

No. 07-1999

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THE STATE OF WISCONSIN,

Plaintiff-Appellee,

v.

AMGEN INC., et al.,

Defendants,

DEY, INC.,

Defendant-Appellant.

Appeal From The United States District Court
For the Western District of Wisconsin
Case No. 06-C-0582-C
The Honorable Judge Barbara B. Crabb

REPLY BRIEF OF DEFENDANT-APPELLANT DEY, INC.

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PRELIMINARY STATEMENT

Defendant-Appellant Dey, Inc. (“Dey”) submits this reply memorandum of law in further support of its appeal.¹

When the United States brought an action against Dey arising from the same transactions and occurrences alleged by Wisconsin, Dey removed this case because it believed the plain language of the FCA, section 3732(b), created original subject matter jurisdiction under 28 U.S.C. § 1441:

The district courts shall have jurisdiction over any action...if the action arises from the same transaction or occurrence as an action brought under section 3730 [of Title 31].

31 U.S.C. § 3732(b).

Dey believed its right to remove was triggered by the filing of the case by the United States, and therefore, removal was timely because 28 U.S.C. § 1446(b) provides:

[A] notice of removal may be filed within thirty days after receipt by the defendant, ... 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) (emphasis added). No court in this Circuit or anywhere had ever considered whether section 3732(b) is a grant of original jurisdiction or whether a *qui tam* complaint and the order unsealing it were “order” or “other paper” under section 1446(b).

¹ The Brief and Required Short Appendix of Defendant-Appellant Dey, Inc., filed July 16, 2007, is referred to herein as “Dey’s Opening Brief” or “Dey Br.” Except as otherwise defined herein, capitalized terms used in this reply memorandum shall have the meaning given to them in the Dey Brief.

Although five courts ultimately ruled against Dey, only Judge Crabb of the District Court of the Western District of Wisconsin (the “District Court”) granted attorneys’ fees on the basis that Dey’s removal was untimely. *See* BA020-021, Opinion and Order, entered Jan. 16, 2007 (“*2007 Wisconsin Decision*”), Docket No. 051. This finding and the award of attorneys’ fees is clearly error as the decisions issued by the other courts establish that Dey certainly had a reasonable basis for removal. For example, Judge Saris in the District of Massachusetts who has been presiding over a multidistrict litigation comprised of AWP actions, like the Wisconsin Action, stated on the issue of timeliness that: “[t]he issue presents a particularly difficult and close question, with persuasive arguments on both sides.” *In re Pharm. Indus. Average Wholesale Price Litig.*, MDL No. 1456, Civil Action No. 01-12257-PBS, 2007 WL 2694347, at *4 (D. Mass. Sep. 17, 2007) (Saris, J.) (“*AWP MDL Order*”) (attached hereto at Tab 1). Judge Crabb, moreover, did not rule against Dey on the jurisdiction point, finding instead that the jurisdiction created by 31 U.S.C. § 3732(b) is a new form of “hybrid” jurisdiction that is a cross between original jurisdiction and supplemental jurisdiction. *See* BA013-014, *2007 Wisconsin Decision*, Docket No. 051.

An award of attorneys’ fees is only permissible if Dey “lacked an objectively reasonable basis” to remove the case. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). Given the conflicting analyses in the opinions by five District Courts of the meaning of 31 U.S.C. § 3732(b), *see* Dey Br. at pp. 25-27, and the rights of a litigant to remove pursuant to 28 U.S.C. § 1446 under the novel and

unusual situation present here, Dey certainly had a reasonable basis to remove. Moreover, the suggestion that Dey's motive to remove was to delay and create some inefficiency is nonsensical since Dey's removals were intended to consolidate seventeen State AWP Actions with the Federal Action that no one disputes is based on the same transactions and occurrences. *See* Dey Br. at 4-6, 8-10.

In deciding that Dey's removal was so obviously untimely as to merit awarding attorneys fees, the District Court relied on an overly narrow view of *Doe v. American Red Cross*, 14 F.3d 196 (3rd Cir. 1993), and *Green v. R. J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001). *Doe* and *Green* are not controlling in the Seventh Circuit and the holdings were limited to whether the time to remove was triggered by court "orders". *See Doe*, 14 F.3d at 198; *Green*, 274 F.3d at 268. Dey's *sui generis* ground for the timeliness of its removal is based on the unique effect of the unsealing of an FCA case inextricably linked to cases pending in state court. Under the plain language of 28 U.S.C. § 1446(b), Dey was entitled to assert that the U.S. Complaint should be considered "other paper" that triggered a new opportunity to remove because it was only when Dey received the U.S. Complaint that it could "ascertain[] that the case is one which is or has become removable". The statute controls, not decisions from other Circuits with different underlying facts, law and context. Moreover, the principle from *Doe* and *Green* that an order from a different but "sufficiently related" case triggers a right to remove under section 1446(b) supports Dey's argument that its receipt of the U.S. Complaint and September 9 Order from the Federal Action, which arises from the same transactions and

occurrences on which the Wisconsin Action is premised, also triggers a new opportunity to remove. Dey respectfully submits that the District Court erred and that this Court should consider Dey's grounds for removal.

In its Opposition Brief, Wisconsin does not challenge Dey's argument that 31 U.S.C. § 3732(b) creates original jurisdiction over the Wisconsin Action.² See Brief of Plaintiff-Appellee State of Wisconsin, filed September 21, 2007 ("Opposition Brief" or "Opp. Br."), at pp. 27-28. Instead, Wisconsin argues that: (a) the District Court's opinion cannot be legally erroneous in the absence of controlling Seventh Circuit law; (b) *Wisconsin v. Abbott Labs.*, 390 F. Supp. 2d 815 (W.D. Wisc. 2005) ("*2005 Wisconsin Decision*"), is law of the case; (c) the "order" and "other paper" at issue in this case do not meet the standards set forth in *Doe* and *Green*; and (d) Wisconsin should be ordered sanctions, costs, and fees for this appeal. For the reasons set forth herein, all of Wisconsin's arguments fail.

ARGUMENT

I. DEY HAD AN OBJECTIVELY REASONABLE BASIS FOR REMOVING THE ACTION

A district court may only award attorneys' fees under 28 U.S.C. § 1447(c) "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin*, 546 U.S. at 136. Dey respectfully submits that its removal was not only objectively reasonable, but proper.

² Dey also argued that the District Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. (Dey Br. at pp. 27-28.) Wisconsin does not challenge this argument either.

A. Dey's 2006 Removals Raised Novel Issues

If removal is not foreclosed by clearly established law, then the removal is objectively reasonable and attorneys' fees are barred. *Lott v. Pfizer, Inc.*, 492 F.3d 789, 793 (7th Cir. 2007). As this Court held:

As a general rule, if, at the time the defendant filed his notice in federal court, clearly established law demonstrated that he had no basis for removal, then a district court should award a plaintiff his attorneys' fees. By contrast, if clearly established law did not foreclose a defendant's basis for removal, then a district court should not award attorneys' fees.

Id.

Prior to Dey's removal, no court had ever decided the timeliness of the removal of a state case inextricably linked to a federal FCA action where the Defendant became aware of the existence of the FCA action, and thus that the state case was removable, based on the FCA complaint and the order unsealing it. Wisconsin admits that there is no controlling case law in this circuit concerning the timeliness of Dey's Notice of Removal. *See* Opp. Br. at p. 13. Additionally, no court had ever ruled on whether 31 U.S.C. § 3732(b) is a grant of original jurisdiction. Accordingly, there is no basis for holding that Dey lacked an objectively reasonable basis for its removal.

The novelty of the issues raised by Dey's removal is demonstrated by the conflicting analyses by the district courts. Judge Saris, who decided nine remand motions on Dey's 2006 Removals, did not hold that the 2006 Removals were untimely. *See AWP MDL Order*, 2007 WL 2694347, at *4. Judge Saris noted that Dey had a "persuasive" argument because "the nexus between the qui tam and

removed action is substantial as both involve a similar factual situation, similar legal issues, and the same defendant”. *Id.* Ultimately, Judge Saris did not rule Dey’s Notices of Removal untimely because: “This issue presents a particularly difficult and close question, with persuasive arguments on both sides.”³ *Id.*

Judge Saris had decided seven remand motions on Defendants’ 2005 Removals, which were based on the same grounds as the 2005 Removal of the Wisconsin Action and which were the subject of the *2005 Wisconsin Decision*. Judge Saris did not rely on her analysis of the timeliness of the 2005 Removals in evaluating Dey’s 2006 Removals (even though Judge Saris referred to the 2005 Removals on a different issue in the very same opinion). *Compare AWP MDL Order*, 2007 WL 2694347, at **2-4, *with id.*, at *8. Apparently, Judge Saris agreed with Dey that the issue of the timeliness of the 2005 Removals is distinguishable from the 2006 Removals.

In contrast, the District Court held, and Wisconsin now argues, that Dey lacked an objectively reasonable basis for its removal because the District Court had previously addressed the timeliness issue in the *2005 Wisconsin Decision*. The timeliness of the 2005 Notice of Removal turned on whether an order of the U.S. Supreme Court in *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308 (2005) (the “*Grable* order”) constituted “other paper” under 28 U.S.C. § 1446(b). *Grable* was completely unrelated to the Wisconsin

³ The AWP MDL Court remanded most of the remaining cases removed by Dey on October 11, 2006 based on the finding that section 3732 only created “supplemental jurisdiction”. This holding is inconsistent with the *2007 Wisconsin Decision* which found section 3732 to create a form of “hybrid” jurisdiction.

Action and the cases had no overlapping parties, facts, or legal issues. *See 2005 Wisconsin Decision*, 390 F. Supp. 2d at 824-25. The District Court erred in relying on the *2005 Wisconsin Decision* with respect to the timeliness of the 2006 Removal.

The timeliness of the 2006 Removals concerned an issue that had never been decided by any court: whether a complaint in an inextricably linked FCA action and the order unsealing it can constitute an “order” or “other paper”. Unlike *Grable*, the Federal Action is not an “unrelated” case. *See Dey Br.* at 8-10; 34-35. As Judge Saris stated: the “federal action[] concern[s] the same factual circumstances and fraud allegations as the state actions,” *AWP MDL Order*, 2007 WL 2694347, at *1, and that “the federal and state cases against Dey arise from the same transaction or occurrence”. *Id.* at *2. Moreover, the September 9 Order and the U.S. Complaint, themselves, are related to the Wisconsin Action because they have the effect of allowing Wisconsin to bring its claims in federal court, thereby giving rise to Dey’s reciprocal right of removal. *See Dey Br.* at 21-22.⁴ Therefore, the District Court erred because Dey’s grounds for the timeliness of the 2006 Removal were fundamentally different from the grounds asserted in the 2005 Removal. The District Court further erred because, at a minimum, the conflicting decisions of the district courts on the 2006 Removals demonstrate that reasonable

⁴ Wisconsin also contends that *Doe* and *Green* require that the order itself, and not merely the action, be related to the action to be removed. Assuming this argument is correct, it does not affect the propriety of Dey’s removal. The September 9 Order and U.S. Complaint were sufficiently related to the Wisconsin Action because they apprised the parties that jurisdiction existed over the Wisconsin Action.

people, including federal judges, can disagree about the timeliness of Dey's 2006 Removals.⁵

B. Dey Did Not Remove the Action For the Purpose of Causing Delay Or Increasing Litigation Costs

The District Court held that Dey removed the action “for the purpose of prolonging litigation or increasing plaintiff's costs in prosecuting the case”. This is not supported by the record. Dey's removal did not cause any delay in this case and discovery is proceeding. *See* Dey Br. at pp. 10-11.

Wisconsin alleges that Dey removed this case for the purpose of increasing Wisconsin's costs to litigate this case, but fails to cite anything in the record to support this claim. *See* Opp. Br. at 26-27. Moreover, Dey's removal had the potential to save litigation expenses for Wisconsin and other States. Wisconsin's counsel, Miner, Barnhill & Galland, P.C., is also acting as counsel in cases brought by Illinois, Kentucky, Alaska, Hawaii, and South Carolina. Dey removed all of these cases. If these cases were not remanded, they would have all been pending in the AWP MDL, *see* A077-088, Notice of Removal, Docket No. 002, where discovery could have been coordinated, thereby fostering efficiencies that plainly do not exist when the cases are in numerous different courts. Wisconsin's bald assertion that litigating this case in federal court would have increased litigation expenses is insufficient.

If successful, Dey's removal would have been beneficial for the courts by conserving judicial resources and efficiently resolving the controversy. As Dey has

⁵ The district courts' analyses also conflicted on the jurisdiction issue. *See* Dey Br. at pp. 25-27; *AWP MDL Order*, 2007 WL 2694347, at *4.

demonstrated, the seventeen State AWP Actions, including the Wisconsin Action, all concerned the same allegations of wrongdoing against Dey as in the Federal Action. *See* Dey Br. at pp. 4-6, 8-10. These State AWP Actions were brought against Dey in seventeen different state courts. *See id.* at 10. Additionally, the Federal Action, along with actions brought against Dey by the State of California, the City of New York and forty-three Counties of the State of New York, have been pending in a single federal court (Judge Saris' court) where those actions will proceed during the discovery phase.⁶ *See* A078, Notice of Removal, Docket No. 002; Dey Br. at pp. 4-5. Judge Saris' court would have provided a single forum where all of the claims of the federal, state and county governments could have been resolved at the same time without inconsistent results on the same issues. Since all of these cases against Dey arise from the same transactions and occurrences involving, a single federal forum is far more efficient and economical for the courts, as well as the parties, than eighteen separate cases in eighteen different state and federal courts.

II. THE DISTRICT COURT ERRED BECAUSE DEY'S REMOVAL WAS PROPER

A. Dey's Removal Was Proper Because 31 U.S.C. § 3732(b) Grants Original Jurisdiction Over The Wisconsin Action

31 U.S.C. § 3732(b) grants the federal district courts subject matter jurisdiction over the Wisconsin Action because the Wisconsin Action "arises from the same transaction[s] and occurrence[s]" as the Federal Action. The District

⁶ A number of similar actions are also pending against other defendants in Judge Saris' court.

Court did not rule against Dey on its substantive jurisdiction argument, and instead, found that section 3732(b) creates a form of “hybrid” jurisdiction. *See* BA013-014, *2007 Wisconsin Decision*, Docket No. 051. Wisconsin does not challenge Dey’s substantive basis for removal on this appeal. *See* Opp. Br. at pp. 27-28.

The timeliness issue cannot be resolved without considering the jurisdiction issue because if 31 U.S.C. § 3732(b) created jurisdiction, then Dey’s removal was timely. The Federal Action was filed in 2000 and remained sealed for six years. *See* A080, U.S. Complaint, Docket No. 002. Many related actions including the Wisconsin Action were filed while the Federal Action remained under seal. The jurisdiction provision of section 3732(b) was not triggered until the action was unsealed. Indeed, until that time, Dey could not have ascertained that jurisdiction existed under section 3732(b). Limiting the operation of section 3732(b) to actions which happened to be filed after the unsealing of a *qui tam* complaint makes no logical sense, is contrary to the statute, and does not comport with the comprehensive statutory scheme established by the FCA.

The FCA contains no provision limiting section 3732(b) to state actions brought after the federal action is commenced. Rather, the FCA established a comprehensive federal scheme whereby the federal district courts have jurisdiction over all actions, including “any action brought under the laws of any State for the recovery of funds paid by a State,” arising from the “same transaction or occurrence,” thereby creating an efficient and economical method of resolving all related disputes arising from the submission of false claims to the state and federal

governments. *See* 31 U.S.C. § 3732(b). Congress' intent that all state and federal actions arising from the same transactions and occurrences as a federal FCA action be resolved in one federal court is further evidenced by the jurisdictional bar of 31 U.S.C. § 3730(b)(5). Section 3730(b)(5) provides that when a federal *qui tam* action is brought under 3730(b), as the Federal Action was, no person other than the United States Government "may intervene or bring a related action based on the facts underlying the pending action." *See* 31 U.S.C. § 3730(b)(5); Dey Br. at pp. 35-36. Since the Wisconsin Action is a related action based on the same facts as the Federal Action, the Wisconsin state court lacks subject matter jurisdiction over the Wisconsin Action, and thus, the action is barred in state court. *See id.* Section 3732(b) provides an exception to the jurisdictional bar which would otherwise prevent parties other than the United States from bringing claims related to pending *qui tam* actions.

A decision that the removal of a state case after the unsealing of an FCA *qui tam* complaint is untimely would, therefore, undercut the statutory scheme and contradict the plain language of the statute. If section 3732(b) creates original jurisdiction, then Dey's removal should be deemed timely.

B. Dey's Removal Was Timely

Under the plain language of 28 U.S.C. § 1446(b), Dey's removal was timely because its receipt of the U.S. Complaint and the September 9 Order was the first time Dey was able to "ascertain[] that the case is one which is or has become removable". The District Court did not address this point in its decision, and Wisconsin fails to challenge it in its Opposition Brief. Instead, the District Court

held and Wisconsin argues that, generally, “order” and “other paper” are limited to “documents generated in the case for which removal is sought.” *See* BA016, 2007 *Wisconsin Decision*, Docket No. 051; Opp Br. at p. 17. The District Court and Wisconsin further contend that an exception to this general rule, acknowledged by the Third Circuit in *Doe v. American Red Cross*, 14 F.3d 196 (3rd Cir. 1993), and the Fifth Circuit in *Green v. R. J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001), did not apply in this case, relying on an overly narrow interpretation of the application of the exceptions in *Doe* and *Green*. The District Court erred because it ignores the plain language of the statute and even if the September 9 Order and the U.S. Complaint did not fall within the *Doe* and *Green* exceptions – which Dey does not concede – this would not be dispositive because these cases are not controlling in the Seventh Circuit.

The plain language of 28 U.S.C. § 1446(b) does not limit orders and other papers to documents generated in the same cases even though some courts have narrowed the application of the statute in this manner. Additionally, some courts, like in *Doe* and *Green*, have found that under certain circumstances this narrow interpretation of the statute does not make sense. Similarly, Dey argues that such a narrow interpretation is inapplicable when jurisdiction is premised on the grant of original jurisdiction in 31 U.S.C. § 3732(b).

1. **The U.S. Complaint and September 9 Order Are “Other Paper”**

Under 28 U.S.C. § 1446(b), the U.S. Complaint and September 9 Order are “other paper” that restarted the 30-day clock for Dey’s time to remove because Dey’s receipt of these documents was the first time it became aware of the Federal Action,

which triggered its right to remove under 31 U.S.C. § 3732(b). Courts have found that “other paper” from a “sufficiently related” case meet the requirements of section 1446(b).

For example, in *iGames Entertainment Inc. v. Regan*, No. 04-CV- 4179, 2004 WL 2538285, at *4 (E.D. Pa. Nov. 9, 2004), the “other paper[s]” were a press release and a Civil Cover Sheet filed in a separate, but related case, involving the same parties, which established the jurisdictional amount in controversy for federal diversity jurisdiction in the removed case. The court held that documents associated with one action were “other paper” that allowed removal of a second action because there was a “sufficient nexus” between the two actions. *See id.* The two actions both arose from the same set of facts, involved common parties, and the documents from the first action apprised the defendants in the second action of grounds for removing that action. *Id.* *See also Hamilton v. Hayes Freight Lines, Inc.*, 102 F. Supp. 594, 596 (E.D. Ky. 1952) (an answer filed in a separate, but related case, with overlapping parties constituted “other paper” in the removed case).

Wisconsin argues that the so-called exceptions of *Doe* and *Green* apply only to “orders”, not “other paper”, and that there is no “sufficient nexus” rule for “other paper”. *See* Opp. Br. at pp. 19-20. Wisconsin also argues that *iGames* should be disregarded because it did not cite to or rely on *Doe* or *Green*. *See id.* *Doe* and *Green* are not controlling in this Circuit and, even if they were, Dey agrees that the holdings in *Doe* and *Green* applied to the definition of “order” under section 1446(b),

not “other paper”. Therefore, nothing in *Doe* and *Green* should prevent a court from finding “other paper” arising from a “sufficiently related” case. As demonstrated by *iGames*, *Doe* and *Green* are merely two examples of how a court may interpret section 1446(b), and the “sufficiently related” doctrine goes beyond the holdings in those cases.

Assuming *Doe* and *Green* were controlling in this Circuit, the principles of these cases support Dey’s position. The U.S. Complaint and the September 9 Order operated like the orders at issue in *Doe* and *Green* in that they informed Dey and the state Attorneys General of the authority to remove the State AWP Actions. It is of no importance that the authority to remove was conveyed by documents informing Dey of a statutory authority, as opposed to authority based on an order. Similar to an order, the statutory authority was clear and unequivocal.

2. The September 9 Order Is an “Order”

The September 9 Order is an “order” under section 1446(b) because Dey’s receipt of the “order” informed Dey that a court had ordered an FCA action to be unsealed against it, thereby triggering Dey’s right to remove under 31 U.S.C. § 3732(b). The District Court erred in finding that the September 9 Order did not qualify as an “order” simply because it was not the same type of order as the one found in either *Doe* or *Green*.⁷ As stated above, *Doe* and *Green* are merely two

⁷ Even if *Green* did control in this Circuit and all of the factors considered in *Green* were required to meet the sufficiently related test, the September 9 Order would fall within the *Green* holding. *See* Dey Br. at pp. 34-35. In *Green*, the Fifth Circuit held that an order from a case involving the same defendants, with a similar factual situation and legal issue, and which had the effect of creating subject matter jurisdiction constitutes an order for purposes of section 1446(b). *See Green*, 274 F.3d at 268. Both the Federal and Wisconsin Actions involve Dey as a defendant, arise

interpretations of the term “order” under section 1446(b) which are not controlling in the Seventh Circuit. Moreover, other courts have adopted variations of the “sufficient relatedness” test of *Doe* and *Green*. See *Ancar v. Murphy Oil U.S.A., Inc.*, Nos. 06-3246 · 06-3262, 2006 WL 2850445 *2 (E.D. La. Oct. 3, 2006) (applying the *Green* factors); *Young v. Chubb Group of Ins. Cos.*, 295 F. Supp. 2d 806, 808 (N.D. Ohio 2003) (applying *Doe* and *Green*). Most notably, in the *2005 Wisconsin Decision*, the District Court did not apply the same factors considered by the Court in either *Doe* or *Green*, but rather applied a hybrid of the factors set forth in each case. See *2005 Wisconsin Decision*, 390 F. Supp. 2d at 824-25.⁸

**3. The Order and Other Paper Need
Only Have the Effect of Allowing Removal**

The September 9 Order and the U.S. Complaint had the effect of allowing removal because they informed Dey that it had been sued under the FCA, thereby triggering jurisdiction under 31 U.S.C. § 3732(b). Wisconsin concedes that an order may fall under section 1446(b) if it is “definitive and controlling authority” with “binding precedential or institutional effect” that “jurisdiction existed”. See Opp Br. at p. 23, *citing Green*. Even under Wisconsin’s theory, Dey should prevail. The

from overlapping and identical allegations of fact, and concern fraud-like claims. See Dey Br. at pp. 8-10, 34-35. Additionally, the September 9 Order had the “effect” of creating jurisdiction because the unsealing and commencement of the Federal Action, brought pursuant to the FCA, triggered jurisdiction under 31 U.S.C. § 3732(b).

⁸ The *2005 Wisconsin Decision* incorrectly cites to *Green* for the proposition that the “order” needs to “expressly” authorize removal. See *2005 Wisconsin Decision*, 390 F. Supp. 2d at 825. The order at issue in *Green* from the case *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486 (5th Cir. 1999) (the “*Sanchez* order”) did not “expressly” authorize removal, but rather had the “effect” of allowing removal. See *Green*, 274 F.3d at 268. To the extent the *2005 Wisconsin Decision* misrepresents the holding in *Green*, it should be disregarded.

September 9 Order and the U.S. Complaint informed Dey of “definitive and controlling authority”, establishing federal jurisdiction over the Wisconsin Action, and that federal jurisdiction is binding on all state and federal courts throughout the country.

The District Court held that an “order”, under *Doe*, must “expressly authorize” removal, or under *Green*, “effectively bar[] the plaintiffs’ lawsuit” in state court. See BA017-018, *2007 Wisconsin Decision*, Docket No. 051. First, as stated above, *Doe* and *Green* are not controlling in the Seventh Circuit, and therefore, cannot limit the application and scope of 28 U.S.C. § 1446(b) in this case. Second, the District Court and Wisconsin concede that the order in *Green* does not “expressly authorize” removal, so this cannot be a necessary requirement. Third, even Wisconsin does not interpret *Green* as narrowly as the District Court, and argues instead, that the key component of the order in *Green* was that it was “definitive and controlling authority” with “binding precedential or institutional effect” that “jurisdiction existed”. See Opp Br. at p. 23, *citing Green*. Dey agrees that the significance of the *Sanchez* order in *Green* was that it had the “effect” of creating jurisdiction, thus allowing removal; not that it barred a claim. Nowhere in *Green* does the court hold that the only type of “effect” that an order can have to qualify under section 1446(b) is a bar-effect.⁹ Here, the statutory provision of section 3732(b) is just as “definitive”, “controlling” and “binding” with respect to the jurisdiction it creates as the *Sanchez* order was in *Green*.

⁹ Even though *Green* does not require the related action to bar claims, the U.S. Complaint and the September 9 Order did have the effect of barring the Wisconsin Action pursuant to 31 U.S.C. § 3730(b)(5). See Dey Br. at pp. 35-36.

4. **“Order” and “Other Paper” Need Not Arise
From a Court in the Same Judicial Hierarchy**

Wisconsin argues that the order needs to be issued by a superior court in the same judicial hierarchy. *See* Opp. Br. at pp. 21-25. Wisconsin asserts that the “order” or “other paper” must have “binding precedential or institutional effect”, or else “the floodgates would be opened for endless, multiple removals”. *See* Opp. Br. at p. 25 & n.10. Here, there can be no such concern because a subsequent order from a district court cannot affect the statutory provision of the FCA providing for jurisdiction. The only way section 3732(b) can be changed is through an act of Congress.

Moreover, the “order” and “other paper” at issue here raise novel issues unique to the federal subject matter jurisdiction established by the FCA. Indeed, the operation of section 3732(b), as it relates to the removal of virtually identical actions pending in state court, had never been considered by a single court prior to Dey’s 2006 Removals. Dey is arguing that only a complaint and order from a federal action in this context should constitute “order” and “other paper”; thus, no “floodgates” will be opened.

**III. THE ABSENCE OF CONTROLLING CASE LAW DOES NOT MEAN THAT
THE DISTRICT COURT’S REMAND ORDER WAS AUTOMATICALLY
PROPER**

Without citing any authority, Wisconsin argues: “Given the absence of controlling law, the District Court had the discretion to construe the language of the provision [of ‘order or other paper’ in section 1446(b)]”. *See* Opp. Br. at p. 11. This argument is meritless. It is well-established that a district court abuses its

discretion when its decision is based on an error of law, even if the legal issue in question is novel. *See Maynard v. Nygren*, 332 F.3d 462, 467-469 (7th Cir. 2003) (reversing and remanding district court’s discretionary dismissal of action for discovery abuses after resolving novel legal question concerning requisite evidentiary standard). As the Seventh Circuit held: “[A] district court by definition abuses its discretion when it makes an error of law.” *Id.* at 467.

Similarly, in *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1254 (9th Cir. 2006), the Ninth Circuit held that an award of attorneys’ fees was an abuse of discretion because the remand order was legally erroneous, even though the remand decision turned on a novel issue of law. The absence of controlling case law did not preclude the Ninth Circuit from holding that the lower court’s attorneys’ fee award was in error. *See id.* *See also Sirotzky v. New York Stock Exchange*, 347 F.3d 985, 987-89 (7th Cir. 2003) (evaluating the denial of an attorneys’ fees award on a remand order for abuse of discretion where there was no controlling Seventh Circuit law on the removal issue). Therefore, Wisconsin’s argument that, in the absence of controlling case law, a district court’s decision is somehow immune from legal error, is without merit.

IV. THE DISTRICT COURT’S DECISION ON THE 2005 REMOVAL WAS NOT LAW OF THE CASE AS TO THE 2006 REMOVAL

Wisconsin contends that the District Court’s discussion of *Doe* and *Green* in its decision on the 2005 Removal was “law of the case” and put Dey on notice that the District Court would hold that the 2006 Notice of Removal was untimely. *See*

Opp. Br. at p. 15. The *2005 Wisconsin Decision* did not govern the timeliness of the 2006 Removal.

The law of the case doctrine only applies when the same issue has previously been decided by the court. *See Appley v. West*, 929 F.2d 1176, 1179 (7th Cir. 1991). “Of course, the doctrine can be applied only if a party attempts to reargue the same matter on second appeal.” *Id.* (holding that the plaintiff “is foreclosed from arguing only those issues that were actually decided by this court”) (internal citations omitted). Since the timeliness issues raised by Dey’s 2006 Removal were not raised in the 2005 Removal or decided in the *2005 Wisconsin Decision*, the *2005 Wisconsin Decision* cannot be law of the case as to the 2006 Removal. *See Point I.A., supra.*

Additionally, the reasons the District Court gave for distinguishing the *Grable* order from the orders in *Doe* and *Green* are not applicable to the U.S. Complaint and the September 9 Order. In the *2005 Wisconsin Decision*, the District Court held: “Both cases [*Doe* and *Green*] stand for the narrow proposition that a decision in an unrelated case that [1] involves the same defendant, [2] concerns a similar factual situation and [3] expressly authorizes removal qualifies as an ‘order’ under § 1446(b).” 390 F. Supp. 2d at 824-25.¹⁰ The *2005 Wisconsin Decision* distinguished the orders in *Doe* and *Green* from the *Grable* order based on the following: (1) no overlapping defendants; (2) the fact situation in the *Wisconsin* case was not similar to the *Grable* case; and (3) the *Grable* order did not authorize

¹⁰ Notably, the District Court does not rely on its interpretation of *Doe* and *Green* from the *2005 Wisconsin Decision* in the *2007 Wisconsin Decision*, but instead attempts to distinguish *Doe* and *Green* on the facts of each case. BA017-018, *2007 Wisconsin Decision*, Docket No. 51.

removal in the *Wisconsin* case. *Id.* at 825. As demonstrated in Dey's Opening Brief, the 2006 Removal cannot be distinguished on any of these three prongs because (1) Dey is a defendant in both cases, (2) both actions arise from the same transactions and occurrences and involve almost identical allegations of fact, and (3) the U.S. Complaint and the September 9 Order had the effect of authorizing removal.

V. NO OTHER COURT AWARDED ATTORNEYS' FEES

Wisconsin's argument that none of the other courts which decided similar remand motions awarded attorneys' fees because those courts had not previously interpreted the timeliness issue on the 2005 Removals is now proven to be meritless. *See* Opp Br. at pp. 25-26. Judge Saris was presented with the timeliness issue in seven remand motions on the 2005 Removals and nine remand motions on the 2006 Removals. Judge Saris held that the 2005 Notices of Removal were untimely, but did not come to the same conclusion on the 2006 Removals and did not award attorneys' fees. *See AWP MDL Order*, 2007 WL 2694347, at *4 (remanding the cases on the substantive jurisdiction issue and finding that the timeliness issue "presents a particularly difficult and close question, with persuasive arguments on both sides").

VI. WISCONSIN IS NOT ENTITLED TO COSTS, FEES, OR SANCTIONS

Wisconsin argues that it is entitled to its costs and fees as a matter of course in defending an award for attorneys' fees pursuant to 28 U.S.C. § 1447(c). *Wisconsin* also claims that Dey's appeal is frivolous and that Dey should be sanctioned, pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1927, for filing this appeal. *Wisconsin's* arguments are meritless.

Wisconsin is not automatically entitled to fees for defending the attorneys' fee award on appeal. Rather, Wisconsin must demonstrate an independent basis for an award of costs and fees incurred on the appeal. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405-09 (1990). The case upon which Wisconsin relies, *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989), was effectively overruled by the U.S. Supreme Court case *Cooter & Gell*. *See Cooter & Gell*, 496 U.S. at 407, *Gorenstein*, 874 F.2d at 438. In *Cooter & Gell*, the U.S. Supreme Court held that an appellee is not entitled to fees and costs in defending an appeal of an attorneys' fees award unless the appeal itself is frivolous under Rule 38 of the Federal Rules of Appellate Procedure:

Rules 11 and 38 are better read together as allowing expenses incurred on appeal to be shifted onto appellants only when those expenses are caused by a frivolous appeal, and not merely because a Rule 11 sanction upheld on appeal can ultimately be traced to a baseless filing in district court.

Cooter & Gell, 496 U.S. at 407.¹¹

Under Fed. R. App. P. 38 or 28 U.S.C. § 1927, sanctions are only appropriate when the appeal is frivolous or vexatious. *See Mustafa v. City of Chicago*, 442 F.3d 544, 549 (7th Cir. 2006); *Depositer v. Mary M. Holloway Foundation*, 36 F.3d 582,

¹¹ There is case law from this Circuit that holds that an appellee is entitled to an award of attorneys' fees for defending an appeal of an award of attorneys' fees as a matter of course when the original attorneys' fees award was made pursuant to a fee-shifting statute. *See Rickels v. City of South Bend*, 33 F.3d 785, 787 (7th Cir. 1994). That rule does not apply to this case. The District Court's award of attorneys' fees was made pursuant to 28 U.S.C. § 1447(c). The Supreme Court has explicitly held that section 1447(c) is not a fee-shifting statute, and that an award of attorneys' fees is appropriate only when the defendant lacked an objectively reasonable basis for the removal. *See Martin v. Franklin Capital Corp.* 46 U.S. 132, 136 (2005).

588 (7th Cir. 1994). An appeal is frivolous when “the result is obvious or the appellant’s argument is wholly without merit” and “there is some evidence of bad faith”. *Koffski v. Village of North Barrington*, 988 F.2d 41, 45 n.8 (7th Cir. 1993). As demonstrated in Dey’s Opening Brief and this reply brief, the District Court abused its discretion in awarding attorneys’ fees, and therefore, this Appeal is not frivolous.

Additionally, to prevail on a motion for sanctions due to a frivolous or vexatious appeal, Wisconsin must point to actual evidence that Dey is pursuing this appeal in bad faith, to delay the proceedings, or to harass Wisconsin. *Depositer*, 36 F.3d at 588; *Mustafa*, 442 F.3d at 550; *Koffski*, 988 F.2d at 45 n.8. This appeal and the removal have not caused delay in the underlying litigation. *See* Wisconsin’s Opposition Brief (failing to challenge Dey’s assertion that no delay was caused). Moreover, there is also no evidence of any bad faith or intent to harass. Instead, Wisconsin requests that this Court infer such evidence because the fee award is allegedly trivial to Dey, the remand decision is not reversible, and the utility of a reversal in this litigation is allegedly “negligible”. Wisconsin’s arguments are inapposite because Dey has the right to challenge an erroneous judgment.¹² Therefore, Wisconsin’s request for sanctions, costs, and fees should be denied.

¹² Wisconsin’s references to Dey’s “parent company Merck” in its request for sanctions are unwarranted, inappropriate, and confusing. At the time it filed this appeal, all of the outstanding shares of Dey were owned by EMD, Inc., which in turn was owned by a company in France named Merck S.A. 99% of the outstanding shares of Merck S.A. were owned by Merck KGaA, a publicly held company in Germany. None of these entities are parties to the Wisconsin Action, nor have they been accused of any wrongdoing by Wisconsin. Merck & Company, Inc. is a named defendant in the underlying action, but has no affiliation with Dey.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Dey's Opening Brief, filed on July 16, 2007, Dey respectfully submits that the applicable law and the evidence in this record require that the Order and Judgment of the District Court be reversed.

Dated: October 9, 2007

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CIRCUIT RULE 31(e) STATEMENT

Pursuant to Rule 31(e) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit, the undersigned hereby certifies that the Table of Contents, Table of Authorities, Reply Brief and Tab 1 attached thereto, and Certificates of Compliance have been provided in electronic format.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

The undersigned, counsel of record for the Defendant-Appellant, Dey, Inc., furnishes the following in compliance with Fed. R. App. P. 32(a)(7):

I hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 6,708 words.

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No. 07-1999

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THE STATE OF WISCONSIN,

Plaintiff-Appellee,

v.

AMGEN INC., et al.,

Defendants,

DEY, INC.,

Defendant-Appellant.

Appeal From The United States District Court
For the Western District of Wisconsin
Case No. 06-C-0582-C
The Honorable Judge Barbara B. Crabb

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the REPLY BRIEF OF DEFENDANT-APPELLANT DEY, INC. to be served as follows:

(a) by sending two (2) true copies of same and one (1) diskette containing a digital version of same, via Federal Express – Overnight Delivery, to:

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(b) on all counsel of record in the underlying action, by transmission to LexisNexis File & Serve, pursuant to the Order of the Circuit Court of Dane County, Branch 7, Case Number 04-CV-1709, dated December 20, 2005.

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Tab 1

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Only the Westlaw citation is currently available.

United States District Court,
D. Massachusetts.
In re PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESAL PRICE Litigation.
This Document Relates to:
The People of the State of Illinois
v.
Abbott Laboratories, Inc., et al., No. 1:06-5528
(N.D.Ill.)
State of Ohio
v.
Dey, Inc., et al., No. 1:06-676 (S.D.Ohio)
State of Florida, ex rel. Ven-a-Care of the Florida
Keys, Inc.
v.
Boehringer Ingelheim Corp., et al., No. 4:06cv476
(N.D.Fla.)
State of Mississippi
v.
Abbott Laboratories, Inc., et al., No. 3:06-566
(S.D.Miss.)
Commonwealth of Kentucky
v.
Warrick Pharmaceuticals Corp., et al., No. 3:06-69
(E.D.Kentucky)
Commonwealth of Pennsylvania
v.
TAP Pharmaceutical Products, Inc., et al., No. 2:06-
4514 (E.D.Penn.)
State of Idaho
v.
Abbott Laboratories, No. 1:07-CV-93 (D.Idaho)
The County of Erie
v.
Abbott Laboratories, Inc., et al., No. 6:06-6505
(W.D.N.Y.)
The County of Oswego
v.
Abbott Laboratories, Inc., et al., No. 5:06-1240
(N.D.N.Y.)
The County of Schenectady
v.
Abbott Laboratories, Inc., et al., No. 1:06-1239
(N.D.N.Y.)
MDL No. 1456.
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--- F.Supp.2d ----, 2007 WL 2694347 (D.Mass.)
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MEMORANDUM AND ORDER

SARIS, U.S.D.J.

I. INTRODUCTION

*1 In these cases, Attorneys General from the states of Illinois, Ohio, Florida, Mississippi, Kentucky, Idaho, Pennsylvania and the New York Counties of Oswego, Erie and Schenectady allege that pharmaceutical companies fraudulently inflated drug prices which caused the states and counties to pay excessive reimbursements under the Medicaid program. Each complaint, alleging state causes of action, was filed in state court. Defendant Dey, Boehringer, or Abbott has removed each of these cases, arguing that the unsealing of the federal False Claims Act actions against them provides a new basis for federal jurisdiction. Plaintiffs, arguing that removal is groundless and untimely, seek remand. After hearing, the motions to remand all the actions are **ALLOWED**.

II. BACKGROUND

Plaintiffs' claims form part of the massive Average Wholesale Price ("AWP") multidistrict litigation ("MDL") pending in this Court. The Court assumes close familiarity with that lawsuit, as well as the alleged drug pricing schemes discussed in its previous AWP MDL decisions. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F.Supp.2d 20 (D. Mass. June 21, 2007); (making findings of fact and conclusions of law following a bench trial on claims under Massachusetts consumer protection laws); *In re Pharm. Indus. Average Wholesale Price Litig.* 431 F.Supp.2d 98 (D.Mass.2006) (remanding cases); *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61 (D.Mass.2005) (certifying a national class action); *In re Pharm. Indus. Average Wholesale Price Litig.*, 263 F.Supp.2d 172 (D.Mass.2003) (dismissing RICO claims).

The United States has also been active in bringing AWP litigation against the same pharmaceutical manufacturers, in the form of qui tam lawsuits pursuant to the federal False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. On March 17, 2006, the United States intervened in a qui tam lawsuit against various pharmaceutical defendants, *United States ex rel. Ven-a-Care of the Florida Keys, Inc., et al. v. Abbott Laboratories*, Civil Action No. 95-1354-CIV (S.D.Fla.); [FN1] *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.); [FN2] *United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., et al. v. Boehringer Ingelheim Corporation, et al.*, Civil Action No. 07-10248-MEL (D.Mass.). These federal actions concern the same

factual circumstances and fraud allegations as the state actions. The defendants subsequently removed the cases that were pending in state courts arguing that 31 U.S.C. 3732(b) [FN3] confers original federal jurisdiction given the existence of the federal false claims action. [FN4] All actions were subsequently transferred to this Court as part of this multidistrict litigation. The plaintiff states and New York counties have moved to remand the cases back to the state courts.

[FN1. This case has been consolidated with the MDL as Civil Action No. 06-11337-PBS.

[FN2. This case has been consolidated with the MDL as Civil Action No. 05-11084-PBS.

[FN3. 31 U.S.C. § 3732(b) provides: 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.

[FN4. On October 11, 2006, Dey, with the consent of the other defendants in each case, removed the Florida, Illinois, Ohio, Kentucky, Mississippi, Pennsylvania, County of Oswego, County of Erie, and County of Schenectady actions. On March 6, 2007, Boehringer joined in the removal of these cases based on the unsealing of the complaint filed against it. On February 26, 2007, within thirty days of the State of Idaho's filing its complaint, Abbott filed its notice of removal in the Idaho state case.

Defendants in the Illinois and Ohio actions moved for leave to file an additional ground for removal. On October 24, 2006 this Court issued a decision, as part of this MDL, denying the state of Arizona's motion to remand its case. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 457 F.Supp.2d 77 (D.Mass.2006) (Sariss, J.). In that order, I explained that the claims on behalf of Medicare Part B beneficiaries raised a substantial federal issue such that federal jurisdiction was appropriate under the test formulated by the Supreme Court in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Defendants now assert that in the Illinois and Ohio cases,

removal is proper because the complaints seek recovery of Medicare Part B prescription drug co-payments and the removal notices were filed within thirty days of the Arizona decision.

II. DISCUSSION

A. Removal Based on the Unsealing of the *Qui Tam* Actions

*2 Defendants removed the cases pursuant to 28 U.S.C. § 1441, which states that "any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed...." 28 U.S.C. § 1441(a). Original federal question jurisdiction exists over "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The defendant bears the burden of establishing the existence of federal jurisdiction. *BIW Deceived v. Local 56*, 132 F.3d 824, 831 (1st Cir.1997). The removal statute should be strictly construed, and any doubts about the propriety of removal should be construed against the party seeking removal. *See, e.g., Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 4 (1st Cir.1999).

Defendants contend that 31 U.S.C. § 3732(b) constitutes a basis for original subject matter jurisdiction, making the cases removable. Under § 3732(b), "[t]he 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." Section 3730 provides for civil actions under the federal False Claims Act. Because the federal and state cases against Dey arise from the same transaction or occurrence, defendants argue that federal courts have jurisdiction over both cases.

1. Timeliness of Removal

The threshold issue is the timeliness of the removal. Generally, a defendant must seek removal within thirty days of receipt of the pleadings or summons. 28 U.S.C. § 1446(b). However, a defendant may also file a notice of removal "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." *Id.* It is undisputed that defendants did not file a removal notice within thirty days of the initial pleading. Defendants argue that the removal clock began to tick again when it received from the United States Department of Justice a copy

of the federal qui tam complaint and the unsealing order issued by the federal court in Boston.

The difficult issue is whether receipt of the qui tam complaint and unsealing order constitutes receipt of "orders or other papers" that restarted the time period for filing for removal on those grounds. Plaintiff contends that neither can be considered as "an order" or "other paper" because Section 1446(b) only applies to events that occur within the state-court action being removed that are caused by a "voluntary act" of the plaintiff. See California v. Keating, 986 F.2d 346, 348 (9th Cir.1993) ("[A] suit which, at the time of filing, could not have been brought in federal court must remain in state court unless a 'voluntary' act of the plaintiff brings about a change that renders the case removable.") (internal quotation marks and citations omitted); Addo v. Globe Life & Acc. Ins. Co., 230 F.3d 759, 762 (5th Cir.2000) (" '[O]ther paper' must result from the voluntary act of a plaintiff which gives the defendant notice of the changed circumstances which now support federal jurisdiction."); Morsani v. Major League Baseball, 79 F.Supp.2d 1331, 1333 n. 5 (M.D.Fla.1999); ("In both federal question and diversity cases ... Section 1446(b) restricts defendants from removing most cases when the circumstances potentially allowing removal arises through no consequence of the plaintiff's actions.").

*3 The First Circuit has not yet addressed the interpretation of "order or other paper" under § 1446(b). Most of the courts that have addressed this language have held that an unrelated court decision does not constitute an "order or other paper." See *In re Pharm. Average Wholesale Price Litig.*, 431 F.Supp.2d at 106 (reciting a list of cases addressing the issue). The two primary exceptions to this finding are two circuit cases, Doe v. American Red Cross, 14 F.3d 196 (3d Cir.1993) and Green v. R.J. Reynolds Tobacco Co., 274 F.3d 263 (5th Cir.2001) which carved out limited circumstances under which an unrelated court decision could constitute an "order or other paper." The parties dispute the meaning of these two cases, and their application to these facts.

The Third Circuit described the background of *Doe*: The American Red Cross and the American National Red Cross (hereinafter "Red Cross") have been sued in state courts across the country by plaintiffs claiming that they contracted Acquired Immune Deficiency Syndrome (AIDS) through contaminated blood transfusions and that their injuries were caused by negligence on the part of the Red Cross. In a common pattern, the Red Cross

removed these actions to federal court, only to have some of them remanded on the ground that its charter did not confer original jurisdiction on the federal courts. While these remanded cases were pending in state courts, the Court issued its order in S.G. authorizing the Red Cross to remove "any state-law actions it is defending." " In response to S.G., the Red Cross typically removed the actions it was defending to federal court, and again plaintiffs sought remand.

Doe, 14 F.3d at 197-98 (citation omitted). Emphasizing the Supreme Court's specific authorization to the Red Cross to remove "any state-law action it is defending," the Third Circuit in *Doe* concluded that the Supreme Court's decision was an "order" under § 1446(b) and permitted removal. However, the Third Circuit limited its holding by stating that a court decision

must be sufficiently related to a pending case to trigger Section 1446(b) removability. We believe that an order is sufficiently related when, as here, the order in the case came from a court superior in the same judicial hierarchy, was directed at a particular defendant and expressly authorized that same defendant to remove an action against it in another case involving similar facts and legal issues.

Id. at 202-03.

Green, a subsequent Fifth Circuit case, built upon the framework laid out in *Doe*. In *Green*, plaintiffs brought a product liability suit in Texas state court against various tobacco companies. The Fifth Circuit found that its decision in Sanchez v. Liggett & Myers, Inc., 187 F.3d 486 (5th Cir.1999) was an "order" under § 1446(b).

[H]ere the defendants R.J. Reynolds, Brown and Williamson, and Philip Morris were all defendants in the Sanchez case, which involved a similar factual situation and legal conclusion (that Tex. Civ. Prac. & Rem.Code § 82.004 bars most products liability actions against manufacturers or sellers of cigarettes). Although Sanchez did not explicitly discuss removal, the effect of the decision in Sanchez has a similar effect on our case as the S.G. decision had on American Red Cross, i.e. that these defendants cannot be sued under Texas law. The similarities between this case and Sanchez bring this case within the limited parameters of American Red Cross. We therefore hold that the Sanchez opinion, under these very narrow circumstances, was an "order" for purposes of § 1446(b) removal in this case involving the same defendants, and a similar factual situation and legal issue.

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*4 Green, 274 F.3d at 268.

Defendants point out several parallels between this case and the *Green* case. The Fifth Circuit emphasized that the *Sanchez* case, which the court held to be an "other order," involved "the same defendants, and a similar factual situation and legal issue." Here, the nexus between the qui tam and removed actions is substantial as both involve a similar factual situation, similar legal issues, and the same defendant. Plaintiff responds that this Court cannot be considered a court superior in the judicial hierarchy, a factor that was important to both the *Green* and *Doe* decisions. Furthermore, plaintiffs highlight the fact that both decisions were careful to limit their holding to the narrow circumstances of their particular cases. See *Doe*, 14 F.3d at 202 ("We take an extremely confined view of this case and our holding is equally narrow."); *Green*, 274 F.3d at 268 ("We therefore hold that the *Sanchez* opinion, under these very narrow circumstances, was an 'order' for purposes of § 1446(b) removal in this case ...").

Four district courts have already addressed the timeliness issue in the exact context presented in this case, the unsealing of a federal qui tam action. [FN5] Each of these courts have determined that the qui tam complaint and the order unsealing the action are not "orders or other papers" within the meaning of 28 U.S.C. § 1446(b). See *Hawaii v. Abbott Labs., Inc.*, 469 F.Supp.2d 842, 851 (D.Haw.2006); *Wisconsin v. Amgen, Inc.*, 469 F.Supp.2d 655, 663 (W.D.Wis. Jan. 16, 2007); *South Carolina v. Boehringer Ingelheim Roxane, Inc.*, 2007 U.S. Dist. LEXIS 30983 (D.S.C. April 26, 2007); *Alabama v. Abbott Labs, Inc.*, 2006 U.S. Dist. LEXIS 80446, at *11 (M.D.Ala. Nov. 2, 2006). The parties have not found any other cases addressing the removal of a related action based upon the unsealing of a qui tam action.

[FN5. A fifth court was presented with the same issue in this context, but chose not to address the timeliness issue, granting remand on independent grounds. See *State of Alaska v. Abbott Labs., Inc., et al.*, 2007 U.S. Dist. LEXIS 38817, at *12 (D.Alaska Jan. 22, 2007).

This issue presents a particularly difficult and close question, with persuasive arguments on both sides. Because I find, as explained below, that § 3732(b) does not provide a basis for removal, I need not decide the timeliness issue.

2. Jurisdiction under § 3732(b)

Plaintiffs argue that § 3732(b) confers only supplemental jurisdiction, which does not provide a basis for removal. See *Syngeta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 34 (2002) ("[a]ncillary jurisdiction ... cannot provide the original jurisdiction that petitioners must show in order to qualify for removal under § 1441"). In support, they point out that Congress explicitly provides for original jurisdiction when it intends to do so. [FN6] Still, the Supreme Court has held that Congress sometimes grants original jurisdiction without using the phrase "original jurisdiction." See *American National Red Cross v. S.G. and A.E.*, 505 U.S. 248 (1992) (holding that the "sue or be sued" provision of the American Red Cross charter confers original jurisdiction on federal courts). In several statutes, Congress has granted jurisdiction to adjudicate a case in the first instance, without using the words "original jurisdiction." [FN7]

[FN6. In fact, Congress has expressly used the words "original jurisdiction" in over eighty other statutes. See, e.g., 15 U.S.C. § 6614(c)(1) ("the district courts of the United States shall have original jurisdiction of any action that is brought as a class action"); 9 U.S.C. § 203 (regarding enforcement of foreign arbitral awards, stating the "district courts of the United States ... shall have original jurisdiction over such an action....").

[FN7. 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 suits for violations of the Clean Water Act).

*5 Defendants argue that jurisdiction must be "original" because Congress chose to apply the statute to "actions" rather than "claims," the operative word in the "supplemental jurisdiction" statute, 28 U.S.C. § 1367. This distinction does not appear to carry any weight. First, Congress did not pass § 1367 until four years after the codification of § 3732(b). See Pub.L. No. 101-650, § 310(a), 104 Stat. 5113 (1990). Furthermore, the Supreme Court recently noted that statutory references to "actions" and "claims" are generally not treated differently. See *Jones v. Bock*, 127 S.Ct. 910, 924 (2007) ("More

generally, statutory references to an 'action' have not typically been read to mean that every claim included in the action must meet the pertinent requirement before the 'action' may proceed.")

The bottom line is that the plain language of the statute is not a silver bullet in the quest to determine whether Congress intended to confer "original" or "supplemental" jurisdiction. The statute is ambiguous.

The legislative history of the passage of 3732(b) provides some guidance. Plaintiffs argue that section 3732(b) should be read as an exception to the "general bar on intervention," codified at § 3730(b)(5), which would prevent parties other than the United States from bringing related actions. 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 [federal FCA] action." Under plaintiffs' interpretation, § 3732(b) therefore provides a means for a state to join a pending federal FCA action to recover state funds lost in the same transactions.

The legislative history of § 3732(b) supports this interpretation, suggesting that Congress intended the provision to enhance the options of the states, rather than to restrict them. The National Association of Attorneys General ("NAAG") was instrumental in lobbying for section 3732(b) as part of the 1986 Amendments to the FCA. As the Senate Report accompanying the 1986 Amendments explains:

And finally, in response to comments from the National Association of [State] Attorneys General, the subcommittee adopted a provision allowing State and local governments to join State law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence.

S.Rep. No. 99-345, at 16 (1986), as reprinted in 1986 U.S.C.C .A.N. 5266, 5281. Thus, in plaintiffs' view, the provision was designed to *allow* state and local governments to join or intervene in federal FCA actions to assert state-law claims. See United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc., 173 F.3d 870, 880 (D.C.Cir.1999) (It "authorizes permissive intervention by states for recovery of state funds."); United States ex rel. Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195, 205 (2d Cir.1998) ("another 1986 amendment, ... permits the joinder, in an FCA suit, of related state-law claims where those claims are 'for the recovery of funds paid by a State.'") (quoting 31 U.S.C. 3732(b)), *overruled on other*

grounds, 529 U.S. 765 (2000). It is unlikely that the NAAG would nag Congress to pass a provision that would strip states of their ability to bring state law claims in state court.

*6 As mentioned before, five District courts have considered similar remand motions in response to Dey's removal of cases following the unsealing of the federal FCA action. Two courts specifically held that § 3732 does *not* grant the district court original jurisdiction, but rather grants supplemental jurisdiction. See Alaska, 2007 U.S. Dist. LEXIS 38817, at *12 ("§ 3732(b) creates supplemental jurisdiction dependent upon the existence of original jurisdiction under 28 U.S.C. § 1345 if brought by the Attorney General or 28 U.S.C. § 1331 if brought by a private person."); Hawaii, 469 F.Supp.2d at 851 (reviewing "the language of the statute, the legislative history, and the context in which it was enacted" to conclude that § 3732(b) "grants the district courts not original jurisdiction, but supplemental jurisdiction"). The remaining three District courts allowed the motion to remand based on a finding that defendants' removal was untimely, but noted that it is unlikely that § 3732(b) provides original jurisdiction. See Wisconsin, 469 F.Supp.2d at 663 (finding it "doubtful" that § 3732(b) provides original jurisdiction); South Carolina, 2007 U.S. Dist. LEXIS 30983, at *7-8 (agreeing with the reasoning and conclusions of the Wisconsin court); Alabama, 2006 U.S. Dist. LEXIS 80446, at *11 (finding that § 3732(b) "appears to be a 'supplemental' jurisdictional statute"). Defendants have not cited any cases concluding that 31 U.S.C. § 3732(b) constitutes a basis of original federal subject-matter jurisdiction.

On balance, given the legislative history, the caselaw holding that § 3732 does not provide original jurisdiction is persuasive. Because supplemental jurisdiction is not a basis for removal, these cases should be remanded to their respective state courts.

2. Jurisdiction under 28 U.S.C. § 1331

Dey makes the alternative argument that removal is proper under 28 U.S.C. § 1331 which grants federal jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Dey contends that the Illinois state claim has been federalized by the federal government's simultaneous claim for 50 percent of the amount claimed by Illinois. In defendants' view, while Illinois' action may be premised on state law, Illinois seeks to recover the same damages from the same alleged scheme that is now at issue in the FCA claims

asserted by the United States. It is true that Dey should not have to pay the same damages twice to two different governmental entities. However, the fact that a defendant's allegedly fraudulent conduct may give rise to both state and federal liability, does not federalize the state law claims.

Defendants' reliance on Simms v. Rodan Energy Services, Inc., 137 F.Supp.2d 731, 734 (W.D.La.2001) is misplaced. The Simms case found that removal of state law injury claims suffered on an offshore platform was proper because federal jurisdiction was granted by the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, et seq. The OCSLA specifically provides for the application of federal law to the outer continental shelf. 43 § 1333(a)(1). In addition, "to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 480 (1981). In contrast, § 3732(b) is a jurisdictional statute which does not purport to apply federal law, but rather provides access to the federal courts for certain actions "brought under the laws of any state." Jurisdictional statutes which seek "to do nothing more than grant jurisdiction over a particular class of cases" do not support "arising under" jurisdiction. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 496-97 (1983). Section 3732(b) does not federalize the state law claims; it merely provides a federal forum where they can be pursued. Section 1331 does not provide a proper basis of removal for defendants.

B. Removal Based on the MDL Court's Arizona Decision

*7 The Illinois and Ohio defendants also renew their motion for removal based on the Supreme Court's decision in Grable. The complaints of Illinois and Ohio seek recovery of alleged overpayments made by Medicare Part B beneficiaries and the state Medicaid programs. On October 24, 2006, this Court issued a memorandum and decision in the AWP MDL which held that the State of Arizona's claim to recover Medicare Part B co-payments raises a substantial federal question under new Supreme Court precedent and denied the motion to remand. See In re Pharm. Indus. Average Wholesale Price Litig., 457 F.Supp.2d at 82. In November of 2006, within thirty days of the Arizona decision, the defendants filed a motions for leave to file a supplemental notice of removal in the Northern District of Illinois and the Southern District of Ohio. In December of 2006 the Illinois case was transferred to this Court as part of

the AWP MDL, followed by the Ohio case in February of 2007.

1. Leave to File the Supplemental Notice

Before reaching the merits of this alternative ground for removal, the Court must determine whether it is appropriate to grant the leave to file the supplemental notice, and whether such notice was timely.

Courts generally allow a defendant to amend a petition after the thirty day time limit for technical defects in the jurisdictional allegations, but not to add a new basis for federal jurisdiction. See, e.g., Heller v. Allied Textile Cos., 276 F.Supp.2d 175, 180-81 (D.Me.2003); see also Blakelev v. United Cable Sys., 105 F.Supp.2d 574, 579 (D.Miss.2000) (citing decisions that address this issue). The difference here, emphasized by the defendants, is that the substantive basis for removal did not exist until after the thirty days had expired.

Defendants rely on Davis v. Life Investors Insurance Co. of America, Inc., 214 F.Supp.2d 691, 694 (S.D.Miss.2002) which appears to be the only case to address these particular circumstances. The Davis court stated:

In each of the cases ... cited to the court by plaintiff or otherwise located by the court, courts have refused to allow amendment of the removal notice beyond the thirty-day period for removal where the ground for removal existed but was not asserted within the thirty-day removal period, for in those cases, the failure to assert an existing basis for removal jurisdiction was viewed as a substantive defect. None of these cases addressed a situation such as is presented here, where there was no defect of any sort in the removal notice.... [T]his ground for removal/federal jurisdiction first arose while the case was pending in federal court after expiration of the thirty-day time limit for removal. In the court's opinion, in this circumstance, amendment of the notice of removal is permissible. Davis, 214 F.Supp.2d at 694. Given the similarity of the procedural posture here to that in the Davis case, I find that it is appropriate to allow the defendants to assert a supplemental notice of removal.

*8 The new basis for removal arguably did not exist until after the initial thirty-day period. In fact, the Illinois defendants attempted to remove this case immediately following the Grable decision on June 13, 2005. On July 13, 2005, the Illinois defendants removed the case arguing that under Grable federal jurisdiction was proper due to the Medicare claims.

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This court found that the removal was untimely because *Grable* was not an "order or other paper" from which defendants could first ascertain that the state court actions were removable within the meaning of 28 U.S.C. § 1446(b) and thus allowed the motions to remand. See *In re Pharm. Indus. Average Wholesale Price Litig.*, 431 F.Supp.2d 98. In contrast, the Arizona defendants' removal based upon *Grable* was timely filed within thirty days of the initial pleading. See *In re Pharm. Indus. Average Wholesale Price Litig.* 457 F.Supp.2d at 79. Not allowing defendants to supplement their removal notice would deny them the opportunity to ever assert the new grounds for removal.

2. Timeliness of the Supplemental Notice

Once again, the defendants must still demonstrate that the supplemental notice of removal was timely filed. Here the defendants argue that the Arizona action is an "order" under § 1446(b) that restarts the clock for filing notice of removal. Defendants note that the Arizona case involved more than a dozen of the same defendants that are being sued in both the Illinois and Ohio cases. Furthermore, the factual circumstances are substantially the same and the legal issue, whether a claim on behalf of Medicare beneficiaries raises a federal question, is identical. In a prior disposition of this case, this Court highlighted the absence of exactly those factors when it found that *Grable* was not an "other paper" and thus found defendants' notice of removal untimely. See *In re Pharm. Indus. Average Wholesale Price Litig.*, 431 F.Supp.2d at 109 ("Unlike the situations in *Doe* and *Green*, *Grable* and the AWP MDL do not involve the same defendants or similar factual issues.").

The plaintiff states of Illinois and Ohio respond by arguing that defendants cannot satisfy two of the requirements laid out in *Doe*. First, the states contend that this Court is not a "court superior in the same judicial hierarchy" because it has no binding effect on the Illinois state or federal courts. While this is true, as the court handling the AWP MDL this court does exercise control over cases that have been transferred for pretrial proceedings. [FN8] Next, the states argue that the Arizona decision did not specifically authorize any defendant to remove any other action against it. This was a key requirement spelled out in *Doe*, which was glossed over in *Green*. Plaintiffs contend that ignoring this requirement would invite swarms of removal actions whenever an opinion is issued which could be viewed as a precedent.

[FN8]. The Illinois and Ohio cases were

transferred to this Court as part of the AWP MDL in December 2006 and February 2007, respectively. The motions for leave to file supplemental notice of removal were filed prior to the transfer.

The defendants are in an unfortunate situation. The key difference between the Arizona case, and the Illinois and Ohio cases, is that the Arizona complaint was filed much later such that the defendants raised *Grable* within the thirty-day removal timetable. In contrast, the Illinois and Ohio defendants could not raise the case within the thirty days. [FN9] In Illinois, the defendants attempted removal within thirty days of the filing of *Grable*, but the Court rejected the argument that *Grable* was an "order or other paper" and found removal untimely. While the different status of the Arizona case and these two cases is due totally to the timing of the *Grable* case and no fault of defendants, allowing the defendants to use the Arizona case as a ladder into federal court would bypass the narrow exceptions permitted under section 1446(b). The Third and Fifth Circuit decisions were careful to limit their holdings to the "very narrow circumstances" before them. *Green*, 274 F.3d at 268. Permitting the decisions of this MDL Court to open new avenues of removal for related cases would repeatedly open the flood gates to new removal actions. It is inappropriate for this Court to further expand the scope of § 1446(b). The supplemental notices of removal are rejected as untimely.

[FN9]. Illinois and Ohio filed their respective complaints in February 2005 and March 2004. The *Grable* decision was issued in June of 2005, well over thirty days later.

ORDER

*9 The Illinois and Ohio defendants' motions for leave to file a supplemental notice of removal (case 1:06-cv-12259-PBS, Docket No. 156-152; case 1:070cv-10270-PBS, Docket No. 64-47) is **ALLOWED**. The motions to remand the Illinois (case 1:06-cv-12259-PBS, Docket No. 156-116), Ohio (case 1:070cv-10270-PBS, formerly case 1:06-cv-00676-SSB-TSB, Docket No. 64-41) Kentucky (case 1:07-cv-10107-PBS, formerly case 3:06-cv-00069-KKC, Docket No. 35-1), Mississippi (case 1:06-cv-12161-PBS, formerly case 3:06-cv-00566-HTW-LRA, Docket No. 91), Pennsylvania (case 1:07-cv-10158-PBS, Docket No. 33-22), Florida (case 1:06-cv-12160-PBS, Docket No. 44-18), Idaho (case 1:07-cv-10874-PBS, formerly case 1:07-cv-00093-BLW, Docket No. 7), County of Erie (case 1:07-cv-10282-PBS, formerly case 6:06-cv-06505-MAT, Docket No.

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96), County of Oswego (case 1:07-cv-10271-PBS, formerly case 5:06-cv-01240-GLS-RFT, Docket No. 116, and County of Schenectady (case 1:07-cv-10273-PBS, formerly case 1:06-cv-01239-GLS-RFT, Docket No. 113) cases are **ALLOWED**. The requests for attorneys' fees and costs are **DENIED**.

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