

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

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-C-0477-C

ABBOTT LABORATORIES, ET AL.,

Defendants.

**MEMORANDUM IN SUPPORT OF PLAINTIFF STATE OF WISCONSIN'S
MOTION FOR REMAND**

INTRODUCTION

The State of Wisconsin, in its law enforcement capacity, has sued the defendant drug manufacturers in Wisconsin state court alleging that the defendants systematically inflated their reported wholesale drug prices resulting in huge drug overcharges to Wisconsin directly, and to its citizens.

Ignoring the fact that the State is the only plaintiff in this lawsuit (defendants concede that the State is not a person for purposes of diversity) and the fact that the State has a direct monetary interest in the outcome of the case, defendants (or at least some of them)¹ have removed this case on the theory that because Wisconsin is seeking relief for its citizens as well as itself, the Court must look to the citizenship of Wisconsin residents for diversity purposes.

¹ One defendant, Gensia Sicor Pharmaceuticals, Inc. has not filed a consent.

Defendants conclude the argument by asserting that they are diverse from all Wisconsin citizens.

Ignoring that the State is the only party plaintiff in this case is frivolous and unsupported by any relevant case law. Indeed, not a single case supports the argument that Wisconsin may be stripped of its sovereign right to choose its forum simply because it seeks relief for its citizens as well as itself. Moreover, for reasons explained *infra*, even if defendants' argument were correct, diversity would still not exist. Before turning to defendants' arguments and why they are meritless, it is useful to briefly outline the background of this lawsuit.

I. THE FACTUAL AND LEGAL CONTEXT OF DEFENDANTS' REMOVAL PETITION.

The State of Wisconsin sued the defendants charging that they had systematically caused to be published phony average wholesale prices as part of a scheme to attract customers, knowing that doing so would cause the State, among others, to overpay for its drugs. Thus, the complaint alleges at paragraph 25:

The purpose of this scheme is to market the spread between the true wholesale price of the drug and the false and inflated AWP and thereby increase the sales, profits and market shares of the defendants. Defendants believe that a false and inflated AWP encourages providers, including doctors and hospitals, to buy their products because by purchasing defendants' products, providers are enabled to use the inflated AWPs to obtain reimbursement while actually purchasing defendants' drugs at much lower prices. The higher the spread between the AWP and the real price the more profit a provider can make, and defendants often market their products by pointing out (explicitly and implicitly) that their drug's spread is higher than a competing drug's.

Some of the defendants have been indicted by, and/or entered into huge settlements with the federal government in connection with their pricing practices. (See Exhibit A detailing the latest such settlement.) And a number of States, including Texas, Pennsylvania, Kentucky, Ohio, Minnesota, Montana, and Nevada, have sued some or all of the defendants. So far as Plaintiffs are aware, only those States whose complaints raise a federal question, concededly not present

here, have been successfully removed. (See, *e.g.*, the decision by the Honorable Judge Saris of the District Court of Massachusetts attached hereto as Exhibit B.) Indeed, as far as plaintiff's counsel can determine, the diversity theory advanced here for removal has never been asserted by the defendants in any of the previous removal litigation (see Judge Saris' opinion which does not mention such an issue) even though a number of the other States purport to sue on behalf of citizens and third party payers.

This case was filed in Dane County, plaintiff's choice of forum. Plaintiff has not raised a federal question and defendants do not argue otherwise. Instead, defendants argue that the State is not the real party in interest and, hence, the court must look to the citizenship of the private parties who, along with the State, will benefit from a successful outcome. For myriad reasons defendants' theory should be rejected and this case remanded to state court where it belongs.

II. DEFENDANTS' BURDEN JUSTIFYING THEIR PETITION IS A HEAVY ONE.

Federal courts disfavor depriving a litigant, particularly a sovereign such as the State of Wisconsin, of its choice of forum within which to litigate purely state law claims. The parties seeking removal have a heavy burden proving that removal was proper. *See In the Matter of The Application of County Collector of the County of Winnebago, Ill.*, 96 F.3d 890, 895 (7th Cir. 1996). Courts should interpret the removal statute narrowly and presume that the plaintiff may choose his or her forum. *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 576 (7th Cir. 1982), *cert. denied*, 459 U.S. 1049. Any doubt regarding jurisdiction should be resolved in favor of the states, *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976), and the burden falls on the party seeking removal. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).

Failure to rigorously apply these principles can lead to years of meaningless litigation as the Seventh Circuit recently stressed in the case of *Hart v. Terminex International*, 336 F.3d 541 (7th Cir. 2003). There, the court concluded, after eight years of federal court litigation, that the parties were not diverse and hence, all the rulings in the case were a nullity as a result of improper removal.

III. THERE IS NO BASIS FOR REMOVAL OF THIS CASE.

Defendants do not come close to meeting their heavy burden. A State is not a person for purposes of diversity jurisdiction when it is acting as a sovereign. Moreover, a State's sovereignty is not lost simply because it seeks relief for its citizens as well as itself. Indeed, any such holding would be barred by the Eleventh Amendment.

A. It Is Undisputed That A State Is Not A Person For Purposes Of Diversity.

There is no dispute that a State is not a person for purposes of diversity and hence cannot be diverse from any defendant no matter where the defendant is located. *See Postal Telegraph Cable Co. v. State of Alabama*, 155 U.S. 482, 487 (1894):

A state is not a citizen. And under the judiciary acts of the United States it is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states, and that the circuit court of the United States has no jurisdiction of it, unless it arises under the constitution, laws, or treaties of the United States.

See also Illinois v. City of Milwaukee, 406 U.S. 91, 97 n.1 (1972).

B. The State Of Wisconsin Has A Strong, Direct, and Statutorily Authorized Interest In The Outcome Of This Case.

As the complaint makes clear, Wisconsin has a substantial direct interest in the outcome of this case and is acting pursuant to its law enforcement authority. As a direct result of

defendants' unlawful actions Wisconsin has suffered financial damages to its Medicaid and Senior Care programs. In addition to that, it can hardly be disputed that Wisconsin has a paramount interest in holding down spiraling health care costs, both for the benefit of itself and its citizens, particularly costs resulting from fraudulent conduct.

In filing this case, Wisconsin is acting pursuant to its specifically granted law enforcement powers. Thus, with respect to the consumer fraud claims (Counts I, II), Wisconsin Statutes Section 100.18(11)(d) authorizes the Department of Justice to “commence an action in circuit court in the name of the state to restrain by temporary or permanent injunction any violation of this section.” Wisconsin Statutes Section 133.16, the underlying basis for plaintiff’s secret rebate claim (Count III), states: “The department of justice . . . by complaint may institute actions or proceedings to prevent or restrain a violation of this chapter, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing be enjoined or prohibited.” The Medicaid fraud claim (Count IV) can only be enforced by the State—no private remedy exists. Wis. Stat. § 49.49(4m)(a)(2). And the unjust enrichment claim (Count V) is simply incident to the other counts and asks for disgorgement of profits as an award instead of individual damage awards.

C. When The State Acts On Its Own Behalf, It Is The Real Party In Interest And Diversity Does Not Exist.

No case has ever held—or even come close to holding—that a State, seeking compensation for damages done to it directly, is stripped of its sovereignty if it also seeks relief for its citizens. Indeed, the case law holds just the opposite.

Almost identical to this case is *Moore ex rel. State of Miss. v. Abbott Laboratories, Inc.*, 900 F.Supp. 26 (S.D. Miss. 1995), where the Mississippi Attorney General brought an

action against pharmaceutical manufacturers of infant formula. The Attorney General claimed that the defendants' unlawful actions had the effect of requiring the citizens of the State to pay artificially high prices for infant formula, and similarly affected the State through its purchases under the Mississippi Women, Infants and Children (WIC) Program. 900 F. Supp. at 29.

The defendants removed the case, claiming the existence of diversity jurisdiction. They asserted that "the Attorney General is acting as the nominal party for a group of lawyers who want to mask what is in fact a private class action on behalf of Mississippi consumers of infant formula" *Id.* at 31. The defendants further asserted that the attorney general's non-*parens patriae* claims were fraudulently joined to defeat diversity jurisdiction, and that accordingly the State of Mississippi was not a real party in interest. *Id.*

The court held that since the attorney general was statutorily authorized to seek penalties in the name of the State for violations of antitrust law, the State was the real party in interest regardless of the status of the *parens patriae* claims. *Id.* The court further held that the *parens patriae* claims were not fraudulently joined nor were they "separate and independent" from the "nonremovable" claims. *Id.* at 32.

The court's analysis in *Moore* applies even where a State's interest is non-pecuniary. In *State of N.Y. by Abrams v. General Motors Corp.*, 547 F. Supp. 703 (S.D.N.Y. 1982), General Motors sought to remove on diversity grounds a lawsuit brought by New York on behalf of its citizens who had purchased General Motors cars. GM argued that the state's interest was purely derivative, and hence the state was a nominal party. The court rejected this argument noting that New York sought injunctive relief to preclude future misconduct, holding: "The State's goal of securing an honest marketplace in which to transact business is a quasi-sovereign interest." 547 F. Supp. at 705-06 (citing *Kelly v. Carr*, 442 F. Supp. 346, 356-57 (W.D. Mich. 1977)) ("surely

some of the most basic of a state's quasi-sovereign interests include maintenance of the integrity of markets and exchanges operating within its boundaries, (and) protection of its citizens from fraudulent and deceptive practices"). "As such, [this quasi-sovereign interest] is sufficient to preclude characterizing the state as a nominal party without any real interest in the outcome of this lawsuit." *Id.* at 706. See the many cases supporting this proposition cited therein and, *State of Missouri v. Freedom Financial Corporation*, 727 F. Supp. 1313 (W.D. Mo. 1989).

And in *State of Ala. ex rel. Galanos v. Star Service & Petroleum Co., Inc.*, 616 F. Supp. 429 (S.D. Ala. 1985), the court held that the possibility that a citizen (there a county) would recover a penalty in a suit brought by the State did not create diversity for jurisdiction purposes. 616 F. Supp. at 431. The court rejected the argument that the County of Mobile, which was a citizen for diversity purposes, was the real party because any funds recovered went to it. The court held that the possibility that a citizen could recover a penalty did "not vitiate the state's interest as *parens patriae*." *Id.* The state had a real interest in the controversy—"preventing unfair or dishonest competition"—and thus was the real party and diversity was not complete. *Id.*

These holdings are consistent with the Supreme Court holding in *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592 (1982), that "a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." 458 U.S. at 607. The complaint Wisconsin filed in Dane County Circuit court, is an enforcement action filed under the State's consumer protection, antitrust, and Medicaid Fraud statutes and clearly articulates its interest in the physical and economic well being of its residents. That interest is more than sufficient to preclude removal.

D. Where The State Of Wisconsin Is The Real Party In Interest, The Eleventh Amendment Bars Removal Of Its Enforcement Action.

It is well established in the law that under the Eleventh Amendment to the Constitution, states are immune from suit in federal court. “Thus, federal courts are straightaway restricted from removing actions where the action could not have been originally filed in federal court.” *Frances J. v. Wright*, 19 F.3d 337, 340 (7th Cir. 1994). See generally *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998).

The Eleventh Amendment does not exist “solely in order to ‘preven[t] federal court judgments that must be paid out of a State’s treasury,’” rather, the Eleventh Amendment “serves to avoid ‘the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.’” *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1124 (1996) (quoting *Port Authority Trans-Hudson Corporation*, 115 S. Ct. 394, 404 (1994), and *Puerto Rico Acqueduct and Sewer Authority*, 506 U.S. 139, 146 (1993)).

However, since the immunity granted by the Eleventh Amendment is an immunity from being made an involuntary party to an action in federal court, it should apply equally to the case where the state is a plaintiff in an action commenced in state court and the action is removed to federal court by the defendant.

Moore ex rel. State of Miss. v. Abbott Laboratories, 900 F. Supp. 26, 30 (S.D. Miss. 1995). See also *California v. Steelcase, Inc.*, 792 F. Supp. 84 (C.D. Cal. 1992). As the Eighth Circuit has explained, the Eleventh Amendment protects against the involuntary coercion to be joined in a federal court. “[C]oncern and respect for state sovereignty are implicated whenever a state is involuntarily subjected to an action, regardless of the role it is forced to play in the litigation.” *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 506 (8th Cir. 1995).

A state may waive² its immunity. But waiver by consent must be “stated by the most express language or by such overwhelming implication from the text as to leave no room for any other reasonable construction.” *Frances*, 19 F.3d at 342 (citing among other cases *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985)). “If the propriety of the removal is doubtful, federal courts should reject the case.” *Employers Ins. of Wausau v. Certain Underwriters at Lloyd’s, London*, 787 F.Supp. 165, 167 (W.D. Wis. 1992). None of those circumstances is presented in this case. Where the State of Wisconsin filed an action in Dane County Circuit Court alleging only causes of action predicated on state law, the Eleventh Amendment deprives the federal courts of jurisdiction and requires this court to grant the State’s motion for remand. *See State of Wis. v. Baker*, 698 F.2d 1323, 1326 (7th Cir. 1983) (citations omitted) (“Because there is no diversity of citizenship between the State and defendants—a state is not a citizen of a state for purposes of diversity jurisdiction—removal of this action to the court below was proper only if the State’s cause of action “arises under the Constitution, laws, or treaties of the United States.”)

IV. DEFENDANTS’ CASES DO NOT SUPPORT REMOVAL. INDEED, THEY MAKE IT CLEAR THAT REMOVAL WAS INAPPROPRIATE.

Defendants have essentially based their petition for removal on one case, *State of Connecticut v. Levi Strauss*, 471 F. Supp. 363 (D. Conn. 1979), a case predating the *General Motors*, *Moore*, and *Galanos* cases. As we show below, that case is distinguishable on

² *E.g.*, a state waives Eleventh Amendment immunity when it removes to federal court, at least as to state-law claims in respect to which the state has explicitly waived immunity from state court proceedings. *See Lapidus v. Board of Regents of University System of Georgia*, 535 U.S. 613, 617-19 (2002).

the facts, and to the extent it discusses law applicable to this case, is supportive of plaintiff's position not the defendants'.³

In the *Levi Strauss* case, the State of Connecticut sought relief under its *parens patriae* statute for purchasers of blue jeans who were state residents alleging that the defendant had violated the state's antitrust act. Connecticut had apparently suffered no damages itself (presumably not being a large purchaser of jeans). The defendants removed, arguing *inter alia*, that because Connecticut was suing to benefit its citizens, the state was not the real party in interest and hence, no diversity existed. The district court remanded the case but, in so doing, opined that where Connecticut acts purely on behalf of a circumscribed group of private citizens, it is not the real party in interest. The theoretical basis for this ruling was a line of authority holding that when a state's claim is brought "only on behalf of particular citizens" it could not invoke the original jurisdiction of the Supreme Court. *Levi Strauss*, 471 F. Supp. at 371.

This decision does not support defendants' arguments for a number of reasons. First, in *Levi Strauss*, the state had suffered no pecuniary damages on one claim. Here Wisconsin alleges substantial damages with respect to all counts, and therefore is a real party in interest in each and every count of the Complaint.

Second, the court in *Levi Strauss* never even reached the issue of whether the state loses its sovereignty if it simultaneously seeks relief for its citizens as well as itself. The court reviewed the complaint and noted that in connection with one claim, a claim for damages to Connecticut citizens, the state had no direct interest. The court then observed that where the state has no interest in a claim the court could look at the residency of the class members who do.

³ The case of *Butler v. Cadbury Beverages*, 1998 WL 422863 (D. Conn. 1998), adds nothing to defendants' position. It involves Connecticut seeking to recover a bonus for one of its

This was simply a straightforward application of the principle that where a state has no interest of any sort in a claim, it is not the real party in interest. The court did not reach the issue of whether the mere existence of one claim brought by the state purely on behalf of private individuals trumped Connecticut's sovereignty with respect to the complaint as a whole. Resolution of this issue was unnecessary because the court found, as to this one claim, that the jurisdictional amount was not met. With respect to all the other claims the court found the state to be acting as a sovereign. Here, of course, the State seeks redress in its sovereign capacity in connection with each claim presented in the lawsuit so the issue as framed in the *Levi Strauss* case does not even arise.

Third, the Supreme Court cases relied on by the court in *Levi Strauss* for the principle that the Supreme Court does not have original jurisdiction over cases brought by states acting solely on behalf of their citizens actually undermine defendants' argument. For example, the case of *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), involved an effort by the State of Georgia to enjoin noxious fumes emanating from Tennessee. Although the state owned "very little of the territory affected," 206 U.S. at 237, the Court ruled that the lawsuit could proceed because the state had interests independent of, and interdependent with, the interests of its residents: "It has the last word as to whether . . . its inhabitants shall breathe pure air." 206 U.S. at 237. Thus, the presence of an individualized private interests does not mean that a state cannot seek original jurisdiction. And in *Pennsylvania v. New Jersey*, 426 U.S. 660, 665-66 (1976), the court made clear that it would curtail a state's assertion of its original jurisdiction only in instances when a state was asserting a "purely" private matter.

citizens. This case is inapposite for all the same reasons the *Levi Strauss* case is.

Finally, defendants' argument is self-destructive. For if the true parties in interest in this case are residents, and former residents, of Wisconsin who paid inflated Medicare Part B payments, and/or insurers and other corporations, there is undoubtedly no diversity present. Some of these former Wisconsin residents, undoubtedly, live in one state or another occupied by the defendants. And we are positive that some corporations in Wisconsin are incorporated in the same states as the defendants are. Hence, even under defendants' theory there is no diversity. *See State of N.Y. v. General Motors*, 547 F. Supp. 703, 704 n.3 (where the court declined to rule on this issue as unnecessary having otherwise determined that diversity was absent). Moreover, if defendants' theory were taken to its logical extent, each and every time the State of Wisconsin sued an out-of-state corporation for violating state consumer or environmental laws, diversity would exist. Surely this is not the intended result of the State exercising its enforcement authority under state law.

To sum up, no case has ever held that a state loses its sovereignty for purposes of diversity when, in the midst of pursuing its own interests, it also seeks relief for its citizens pursuant to its enforcement authority. The authority is all the other way.

V. REMOVAL IS PROHIBITED UNLESS ALL DEFENDANTS CONSENT.

“As a general rule, all defendants must join in a removal petition in order to effect removal.” *Production Stamping Corp. v. Maryland Cas. Co.*, 829 F. Supp. 1074, 1076 (E.D. Wis. 1993) (citing *Northern Illinois Gas Co. v. Airco Industrial Gases, Div. of Airco, Inc.*, 676 F.2d 270, 272 (7th Cir. 1982); *Padden v. Gallaher*, 513 F. Supp. 770, 771 (E.D. Wis. 1981); *Samuel v. Langham*, 780 F. Supp. 424, 427 (N.D. Tex. 1992)).

“Unanimity among the defendants must be expressed to the court ‘within thirty days after the receipt by the defendant ... of the copy of the initial pleading’ containing the removable

claim.” *Production Stamping Corp.* 829 F. Supp. at 1076 (citing 28 U.S.C. § 1446(b), *Fellhauer v. Geneva*, 673 F. Supp. 1445, 1447 (N.D. Ill. 1987)). “The time limitation is mandatory and must be strictly construed.” *Production Stamping Corp.*, 829 F. Supp. at 1076 (citing *Moody v. Commercial Ins. Co.*, 753 F. Supp. 198, 202 (N.D. Tex. 1990)).

“Accordingly, if all the defendants do not join in or consent to the removal petition within the thirty-day period, ‘the district court shall remand the case’” *Production Stamping Corp.* 829 F. Supp. at 1076 (citing 28 U.S.C. § 1447(c); *Mason v. Intern’l Business Machines, Inc.*, 543 F. Supp. 444, 446 (M.D.N.C. 1982); *Fellhauer*, 673 F. Supp. at 1447).

The thirty-day period for filing notice of removal begins to run when the first of multiple defendants is served. If the first defendant fails to remove the action within thirty days of being served, that defendant is precluded from joining a removal by later-served defendants and because removal must be unanimous, the case cannot be removed. *Biggs Corp. v. Wilen*, 97 F. Supp. 2d 1040 (D. Nev. 2000). All served defendants must join in the removal within thirty days from the day on which the first defendant is served. *Getty Oil, Div. of Texeco v. Ins. Co. of North AM.*, 841 F.2d 1254 (5th Cir. 1988); *Brooks v. Rosiere*, 585 F. Supp. 351, 353 (E.D. La. 1984); *Godman v. Sears, Roebuck and Co.*, 588 F. Supp. 121, 123 (E.D. Mich. 1984).

This Court adopted the first served defendant rule in *Higgins v. Kentucky Fried Chicken*, 953 F. Supp. 266 (W.D. Wis. 1997). It said: “The majority of courts have held that there is only one thirty-day period in which defendants can remove and that this period starts with service on or notice to the first defendant” *Id.* at 268. And:

It follows that since all served defendants must join in the petition, and since the petition must be submitted within thirty days of service on the first defendant, all served defendants must join in the petition no later than thirty days from the day on which the first defendant was served.

Id. at 268 (citing *Kuhn v. Brunswick Corp.*, 871 F. Supp. 1444, 1447 (N.D. Ga. 1994)).

In a more recent case, the Eastern District followed the rule as well. In *Auchinleck v. Town of Lagrange*, 167 F. Supp. 2d 1066 (E.D. Wis. 2001), the court stated:

The issue, then, boils down to this: in a lawsuit with multiple defendants served on different days, when does the thirty-day time period for removal begin to run? The statutory language does not contemplate service among multiple defendants. The Seventh Circuit has not squarely addressed how to approach this problem. However, the more recent cases in this circuit to address the issue have followed the “first-served” rule. *See Phoenix Container, L.P. v. Sokoloff*, 83 F. Supp. 2d 928 (N.D. Ill. 2000); *see also Higgins v. Kentucky Fried Chicken*, 953 F. Supp. 266 (W.D. Wis. 1997). Under this rule, the time period begins to run when the first defendant has been served, and the failure of any party to file within those thirty days precludes removal for all future defendants. The logic behind this rule is based on the concept that all defendants must consent to removal. *See P.P. Farmers’ Elevator Co. v. Farmers Elevator Mutual Ins. Co.*, 395 F.2d 546, 547 (7th Cir. 1968).

Id. at 1068.

Of the twenty defendants, only nineteen have consented to the Notice of Consent to the removal. The first defendant was served on June 15, 2004, so 30 days have passed. (Paragraph 1 of Notice). Defendant Gensia Sicor Pharmaceuticals, Inc. was served on July 7, 2004, at Gensia Sicor Pharmaceuticals, Inc., 19 Hughes, Irvine, California, and has not provided Notice of Consent (*see* Affidavit of Service, attached hereto as Exhibit C). Not only was Gensia Sicor served on July 7, 2004, but defendant Bayer claims to have conducted a diligent inquiry of all defendants seeking consent to removal. (Paragraph 31 of Notice). According to defendant Bayer’s representations, Sicor was notified of the lawsuit. Moreover, Gensia Sicor joined in defendants’ motion to stay. Thus the Notice of Removal filed July 14, 2004, lacks the unanimous consent of all defendants required to obtain the Court’s jurisdiction. This defect requires the Court to grant the State’s motion to remand.

VI. PLAINTIFFS ARE ENTITLED TO PAYMENT OF JUST COSTS AND ACTUAL EXPENSES INCLUDING ATTORNEYS FEES.

Plaintiff requests payment of just costs and any actual expenses, including attorneys' fees which have been incurred by the plaintiff as a result of the removal. 28 U.S.C. § 1447(c) allows the Court to require payment of such costs, expenses, and fees which are incurred as a result of the removal. If ordered, plaintiff will submit an affidavit itemizing such costs, fees, and expenses.

Although plaintiff believes that defendants' removal was frivolous, the 1988 amendments to 28 U.S.C. § 1447 do not require a party seeking fees and costs to show the removal was frivolous or undertaken in bad faith. *Morris v. Bridgestone/Firestone, Inc.* 985 F.2d 238 (6th Cir. 1993); *Leibig v. Dejoy*, 814 F. Supp. 1074 (M.D. Fla. 1993). Some courts have disagreed. See *Marler v. Amoco Oil Co.*, 793 F. Supp. 656 (E.D.N.C. 1992); *Hartford County, Md. v. Hartford Mut. Ins. Co.*, 749 F. Supp. 701 (D. Md. 1990).

While courts differ on the issue, the reasonable inference to be drawn from the plain language of the statute is that the party seeking the award need not show that the case was removed frivolously or in bad faith. This Court adopted that position in its unpublished order in *State of Wisconsin v. Hotline Industries, Inc.*, Case No. 99-C-0398-C (W.D. Wis. Aug. 2, 1999) (order granting plaintiff State of Wisconsin's motion for award of attorney fees), *rev'd on other grounds*, 236 F.3d 363 (7th Cir. 2000) (attached hereto as Exhibit D), finding the 1988 amendments remedial rather than punitive. Such a reading is consistent with the tenor of the Seventh Circuit's decision in *Hart v. Terminex Intern.*, 336 F.3d 541 (7th Cir. 2003), cautioning litigants against invoking federal jurisdiction where such jurisdiction is not absolutely clear.

Plaintiff respectfully requests that this Court exercise its discretion and award just costs, expenses, and fees pursuant to 28 U.S.C. § 1447(c).

VII. CONCLUSION.

Plaintiff State of Wisconsin submits for all of the aforementioned reasons that removal was improper in this case. Plaintiff respectfully requests that this case be remanded to state court and that costs, expenses, and fees be awarded.

Dated this _____ day of July, 2004.

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