

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

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-C-0408-C

ABBOTT LABORATORIES, ET AL.,

Defendants.

**PLAINTIFF STATE OF WISCONSIN'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO STAY ACTION ON
PLAINTIFF'S MOTION TO REMAND**

Defendants have removed this case for a second time arguing that a recent Supreme Court decision, *Grable & Sons Metal Products v. Darue Engineering*, ___ U.S. ___, 125 S. Ct. 2363 (2005), changed the law of federal question jurisdiction permitting them to remove plaintiff's case even though plaintiff's complaint alleges purely state law claims. Defendants also argue that this decision starts a new eligibility period for removal, permitting them to sidestep the requirement that removal notices must be filed within 30 days of service. In response, plaintiff filed a motion to remand showing that defendants' removal notice is neither timely nor substantively meritorious. (Attached hereto as Appendix A.)

Defendants now seek a stay to preclude this Court from deciding plaintiff's motion for remand. Consistent with this Court's earlier decision in this case, and the developing law elsewhere, this request should be rejected.

I. CASE LAW REJECTS DEFENDANTS' ARGUMENTS THAT A STAY SHOULD BE GRANTED IN THE FACE OF A MOTION TO REMAND.

Court decisions generally favor deciding remand motions before the Judicial Panel on Multidistrict Litigation acts to transfer a case. As the court said in *Moton v. Bayer Corporation*, No. CIV.A.05-0310-WSM, 2005 WL 1653731, at *2 (S.D. Ala. July 8, 2005): “Many courts have concluded that motions to remand should always, or usually, be resolved prior to transfer.”

Wisconsin district courts have developed a practical three-step paradigm for determining when to decide a motion for remand prior to transfer of the case to the MDL proceeding in a foreign forum.

This Court described the paradigm as follows:

In *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044, 1048-49 (E.D. Wis. 2001), the district court proposed an analytical framework for situations in which a court must decide both a motion to remand and a motion to stay proceedings pending a possible MDL transfer. According to *Meyers*, the district court’s “first step should be to make a preliminary assessment of the jurisdictional issue.” *Id.* at 1048. If this initial examination

suggests that removal was improper, the court should promptly complete its consideration and remand the case to state court. If, on the other hand, the jurisdictional issue appears factually or legally difficult, the court’s second step should be to determine whether identical or similar jurisdictional issues have been raised in other cases that have been or may be transferred to the MDL proceeding.

Id. at 1049. Finally, “[o]nly if the jurisdictional issue is both difficult and similar or identical to those in cases transferred or likely to be transferred should the court proceed to the third step and consider the motion to stay.” *Id.* I find the *Meyers* court’s analytical framework persuasive and adopt it for the purpose of this order.

State of Wisconsin v. Abbott Laboratories, et al., Case No. 04-C-447-C, Order at 2-3 (W.D. Wis. Sept. 9, 2004).

Under this formula the defendants must show that the jurisdictional issue they raise is a close question, and that other consolidated cases are raising the same issue. And even if defendants can make such a showing, that does not end the matter according to *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044, 1049 (E.D. Wis. 2001): “[I]f the stay motion is reached at all, it will generally require weighing the judicial economy gained and hardship to the moving party avoided by granting the stay against the harm to the non-moving party.”

The court in *Meyers* explained the rationale for this three-step decisional process as follows:

My view is that a court’s first step should be to make a preliminary assessment of the jurisdictional issue. Although *Landis* might be read to empower me to stay the case without making any effort to verify jurisdiction, I am, nevertheless, reluctant to do so. First, *Steele Co.* emphasized the constitutional importance of the “jurisdiction first” principle. Second, 28 U.S.C. § 1447(c) directs that “[i]f at any time before judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.” (emphasis added). This section dictates that a judge should give at least some consideration to a remand motion. The third reason is judicial economy. “If the limited review reveals that the case is a sure loser in the court that has jurisdiction (in the conventional sense) over it, then the [transferor] court ... should dismiss the case rather than waste the time of another court.” *Phillips v. Seiter*, 173 F.3d 609, 611 (7th Cir. 1999) (discussing transfer of habeas corpus cases rather than multi-district civil litigation).

The fourth reason is that even though a stay does not directly implicate the merits of a case, it undeniably has important effects on the litigation. A plaintiff may carefully craft a state court complaint in order to avoid litigating the matter in federal court. *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000) (“plaintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum”). Justice Holmes observed that “the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a ‘suit arising under’ the patent or other law of the United States by his declaration or bill.” *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716 (1913).

Meyers, 143 F. Supp. 2d at 1048.

The decisional construct endorsed by this Court in its earlier decision, has now been widely accepted. *See Moton*, 2005 WL 1653731:

The *Meyers* methodology has been widely adopted. *See Hotseller v. Pfizer, Inc.*, 2005 WL 756224 at *2 (S.D.Ind. 2005); *Wisconsin v. Abbott Laboratories*, 2004 WL 2055717 at *1 (W.D.Wis. 2004); *Brock v. Stolt-Nielsen SA*, 2004 WL 1837934 at *2 (N.D.Cal. 2004); *Nekritz v. Canary Capital Partners, LLC*, 2004 WL 1462035 at *2 (D.N.J. 2004); *Conroy v. Fresh Del Monte Produce, Inc.*, 325 F.Supp.2d 1049, 1053-54 (N.D.Cal. 2004); *New Mexico State Investment Council v. Alexander*, 317 B.R. 440, 443-44 (D.N.M. 2004); *Chinn v. Belfer*, 2002 WL 31474189 at *3 (D.Or. 2002); *Board of Trustees v. Worldcom, Inc.*, 244 F.Supp. 2d 900, 902-03 (N.D.Ill. 2002)(“When the merits of a remand motion are easy, a decision requires little judicial time and a stay would merely postpone the inevitable,” and the “threat of inconsistent judgments ... is de minimus”); *see also Illinois Municipal Retirement Fund v. Citigroup, Inc.*, 391 F.3d 844, 852 (7th Cir. 2004)(“Though some district courts stay proceedings during the interim following a conditional transfer order, ..., this is not required where the court concludes that it lacks subject matter jurisdiction.”).

Moton, 2005 WL 1653731, at *2 n.5.

Defendants fail to meet their obligations under *Meyers* and this Court’s earlier decision in two ways. First, their jurisdictional argument is transparently without merit. Second, even if defendants could meet their initial burden of showing a difficult jurisdictional issue, the balance of hardships overwhelmingly favors resolving plaintiff’s remand motion here.

II. DEFENDANTS’ REMOVAL IS OBVIOUSLY IMPROPER.

A simple review of defendants’ argument in support of remand is sufficient to deny defendants’ motion for a stay. Defendants’ removal is untimely. And, defendants’ argument that the law on federal question jurisdiction was fundamentally changed by a recent Supreme Court decision is wrong.

Defendants’ failure to meet the timely filing requirements of the removal statute, without more, compels remand. According to 42 U.S.C. § 1446(b), defendants were required to remove their case successfully within 30 days of service. Here, however, defendants unsuccessfully

sought to remove this case on different grounds (diversity) within the 30-day period and, having failed in this attempt, the 30-day period has now expired.

Conceding their lack of timeliness, defendants argue in their removal papers that a new Supreme Court decision changed the law on federal jurisdiction and thereby restarted their removal clock, citing *Smith v. Burroughs Corp.*, 670 F. Supp. 740 (E.D. Mich. 1987). But as plaintiffs showed in their remand memorandum, the *Smith* case has been repudiated by virtually every subsequent decision, including one decided in the same district. See *Kocaj v. Chrysler Corp.*, 794 F. Supp. 234 (E.D. Mich. 1992), where the court held:

Smith is unpersuasive. This Court has found no other case that follows the *Smith* decision. As aptly noted by the court in *Phillips v. Allstate Ins. Co.*, 702 F.Supp. 1466, 1468 n. 2 (C.D.Cal.1989):

The decision by the court for the Eastern District of Michigan in *Smith v. Burroughs Corp.*, 670 F.Supp. 740 (E.D.Mich.1987) seems to stand alone in its conclusion that a removal is timely if filed within 30 days of a court decision which first renders the action removable.

Kocaj, 794 F. Supp. at 237.

Indeed, it is universally the rule that a new Supreme Court decision does not restart the removal period. As the case of *Morsani v. Major League Baseball*, 79 F. Supp. 2d 1331, 1333 (M.D. Fla. 1999) described the current state of the law:

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).

Morsani, 79 F. Supp. 2d at 1333 (footnote omitted).

There is no significant contrary law.¹ In sum, defendants’ failure to satisfy the 30-day time restriction compels remand now, not later.

The defendants’ contention that the recent Supreme Court decision of *Grable & Sons Metal Products*, 125 S. Ct. 2363 changed the law on federal jurisdiction transforming this case into a federal case is hardly more compelling than their timeliness argument. As plaintiff’s remand motion shows, all the *Grable* case does is permit federal jurisdiction in a unique factual setting—a quiet title proceeding—in which the federal government had a substantive interest. It does not authorize removal of a state court tort or statutory claim merely because interpretation of a federal statute may be needed at some juncture. In fact, it affirms that such cases are not removable. In sum, defendants’ removal fails the first test of the Wisconsin paradigm, namely that it present a difficult jurisdictional question.

¹Defendants have tried to buttress their discredited *Smith* cite by citing three other cases, *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001), *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993) and *Davis v. Time Ins. Co.*, 698 F. Supp. 1317 (S.D.Miss. 1988). None of these cases supports defendants’ position. *Green* and *Doe* are both limited to a factual setting where the defendant in the newly removed action was also the defendant in the case changing the underlying federal law, *see Green*, 274 F.3d at 267. And the court in *Davis*, 698 F. Supp. 1317 held that the change in federal law (holding that ERISA preempted state law) was so dramatic that it created a whole new lawsuit which started the 30-day period all over again. Moreover, *Davis*, as limited as it is, has been rejected by virtually every subsequent decision to consider the matter. *See, e.g., Morsani*, 79 F. Supp. 2d at 1333.

III. THE BALANCE OF HARDSHIPS ARGUES AGAINST A STAY.

Defendants argue that because they have sought transfer of many state cases, each of which raises the same jurisdictional issues, the Court should transfer this case for one consolidated decision. This argument fails for several reasons.

First, as outlined above, the defendants have tripped over their first hurdle, at least in this jurisdiction, which is to show that removal was arguably meritorious.

Second, it is not clear that there will be a consolidated proceeding. As far as plaintiff can determine, every state that has had its case removed has filed, or intends to file, a motion for remand. Many of those courts will look to the paradigm utilized in Wisconsin and, if they do, will refuse transfer. Thus, defendants cannot even show that there will be any economies of scale in transferring this case.

Finally, even if defendants could meet their burden to show that the jurisdictional question is a difficult one and that the same question will be raised in other cases, defendants would still not be entitled to a stay because the balance of hardships favors the plaintiff.

Defendants' removal has already considerably disrupted the underlying litigation. At the time the case was removed Dane County Circuit Court Judge Krueger had before her two lengthy motions—a motion to dismiss which contained hundreds of pages of exhibits, and a motion for a protective order. Judge Krueger had been working on resolving these motions for a number of weeks. This process has now been interrupted. Also, the parties had recently sent Judge Krueger a stipulation appointing Judge Eich as discovery referee, a process that has now been suspended. Finally, the very day this case was removed was the day defendants were required to respond to plaintiff's document requests. Defendants filed their responses on time but most of them were incredibly non-responsive (*see* the attached response of defendant Sandoz,

Appendix B). While the remand process proceeds, plaintiff is powerless to bring defendants to the table to resolve this kind of stonewalling. *See, e.g., Barcena v. State of Illinois, Department of Insurance*, No. 92-C-2568, 1992 WL 186068, at *2 (N.D.Ill. July 27, 1992).

Transfer to the MDL will only make things worse. The transfer itself will take many months. *See In re Prudential Ins. Co. of America Sales Pract.*, 170 F. Supp. 2d 1346, 1347 (J.P.M.L. 2001):

[A]s a practical matter, there is a lag time of at least three or four months from the filing of an action, its identification as a potential tag-along action, issuance of a conditional transfer order, stay of transfer when a party timely objects to the conditional transfer, briefing on the question of transfer, the Panel hearing session, and the issuance of the Panel's subsequent order.

Adding to this delay is the time necessary to transfer the files and obtain a hearing before the transferee judge. And any resolution of plaintiff's remand motion may have to await decisions from other districts on defendants' stay motions.

These delays are likely to be compounded by the fact that the transferee court is inundated with motions and discovery issues as it is, and there is no telling when the court will be able to reach plaintiff's remand motion. Thus, for example, the transferee court has not yet reached plaintiff's class certification motion even though it was fully briefed and argued in February.

Finally, this is a case where such delays are particularly troublesome for the State's enforcement action. In addition to the enforcement of Wisconsin's antitrust and consumer laws, the two additional components of this lawsuit are claims brought on behalf of Wisconsin's Medicaid program and claims brought on behalf of Medicare Part B participants. Putting an end to defendants' pernicious practices and collecting money owed the State Medicaid Program by defendants as soon as possible is very important to the state and its taxpayers. Additionally,

Medicare Part B participants are generally very sick persons (often with cancer) and an unnecessary delay in their monetary recovery may mean no recovery at all.

There are no corresponding disadvantages to the defendants if the motion to remand is promptly decided by this Court.

IV. DEFENDANTS' MEMORANDUM IGNORES THE TWO CRUCIAL ELEMENTS IN RESOLVING A STAY REQUEST AND RELIES INSTEAD ON CASES THAT ARE INAPPOSITE.

Defendants' memorandum ignores the two most crucial elements in resolving their requested stay. First, they fail to responsibly address the fact that their removal is untimely under all the applicable law, relegating their complete discussion of this issue to a footnote, (number 5), which consists of asserting the same repudiated case law contained in their notice of removal and misstating the holdings of *Green*, 274 F.3d 263 and *Doe v. American Red Cross*, 14 F.3d 196. See plaintiff's n.1, *infra*. (Defendants argument on the impact of *Grable & Sons Metal Products*, 125 S. Ct. 2363 is no more substantial consisting only of the naked assertion, refuted by plaintiff in its memorandum in support of remand, that a state law claim requiring the interpretation of a federal statute creates federal question jurisdiction even in the context of state tort or statutory claims.)

Second, they fail to acknowledge the existence of the three-part stay test set forth in this Court's earlier opinion in this case (which clearly compels remand when applied here), or the many cases decided since this Court ruled adhering to the same analysis. Instead, defendants primarily rely on string cites of other transferred cases (ignoring the fact that most of the state cases have not been so transferred), opinions which precede this Court's earlier holding and/or opinions where federal jurisdiction was clearly present.

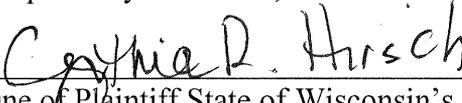
Defendants' failure to address the two essential elements in resolving a stay request in this case speaks volumes about the lack of merit of their request.

CONCLUSION

For all the foregoing reasons plaintiff respectfully requests that this Court deny defendants' motion for a stay.

Dated this 2 day of August, 2005.

Respectfully submitted,



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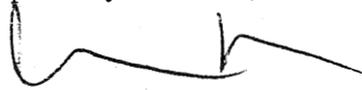
Defendants.

PLAINTIFF STATE OF WISCONSIN'S MOTION TO REMAND

Plaintiff State of Wisconsin respectfully moves the Court to remand this action to the Circuit Court of Dane County on the grounds that there is no federal jurisdiction, and because the defendants' removal petition is defective as more specifically described in the accompanying memorandum supporting remand.

Dated this 21st day of July, 2005.

Respectfully submitted,



One of Plaintiff State of Wisconsin's Attorneys

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Defendants.

**THE STATE OF WISCONSIN'S MEMORANDUM IN SUPPORT
OF MOTION TO REMAND**

Defendants' second attempt to remove this case is untimely. The principal case defendants rely on to argue that their notice is timely not only stands alone amid an avalanche of contrary authority, but has been rejected, in light of that avalanche, by a subsequent decision from the same district in which it was decided. Moreover, aside from its untimeliness, the removal has no substantive merit. Thus, the only possible outcome of defendants' Notice—and defendants had to know this—will be to unnecessarily delay the underlying litigation, where the trial court has been diligently working over the last several weeks to decide important motions. Although this process has now been interrupted, this Court can minimize the damage caused by the defendants' conduct by promptly sending this case back to State Court where it belongs. Moreover, because defendants' removal is frivolous, they should be sanctioned unless they withdraw it.

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 proving that removal was proper. See *In the Matter of The Application of County Collector of the County of Winnebago, Ill.*, 96 F.3d 890, 895

(7th Cir. 1996). Courts should interpret the removal statute narrowly and presume that the plaintiff may choose his or her forum. *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 576 (7th Cir. 1982), *cert. denied*, 459 U.S. 1049. Any doubt regarding jurisdiction should be resolved in favor of the states, *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976), and the burden falls on the party seeking removal. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).

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

II. Defendants' Notice of Removal is Untimely.

Defendants' Notice of Removal is untimely and a new Supreme Court decision does not alter this result. Pursuant to 28 U.S.C. § 1446(b), defendants were required to file a notice of removal within 30 days of service. That provision states:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

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.

See also Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999).¹

Having lost their previous removal attempt, defendants have failed to comply with the 30 day requirement and they do not contend otherwise. Thus, their notice of removal is untimely.

To escape this obvious conclusion defendants argue that a recent decision of the Supreme Court, *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 125 U.S. 2363 (2005), decided on June 13, 2005, (which they wrongly characterize as changing removal law), starts the removal clock all over again. They contend that the Supreme Court decision is an “order or other paper” from which they “first...ascertained” that the case was removable thereby triggering a new thirty-day removal period.

The principal case defendants cite to support their argument, *Smith v. Burroughs Corp.*, 670 F.Supp. 740 (E.D. Mich. 1987) did in fact hold that a new, relevant Supreme Court decision triggers a renewed 30 day period. The defendants fail to inform the Court, however, that *Smith* has been so universally repudiated that five years later it could not command agreement even from another judge in the district where it was decided. *See Kocaj v. Chrysler Corp.*, 794 F.Supp. 234 (E.D. Mich. 1992), which wrote:

Smith is unpersuasive. This Court has found no other case that follows the *Smith* decision. As aptly noted by the court in *Phillips v. Allstate Ins. Co.*, 702 F. Supp. 1466, 1468 n.2 (C.D. Cal. 1989): The decision by the court for the Eastern District of Michigan in *Smith v. Burroughs Corp.*, 670 F.Supp. 740 (E.D.Mich.

¹ One good reason for not permitting removal later in a case is that doing so interferes with the efforts of state court judges. This case is a perfect example. For weeks Judge Krueger has been working on significant disputes and other issues in this case including defendants’ voluminous motion to dismiss, a dispute between the parties on whether discovery in this case can be shared with other states, and the appointment of a Referee to treat discovery problems. All that work has now been interrupted and must await a decision on the remand motion. And once remand is granted the process will have to begin again with an attendant duplication of effort.

1987) seems to stand alone in its conclusion that a removal is timely if filed within 30 days of a court decision which first renders the action removable.”

Kocaj, supra, 794 F. Supp. at 237.

Rejection of the notion that a recently decided Supreme Court decision triggers a new removal period has been universal. The case of *Morsani v. Major League Baseball*, 79 F.Supp.2d 1331, 1333 (M.D. Fla. 1999) sums up the current state of the law this way:

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).

Morsani, at 1334, footnote omitted. The *Morsani* case is attached hereto. See footnote 4 at page 1333 for a listing of the many decisions upon which it relied.

There is only one exception to the *Morsani* holding (and even this exception is not universally accepted): “[I]n very limited circumstances... a decision by a court in an unrelated case, but which involves the same defendant, a similar factual situation, and the question of removal—can constitute an “order” under sec. 1446(b).” *Green v. R.J Reynolds Tobacco Company*, 274 F.3d 263, 267 (5th Cir. 2001). None of those requirements is met here. (See also *Ervin v. Stagecoach Moving and Storage*, 2004 WL 1253401 (N.D. Tex. 2004) paragraph 2, fn.3 and *Hamilton v. United Healthcare of Louisiana*, 2003 WL 22779081 (E.D. La. 2003) describing the narrow reach of the *Green* exception).

In short, defendants’ argument that a recent Supreme Court decision triggers a new thirty day removal period is frivolous. Further, their conduct in citing the *Smith* case in support of their

removal petition without admitting to the Court the huge extent of disagreement with that decision, including rejection of it within the same District in which it was decided, is an affront to the Court, and sanctionable.

III. The *Grable* Case Provides No New Grounds For Removal.

Even if the defendants' latest attempt to remove this case was timely the case they rely on to support removal, *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 125 S.Ct. 2363 (2005) does not do so.

Before discussing the reasons defendants' reliance on the *Grable* case is baseless some background is useful. Wisconsin alleges that defendants have violated various laws of the state of Wisconsin by publishing phony and inflated average wholesale prices for their drugs which Wisconsin and other purchasers and payers relied upon to their detriment. Among the laws Wisconsin asserts were violated by this conduct are the Wisconsin Consumer Protection Act, Wis. Stat. sec. 100.18, and Wisconsin's antitrust law, Wis. Stat. 133.1 et seq. *No federal claim is asserted.*

Other states have filed similar cases against the defendants. These cases, by and large, have been brought in each state's respective state court and remain there to this day. Some class actions have been brought on behalf of consumers. Many of these have been consolidated in an MDL proceeding in Massachusetts, in which plaintiffs assert federal RICO and antitrust claims not present in this case. Currently that case is enmeshed in lengthy class action proceedings.

Defendants earlier attempted to remove pricing cases brought by several of the states asserting that federal question jurisdiction was present. These attempts were rejected. *See State of Montana v. Abbott Laboratories, Inc.*, 266 F.Supp. 2d 250, 255-56 (D. Mass. 2003).

Defendants subsequently sought to remove Wisconsin's case on the basis of diversity. They lost

again. *WI v. Abbott Laboratories, et al.*, Case No. 04-C-0477-C (W.D. Wis., October 5, 2004)(Crabb, J.)(attached). *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 125 S. Ct. 2363 (2005) does not vitiate these earlier decisions.

The *Grable* case is an offshoot of *Merrell Dow Pharmaceuticals Inc., v. Thompson*, 478 U.S. 804 (1986). In *Merrell Dow* the plaintiff, allegedly injured from using the drug Bendectin while she was pregnant, asserted common law theories of negligence and fraud against the defendant based in part on the allegation that the defendant had misbranded the drug in violation of the Federal Food, Drug, and Cosmetic Act (FDCA). The complaint alleged that it was this violation of federal law that proximately caused plaintiff's injury. The defendant removed contending that there was federal question jurisdiction because plaintiff's claim arose under the laws of the United States.

The *Merrell Dow* Court rejected defendants' argument that the need to construe a federal statute was sufficient to confer federal jurisdiction on a state tort claim. Instead, to determine whether Congress intended to authorize federal jurisdiction where the statute at issue was silent, the Court looked to whether Congress had created a private, federal cause of action. The Court concluded that Congress did not view federal jurisdiction as a necessary component of a federal statute where no such private remedy existed. Thus, the Court held: "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution laws, or treaties of the United States.'" *Merrell Dow*, supra, at 817. Based on *Merrell Dow* the court in *State of Montana v. Abbott Laboratories, Inc.*, 266 F. Supp.2d 250, 255, 56 (D. Mass.2003) denied defendants attempt to remove, finding

that there was no independent federal cause of action and that the possible need to interpret federal Medicaid regulations, without more, did not provide federal question jurisdiction.

Defendants now contend that *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 125 S. Ct. 2363 (2005) undermines the holding of *Merrell Dow* and the court's holding in *State of Montana* because: "the Supreme Court ruled directly to the contrary, holding that state law claims that raise a substantial federal question are removable to federal court regardless of whether the particular federal statute involved has a private right of action." Defendants' Removal Petition at paragraph 14. This is a completely inaccurate portrayal of *Grable*.

Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing, 125 S.Ct. 2363 (2005) rests on a completely different set of facts than *Merrell Dow* or *State of Montana*. And the unique facts of *Grable* are what led the Court to permit removal in that case. *Grable* was a quiet title action raising (almost uniquely in that context) contested issues of federal law with respect to which the agencies of the Federal Government had a substantive interest in the outcome. It was this unusual factual context that drove the Court's result, not any attempt to reconsider *Merrell Dow*. Early on the Court made that clear:

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986), on which *Grable* rests its position, is not to the contrary. *Merrell Dow* considered a state tort claim resting in part on the allegation that the defendant drug company had violated a federal misbranding prohibition, and was thus presumptively negligent under Ohio law. *Id.*, at 806, 106 S.C. 3229. The Court assumed that federal law would have to be applied to resolve the claim, but after closely examining the strength of the federal interest at stake and the implications of opening the federal forum, held federal jurisdiction unavailable. Congress had not provided a private federal cause of action for violation of the federal branding requirement, and the Court found "it would ... flout, or at least undermine, congressional intent to conclude that federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation ... is said to be a ... 'proximate cause' under state law." *Id.* at 812, 106 S.Ct. 3229.

Grable, at 2369.

The Court underscored the *sui generis* nature of *Grable's* subject matter, concluding that permitting federal jurisdiction in the unique context presented in *Grable* would result in very few transfers of state court cases to federal court:

Although Congress also indicated ambivalence in this case by providing no private right of action to *Grable*, it is the rare state quiet title action that involves contested issues of federal law, see n.3., *supra*. Consequently, jurisdiction over actions like *Grable's* would not materially affect, or threaten to affect, the normal currents of litigation. Given the absence of threatening structural consequences and the clear interest the Government, its buyers, and its delinquents have in the availability of a federal forum, there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of the state-law title claim.

Grable, 125 S.Ct. at 2371.

Finally, the Court made it clear that state court tort suits based on violations or interpretations of federal statutes were to continue to be treated differently than the quiet title action underlying *Grable*. Indeed, the Court continued specifically to endorse the notion that state tort claims are not removable even if they depend on a federal statute:

One only needed to consider the treatment of federal violations generally in garden variety state tort law. * * * 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. Expressing concern over the "increased volume of federal litigation," and noting the importance of adhering to "legislative intent," *Merrell Dow* thought it improbable that the Congress, having made no provision for a federal cause of action, would have meant to welcome any state-law tort case implicating federal law "solely because the violation of the federal statute is said to [create] a rebuttable presumption [of negligence] ... under state law."

Grable, 125 S.Ct. at 2370-71.

In sum, *Grable* is simply a footnote to *Merrell Dow*, holding only that in certain unique and limited contexts the absence of a federal remedy does not preclude removal. *Grable* not

only does not endorse removing state tort claims that involve a federal statute as defendants argue—it makes it clear that such cases are not removable.

A recent district court decision by Judge Kauffman in the Eastern District of Pennsylvania confirms this conclusion. There, when confronted by the same *Grable* arguments defendants raise here, he held:

In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, the Supreme Court held that “a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim” arising under federal law. 478 U.S. 817. That is precisely the case here. Moreover, the Supreme Court has recently referred to a state-law negligence claim that cites a federal statute to establish a defendant’s duty to the plaintiff as the classic example of what does not raise a federal question. *Grable & Sons*, 2005 WL 1383694 at *7.

Thomas v. Friends Rehabilitation Program, Inc., 2005 WL 1625054 (E.D.Pa., July 11, 2005) at *3.

IV. Sanctions Are Appropriate If The Defendants Do Not Withdraw Their Arguments.

Defendants’ Notice of Removal is sanctionable. Their argument that their Notice is timely rests on a case rejected within the very same district in which it was decided and universally repudiated elsewhere. Defendants’ citation of this case—particularly without informing the Court of the later decision in the same district—is grounds for sanctions under Rule 11.

Additionally, defendants’ statement that “..the Supreme Court ruled directly to the contrary, holding that state law claims that raise a substantial federal questions are removable to federal court regardless of whether a particular federal statute involved here has a private right of action,” is an inexcusable misstatement of the holding of *Grable* as we have shown above. If defendants do not withdraw these arguments in their next pleading plaintiff will file a Rule 11 motion seeking sanctions in addition to those awardable for improvident removal.

CONCLUSION

For all the foregoing reasons plaintiff asks the Court to remand this case to the State Court from whence it came and to award it its costs and fees. Plaintiff also asks that the Court consider sanctioning the defendants in the event they do not withdraw the Notice of Removal.

Dated this 21st day of July, 2005.

Respectfully submitted,

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79 F.Supp.2d 1331

Page 1

79 F.Supp.2d 1331, 2000-1 Trade Cases P 72,845

(Cite as: 79 F.Supp.2d 1331)

H

United States District Court,
M.D. Florida,
Tampa Division.

Frank L. MORSANI, et al., Plaintiffs,

v.

MAJOR LEAGUE BASEBALL, et al., Defendants.

No. 99-1078-CIV-T-23E.

Dec. 13, 1999.

Investment group filed action in state court against various professional baseball organizations for tortious interference with business relations and for violation of state antitrust law. Following removal to federal court, plaintiffs moved to remand. The District Court, Merryday, J., held that: (1) Supreme Court decision rejecting rule that failure to file notice of removal within 30 days after first receipt by one defendant of copy of complaint was not "order or other paper" allowing removal of action to federal court, and (2) state court's grant of summary judgment on antitrust count precluded federal court from asserting jurisdiction on basis of baseball's federal antitrust exemption.

Motion granted.

West Headnotes

[1] Removal of Cases ↪79(1)

334k79(1) Most Cited Cases

Change in method of computation of time is neither substantive right of removal nor right to appeal or reconsider earlier order regarding removal. 28 U.S.C.A. § 1446(b).

[2] Removal of Cases ↪79(1)

334k79(1) Most Cited Cases

Supreme Court decision rejecting rule that failure to file notice of removal within 30 days after first receipt by one defendant of copy of complaint was not "order or other paper" allowing removal of

action to federal court, even though action had originally been remanded to state court on basis of rejected rule. 28 U.S.C.A. § 1446(b).

[3] Removal of Cases ↪102

334k102 Most Cited Cases

Federal court did not have subject matter jurisdiction in removed action against major league baseball due to fact that original state court complaint included claim for violation of state antitrust law, even if professional baseball was afforded broad exemption from antitrust liability under federal law, where state court had already granted summary judgment in favor of baseball on antitrust count, and only remaining counts in state court action were for tortious interference with business relations.

*1331 Anthony W. Cunningham, Cunningham, Clark & Greiwe, P.A., Tampa, FL, for Plaintiffs.

John W. Foster, Sr., Baker & Hostetler, Orlando, FL, Robert Earl Banker, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, FL, for Defendants.

***1332 ORDER**

MERRYDAY, District Judge.

This action was filed in state court in 1992. Plaintiffs Frank L. Morsani and the Tampa Bay Baseball Group, Inc. sued approximately 60 defendants, including the American League of Professional Baseball Clubs, Inc., the National League of Professional Baseball Clubs, Inc., an entity dubiously described as "Major League Baseball," [FN1] a number of major league baseball teams, and a number of individuals associated with particular teams, the leagues, and the Office of the Commissioner of Baseball. The plaintiffs' original four-count complaint comprises three alleged causes of action for tortious interference with business relations and an alleged

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79 F.Supp.2d 1331

Page 2

79 F.Supp.2d 1331, 2000-1 Trade Cases P 72,845

(Cite as: 79 F.Supp.2d 1331)

cause of action for violation of Florida's antitrust laws. The plaintiffs' claims arise from three separate efforts to obtain a major league baseball franchise in Tampa, Florida. The plaintiffs refer to these efforts respectively as the "Twins Deal" (involving an attempt to purchase and relocate the Minnesota Twins franchise), the "Rangers Deal" (a similar effort with respect to the Texas Rangers), and the "Expansion" (involving the award of a new franchise to the original owners of the Florida Marlins). Plaintiffs' Motion to Remand (Doc. 8) at pp. 2-5.

FN1. The plaintiffs allege that "Major League Baseball" is "a unique incorporated or unincorporated association, organization, alter ego, or the like," consisting of the American League, the National League, and the Office of the Commissioner of Baseball. Plaintiffs' Third Amended Complaint at p. 6. The defendants counter by "affirmatively assert[ing] that the Defendant designated as 'Major League Baseball' is a non-judicial entity and is, therefore, not a proper party." Defendants' Answer at p. 3. Notwithstanding seven years of litigation, the determination of whether a legally cognizable entity named "Major League Baseball" exists remains stubbornly unresolved.

THE DEFENDANTS' FIRST REMOVAL

The defendants initially removed this action in 1993. However, Judge Elizabeth A. Kovachevich remanded the case upon finding that the defendants failed to file their notice of removal within thirty days after the first receipt by one of the defendants of a copy of the complaint. See March 9, 1993 Order in Case No. 93-11-CIV-T-15C; 28 U.S.C. § 1446(b). This thirty-day "receipt rule" prevailed in the Eleventh Circuit and in several other circuits [FN2] until the Supreme Court's rejection of the rule in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999). After remand and from 1993 until 1999, the case advanced in state court. [FN3]

FN2. See *Michetti Pipe Stringing, Inc. v. Murphy Brothers, Inc.*, 125 F.3d 1396 (11th Cir.1997), and cases cited therein at n. 6.

FN3. In *Morsani, et al. v. Major League Baseball, et al.*, Appeal No. 98-01327, the plaintiffs are appealing the trial court's award of summary judgment as to count I of the complaint but not appealing the summary judgment as to count IV. The Second District Court of Appeal stayed its proceedings following the removal of this action to federal court. Likewise, the Florida Supreme Court stayed its consideration of a question certified by the district court of appeal pursuant to Rule 9.125, Florida Rules of Appellate Procedure.

THE DEFENDANTS' SECOND REMOVAL

On May 5, 1999, the defendants again filed a notice of removal, relying on the second paragraph of 28 U.S.C. § 1446(b):

[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.

The defendants contend that *Murphy Brothers* is an "order or other paper" within the meaning of Section 1446(b) and, therefore, that the appearance of *Murphy Brothers* is an event triggering a renewed right of removal. Consistent with that assumption, the defendants filed their notice of removal within thirty days after publication of *Murphy Brothers*.

*1333 DISCUSSION

I.

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). [FN4] 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

79 F.Supp.2d 1331

Page 3

79 F.Supp.2d 1331, 2000-1 Trade Cases P 72,845

(Cite as: 79 F.Supp.2d 1331)

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). [FN5]

FN4. See, e.g., *Lozano v. GPE Controis*, 859 F.Supp. 1036, 1038 (S.D.Tex.1994) (the term "other paper" refers to papers generated within the specific state proceeding to be removed and not other unrelated judicial opinions that might suggest removability); *Kocaj v. Chrysler Corp.*, 794 F.Supp. 234, 236 (E.D.Mich.1992) (circuit court of appeals decision was not "other paper" making action removable); *Johansen v. Employee Benefit Claims, Inc.*, 668 F.Supp. 1294, 1296 (D.Minn.1987) (Supreme Court decision is not an "order or other paper" making action removable; "other paper" refers solely to documents generated within the state court litigation itself); *Holiday v. Travelers Ins. Co.*, 666 F.Supp. 1286 (W.D.Ark.1987) (recent Supreme Court decisions were not "other papers" within the meaning of Section 1446(b)); *Hollenbeck v. Burroughs Corp.*, 664 F.Supp. 280, 281 (E.D.Mich.1987) (Supreme Court opinion in unrelated case did not constitute "order or other paper"); *Gruner v. Blakeman*, 517 F.Supp. 357, 360-61 (D.Conn.1981) (subsequent decision in a related case did not constitute "order or other paper"); *Avco Corp. v. Intern. Union*, 287 F.Supp. 132, 133 (D.Conn.1968) ("order or other paper" refers only to papers filed in proceeding itself, not to unrelated Supreme Court opinion); see also *O'Bryan v. Chandler*, 496 F.2d 403, 412 (10th Cir.), cert. denied, 419 U.S. 986, 95 S.Ct. 245, 42 L.Ed.2d

194 (1974) (noting *Avco* was rightly decided); *Metropolitan Dade County v. TCI TKR of South Florida*, 936 F.Supp. 958, 959 (S.D.Fla.1996) (Federal Communications Commission opinion was not an "order or other paper" making state court action removable).

FN5. This result is consistent with the well-established "voluntary/involuntary rule" applied to diversity cases removed pursuant to Section 1446(b). Under this rule, a state court case that is initially non-removable, but which subsequently becomes removable, may nevertheless not be removed unless the change that makes the case removable is the result of the plaintiff's voluntary act. See, e.g., *Poulos v. Naas Foods, Inc.*, 959 F.2d 69 (7th Cir.1992); *Insinga v. LaBella*, 845 F.2d 249 (11th Cir.1988); *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545 (5th Cir.1967). In both federal question and diversity cases, therefore, Section 1446(b) restricts defendants from removing most cases when the circumstance potentially allowing removal arises through no consequence of the plaintiff's actions.

[1] The two published decisions cited by the defendants that are contrary to this body of law are anomalous and unpersuasive. [FN6] Further, the defendants' reliance on *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir.1993); *Torres v. Ortega*, 1993 WL 62998 (N.D.Ill. Mar. 3, 1993); and *McCool v. American Red Cross*, 1992 WL 396805 (E.D.Pa. Dec.22, 1992) is ill-founded. In *1334 each of these cases, the courts interpret the "order or other paper" language of Section 1446(b) in light of Supreme Court authority enabling the American Red Cross to remove tainted blood-products cases. *American National Red Cross v. S.G.*, 505 U.S. 247, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992). [FN7] As the Third Circuit explained in *Doe*, the Supreme Court's S.G. decision was "not simply an order emanating from an unrelated action but rather ... an unequivocal order directed to a party to the pending litigation, explicitly authorizing it to

(Cite as: 79 F.Supp.2d 1331)

remove any cases it is defending." *Doe*, 14 F.3d at 202. Notably, the Third Circuit expressly distinguished its "extremely confined [and] narrow" ruling from the line of cases cited in footnote 4 of this order. *Doe*, 14 F.3d at 202. [FN8]

FN6. *Smith v. Burroughs Corp.*, 670 F.Supp. 740, 741 (E.D.Mich.1987) (Supreme Court decision concerning ERISA preemption was an "order or other paper" allowing removal); *Davis v. Time Ins. Co.*, 698 F.Supp. 1317, 1322 (S.D.Miss.1988) (same). In both of these cases, the courts reacted to the Supreme Court's decisions in *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), which confirmed ERISA's broad preemption of state law claims. A compelling majority of courts, however, have not found the *Pilot Life* and *Metropolitan Life* decisions to constitute an "order or other paper" pursuant to 28 U.S.C. § 1446(b). See, e.g., *Johansen v. Employee Benefit Claims, Inc.*, 668 F.Supp. 1294, 1296 (D.Minn.1987) (Supreme Court's recent ERISA decisions did not give rise to a right of removal); *Holiday v. Travelers Ins. Co.*, 666 F.Supp. 1286 (W.D.Ark.1987) (same); *Hollenbeck v. Burroughs Corp.*, 664 F.Supp. 280, 281 (E.D.Mich.1987) (same). Moreover, the Eastern District of Michigan abandoned *Smith v. Burroughs Corp.* in ruling precisely to the contrary in *Kocaj v. Chrysler Corp.*, 794 F.Supp. 234 (E.D.Mich.1992).

FN7. In *American National Red Cross v. S.G.*, the Supreme Court held that the Charter of the American National Red Cross, 36 U.S.C. § 2, authorized the Red Cross "to remove from state to federal court any state-law action it is defending." 505 U.S. at 248, 112 S.Ct. at 2467 (1992).

FN8. If Congress passed a law stating that in any case affecting the enterprise of major league baseball, the defendants may remove the action to a district court, a substantive right of removal would accrue at that time, and the S.G. decision would serve as a closer analogy. However, *Murphy Brothers* creates no new or renewed right of removal. *Murphy Brothers* refines a method for the computation of time pursuant to Section 1446(b). A change in the method of computation of time is neither a substantive right of removal nor a right to appeal or reconsider an earlier order regarding removal.

[2] For the foregoing reasons, the defendants' argument that *Murphy Brothers* constitutes an "order or other paper" allowing removal of this action to federal court is rejected. *Murphy Brothers* neither revives a long-deceased removal right nor creates a new one. [FN9]

FN9. A peculiar irony of the defendants' position is that they essentially ask this Court to revisit a prior order that was not reviewable on appeal. See 28 U.S.C. § 1447(d). The defendants claim to enjoy a resurrected right of removal notwithstanding the fact that, even if Judge Kovachevich had remanded incorrectly in 1993 (that is, contrary to the then-prevailing law), the defendants were without an opportunity to appeal and were irreparably remanded--right or wrong. See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28, 116 S.Ct. 494, 496-97, 133 L.Ed.2d 461 ("As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction ... a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)").

II.

Of the four counts alleged in the plaintiffs' initial

(Cite as: 79 F.Supp.2d 1331)

complaint, the plaintiffs and the defendants agree that federal question jurisdiction attaches, if at all, only as a result of the allegations in count IV, the plaintiffs' state law antitrust claim. Relying on the "antitrust exemption" professional baseball has long enjoyed, [FN10] the defendants argue that this Court should exercise jurisdiction over count IV because "federal law *1335 has entirely preempted state antitrust law with regard to the business of baseball." Defendants' Opposition to Plaintiffs' Motion to Remand (Doc. 15) at p. 12. (The remaining counts of the complaint are state law tortious interference claims, which the defendants urge the Court to accept in an exercise of supplemental jurisdiction.)

FN10. See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953); *Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922); *Prof'l Baseball Schools and Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1085-86 (11th Cir.1982) ("the exclusion of the business of baseball from the antitrust laws is well-established"); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir.1978); *Portland Baseball Club v. Kuhn*, 491 F.2d 1101 (9th Cir.1974); *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir.1970), cert. denied, 400 U.S. 1001, 91 S.Ct. 462, 27 L.Ed.2d 452 (1971); *McCoy v. Major League Baseball*, 911 F.Supp. 454 (W.D.Wash.1995); *New Orleans Pelicans Baseball, Inc. v. National Ass'n of Professional Baseball Leagues, Inc.*, 1994 WL 631144 (E.D.La. Mar. 1, 1994); *Minnesota Twins Partnership v. State*, 592 N.W.2d 847 (Minn.1999); *State v. Milwaukee Braves, Inc.*, 31 Wis.2d 699, 144 N.W.2d 1 (1966), cert. denied, 385 U.S. 1044, 87 S.Ct. 770, 17 L.Ed.2d 689 (1967). See generally Hon. Connie Mack and Richard M. Blau, *The Need for Fair Play*;

Repealing the Federal Baseball Antitrust Exemption, 45 Fla. L.Rev. 201 (1993) (discussing the broad scope of the exemption). Notwithstanding abundant and controlling federal precedent to the contrary, *Butterworth v. National League of Professional Baseball Clubs*, 644 So.2d 1021 (Fla.1994), purports to determine that professional baseball's antitrust exemption applies only to the player reserve system. Utterly foreign to the unquestionable weight of governing federal authority, this view, most charitably construed, amounts to a prediction that the Supreme Court of the United States (which, after all, determines such matters without reference to the inclinations of Florida's Supreme Court) will recede from *Flood v. Kuhn* in due course. Perhaps so. However, the boundaries of the federal antitrust laws in general and the baseball exemption in particular are not subject to accretion or reliction in response to a change of the tide at the Florida Supreme Court. Perhaps the only way this case might properly reside in federal court is if count IV is resuscitated and Florida's courts purport to apply *Butterworth*. Removal undoubtedly would follow.

[3] In their memoranda, the parties do not address whether *Murphy Brothers* applies retroactively--that is, entitles a disappointed removing party to an opportunity to procure a reassessment of past law (and decisions rightly rendered in accord with it) in light of present law. The Supreme Court in *Murphy Brothers* did not address whether its decision applies retroactively or only prospectively, and other Supreme Court decisions dealing with retroactivity provide little guidance. [FN11] However, the retroactivity question in this case is effectively obscured or mooted by the fact that the plaintiffs' claims differ in a critical respect from the plaintiffs' claims at the time this case was first removed. Specifically, the state trial court awarded summary judgment to the defendants on count IV, the plaintiffs' antitrust claim. For this reason, even

(Cite as: 79 F.Supp.2d 1331)

if *Murphy Brothers* applies retroactively, and even if Judge Kovachevich for this reason could be said to have ruled "wrongly," and even if the notice of removal in 1993 was somehow rendered timely, the Court would still remand this case for lack of subject matter jurisdiction.

FN11. Many commentators have noted that the Supreme Court's "retroactivity jurisprudence" has grown increasingly opaque in recent years. See, e.g., K. David Steele, *Prospective Overruling and the Judicial Role After James B. Beam Distilling Co. v. Georgia*, 45 Vand. L.Rev. 1345 (1992); Paul E. McGreal, *Back to the Future: The Supreme Court's Retroactivity Jurisprudence*, 15 Harv. J.L. & Pub. Pol'y 595 (1992).

This Court is bound to follow precedent favoring the broad exemption from antitrust liability afforded the business of professional baseball. [FN12] However, the plaintiffs' claims as now arrayed present no attack on baseball's antitrust exemption. After the defendants obtained summary judgment on count IV of the complaint, the plaintiffs chose not to appeal the trial court's decision. [FN13] Accordingly, the plaintiffs *1336 no longer threaten the defendants with liability on the only count that provides the defendants' asserted basis for removal. If the purpose of baseball's broad antitrust exemption is to protect the enterprise of baseball from the threat of antitrust liability, that purpose is currently unobstructed by the presence of the remaining tortious interference claims in state court.

FN12. Indeed, even when Congress passed the Curt Flood Act of 1998, Pub.L. 105-297, Oct. 27, 1998, 112 Stat. 2824, repealing the antitrust exemption as it applied to the employment of major league baseball players, Congress explicitly preserved the exemption for all matters "relating to or affecting franchise expansion, location or relocation, franchise ownership issues, including ownership transfers...." 15 U.S.C. § 27a(b)(3). See generally Ted Curtis, *The Flood Act's*

Place in Baseball Legal History, 9 Marq. Sports L.J. 403 (1999). Congress' preservation of the broadest aspects of the antitrust exemption in this recent legislation casts in sharp relief the misdirection in *Butterworth*, 644 So.2d 1021 (Fla.1994).

FN13. Although the plaintiffs filed a notice of appeal from the trial court's order granting summary judgments on both counts I and IV of their complaint, they declared in their "Statement of Judicial Acts to be Reviewed," filed pursuant to Rule 9.200(a)(3), Fla.R.App.P., that they challenged only the trial court's award of summary judgment on count I and not the summary judgment as to count IV. Accordingly, in their appellate brief, the plaintiffs expressed that they would "not quarrel with the Trial Court's disposition of the antitrust violations alleged in Count IV," and made no argument challenging the summary judgment concerning count IV. Plaintiffs' reply memorandum (Doc. 16) at p. 2.

Rule 9.110(k), Florida Rules of Appellate Procedure, although not specifically cited in the memoranda of either party, provides the plaintiffs an opportunity to appeal the summary judgment concerning count IV either (1) promptly upon rendition of the partial final judgment or (2) on appeal from the final judgment "in the entire case." However, the defendants argue wrongly that "[s]ummary judgment against the plaintiffs on Count IV was ... not immediately appealable," and therefore "the plaintiffs' antitrust claim is very much 'in existence.'" Defendants' Opposition to Plaintiffs' Motion to Remand (Doc. 15) at p. 10. [FN14] The plaintiffs counter that this argument is illusory, because their failure to appeal their antitrust claim before Florida's Second District Court of Appeal "estops" them from appealing the summary judgment on count IV in the future. [FN15] However, the plaintiffs' assertion is entirely speculative and dependent on principles of state law that Florida's courts have not yet applied in this case.

79 F.Supp.2d 1331

Page 7

79 F.Supp.2d 1331, 2000-1 Trade Cases P 72,845

(Cite as: 79 F.Supp.2d 1331)

FN14. The defendants' assertion that the plaintiffs could not appeal the summary judgment order is incorrect, and reveals a misunderstanding of the relation between Rule 9.110(k), Fla.R.App.P., on the one hand, and *Mendez v. West Flagler Family Ass'n, Inc.*, 303 So.2d 1 (Fla.1974), on the other. *Mendez* and related cases govern the defendants' ability to appeal the partial final judgment respecting count IV as a "final order," notwithstanding the pendency of counts I, II, and III. Without respect to whether the partial final judgment on count IV is appealable as a "final order" under *Mendez*, Rule 9.110(k) preserves the plaintiffs' right to appeal the adverse order on count IV from the final judgment in the case as a whole.

FN15. To underscore their abandonment of their antitrust claim, the plaintiffs filed a "Notice of Intent to Rely Upon Supplemental Pleading" (Doc. 21), attaching a notice of voluntary dismissal of count IV with prejudice, which the plaintiffs state they intend to file in state court. Because Rule 1.420(a), Florida Rules of Civil Procedure, provides that the plaintiffs may dismiss count IV only by stipulation or court order, the plaintiffs' notice (Doc. 21) is not entitled to binding effect (nor is it either a "pleading" of any kind, pursuant to Rule 1.100, Fla.R.Civ.P., or any sort of "supplement" within the applicable rules).

CONCLUSION

The plaintiffs' complaint, as it stands before this Court, presents no federal question. Nothing suggests that in 1993 Judge Kovachevich wrongly remanded this action as the law was then or that any different result attaches in 1999 as the law is now. Accordingly, the defendants' removal of this action was in 1993 distinctively tardy but is in 1999, at best, decidedly premature.

For these reasons, the plaintiffs' motion to remand (Doc. 8) is **GRANTED**. The Clerk is directed to

(1) close the file and (2) terminate all pending motions.

END OF DOCUMENT

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

STATE OF WISCONSIN,

Plaintiff,

OPINION and
ORDER

04-C-0477-C

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., FUJISAWA HEALTHCARE, INC.,
GENSIA SICOR PHARMACEUTICALS, INC.,
GLAXOSMITHKLINE, INC., JOHNSON &
JOHNSON, INC., PFIZER, INC., PHARMACIA,
SCHERING-PLOUGH CORPORATION,
TAP PHARMACEUTICAL PRODUCTS, INC.,
WATSON PHARMACEUTICALS, INC.,

Defendants.

This is a suit for monetary and injunctive relief filed by the State of Wisconsin against twenty pharmaceutical manufacturers. Plaintiff alleges that defendants inflated the average wholesale prices of their drugs, thereby violating several provisions of Wisconsin law. The

A copy of this document
has been mailed to the following:

All counsel of
record
this 6th day of October, 2004 by
S. Vogel, Secretary to Judge Crabb

10-5

case was originally filed in the Circuit Court for Dane County. On July 14, 2004, defendant Bayer Corporation filed a notice of removal with this court, asserting that this court had jurisdiction over this case under the diversity statute, 28 U.S.C. § 1332. All of the other defendants filed consents to the removal, with the exception of defendant Gensia Sicor Pharmaceuticals, Inc., which did not file its consent until July 27, 2004, one day after plaintiff filed its motion to remand. In its motion, plaintiff also requested an award of costs and attorney fees incurred as a result of the removal. In an order dated September 9, 2004, I lifted a previously entered stay on the briefing regarding plaintiff's motion to remand. Defendants have submitted a brief in opposition and I am ready to rule on plaintiff's motion. After reviewing the arguments submitted by the parties, I conclude that removal of this case was improper because this court lacks subject matter jurisdiction over the case. Therefore, I will grant plaintiff's motion to remand. In addition, I will grant plaintiff's request for costs and attorney fees.

FACTS

Plaintiff State of Wisconsin, through its Attorney General Peggy A. Lautenschlager, filed its complaint in the Circuit Court for Dane County, Wisconsin, on June 3, 2004. Plaintiff's complaint consists of five counts arising from defendants' alleged practice of "publishing false and inflated prices for their drugs." Cpt. ¶ 1. Plaintiff brought this action

“on behalf of itself, its citizens, and Wisconsin organizations (those that pay the prescription drug costs of their members, hereinafter ‘private payers’), who have paid inflated prices for defendants’ prescription drugs as a result of defendants’ unlawful conduct.” Cpt. ¶ 2.

Plaintiff alleges that defendants’ alleged inflation of drug prices caused harm to the state, Wisconsin citizens, and certain private, Wisconsin-based organizations. First, plaintiff alleges that defendants’ conduct caused the state to overpay for the drugs it purchases through its Medicaid program. Second, plaintiff alleges that Wisconsin Medicare Part B participants, primarily disabled and elderly citizens, were forced to pay higher co-pays for their prescription drugs than they would if defendants had published the actual drug prices. Third, plaintiff alleges that private, Wisconsin-based organizations that pay the prescription drug costs of their members overpaid for prescription drugs. Cpt. ¶ 52.

The 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.

Plaintiff seeks several forms of relief. With respect to Counts I and II, plaintiff seeks injunctive relief, civil forfeitures and restitution to the state programs, private citizens, and

other private payers harmed by defendants' actions. On Count III, plaintiff seeks injunctive relief, civil forfeitures and treble damages for the state and those injured by defendants' conduct. With respect to Count IV, plaintiff seeks civil forfeitures and remedial damages. For Count V, plaintiff seeks injunctive relief and disgorgement of all profits realized as a result of defendants' unlawful conduct.

DISCUSSION

A. Jurisdiction

Initially, I note that on August 3, 2004, the Clerk of the Judicial Panel on Multidistrict Litigation issued a conditional transfer order transferring this case to the District of Massachusetts for consolidated pre-trial proceedings 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." Thus, the court has jurisdiction to rule on plaintiff's motion.

B. Standard of Review

Although plaintiff has requested this court to remand the case, defendants bear the

burden of proving that this court has subject matter jurisdiction because they removed the case to federal court. Tykla v. Gerber Products Co., 211 F.3d 445, 448 (7th Cir. 2000). To meet this burden, defendants must support their allegations of jurisdiction with evidence indicating a “reasonable probability that jurisdiction exists.” Chase v. Shop ‘N Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997). The existence of jurisdiction is determined as of the date of removal. Sirotzky v. New York Stock Exchange, 347 F.3d 985, 988 (7th Cir. 2003). Also, 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. See Doe v. Allied Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993); People of the State of Illinois v. Kerr-McGee Corp., 677 F.2d 571, 576 (7th Cir. 1982).

Plaintiff argues that removal of this case was improper for three reasons. First, there is no diversity jurisdiction in this case because the state of Wisconsin is the real party in interest. Second, the Eleventh Amendment bars removal of this case. Third, removal was improper because one of the defendants, Gensia Sicor Pharmaceuticals, did not file a timely consent to the notice of removal. I agree that the state of Wisconsin is the real party in interest and that this court does not have diversity jurisdiction over the case. Because my agreement with plaintiff’s first argument is sufficient to decide this motion, I express no opinion on plaintiff’s arguments regarding the Eleventh Amendment and failure to file a

timely consent.

C. Real Party in Interest

The removal statute, 28 U.S.C. § 1441, 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 by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” In its notice of removal, defendant Bayer Corporation alleged that this court had original jurisdiction over this case by way of diversity. Diversity jurisdiction requires that the parties be citizens of different states and the dispute between them exceed \$75,000. 28 U.S.C. §1332.

It is well settled that a state is not a citizen for diversity purposes. Indiana Port Comm’n v. Bethlehem Steel Corp., 702 F.2d 107, 109 (7th Cir. 1983) (citing Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482 (1891)). However, in determining whether diversity jurisdiction exists, courts must look beyond the named parties and consider the citizenship of the real parties in interest. Navarro Savings Assn. v. Lee, 446 U.S. 458, 460 (1980); CCC Information Services, 230 F.3d at 346. The focus of the “real party in interest” inquiry is on “the essential nature and effect of the proceedings.” Adden v. Middlebrooks, 688 F.2d 1147, 1150 (7th Cir. 1982) (citing Ex parte New York, 256 U.S. 490, 500 (1921)). The court must determine whether plaintiff has “a substantial stake in

the outcome of the case.” State of West Virginia v. Morgan Stanley & Co. Inc., 747 F. Supp. 332, 337 (S.D. W. Va. 1990) (internal citations and quotations omitted).

Defendants propose to split the claims in plaintiff’s complaint into two groups: those brought on behalf of the state and those brought on behalf of private citizens and organizations in Wisconsin. Defendants concede that plaintiff has an interest in the claims brought on behalf of the state but argue that with respect to the claims brought on behalf of private parties, those private parties are the true parties in interest because the relief requested will go directly to them. Therefore, defendants argue, the citizenship of those parties is relevant for diversity purposes. Defendants then argue that the claims brought on behalf of several large Wisconsin-based health insurers meet § 1332(a)(1)’s diversity and amount in controversy requirements. Thus, the court has diversity jurisdiction over those claims and supplemental jurisdiction over all other claims in plaintiff’s complaint pursuant to 28 U.S.C. § 1367.

In support of their arguments, defendants cite State of Connecticut v. Levi Strauss & Co., 471 F. Supp. 363 (D. Conn. 1979). In that case, Connecticut brought suit under its enforcement capacity and as *parens patriae* against the defendant under the state’s antitrust statute. The defendant removed the case to federal court and the state sought remand. In analyzing whether diversity jurisdiction existed, the court began by noting that the state was seeking “several types of monetary awards, and . . . in different capacities.” Id. at 370.

Specifically, the state had requested (1) recovery of allegedly unlawful overcharges incurred by Connecticut citizens, to be distributed to the affected individuals where possible but otherwise to be kept by the state; (2) a statutorily authorized civil penalty; and (3) attorney fees. Id. The court concluded that, insofar as the state was seeking monetary relief for “identifiable purchasers, the citizen status of the purchasers rather than the sovereign status of their benefactor controls for diversity purposes.” Id. at 371.

Plaintiff argues that this court should not apply the reasoning in Levi Strauss to this case. Plaintiff argues that it is the real party in interest in this case when the case is viewed as a whole. First, Counts I-IV in the complaint (the two consumer fraud claims, the secret rebates claim and the Medicaid fraud claim) are brought pursuant to the state’s law enforcement authority. See Wis. Stat. § 100.18 (11)(d) (authorizing Department of Justice to bring suit in name of state to enjoin violation of consumer fraud statute); § 133.16 (authorizing Department of Justice to bring suit to prevent or restrain violations of antitrust statute); § 49.495 (giving Department of Justice authority to prosecute violations of laws affecting medical assistance programs). Second, a state is not stripped of its sovereignty merely because it seeks relief on behalf of its citizens in addition to relief for harm done to the state itself. In support of this argument, plaintiff cites Moore v. Abbott Laboratories, Inc., 900 F. Supp. 26 (S.D. Miss. 1995) and State of New York v. General Motors Corp., 547 F. Supp. 703 (S.D.N.Y. 1982).

In Moore, 900 F. Supp. at 28-29, the Mississippi Attorney General filed suit against three pharmaceutical companies, alleging violations of the state's antitrust and consumer fraud statutes. The attorney general alleged that the defendants agreed to fix the wholesale price of infant formula sold in the state, thereby injuring private citizen consumers and the state, which purchased infant formula pursuant to a welfare program. The attorney general filed the suit on behalf of the state and as *parens patriae* on behalf of injured Mississippi citizens. The defendants removed the case to federal court, arguing that the real parties in interest were the private individuals who had purchased the formula. The court disagreed, ruling that the state was the real party in interest because the attorney general was suing under his statutory authority to bring suit for violations of the antitrust statute. Id. at 31.

In State of New York, 547 F. Supp. at 704, the New York Attorney General sued General Motors after receiving consumer complaints about alleged defects in one of the transmissions used in GM automobiles. The state sought several forms of injunctive relief and restitution to the injured consumers. General Motors removed the case to federal court, arguing that the state was merely a nominal party and that the real parties in interest were the allegedly defrauded consumers. The district court remanded the case primarily because of the wide-ranging injunctive relief sought by the state. Id. at 707. The court noted that the state had a "quasi-sovereign interest" in securing an honest marketplace that "preclude[d] characterizing the state as a nominal party without a real interest in the

outcome of this lawsuit.” Id. at 705-06 (citing Kelley v. Carr, 442 F. Supp. 346, 356-57 (W.D. Mich. 1977)). The court continued by stating that

This conclusion is not altered by the State’s decision to seek restitutionary relief and damages on behalf of those who allegedly have been defrauded by GM. Recovery of damages for aggrieved consumers is but one aspect of the case. The focus is on obtaining wide-ranging injunctive relief designed to vindicate the State’s quasi-sovereign interest in securing an honest marketplace for all consumers. That recovery on behalf of an identifiable group is also sought should not require this Court to ignore the primary purpose of the action and to characterize it as one brought solely for the benefit of a few private parties.

Id. at 706-07.

In the present case, defendants’ arguments appear to rest on a basic misunderstanding of the court’s inquiry when faced with a real party in interest question. Defendants argue that the complaint should be split initially into two groups: claims made on behalf of private entities and claims made on behalf of the state. According to defendants, the court should then determine who is the real party in interest with respect to each group of claims. Defendants are correct that plaintiff appears to be wearing two hats by requesting relief for itself and for private parties, but that fact does not require this court to break the complaint apart along those lines for purposes of determining the real party in interest. On the contrary, most courts analyze real party in interest questions by examining the state’s interest in a lawsuit as a whole. See Moore, 900 F. Supp. at 28-29, 31; State of West Virginia, 747 F. Supp. at 337; State of Missouri ex rel. Webster v. Freedom Financial Corp.,

727 F. Supp. 1313, 1317 (W.D. Mo. 1989) (“[t]he interest of the state of Missouri . . . is sufficient to preclude characterizing the State as a nominal party without a real interest in the outcome of *this lawsuit*) (emphasis added); State of New York, 547 F. Supp. at 707 (“This is, in all respects, the State’s action.”).

Defendants cite Missouri, Kansas & Texas Railway Co. v. Hickman, 183 U.S. 53, 59 (1901), in which the Supreme Court stated that, in determining whether a state may be considered the real party in interest, “the state is such real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate.” This language seems to foreclose plaintiff’s argument that it is the real party in interest because plaintiff is seeking restitution for private parties. However, lower courts have not strictly construed the language in Missouri, but instead have focused on the state’s interest, monetary or otherwise, in the context of the entire case. See State of West Virginia, 747 F. Supp. at 338 (citing cases).

Thus, viewing the complaint as a whole, I am persuaded that plaintiff has a “substantial stake” in the outcome of this case. Four of the five claims in this case were brought by the Attorney General pursuant to specific statutory authority. See Moore, 900 F. Supp. at 31. In addition to damages for the private parties who allegedly overpaid for defendants’ drugs, plaintiff seeks injunctive relief on four of the five claims. This type of prospective relief goes beyond addressing the claims of previously injured organizations or

individuals. It is aimed at securing an honest marketplace, promoting proper business practices, protecting Wisconsin consumers and advancing plaintiff's interest in the economic well-being of its residents. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982) (discussing state interests enforceable through *parens patriae* actions); State of Missouri ex rel. Webster, 727 F. Supp. at 1317; Kelley, 442 F. Supp. at 356-57 (“some of the most basic of a state’s quasi-sovereign interests include maintenance of the integrity of markets and exchanges operating within its boundaries, protection of its citizens from fraudulent and deceptive practices, support for the general welfare of its residents and its economy, and prevention of its citizens’ revenues from being wrongfully extracted from the state.”). The fact that private parties may benefit monetarily from a favorable resolution of this case does not minimize or negate plaintiff’s substantial interest. State of Alabama ex rel. Galanos v. Star Service & Petroleum Co., 616 F. Supp. 429, 431 (S.D. Ala. 1985) (“[w]hether other parties will benefit from this action does not affect the state’s valid interest in enforcing this statutory scheme”); State of New York, 547 F. Supp. at 706-07. In sum, I conclude that the state of Wisconsin is the real party in interest in this litigation. Consequently, this court does not have jurisdiction over this case under 28 U.S.C. § 1332.

D. Fees and Costs

Finally, plaintiff has asked for an award of attorney fees and costs incurred in seeking

ORDER

IT IS ORDERED that

1. Plaintiff's motion to remand this case to state court is GRANTED.
2. Plaintiff's request for costs and attorney fees under 28 U.S.C. § 1447(c) is GRANTED.
3. Plaintiff may have until October 20, 2004, in which to submit an itemization of the actual expenses, including costs and attorney fees, it incurred in responding to defendants' removal.
4. Defendants may have until November 3, 2004, to file an objection to any itemized costs and fees.
5. This case is REMANDED to the Circuit Court for Dane County, Wisconsin.
6. The clerk of court is directed to return the record in case number 04-C-0477-C to the Circuit Court for Dane County, Wisconsin.

Entered this 5th day of October, 2004.

BY THE COURT:

Barbara B. Crabb
BARBARA B. CRABB
District Judge

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

-----X

STATE OF WISCONSIN,	:	
Plaintiff,	:	
v.	:	Case No.: 05 C 408 C
	:	
ABBOTT LABORATORIES, et al.,	:	
Defendants.	:	

-----X

**DEFENDANT SANDOZ INC.'S RESPONSES AND OBJECTIONS TO
PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure ("FRCP"), defendant Sandoz Inc. ("Sandoz"), by its attorneys, hereby asserts its Responses and Objections to Plaintiff State of Wisconsin's ("the State") First Set of Requests for Production of Documents (the "First Document Requests"), that were served prior to the removal of this action to this Court, as follows:

In making these objections and responses, Sandoz deems the States' First Document Requests as having been propounded under the FRCP and responds pursuant to the FRCP. The objections and written responses set forth herein are being offered pursuant to a prior agreement with counsel for the State to provide written responses to the First Document Requests on or before July 15, 2005. However, Sandoz reserves its right to seek a stay of discovery before this Court or before the court to which the multi-district litigation, In re Pharmaceutical Industry Average Wholesale Price Litigation, MDL No. 1446, has been assigned; Defendants will seek to have this action transferred to that multi-district litigation. Moreover, by

providing these responses, Sandoz does not agree to produce documents in advance of any case management order or discovery schedule entered by this Court or by the court presiding in In re Pharmaceutical Industry Average Wholesale Price Litigation.

GENERAL OBJECTIONS

The following General Objections apply to each Definition and Request and shall have the same force and effect as if fully set forth as a Specific Objection to each Definition and Request:

1. By objecting and responding to these First Document Requests, Sandoz does not in any way waive or intend to waive (a) any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, for any purpose, of any information or documents that may be produced in response to the First Document Requests; (b) any objections as to the vagueness, ambiguity, or other infirmity in the form of any Request; (c) any objections based on the undue burden imposed by any Request; (d) any objections to the use of the documents or information that may be produced in response to the First Document Requests at any hearings or at trial; (e) any objections to any further Requests involving or relating to the subject matter of the First Document Requests; (f) any privileges, rights, or immunity under the applicable FRCP, Federal Rules of Evidence, statutes, or common law.

2. By stating herein that it agrees at an appropriate time to produce documents or information in response to a particular Request, Sandoz does not assert that it has responsive documents or information or that such materials exist, only that it agrees that, at the appropriate time, it will conduct a reasonable search of its files most likely to contain responsive documents or information and produce responsive, non-objectionable, non-privileged documents revealed

by such investigation. No objection made herein, or lack thereof, is an admission by Sandoz as to the existence or non-existence of any information.

3. Sandoz objects to the First Document Requests as they were not served upon Sandoz pursuant to the requirements of WIS. STAT. § 804.09 and in violation of the stay entered by the State of Wisconsin Circuit Court (“Wisconsin Circuit Court”) in its Order dated April 8, 2005. Notwithstanding this objection, Sandoz has accepted service of the First Document Requests. Sandoz further objects to the First Document Requests to the extent that the State purports to amend them by the letter from its counsel, Miner, Barnhill & Galland, P.C. to counsel for Sandoz, dated May 20, 2005 in a manner unauthorized by the Wisconsin Rules of Civil Procedures or FRCP. In making the objections and responses set forth herein, Sandoz understands the State to have merely offered, as a possible compromise, to narrow its definition of “Targeted Drugs” to the over 300 formulations of 52 drugs marketed by Sandoz, that are identified in Exhibit A to that letter.

4. Sandoz objects to the First Document Requests to the extent that they are premature and were propounded by the State in violation of the Wisconsin Circuit Court’s stay entered on April 8, 2005. Sandoz further objects to the extent that the First Document Requests are premature in that they seek a response while the Defendants’ motion to dismiss this action is *sub judice*. Sandoz further objects that it has had inadequate time to complete its investigation and discovery relating to this action and any Objections set forth below are based upon, and necessarily limited to, information that has been ascertained thus far.

Pursuant to FRCP 26(e), Sandoz reserves its right to amend, supplement, and/or to withdraw any General or Specific Objection set forth herein on the basis of documents or information found during its investigation or any discovery that might be taken in this action.

5. Sandoz objects to each Definition and Request to the extent it imposes or purports to impose discovery obligations greater than, or inconsistent with, Sandoz's obligations under the FRCP and to the extent that the State seeks discovery beyond that permitted by such Rules.

6. Sandoz objects to each Definition and Request to the extent it seeks information or documents protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or protection against disclosure.

7. Sandoz objects to each Definition and Request to the extent it seeks the production of proprietary or commercially sensitive information, including but not limited to, personal financial information, confidential and/or proprietary research, procedures and processes relating to the pricing of pharmaceuticals, current and past marketing plans and methods, and current and past business planning and financial information. Sandoz' production of any document or provision of information pursuant to these Requests shall not be constructed as a waiver of the confidentiality of any such document or information. Sandoz reserves its right to withhold production prior to the entry of a protective order by this Court or the court presiding in the MDL.

8. Sandoz objects to each Definition and Request to the extent it requires Sandoz to disclose information or produce documents outside of Sandoz' possession, custody, or control and/or no longer in existence, to seek information about or produce documents from persons not currently employed or associated with Sandoz, or to provide or search for information or produce documents in the possession, custody or control of non parties. At the appropriate time, Sandoz will only disclose information and produce documents that are within its possession, custody, or control.

9. Sandoz objects to each Definition and Request to the extent it seeks information or documents already in the State's possession, custody, or control or in the possession, custody, or control of any of the State's officers, employees, agents, agencies, or departments. Sandoz further objects to each Definition and Request to the extent it requires Sandoz to search for information publicly available or to search for information or documents for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State or any of its officers, employees, agents, agencies, or departments as it is for Sandoz.

10. Sandoz objects to each Definition and Request to the extent it is duplicative or redundant of other Definitions or Requests or other discovery requests propounded by the State. Each written response and/or document that may be produced in response to a specific Request is deemed to be produced in response to every other Request or discovery request of the State to which the written response, document, or information is or may be responsive.

11. Sandoz objects to each Definition and Request as unduly burdensome to the extent it seeks the provision or production of "any" or "all" documents on a subject matter. Subject to and without waiver of this objection, and subject to resolution of Sandoz' other objections set forth herein, Sandoz agrees that at an appropriate time it will produce non-privileged documents that are located following a reasonable search of those Sandoz' files that are most likely to contain documents or information responsive to these Requests.

12. Sandoz objects to any implications and to any explicit or implicit characterization of facts, events, circumstances, or issues in the First Document Requests. Sandoz' written response or production of documents or information in connection with a particular Request is not intended to indicate that Sandoz agrees with any implication or any explicit or implicit

characterization of facts, events, circumstances, or issues in the First Document Requests, or that such implications or characterizations are relevant to this action.

13. Sandoz objects to the definition of “Average Manufacturer Price” and “AMP” as set forth in Definition No. 1 on the grounds that it is vague and ambiguous, including the terms “the price you report or otherwise disseminate as the average manufacturer price for any Pharmaceutical that you report.” Sandoz further objects to this definition to the extent that it purports to set an accurate or legally significant definition of the terms Average Manufacture Price or AMP and Sandoz refers to the statutes and regulation for the definition of this term.

14. Sandoz objects to the definition of “Chargeback” as set forth in Definition No. 2 on the grounds that it is vague and ambiguous, including the terms “payment, credit or other adjustment,” “purchaser of a drug,” “difference between the purchaser’s acquisition cost and the price at which the Pharmaceutical was sold to another purchaser at a contract price.” Sandoz further objects to this definition to the extent that it purports to set an accurate or legally significant definition of the term Chargeback and to the extent it differs from the common usage and understanding of the term in the industry.

15. Sandoz objects to the definition of “Defined Period of Time” as set forth in Definition No. 3 on the grounds that it is overly broad and unduly burdensome. Sandoz further objects to this definition to the extent that it seeks information of documents from outside the statute of limitations applicable to the State’s claims, beyond the time period relevant to this action, and beyond the time period reasonably anticipated to encompass probative information that is relevant to the claims in this action.

16. Sandoz objects to the definition of “Document” in Definition No. 4 to the extent that it seeks to impose discovery obligations that are broader than, or inconsistent with, Sandoz’

obligations under the FRCP. Sandoz further objects to this definition to the extent it would require Sandoz to produce multiple copies of the same document or to conduct an unduly burdensome search for duplicative information including, among other things, electronic databases containing overlapping information.

17. Sandoz objects to the definition of “Incentive” as set forth in Definition No. 5 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz further objects to this definition to the extent that it seeks information or documents from outside the statute of limitations applicable to the State’s claims, beyond the time period relevant to this action, and beyond the time period reasonably anticipated to encompass probative information that is relevant to the claims in this action.

18. Sandoz objects to the definition of “National Sales Data” as set forth in Definition No. 6 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz objects to this definition to the extent that it seeks information or documents on “National Sales” that are not relevant to the State’s claims, which are limited to reimbursements made in the State of Wisconsin. Sandoz further objects to the definition of National Sales Data to the extent it incorporates other objectionable definitions, including “Incentive” and “Targeted Drugs.”

19. Sandoz objects to the definition of “Pharmaceutical” as set forth in Definition No. 7 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz further objects to this definition to the extent that it seeks to impose on Sandoz the burden to ascertain or obtain information in the exclusive possession of its customers or other non parties to this action.

20. Sandoz objects to the definition of “Spread” as set forth in Definition No. 8 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz further

objects to this definition to the extent that it seeks to impose on Sandoz the burden to ascertain or obtain information in the possession of its customers or other non parties to this action.

21. Sandoz objects to the definition of “Targeted Drugs” as set forth in Definition No. 9 to the extent that it is vague and ambiguous and inconsistent with the drugs identified in Exhibit A to the State’s letter of May 20, 2005. Sandoz further objects to this definition to the extent it seeks information from beyond the time period relevant in this litigation or information about drugs not named in the Amended Complaint on the grounds that such information is not relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence.

In addition, as set forth above in General Objection No. 9, Sandoz objects that this Definition requires Sandoz to undertake the burden of identifying drugs relevant to the State’s claims when such information is already in the State’s possession, custody, or control or in the possession, custody, or control of any of the State’s officers, employees, agents, agencies, or departments, and/or the burden on the State or its officers, employees, agents, agencies or departments to identify the drugs relevant to its claims is substantially the same or less than the burden on Sandoz.

SPECIFIC OBJECTIONS

Request No. 1:

All National Sales Data for each Targeted Drug during the Defined Period of Time.

Objection to Request No. 1:

In addition to the foregoing General Objections, Sandoz objects to Request No. 1 on the grounds that it is overly broad, vague and ambiguous, unduly burdensome, and designed to harass and annoy Sandoz. For example, on its face, this Request may be reasonably construed

to require Sandoz to first perform numerous calculations to identify the drugs subject to the State's request, then search its files covering the period from 1993 to the present for all documents containing data related to Sandoz' sales of those identified drugs, and then organize that data from the manner in which it is maintained to the manner called for by the State's request.

Sandoz also objects to Request No. 1 on the grounds that calls for the production of information or documents not relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence. Sandoz further objects to Request No. 1 to the extent that it purports to require Sandoz to disclose information or produce documents for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State or its officers, employees, agents, agencies or departments as it is for Sandoz, or for which responsive information or documents are available in the public domain

Subject to and without waiving the foregoing objections, Sandoz agrees that at an appropriate time it will conduct a reasonable search for and produce non-privileged documents responsive to a properly narrowed request.

Request No. 2:

All Documents containing AMPs as reported or calculated by you for the Targeted Drugs OR a spread sheet or database showing all reported and calculated AMPs for each Targeted Drug over the Defined Period of Time which lists when such AMPs were reported or calculated, and the quarter to which each AMP applies.

Objection to Request No. 2:

In addition to the foregoing General Objections, Sandoz objects to Request No. 2 on the grounds that it is overly broad, unduly burdensome, and seeks documents neither relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably

calculated to lead to the discovery of admissible evidence. Sandoz incorporates by reference its objection to the Definition “Targeted Drugs” and objects to Request No. 2 on the grounds that the phrases “reported or calculated” is overly broad, vague, and ambiguous. Sandoz further objects to Request No. 2 on the grounds that it purports to require Sandoz to disclose information or produce documents for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State or its officers, employees, agents, agencies or departments as it is for Sandoz, or for which responsive information or documents are available in the public domain. Sandoz also objects to Request No. 2 to the extent it seeks information protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or protection against disclosure.

Subject to and without waiving the foregoing objections, Sandoz agrees that it will at an appropriate time produce non-privileged documents sufficient to show the AMP reported by Sandoz to the Centers for Medicare and Medicaid Services for any Sandoz drug determined to be at issue in this action for the time period determined to be relevant to this action.

Request No. 3:

All Documents created by you, or in your possession, that discuss or comment on the difference (or Spread) between any Average Wholesale Price or Wholesale Acquisition Cost and the list or actual sales price (to any purchaser) of any of defendants’ Pharmaceuticals or any Pharmaceuticals sold by other manufacturers. Documents which merely list the AWP or WAC price and the list or actual sales price without further calculation of the difference, or without other comment or discussion of or about the spread between such prices are not sought by this request.

Objection to Request No. 3:

In addition to the foregoing General Objections, Sandoz objects to Request No. 3 on the grounds that it is overly broad, vague, and ambiguous, particularly the phrases “discuss or

comment,” “other manufacturers,” “difference (or Spread),” “Average Wholesale Price,” “Wholesale Acquisition Cost,” “list or actual sales price,” and “purchaser” are overly broad, vague, and ambiguous. For example, this Request may be reasonably construed to require Sandoz to search its files covering the period from 1993 to the present for any document mentioning the term “Spread,” with reference to any “Pharmaceutical” manufactured by any defendant in this action, literally thousands of drugs. The State’s attempt to narrow this Request by omitting documents lacking any “comment or discussion . . . about the spread” does not resolve the ambiguity of this Request and imposes on Sandoz the burden of deducing what type of references to the “Spread” are sought by this request.

Sandoz also objects to this Request to the extent it seeks documents neither relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence. Sandoz also objects to Request No. 3 on the grounds that it requires Sandoz to disclose information and produce documents outside of Sandoz’ possession, custody, or control; to seek information and produce documents about persons not currently employed or associated with Sandoz; or to provide or seek information and produce documents regarding non parties. Sandoz further objects to Request No. 3 on the grounds that it purports to require Sandoz to disclose information or produce documents for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State or its officers, employees, agents, agencies or departments as it is for Sandoz, or for which responsive information or documents are available in the public domain. Sandoz further objects to Request No. 3 to the extent it seeks information protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or protection against disclosure.

Subject to and without waiving the foregoing objections, Sandoz agrees that at an appropriate time it will produce non-privileged documents responsive to a properly narrowed request.

Request No. 4:

All Documents containing an average sales price or composite price identified by you in response to Interrogatory No. 1 of the State's First Set of Requests to All Defendants.

Objection to Request No. 4:

In addition to the foregoing General Objections, Sandoz objects to Request No. 4 on the grounds that the phrase "average sales price" and "composite price" are overly broad, vague, and ambiguous and Sandoz hereby incorporates by reference its objections and response to Interrogatory No. 1.

Sandoz also objects to this Request to the extent it seeks documents neither relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence. Sandoz further objects to Request No. 4 on the grounds that it purports to require Sandoz to disclose information or produce documents for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State as or its officers, employees, agents, agencies or departments as it is for Sandoz, or for which responsive information or documents are available in the public domain. Sandoz further objects to Request No. 4 to the extent it seeks information protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or protection against disclosure.

Request No. 5:

All Documents sent to or received from First DataBank, Redbook and Medi-span regarding the price of any Targeted Drug.

Objection to Request No. 5:

In addition to the foregoing General Objections, Sandoz objects to Request No. 5 on the grounds that it is overly broad, vague, ambiguous, and not reasonably calculated to lead to the discovery of admissible evidence. Sandoz also objects to the extent that the Request seeks documents not relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to admissible evidence, nor relevant to the time period relevant to this action. Sandoz also objects to Request No. 5 on the grounds that it requires Sandoz to disclose information and produce documents outside of Sandoz' possession, custody, or control; to seek information and produce documents about persons not currently employed or associated with Sandoz; or to provide or seek information and produce documents regarding non parties. Sandoz further objects to Request No. 5 to the extent it seeks reported prices on the grounds that the Request purports to require Sandoz to disclose information or produce documents which are available in the public domain, or for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State as or its officers, employees, agents, agencies or departments as it is for Sandoz.

Subject to and without waiving the foregoing objections, Sandoz will produce at an appropriate time non-privileged documents sent to or received from First DataBank, Redbook and Medi-span to the extent such documents include a price for any Sandoz drug determined to be at issue in this action.

Request No. 6:

All Documents in your possession prepared by IMS health regarding a Targeted Drug or the competitor of a Targeted Drug regarding pricing, sales or market share.

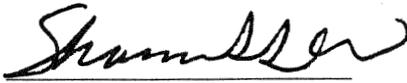
Objection to Request No. 6:

In addition to the foregoing General Objections, Sandoz objects to Request No. 6 on the grounds that the phrases “regarding,” “the competitor,” and “pricing, sales or market share” are overly broad, vague, ambiguous, and not reasonably calculated to lead to the discovery of admissible evidence. Sandoz also objects to the extent that the Request seeks documents not relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to admissible evidence, nor relevant to the time period relevant to this action. For example, this Request requires Sandoz to search for IMS Health documents that refer to, not only Sandoz’ drugs, but also to the unidentified drugs that the State considers “competitor[s]” of Sandoz’ drugs.

Subject to and without waiving the foregoing objections, Sandoz agrees that at an appropriate time it will conduct a reasonable search for and produce responsive, non-privileged documents that were prepared by IMS Health to the extent such documents include information about the price, sales, or market share of any Sandoz drug determined to be at issue in this action.

Dated at Milwaukee, Wisconsin, on July 15, 2005.

FRIEBERT, FINERTY & ST. JOHN, S.C.

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