

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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THE STATE OF WISCONSIN,

Plaintiff,

-against-

AMGEN, INC., et al.,

Defendants.

No. 06-C-0582-C

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DEFENDANT DEY, INC.'S BRIEF IN  
OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

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## PRELIMINARY STATEMENT

On October 11, 2006, Defendant Dey, Inc. ("Dey") removed this civil action from the Circuit Court in and for Dane County, Wisconsin (the "Wisconsin Action") to this Court.<sup>1</sup> This action became removable on September 11, 2006, when the United States delivered to Dey's counsel the complaint in an action captioned *United States of America ex rel. Ven-A-Care of the Florida Keys, Inc. v. Dey, Inc. et al.*, Civil Action No. 05-11084-MEL (D. Mass.) (the "Federal *Qui Tam* Action"), brought pursuant to the federal False Claims Act, 31 U.S.C. § 3729 *et seq.* (the "FCA").<sup>2</sup> The Federal *Qui Tam* Action was brought pursuant to an Order of the District of Massachusetts dated September 9, 2006, which unsealed and permitted service by the United States. Dey received the Order after September 11, 2006.

Defendants previously removed this case on July 14, 2005 on the grounds of diversity. This Court remanded on October 5, 2004. On July 13, 2005, the defendants removed again, but on the grounds that federal question jurisdiction existed pursuant to 28 U.S.C. § 1446(b) and the Supreme Court's decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). In its September 29, 2005 decision remanding the case, this Court held that removal was not permitted based on *Grable*. *Wisconsin*

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Dey also removed on October 11, 2006 several other state actions, which actions make allegations similar to the allegations made by Wisconsin in this action. On November 8, 2006, the Judicial Panel on Multidistrict Litigation ("JPML") issued a Conditional Transfer Order, which transferred this action, as well as several of the other removed actions, to the multidistrict litigation entitled *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL-1456 (D. Mass.). See CTO-33, *In re Pharm. Indus. Average Wholesale Price Litig.*, MDL-1456 (JPML November 8, 2006).

<sup>2</sup> The "Federal *Qui Tam* Complaint" and the Order unsealing it are annexed to Dey's Notice of Removal filed on October 11, 2006 ("October 11 Notice") as Exhibits A and B, respectively.

*v. Abbott Labs.*, 390 F. Supp. 2d 815, 817 (W.D. Wis. 2005) (discussed *infra* p. 20). This removal is based on new grounds, different from those raised in the previous removals.<sup>3</sup>

When the United States intervened and brought the Federal *Qui Tam* Action against Dey, it triggered a wholly independent grant of federal subject matter jurisdiction to adjudicate the Wisconsin Action. Under 31 U.S.C. § 3732(b):

The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government *if the action arises from the same transaction or occurrence as an action brought under section 3730 [of Title 31]*.

(emphasis added). Section 3732(b) explicitly grants the federal district courts "jurisdiction" over "any action" that meets its terms. This provision undeniably applies to the Wisconsin Action because it is an action "brought under the laws of any state for the recovery of funds paid by a state or local government", and Wisconsin does not deny the allegations in the removal notice that this action arises from the same transactions and occurrences as the Federal *Qui Tam* Action.

Wisconsin argues that Congress did not intend section 3732(b) to grant "original jurisdiction" because the word "original" is not in the statute, while in the same breath arguing that the jurisdiction contemplated is merely "supplemental" even though that word is not in the statute either. Plaintiff's Brief in Support of Motion to Remand ("Wisconsin Br.") at 9-12. In *American National Red Cross v. S. G. and A.E.*, 505 U.S. 247, 257 (1992), the United States Supreme Court held that "original" federal subject matter jurisdiction allowing removal could be created without using the term "original jurisdiction". Numerous statutes, in fact, do so. (*See*

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<sup>3</sup> "[T]he removal statutes permit successive removals . . . provided an adequate factual basis exists for a later removal." *Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838; 842 (S.D. Ill. 2006); *see also Benson v. SI Handling Systems, Inc.*, 188 F.3d 780, 782-83 (7th Cir. 1999).

*infra* Part I.A. and note 3) Here, the express grant of general "jurisdiction" in section 3732(b) is more explicit than the statute at issue in *American National Red Cross*.

Wisconsin's related argument that the application of section 3732(b) was not intended to expand the jurisdiction of the federal courts, (Wisconsin Br. at 14.), is contradicted by the legislative history of the FCA, which states that Congress, in fact, intended to "expand the jurisdiction of the Government in False Claims Act cases". H.R. Rep. No. 99-660, at 17 (1986). Wisconsin urges that this same legislative history establishes that section 3732(b) was not intended to allow a defendant to control the forum by removing to federal court. (Wisconsin Br. at 13-14.) This argument is also wrong. When Congress grants jurisdiction to the federal courts over an action, as it has here, removal is presumptively allowed under 28 U.S.C. §1441(a), the general removal statute. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003).

Wisconsin argues that 28 U.S.C. § 1446(b)'s reference to "a copy of an amended pleading, motion, order or other paper" applies exclusively to paper filed in the same state action and only when the voluntary action of the plaintiff makes the case removable. Wisconsin is wrong. The Third and Fifth Circuits, and several district courts, recognize that papers or orders from a separate action fall within section 1446(b) when a sufficient nexus exists between the two actions—even when the paper or order is not caused by the voluntary act of the plaintiff. The Federal *Qui Tam* Complaint and the Order unsealing it and allowing the United States to intervene fall within section 1446(b). *See Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 268 (5th Cir. 2001); *Doe v. American Red Cross*, 14 F.3d 196, 201-03 (3d Cir. 1993) and cases cited herein. Furthermore, the voluntary act rule, which is derived from the well-pleaded complaint rule, does not apply in actions based on an independent grant of federal jurisdiction.

## STATEMENT OF FACTS

Dey manufactures and sells pharmaceutical products, including certain generic inhalation drugs, which are effective in controlling asthma. When Dey's products are dispensed by pharmacies to patients covered by Medicaid, the pharmacists are reimbursed under Medicaid programs jointly funded by the federal and state governments. The federal share of Medicaid reimbursement varies depending on the state's per capita income compared to the national average. The federal share among the states is at least 50% and as much as 83%. In Wisconsin, on each reimbursement for Medicaid-covered drugs, the federal government pays 57.65% of all Medicaid reimbursements in Wisconsin (figures for FY 2006). See <http://aspe.hhs.gov/health/finap.htm> (quoting 69 Fed. Reg. 68370-68372 (Nov. 24, 2004)).

Between 2000 and September 2006, twenty-two states sued Dey and dozens of other pharmaceutical manufacturers alleging that the manufacturers caused higher Medicaid reimbursements to be paid to the providers by reporting certain benchmark prices known as average wholesale price ("AWP") and wholesale acquisition cost ("WAC"), prices that were not equal to the actual acquisition cost. The suits seek repayment of the allegedly improper "spread" between AWP-based and WAC-based reimbursement and some proxy for the alleged "true" acquisition price, as well as multiple damages, fines and penalties under various legal theories.

The Federal *Qui Tam* Action alleges the same case against Dey as is alleged in Wisconsin: that Dey caused higher Medicaid and Medicare Part B payments to be paid to providers because Dey's AWP and WAC prices did not equal the actual acquisition costs paid by providers. The very same AWP and WAC prices reported by Dey to First Databank are at issue in both actions. As in Wisconsin, the Federal *Qui Tam* Action seeks recovery of the same allegedly illegal "spread" paid on the same Dey drugs. Both the Federal *Qui Tam* Action and the Wisconsin Action seek damages based on allegations that Dey caused the filing of false claims.

The Federal *Qui Tam* complaint alleges that the "United States brings this action to recover treble damages and civil penalties under the False Claims Act, 31 U.S.C. §§ 3729-33." (Federal *Qui Tam* Complaint at ¶ 1.) Wisconsin asserts similar claims under Wisconsin statutes and common law.

Therefore, every individual claim for Medicaid reimbursement of Dey drugs at issue in the Federal *Qui Tam* Action is also at issue in the Wisconsin Action. Every aspect of the Wisconsin Medicaid and Medicare Part B transactions and reimbursements are at issue in both cases. Both the Federal Government and Wisconsin make claims based on the same drugs manufactured and sold by Dey. As a result of the identity of parties and the transactions and occurrences underlying the claims, there is extensive overlap in the discovery and litigation of the Wisconsin and Federal *Qui Tam* Actions. Indeed, the same witnesses from Dey, Wisconsin and the federal agencies that administer Medicaid will testify in the Wisconsin action and in the Federal *Qui Tam* Action.

## ARGUMENT

### **I THIS COURT HAS ORIGINAL JURISDICTION OVER THE WISCONSIN ACTION UNDER 37 U.S.C. § 3732(b) AND THE ACTION IS REMOVABLE UNDER 28 U.S.C. —1441**

#### **A. This Court Has Original Subject Matter Jurisdiction Over This Action Because Section 3732(b) Is An Independent Statutory Grant of Jurisdiction**

When the terms of § 3732(b) are met, as they are here, the District Courts have subject matter jurisdiction over the state law action. In *US. ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, the United States Court of Appeals for the Second Circuit stated:

Moreover, it is obvious that a different part of § 3732 does indeed deal with subject matter jurisdiction, for subsection (b) provides expressly that the district courts "shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government."

110 F.3d 861, 866 (2d Cir. 1997) (citing 31 U.S.C. § 3732(b)).

The State's contention that section 3732(b) does not provide "original jurisdiction" is wrong; it is based solely on the absence of the word "original" in the broad grant of "jurisdiction" in section 3732(b). While section 3732(b) does not use the word "original", the absence of that word is of no moment. "Original jurisdiction" simply means jurisdiction to adjudicate a case in the first instance and is distinguished from appellate jurisdiction. *See ZB Holdings, Inc. v. White* 144 F.R.D. 42, 47 (S.D.N.Y. 1992) ("This Court understands 'original jurisdiction' to mean jurisdiction in the first instance over a viable lawsuit . . ."); *T.L. G. v. M.E.H.*, 692 P.2d 1227, 1228 (Mont. 1984) (citing *Brown v. Pitchess*, 13 Cal.3d 518 (Cal. 1975)) ("The phrase 'original jurisdiction' means the power to entertain cases in the first instance, as distinguished from appellate jurisdiction").

Use of the unqualified term "jurisdiction" encompasses "original jurisdiction" because it permits the states to file "actions" in the federal courts. Congress uses different formulations when granting jurisdiction and does not always use the phrase "original jurisdiction". *See American National Red Cross*, 505 U.S. at 248. Many statutes use the word "jurisdiction" without any modifying language to grant jurisdiction to the district courts to hear and determine disputes in the first instance.<sup>4</sup> Courts construing such statutory grants of

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<sup>4</sup> *See, e.g.*, 25 U.S.C. § 345 (providing that the "district courts are given jurisdiction to try and determine any action, suit, or proceeding" involving the allotment of Native American land); 33 U.S.C. § 1365(a) (providing that the "district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties," to entertain citizen suits for violations of the Clean Water Act); 33 U.S.C. § 1415(g) (using the word "jurisdiction" to allocate to federal courts the power to hear actions for violations of the Marine Protection, Research and Sanctuaries Act of 1972); *see also Simms v. Roclan Energy Services, Inc.*, 137 F. Supp. 2d 731 (W.D. La. 2001) (allowing removal of action under 43 U.S.C. § 1349(b) which provides district courts jurisdiction (continued...))

jurisdiction have held that Congress intended to grant to the designated courts the jurisdictional power to hear disputes — i.e., subject matter jurisdiction — even when the statutes did not expressly use the word "original".<sup>5</sup>

In *American National Red Cross*, 505 U.S. at 258, the Supreme Court held that a defendant may remove when jurisdiction is supplied by a "separate and independent" grant of federal jurisdiction, regardless of whether the term "original jurisdiction" appears in the statute. The Supreme Court found that the Congress intended the language "sue and be sued" to be a grant of "original" federal jurisdiction and rejected the First Circuit's finding that the words "original jurisdiction" were essential to removal. 505 U.S. at 248. The Supreme Court, therefore, rejected a textual argument almost identical to that made by Wisconsin in this action.

Section 3732(b) is a far more explicit grant of jurisdiction than the provisions at issue in *American National Red Cross*. Section 3732(b) expressly confers "jurisdiction" for the "district courts" to adjudicate "any action brought under the laws of any State"— the specific circumstances that are present here. Section 3732(b) would even satisfy the dissent in *American National Red Cross*, which argued that "nothing in the language of [the sue and be sued provision] suggests that it has anything to do with regulating the jurisdiction of the federal

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(... continued)

over cases arising under the Outer Continental Shelf; but makes no mention of "original jurisdiction").

<sup>5</sup> See *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004) (finding subject matter jurisdiction over a claim brought under 33 U.S.C. § 1365); *Save our Sound Fisheries Ass 'n v. Callaway*, 429 F. Supp. 1136, 1145 (D.R.I. 1977) (finding jurisdiction over private citizen causes of action brought pursuant to 33 U.S.C. §§ 1365 and 1415); *Pence v. Kleppe*, 529 F.2d 135, 138 (9th Cir. 1976) ("On its face, this statute [25 U.S.C. § 345] is a grant of general jurisdiction to United States District Courts in actions such as this one"). The courts in these cases attached no significance to the absence of the word "original".

courts." 505 U.S. at 267 (Scalia, J., dissenting). Section 3732(b) is specifically directed at the jurisdiction of federal courts in situations where the federal and state governments are seeking recovery in separate actions that arise from the same transactions or occurrences.

**B. This Action May Be Removed Under 28 U.S.C. § 1441 *et seq.* Because of the Grant of Jurisdiction in Section 3732(b)**

Wisconsin's decision to commence this action in state court does not block Dey's right to remove it under section 3732(b) because section 1441(a) allows a defendant to remove any action over which there is federal jurisdiction unless Congress "expressly" prohibits removal. *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 450 (7th Cir. 2005) (holding that 47 U.S.C. § 227 does not preclude removal because that section contains no express prohibition of removal).

When a federal statute confers jurisdiction on the federal district courts the action is presumptively removable under the general removal statute. *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-698 (2003). In *Breuer*, the Supreme Court affirmed the Eleventh Circuit's denial of a remand motion that was premised on an argument similar to Wisconsin's. In *Breuer*, the plaintiff sued his employer in Florida state court. *Id.* at 693. The employer removed the case to federal court on the basis of a provision in the Fair Labor Standards Act of 1938 ("FLSA") which provided that suit under the FLSA "may be maintained . . . in any Federal or State court of competent jurisdiction." *Id.* at 693 (quoting 29 U.S.C. § 216(b)). The plaintiff moved to remand, arguing, precisely as Wisconsin now argues, that the jurisdictional grant in the FLSA impliedly prohibited removal under the general removal statute. *Id.* at 694. The Eleventh Circuit and the Supreme Court rejected this argument because there was no express prohibition of removal, a holding that should control the issue in this action of whether removal is permitted under section 3732(b).

In both *Breuer* and this case, there is no question that under the jurisdictional provision the respective plaintiffs "could have begun [their] action in the District Court" because section 3732(b) allows the state to bring "actions". *See id.* at 694. Removal then follows under 28 U.S.C. § 1441(a) because nothing in the FCA provision "looks like an express prohibition of removal, there being no mention of removal, let alone of prohibition." *Id.* Wisconsin does not—and cannot—identify an express prohibition of removal based on section 3732(b). On the contrary, it urges the Court to infer that there can be no removal under section 3732(b) based on legislative history, context, and argument, precisely what the Supreme Court's *Breuer* decision precludes.

**C. Wisconsin's Legislative History Argument Supports. Dey's Position**

Wisconsin argues that the legislative history shows that the principal purpose of section 3732(b) was to permit the states the option of filing in federal court and that this broadening of the states' options forecloses removal. (Wisconsin Br. at 13-14.) Even if this contention were true, it undermines Wisconsin's position because it concedes — as it must — that this provision gives the states the right to commence "actions" in the federal courts, a right that manifests the existence of original jurisdiction over such state actions. Plaintiff's argument that Congress would not "drastically expand federal jurisdiction over traditionally state actions" by allowing the removal is wrong. As the legislative history shows, Congress did intend to expand federal jurisdiction when it enacted section 3732(b): "Other amendments contained in the bill *expand the jurisdiction* of the Government in False Claims Act cases and *grant the Federal District Courts jurisdiction* over state claims". H.R. Rep. No. 99-690, at 17 (1986) (emphasis added). The Supreme Court, in any case, rejected this same argument made in *Breuer*, the argument that legislative history could be used to read into a statute an implied exception to the general removal statutes. *Breuer*, 538 U.S. at 694-95.

Wisconsin also argues that section 3732(b) should be read only as an exception to the "general bar on intervention" codified at 31 U.S.C. § 3730(b)(5) which would otherwise prevent parties other than the United States from bringing state law claims related to pending *qui tam* actions. (Wisconsin Br. at 11.) This argument actually supports Dey's position. The "general bar" of section 3730(b)(5) provides:

When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

Section 3730(b)(5), therefore, bars two different things: (1) "intervention" and (2) "a related action". Under this provision, once the United States brings an FCA action such as that filed against Dey, no one can intervene or bring a related action. Thus, section 3730(b)(5) bars state actions like this one because it is a "related action."<sup>6</sup> Under the State's reasoning, however, section 3732(b) was intended as an exception to section 3730(b)(5). This exception allows the states to intervene in the district courts and also to bring "actions". This is because section 3732(b) specifically says: "The district courts shall have jurisdiction over any action brought under the laws of any State. . . ." 31 U.S.C. -§ 3732(b). Section 3732(b), therefore, allows states to bring related "actions" because it uses the word "action", and nothing in section 3732(b) even suggests the exception is limited to intervention.

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<sup>6</sup> Wisconsin acknowledges that several courts have held that section 3730(b)(5) bars states from intervening or bringing actions related to FCA actions. (Wisconsin Br. at 11-12.)

<sup>7</sup> When Congress has granted a right to intervene, it has done so explicitly by using the word "intervene." For example, in 28 U.S.C. § 2403(b), Congress explicitly granted states the right to intervene in federal cases regarding the constitutionality of certain state statutes. 18 U.S.C. § 3626(a)(3)(F) ("Any State or local official including a legislator or unit of government . . . shall . . . have the right to intervene . . ."). *See also* 28 U.S.C. § 2323 ("[c]ommunities, associations, corporations, firms, and individuals" as the parties who "may intervene"); 26 U.S.C. § 7424 (United States may exercise the right to "intervene"); *International Paper Co. v. Inhabitants of the Town of Jay, Maine*, 887 F.2d (continued...)

Thus, section 3732(b), where Congress granted jurisdiction over such "actions", creates something more than a right of intervention—it creates the right to bring an action in federal court in the first instance. Since section 3732(b) allows the state to commence an action in federal court, it necessarily follows that the federal courts have original jurisdiction over such actions and those actions may be removed pursuant to the general removal statute.

**D. Section 3732(b) Creates Jurisdiction Over Actions, Not Supplemental Jurisdiction Over Claims**

Original jurisdiction over the Wisconsin Action exists based on the independent grant of jurisdiction provided under section 3732(b) and the holding in *American National Red Cross*. The grant of jurisdiction in section 3732(b) is not supplemental because that section allows the states to commence "actions" in federal courts. There is no requirement that the states intervene in the pending action; rather, section 3732(b) provides the option of commencing a separate action. If Congress had intended section 3732(b) to grant only supplemental jurisdiction over "claims", it would have expressly limited the statute to adjudicate state "claims" already made in an existing FCA action. Congress did so when it enacted section 1367, the "supplemental jurisdiction" statute that applies only to *claims*. Section 3732(b), by contrast, applies to "*actions*," a term "not limited to specific claims, but . . . synonymous with the term 'case' in the constitutional sense." *California v. Keating*, 986 F.2d 346, 348 (9th Cir. 1993) (citations omitted).

Section 3732(b), therefore, provides for original jurisdiction over independent cases, such as this one brought by Wisconsin. There is no limiting language in Section 3732(b).

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(... continued)

338, 342 (1st Cir. 1989) (holding that state could not intervene because the facts of the case did not fall under the express language of section 2403(b)); *Blair v. Shanahan*, 38 F.3d 1514, 1522 (9th Cir. 1994), *cert. denied*, 514 U.S. 1066.

Wisconsin argues that Congress did not use the term "supplemental jurisdiction" when it enacted 31 U.S.C. § 3732(b) because it had not yet enacted 28 U.S.C. § 1367. (Wisconsin Br. at 11.)

This argument is meritless. Congress could have used the terms "ancillary" or "pendent" which were in use at the time; it also could have barred removal as it does so in other circumstances.

Wisconsin cites to several inapposite cases where parties improperly removed state actions on the grounds that original jurisdiction existed based solely on the supplemental jurisdiction statute.<sup>8</sup> (Wisconsin Br. at 9-10.) None of these cases involves a statutory grant of "jurisdiction" that allows the commencement of "actions", as section 3732(b) does. The express grant in section 3732(b) of "jurisdiction" over "actions" distinguishes section 3732(b) from supplemental jurisdiction in section 1367, which is limited to "claims". Unlike supplemental jurisdiction provided under section 1367(a), which applies only to claims within a single action, section 3732(b) grants federal "jurisdiction over any action brought under the laws of any State," allowing state action separate from but sufficiently related to an FCA action to be properly removed to federal court. Although the pendency of the Federal *Qui Tam* Action triggers this grant of federal jurisdiction, it does not mean jurisdiction is supplemental, pendency of the Federal *Qui Tam* Action is merely the event that triggers the independent grant of federal jurisdiction in section 3732(b). This independent grant of jurisdiction is what allows the states to bring separate actions in federal court and is a source of original federal jurisdiction.

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<sup>8</sup> *Syngeta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002) (rejecting removal based on a federal statute that does not "confer the original jurisdiction required to support removal pursuant to § 1441"); *Ahearn v. Charter Township of Bloomfield*, 100 F.3d 451, 456 (6th Cir. 1996) (holding that "[t]he supplemental jurisdiction statute is not a source of original subject-matter jurisdiction . . . ." (citations omitted)); *Critney v. National City Ford, Inc.*, 255 F. Supp. 2d 1146, 1148 (S.D. Cal. 2003)(remanding an action where there existed only supplemental federal jurisdiction over the claims asserted).

The jurisdictional structure created in section 3732(b) is the same as the grant of federal jurisdiction over "related" state actions in 28 U.S.C. § 1334(b), which grants the federal courts jurisdiction over actions "related to" pending federal bankruptcy actions. Under section 1334(b), the pendency of a federal bankruptcy action triggers federal jurisdiction under section 1334(b) over any other action that is "related to" the bankruptcy action, even if the other action is based only on state law. This type of federal jurisdiction supports removal. *See Davis v. Life Investors Ins. Co. of America*, 282 B.R. 186 (S.D. Miss. 2002).

In the same way that a pending bankruptcy action triggers federal jurisdiction over state actions "related to" the bankruptcy action, a pending FCA action triggers federal "jurisdiction over any action brought under the laws of any State. . . ." *Compare* 31 U.S.C. § 3732(b) *with* 28 U.S.C. § 1334(b). This type of jurisdiction is not supplemental because, unlike section 1367, section 3732(b) deals with separate actions, not claims within a single action. *See generally In re Estate of Tabas*, 879 F. Supp. 464, 467 (E.D. Pa. 1995) (acknowledging that "[o]n its face [section 1367] distinguishes between actions and claims"). As noted in *Thistlethwaite*, section 3732(b) "obvious[ly] ... deal[s] with subject matter jurisdiction". 110 F.3d at 866. Upon satisfaction of the specified conditions, section 3732(b)'s grant of subject matter jurisdiction allows a state to bring an action in the first instance in federal court—the very definition of original jurisdiction.

For this reason the October 27, 2006 decision by a magistrate judge in Hawaii, cited by Wisconsin, (the "Hawaii decision") is wrong; that decision did not appreciate that the express grant of federal subject matter jurisdiction in section 3732(b) allows a state to commence an action in federal court. Similarly, a decision in the District Court for the Middle District of Alabama (the "Alabama decision") also failed to consider that section 3732(b) allows a state to

commence an action in federal court.<sup>9</sup> In the Hawaii decision and the Alabama decision, the courts declined to find subject matter jurisdiction based on 3732(b) in similar AWP actions removed by Dey from state courts. Both courts did so using somewhat tentative language: The Alabama court said that it "appear[ed]" that section 3732(b) granted supplemental jurisdiction, while the Hawaii court said that there were "indicat[ions]" that section 3732(b) granted supplemental jurisdiction. *Hawaii v. Abbott Labs., Inc.*, No. 06-00437, at \*13 (D. Hawaii October 27, 2006) (decision entitled "Amended Order Denying Defendant Dey, Inc.'s Motion For Leave To File Supplemental Notice Of Removal"); *Alabama v. Abbott Labs.*, No. 2:06cv920, at \*1 (M.D. Ala. Nov. 2, 2006). Both decisions conflict with the Second Circuit's decision in *Thistlethwaite* that the language in section 3732(b) is an "obvious" grant of subject matter jurisdiction. 110 F.3d at 866. Neither addresses the use of the term "action" or the express language granting "jurisdiction" in section 3732(b), the distinguishing factors between an independent source of jurisdiction such as section 3732(b) and supplementary jurisdiction under section 1367, as discussed above. Neither decision addresses *American National Red Cross* or acknowledges the numerous other statutes that grant original federal jurisdiction without using the words "original jurisdiction". The Hawaii decision gives undue weight to the legislative history, *Hawaii*, No. 06-00437, at \*14, in deciding that state actions cannot be removed based on section 3732(b), an argument that was expressly rejected in *Breuer*. Dey, therefore, submits that these decisions are wrongly decided and should not be followed here.

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<sup>9</sup> Although Wisconsin has not previously cited the Alabama decision, it is likely the State will do so in its reply brief. A copy of the Alabama decision is annexed hereto for the Court's convenience as Exhibit A.

**E. Federal Question Jurisdiction Also Exists Under 28 U.S.C. § 1331**

While the statutory grant of jurisdiction contained in section 3732(b) creates an independent and sufficient basis for removal of this action, this Court also has original jurisdiction over the action pursuant to 28 U.S.C. § 1331, which provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The assertion of federal sovereignty in the Federal *Qui Tam* Action causes the claims here to arise under the FCA, a law of the United States. The Wisconsin state claim has been federalized by the federal government's simultaneous claim for more than 50% of the amount claimed by Wisconsin and because both actions are based on the same facts and legal issues.

A similar situation arises under the statutory grant of jurisdiction in the Outer Continental Shelf Act, 43 U.S.C. § 1331 *et seq.* ("OCSLA"), which federalizes state law claims arising in connection with operations on the Continental Shelf. *Simms v. Roctan Energy Services, Inc.*, 137 F. Supp. 2d 731, 734 (W.D. La. 2001). In such circumstances, there exists a "federal question" in the constitutional sense - regardless of its borrowing from substance from the states". *EEX Corp. v. ABB Vetco Gray, Inc.*, 161 F. Supp. 2d 747, 751 (S.D. Tex. 2001).

The FCA, like OCSLA, includes a specific grant of subject matter jurisdiction over an action based on state law when "the action arises from the same transaction or occurrence as an action brought under section 3730." 31 U.S.C. § 3732(b). While the Wisconsin Action may be premised on state law, Wisconsin seeks to recover the same damages from the same alleged scheme and transactions that are now at issue in the FCA claims asserted by the United States in the Federal *Qui Tam* Action. Therefore, the Wisconsin Action presents a

case arising under federal law – the FCA – and is removable pursuant to 28 U.S.C. §§ 1331 and 1441(a).

As the Third Circuit noted in *TMI Litigation Cases*, federal statutory schemes (such as the FCA) are a proper exercise of federal sovereignty under the Constitution and permit the creation of "arising under" federal question jurisdiction:

Where Congress creates a right of action, and formulates substantive federal provision applicable to that action, the action arises under federal law despite the fact that the same wrong may previously have been actionable under state law. Were the rule otherwise, actions which today may be brought under the Federal Tort Claims Act, the Outer Continental Shelf Lands Act and other federal statutes would not arise under federal law because, prior to enactment of the federal statute, actions based on the identical occurrence could have been brought in a state court. The federal nature of the right to be established is decisive.

940 F. 2d 832, 857-58 (3d Cir. 1991).

Because both Wisconsin and the United States seek recovery of the same Medicaid and Medicare reimbursements paid on the same allegedly false claims, Wisconsin's claims have been federalized, giving rise to a federal question arising under the FCA. Removal of this action is, therefore, appropriate.

II. **DEY'S OCTOBER 11 NOTICE IS TIMELY UNDER 28 U.S.C. § 1446(b)**

28 U.S.C. § 1446(b) restarts the clock on a defendant's time to remove:

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 . . . order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . .

28 U.S.C. § 1446(b). Dey's October 11 Notice was filed within thirty (30) days after Dey's counsel's receipt of a copy of the Federal *Qui Tam* Complaint and the District of Massachusetts Order unsealing the Complaint (the "Order").

**A. The "Other Paper" Need Not Arise from the State Action**

Wisconsin argues that the Federal *Qui Tam* Action Complaint, and the Order unsealing it, that Dey received cannot constitute either an "order" or "other paper" for purposes of section 1446(b) because it does not emanate from the Wisconsin Action. The State is wrong. The question here is not whether the "order or other paper" emanated from the state action, it is whether the "order or other paper" emanated from another, related action that has a nexus to this action and whether the effect of the "order or other paper" makes this action removable.

If an "order or other paper" does emanate from a different case with a nexus to the action being removed and that "order or other paper" has an effect on the basis for removal, the thirty (30) day time limit for removal under section 1446(b) is restarted. *See Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 267-68 (5th Cir. 2001); *Doe v. American Red Cross*, 14 F.3d 196, 202-03 (3d Cir. 1993); *Young v. Chubb Group of Ins. Cos.*, 295 F. Supp.2d 806, 808 (N.D. Ohio 2003); *Ancar v. Murphy Oil U.S.A., Inc.*, Nos. 06-3246 — 06-3262, 2006 WL 2850445, at \*3 (E.D. La. Oct. 3, 2006). Pleadings and "other paper[s]" from related actions with common parties qualify under 1446(b) when there is a sufficient "nexus" between the actions. In *Yarnevic v. Brink's, Inc.*, the Fourth Circuit held that it would consider the new information concerning the plaintiff's citizenship in support of removal, notwithstanding that the information was not obtained from filings in the state court action but was first disclosed by the plaintiff in his remand motion in federal court:

The "motion, order or other paper" requirement is broad enough to include *any* information received by the defendant, "whether communicated in a formal or informal manner." *Broderick v. Dellasandro*, 859 F.Supp. 176, 178 (E.D. Pa. 1994) (quoting 14A Wright, Miller, & Cooper, Federal Practice and Procedure, § 3732 at 520).

102 F.3d 753, 755 (4th Cir. 1996) (emphasis added). In *iGames Entertainment Inc. v. Regan*, No. 04-CV-4179, 2004 WL 2538285, at \*4 (E.D. Pa. Nov. 9, 2004), the United States District Court for the Eastern District of Pennsylvania held that "documents associated" with one action qualified as "other paper" for the removal of another action where there was a "sufficient nexus" between the two cases. 2004 WL 253 8285, at \*4. (citing *Hamilton v. Hayes Freight Lines, Inc.*, 102 F. Supp. 594, 596 (E.D. Ky. 1952)).

In *Doe*, the removing defendant was the Red Cross. The Third Circuit found that the Supreme Court's decision in *American National Red Cross v. S. G. and A.E.*, discussed above, allowed removal of the *Doe* case from state court. *Doe*, 14 F.3d at 202-03. The Supreme Court decision in *American National Red Cross*, which specifically addressed the issue of removal, was found to be an "order" within section 1446(b) even though it arose in a different case and even though it was not caused by the voluntary act of those plaintiffs. *Id.*

In *Green*, the Fifth Circuit, following *Doe*, held that documents from another case can serve as a basis for removal under section 1446(b), if the other case shares similar defendants and factual and legal issues. 274 F.3d at 268. The court in *Green* specifically held that the Fifth Circuit's decision in another case against the same defendants, *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486 (5th Cir. 1999), could constitute an "order" sufficient to restart defendants' time to remove the *Green* case if there was a nexus between the two actions:

The Third Circuit [in *Doe*], however, has held that in very limited circumstances, similar to those here — a decision by a court in an unrelated case, but which involves the same defendant, a similar factual situation, and the question of removal — can constitute an "order" under § 1446(b).

*Green*, 274 F.3d at 267. The Fifth Circuit found that the defendants in *Sanchez* and the defendants in *Green* overlapped and the two cases also involved a similar factual situation and similar legal issues. *Id.* at 268. The *Sanchez* decision that qualified as an "order or other paper"

in *Green* did not explicitly discuss the "question of removal" like the Supreme Court's Order did in *Doe*. Instead, it held that state law claims were barred by state statute. *Sanchez*, 187 F.3d at 489-491. The Fifth Circuit held that it was sufficient that the paper or order have the "effect" of allowing removal. *Green*, 274 F.3d at 268.

Serving Dey with the Federal *Qui Tam* Action Complaint triggered federal jurisdiction over the this action under section 3732(b). Both actions share similar parties, facts, and legal issues. The nexus is far stronger here than in *Doe* and *Green*. For example, in *Doe*, the Third Circuit found that the two cases both involved the same defendant and the operative decision in one case triggered the jurisdictional basis for removing a different case pending in state court. 14 F.3d at 202-03. In *Green*, the Fifth Circuit, applying *Doe*, found that the two different actions involved the same defendants and similar factual and legal issues. 274 F.3d at 268. The overlap between the Federal *Qui Tam* Action and the Wisconsin Action is more extensive, because the federal government and Wisconsin are seeking the same damages. As detailed above, the transactions and occurrences at issue, and, indeed, the core claims for reimbursement amounts of the Federal *Qui Tam* Action and the Wisconsin Action, are the same. Not only is Dey a defendant in both actions, the United States, the plaintiff in the Federal *Qui Tam* Action, is, at a minimum, a real party in interest in the Wisconsin Action because it claims it paid more than 50% of the reimbursements paid on the purportedly false claims alleged in both actions.<sup>10</sup>

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<sup>10</sup> Also, the National Association of Medicaid Fraud Control Units, which includes Wisconsin as a member and is active in coordinating these cases between the States and the United States, is funded by the federal government. *See United States ex rel. St. John LaCorte v. Merck & Co.*, No. 99-3807, 2004 U.S. Dist. LEXIS 4860, at \* 20 (E.D. La. March 24, 2004).

The prior decisions remanding state AWP cases based on *Grable* are irrelevant because in each of those decisions there was no nexus between *Grable* and the AWP case being removed. The *Grable* case did not include any of the same parties in the AWP cases, and there was no overlap in any of the substantive issues. See *In re Pharm. Indus. Average Wholesale Price Litig.*, 431 F. Supp. 2d 98, 107-09 (D. Mass. 2006); *Pennsylvania v. TAP Pharm. Prods., Inc.*, 415 F. Supp.2d 516, 526-27 (E.D. Pa. 2005); *State of Minnesota v. Pharmacia Corp.*, No. 05-1394 (PAM/JSM), 2005 WL 2739297, at \*2-3 (D. Minn. Oct. 24, 2005). Likewise, in the MDL removal decision, Judge Saris, in rejecting the *Grable* "other paper" argument, noted that:

While there are policy arguments for permitting removal where a closely related case has been reversed on appeal, here the connection between the Supreme Court case and this litigation is too tenuous; *Grable* and the AWP MDL involve wholly different statutes and unrelated parties.

*In re Pharm. Indus. Average Wholesale Price Litig.*, 431 F. Supp. 2d at 109.

In its prior decision, this Court considered the *Doe* and *Green* cases. *State of Wisconsin v. Abbott Labs.*, 390 F. Supp. 2d 815, 824-25 (W.D. Wis. 2005). In rejecting the previous removal based on the *Grable* case this Court, like the other courts evaluating removal of AWP actions based on *Grable*, noted the absence of a nexus between *Grable* and this action: "Defendants in [the Wisconsin AWP action] were not parties in *Grable*. *Grable* did not involve a fact situation similar to the present case." *State of Wisconsin v. Abbott Labs.*, 390 F. Supp. 2d at 825. This Court distinguished the facts of *Doe* and *Green* in its prior decision, because there was no nexus between *Grable* and this action. *Id.* at 824-25. Now, however, there exists a stronger nexus between this action and the Federal *Qui Tam* Action than there was in either *Doe* or *Green*. Because of this strong and overlapping nexus, the Federal *Qui Tam* Complaint, and the Order unsealing it, restarted the time limit for Dey to remove under 1446(b).

## B. The Cases Upon Which Plaintiff Relies Are Inapposite

Wisconsin cites numerous cases for the proposition that the "order or other paper" under section 1446(b) must arise from the state action (Wisconsin Br. at 5-6.) The "other paper" at issue in those actions arose from cases that did not involve any of the same parties and claims. Indeed those cases more readily stand for the proposition that "subsequent court decision[s] in wholly *unrelated* case[s], defining what constitutes the basis for removal to the federal court", cannot constitute "other paper" under section 1446. *See Avco Corp. v. Local 1010 of the International Union*, 287 F. Supp. 132, 133 (D. Conn. 1968) (emphasis added). In *Green*, however, the Court distinguished many of the same cases relied upon by Wisconsin because those cases involved circumstances different from a situation, like this one, where the same defendant was a party. 274 F.3d at 267. The Hawaii and Alabama decisions are also inapposite. The Hawaii decision incorrectly interprets the *Doe* and *Green* cases as requiring an order or other paper to prohibit the state action in question (Hawaii decision at 11), but *Doe* and *Green* actually stand for the proposition that the order or other paper need only have the effect of allowing removal. In addition, the Hawaii decision failed to consider the strong nexus between the state action and the Federal *Qui Tam* Action, a nexus much stronger than those in *Doe* and *Green*. The Alabama decision also does not address the strong nexus between the state action and the Federal *Qui Tam* Action and does not even acknowledge the *Doe* or *Green* decisions or the principles established in those cases. There are, however, no other circuit court opinions refuting the *Doe* and *Green* decisions.

The principles established in the *Doe* and *Green* decisions, and the other decisions discussed above, should be applied here because there exists a strong nexus between the Federal *Qui Tam* Action and the Wisconsin action. The Federal *Qui Tam* Action involves the same

defendant, the same facts, similar legal issues, and plaintiffs who assert claims for the same transactions and occurrences.

**C. The "Voluntary Action" Rule Does Not Apply in This Case**

Wisconsin argues section 1446(b) applies only to "voluntary acts" of the plaintiff. Plaintiff relies on several cases that reject removals where an action of the defendant, or another party wholly adverse to the plaintiff, caused the case to become removable. " This case is different. Dey has not done anything to make this case removable.

28 U.S.C. § 1446(b), moreover, does not say "voluntary act of the plaintiff" The "rule" is a gloss on the statute; and, the rationale behind the rule dictates that it is inapplicable here. The rule grows out of the well-pleaded complaint principle in the context of diversity actions and addresses two potential policy problems: (i) that deference to a plaintiff's choice of forum under the well pleaded complaint rule means a defendant should not be able to rewrite plaintiffs claim to enable removal, and (ii) that a subsequent state appellate decision could undermine the basis for a prior removal. *See Poulos v. NAAS Foods, Inc.* 959 F.2d 69, 72 (7th Cir. 1992). Neither rationale applies here; and, the rule should not apply to this case.

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<sup>11</sup> *Dowd v. Alliance Mortgage Co.*, 339 F. Supp. 2d 452, 454 (E.D.N.Y. 2004) ("Defendant's actions, and not Plaintiffs, created the basis for removability."); *Stauffer v. Citizens Alliance Education Foundation*, 2001 WL 34039481, at \*2 (D. Ore. Dec. 14, 2001) (removal improper when based on defendants' offering of "a potential ground for disqualification of a state court judge"); *Henderson v. City of Chattanooga*, 2002 WL 32060139, at \*7 (E.D. Tenn. Mar. 15, 2002) (rejecting removal based on federal claims brought in an "entirely adverse" intervening complaint by intervening plaintiffs "diametrically opposed and hostile" to the plaintiffs in the original state action). The other cases cited by Plaintiff, *Kocaj v. Chrysler Corp.*, 794 F. Supp. 234, 236-37 (E.D. Mich. 1992) (rejecting removal when based on the issuance of a decision in a wholly unrelated action); *Morsani v. Major League Baseball*, 79 F. Supp. 2d 1331, 1333-34 (M.D. Fla. 1999) (removal improper when based on the issuance of a decision in a wholly unrelated action), address circumstances where other decisions did not qualify as an "order or other paper" under section 1446(b), which is not the case here.

Dey has not done anything to "rewrite" Wisconsin's claims. *Cf. City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (1997). This is no different from a case where the plaintiff sues an out-of-state resident. Such a plaintiff does so with the risk that he or she might be removed on diversity grounds. The fact that this case was not removable by Dey until the United States elected to unseal the complaint does not bring this within the "voluntary act" rule because removal is not based on the acts of Dey or any defendant, and the United States and Wisconsin both seek to recover the same reimbursements for the same drugs. When Wisconsin filed this case it knew that the federal government was investigating the same alleged scheme that Wisconsin has alleged in its complaint. (Wisconsin Compl. at ¶ 46.)

Moreover, as the Supreme Court held in *American National Red Cross*, the well-pleaded complaint rule does not apply to an independent grant of federal jurisdiction. 505 U.S. at 258. The voluntary act rule, therefore, also should not apply when removal is based on a grant of jurisdiction under a federal statute independent of federal question jurisdiction under 28 U.S.C. § 1331 because the rule arises from the well-pleaded complaint rule.<sup>12</sup> For example, the voluntary act rule does not apply to the removal under section 1334(b) of actions "related to bankruptcy cases pending in the federal courts. Even though a bankruptcy proceeding is not caused by the voluntary act of the plaintiff, receipt of a notice of a bankruptcy petition triggers the removal time period under 1446(b), making the case removable. *See Davis v. Life Investors Ins. Co. of America, Inc.*, 214 F. Supp. 2d 691, 694 (S.D. Miss. 2002); *see also In Re Asbestos Litigation*, No. CV01-1790-PA, 2002 WL 649400, at \*2-3 (D. Or. Feb. 1, 2002); *Thomson v.*

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<sup>12</sup> Jurisdiction over this action is appropriate under both 28 U.S.C. § 1331 and 31 U.S.C. § 3732(b). *See supra* Point I.A and E.

*Able Supply Co.*, 179 F. Supp. 2d 693, 696 (W.D. Tex. 2002); *but see In Re Donington, Karcher, Salmond, Ronan & Reinone, P.A.*, 194 B.R. 750, 755-56 P.N.J. 1996).

Section 3732(b) is an independent grant of jurisdiction, separate and apart from federal question jurisdiction under 28 U.S.C. § 1331. Thus, the well-pleaded complaint rule does not apply to actions, such as this one, subject to the grant of jurisdiction in section 3732(b), and the voluntary act rule, an offshoot of the well-pleaded complaint rule, also should not apply to actions like this one.

**D. The Federal *Qui Tam* Complaint Against Dey Is A Ground for Removal Separate And Apart From The *Qui Tam* Action Against Abbott**

Wisconsin argues that removal is improper because a different *qui tam* complaint alleging claims under the FCA was first unsealed against Abbott Laboratories ("Abbott") on May 16, 2006 (the "Abbott *Qui Tam* Action"), and Abbott did not remove.

It was the service upon Dey of the complaint in the Federal *Qui Tam* Action that triggered its obligation "to participate in a civil action or forgo procedural or substantive rights". *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351 (1999). Dey's obligation to decide, based on the Federal *Qui Tam* Complaint, whether to remove this action to federal court, and to persuade its co-defendants to join in the removal, began only upon service on Dey of the complaint in the Federal *Qui Tam* Action. Indeed, Dey could not have taken steps to remove on these grounds before it was served because the complaint was sealed. *See United States ex rel. LaCorte v. Merck & Co.*, 2004 U.S. Dist LEXIS 4860, at \*10-11 (holding that the State of Louisiana's time to intervene in pending *qui tam* action under the FCA only started to run when the *qui tam* complaint was unsealed).

Wisconsin's argument that Abbott waived its right of removal which now precludes the other defendants from joining in or consenting to the removal ignores the fact that

the basis for Dey's notice of removal is separate and independent from any basis for removal Abbott may have had based on the Abbott *Qui Tam* Action. Moreover, Wisconsin relies on diversity cases inapposite to the circumstances presented in this action.<sup>13</sup>

Since *Murphy Brothers*, the majority of courts acknowledge that with respect to removal the inaction of one defendant should not waive the right of another. *Marano Enterprises v. Z-Teca Restaurants, L.P.*, 254 F.3d 753, 757 (8th Cir. 2001) (a later-served defendant may remove within 30 days of service despite first-served defendant's failure to timely remove); *Brierly v. Aluisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999); *Eltman v. Pioneer Communications of America, Inc.*, 151 F.R.D. 311, 318 (N.D. Ill. 1993). Moreover, a defendant who failed to remove is not precluded from consenting to the later removal. *Brierly*, 184 F.3d at 533, n.3 ("[A] first-served defendant can consent to a later-served defendant's removal petition").

Dey could not have removed this action until it was served with the Federal *Qui Tam* Complaint on September 11, 2006 because the action against Abbott did not assert any claims against Dey. Since the two *qui tam* actions are different, Dey is not precluded from removing and Abbott is not precluded from consenting to Dey's removal.

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<sup>13</sup> See *Westwood v. Fronk*, 177 F. Supp. 2d 536 (N.D. W.Va. 2001) (removal based on diversity denied after co-defendant filed cross-claim); *Krasnow v. Texaco, Inc.*, 773 F. Supp. 806 (E.D. Va.1991) (removal based on diversity denied after the state court decided one defendant's demurrer); *Gorman v. Abbott Laboratories*, 629 F. Supp. 1196 (D. R.I. 1986) (removal based on diversity denied because original defendant filed answer in state action); *Crocker v. A.B. Chance Co.*, 270 F. Supp. 618 (S.D. Fla. 1967) (removal based on diversity denied after the original defendant waived the right to removal on diversity).

### III. WISCONSIN'S SEVERANCE ARGUMENTS ARE MERITLESS

Wisconsin could have sued each of the defendants separately but opted not to do so. Instead, it bundled all of the defendants in a single complaint, pleading its claims against the industry in, for the most part, general terms rather than providing specific allegations of individual defendants' conduct. Doing so served its purpose at the time. Now, Wisconsin seeks to do otherwise; but, its newfound desire to sever is a transparent attempt to avoid litigating in federal court. Wisconsin should be held to the framework established by its pleadings, unless and until it elects to amend. Moreover, Wisconsin's attempt to raise the issue of severance in its brief is procedurally improper. This issue should have been raised by way of a separate motion to sever brought in accordance with the Federal Rules of Civil Procedure, which would give each defendant in this action the opportunity to be heard on the issue of severance.

### CONCLUSION

For the foregoing reasons, Defendant Dey, Inc. respectfully requests that Plaintiff's motion to remand, or alternatively to sever the claims against Dey from the claims against the remaining defendants, be denied in its entirety.<sup>14</sup> -

Dated this 13th day of November, 2006.

Respectfully Submitted,

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<sup>14</sup> Sanctions, fees and costs are inappropriate here because statutes and case law plainly support removal of this case. An award of costs and attorneys' fees here, moreover, is plainly inappropriate. There is no binding precedent foreclosing removal under 31 U.S.C. § 3732(b). *Cf. G.M. Sign, Inc. v. Global Sharp Solutions, Inc.*, 430 F. Supp. 2d 826, 829 n.4 (N.D. Ill. 2006). The "other paper" authorities are in conflict in the circuits and the district courts; therefore, an award of costs or attorney's fees here would be unfair. *Cf. Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1310 (11th Cir. 2002) (observing unfairness to litigants occurring because of conflicting decisions).

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# Exhibit A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

STATE OF ALABAMA, )

Plaintiff, )

v. )

CIVIL ACTION NO.

**2:06cv920-MHT**

(WO)

**ABBOTT LABORATORIES, INC., )**

et al., )

Defendants. )

ORDER

This litigation is before this court, once again on plaintiff State of Alabama's motion to remand. The motion should be granted for a number of reasons, including the following: (1) 31 U.S.C. § 3732(b) appears to be a "supplemental" jurisdictional statute and thus cannot, by itself, be a basis for "removal" jurisdiction, which must rest on "original" jurisdiction. In other words, a removing party cannot assert "supplemental" jurisdiction as a basis for "removal" jurisdiction in one case based on "original" jurisdiction in an entirely

different case.. See Syngeta Crop Prot., Inc. V. Henson, 537 U.S. 28, 34 (2002); Ahearn v. Charter Township of Bloomfield, 100 F.3d 451, 456 (6th Cir. 1996); see also Darden v. Ford Consumer Fin. Co., Inc., 200 F.3d 753, 755 (11th Cir. 2000). (2) Because the Massachusetts qui tam lawsuit was not generated in the Alabama state-court proceeding, it is not an "order or other paper," 28

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1. Section 3732 provides:

(a) Actions under section 3730.--Any action under section 3730 may be brought in any judicial district in which the defendant ~~Or~~, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

"(b) Claims under state law.--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730."

U.S.C. § 1446(b). See Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252, 254 (5th Cir. 1961)<sup>2</sup>; Morsani v. Major League Baseball, 79 F.Supp.2d 1331 (N.D. Fla. 1999). (3) Because the Massachusetts cqui tam lawsuit was not a voluntary act of plaintiff State of Alabama, 28 U.S.C. § 1446 removal is not appropriate. See Addo v. Globe Life & Acc. Ins. Co., 230 F.3d 759, 762 (5th Cir. 2000). Finally, although the court does not reach the issue, it has serious concerns that it can even entertain a second removal of this case. See Harris v. Blue Cross/Blue Shield of Alabama, Inc., 951 F.2d 325, 330 (11th Cir. 1992) ("[O]ut of respect for the state court and in recognition of principles of comity, [t]he action must not ricochet back and forth depending upon the most recent determination of a federal court.").

Accordingly, it is ORDERED that plaintiff State of

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2. In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Alabama's motion to remand (doc. no. 128) is granted and that this lawsuit is, again, remanded to the Circuit Court of Montgomery County, Alabama, for want of subject-matter jurisdiction.

It is further ORDERED that the motion to stay (doc. no. 170) is denied.

It is further ORDERED that all other outstanding motions (other than pro hac vice motions) are left for resolution by the state court after remand.

The clerk of the court is DIRECTED to take appropriate steps to effect the remand.

DONE, this the 2nd day of November, 2006.

/s/ Myron H. Thompson  
UNITED STATES DISTRICT JUDGE