

No. 07-1999

---

UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

STATE OF WISCONSIN,

*Plaintiff-Appellee,*

v.

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

---

BRIEF OF PLAINTIFF-APPELLEE STATE OF WISCONSIN

---

MINER, BARNHILL & GALLAND, P.C.  
Betty Eberle  
Charles Barnhill  
44 East Mifflin Street, Suite 803  
Madison, WI 53703  
(608) 255-5200 Tel.  
(608) 255-5380 Fax  
Email: [heberle@lawmbg.com](mailto:heberle@lawmbg.com)  
Special Counsel - State of Wisconsin

## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 07-1999

Short Caption: State of Wisconsin v. Dey, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information; The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

State of Wisconsin

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Miner, Barnhill & Galland, P.C., Archibald Consumer Law Office; Winget-Hernandez, LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Betty Eberle Date: September 17, 2007

Attorney's Printed Name: Betty Eberle

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No     

Address: 44 East Mifflin Street; Suite 803

Madison, WI 53703

Phone Number: 608-255-5200 Fax Number: 608-255-5380

E-Mail Address: beberle@lawmbg.com

## TABLE OF CONTENTS

	Page
CIRCUIT RULE 26.1 DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	3
SUMMARY OF THE ARGUMENT.....	10
ARGUMENT.....	12
I.    Standard of Review.....	12
II.   The District Court Did Not Abuse its Discretion in Awarding Fees.....	12
A.    Absent Controlling Law, the District Court’s Decision to Remand the Case Based on Timeliness Was Not Legally Erroneous.....	13
B.    The District Court Did Not Abuse its Discretion in Finding that There Was No Objectively Reasonable Basis to Establish the Timeliness of Dey’s Removal.....	15
1.    The Massachusetts <i>qui tam</i> documents did not fall within the District Court’s previous interpretation of the <i>Doe/Green</i> exception and this is dispositive. ....	16
2.    Dey’s interpretation of the exception is even broader than that in <i>Doe</i> and <i>Green</i> . ....	18
a.    Dey’s “sufficient nexus between the actions” theory is outside the scope of <i>Doe</i> and <i>Green</i> .....	18
b.    Dey’s theory that an order need only have the effect of “allowing” removal to qualify under the exception is outside the scope of <i>Doe</i> and <i>Green</i> .....	20
i.    Dey’s interpretation of “allowing” removal is broader than in <i>Doe</i> .....	21
ii.   Dey’s interpretation of “allowing” removal is broader than in <i>Green</i> .....	22

**TABLE OF CONTENTS**  
(cont.)

	<b>Page</b>
3. Attorney’s Fees Were Not Awarded in the Three Other Remanded AWP Actions Because There Was No “Law of The Case” in the Other Actions. ....	25
4. The District Court Correctly Held That Dey Removed the Case to Increase Wisconsin’s Cost of Litigation. ....	26
III. Dey Improperly Reargues its Substantive Jurisdictional Position; the District Court Based its Decision to Award Fees Solely on the Timeliness Issue, Not on the Propriety of Dey’s Argument that Section 3732 Provided a Basis for Removal. ....	27
IV. Wisconsin Requests Both An Award of Costs and Fees and Sanctions Against Dey for this Appeal.....	28
CONCLUSION.....	30
CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)(B).....	31
CIRCUIT RULE 31(e)(1) CERTIFICATION .....	32
PROOF OF SERVICE .....	33
TABLE OF CONTENTS OF APPENDIX.....	34

## TABLE OF AUTHORITIES

	Page
<b>Federal Cases</b>	
<i>Alabama v. Abbott Labs., Inc.</i> , Case No. 2:06cv920, 2006 WL 3170553, *1 (M.D. Ala., Nov. 2, 2006).....	14
<i>Alaska v. Abbott Labs.</i> , Case No. 3:06-cv-0267 (D. Alaska, Jan.22, 2007) (A176-81); Hawaii, 469 F.Supp.2d at 842 .....	26
<i>Ancar v. Murphy Oil, U.S.A., Inc.</i> , Case No. 06-3246, 2006 WL 2850445 (E.D. La. Oct. 3, 2006) .....	20, 23
<i>Barrett v. Baylor</i> , 457 F.2d 119 (7th Cir. 1972) .....	15
<i>Dahl v. R.J. Reynolds Tobacco Co.</i> , 478 F.3d 965 (8th Cir. 2007).....	14
<i>Doe v. American Red Cross</i> , 14 F.3d 196 (3d Cir. 1993) .....	<i>passim</i>
<i>Enterprises, Inc. v. Quality Care-USA, Inc.</i> , 874 F.2d 431 (7th Cir. 1989).....	28
<i>iGames Entertainment, Inc. v. Regan</i> , Case No. 04-CV-4179, 2004 WL 2538285 (E.D. Pa., Nov. 9, 2004) .....	19
<i>Grable &amp; Sons Metal Products, Inc. v. Darue Engineering &amp; Manufacturing</i> , 545 U.S. 308 (2005) .....	<i>passim</i>
<i>Green v. R.J. Reynolds</i> , 274 F.3d 263 (5th Cir. 2001) .....	<i>passim</i>
<i>Gruner v. Blakeman</i> , 517 F.Supp. 357 (D. Conn. 1981).....	22
<i>Hawaii v. Abbott Laboratories, Inc.</i> , 469 F.Supp.2d 842 (D. Haw. 2006) .....	21
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983).....	28
<i>Martin v. Franklin Capital Corp.</i> , 546 U.S. 132 (2005) .....	12
<i>Sanchez v. Liggett &amp; Myers, Inc.</i> , 187 F.3d 486 (5th Cir. 1999).....	22
<i>Tenner v. Zurek</i> , 168 F.3d 328 (7th Cir. 1999) .....	12
<i>Young v. Chubb Group of Ins. Cos.</i> , 295 F.Supp.2d 806 (N.D. Ohio 2003) .....	20, 24
<i>Wisconsin v. Abbott Labs.</i> , 341 F.Supp.2d 1057 (W.D. Wis. 2004).....	3
<i>Wisconsin v. Abbott Labs.</i> , 390 F.Supp.2d 815 (W.D. Wis. 2005).....	<i>passim</i>

**TABLE OF AUTHORITIES**  
(cont.)

	<b>Page</b>
<b>Federal Statutes</b>	
28 U.S.C. § 1331.....	4
28 U.S.C. § 1446(b) .....	<i>passim</i>
28 U.S.C. § 1447(c).....	12, 28
28 U.S.C. § 1447(d) .....	13, 14
31 U.S.C. § 3730(b)(5).....	24
31 U.S.C. § 3732.....	6, 25
<b>Federal Rules</b>	
Fed. R. App. P. 38 .....	28

## STATEMENT OF THE ISSUES

Whether the District Court abused its discretion when, in remanding this case after the third removal, it awarded the State of Wisconsin \$14,208 in costs and attorney's fees based on its finding that Dey had no objectively reasonable ground to believe that a procedural order and complaint in a Massachusetts *qui tam* case had extended the time for removal under 28 U.S.C. § 1446(b) because Dey removed knowing that:

1. the District Court had previously interpreted Section 1446(b) and an exception thereto (in the absence of controlling law in this Circuit) very narrowly in a previous order; and
2. the documents on which Dey relied did not fall within the District Court's interpretation of either Section 1446(b) or the exception.

## STATEMENT OF THE CASE

In June 2004, Plaintiff State of Wisconsin filed suit in Wisconsin state court against numerous pharmaceutical manufacturers, including Defendant-Appellant Dey. (BA003, 006)<sup>1</sup> Wisconsin's amended complaint consists of five counts, all arising under Wisconsin law. (BA007; A106-68) The counts allege violations of Wis. Stat. §§ 100.18(1) and 100.18(10)(b), which prohibit making false representations with the intent to sell merchandise; a violation of the Wisconsin Trust and

---

<sup>1</sup> In this brief, cites to "R.\_\_\_\_" refer to cites to the Record and "WIS\_\_\_\_" refers to pages of Plaintiff Wisconsin's Appendix contained herein. Consist with Dey's brief, cites to "BA\_\_\_\_" refer to the required short appendix bound to Dey's brief and cites to "A\_\_\_\_" refer to Dey's supplemental appendix.

Monopolies Act, Wis. Stat. § 133.05; a claim for fraud on the Wisconsin Medicaid Program, Wis. Stat. § 49.49(4m)(a)(2); and a common law claim for unjust enrichment. (BA007; A135-40)

Wisconsin, through its Medicaid program, is a huge purchaser of drugs, purchasing over \$610 million annually. (A121, ¶32) Wisconsin’s complaint alleges that both the State of Wisconsin and its citizens participating in the Medicare Part B program have been harmed by defendants’ deceptive conduct in falsely inflating their prices. (A135)

Dey is a pharmaceutical manufacturer that is owned by Merck.<sup>2</sup> Wisconsin’s complaint alleges that Dey and other defendant pharmaceutical manufacturers have taken advantage of the enormously complicated and non-transparent market for prescription drugs to engage in an unlawful scheme to cause Wisconsin and its citizens to pay inflated prices for prescription drugs. (A110) The scheme involves the publication by defendants of phony “average wholesale prices” (AWPs), which then become the basis for calculating the cost at which “providers”—the physicians, clinics, and pharmacies who provide these prescription drugs to patients—are reimbursed by Wisconsin. (Id.)

Defendants reinforce this basic tactic with other deceptive practices, including the use of secret discounts and rebates to providers and the use of various devices to keep secret the prices of their drugs currently available in the market place. (A110-11) By willfully engaging in this scheme, defendants have succeeded in

---

<sup>2</sup> See Dey’s Circuit Rule 26.1 Disclosure Statement.

having Wisconsin and its citizens finance windfall profits to these providers. (A111) Defendants attempt to profit from their scheme by using the lure of these windfall profits competitively to encourage providers to buy more of their drugs instead of competing in the market place solely on the basis of legitimate factors such as price and the medicinal value of their drugs. (Id.)

On October 11, 2006, Dey removed this case from state court. (BA006) This case had been removed and remanded twice before. (Id.) On January 16, 2007, the District Court found the third removal untimely under Section 1446(b) and remanded the case. (BA018) The District Court also found that Dey had no objectively reasonable ground for the timeliness of the removal and awarded costs and fees incurred in successfully remanding this case. (BA019-20) Dey appeals the District Court's \$14,208 award. (BA025)

## STATEMENT OF FACTS

### First Removal

Defendants removed the case on July 14, 2004, contending that federal jurisdiction arose under the diversity statute, 28 U.S.C. § 1332. *Wisconsin v. Abbott Labs.*, 341 F.Supp.2d 1057, 1059 (W.D. Wis. 2004). The District Court remanded the case on October 7, 2004 because under “well settled” law, a State is “not a citizen for diversity purposes.” *Id.* at 1060-61.

### Second Removal, Establishing the Relevant Law of the Case

The District Court's disposition of the timeliness issue at play in defendants' second removal of this case established the law of the case that is relevant to this

appeal. On July 13, 2005, a year after the first removal (BA006), Defendants unsuccessfully removed the case again, this time contending that the Supreme Court decision *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), established that removal was substantively proper under 28 U.S.C. § 1331, and timely under 28 U.S.C. § 1446(b). *Wisconsin v. Abbott Labs.*, 390 F.Supp.2d 815, 817, 824 (W.D. Wis. 2005) (attached hereto as WIS003, 010). The District Court rejected both contentions.

#### Disposition of Substantive Basis for Second Removal

The District Court rejected *Grable* as a substantive basis for removal. *Grable* held that “a state law claim is removable if it presents a disputed and substantial question of federal law that a federal court may decide without disturbing ‘any congressionally approved balance of federal and state judicial responsibilities.’” 390 F.Supp.2d 815, 821-22 (quoting *Grable*, 545 U.S. at 314):(WIS007-08). The District Court remanded because it found, contrary to the requirements of *Grable*, that the instant case did “not implicate an overriding federal interest and because removal would disturb the balance of judicial responsibilities between state and federal courts.” 390 F.Supp.2d at 824:(WIS010).

#### Disposition of Timeliness Issue of Second Removal

The District Court also found that the removal was untimely. Since the statutory removal period had long expired, Defendants argued that the *Grable* decision constituted an “other paper” under 28 U.S.C. § 1446(b) that extended the period for timely removal. *Id* at 824:(WIS010). Section 1446(b) provides that

removal is timely if filed within thirty days after receipt of an amended pleading, motion, order or other paper from which it may first be ascertained that the case has become removable. 28 U.S.C. §1446(b).

At the time of the second removal, there was no controlling law regarding whether a decision emanating from a separate case, such as *Grable*, qualifies as an “other paper” under Section 1446(b). 390 F.3d at 824:(WIS010). Thus, the District Court set forth its own analysis. The District Court first observed that courts were split on the question, but noted that the majority of courts to address the question limited the phrase “other paper” to include only documents filed in the case for which removal is sought. *Id.* The District Court also looked to the language of the statute, noting that Section 1446(b) refers to “receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper.” *Id.* The District Court concluded that the “[i]nclusion of the concept of receipt through service and the words ‘pleading’ and ‘motion’ suggest that it is reasonable to limit the phrase ‘other paper’ to documents generated in the case for which removal is sought.” *Id.*

The District Court then interpreted a “narrow” exception for certain orders from separate cases created in the Third and Fifth Circuit cases of *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993) and *Green v. R.J. Reynolds*, 274 F.3d 263 (5th Cir. 2001), on which Dey had relied. 390 F.2d at 824:(WIS010). The District Court limited any possible exception under *Doe* and *Green* to “a decision in an unrelated

case that [1] involves the same defendant, [2] concerns a similar factual situation and [3] expressly authorizes removal . . . . *Id.* at 824-25:(WIS010-11).

Based on its “narrow” interpretation of *Doe* and *Green*, the District Court distinguished *Grable* on all three prongs, holding: “[1] Defendants in the present case were not parties in *Grable*[:]; [2] *Grable* did not involve a fact situation similar to the present case[: and] [3] [] although *Grable* did address the question of removal, it did not authorize removal of state law actions against pharmaceutical companies.” *Id.* at 825:(WIS011). The District Court also held that *Doe* and *Green* were inapplicable because the defendants did not contend that *Grable* constituted an “order” but rather an “other paper.” *Id.* The District Court remanded the case to state court. *Id.*

### Third Removal, Underlying the Attorneys Fee Award on Appeal

On October 11, 2006 a year after the second removal, defendant Dey removed the case for a third time based on the unsealing of a complaint against it in *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.), a federal False Claim action (“the Massachusetts *qui tam* action”). (A066, 076) Dey contended that the unsealing of the complaint triggered original jurisdiction under a provision of the False Claims Act, 31 U.S.C. § 3732. (A066-67) Dey again claimed that that the removal was timely under 28 U.S.C. § 1446(b), this time based on its receipt of a complaint in the Massachusetts *qui tam* action. (A076)

### Disposition of Substantive Basis for Third Removal

In its argument before the District Court, Dey claimed that the unsealing of the Massachusetts *qui tam* action made removal possible under Section 3732(b) of the False Claims Act. (R.36 at 2) Section 3732(b) grants federal courts jurisdiction over certain state law actions to allow States to “join [s]tate law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence.” (BA010) Dey claimed that the statute’s grant of federal jurisdiction constituted “original jurisdiction” over the state law actions. (R.36 at 5) Thus, Dey argued, the unsealing of the Massachusetts *qui tam* action, which involved the same transactions or occurrences as the instant case, created original jurisdiction over Wisconsin’s already-existing state law action. (Id. at 5-14) Dey argued that this alleged newly-created original jurisdiction allowed it to remove the case. (Id.)

The District Court stated that the grant of jurisdiction in Section 3732(b) “look[ed] a lot like supplemental jurisdiction,” and found it “doubtful” that the False Claims Act provision could be a basis for removal. (BA014) The District Court however, declined to make a definitive ruling on the issue because it found that the removal was untimely. (Id.)

### Disposition of Timeliness Issue of Third Removal

Despite the District Court’s holding in the previous removal that Section 1446(b) applied only to documents in the case, Dey claimed that documents from the Massachusetts *qui tam* action constituted an “other paper” under the “plain

language” of the statute. (Dey Br. at 30; R.36 at 16) The District Court rejected Dey’s contention, quoting its 2005 remand order construing Section 1446(b). (BA015)

Despite the District Court’s holding in the previous removal that the exception set out by *Doe* and *Green* applied only to “orders,” Dey claimed that the complaint against it in the Massachusetts *qui tam* action constituted an “order or other paper” under the *Doe/Green* exception. (Dey Br. at 31-38; R.36 at 17-20) The District Court rejected the complaint as falling within the *Doe/Green* exception. (BA018)

Despite the District Court’s interpretation of the exception under *Doe* and *Green* as limited to “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:(WIS010-11), Dey claimed that a procedural order in the Massachusetts *qui tam* action (that did not concern a similar factual situation or expressly authorize removal (A103-05)) fell within the *Doe/Green* exception. (Dey Br. at 31-38; R.36 at 17-20)

The three-page procedural order at issue simply directed that the complaints against Dey and other defendants be unsealed and served on the defendants. (A103, ¶¶1&2) It also ordered that all other previously-filed documents in the case remain under seal, that the seal be lifted for subsequent matters, and that the parties serve on the United States all documents from the part of the action in which the United States did not intervene, stating that the United States is entitled to intervene in

that part at any time. (A104 at ¶¶3-5) Finally, the order directed that all orders be sent to the United States, stating that the court would solicit consent from the United States before ruling on any motion to dismiss any part of the action in which the United States declined to intervene. (Id. at ¶¶6, 7) The order did nothing more and contained no legal analysis. (A103-05)

In an attempt to have the procedural order fall within the *Doe/Green* exception, Dey set forth its own broader interpretation of the exception, despite the District Court's previous "narrow" interpretation of the *Doe/Green* exception. 390 F.2d at 824:(WIS010). Whereas the District Court held that the appellate *decision* and the removal action must involve similar factual situations, *id.* at 824-25:(WIS010-11), Dey argued that it was sufficient that the *action* from which the decision emanated be factually similar to the removal action. (Dey Br. at 36-38; R.36 at 20) Whereas the District Court held that the appellate decision must "expressly authorize removal," 390 F.2d at 824-25:(WIS010-11), Dey argued that it was sufficient that the decision have the effect of "allowing" removal. (Dey Br. at 33-34; R.36 at 19)

The District Court, noting that this was the second time the case was removed based on *Doe* and *Green*, held that although "the defendants are identical to those named in the federal *qui tam* action, [the order] was issued from a court that was not superior and the order did not 'expressly authorize' the removal of this action." (BA016-17) The District Court also specifically noted that "[u]nlike the appellate decision at issue in *Green* that effectively barred the plaintiffs' lawsuit

entirely, the federal *qui tam* action [did] not affect the viability of the claims plaintiff is raising in state court.” (BA018) Thus, the District Court found the removal untimely.

The District Court then addressed Wisconsin’s request for an award of costs and fees. The District Court stated that “Dey sought to remove for a third time, relying on a theory of questionable merit, knowing full well that under this court’s interpretation of § 144[6](b), neither the *qui tam* complaint nor the order unsealing it could qualify as grounds for timely removal in this case.” (BA019) The District Court noted that “Defendant Dey’s argument in defense of its timeliness has been rejected by every court to consider it, including now this one.” (Id.) The District Court concluded: “Consequently, I cannot help but conclude that defendant Dey removed the case without an objectively reasonable ground for doing so, for the purpose of prolonging litigation or increasing plaintiff’s costs in prosecuting the case.” (BA019-20) Accordingly, the District Court awarded Wisconsin its requested costs and fees of \$14,208. (BA025)

### **SUMMARY OF THE ARGUMENT**

Dey cannot show that the District Court abused its discretion in awarding attorneys fees when it remanded this action for the third time. The Court awarded fees because Dey removed under a theory of timeliness that was contrary to the legal test articulated in a previous order in the case.

Dey first argues that removal was in fact proper and that the District Court’s decision to remand was “legally erroneous.” (Dey Br. at 17, 30-38) However, the

District Court's decision could not have been "legally erroneous" because there is no controlling Seventh Circuit law on the timeliness issue in this case: whether a document from a separate case qualifies as an "order or other paper" under Section 1446(b). (BA015) Given the absence of controlling law, the District Court had discretion to construe the language of the provision to exclude documents from separate cases. Similarly, the District Court had discretion to construe narrowly an exception set forth under non-controlling law from other circuits or even to reject the exception altogether.

Dey then argues that the District Court abused its discretion in finding that there was no objectively reasonable basis to establish the timeliness of Dey's removal. (Dey Br. at 38-39) However, Dey removed the case based on a theory of timeliness that required an expanded interpretation of the *Doe/Green* exception, despite the fact the District Court had already interpreted the exception narrowly in a 2005 order. The District Court's 2005 interpretation included the requirement that to fall within the exception, an order must "expressly authorize[] removal." 390 F.2d at 825:(WIS011). Neither of the Massachusetts *qui tam* documents on which Dey relied expressly authorized removal. Thus, Dey had no objectively reasonable basis on which to remove the case.

That the Massachusetts *qui tam* documents did not fall within the District Court's previous narrow interpretation of the *Doe/Green* exception is dispositive. However, this point is made even clearer by the fact that Dey's theory regarding the documents falls outside of the exception as interpreted by both *Doe* and *Green*.

Finally, it is improper for Dey to reargue its substantive jurisdictional position (Dey Br. at 17-29) because the District Court based its decision to award fees solely on the timeliness issue, not on the propriety of Dey's argument that Section 3732 provided a basis for removal. Accordingly, Wisconsin moves to strike the portions of Dey's brief dedicated to that issue.

Wisconsin also requests an award of costs and fees for this appeal and sanctions against Dey.

## ARGUMENT

### I. Standard of Review.

This Court's review of a district court's decision to award fees under Section 1447(c) is for abuse of discretion. *Tenner v. Zurek*, 168 F.3d 328, 329 (7th Cir. 1999).

### II. The District Court Did Not Abuse its Discretion in Awarding Fees.

The District Court concluded that Dey removed the case "knowing full well under this court's interpretation of § 144[6](b), neither the *qui tam* complaint nor the order unsealing it could qualify as grounds for timely removal in this case." (BA019) Although Dey disagrees with this conclusion, it does not dispute that removing a case without an objectively reasonable basis entitles a plaintiff to an award of attorney's fees under 28 U.S.C. § 1447(c). (Dey Br. at 16) (citing *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005)).

Dey removed the case based on the incorrect proposition that the removal was timely because a complaint and procedural order from a Massachusetts *qui tam* action in which Dey was the defendant constituted an "order or other paper" under

Section 1446(b) of the removal statute, the receipt of which restarts the thirty-day period for removal. (Dey Br. at 29-38) Dey argues that the District Court abused its discretion in awarding fees because (1) the District Court was wrong as a matter of law to remand the case on timeliness grounds in the first place; and since the removal was timely, (2) Dey had an objectively reasonable ground for the removal. Neither assertion has merit.

A. Absent Controlling Law, the District Court's Decision to Remand the Case Based on Timeliness Was Not Legally Erroneous.

Dey argues first that the District Court's decision to remand the case on timeliness grounds was "legally erroneous." (Def. Br. at 17, 29-38) Given the unusual law governing removal, a defendant cannot appeal from a district court's decision to remand a case. 28 U.S.C. § 1447(d). Dey argues, however, that in appealing an award of fees, if it is established that the decision to remand was contrary to controlling law, *i.e.*, if the removal was actually proper, the defendant would obviously have had an objectively reasonable basis to remove. (Dey Br. at 16-17) That is not the case here.

The District Court's decision could not have been "legally erroneous" because as the District Court noted, there is no controlling Seventh Circuit law on the timeliness issue in this case: whether a document from a separate case qualifies as an "order or other paper" under Section 1446(b). (A015-16) Given the absence of controlling law, the District Court had the discretion to construe the language of the provision. The District Court concluded that the provision did not apply to

documents from separate cases, noting that a majority of courts to address this issue came to the same conclusion. (Id.)

The District Court also addressed Dey's request to adopt an exception for certain orders from separate cases set forth in two cases from other circuits, *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993) and *Green v. R.J. Reynolds*, 274 F.3d 263 (5th Cir. 2001). The District Court interpreted the exception narrowly and found that the documents on which Dey relied did not fall within it.<sup>3</sup> (A016-18) Since the exception was not established under controlling law, the District Court's narrow construction of it could not have been legally erroneous. In fact, the District Court could have refused the adoption of the exception entirely.

Indeed, every other court to consider Dey's argument in an analogous situation has found Dey's removal untimely.<sup>4</sup> Dey has failed to establish that the District Court's decision to remand the case based on the timeliness issue was legally erroneous.

---

<sup>3</sup> The Eighth Circuit has also construed the *Doe/Green* exception narrowly. *Dahl v. R.J. Reynolds Tobacco Co.*, 478 F.3d 965, 970 (8th Cir. 2007) (refusing to apply the *Doe/Green* exception to an order that did not involve the same defendants in the remand action because "*Doe* expressly limited [its] holding[] to the unusual circumstances presented").

<sup>4</sup> *Hawaii v. Abbott Labs, Inc.*, 469 F.Supp.2d 842, 849 (D. Haw. 2006) (holding in an analogous case: "Given the fact that the [Massachusetts] *Qui tam* Action does not resolve a matter of law that is controlling in this case and that there was no express authorization for removal from a superior court, ... the [Massachusetts] *Qui tam* Action did not constitute an 'order or other paper' within the meaning of 28 U.S.C. § 1446(b) to permit removal."); *Alabama v. Abbott Labs., Inc.*, Case No. 2:06cv920, 2006 WL 3170553, \*1 (M.D. Ala., Nov. 2, 2006) (holding in an analogous case: "Because the Massachusetts *qui tam* lawsuit was not generated in the Alabama state-court proceeding, it is not an 'order or other paper,' 28 U.S.C. § 1446(b).").

B. The District Court Did Not Abuse its Discretion in Finding that There Was No Objectively Reasonable Basis to Establish the Timeliness of Dey's Removal.

Dey devotes less than two pages of its appeal brief to arguing that it had an objectively reasonable basis for believing its removal was proper. (Dey Br. at 38-39) Dey does not contend that the Massachusetts *qui tam* documents fell within the District Court's previous interpretation of the *Doel Green* exception. Dey fails to do this even though the "law of the case" doctrine put Dey on notice that any subsequent removal would be governed by the District Court's previous narrow interpretation of the exception. *Barrett v. Baylor*, 457 F.2d 119, 123 (7th Cir. 1972) ("The rule of the law of the case is a rule of practice, based on sound policy that, when an issue is once litigated and decided, that should be the end of the matter.").

Indeed, Dey was not starting from a clean slate in the instant removal. In 2005, Dey removed the case claiming the issuance of the Supreme Court case *Grable* restarted the removal clock under the *Doel Green* exception. Dey made this argument even though it was not a defendant in *Grable* and an explicit requirement in both *Doe* and *Green* was that the order involve the same defendants as those in the removal action. The District Court answered Dey's 2005 request for an expanded application of the *Doel Green* exception by setting forth a very narrow interpretation of the exception. 390 F.2d at 824-25: (A010-11). While Dey's initial request for an expanded reading of the *Doel Green* exception in 2005 may not have been improper, its second attempt to remove based on another expanded reading (despite the law of the case setting forth a narrow reading) was improper.

Dey argues that the District Court’s previous interpretation of the *Doel/Green* exception did not apply to the instant removal because the “order” that gave rise to the 2005 removal was “readily distinguishable” from the “order” that gave rise to the instant removal. (Id. at 38) However, the District Court distinguished *Grable* in the 2005 removal on all three prongs<sup>5</sup> of its interpretation of the *Doel/Green* removal:

Defendants in the present case were not parties in *Grable*. *Grable* did not involve a fact situation similar to the present case. Finally, although *Grable* did address the question of removal, it did not authorize removal of state law actions against pharmaceutical companies.”

(WIS020-21) The fact that the Massachusetts *qui tam* documents might fulfill one or two of the prongs that *Grable* did not is irrelevant since neither of the Massachusetts *qui tam* documents fulfill the third prong—that an order expressly authorize removal. 390 F.2d at 824-25: (A010-11).

That neither document “expressly authorized removal” contrary to the requirements of the 2005 order is enough to find that Dey had no objectively reasonable ground for removal. Below, Wisconsin discusses *all* of the ways in which the Massachusetts *qui tam* documents failed to fulfill the requirements of the 2005 order. That the documents did not fulfill the 2005 requirements is dispositive. Wisconsin, however, also shows that Dey’s latest reading of the exception not only

---

<sup>5</sup> Dey misrepresents the District Court’s holding when it states that the District Court distinguished *Grable* only because the parties did not overlap and did not share similar factual issues. (Dey Br. at 37)

falls outside the District Court’s narrow reading, but it in fact falls outside *any* reasonable interpretation of the *Doe/Green* exception.

1. The Massachusetts *qui tam* documents did not fall within the District Court’s previous interpretation of the *Doe/Green* exception and this is dispositive.

Wisconsin cannot discern the basis for Dey’s argument that the *complaint* from the Massachusetts *qui tam* action qualifies as an “order or other paper” under Section 1446(b) given the District Court’s previous holding. Prior to the instant removal, the District Court clearly construed the statute to exclude documents from separate cases, and held that the *Doe/Green* exception applied only to “orders” not to “other papers.” Since the complaint emanates from a separate case and cannot reasonably be considered an “order,” the District Court did not abuse its discretion in finding that Dey’s receipt of it was not an objectively reasonable ground to establish that the removal was timely.

Dey argues that the *procedural order* emanating from the Massachusetts *qui tam* action fell within an *expanded* interpretation of the *Doe/Green* exception. This is irrelevant because the question is whether the order fell within the District Court’s previous narrow interpretation of the exception. The District Court’s interpreted the exception under *Doe* and *Green* as limited to “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:(WIS010-11). The three-page Massachusetts *qui tam* order merely set forth and ordered the procedural steps necessary to unseal and commence a federal False Claims Act action against Dey. (A103-05) Since the

order did not concern “a similar factual situation” as in the removal action or “expressly authorize[] removal,” *id.*, the District Court did not abuse its discretion in finding that Dey’s receipt of it was not an objectively reasonable ground to establish that the removal was timely.

2. Dey’s interpretation of the exception falls outside any reasonable interpretation of the *Doe/Green* exception.

Dey’s interpretation of *Doe* and *Green* is much broader than the law set out in those cases. As an initial matter, like the District Court, both *Doe* and *Green* limited its holding to “orders,” not “other papers.” Thus, contrary to Dey’s contention, the Massachusetts *qui tam* complaint, not being an order, does not fall within the exception. As discussed below, neither does the Massachusetts *qui tam* order.

- a. Dey’s “sufficient nexus between the actions” theory is outside the scope of *Doe* and *Green*.

Dey claims that the Massachusetts *qui tam* order falls within the exception because the Massachusetts *qui tam* action and the instant action have a strong nexus. (Dey Br. at 34, 37-38) However, neither *Doe* nor *Green* supports Dey’s “sufficient nexus between the actions” test, as both *Doe* and *Green* require that the *order* (not just the action) relate to the case to be removed. This was clear in *Doe*:

[A]n *order*, as manifested through 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.

14 F.3d at 202-03 (emphasis added). It was also clear in *Green* that the *order*, not merely the action, must be related, as the Court stated in reference to the *Sanchez* order:

Similarly, here the [removing defendants] 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).

*Green*, 274 F.3d at 267-68 (emphasis added). Obviously, an order, not an action, contains a “legal conclusion.”

Indeed, the “sufficient nexus between actions” theory is not based on either *Doe* or *Green*, but on an unpublished decision *iGames Entertainment, Inc. v. Regan*, Case No. 04-CV-4179, 2004 WL 2538285 (E.D. Pa., Nov. 9, 2004), in which a Pennsylvania district court concluded, *contrary to Doe, Green, and the District Court*, that an “order or other paper” under Section 1446(b) is *not* limited to papers in the case.<sup>6</sup> *iGames* does not even mention *Doe* or *Green*. Thus, the “sufficient nexus between actions” theory is not an interpretation of the *Doe/Green* exception, but simply part of a district court opinion that reached a contrary conclusion.

---

<sup>6</sup> In *iGames*, the defendants argued that documents from the case itself, along with a press release referring to a separate district court case with common parties and similar claims, established that the amount in controversy satisfied the requirement for federal diversity jurisdiction. (A184: 2004 WL 2538285, at \*3-4) The court concluded that the documents “created a *sufficient nexus* between [the Pennsylvania] case and the Delaware action,” and put the defendants on notice that the plaintiffs’ claims arose from a \$6 million contract. *Id.* (emphasis added).

- b. Dey’s theory that an order need only have the effect of “allowing” removal to qualify under the exception is outside the scope of *Doe* and *Green*.

The second part of Dey’s theory—that an order need only have the effect of “allowing” removal to qualify under the *Doe/Green* exception—is not supported by either *Doe* or *Green*. *Green* merely stated that although the higher court order “did not explicitly discuss removal, the effect of the decision ... has a *similar effect*” on *Green* as the *Red Cross* Supreme Court decision had on *Doe*. 274 F.3d at 268 (emphasis added). A brief review of the cases reveal that the Massachusetts *qui tam* order in no way had a “similar effect” on the instant action as the orders in *Doe* or *Green* had on those cases, or the two other cases relied on by Dey—*Ancar v. Murphy Oil, U.S.A., Inc.*, Case No. 06-3246, 2006 WL 2850445 (E.D. La. Oct. 3, 2006) (A187-90), and *Young v. Chubb Group of Ins. Cos.*, 295 F.Supp.2d 806 (N.D. Ohio 2003).

Discussed in more detail below, in all four cases,

- the actions were timely removed and then remanded;
- orders were issued (in separate cases with the same defendants) from superior courts in the same judicial hierarchies;
- the orders definitively disproved the legal grounds for the previous remands;
- the actions were removed again;
- in the re-removals, the defendants relied on the intervening orders that specifically found that the law remanding the cases the first time was no longer good law;

- thus, in all four cases, the orders had a “binding precedential or institutional effect” *Doe*, 14 F.3d at 203 n.7, of establishing that the grounds for the previous removals were now proper.

The Massachusetts order had no such effect on the instant action. *See Hawaii v. Abbott Laboratories, Inc.*, 469 F.Supp.2d 842, 848 (D. Haw. 2006) (finding that the same Massachusetts order did not fall under the *Doe/Green* exception because it did not constitute “(1) an intervening decision from a superior court; (2) that was binding on the court handling the removed state action; (3) and resolved a disputed question of law; (4) that was dispositive as to the question of federal jurisdiction at issue in the removed action.”).

- i. Dey’s interpretation of “allowing” removal is broader than in *Doe*

Dey’s novel position regarding the exception is much broader than any court has previously found. In *Doe*, the Red Cross removed a case, contending that language in its congressional charter conferred original jurisdiction on the federal courts. 14 F.3d at 199. The district court disagreed and remanded. *Id.* While the case was pending in state court, the Supreme Court specifically addressed and authorized removal in a separate case, based on the Red Cross charter. *Id.* at 197. When the Red Cross filed a second removal in *Doe*, relying on the intervening Supreme Court decision, *id.* at 199, the Third Circuit held that the second removal was proper. It was “key” to its ruling that the Supreme Court decision was “an unequivocal order directed to a party to the pending litigation, explicitly authorizing it to remove any cases it [was] defending.” *Id.* at 202. Indeed, the Court

expressly limited its holding by stating that “an order is sufficiently related when, as here, the order in the case [1] came from a court superior in the same judicial hierarchy, [2] was directed at a particular defendant and [3] expressly authorized that same defendant to remove an action against it in another case involving similar facts and legal issues.” *Id.* at 203.

*Doe* also distinguished *Gruner v. Blakeman*, 517 F.Supp. 357 (D. Conn. 1981), in which the court had rejected, as a basis for removal under Section 1446(b), a non-binding district court order from another court. 517 F.Supp. at 361. *Gruner* was “readily distinguishable,” the *Doe* court held, because a “decision of the New York District Court cannot be considered to have the same binding precedential or institutional effect on the Connecticut District Court, a court on the same hierarchical level, as a Supreme Court order.” *Id.* at 203 n.7. Thus, the *Doe* court itself explicitly rejected Dey’s argument.

- ii. Dey’s interpretation of “allowing” removal is broader than in *Green*

*Green* does not support defendant’s position, either. In *Green*, defendants removed a case asserting diversity jurisdiction, claiming that a Texas statute barred the claims against the sole non-diverse defendant. 274 F.3d at 265. The district court disagreed and remanded. *Id.* Shortly thereafter, the Fifth Circuit decided *Sanchez v. Liggett & Myers, Inc.* 187 F.3d 486 (5th Cir. 1999), in which the defendants were the same as the removing defendants in *Green*. 274 F.3d at 265, 268. In *Sanchez*, the Fifth Circuit definitively held that the Texas statute did bar the same claims at issue in *Green*. *Id.* at 265.

The defendants removed *Green* a second time relying on the *Sanchez* decision. The Fifth Circuit relied on the “very limited [similar] circumstances” in *Doe* to find the removal timely. 274 F.3d at 267. The removing defendants in *Green* were all defendants in the *Sanchez* case, the *Sanchez* decision involved a similar factual situation as in *Green*, and while “*Sanchez* did not explicitly discuss removal,” the effect of the legal conclusion in *Sanchez* (that [a Texas statute] bars [the same claims brought by the non-diverse defendant])” *id.* at 268, “ha[d] a similar effect on [*Green*] as the [*Red Cross* Supreme Court] decision had on [*Doe*], i.e. that these defendants cannot be sued under Texas law.” *Id.* As *Green* noted, the removal question was “inseparable” from the legal issue in *Sanchez*:

In this case, the jurisdictional question is inseparable from the merits. The federal courts have jurisdiction if [the non-diverse defendant] is not a proper defendant. If the Greens failed to state a claim against [the non-diverse defendant], removal was appropriate.

274 F.3d at 268 n.3. Thus, while *Sanchez* did not explicitly discuss removal, the decision was definitive and controlling authority that the non-diverse defendant’s state claims were barred and that diversity jurisdiction existed. Thus the “binding precedential or institutional effect” of *Sanchez*, 14 F.3d at 203 n.7, was to unmistakably authorize the propriety of the removal of the *Green* claims.<sup>7</sup>

---

<sup>7</sup> In *Ancar*, the intervening higher court order was a Fifth Circuit decision that specifically addressed the same remand issue as in *Ancar* and determined that federal jurisdiction over such claims existed based on its interpretation of the statute implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 2006 WL 2850445, at \*1, 3 (A187-90). The *Ancar* court viewed the Fifth Circuit decision as a definitive authority under Fifth Circuit law that the claims were subject to federal jurisdiction. *Id.* at \*3 (A190) (“This Court finds that ... it is bound by the Fifth Circuit’s decision in *Acosta*, which warrants

In a *post hoc* attempt<sup>8</sup> to establish that the Massachusetts order had a “similar effect” on the instant case as the *Sanchez* order had on *Green*, Dey argues that the Massachusetts order “barred the [instant] claims in state court.” (Dey Br. at 33, 35-36) This argument fails. First, its argument is unclear: Dey confusingly admits that its argument is not relevant to the timeliness issue: “Even though the issue is not relevant to the “order” or “other paper” question, the pendency of the Federal Action bars the Wisconsin Action in state court.” (Dey Br. at 35)

Second, the Dey’s proffered comparison has no merit. Dey (incorrectly) argued before the District Court that 31 U.S.C. § 3730(b)(5) barred the state action.<sup>9</sup> (R.36 at 10) Similarly, the *Green* defendants argued that a Texas statute barred the state claims. 274 F.3d at 265. That, however, is where the similarity ends. In *Green*, the intervening Fifth Circuit case of *Sanchez* definitively established that the Texas statute did indeed bar the state claims. *Id.* Unlike *Sanchez*, however, the Massachusetts order did *not* definitively establish that Section 3730(b)(5) barred

---

denial of the instant motion to remand.”)

In *Young*, the intervening higher court order was a Sixth Circuit decision that settled an issue on which the district courts had been in conflict regarding a specific provision of the diversity jurisdiction statute, § 1332(c)(1). 295 F.Supp.2d at 807. The *Young* court viewed the Sixth Circuit decision as a definitive authority that diversity jurisdiction existed, thus allowing removal. 295 F.Supp.2d at 808 (allowing re-removal because “both [the Sixth Circuit decision] and the instant matter involve similar facts and legal issues regarding the removability of [certain uninsured motorists] actions.”).

<sup>8</sup> The argument is also procedurally improper because Dey did not argue to the District Court that its (incorrect) theory that Section 3730(b)(5) barred the state claims was relevant to the timeliness issue.

<sup>9</sup> Section 3730(b)(5) provides that when a relator brings an action under the False Claims Act, no person other than the Government may intervene or bring a related action in federal court based on the facts underlying the pending action. 31 U.S.C.A. § 3730(b)(5).

the state action—it did not even mention Section 3730(b)(5). (A103-05) Nor did it mention Dey’s legal basis for removal—jurisdiction under 31 U.S.C. § 3732 (itself a “theory of questionable merit” (BA019), which no court has ever accepted) The Massachusetts *qui tam* order had no “binding precedential or institutional effect” of establishing that the ground for removal was unmistakably proper.<sup>10</sup> 14 F.3d at 203 n.7

Thus, the Massachusetts *qui tam* order does not have a “similar effect” on the instant case as *Sanchez* had on *Green*. Since Dey’s argument constituted of an entirely novel (and unreasonable) interpretation of the *Doel/Green* exception, it had no basis to believe that the Massachusetts *qui tam* order would qualify under the District Court’s previous narrow reading of the exception.

3. Attorney’s Fees Were Not Awarded in the Three Other Remanded AWP Actions Because There Was No “Law of The Case” in the Other Actions.

Dey’s reference to the fact that attorney’s fees were not awarded in the three other remanded AWP actions (Dey Br. at 7) only serves to illustrate that the District Court was correct to award fees here. In none of the other cases was there pre-existing “law of the case” regarding timeliness under Section 1446(b). In both the Alaska<sup>11</sup> and Hawaii cases, there were no previous removals to establish any “law of the case.” *Alaska v. Abbott Labs.*, Case No. 3:06-cv-0267 (D. Alaska, Jan.22,

---

<sup>10</sup> Indeed, if Dey’s theory of timeliness were accepted, every time a defendant had a “theory” that a paper “allowed” removal, the floodgates would be opened for endless, multiple removals.

<sup>11</sup> In fact, the Alaska case was filed *after* Dey was served the Massachusetts documents (Dey Br. at 6 n.2), so there was no issue of the timeliness of the removal.

2007) (A176-81); *Hawaii*, 469 F.Supp.2d at 842. In the Alabama case, *Alabama v. Abbott Labs., Inc.*, No. 2:06cv920-MHT (M.D. Ala. 2006) there was a previous remand order, but it did not address the timeliness issue. (WIS012-13) Thus, unlike in the instant case, Dey did not remove those cases based on an argument contrary to any governing law of the case.

4. The District Court Correctly Held That Dey Removed the Case to Increase Wisconsin's Cost of Litigation.

Finally, Dey argues that the District Court abused its discretion in awarding fees because discovery was proceeding during the remand process, and therefore the “District Court’s conclusion that Dey removed the Wisconsin Action *solely* to cause delay is not supported by the record.” (Dey Br. at 39) (emphasis added). Dey’s characterization of the District Court’s conclusion is false.

Instead, after noting that “Dey’s argument in defense of its timeliness has been rejected by every court to consider it,” the District Court stated that it could not “help but conclude that defendant Dey removed the case without an objectively reasonable ground for doing so, for the purpose of prolonging litigation *or increasing plaintiff’s costs in prosecuting the case.*” (BA020) (emphasis added). Dey cannot credibly argue that the removal under review did not increase Wisconsin’s cost in this case. It did, and given Dey’s actions in removing the case on a theory contrary to the law of the case, Wisconsin is entitled to an award of its costs and fees.<sup>12</sup>

---

<sup>12</sup> In addition to increasing Plaintiff’s cost of litigation, the improper removal drained (and continues to drain) attorney time away from the ongoing main litigation.

III. Dey Improperly Reargues its Substantive Jurisdictional Position; the District Court Based its Decision to Award Fees Solely on the Timeliness Issue, Not on the Propriety of Dey's Argument that Section 3732 Provided a Basis for Removal.

Dey improperly reargues its substantive jurisdiction position that Section 3732 of the False Claims Act creates original jurisdiction. (Dey Br. at 17-29) The District Court based its decision to award fees *solely* on the timeliness issue, not on the propriety of Dey's Section 3732 argument:

In this case, after two previous unsuccessful attempts to remove this case, defendant Dey sought to remove for a third time, relying on a theory of questionable merit, *knowing full well that under this court's interpretation of § 144[6](b), neither the qui tam complaint nor the order unsealing it could qualify as grounds for timely removal in this case.* Defendant Dey's argument *in defense of its timeliness* has been rejected by every court to consider it, including now this one. Consequently, I cannot help but conclude that defendant Dey removed the case without an objectively reasonable ground for doing so, for the purpose of prolonging litigation or increasing plaintiff's costs in prosecuting the case.

(BA019-20) (emphasis added) The award of fees was made *assuming* that jurisdiction would have existed absent timeliness concerns:

Even if the statute were to confer jurisdiction under these circumstances, defendant Dey's removal would fail because it is untimely under 28 U.S.C. § 1446(b).

(BA014) As Dey admits, the "District Court never reached a determination on Dey's jurisdictional basis for removal . . . ." <sup>13</sup> (Dey Br. at 38)

---

<sup>13</sup> However, there is no support for Dey's companion sentence stating that the District Court's analysis indicates that Dey's conclusion that federal jurisdiction existed was "reasonable." (Dey Br. at 38) The District Court characterized Dey's basis for jurisdiction as a "theory of questionable merit" and stated that it was "doubtful" that jurisdiction existed. (BA019-20)

Now the question is whether the filing of the federal *qui tam* action three years *after* Wisconsin initiated its purely state law-based suit is ground for removal under § 3732(b). I find it doubtful that § 3732(b) supports such a result, but *I need not make a definitive ruling on that question.*

(BA014) (emphasis added). Thus, Dey's inclusion of the jurisdictional argument is improper for two reasons: because it is not germane to the issue under review—the award of fees; and because this Court has no final decision from the District Court regarding the jurisdictional argument to review. Per Wisconsin's separate Motion to Strike, these arguments should be disregarded and stricken.

#### IV. Wisconsin Requests Both An Award of Costs and Fees and Sanctions Against Dey for this Appeal.

Wisconsin requests an award of costs and fees for this appeal. Having been awarded fees under 28 U.S.C. § 1447(c) by the District Court, Wisconsin is entitled to fees for its defense of this award. *Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 438 (7th Cir. 1989) (“If a plaintiff wins a suit and is entitled by statute to a reasonable attorney's fee, the entitlement extends to the fee he reasonably incurs in defending the award of that fee.”) Wisconsin requests that this Court award fees rather than remanding for two reasons. First, this case has been remanded to state court and the main litigation is proceeding there, not in the District Court. Second, as Dey has shown its willingness to appeal even a \$14,208 fee award, it is certain to appeal any subsequent award of fees. Judicial economy thus favors the resolution of this issue without remand. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (“A request for attorney's fees should not result in a second major litigation.”)

Per Wisconsin's separate Motion for Sanctions, Wisconsin also requests that the Court sanction Dey under Federal Rule of Appellate Procedure 38 by awarding double costs, including fees, because this appeal is frivolous. Although the District Court found that the underlying *removal* was not "so frivolous and unjustified as to warrant sanctions," Dey's *appeal* from the Court's *discretionary* finding that Wisconsin was entitled to \$14,208 *is* frivolous. Indeed, it is manifestly intended to harass Wisconsin, and increase the costs of litigation, as it has no rational purpose: the financial impact of the \$14,208 award was manifestly trivial to Dey and its parent company Merck and dwarfed by the cost of the appeal; the remand itself is not reversible; the legal principle implicated is so narrow that its utility in the litigation is negligible. Significant sanction on this appeal is necessary to deter future abuse of this Court's procedures.

## CONCLUSION

For the foregoing reasons, Wisconsin requests that this Court affirm the District Court's award of costs and attorney's fees of \$14,208; award Wisconsin costs and fees for this appeal; and sanction Dey for its frivolous appeal of the District Court's discretionary award of costs and fees.

Dated this 17th day of September, 2007.

MINER, BARNHILL & GALLAND, P.C.

---

Betty Eberle  
Chuck Barnhill  
44 East Mifflin Street; Suite 803  
Madison, WI 53703  
(608) 255-5200 Tel.  
(608) 255-5380 Fax  
Email: [heberle@lawmbg.com](mailto:heberle@lawmbg.com)  
Special Counsel - State of Wisconsin

**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)(B)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 7,912 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Century 12.

Dated this 17th day of September, 2007.

MINER, BARNHILL & GALLAND, P.C.

---

Betty Eberle  
Charles Barnhill  
44 East Mifflin Street, Suite 803  
Madison, WI 53703  
(608) 255-5200 Tel.  
(608) 255-5380 Fax  
Email: [beberle@lawmbg.com](mailto:beberle@lawmbg.com)  
Special Counsel - State of Wisconsin

**CIRCUIT RULE 31(e)(1) CERTIFICATION**

Pursuant to Circuit Rule 31(e)(1), a digital version of this brief in PDF format has been furnished to the Court and opposing counsel.

Dated this 17th day of September, 2007.

MINER, BARNHILL & GALLAND, P.C.

---

Betty Eberle  
Charles Barnhill  
44 East Mifflin Street; Suite 803  
Madison, WI 53703  
(608) 255-5200 Tel.  
(608) 255-5380 Fax  
Email: [beberle@lawmbg.com](mailto:beberle@lawmbg.com)  
Special Counsel - State of Wisconsin

## PROOF OF SERVICE

I hereby certify that I caused true and correct copies (2) of Brief of Plaintiff-Appellee, State of Wisconsin, along with a digital version of same, to be served upon all counsel of record by transmission to LNFS pursuant to Order of the Circuit Court of Dane County, Branch 7, Case Number 04-CV-1709, dated December 20<sup>th</sup>, 2005 and as shown below by First Class U.S. Mail and/or hand delivery.

Via First Class U.S. Mail

Dawn M. Beery  
Paul F. Doyle  
William A. Escobar  
Nail Merkl  
Christopher C. Palermo  
Kelley Drye & Warren LLP  
333 West Wacker Drive  
Chicago, IL 60606

and

Via Hand Delivery

John M. Moore  
Sheila Sullivan  
Bell, Gierhart & Moore, S.C.  
44 East Mifflin Street  
Madison, WI 53701

Dated this 17th day of September, 2007.

MINER, BARNHILL & GALLAND, P.C.

---

Betty Eberle  
Charles Barnhill  
44 East Mifflin Street; Suite 803  
Madison, WI 53703  
(608) 255-5200 Tel.  
(608) 255-5380 Fax  
Email: [beberle@lawmbg.com](mailto:beberle@lawmbg.com)  
Special Counsel - State of Wisconsin

## TABLE OF CONTENTS OF APPENDIX

	<b>Page</b>
<i>State of Wisconsin v. Abbott Laboratories</i> , 390 F.Supp.2d 815 (W.D. Wis. 2005)	WIS001
Order, <i>State of Alabama v. Abbott Laboratories</i> , Civil Action No. 2:05cv647-T	WIS012

of his crotch and buttocks (Collins Dep. at 35-6), having his shorts pulled down (*Id.* at 48-9), and having stones and mud balls thrown at him while he was driving a forklift. (*Id.* at 61-63.) Collins' Title VII claims falter, though, because no evidence indicates that the harassment was motivated by his race or sex. See *Patton v. Indianapolis Public Sch. Bd.*, 276 F.3d 334 (7th Cir.2002) (holding that Title VII is not implicated where harassment is not based on a protected characteristic). The mere fact that most of the harassment was committed by persons of a race other than Collins' does not mean that race was the motivating factor. See *Mitchell v. Carrier Corp.*, 954 F.Supp. 1568, 1578 (M.D.Ga. 1995) (holding that mere fact that employee's recalcitrant subordinates were all of races different than his did not show that their misconduct stemmed from racial animus). Collins' co-workers might have harassed him for any number of (bad) reasons. Nothing in the record suggests that the reasons were the impermissible ones of race or sex.<sup>2</sup>

#### CONCLUSION

For the foregoing reasons, Buechel's motion for summary judgment is hereby **GRANTED**. The clerk of court shall enter judgment accordingly.

**SO ORDERED.**



2. Collins testified at his deposition that he believed that some, though not all, of this behavior was motivated by his race and/or sex. (Collins Dep. at 79-89.) A plaintiff's

STATE of Wisconsin, Plaintiff,

v.

ABBOTT LABORATORIES, Amgen, Inc., Astrazeneca Pharmaceuticals, LP, Astrazeneca, LP, Aventis Pharmaceuticals, Inc., Aventis Behring, LLC., Baxter International, Inc., Bayer Corporation, Boehringer Ingelheim Corporation, Bristol-Myers Squibb Co., Dey, Inc., Gensia Sicor Pharmaceuticals, Inc., Glaxosmithkline, Inc., Johnson & Johnson, Inc., Pfizer, Inc., Pharmacia, Schering-Plough Corporation, Tap Pharmaceutical Products, Inc., Watson Pharmaceuticals, Inc., Ben Venue Laboratories, Inc., Boehringer Ingelheim Pharmaceuticals, Inc., Immunex Corporation, Ivax Corporation, Ivax Pharmaceuticals, Inc., Janssen Pharmaceutical Products, LP, McNeil-PPC, Inc., Merck & Company, Inc., Mylan Laboratories, Inc., Mylan Pharmaceuticals Corporation, Novartis Pharmaceuticals Corporation, Ortho Biotech Products, LP, Ortho-McNeil Pharmaceutical, Inc., Roxane Laboratories, Inc., Sandoz, Inc., Geneva Pharmaceuticals, Inc., Smithkline Beecham Corporation, Teva Pharmaceutical Industries, Ltd., Warrick Pharmaceuticals Corporation and Watson Pharma, Inc., Defendants.

No. 05-C-408-C.

United States District Court,  
W.D. Wisconsin.

Sept. 29, 2005.

**Background:** State sued pharmaceutical manufacturers in state court, claiming that overstatement of wholesale drug prices

belief that harassment was racially or sexually motivated is insufficient to support a Title VII claim. See *Gatling v. Atlantic Richfield Co.*, 577 F.2d 185, 188 (2d Cir.1978).

caused state to overpay under Medicaid and Medicare. The District Court remanded, state again removed and manufacturers again moved for remand.

**Holdings:** The District Court, Crabb, J., held that:

- (1) court could decide motion even though Conditional Transfer Order had been received from Panel on Multidistrict Litigation transferring case for consolidated pre trial purposes;
- (2) removal was improper; and
- (3) removal was untimely.

Motion denied.

#### 1. Federal Courts ⇌157

Federal district court sitting in Wisconsin had jurisdiction to decide remand motion, motion to supplement record, and motion to file supplemental authority in support of motion to remand, filed by state in suit against pharmaceutical manufacturers claiming overcharges for drugs purchased by state, even though court had received Conditional Transfer Order transferring case to District of Massachusetts for consolidated pretrial proceedings involving similar suits. 28 U.S.C.A. § 1407.

#### 2. Federal Courts ⇌162, 171, 191

Claims grounded in state law may qualify as civil actions "arising under" Constitution, laws or treaties of United States, for federal question jurisdictional purposes, when they present substantial and disputed question of federal law. 28 U.S.C.A. § 1331.

#### 3. Removal of Cases ⇌19(1)

Removal of suit, claiming that pharmaceutical companies overstated average wholesale price of drugs, causing overpayment by state under Medicaid and Medicare, was improper; no overriding federal interest was implicated, and allowance of removal would disturb balance of judicial responsibilities between state and federal courts sought to be established by Con-

gress. 28 U.S.C.A. § 1446(b); 42 U.S.C.A. § 1395 et seq.

#### 4. Removal of Cases ⇌79(1)

United States Supreme Court decision in another case was not "other paper," triggering right to remove case which previously could not be removed; phrase "other paper" included only documents filed in case for which removal was sought. 28 U.S.C.A. § 1446(b).

See publication Words and Phrases for other judicial constructions and definitions.

---

Mark A. Cameli, Lynn M. Stathas, Reinhart, Boerner, Van Deuren, S.C., Patrick J. Knight, Gimbel, Reilly, Guerin & Brown, Beth J. Kushner, Von Briesen & Roper, S.C., Brian R. Smigelski, Friebert, Finerty & St. John, S.C., Milwaukee, WI, William M. Conley, Roberta F. Howell, Foley & Lardner, Brian E. Butler, Stafford Rosenbaum, LLP, Stephen P. Hurley, Hurley, Burish & Milliken, S.C., Bruce A. Schultz, Coyne Schultz Becker & Bauer, John W. Markson, Bell, Gierhart & Moore, S.C., Lester A. Pines, Cullen, Weston, Pines & Bach, Daniel W. Hildebrand, Dewitt, Ross & Stevens, Donald K. Schott, Quarles & Brady, Earl H. Munson, Boardman, Suhr, Curry & Field, Steven P. Means, Michael Best & Friedrich, LLP, Michael P. Crooks, Peterson, Johnson & Murray, S.C., David J. Harth, Heller Ehrman LLP, Kim Grimmer, Solheim, Billing & Grimmer, S.C., Madison, WI, Douglas B. Farguhar, Hyman, Phelps & McNamara, Washington, DC, Michael R. Fitzpatrick, Brennan, Steil, Basting & MacDougall, Janesville, WI, for Defendants.

#### OPINION and ORDER

CRABB, District Judge.

This civil action for monetary and injunctive relief appears for the second time

in this court. It is one of a number of lawsuits pending in state and federal courts across the country against pharmaceutical manufacturers. The gravamen of the complaint filed by plaintiff State of Wisconsin is that defendant pharmaceutical companies inflated the average wholesale prices of their drugs, thereby violating several provisions of Wisconsin law.

This action was commenced in the Circuit Court for Dane County in June 2004. Defendants removed it to this court in July 2004, arguing that subject matter jurisdiction existed under the diversity statute, 28 U.S.C. § 1332. I disagreed and granted plaintiff's motion to remand. *State of Wisconsin v. Abbott Laboratories, et al.*, 341 F.Supp.2d 1057 (W.D.Wis.2004). Defendants have removed the case to this court a second time, arguing that a recent Supreme Court decision, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, — U.S. —, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005), demonstrates that this court has jurisdiction under the federal question statute, 28 U.S.C. § 1331.

Presently before the court are three motions filed by plaintiff: a motion to remand, a motion to supplement the record and a motion to file supplemental authority in support of the motion to remand. Plaintiff's motion to supplement the record and motion to file supplemental authority will be granted. Plaintiff's motion to remand will be granted as well. Although this case involves a substantial and disputed question of federal law, it does not involve a federal interest substantial enough to justify the exercise of federal jurisdiction. In addition, defendants' second notice of removal was not filed timely under 28 U.S.C. § 1446(b). Finally, I will grant plaintiff's request for costs and attorney fees.

According to the notice of removal, plaintiff filed an amended complaint in this

case on or about November 1, 2004. Defendants attached a copy of the amended complaint to the notice of removal. Notice of Removal, dkt. # 2, Exh. C. For the sole purpose of deciding this motion, I draw the following facts from the amended complaint.

#### ALLEGATIONS OF FACT

The market for prescription drugs operates roughly as follows. Defendants manufacture drugs and sell them to hospitals, physicians and pharmacies, collectively known as "providers," who in essence resell the drugs to patients when the drugs are administered or prescribed. Providers pay manufacturers directly for the drugs; after a patient receives a drug, the provider is reimbursed by the patient, his insurance company or a government program such as Medicare or Medicaid, collectively known as "payers."

Insurance companies and government payers calculate the rates at which providers are reimbursed on the basis of a drug's "average wholesale price." Defendants set average wholesale prices for each of their drugs. These prices are compiled and published in medical compendiums and are the only prices made available to providers and the public. If the price paid by a provider to the manufacturer is less than the reimbursement the provider receives from the payer, the provider retains the difference, or "spread," as profit. Because providers have substantial influence in deciding which drugs they will prescribe or administer, drug manufacturers are eager to court them. One of the ways defendants market their drugs to providers is by generating large spreads. Defendants have attempted to maximize the spread by publishing false and inflated average wholesale prices for their drugs.

Defendants have succeeded in their unlawful pricing by concealing their scheme

from plaintiff and other payers. They sell their drugs to providers in a manner that hides the true price of their drugs, designate sales agreements with providers as trade secrets, charge different prices to different providers for the same drug and hide the true prices of their drugs by providing free drugs and phony grants to providers as a means of discounting the prices.

By publishing false and inflated average wholesale prices and keeping their actual prices secret, defendants have harmed plaintiff, its citizens and private payers in Wisconsin. Plaintiff is a payer under Medicaid, a joint state and federal health care entitlement program. Reimbursements to pharmacies and physicians for drugs covered by Medicaid are calculated by subtracting a fixed percentage from the average wholesale prices. Thus, publication of inflated prices has caused the state to overpay for the drugs it purchases through its Medicaid program.

In addition, many Wisconsin citizens participate in Medicare, a health insurance program funded by the federal government. Medicare consists primarily of two major components, Part A and Part B. Part B is an optional program that provides coverage for some healthcare services not covered by Part A. It is supported by government funds and by premiums paid by individuals who choose to participate. Part B has a limited drug benefit. The federal government pays 80% of the allowable cost of a drug and participants are responsible for the remaining 20%. Because the allowable costs under Part B are calculated on the basis of defendants' inflated average wholesale prices, participants in Wisconsin have paid higher co-payments for their prescription drugs.

Finally, private, Wisconsin-based organizations that pay the prescription drug costs of their members have overpaid for

prescription drugs. Because of the complexity of the prescription drug market, these organizations contract with Pharmacy Benefit Managers to handle their prescription drug reimbursements. Pharmacy Benefit Managers assert that they have the bargaining power needed to negotiate the price of drugs with drug manufacturers. However, plaintiff alleges that they have used their power to obtain benefits for themselves in the form of fees and rebates paid by manufacturers. In addition, Pharmacy Benefit Managers benefit from inflated average wholesale prices because they use them to set the reimbursement rates for the private payers they represent.

Plaintiff brings suit on its own behalf and in *parens patriae* capacity on behalf of the citizens of Wisconsin against defendant pharmaceutical companies. The amended complaint consists of five counts, all arising under Wisconsin law. Counts I and II allege violations of Wis. Stat. §§ 100.18(1) and 100.18(10)(b), which prohibit making false representations with the intent to sell merchandise. Count III alleges a violation of the Wisconsin Trust and Monopolies Act, Wis. Stat. § 133.05. Count IV alleges a claim for fraud on the Wisconsin Medicaid Program, Wis. Stat. § 49.49(4m)(a)(2). Count V states a common law claim for unjust enrichment.

## DISCUSSION

### A. Jurisdiction

[1] The Judicial Panel on Multidistrict Litigation has transferred many of the average wholesale price lawsuits filed across the country to the United States District Court for the District of Massachusetts for consolidated pre-trial proceedings. *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456. Defendants seek to have this action transferred to that court. On August 12, 2005,

this court received a copy of a Conditional Transfer Order transferring this case to the District of Massachusetts pursuant to 28 U.S.C. § 1407. However, Rule 1.5 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation states that the existence of a conditional transfer order “does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.” See also *Illinois Municipal Retirement Fund v. Citigroup, Inc.*, 391 F.3d 844, 851–852 (7th Cir.2004) (district courts should consider motion to remand even though conditional transfer order has been issued). Thus, this court retains jurisdiction to decide plaintiff’s motions.

#### B. Motion to Stay Decision

In their brief in opposition to the motion to remand, defendants argue that the court should stay a decision on the motion to remand until the Judicial Panel on Multidistrict Litigation determines whether this case should be transferred to the District of Massachusetts. Apparently, defendants are under the impression that their motion to stay a decision on plaintiff’s motion to remand remains undecided. However, Magistrate Judge Crocker denied their motion in an order dated August 4, 2005. Although Judge Crocker characterized defendants’ motion as a motion to stay *briefing* on the motion to remand, he wrote that if “this court has the time to address the remand dispute before the MDL panel acts, it would be more efficient for the parties and the judicial system as a whole for this court to rule on the state’s motion.” Order, dkt. # 49, at 2. Given that defendants never filed a motion to stay *briefing* and that Judge Crocker referred to their motion to stay a decision in his order, defendants should have known that his order was addressing their motion to

stay a decision. Regardless of its caption, the motion was and remains denied.

#### C. Motion to Supplement the Record and Motion to File Supplemental Authority

On August 22, 2005, defendants filed a request for leave to supplement their brief in opposition to the motion to remand with supplemental authority in the form of recent decisions from courts in Illinois and Alabama addressing motions to remand in cases against pharmaceutical companies. Dkt. # 55. In response, plaintiff filed an opposition to defendants’ request. Dkt. # 56. Two days later, however, plaintiff filed its own motion to supplement the record. Dkt. # 57. Approximately two weeks after that, plaintiff filed a motion to file supplemental authority. Dkt. # 58. Plaintiff’s motion to supplement the record and its motion to file supplemental authority will be granted. In ruling on the motion to remand, I have considered all of the decisions brought to the court’s attention by the parties after the close of briefing on the motion to remand.

#### D. Motion to Remand

Although plaintiff has requested remand, defendants bear the burden of proving that this court has subject matter jurisdiction because they removed the case to federal court. *Tylka v. Gerber Products Co.*, 211 F.3d 445, 448 (7th Cir.2000). In determining whether removal was proper, a district court must construe the removal statute, 28 U.S.C. § 1441, narrowly and resolve any doubts regarding subject matter jurisdiction in favor of remand. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir.1993); *People of the State of Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 576 (7th Cir.1982).

Plaintiff’s motion to remand raises two issues: whether federal jurisdiction exists in this case under the federal question statute, 28 U.S.C. § 1331, and, if so,

whether defendants removed this case timely under 28 U.S.C. § 1446(b).

1. *Propriety of removal*

[2] Federal law provides that a civil action begun in state court may be removed if a district court would have original jurisdiction over the action. 28 U.S.C. § 1441(a). As noted above, defendants contend that this court has original jurisdiction over this case because it contains a federal question. The federal question statute, 28 U.S.C. § 1331, extends federal jurisdiction to “all civil actions arising under the Constitution, laws, or treaties of the United States.” In the vast majority of cases, a claim arises under federal law because federal law creates the cause of action. However, claims grounded in state law may invoke “arising under” jurisdiction when they present a substantial and disputed question of federal law. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 13, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Commercial National Bank of Chicago v. Demos*, 18 F.3d 485, 488 (7th Cir.1994). Defendants argue that the present case falls into this latter category. Although the amended complaint invokes Wisconsin law only, defendants contend that “the State of Wisconsin’s claim to recover Medicare Part B co-payments raises a substantial federal question in that it requires the resolution of issues of federal law relating to the federal Medicare program, namely the meaning of [average wholesale price] in the federal Medicare statute and regulations.” Notice of Removal, dkt. # 2, at 2.

[3] Defendants’ argument relies on a recent Supreme Court decision, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, — U.S. —, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005), but the proper starting point for analysis is a case decided twenty years earlier. In

*Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986), the Supreme Court held that a complaint alleging a violation of a federal statute as an element of a state law claim was not sufficient to invoke the jurisdiction of the federal courts under 28 U.S.C. § 1331 because the federal statute did not confer a private right of action. The case involved state law negligence claims against a drug manufacturer. The plaintiffs alleged that the manufacturer provided an inadequate warning in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301–395, a regulatory statute that did not contain a private right of action. The plaintiffs argued that violation of the federal statute erected a rebuttable presumption of negligence and that it “directly and proximately” caused the alleged injuries. *Id.* at 806, 106 S.Ct. 3229.

The Court began its analysis by noting that “determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.” *Id.* at 810, 106 S.Ct. 3229. It considered the lack of a private cause of action in the federal statute particularly probative of congressional intent and concluded that it would undermine that intent to extend federal question jurisdiction to redress a violation of the statute solely because the violation was an element of a state law claim. *Id.* at 814, 106 S.Ct. 3229 (“the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently “substantial” to confer federal-question jurisdiction.”).

In the wake of *Merrell Dow*, when federal courts had to determine whether fed-

eral question jurisdiction existed over state law claims alleging the violation of federal statutes, they looked to whether those statutes provided private rights of action. *E.g.*, *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir.1994); *Montana v. Abbot Laboratories*, 266 F.Supp.2d 250, 256 (D.Mass. 2003) (citing cases). Recently, in *Grable*, the Court backed away from this approach and implied that the absence of a private right of action would not shut the federal courthouse door in every case. *Grable* involved a quiet title action brought in state court concerning property that had been seized by the IRS. Resolution of the case hinged on the interpretation of a notice provision in a federal tax statute. The Court held that removal of the case to federal court was proper even though the tax statute lacked a private right of action. *Grable*, 125 S.Ct. at 2365. In doing so, the Court emphasized that federalism concerns should guide lower courts considering whether to shift litigation from state to federal court:

[E]ven when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331 . . . . Because arising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (or at least assumed) by Congress, the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction.

*Id.* at 2367-68.

Applying this language, the Court concluded that the quiet title action involved a

substantial and disputed federal issue: interpretation of the notice provision in the federal tax statute. In addition, the Court highlighted the federal government's strong interest in "the availability of a federal forum to vindicate its own administrative action" and the greater degree of familiarity of federal courts with tax matters. *Id.* at 2368. Finally, the Court concluded that removal of the case would not upset the balance between federal and state courts because quiet title actions rarely raise disputed issues of federal law. *Id.*

The Court stated further that its holding did not overrule the decision in *Merrell Dow*. Rather, it characterized *Merrell Dow* as consistent with the framework set out in *Grable*. In *Merrell Dow*, the absence of a federal cause of action suggested the lack of a "substantial" federal question and, when combined with the fact that state remedies for mislabeling had not been preempted, provided "an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331." *Grable*, 125 S.Ct. at 2370. Moreover, federal statutes and regulations are involved often in state tort actions, as was the case in *Merrell Dow*. By contrast, quiet title actions rarely raise questions of federal law. By refusing to extend jurisdiction over the tort claims in *Merrell Dow*, the Court avoided opening the floodgates for a massive shift in litigation. *Id.* at 2370-71 ("A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts.").

In sum, *Grable* holds that a state law claim is removable if it presents a disputed and substantial question of federal law that a federal court may decide without disturbing "any congressionally approved

balance of federal and state judicial responsibilities." *Id.* at 2368. In the present case, plaintiff asserts five claims, all grounded in Wisconsin law: unjust enrichment, antitrust, fraud on the Wisconsin Medicaid program and two claims of false advertising. Each claim is rooted in defendants' alleged publication of inflated average wholesale prices for their drugs, which caused Wisconsin, its citizens, insurance companies and other private organizations to overpay for the drugs. The Medicare statute does not contain a private right of action to recover overpayments made on the basis of inflated average wholesale prices. Nonetheless, defendants argue that removal is proper because the meaning of "average wholesale price" in the Medicare statute is a disputed and substantial element of plaintiff's claims, specifically the claims "to recover Medicare Part B co-payments for [plaintiff's] Medicaid program and on behalf of its Medicare beneficiaries." Dfts.' Br., dkt. # 52, at 25; *see also Montana*, 266 F.Supp.2d at 255 (Minnesota's *parens patriae* claims on behalf of Medicare beneficiaries present substantial federal question). Moreover, defendants contend that there is a substantial federal interest in having a single interpretation of "average wholesale price" in the Medicare statute. Finally, they argue that the exercise of federal jurisdiction in this case will not disrupt the division of labor between the federal and state courts because the district court handling the multidistrict litigation concerning average wholesale prices has already exercised jurisdiction over claims similar to those brought by plaintiff.

In response, plaintiff distinguishes *Grable* as an anomaly, a specific exception to *Merrell Dow* in which federal jurisdiction was appropriate because (1) a federal agency, the IRS, had an interest in the interpretation of the notice provision; (2) the meaning of the notice provision was

the only disputed issue; and (3) removal of the case would not herald a massive shift in litigation from state to federal court because quiet title actions rarely raise contested issues of federal law. Plaintiff contends that the present case, like *Merrell Dow*, presents garden variety tort claims that only tangentially involve federal questions. It cites the Court's admonition that lower courts should refrain from exercising jurisdiction in such cases because doing so would "herald[] a potentially enormous shift of traditionally state cases into federal courts." *Grable*, 125 S.Ct. at 2370.

To date, only one published decision has considered these arguments in a suit concerning average wholesale price manipulation. *Commonwealth of Pennsylvania v. Tap Pharmaceutical Products, Inc.*, No. Civ.A. 2:05-CV-03604, 2005 WL 2242913 (E.D.Pa. Sept. 9, 2005). In that case, Pennsylvania asserted claims of fraud, misrepresentation and unjust enrichment similar to those asserted by plaintiff in the present case. The pharmaceutical companies sought to transfer the case to the multidistrict proceeding in Massachusetts and the state filed a motion to remand. The court concluded that the term "average wholesale price" was not disputed because "the Commonwealth does not premise its *parens patriae* claim on the construction of these words as they appear in the applicable Medicare statute and regulations." *Id.* at \*6. In fact, neither Congress nor the Medicare program provided a definition for the term in the statute or regulations. Therefore, a particular construction of the phrase under federal law was not necessary for the state to prevail. *Id.* As with the labeling provision at issue in *Merrell Dow*, the court concluded that the phrase supplied a federal standard against which the prices reported by the pharmaceutical companies were to be judged.

In addition, the court concluded that the meaning of “average wholesale price” in the Medicare statute was not a substantial question of federal law. According to the court, “the administration of Medicare would be unaffected by a state-court adjudication” of Pennsylvania’s claims because Medicare no longer calculates reimbursements on the basis of average wholesale prices and, even if it did, adjudication of the state claims would not alter the method of reimbursement. *Id.* at 2005 WL 2242913, \*7. In a footnote, the court noted further that, as in *Merrell Dow*, there was no evidence that Congress intended to preempt state regulation of fraudulent medical billing practices. *Id.* at 2005 WL 2242913, \*7 n. 6.

In the present case, I agree with defendants that plaintiff’s claims present a substantial and disputed question of federal law. Plaintiff seeks recoupment of alleged overpayments it made under Medicaid as well as alleged overpayments made by Medicare Part B participants in Wisconsin. In determining whether plaintiff and Wisconsin citizens have overpaid for prescription drugs (and therefore whether defendants have violated Wisconsin law), a court will have to determine the meaning of the phrase “average wholesale price” as it appears in the Medicare statute and its implementing regulations. Then, the court will have to determine whether a discrepancy exists between the average wholesale price and the prices reported by defendants. *Montana*, 266 F.Supp.2d at 255 (“an essential element of Minnesota’s *parens patriae* claims is proof of a discrepancy between the [average wholesale prices] reported by Pharmacia and the meaning of [average wholesale price] under the Medicare statute.”).

That is not the end of the inquiry, however. Although plaintiff’s claims present a substantial and disputed question of federal law, removal of the present case is

proper only if it will not disturb the balance struck by Congress between the federal and state courts. *Grable*, 125 S.Ct. at 2367. At this point, differences between the present case and the quiet title action in *Grable* begin to appear. For one, there is no strong federal interest in the present case comparable to the federal interest in tax collection implicated in *Grable*. The federal question raised in *Grable* was of critical importance to the IRS’s efforts to satisfy tax liabilities from the property of delinquent taxpayers. Although a federal agency administers the Medicare program, states play the primary role in apportioning Medicaid benefits within the broad parameters set by federal law. *Montana*, 266 F.Supp.2d at 253. States and the federal government have an interest in securing an interpretation of the Medicare statute and regulations. At best, the federal and state interests are equivalent. Moreover, the fact that Congress has not preempted the states’ use of consumer protection statutes to police medical billing practices indicates the absence of a dominant federal interest. *Merrell Dow*, 478 U.S. at 816, 106 S.Ct. 3229.

Second, in *Grable*, the Court was willing to extend federal jurisdiction because quiet title actions under state law rarely raise issues of federal law. By contrast, the present case is one of many that have been filed by states across the country concerning pharmaceutical companies’ alleged fraud in price-setting. Shifting all of these cases (not to mention other state-law claims grounded in alleged violations of federal law) into federal court would work a significant disruption in the division of labor between federal and state courts. (I am aware that many average wholesale price cases have been removed to federal court. However, most of these cases were transferred before the Court emphasized the importance of preserving the balance between the state and federal systems in

*Grable*). Finally, the nature of the present case is more analogous to *Merrell Dow* than *Grable*. Plaintiff has asserted statutory and common law tort claims that, like the negligence claims in *Merrell Dow*, rest on alleged violations of federal law. Because this case does not implicate an overriding federal interest and because removal would disturb the balance of judicial responsibilities between state and federal courts, I conclude that removal of this action was improper.

## 2. *Timeliness of removal*

[4] Even if I concluded that removal of this case was proper, plaintiff would be entitled to remand because defendants failed to file their notice of removal timely. Because the parties devote substantial portions of their briefs to this question, I will address their arguments briefly.

Ordinarily, a notice of removal must be filed within thirty days after defendant receives a copy of the initial pleading in a case. 28 U.S.C. § 1446(b). Because plaintiff filed this case in June 2004, defendants' latest attempt at removal would be untimely. However, § 1446(b) includes an exception to the thirty-day limit:

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Defendant seizes on this provision, arguing that this case was not removable on the basis of federal question jurisdiction when it was filed but that the *Grable* decision constitutes an "other paper" which indi-

cates that the case has become removable. Because defendants filed their notice of removal within thirty days of the issuance of the *Grable* decision, removal was timely.

The courts are split on the question whether a decision in an unrelated case qualifies as an "order or other paper" under § 1446(b). *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 266-67 (5th Cir.2001) (reviewing cases). As plaintiff notes, the majority of courts to address the question have concluded that a decision in a case unrelated to the action for which removal is sought does not qualify as an "other paper" indicating that the action has become removable for the purpose of § 1446(b). *E.g., Morsani v. Major League Baseball*, 79 F.Supp.2d 1331, 1333-34 (M.D.Fla.1999). These courts have limited the phrase "other paper" to include only documents filed in the case for which removal is sought. Defendants argue that this limiting construction is improper because it does not appear in the plain language of the statute. Although correct as a technical matter, defendants' argument ignores the well established principle that statutory language draws its meaning from the context in which it is used. *Barnes v. United States*, 199 F.3d 386, 389 (7th Cir. 1999). Section § 1446(b) refers to "receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper." Inclusion of the concept of receipt through service and the words "pleading" and "motion" suggest that it is reasonable to limit the phrase "other paper" to documents generated in the case for which removal is sought. *Kocaj v. Chrysler Corp.*, 794 F.Supp. 234, 236-37 (E.D.Mich.1992).

Defendants cite two appellate decisions, *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir.1993) and *Green v. R.J. Reynolds*, 274 F.3d 263 (5th Cir.2001), but neither is applicable to the present case. Both cases

stand for the narrow proposition that a decision in an unrelated case that involves the same defendant, concerns a similar factual situation and expressly authorizes removal qualifies as an "order" under § 1446(b). *Green*, 274 F.3d at 267-68. They are inapplicable because defendants do not contend that *Grable* constitutes an "order" but rather an "other paper." Moreover, *Green* and *Doe* are distinguishable on their facts. Defendants in the present case were not parties in *Grable*. *Grable* did not involve a fact situation similar to the present case. Finally, although *Grable* did address the question of removal, it did not authorize removal of state law actions against pharmaceutical companies.

Because the *Grable* decision does not constitute an "other paper from which it may first be ascertained that the case is one which is or has become removable," defendants' removal of this case was untimely.

#### E. Sanctions, Fees and Costs

Plaintiff requests the court to consider sanctioning defendants for attempting to remove this case a second time. Although I have concluded that removal was improper, I do not believe that the arguments put forth by defendants were so frivolous and unjustified as to warrant sanctions. Therefore, I will deny this request.

In addition to its request for sanctions, plaintiff requests an award of costs and fees. In this circuit, a party that succeeds in showing that removal is improper is presumptively entitled to an award of fees. *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir.2000) ("§ 1447 is not a sanctions rule; it is a fee-shifting statute, entitling the district court to make whole the victorious party."); see also *Wisconsin v. Hotline Industries, Inc.*, 236 F.3d 363, 367-68 (7th Cir.2000); *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 927 (7th Cir.2000). Plaintiff need not show that removal was undertaken in bad faith.

*Sirotzky v. New York Stock Exchange*, 347 F.3d 985, 987 (7th Cir.2003). Rather, an award is proper when "[r]emoval [is] unjustified under settled law." *Garbie*, 211 F.3d at 410. Although defendants' arguments were not frivolous, removal of this case was improper on at least two grounds. In light of the presumption that plaintiff is to be made whole, I conclude that plaintiff is entitled to reimbursement for its reasonable fees and costs.

#### ORDER

IT IS ORDERED that

1. Plaintiff's motion to remand is GRANTED and this case is REMANDED to the Circuit Court for Dane County, Wisconsin;

2. Plaintiff's request sanctions is DENIED;

3. Plaintiff's request for reimbursement of costs and attorney fees under 28 U.S.C. § 1447(c) is GRANTED;

4. Plaintiff may have until October 10, 2005, in which to submit an itemization of the actual expenses, including costs and attorney fees, it incurred in responding to defendants' removal;

5. Defendants may have until October 17, 2004, to file an objection to any itemized costs and fees;

6. The clerk of court is directed to return the record in case number 05-C-408-C to the Circuit Court for Dane County, Wisconsin.



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

STATE OF ALABAMA, in its	)	
capacity as sovereign and	)	
on behalf of the Alabama	)	
Medicaid Agency,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	2:05cv647-T
	)	
ABBOTT LABORATORIES,	)	
INC., et al.,	)	
	)	
Defendants.	)	

ORDER

After careful consideration of the state-law claims presented in this case, the court does not believe that the claims "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Grable & Sons Metal Prods., Inc. v. Darue Eng'g. & Mfr., 545 U.S. \_\_\_, \_\_\_, 125 S. Ct. 2363, 2368 (2005); see also Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425 (1987); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542 (1987);

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 103 S.Ct. 2841 (1983); Gully v. First National Bank of Meridian, 299 U.S. 109, 57 S.Ct. 96 (1936).

Accordingly, it is the ORDER, JUDGMENT, and DECREE of the court that plaintiff's motion to remand (Doc. no. 69) is granted and that, pursuant to 28 U.S.C.A. § 1447(c), this cause is remanded to the Circuit Court of Montgomery County, Alabama, for want of subject-matter jurisdiction.

It is further ORDERED that plaintiff's and defendants' motions to stay (Doc. nos. 71 & 109) and plaintiff's motion for expedited ruling (Doc. no. 73) are denied.

It is further ORDERED that all other substantive motions are left for disposition by the state court after remand.

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

DONE, this the 11th day of August, 2005.

/s/ Myron H. Thompson  
UNITED STATES DISTRICT JUDGE