

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

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STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 06-C-0582-C

AMGEN, INC. ET AL.,

Defendants.

THERESA H. OWENS  
CLERK US DIST COURT  
WD OF WI

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**PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND**

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**INTRODUCTION**

This is the defendants' third and least meritorious attempt to remove this case. As plaintiff shows, *infra*, defendants' claimed basis for removal is untimely and the statute which they claim provides federal jurisdiction does not so. Indeed, the basis for defendant's argument, that its current removal petition is timely, was expressly rejected by this Court—in this case—a year ago. Although the Supreme Court has recently adopted a more stringent test for awarding fees when removal is improvidently sought, this case satisfies that standard and fees should be awarded to Wisconsin for the work required to present its motion for remand.

On October 11, 2006, defendant Dey, Inc. ("Dey"), joined by the other defendants, removed this case, arguing that the federal government's service upon Dey of a recently unsealed *qui tam* complaint pursuant to the federal False Claims Act, 31 U.S.C. § 3729, *et seq.*, made this action removable under 28 U.S.C. §§ 1441 and 1446(b). Dey asserts that the federal courts have original jurisdiction over this case pursuant to 31 U.S.C. § 3732(b). Dey contends that the Notice of Removal is timely "because it has been filed within thirty (30) days of Dey's first

receipt of a copy of the pleading, order, and other paper from which Dey was first able to ascertain that the Wisconsin action had become removable.” *Id.* at 11, ¶ 36.

Dey’s removal is frivolous. First, Dey’s removal is untimely, as it was not filed within 30 days of service of Wisconsin’s complaint upon Dey. Moreover, neither the federal *qui tam* complaint against Dey nor the order unsealing it is an “amended pleading, motion, order, or other paper” triggering a new 30-day removal period within the meaning of 28 U.S.C. § 1446(b). The plain meaning and legislative history of the statute, and case law interpreting it, including this Court’s prior decision, attached hereto as Appendix A, establish that it only applies to an event in the state court action being removed that is caused by the plaintiff’s voluntary act. Here, the federal *qui tam* complaint was an event that neither occurred in the Wisconsin state action nor was caused by an act of the State of Wisconsin (voluntary or otherwise). All defendants, including Dey, are intimately familiar with this well-established construction of the statute, because they previously invoked the statute last year, unsuccessfully, when they removed this very lawsuit based on an event external to the Wisconsin case that was not caused by Wisconsin’s voluntary act. In remanding this case, this Court, as well as the MDL court in Boston – the same court to which Dey and the other defendants again seek to have this case transferred – explicitly rejected the construction of Section 1446(b) that defendants advance here.

Second, even if Dey could surmount the 1446(b) hurdle, the federal statute upon which Dey relies for its assertion of federal jurisdiction, 31 U.S.C. § 3732(b) – a part of the federal False Claims Act (“FCA”) – does not confer original jurisdiction over the State’s claims. The plain language and legislative history of the statute make clear that this provision grants only supplemental jurisdiction, authorizing, but not requiring a State like Wisconsin to bring state law

claims in federal court when there is a pending related federal FCA action. It does not allow a defendant like Dey to control the State's choice of forum. Moreover, it is well-established that supplemental jurisdiction over state law claims is insufficient to establish federal question jurisdiction under 28 U.S.C. § 1331. Third, the earlier failure of Abbott to remove this case in circumstances identical to those underlying Dey's removal petition waive Dey's right to remove at this juncture. And finally, even if federal jurisdiction exists with respect to the State's claims against Dey, no federal jurisdiction exists over the State's claims against the remaining defendants, and the Court can and should sever and remand them to state court.

Because there is no objectively reasonable basis for Dey's notice of removal, particularly as it relates to the Section 1446(b) issue, the State is entitled to attorneys' fees and costs.

## ARGUMENT

### I. **Defendants' Burden to Justify Removal is a Heavy One.**

Federal courts disfavor depriving a litigant, particularly a sovereign such as the State of Wisconsin, of its choice of forum within which to litigate purely state law claims. The parties seeking removal have a heavy burden of proving that removal was proper. *See In the Matter of The Application of County Collector of the County of Winnebago, Ill.*, 96 F.3d 890, 895 (7th Cir. 1996). "Courts are required to interpret the rules for removal strictly, and to "presume that the plaintiff may choose his or her forum." *General Electric Railcar Services Corp. v. Nat'l Steel Car Ltd.*, 2004 WL 2392104 \* 1 (N.D.Ill. Oct. 25, 2004) (Norgle, J.) (*citing Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir.1993)); *see also Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 576 (7th Cir. 1982). Any doubt regarding jurisdiction should be resolved in favor of remand, *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976), and the burden

falls on the party seeking removal. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Allied-Signal, Inc.*, 985 F.2d at 911.

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

**II. The Federal Qui Tam Complaint Against Dey is Not An “Amended Pleading, Motion, Order, or Other Paper” Within the Meaning of 28 U.S.C. § 1446(b).**

Although it is undisputed that the 30 day remand period has long since elapsed, Dey contends that the service of the federal qui tam complaint on Dey on September 11, 2006 created a new basis for federal jurisdiction that triggered an additional 30-day period for removal for pursuant to 28 U.S.C. § 1446(b). The relevant language of that statute provides:

If the case started 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.

Initially, it must be noted that Dey conspicuously avoids identifying whether it contends that the federal qui tam complaint is an “amended pleading,” a “motion,” an “order,” or an “other paper.” It makes no difference, as the plain language, legislative history, and case law interpreting Section 1446(b) clearly establish that the statute only applies to an event occurring in the state court action being removed that is caused by a voluntary act of the plaintiff.

**A. Section 1446(b) Only Applies to Events Occurring Within the State Court Action Being Removed.**

1. The Plain Language of Section 1446(b)

The plain language of Section 1446(b) makes clear that it only applies to events that occur within the state court action being removed. *Morsani v. Major League Baseball*, 79 F.Supp.2d 1331 (M.D. Fla. 1999), one of the leading cases interpreting Section 1446(b), examined numerous cases that addressed the issue and summarized the state of the law as follows:

Many courts have examined and rejected the defendants' argument that an order entered in another case may constitute an "order or other paper" pursuant to Section 1446(b). These courts interpret Section 1446(b) to refer only to "an amended pleading, motion, order or other paper" that arises within the case for which removal is sought. The plain language of the statute, referring to the "receipt by the defendant, through service or otherwise," implies the occurrence of an event within the proceeding itself; defendants do not in the ordinary sense "receive" decisions entered in unrelated cases. Accordingly, the courts consistently hold that publication of an order on a subject that might affect the ability to remove an unrelated state court suit does not qualify as an "order or other paper" for the purposes of Section 1446(b).

*Id.* at 1334 (omitting footnote that lists the many decisions upon which it relied). The same conclusion was reached in *Kocaj v. Chrysler Corp.*, 794 F.Supp. 234, 236 (E.D.Mich. 1992):

Simply put, a plain reading of the second paragraph of § 1446(b) elicits the conclusion that the term "other paper" means a paper in the state court action that does not constitute "an amended pleading, motion, [or] order." As the court in *Holiday [v. Travelers Ins. Co.]*, 666 F.Supp. 1286 (W.D.Ark. 1987) aptly observed, such "other paper" could, for example, be a plaintiff's response to a summary judgment motion, answers to interrogatories, or statements of a plaintiff. *Holiday* at 1290 (citing cases). Defendant's interpretation of "other paper," broadly construing such term to include even a decision in an unrelated action, ignores the preceding language in § 1446(b) – "within thirty days after receipt by the defendant, through service or otherwise" (emphasis added) – which language plainly refers to items served or otherwise given to a defendant in a state court case.

This construction of the statute is widespread, and has been generally adopted. *See Rose v. Beverly Health & Rehabilitation Services, Inc.*, 2006 WL 2067060 \*5 (E.D.Cal., July 22, 2006) (“Within the Ninth Circuit, the phrase ‘other paper’ has been interpreted as ‘documents generated within the state court litigation.’”) (citations omitted); *Phillips v. Allstate Ins. Co.*, 702 F.Supp. 1466, 1468-69 & n.2 (C.D.Cal. 1989) (“virtually every court which has considered the question of what suffices as a removal triggering ‘paper’ has concluded that the term does not include intervening statutory or case law changes. . . . Almost without exception, [cases dealing with the effect of modifications of prior case law on the timeliness of removal actions] have held that the paper required in § 1446(b) must be a part of the underlying suit rather than an outside development in removal jurisdiction.”); *Elm v. Soo Line Railroad*, 2006 WL 1426594 \*2 (D.Minn., May 22, 2006) (“courts have generally held that ‘other paper’ refers ‘solely to documents generated within the state court litigation itself.’”) (citations omitted); *Craft v. Philip Morris Co.*, 2006 WL 744415 \*6 (E.D.Mo., Mar. 17, 2006) (“the most logical interpretation of the plain language of the statute, ‘amended pleading, motion, order or other paper’ is that ‘order or other paper’ refers to only records in the state case.”); *Black v. Brown & Williamson Tobacco Corp.*, 2006 WL 744414 \*6 (E.D.Mo., Mar. 17, 2006) (same); *Allen v. Monsanto Co.*, 396 F.Supp.2d 728, 731 (S.D.W.Va. 2005) (“courts universally hold that a court decision in separate, unrelated case does not constitute ‘other paper’ for removal purposes.”); *Klink v. Metavante Corp.*, 2002 WL 31962610 \*2, n.1 (E.D.Mich., Dec. 16, 2002); *Burns v. Prudential Securities, Inc.*, 2006 WL 1932310 \*4 (N.D. Ohio, July 10, 2006) (“A court decision in an unrelated case does not constitute a ‘motion, order, or other paper’ for § 1446(b) purposes and does not, therefore, create a new 30-day period during which a defendant can remove a case.”); *Sclafani v. Ins. Co. of N. Amer.*, 671 F.Supp. 364, 365 (D.Md. 1987); (Section 1446(b) “relates only to

papers filed in the action itself which alter or clarify the stated claim so as to reveal for the first time that a federal cause of action is stated”); *Johansen v. Employee Benefit Claims, Inc.*, 668 F.Supp. 1294, 1296 (D.Minn. 1987) (“every court which has faced the issue present in this case has construed the phrase ‘or other paper’ as referring solely to documents generated within the state court litigation itself.”)

2. The Legislative History of Section 1446(b)

The legislative history of 28 U.S.C. § 1446(b) also supports the conclusion that the statute is limited to events occurring in the state court action that is being removed. *McCormick v. Excel Corp.*, 413 F.Supp.2d 967 (E.D.Wis. 2006), contains the most recent explanation of the legislative history:

The legislative history of § 1446(b) also supports an inference that Congress intended to limit order and other paper to documents in the pending case. This is so because prior to 1949, when Congress amended § 1446(b), the Supreme Court had developed case law interpreting *Powers v. Chesapeake & Ohio Railway Co.*, 169 U.S. 92, 18 S.Ct. 264, 42 L.Ed. 673 (1898), as standing for the proposition that a case that became eligible for removal after the initial complaint could be removed only as the result of a voluntary act by the plaintiff. See Adam C. Clainton, *Uncertainty in Federal Removal Procedure: The Riddle of the “Other Paper”*, 71 Def. Couns. J. 388, 393, 401 (Oct. 2004) (stating that although 1446(b) does not mention a “voluntariness” requirement, courts have read such limitation into it in light of the House report stating that the amendment was “declaratory of the existing rule laid down by” such decisions as *Powers* ). Although courts have criticized the so-called “voluntary/involuntary” rule as overly formalistic, see *Lyon v. Ill. Cent. Ry. Co.*, 228 F.Supp. 810, 811 (S.D.Miss.1964), the circuit courts have generally followed it, see e.g., *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 71-72 (7th Cir.1992). It may reasonably be inferred from Congress’s endorsement of the rule that Congress also intended to limit order and other paper to documents in the case being removed. See 17 *No. 2 Fed. Litigator*, 30 (Feb.2002) (indicating that the voluntariness requirement leads to the conclusion that order or other paper refers only to documents to the case being removed). A plaintiff can only generate documents in a case that is pending.

*Id.* at 971.

Because the federal government's filing and service upon Dey of its qui tam complaint is not an event that occurred within the Wisconsin state action, it cannot serve as the basis for federal jurisdiction.

**B. Section 1446(b) Only Applies to Voluntary Acts of the Plaintiff.**

In addition to being limited to events that occur within the state court action from which removal is sought, 28 U.S.C. § 1446(b) is also limited to voluntary acts of the plaintiff. This Court so held last year:

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. Appendix A at 20.

*See, Kocaj v. Chrysler Corp.*, 794 F.Supp. 234, 236-37 (E.D. Mich. 1992), *Morsani*, 79 F.Supp. 2d at 1333 n.5 ("In both federal question and diversity cases . . . Section 1446(b) restricts defendants from removing most cases when the circumstance potentially allowing removal arises through no consequence of the plaintiff's actions"); *Dowd v. Alliance Mortgage Co.*, 339 F.Supp. 2d 452, 455 (E.D.N.Y. 2004) ("involuntary changes in a case do not create removability if the plaintiff's complaint was not removable"); *Addo v. Globe Life & Acc. Ins. Co.*, 230 F.3d 759, 762 (5th Cir. 2000) ("'other paper' must result from the voluntary act of a plaintiff which gives the defendant notice of the changed circumstances which now support federal jurisdiction.") (citing *SWS Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996)); *Stauffer v. Citizens Alliance Educational Foundation*, 2001 WL 34039481 \*2 (D.Ore., Dec. 14, 2001); *Henderson v. City of Chattanooga*, 2002 WL 32060139 \*5 (E.D.Tenn., Mar. 15, 2002) ("A state court case that initially is non-removable cannot subsequently become

removable or be transformed into a removable case unless a change occurs that makes it removable as a result of the plaintiff's voluntary act."); *see also id.* at \*6 ("because a plaintiff is the master of his own complaint, involuntary changes caused by a party other than the plaintiff cannot make a case removable. . . . The voluntary-involuntary rule was developed, and is followed most often, in diversity cases. . . . However, the voluntary-involuntary rule is also applicable in nondiversity cases where federal subject matter jurisdiction is based on a federal question.") (citations omitted).

Because the federal government's service upon Dey of its qui tam complaint was not an action by Wisconsin (voluntary or otherwise), it is not an event that falls within 28 U.S.C. § 1446(b).

### **III. 31 U.S.C. § 3732(b) Does Not Confer Original Jurisdiction.**

Even if the federal qui tam complaint against Dey falls within 28 U.S.C. § 1446(b) (which it does not), this action is still not removable. Dey seeks to supplement its notice of removal to add a new basis for removal pursuant to 28 U.S.C. § 1441, which states that "any civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed . . ." 28 U.S.C. § 1441(a) (emphasis added). In support of its original jurisdiction argument, Dey relies on 31 U.S.C. § 3732(b). However, as demonstrated below, this Court does not have original jurisdiction over Wisconsin's action. At most, Section 3732(b) provides for supplemental jurisdiction over Wisconsin's claims against Dey, but permits the State, rather than Dey, to determine whether to bring these claims in federal court.

It is well-established that actions for which the district courts have only supplemental jurisdiction may not be removed. *See, e.g., Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 34 (2002) ("Ancillary jurisdiction . . . cannot provide the original jurisdiction that petitioners must

show in order to qualify for removal under § 1441.”); *Ahearn v. Charter Township of Bloomfield*, 100 F.3d 451, 456 (6th Cir. 1996) (supplemental jurisdiction statute is not a source of original subject-matter jurisdiction and a removal petition therefore may not base subject-matter jurisdiction on a supplemental-jurisdiction statute). *See Critney v. National City Ford, Inc.*, 255 F.Supp.2d 1146, 1148 (S.D.Cal. 2003) (“A district court may exercise supplemental jurisdiction over pendent state claims only if it possesses original jurisdiction over a related federal cause of action. . . . In other words, original jurisdiction is a *prerequisite* to the district court's exercise of supplemental jurisdiction”)(emphasis in original).

It is Dey’s burden, and a heavy one, to establish that this court has original jurisdiction over Wisconsin’s claims against Dey pursuant to 31 U.S.C. § 3732(b). That statute provides:

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

That this statute does not confer original jurisdiction over Wisconsin’s claims against Dey is apparent from the plain language of 3732(b) as well as overall structure and legislative history of the False Claims Act (“FCA”).

By its express terms, the statute does not provide a grant of original jurisdiction. Congress could have explicitly provided for original jurisdiction, as it has done in over 80 other statutes, but it did not. *See, e.g.*, 15 U.S.C. § 6614(c)(1) (“the district courts of the United States shall have *original jurisdiction* of any Y2K action that is brought as a class action”); 9 U.S.C. § 203 (regarding enforcement of foreign arbitral awards, stating the “district courts of the United States . . . shall have *original jurisdiction* over such an action . . .”); 5 U.S.C. § 9007 (regarding long-term care insurance, stating the “district courts of the United States have *original jurisdiction* of a [such] civil action or claim . . .”); 12 U.S.C. § 1441a (a)(11) (“any civil action,

suit, or proceeding to which the Thrift Depositor Protection Oversight Board is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have *original jurisdiction*.”).

The jurisdiction over state claims provided by Section 3732(b) is *supplemental* jurisdiction. It operates like any other supplemental jurisdiction provision – it is entirely dependent on the existence of *another* claim with original jurisdiction, a federal FCA claim. It is not surprising that Congress felt it necessary to codify this grant of ordinary supplementary jurisdiction. It was not until 1990 that a statute codifying (and enhancing) supplementary jurisdiction was enacted by Congress. See 28 U.S.C. § 1367. Prior to that – in 1986 when Section 3732(b) was enacted – the limits of supplemental jurisdiction, particularly with respect to joinder of pendent parties, were opaque at best. See *Commonwealth Edison Co. v. Westinghouse Electric Co.*, 759 F.Supp. 449, 452-53 (N.D. Ill 1991); *Perkins v. Halfex Co.*, 744 F.Supp. 169 (N.D. Ohio 1990).

The FCA, when read as a whole, clearly demonstrates that Section 3732(b) merely provides for supplemental jurisdiction. Section 3732(b) is an exception to the general bar on intervention by all other parties except for the United States in a federal FCA action, permitting States and local governments to join or intervene in a federal FCA action when it grows out of the same transaction or occurrence as the State or local government claims. Under 31 U.S.C. § 3730(b)(5), only the United States “may intervene or bring a related action based on the facts underlying” the federal FCA action. Accordingly, the codification of 31 U.S.C. § 3732(b) provides a vehicle for a State to join a pending FCA action brought by the United States to recover state funds lost due to actions growing out of the same transaction or occurrence as the federal FCA claim and avoids the need to answer questions about whether a State can (or need)

be a *qui tam* relator in order to recover.<sup>4</sup> Without Section 3732(b), some courts have held, states would be barred from intervention. *See U.S. ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 880 (D.C. Cir. 1999) (“§ 3732(b) ... authorizes permissive intervention by states for recovery of state funds (creating what is in effect an exception to § 3730(b)(5)’s apparent general bar on intervention by all other parties except for the United States”). Thus, 31 U.S.C. § 3732(b) provides a means for a State or local government plaintiff to be the master of its own claim when there is a related pending federal FCA action.

Defendants have not cited, and the State has not located, a single published case concluding that 31 U.S.C. § 3732(b) constitutes a basis of original federal subject matter jurisdiction. Rather, case law addressing 31 U.S.C. § 3732(b) supports the conclusion that it provides a method for State and local governments *permissively* to join a federal FCA action growing out of the same transaction or occurrence. The United States Circuit Court of Appeals for the District of Columbia Circuit found that “[t]he more obvious reading of § 3732(b), however, is that it authorizes *permissive intervention by states* for recovery of state funds (creating what is in effect an exception to § 3730(b)(5)’s apparent general bar on intervention by all other parties except for the United States).” *SCS Business & Technical Inst., Inc.*, 173 F.3d at 880 (emphasis added, parenthetical in original); *see United States ex rel. Stevens v. Vermont Ag. of Nat. Resources*, 162 F.3d 195, 205 (2d Cir. 1998) (“another 1986 amendment, . . . *permits the joinder*, in an FCA suit, of related state-law claims where those claims are ‘for the recovery of funds paid by a State . . .’”(emphasis added), *overruled on other grounds*, 529 U.S. 765 (2000); JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.01[B], at 4-20 (2006) (“[T]his

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<sup>4</sup> *See United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (pre-1986 amendments case finding a State may not be a relator), *superseded by statute*; *cf. Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 n.18 (2000) (leaving open question whether a State is a “person” under the Federal False Claims Act for purposes of commencing suit).

provision does not require the state to be a relator for jurisdiction to exist. Theoretically, a state could intervene in a federal False Claims Act suit to assert its own damages, and the *Long* court concluded that this type of permissive intervention is the more obvious interpretation of Section 3732(b).”); *see also United States ex rel. LaCorte v. Merck & Co., Inc.*, 2004 U.S. Dist. LEXIS 4860 \*23-24 (E.D. La. 2004) (permitting the State of Louisiana to intervene in a federal FCA case under 31 U.S.C. § 3732(b) to pursue claims under Louisiana state law); *United States v. Sequel Contractors, Inc.*, 402 F. Supp. 2d. 1142, 1149-50 (C.D.Cal. 2005) (permitting Orange County, California to join its claims under the California False Claims Act with a federal FCA action under both 31 U.S.C. § 3732(b) and the general federal supplemental jurisdiction statute); *United States ex rel. Anthony v. Burke Eng’g Co.*, 356 F. Supp. 2d 1119, 1120 (C.D. Cal. 2005) (permitting a relator, pursuant to 31 U.S.C. 3732(b), to prosecute violations of California and Nevada law as supplemental to his federal FCA claim, the claim upon which the *Anthony* court had original jurisdiction).

Furthermore, the legislative history of Section 3732(b) makes clear that Congress intended for this provision to enhance the options of States, not restrict them. Section 3732(b) was added by the 1986 Amendments to the FCA at the urging of the National Association of State Attorneys General (“NAAG”). As the Senate Report accompanying the 1986 Amendments provides:

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

S. Rep. No 345, 99<sup>th</sup> Cong., 2d Sess., at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5281 (emphasis added). Thus, the purpose of section 3732(b) was *to permit, not require*, States and

local governments to join pending federal FCA actions growing out of the same transaction or occurrence. See *SCS Business & Technical Institute, Inc.*, 173 F.3d at 880 (Section 3732(b) “authorizes *permissive* intervention by states for recovery of state funds”) (emphasis added). It would belie common sense to conclude that NAAG urged Congress to enact a statute stripping states of their ability to bring state law claims in state court and *requiring* all state law actions to be brought in federal court, or – as Dey contends here – permit a defendant to drag a case alleging purely state law claims out of state court when there happens to be a pending federal FCA action growing out of the same transaction or occurrence. Indeed, it makes little sense that Congress would take such a drastic step to turn over control of the choice of forum to a defendant without making any mention of this purpose. Defendants’ argument is that Congress engaged in an drastic expansion of federal jurisdiction over traditionally state actions and intended to add enormous burdens to federal courts and the United States Department of Justice (which, under defendants’ theory, would have to deal with any and all state complaints anytime a federal FCA action is filed) all without a single statement or indication that this is what Congress intended. This argument is clearly without merit.

Section 3732(b) was not meant to tread on the states’ sovereignty in choosing the forum in which to bring their state law claims. Rather, it was meant to broaden their choices. When a state or local government desires to pursue an action arising from the same transaction or occurrence as a pending federal FCA action, Section 3732(b) provides the option of choosing a federal forum to State and local governments, not defendants.

#### **IV. Abbott’s Waiver of Removal Waives Dey’s Right to Remove.**

Omitted from Dey’s removal petition is the fact the Government unsealed its False Claims Act against Abbott—Dey’s co-defendant—before it unsealed against Dey and well

outside the 30 day removal period. The Government's unsealing occurred on May 16, 2006, more than 120 days before Dey sought removal. (Appendix B) Abbott, however, declined to remove this case within the mandatory 30 day time period thereby unequivocally waiving its right to remove. This is fatal to Dey's removal petition even if Dey would otherwise have a right to remove.

The weight of authority holds that once one defendant waives its right to remove it waives it for all defendants. *See, Gorman v. Abbott Laboratories*, 629 F.Supp. 1196 (D.R.I.,1986):

The reasoning of these courts is impeccable. The right to remove is of finite duration; if not activated promptly, it self-destructs. Once Humpty-Dumpty has toppled from the wall, he cannot be put back together again. Failure of a defendant to embark upon removal within the statutorily allotted time causes the right to perish. Such neglect cannot be cured retroactively by joining a subsequently-served defendant's removal pavane. *Friedrich*, 467 F.Supp. at 1014; *Transport Indemnity*, 339 F.Supp. at 409; *Perrin*, 385 F.Supp. at 945; *Manis v. North American Rockwell Corp.*, 329 F.Supp. 1077, 1078 (C.D.Cal.1971). The first defendant having irretrievably lost the right to remove, it has likewise lost the facility effectively to consent to any other defendant's attempt to remove the action. That being so, and all defendants being required to join in a proper removal petition in a diversity case, *see ante* Part II, the first-served defendant's debarment vitiates the (timely) application of the later-served defendant

*Gorman v. Abbott Laboratories* 629 F.Supp. 1196, \*1201 (D.R.I.,1986)

Or as the same decision puts the proposition more harshly, at 1202:

Moreover, there is no overriding inequity. If all defendants had been served simultaneously, Merck's desire to remove would have been stymied entirely if Abbott had refused to march in the parade. By waiving its own right of removal, Abbott is estopped, presently, from tendering a valid consent to removal; it is compelled by its prior conduct to spurn Merck's imprecations. There is nothing unfair about holding a party to the natural consequences of its procedural blunders.

*Gorman v. Abbott Laboratories* 629 F.Supp. 1196, \*1202 (D.R.I.,1986)

See *Westwood v. Fronk*, 177 F.Supp. 536 (N.D. West Virginia 2001); *Estate of Krasnow v. Texaco, Inc.*, 773 F.Supp. 806 (E.D. Va. 1991); *Crocker v. A.B. Chance, Co.*, 270 F.Supp. 618 (S.D. Fla. 1967).

Thus, Abbott's failure to remove this case upon notice of the unsealing of the government's complaint against it precludes Dey's ability to remove. (It also obviously says something about Abbott's view of the merits of Dey's removal petition.)

**V. Even if Federal Jurisdiction Exists with Respect to the State's Claims Against Dey, The Court Should Sever the Claims Against the Remaining Defendants and Remand Them to State Court.**

Even if 31 U.S.C. § 3732(b) conferred federal jurisdiction over the State's claims against Dey (which it does not), and even if Dey was timely, there is no federal jurisdiction over the State's claims against the remaining defendants. Accordingly, the court may only retain those claims on the basis of supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Section (a) of that statute provides:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action with such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

In deciding whether the State's claims against the remaining defendants are so related to the claims against Dey that they form part of the same case or controversy, courts look to whether the claims "arise from the same facts, or involve similar occurrences, witnesses or evidence." *Hudson v. Delta Air Lines*, 90 F.3d 451 (11th Cir. 1996). Here, although the witnesses and evidence regarding the Wisconsin Medicaid program's prescription drug reimbursement rules and regulations are likely to be common as to the State's claims against all defendants, the State intends to prove its case against each defendant through fact witnesses and

evidence that are not common to all defendants. Moreover, that the State's claims against the remaining defendants are not part of the same "case or controversy" is apparent from the fact that the federal government has chosen not to join multiple defendants in a single case (as of the date of filing of this brief, the federal government has unsealed separate complaints against Abbott Laboratories and Dey; presumably complaints against additional individual drug manufacturers will be unsealed in the future).

Even if the State's claims against the remaining defendants are part of the same "case or controversy" as the State's claims against Dey, this Court still has discretion to decline to exercise supplemental jurisdiction over them. Pursuant to 28 U.S.C. § 1367(c):

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --

- (1) the claim raises a novel or complex issue of State law;
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; . . . or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Here, the State's claims against the remaining defendants raise complex issues of state law that are unrelated to the federal government's claims. Moreover, the claims against the remaining defendants substantially predominate over the State's claims against Dey, as the defendants are trying to combine and consolidate purely state law claims from all across the country onto a single federal FCA complaint against Dey. Finally, the exercise of supplemental jurisdiction would materially impede both the federal case and Wisconsin's case, constituting a compelling reason for declining to exercise supplemental jurisdiction. *See Madden v. Able Supply*, 205 F.Supp.2d 695 (where plaintiff brought state law claims against 40 defendants for asbestos poisoning of her husband and federal jurisdiction existed as to only one defendant, court

severed the claims against the remaining defendants and remanded them to state court, finding that the claims substantially predominated over the federal claim and the likelihood of transfer of the non-federal claims to a multi-district litigation where they would languish for years in light of the numerous other pending cases constituted a compelling reason for declining to exercise supplemental jurisdiction).

**VI. The State Is Entitled to Attorneys' Fees and Costs**

28 U.S.C. § 1447(c) provides: "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The Supreme Court recently articulated the standard to be applied in determining whether to award costs and expenses pursuant to this statute:

Absent unusual circumstances, courts may award attorney's fees under 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied. . . . In applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case.

*Martin v. Franklin Capital Corp.*, 126 S.Ct. 704, 711 (2005). Here, defendants clearly lack an objectively reasonable basis for removal. This is particularly true with respect to its position that the federal qui tam complaint constitutes an "amended pleading, motion, order, or other paper" within the meaning of 28 U.S.C. § 1446(b). This position had previously been squarely rejected by this Court, a fact defendants' simply ignored.

Accordingly, the State is entitled to its attorneys' fees and costs.

## CONCLUSION

For the foregoing reasons, defendants' motion for leave to file supplemental notice of removal should be denied and plaintiff's motion to remand should be granted.

Dated this 23<sup>rd</sup> day of October, 2006.



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