remand) (quotations omitted). See also *Gaffney v. Merck & Co.*, 2005 WL 1700772, at *1 (W.D. Tenn. July 19, 2005) ("Although some courts have opted to rule on pending motions to remand prior to the MDL Panel's decision on transfer, . . . there are many more that have chosen to grant a stay, even if a motion to remand is filed.") (citations omitted); *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997) ("[A] majority of courts have concluded that it is often appropriate to stay preliminary pretrial proceedings while a motion to transfer and consolidate is pending with the MDL Panel."). As defendants demonstrated in their motion to stay, federal courts and the JPML have consistently recognized that it is proper to stay a decision (continued...)

This case plainly satisfies *Meyers*' three-part test. First, as the foregoing sections of the brief have demonstrated, the jurisdictional issue is a difficult one that warrants careful judicial reflection. In hopes of inducing a quick ruling on its remand motion, plaintiff has told the Court that defendants' "jurisdictional argument is transparently without merit" because "it is universally the rule that a new Supreme Court decision does not restart the removal period." Pl. Stay Mem. 4, 5. As defendants have shown, that statement is not only patently wrong, *see supra* Part I, it is contradicted by cases that plaintiff cites in its *own* brief, including *Red Cross*, *Green*, *Smith* and *Davis*. *See id.* at 5-6. Plaintiff's "no federal question" argument is also unpersuasive. While plaintiff portrays this case as one in which "interpretation of a federal statute *may* be needed at some juncture," *id.* at 6 (emphasis added), the fact is that Judge Saris has already ruled that interpreting the federal Medicare statute will form an "essential element" of plaintiff's state law claims for alleged overpayments for Medicare Part B co-payments. Defendants have explained that in the unique circumstances of the AWP litigation, *Grable* eliminated the barrier that had prevented this and the other AWP cases from being removed when it rejected the "private cause of action" requirement that Judge Saris relied on to remand earlier AWP cases. In short, this case is not the sort of "sure loser" that warrants summary remand under *Meyers*. *Meyers*, 143 F. Supp. 2d at 1048.

The second step of the *Meyers* framework is to determine whether the same or similar jurisdictional issues have been raised in other cases that have been or may be transferred to the MDL proceeding. Plaintiff has not disputed that this prong of the *Meyers* framework is satisfied. *See* Pl. Stay Mem. 4 (challenging only prongs one and three). Nor could it reasonably

on a motion to remand and leave the jurisdictional issue to the MDL court. *See* Def. Stay Mot. 10 (citing cases).

do so, as ten other AWP cases brought by other states were removed on the same day as this case on the basis of the same *Grable* decision. Every state has moved to remand based on the same jurisdictional arguments that plaintiff raises here. Indeed, the same outside law firm that plaintiff has retained to litigate this case is simultaneously making the very same arguments in other jurisdictions on behalf of Illinois and Kentucky whose cases were also removed based on the *Grable* decision. Because all of the removed cases present the same jurisdictional issues that are raised in plaintiff's remand motion, and because Wisconsin raises no arguments that are unique or unusual, the second step of the *Meyers* framework is satisfied.²⁹

Third, as demonstrated in defendants' motion to stay, the interests of judicial economy and consistency of decision weigh overwhelmingly in favor of a stay and the balance of hardships tips in favor of defendants. Avoiding the necessity for defendants to litigate identical AWP claims in multiple jurisdictions is a substantial consideration, and the relatively brief delay that plaintiff will encounter until this case is transferred to Judge Saris is not a

²⁹ The common jurisdictional issue presented in the eleven removed AWP cases that are pending transfer to the MDL contrasts sharply with the Wisconsin-specific removal issue that was before the Court last year, when defendants removed this case on the basis of diversity. *See Wisconsin v. Abbott Labs.*, Case No. 04-C-477-C, 2004 WL 2055717 (W.D. Wis. Sept. 9, 2004). The issue of diversity jurisdiction arose as a consequence of the unique facts and posture of this case, and at that time no other AWP case had been removed based on diversity. In remanding the case, the Court emphasized that "there is no apparent overlap between the jurisdictional issue presented in this case and the jurisdictional issues raised in other cases that have been transferred to Judge Saris." *Id.* at *1. In contrast, the jurisdictional issue that is now before the Court – whether the AWP-based claims give rise to federal question jurisdiction – as well as the related issue of whether the *Grable* decision can trigger the time for removal, is common to all eleven cases that are pending transfer to the MDL, all of which were removed on the same day and on the same ground.

sufficient factor to warrant a stay in the face of the economies and efficiencies to be gained through consolidation.³⁰

Plaintiff's hardship arguments are not persuasive. There is no basis for plaintiff's assertion that its remand motion will languish indefinitely if it is transferred to Judge Saris because she is "inundated with motions and discovery issues." Pl. Stay Mem. 8-9. Judge Saris has a Magistrate Judge who is handling discovery motions. Those motions are decided promptly, and often from the bench. The only significant motions before Judge Saris pertain to class certification, and Judge Saris has informed the parties to the MDL that she will issue a decision on those motions later this month. After that Judge Saris will be free to turn to the states' remand motions, all of which raise identical issues with which she is well versed.

Plaintiff's hardship argument is further undermined because plaintiff, along with other states, has appeared — with no discernible hardship — in another related MDL case in Boston in order to protect its interests with respect to a proposed class-wide settlement.³¹ Indeed, plaintiff and other states have filed a brief and appeared in open court in the AWP MDL

³⁰ See, e.g., *Egon v. Del-Van Fin. Corp.*, No. 90-4338, 1991 WL 13726, at *1 (D.N.J. Feb. 1, 1991) ("[E]ven if a temporary stay can be characterized as a delay prejudicial to plaintiffs, there are considerations of judicial economy and hardship to defendants that are compelling enough to warrant such a delay."); *Tench v. Jackson Nat'l. Life Ins. Co.*, No. 99 C 5182, 1999 WL 1044923, at *2 (N.D. Ill. Nov. 12, 1999) (granting a stay as plaintiff would suffer no prejudice from the short delay); *Good v. Prudential Ins. Co.*, 5 F. Supp. 2d 804, 809 (N.D. Cal. 1998) (granting a stay where "a stay pending a final decision by the MDL Panel would likely be brief"); *Rosenfeld v. Hartford Fire Ins. Co.*, Nos. 88 Civ. 2153 (MJL), 88 Civ. 2252 (MJL), 1988 WL 49065, at *2 (S.D.N.Y. May 12, 1988) ("While [plaintiffs] may suffer some initial delay, once the cases are coordinated and the defendants are able to respond to all the complaints in a coordinated manner, more time may well be saved than was lost.").

³¹ See, e.g., *In re: Lupron Marketing and Sales Practices Litig.*, MDL 1430 (D. Mass) Civ. No. 01-CV-10861, Docket Entry 337 (March 16, 2005) (Objection of the Attorneys General of Wisconsin, Kentucky, and Illinois to final approval of the class settlement agreement and of intention to appear at the hearing).

to stake out their position with respect to any possible class-wide relief.³² Because plaintiff's *parens patriae* claims overlap with those of the putative class action pending in the AWP MDL, judicial efficiency would be further served if this case is transferred to that court.

Plaintiff complains that “[t]he transfer itself will take many months.” Pl. Stay Mem. 8. That delay, however, will only occur if plaintiff chooses to oppose transfer by objecting to the JPML’s CTO, which was issued on August 9.³³ Absent objection, the CTO will become final and the case will be transferred to the AWP MDL fifteen days later on August 24. If plaintiff objects and moves to vacate the CTO, transfer will be delayed by several months while the JPML considers the merits of plaintiff’s objections.³⁴ Given that the JPML has rejected every single objection made to a CTO in the AWP cases, such objections would be futile. Plaintiff can avoid that delay entirely if it chooses not to object. And if defendants’ jurisdictional argument is as weak as plaintiff contends, then plaintiff should be confident that Judge Saris will remand in less time than it will take the JPML to deal with plaintiff’s objection to the CTO.³⁵

³² See *In re Pharma. Indus. Average Wholesale Price Litig.* MDL 1456 (D. Mass) Civ. No. 01-12257 PBS, docket entry 1340 (Feb. 02, 2005) (Joint Motion to Leave to File a Memorandum Regarding Plaintiff’s Motion for Class Certification and to Appear at the Court’s February 10, 2005 Hearing, by the Attorneys General of Illinois, Kentucky, Wisconsin, and Idaho).

³³ See *In re Pharma. Indus. Average Wholesale Price Litig.* MDL 1456, CTO-25 (J.P.M.L. Aug. 9, 2005) (Ex. 1).

³⁴ Under the Rules of Procedure of the JPML, plaintiff has fifteen days from the issuance of the CTO in which to file a “notice of opposition.” Plaintiff then has an additional fifteen days in which to file a motion to vacate the CTO. Defendants have twenty days in which to file a response to the motion to vacate. Plaintiff then has five days in which to file a reply. Thus, briefing is completed nearly two months after the issuance of the CTO. After briefing is complete, the Panel issues a “Hearing Order” placing the matter on one of its hearing calendars. As the JPML only meets every other month, it can take up to two months from the completion of briefing before the matter is taken under consideration by the JPML. It can then take an additional month or more before a decision is announced.

³⁵ During this period, the parties can continue to move forward on pending discovery issues. Defendants have served responses to plaintiff’s discovery requests, and defendants are prepared (continued...)

Finally, plaintiff's alleged concerns about the effect of any delay on the State, its Medicaid program, or its Medicare beneficiaries do not weigh in favor of a stay. As explained at length in defendants' brief supporting their motion to dismiss, *see, e.g.*, Def.'s Br. in Support of Mot. to Dismiss 21-23, plaintiff has been aware for many years that AWP does not reflect the actual cost of acquiring the drug.³⁶ Despite this knowledge, plaintiff has taken no action to change its reimbursement system and waited until 2004 to file this action.³⁷ Plaintiff cannot rely on an "emergency" of its own making to argue that any delay here is prejudicial to its interests.

Applying its three-step framework, the Court in *Meyers* ultimately deferred a ruling on the remand motion in that case. That same approach counsels in favor of letting the AWP MDL judge resolve the eleven remand motions, rather than having them decided piecemeal in courts across the country. Doing so will conserve the resources of the courts and will avoid inconsistent decisions. Although plaintiff has asserted that "[c]ourt decisions generally favor deciding remand motions before the [JPML] acts to transfer a case," Pl. Stay Mem. 2, the truth is that federal courts and the JPML have consistently recognized that it is proper to defer a decision on a motion to remand and leave the jurisdictional issue to the MDL court. *See* Def. Stay Mot. 10 (citing cases).³⁸ Indeed, ten district courts considering related AWP lawsuits followed this approach once before, and declined to rule on remand motions pending potential transfer to Judge Saris, reasoning that judicial economy and consistency of

to continue to meet and confer with plaintiff while plaintiff's remand motion is pending before Judge Saris.

³⁶ *See* Wisconsin DHFS, Joint Committee on Finance, Paper #479, 4 at 3 (June 1, 1999) (<http://www.legis.state.wi.us/lfb/1999-01budgetdocuments/99-01BudgetPapers/479.pdf>).

³⁷ As to Medicare beneficiaries, that program no longer uses AWP.

³⁸ *See also* n.28. *supra*.

decision weighed in favor of a stay. *See* Def. Stay Mot. at 8-9 & n.7. This Court should do the same.

CONCLUSION

The Court should defer ruling on plaintiff's motion to remand pending transfer to the MDL court. Alternatively, plaintiff's motion to remand should be denied.

Dated: August 11, 2005.

Roberta Howell

James R. Clark, SBN 1014074
Roberta F. Howell, SBN 1000275
Michael D. Leffel, SBN 1032238
FOLEY & LARDNER LLP
150 East Gilman Street
Post Office Box 1497
Madison, Wisconsin 53701-1497
Tel: 608.257.5035
Fax: 608.258.4258
*Attorneys for Defendant Bristol-Myers Squibb,
Company*

Of Counsel:
Steven M. Edwards
Lyndon M. Tretter
Hogan & Hartson LLP
875 Third Avenue
New York, New York 10022
Tel: 212.918.3000
Fax: 212.918.3100

EXHIBIT 1

UNITED STATES OF AMERICA
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

CHAIRMAN:
Judge Wm. Terrell Hodges
United States District Court
Middle District of Florida

MEMBERS:
Judge John F. Keenan
United States District Court
Southern District of New York

Judge D. Lowell Jensen
United States District Court
Northern District of California

Judge J. Frederick Motz
United States District Court
District of Maryland

Judge Robert L. Miller, Jr.
United States District Court
Northern District of Indiana

Judge Kathryn H. Vratil
United States District Court
District of Kansas

Judge David R. Hansen
United States Court of Appeals
Eighth Circuit

DIRECT REPLY TO:

Michael J. Beck
Clerk of the Panel
One Columbus Circle, NE
Thurgood Marshall Federal
Judiciary Building
Room G-255, North Lobby
Washington, D.C. 20002

Telephone: [202] 502-2800
Fax: [202] 502-2888

<http://www.jpml.uscourts.gov>

August 9, 2005

TO INVOLVED COUNSEL

Re: MDL-1456 -- In re Pharmaceutical Industry Average Wholesale Price Litigation

(See Attached Schedule CTO-25)

Dear Counsel:

Attached hereto is a copy of a conditional transfer order filed today by the Panel involving the above-captioned matter. This matter is transferred pursuant to Rule 7.4 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 F.R.D. 425, 435-36 (2001). Copies of Rule 5.2, dealing with service, and Rules 7.4 and 7.5, regarding "tag-along" actions, are attached for your convenience.

Inasmuch as there is an unavoidable time lag between notification of the pendency of the tag-along action and the filing of a conditional transfer order, counsel are required by Rule 7.4(b) to notify this office **BY FACSIMILE**, at (202) 502-2888, of any official changes in the status of the tag-along action. These changes could involve dismissal of the action, remand to state court, transfer to another federal court, etc., as indicated by an order filed by the district court. Your cooperation would be appreciated.

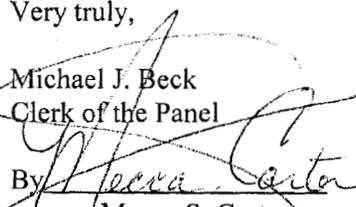
NOTICE OF OPPOSITION DUE ON OR BEFORE: August 24, 2005 (4 p.m. EST)
(Facsimile transmission is suggested.)

If you are considering opposing this conditional transfer order, please review Rules 7.4 and 7.5 of the Panel Rules before filing your Notice of Opposition.

A list of involved counsel is attached.

Very truly,

Michael J. Beck
Clerk of the Panel

By 
Mecca S. Carter
Deputy Clerk

Attachments

JPML Form 39

AUG - 9 2005

FILED
CLERK'S OFFICE

DOCKET NO. 1456

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

*IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESAL PRICE
LITIGATION*

(SEE ATTACHED SCHEDULE)

CONDITIONAL TRANSFER ORDER (CTO-25)

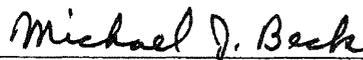
On April 30, 2002, the Panel transferred 16 civil actions to the United States District Court for the District of Massachusetts for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. Since that time, 59 additional actions have been transferred to the District of Massachusetts. With the consent of that court, all such actions have been assigned to the Honorable Patti B. Saris.

It appears that the actions on this conditional transfer order involve questions of fact which are common to the actions previously transferred to the District of Massachusetts and assigned to Judge Saris.

Pursuant to Rule 7.4 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 F.R.D. 425, 435-36 (2001), these actions are transferred under 28 U.S.C. § 1407 to the District of Massachusetts for the reasons stated in the order of April 30, 2002, 201 F.Supp.2d 1378 (J.P.M.L. 2002), and, with the consent of that court, assigned to the Honorable Patti B. Saris.

This order does not become effective until it is filed in the Office of the Clerk of the United States District Court for the District of Massachusetts. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:



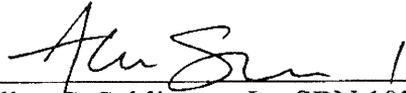
Michael J. Beck
Clerk of the Panel

SCHEDULE CTO-25 - TAG-ALONG ACTIONS
DOCKET NO. 1456
IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE
LITIGATION

<u>DIST. DIV. C.A. #</u>	<u>CASE CAPTION</u>
ALABAMA MIDDLE ALM 2 05-647	State of Alabama v. Abbott Laboratories, Inc., et al.
FLORIDA NORTHERN FLN 4 05-257	State of Florida ex rel., et al. v. Alpharma, Inc., et al.
ILLINOIS NORTHERN ILN 1 05-4056	The People of the State of Illinois v. Alpharma, Inc., et al.
KENTUCKY EASTERN KYE 3 05-47 KYE 3 05-48 KYE 3 05-49	Commonwealth of Kentucky, etc. v. Alpharma, Inc., et al. Commonwealth of Kentucky, etc. v. Abbott Laboratories, Inc. Commonwealth of Kentucky v. Warrick Pharmaceuticals Corp., et al.
MINNESOTA MN 0 05-1394	State of Minnesota, etc. v. Pharmacia Corp.
NEW YORK NORTHERN NYN 1 05-872 NYN 1 05-873 NYN 1 05-874	People of the State of New York, etc. v. Pharmacia Corp. The People of the State of New York, etc. v. Aventis Pharmaceuticals, Inc. The People of the State of New York, etc. v. GlaxoSmithkline, PLC, et al.
PENNSYLVANIA EASTERN PAE 2 05-3604	Commonwealth of Pennsylvania, etc. v. Tap Pharmaceutical Products, Inc., et al.
WISCONSIN WESTERN WIW 3 05-408	State of Wisconsin v. Abbott Laboratories, et al.

Of Counsel:

James R. Daly
Jeremy P. Cole
JONES DAY
77 West Wacker
Chicago, IL 60601-1692
312-782-3939
312-782-8585 (fax)



Allen C. Schlinsog, Jr., SBN 1025656
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 2100
P.O. Box 2965
Milwaukee, WI 53201-2965
414-298-1000
414-298-8097 (fax)

Attorneys for Defendant Abbott Laboratories



William M. Conley, State Bar No. 1009504

David Simon, State Bar No. 1024009

Jeffrey A. Simmons, State Bar No. 1031984

FOLEY & LARDNER L.L.P.

150 East Gilman Street

Verex Plaza

Madison, WI 53703

Telephone: (608) 257-5035

Facsimile: (608) 258-4258

Attorneys for Amgen Inc.

OF COUNSEL:

Joseph H. Young

Steven F. Barley

HOGAN & HARTSON, L.L.P.

111 S. Calvert St., Suite 1600

Baltimore, MD 21202

Telephone: (410) 659-2700

Facsimile: (410) 539-6881

Of Counsel:

D. Scott Wise

Michael S. Flynn

Carlos M. Pelayo

DAVIS POLK & WARDWELL

New York, New York

Telephone: (212) 450.4000

Fax: (212) 450.3800



Brian E. Butler, SBN 1011871

Barbara A. Neider, SBN 1006157

Joseph P. Wright, SBN 1001904

STAFFORD ROSENBAUM LLP

222 West Washington Avenue, Suite 900

Post Office Box 1784

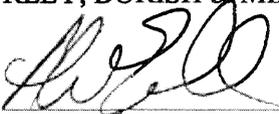
Madison, Wisconsin 53701-1784

Telephone: (608) 256-0226

Fax: (608) 259-2600

*Attorneys for Defendant AstraZeneca
Pharmaceuticals, LP and AstraZeneca, LP*

HURLEY, BURISH & MILLIKEN, S.C.

By: 

Stephen P. Hurley, Esq.

State Bar ID No. 1015654

Andrew W. Erlandson, Esq.

State Bar ID No. 1029815

10 East Doty Street, Ste. 320

Madison, WI 53703

Telephone: (608) 257-0945

Facsimile: (608) 257-5764

HOGAN & HARTSON L.L.P.

Jonathan T. Rees

Gregory M. Petouvis

555 13th Street, N.W.

Washington, DC 20004

Telephone: (202) 637-5600

Facsimile: (202) 637-5910

*Attorneys for Defendant
ZLB Behring, LLC*

HURLEY, BURISH & MILLIKEN, S.C.

By: 

Stephen P. Hurley, Esq.
State Bar ID No. 1015654
Andrew W. Erlandson, Esq.
State Bar ID No. 1029815
10 East Doty Street, Ste. 320
Madison, WI 53703
Telephone: 608-257-0945
Facsimile: 608-257-5764

In Washington, DC

Paul S. Schlieffman, Esq.
Carlos E. Provencio, Esq.
SHOOK, HARDY & BACON
Hamilton Square
600 14th Street, NW, Suite 800
Washington D.C., 20005-2004
Telephone: 202-783-8400
Facsimile: 202-783-4211

In Kansas City, MO:

Michael L. Koon, Esq.
Tiffany W. Killoren, Esq.
SHOOK, HARDY & BACON
2555 Grand Blvd.
Kansas City, MO 64108
Telephone: 816-474-6550
Facsimile: 816-421-5547

*Attorneys for Defendant
Aventis Pharmaceuticals, Inc*



Bruce A. Schultz

State Bar #: 01016100

COYNE, SCHULTZ,

BECKER & BAUER, S.C.

150 E. Gilman St., Suite 1000

Madison, WI 53703

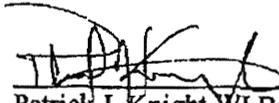
Telephone: (608)255-1388

Fax: (608)255-8592

*Attorneys for Defendant Baxter Healthcare
Corporation*

Of Counsel:

Paul J. Coval
Douglas L. Rogers
Darrell A. H. Miller
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-6400
Fax: (614) 464-6350



Patrick J. Knight WI Bar No.1003374
Gimbel, Reilly, Guerin & Brown
Two Plaza East, Suite 1170
330 East Kilbourn Avenue
Milwaukee, WI 53202
Tel: (614) 464-6400
Fax: (614) 464-6350
E-mail: pknight@grglaw.com

*Attorney for Defendants Ben Venue
Laboratories, Inc., Boehringer Ingelheim
Pharmaceuticals, Inc., and Roxane
Laboratories, Inc, now named Boehringer
Ingelheim Roxane, Inc.*

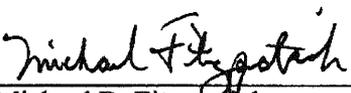
Of Counsel:
Paul F. Doyle
Christopher C. Palermo
Antonia F. Giuliana
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
Telephone: 212/808-7800
Facsimile: 212/808-7897



John M. Moore
State Bar No. 1010235
John W. Markson
State Bar No. 1018620
BELL, GIERHART & MOORE, S.C.
44 East Mifflin Street
Madison, WI 53701-1806
Telephone: 608/257-3757
Facsimile: 608/257-3757

Attorneys for Defendant Dey, Inc.

BRENNAN, STEIL & BASTING, S.C.

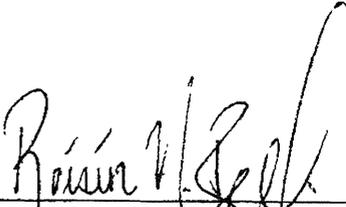
By: 

Michael R. Fitzpatrick
Local Counsel
State Bar No. 1018492
One E. Milwaukee St.
P. O. Box 1148
Janesville, WI 53547-1148
(608) 756-4141

David J. Burman
Kathleen M. O'Sullivan
Zoe Philippides
PERKINS COIE LLP
1201 Third Avenue, 48th Floor
Seattle, WA 98101-3099
(206) 359-8000

Attorneys for Defendant Immunex Corporation

By:


Steven P. Means, SBN 1011355
Roisin H. Bell, SBN 1036098
MICHAEL BEST & FRIEDRICH LLP
One South Pinckney St., Suite 700
P.O. Box 1806
Madison, WI 53701-1806
Telephone: (608) 257-3501
Facsimile: (608) 283-2275

Co-counsel:

Bruce Wessel
Brian Ledahl
IRELL & MANELLA LLP
1800 Avenue of the Stars
Los Angeles, CA 90067
Telephone: (310) 203-7045
Facsimile: (310) 203-7199

**Attorneys for Defendant IVAX
Corporation and IVAX
Pharmaceuticals, Inc.**

Of Counsel:

William F. Cavanaugh, Jr.
Andrew D. Schau
Erik Haas
PATTERSON, BELKNAP, WEBB & TYLER
LLP
1133 Avenue of the Americas
New York, NY 10036-6710
Tel: (212) 336-2000
Fax: (212) 336-2222



Donald K. Schott
State Bar No. 1010075
Waltrud A. Arts
State Bar No. 1008822
James W. Richgels
State Bar No. 1046173
QUARLES & BRADY LLP
One S. Pinckney St., Suite 600
Madison, WI 53703
Tel: (608) 251-5000
Fax: (608) 251-9166

Attorneys for Defendants
JOHNSON & JOHNSON, JANSSEN
PHARMACEUTICA PRODUCTS, L.P.,
ORTHO-MCNEIL PHARMACEUTICAL, INC.,
ORTHO BIOTECH PRODUCTS, L.P., AND
MCNEIL-PPC, INC.

Of Counsel:

John M. Townsend
Robert P. Reznick
Robert B. Funkhouser
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, DC 20006-2401
Tel: (202) 721-4600
Fax: (202) 721-4646



Michael P. Crooks
PETERSON, JOHNSON & MURRAY, S.C.
131 West Wilson Street, Suite 200
Madison, Wisconsin 53703
Tel: (608) 256-5220
Fax: (608)-256-5270

Attorneys for Defendant Merck & Co., Inc.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Harth", written over a horizontal line.

David J. Harth
David E. Jones
Heller Ehrman LLP
One East Main Street
Suite 201
Madison, Wisconsin 53703-5118
Telephone: (608) 663-7460
Facsimile: (608) 663-7499

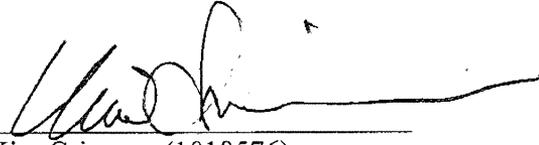
*Attorneys for Defendants Mylan Laboratories Inc.
and Mylan Pharmaceuticals Inc.*

Of Counsel

Gary R. Greenberg
Louis J. Scerra, Jr.
Jonathan D. Cohen
James M. Vant
Greenberg Traurig, LLP
One International Place, 20th Floor
Boston, Massachusetts 02110
Telephone: (617) 310-6000
Facsimile: (617) 310-6001

Of Counsel:

Jane W. Parver
Saul P. Morgenstern
Mark D. Godler
KAYE SCHOLER LLP
425 Park Avenue
New York, New York 10022



Kim Grimmer (1018576)
SOLHEIM BILLING & GRIMMER, S.C.
U.S. Bank Plaza, Suite 301
One South Pinckney Street
P.O. Box 1644
Madison, WI 53701-1644
(608) 282-1230 (Direct Dial)

*Attorneys for Defendant
Novartis Pharmaceutical Corporation*

By:



Beth Kushner SBN 1008591
Timothy Feeley
von BRIESEN & ROPER, S.C.
411 East Wisconsin Avenue, Suite 700
Milwaukee, WI 53202
Tele: (414) 287-1373
Fax: (414)276-6281

John C. Dodds
Erica Smith-Klocek
Kimberly K. Heuer
MORGAN, LEWIS & BOCKIUS, LLP
1701 Market Street
Philadelphia, PA 19103
Tele: (215) 963-5000
Fax: (215)963-5001

Scott A. Stempel
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
Tele: (202) 739-3000
Fax: (202) 739-3001

Attorneys for Pfizer Inc. and Pharmacia Corporation

Of Counsel:

Wayne A. Cross

Michael J. Gallagher

Paul T. Olszowka

Maja Fabula

WHITE & CASE LLP

1155 Avenue of the Americas

New York, NY 10036

Telephone: (212) 819-8200

Fax: (212) 354-8113

Brian R. Smigelski

Brian R. Smigelski, SBN 1018322

Shannon A. Allen, SBN 1024558

FRIEBERT, FINERTY & ST. JOHN, S.C.

Two Plaza East - Suite 1250

330 East Kilbourn Avenue

Milwaukee, WI 53202

Telephone: (414) 271-0130

Fax: (414) 272-8191

Attorneys for Defendant Sandoz Inc.



Robert J. Kovacev
Patryk J. Drescher
ROPES & GRAY LLP
One Metro Center
700 12th Street, N.W.
Suite 900
Washington, DC 20005
Telephone: (202) 508-4600
Facsimile: (202) 508-4650

Brien T. O'Connor
ROPES & GRAY LLP
One International Place
Boston, MA 02110-2624
Telephone: (617) 951-7000
Facsimile: (617) 951-7050

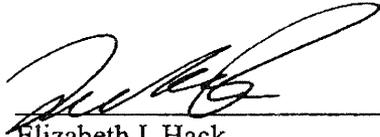
Earl H. Munson, SBN 1008156
BOARDMAN, SUHR, CURRY & FIELD LLP
One South Pinckney Street, 4th Floor
Madison, WI 53703
Telephone: (608) 257-9521
Facsimile: (608) 283-1709

*Attorneys for Defendants Schering-Plough Corp.,
and Warrick Pharmaceuticals Corp.*

SICOR, INC. and

TEVA PHARMACEUTICALS USA, Inc.

By its attorneys,



Elizabeth I. Hack

T. Reed Stephens

Philip Ackerman

SONNENSCHN NATH & ROSENTHAL , LLP

1301 K Street, N.W.

Suite 600, East Tower

Washington, D.C. 20005

(202) 408-6400

Lester A. Pines

CULLEN, WESTON, PINES & BACH

22 W. Washington Avenue, #900

Madison, WI 53703-2718

Tele: (608) 251-0101

Fax: (608) 251-2883

Of Counsel:

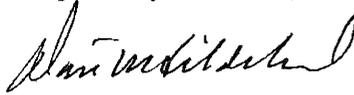
Mark H. Lynch
Geoffrey E. Hobart
Ronald G. Dove, Jr.
COVINGTON & BURLING
1201 Pennsylvania Avenue NW
Washington, D.C. 20004
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Frederick G. Herold
DECHERT LLP
1117 California Avenue
Palo Alto, CA 94304
Telephone: (650) 813-4930
Facsimile: (650) 813-4848

Thomas H. Lee II
DECHERT LLP
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
Telephone: (215) 994-2994
Facsimile: (215) 994-2222

Mark D. Seltzer
HOLLAND & KNIGHT LLP
10 St. James Avenue
Boston, MA 02116
Telephone: (617) 523-2700
Facsimile: (617) 523-6850

Respectfully submitted,



Daniel W. Hildebrand
DEWITT ROSS & STEVENS, S.C.
2 East Mifflin Street, Suite 600
Madison, WI 53703
Tele: (608) 255-8891
Fax: (608) 252-9243

**Attorneys for SmithKline Beecham
Corporation, d/b/a GlaxoSmithKline**

Of Counsel:

Daniel E. Reidy

JONES DAY

77 West Wacker Drive

Chicago, IL 60601-1682

312-782-3939

312-782-8585 (fax)



Allen C. Schlinsog, Jr., SBN T025656

Reinhart Boerner Van Deuren s.c.

1000 North Water Street, Suite 2100

P.O. Box 2965

Milwaukee, WI 53201-2965

414-298-1000

414-298-8097 (fax)

*Attorneys for Defendant TAP Pharmaceutical
Products, Inc.*

Of Counsel:

Douglas B. Farquhar
Hyman, Phelps & McNamara, P.C.
700 13th Street, NW
Washington, D.C. 20005
Telephone: (202) 737-5600
Fax: (202) 737-9329



Ralph A. Weber
Gass Weber Mullins LLC
309 North Water Street
Milwaukee, WI 53202
Telephone: (414) 224-7698
Fax: (414) 224-6116

*Attorneys for Defendants Watson
Pharmaceuticals, Inc and Watson Pharma,
Inc*