

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

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STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN, INC., *et al.*,

Defendants.

THERESA M. OWENS  
CLERK US DIST COURT  
WD OF WI

No. 06-C- 0582-C

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

Since the State of Wisconsin filed its motion to remand, two federal courts have considered and rejected the identical arguments presented by Dey in its opposition brief. *See* October 30, 2006 order in *State of Hawaii v. Abbott Laboratories, Inc., et al.*, No. 06-00437 (D.Hawaii) ("Hawaii order"), and November 2, 2006 order in *State of Alabama v. Abbott Laboratories, Inc., et al.*, No. 2:06cv920 (M.D.Ala.) ("Alabama order"), copies of which were previously filed with the court.<sup>1</sup> This Court should reject Dey's arguments, as well.

First, as the Hawaii and Alabama courts concluded, neither the federal *qui tam* complaint against Dey nor the order unsealing it is an "order or other paper" within the meaning of 28 U.S.C. §1446(b) that restarted the 30-day removal clock. Accordingly, Dey's removal is untimely. Second, as those courts found, 31 U.S.C. §3732(b) does not constitute a grant of original jurisdiction, a necessary prerequisite to removal under 28 U.S.C. §1441(a).

<sup>1</sup> The Hawaii order was entered by Magistrate Judge Barry J. Kurren. On November 7, 2006, Dey appealed the order pursuant to Fed.R.Civ.P. 72(a). On November 13, 2006, Hawaii filed its response to Dey's appeal. Oral argument on the appeal is scheduled for November 27, 2006. Dey faces a serious uphill battle in its appeal, as the order can only be set aside if it is found to be "clearly erroneous or contrary to law." Fed.R.Civ.P. 72(a); D.Haw. Local Rule 74.1. It is neither.

Accordingly, even if the removals were timely (which they are not), federal jurisdiction does not exist and remand is required.<sup>2</sup>

**I. Dey's removal is untimely.**

Relying on the second paragraph of 28 U.S.C. §1446(b), Dey contends that the 30-day removal clock restarted on September 11, 2006, when it received from the United States Department of Justice a copy of the federal *qui tam* complaint and the September 9, 2006 unsealing order issued by the federal court in Boston. The second paragraph of §1446(b) provides:

If the case started by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable....

Although it was not clear from Dey's removal papers, Dey now contends that the *qui tam* complaint is an "other paper" and the unsealing order is an "order" within the meaning of this provision. This distinction is important, because, as explained below, the case law interpreting §1446(b) often distinguishes between these two terms.

As the State demonstrated in its opening brief, the predominant view of courts that have interpreted the terms "order" and "other paper" in §1446(b) have concluded that it applies only to events that occur within the state-court action being removed that are caused by the voluntary act of the plaintiff. This predominant construction and interpretation flows from the plain language of the statute as well as its legislative history. *See* plaintiff's memorandum in support of motion to remand ("remand motion"), at 5-9 and cases cited therein. Because the federal *qui tam* complaint and the order unsealing it did not occur within the Wisconsin state-court action

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<sup>2</sup> Importantly, only Dey has opposed the state's remand motion. The Court should therefore treat the motion as unopposed by the remaining defendants.

and were not caused by any act of Wisconsin (voluntary or otherwise), Dey's receipt of them did not provide a new 30-day period for removal.

As the state predicted, Dey does not seriously dispute that the above interpretation of the statute is the predominant one. Rather, Dey argues that the facts of this case fall within a narrow exception to the predominant interpretation as set forth in *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993), and *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001). Dey contends that these cases stand for the proposition that “[i]f an ‘order or other paper’ does emanate from a different case with a nexus to the action being removed and that ‘order or other paper’ has an effect on the basis for removal, the thirty (30) day time limit for removal under section 1446(b) is restarted.” Dey’s memorandum in opposition to plaintiff’s motion to remand (“opp.”), at 17. Dey grossly mischaracterizes the limited holdings of these cases. Neither cases supports Dey’s position.

As an initial matter, the federal *qui tam* complaint itself cannot trigger a new 30-day removal period under *American Red Cross* or *Green* because it is not an “order.” Accordingly, the only “order” that Dey can (and does) rely on as restarting the 30-day removal clock is the September 9, 2006 unsealing order. Dey fails to demonstrate that the unsealing order satisfies the rigorous test set forth in *American Red Cross* and *Green* in order to constitute an “order” within the meaning of §1446(b).

In *American Red Cross*, the Red Cross removed plaintiff’s state-law action, arguing that the “sue-or-be-sued” provision of its charter conferred federal jurisdiction. The district court rejected this argument and remanded the case. After remand, and while the case was still pending in state court, the Supreme Court held in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), that the “sue-or-be-sued” provision of the Red Cross’s charter conferred federal

jurisdiction. *The Supreme Court expressly authorized the Red Cross to remove* “any state-law actions it is defending.” *American Red Cross*, 14 F.3d at 197-98. The Court emphasized the narrow reach of its decision: “We take an extremely confined view of this case and our holding is equally narrow.” *Id.* at 202. Indeed, the Court repeatedly noted that the “order” in the intervening Supreme Court case was “an unequivocal order directed to a party in the pending litigation, explicitly authorizing it to remove any cases it [was currently] defending.” *Id.* Moreover, the Court only construed the term “order” in §1446(b). It expressly refused to construe or interpret the term “other paper.” *Id.* at 202.

More importantly, far from simply requiring that “a nexus” exists between the intervening court decision and the underlying state-court case and that the decision only have “an effect” on the basis for removal as Dey contends (*see opp.*, at 17), *American Red Cross* established a rigorous test for determining whether the relationship was sufficient to trigger a new 30-day removal period:

Some comment is required, however, to express our agreement with the Appellants’ premise that an order, as manifested through a court decision, must be sufficiently related to a pending case to trigger Section 1446(b) removability. We believe that an order is sufficiently related when, as here, the order in the case came from a court superior in the same judicial hierarchy, was directed at a particular defendant and expressly authorized that same defendant to remove an action against it in another case involving similar facts and legal issues.

*Id.* at 202-03.

Dey fails to satisfy this stringent test. First, the unsealing order is not a “court decision” in any meaningful sense of that term. *American Red Cross* addressed and is limited to orders that consider and resolve disputed questions of law. Here, however, the unsealing order was not the result of, nor did it resolve, any dispute between Dey and the federal government or the *qui tam* relator. Rather, it was simply a procedural order that allowed the lawsuit to become public

and permitted the federal government to commence litigation. For all practical purposes, the unsealing order was tantamount to the filing of the complaint. Second, the unsealing order did not come from a “court superior in the same judicial hierarchy.” Rather, it was issued by a federal district court in Boston, which has no binding effect on any proceedings in the Wisconsin state or federal courts. Third, the unsealing order was not “directed at a particular defendant.” Instead, it was directed to the clerk of the court, authorizing the complaint to become part of the public record. Finally, the unsealing order did not expressly authorize Dey to remove any other actions against it.

*American Red Cross* addresses the narrow situation in which an intervening court ruling that is binding on the court handling the state-court action is actually dispositive of the federal jurisdictional question. The September 9, 2006 unsealing order says nothing whatsoever about federal jurisdiction generally, federal jurisdiction over Wisconsin’s state-court action specifically, nor anything about 31 U.S.C. §3732(b), the specific basis for federal jurisdiction advanced by Dey. Accordingly, it does not fall within the narrow *American Red Cross* exception.

In *Green*, defendants removed plaintiff’s state-court action, arguing that a federal statute preempted plaintiff’s state-law claims. The district court granted plaintiffs’ remand motion, concluding that the federal statute did not preempt state law. After remand, and while the case was pending, the Fifth Circuit decided a case (*Sanchez*), holding that the federal statute *did* preempt state law. Defendants again removed and plaintiffs again filed a remand motion. The *Green* court concluded that the facts of the case fell within the narrow exception of *American Red Cross*:

The Third Circuit, however, has held that in very limited circumstances, similar to those here -- 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 §1446(b).

*Green*, 274 F.3d at 267. The court noted that although *Sanchez* did not explicitly authorize defendants to remove pending state-court cases (distinguishing it from the facts of *American Red Cross*), *Sanchez* had a similar effect as the Supreme Court decision had on the defendant in *American Red Cross*, *i.e.*, it was dispositive as to the question of federal jurisdiction. *Id.* at 268. Like *American Red Cross*, *Green* limited its holding to the specific circumstances of the case: “The similarities between this case and *Sanchez* bring this case within the *limited parameters* of *American Red Cross*. We therefore hold that the *Sanchez* opinion, under these *very narrow circumstances*, was an ‘order’ for purposes of §1446(b) removal.” *Id.* at 268 (emphasis added).

Like *American Red Cross*, *Green* involved: (a) an intervening decision from a superior court (b) that was binding on the court handling the removed state action (c) and resolved a disputed question of law (d) that was dispositive as to the question of federal jurisdiction at issue in the removed action. As explained above, Dey cannot satisfy any part of this four-part test.

What Dey seeks here, then, is not a finding that this case falls within the limited holdings of *American Red Cross* and *Green* (because it clearly does not), but rather the creation of a new, broader exception to the rule that orders in other cases do not constitute “orders” under §1446(b). Dey’s request is unjustified for several reasons. *First*, Dey fails to define the parameters or limitations of this new exception it is asking the Court to create. *Second*, Dey fails to identify any compelling policy reason for creating a new exception. *Third*, there is a very compelling policy reason *not* to create a new exception here. Allowing a party to remove a case in the absence of an intervening decision from a superior court that is binding on the state-court action and that resolves a disputed question of law that is dispositive as to the question of federal jurisdiction would open the floodgates of the federal courts to swarms of removal actions.

Federal courts would be asked to interpret and construe orders and opinions that have no binding precedent and the holdings and effects of which will be subject to serious dispute by the parties. Federal statutes like 28 U.S.C. §1446(b) that provide clear deadlines should not be subject to such uncertainty. *Fourth*, creating the new exception that Dey seeks is inconsistent with the bedrock principle that the removal and jurisdiction statutes should be construed narrowly and strictly against removal and in favor of remand. See *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993); *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976).

The two cases cited by Dey that follow *American Red Cross* and *Green* are inapposite. In *Ancar v. Murphy Oil U.S.A., Inc.*, 2006 WL 2850445 (E.D.La. Oct. 3, 2006), the court found that an intervening decision from the Fifth Circuit was an “order” under §1446(b). However, unlike the instant case, the intervening decision in *Ancar* was entered by a superior court in the same judicial hierarchy and the decision was dispositive as to the question of federal jurisdiction at issue in the removed case (relating to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §201, *et seq.*). Similarly, in *Young v. Chubb Group of Ins. Cos.*, 295 F.Supp. 2d 806 (N.D. Ohio 2003), the court concluded that an intervening decision from the Sixth Circuit was an “order” within the meaning of §1446(b). As in *Ancar*, the intervening decision was issued by a superior court in the same judicial hierarchy and the decision was dispositive as to the jurisdictional question at issue in the removed case (the removability of actions falling covered by *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660 (Ohio 1999)).<sup>3</sup>

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<sup>3</sup> Dey attempts to distinguish the previous remand decisions by this court, federal courts in Pennsylvania and Minnesota, as well as the MDL court in Massachusetts, which refused to follow *American Red Cross* and *Green*, on the ground that the intervening Supreme Court decision which defendants argued restarted the 30-day removal clock, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 125 S.Ct. 2363 (2005), involved different parties and different issues. *Opp.*, at 20. Here, Dey argues, the federal *qui tam* action and this action share a common party (Dey) and common substantive issues. Yet this argument does not get Dey over the remaining

Also irrelevant are the two other cases cited by Dey, *Yarnevic v. Brink's, Inc.*, 102 F.3d 753 (4th Cir. 1996), and *iGames Entertainment, Inc. v. Regan*, 2004 WL 2538285 (E.D.Pa. Nov. 9, 2004). *See opp.*, at 17-18. In *Yarnevic*, the plaintiff, a resident of Ohio, filed suit in state court against two defendants. The defendant corporation was a citizen of Delaware and the individual defendant was a citizen of Ohio. Defendants removed, arguing that diversity jurisdiction existed because the individual defendant was the agent of the defendant corporation and therefore was also a citizen of Delaware. In his motion to remand, plaintiff stated for the first time that he had moved to Pennsylvania after he filed his complaint but before it was served. This motion made clear that there was complete diversity between the parties at the time of removal. The court found that plaintiff's remand motion was a "motion" or "other paper" under §1446(b) that restarted the 30-day removal clock. *Yarnevic* falls comfortably within the general rule that the "other paper" must result from the voluntary act of the plaintiff.<sup>4</sup> *Yarnevic* is of no help to Dey, however, because the event that Dey contends triggered a new 30-day removal period was not caused by any act of the State of Wisconsin, voluntary or otherwise.

In *iGames Entertainment*, plaintiffs filed an action in Pennsylvania state court. Defendants removed the Pennsylvania case to state court, arguing that diversity jurisdiction existed and the amount in controversy exceeded \$75,000.00. Plaintiffs moved to remand,

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hurdles of the rigorous standard articulated by *American Red Cross* and *Green* which, as explained above, it cannot surmount.

<sup>4</sup> Dey's argument that the "voluntary action" rule does not apply (*see opp.*, at 22-24) is incorrect, an effort at misdirection, and irrelevant. It is incorrect because although the rule originates from diversity jurisdiction jurisprudence, courts have made clear that it is equally applicable in the federal question jurisdiction jurisprudence. *See, e.g., Morsani v. Major League Baseball*, 79 F.Supp.2d 1331, 1333, n. 5 (M.D.Fla. 1999) ("[i]n both federal question and diversity cases...Section 1446(b) restricts defendants from removing most cases when the circumstance potentially allowing removal arises through no consequence of the plaintiff's actions"). It is an effort at misdirection because Dey seeks to rewrite the rule, contending that it focuses on whether the act giving rise to removal resulted from the act of the *defendant*. It is irrelevant because even if the rule is inapplicable, Dey must still meet its burden of establishing that the facts of this case fall within the limited holdings of *American Red Cross* and *Green*. As demonstrated above, Dey has not done so.

arguing that defendants could not establish the requisite amount in controversy where the civil cover sheet in the Pennsylvania action only indicated that the amount in controversy was “more than \$50k.” However, plaintiffs had served pre-complaint discovery on the defendants, including a press release that referenced a previous lawsuit that the defendants had filed against plaintiffs in federal court in Delaware in which defendants alleged that plaintiffs had withheld \$2 million in breach of a contract between the parties. These documents put defendants on notice for the first time that the same breach-of-contract claim at issue in the Delaware case was at issue in the Pennsylvania case. The court found that these documents were “other papers” under §1446(b) sufficient to establish that the amount in controversy in the Pennsylvania action exceeded \$75,000.00. *iGames Entertainment*, too, therefore falls within the general rule that a voluntary act of the plaintiff that occurs within the removed state-court action can be considered in determining whether a right to remove exists. Again, the federal *qui tam* complaint and order unsealing it upon which Dey relies in this case were not caused by the State of Wisconsin.

Accordingly, neither the federal *qui tam* complaint nor the order unsealing it constitute an “order or other paper” within the meaning of 28 U.S.C. §1446(b). Dey’s removal is therefore untimely and remand is required on this basis alone.

**II. Dey has failed to establish that federal jurisdiction exists.**

28 U.S.C. §1441(a) authorizes removal when the federal courts have “original jurisdiction” over the matter. The State demonstrated in its opening brief that 31 U.S.C. §3732(b) does not confer original jurisdiction. Remand motion, at 9-14. In the Hawaii action, Judge Kurren agreed:

§3732(b) does not grant the district courts original jurisdiction over related claims brought by state governments. Rather, it grants them only supplemental jurisdiction. Because supplemental jurisdiction cannot be a basis for removal,

*Sygenta Crop Protection, Inc.*, 537 U.S. at 34, the *Ven-A-Care* suit does not provide Dey with an additional substantive basis for removing this case.

Hawaii order, at 15. Judge Thompson reached the same conclusion in the Alabama action. *See* Alabama order, at 1 (“31 U.S.C. §3732(b) appears to be a ‘supplemental’ jurisdictional statute and thus cannot, by itself, be a basis for ‘removal’ jurisdiction, which must rest on ‘original’ jurisdiction”). In its opposition, Dey does not dispute the well-established principle that *supplemental* jurisdiction cannot be a basis for removal, but instead bases all of its arguments on the mistaken premise that 31 U.S.C. §3732(b) confers “original jurisdiction” over Wisconsin’s claims. More specifically, Dey contends that 31 U.S.C. §3732(b): (a) grants original jurisdiction; (b) indirectly grants original jurisdiction through 28 U.S.C. §1331; and (c) is not an *exception* to removal. Each of these arguments is without merit.

**A. Section 3732(b) grants supplemental jurisdiction because the jurisdiction is dependent on another claim.**

Supplemental jurisdiction is defined by *Black’s Law Dictionary* as “[j]urisdiction over a claim that is part of the same case or controversy as another claim over which the court has original jurisdiction.” Here, the jurisdiction §3732(b) confers is dependent on another claim over which the federal courts have original jurisdiction -- thus making the jurisdiction supplemental. The legislative history of §3732(b) also supports the conclusion that it allows -- but does not force -- states to intervene in FCA actions. Interpreting Congress’ grant of jurisdiction in the statute as supplemental is in line with the stated intent-of provision,<sup>5</sup> whereas interpreting the grant as original (and thus allowing removal) contradicts this intent. *See SCS Business & Technical Inst., Inc.*, 173 F.3d, 870, 880 (D.C. Cir. 1999) (“courts interpreting the FCA have

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<sup>5</sup> “[I]n response to comments from the National Association of Attorneys General, the subcommittee adopted a provision allowing state and local governments to join state law actions with false claim actions brought in federal district court if such actions grow out of the same transaction or occurrence.” S. Rep. No. 345, 99th Cong., 2nd Sess., at 16 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5281.

recognized that the purpose of §3732(b) is to authorize ‘permissive intervention by states for recovery of state funds’’).

Nevertheless, Dey makes several meritless arguments in support of its assertion that §3732(b) confers “original” jurisdiction. First, Dey cites *U.S. ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 110 F.3d 861 (2d Cir. 1997), which stated that §3732(b) “deal[s] with subject matter jurisdiction.” However, *Dowty Woodville Polymer* did not hold that §3732(b) grants “original jurisdiction.” Rather, the case addressed a different provision of the False Claims Act, §3732(a), which it found was a venue provision. The court’s reference to §3732(b) as dealing with “subject matter jurisdiction” is of no moment, because “subject matter jurisdiction” can be either original or supplemental. *See, e.g., Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1166 (9th Cir. 2002) (“we must consider the constitutionality of *supplemental subject matter jurisdiction* involving a party over whom there is no independent basis for federal court jurisdiction”) (emphasis added).

Next, Dey notes that in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), the Supreme Court found that “the ‘sue and be sued’ provision of a particular federal corporate charter conferred original federal jurisdiction over cases to which that corporation was a party,” 505 U.S. at 252, and that charter did not use the term “original jurisdiction.” From this Dey incorrectly contends that §3732 must confer original jurisdiction because it similarly does not contain the term “original.” Dey’s argument is without merit. First, contrary to Dey’s contention, the Supreme Court in *Red Cross* never addressed whether the term “original jurisdiction” appeared in the corporate charter. Second, the Court was analyzing an inapposite situation: the circumstances under which an organization whose charter stated that it could be sued in federal could be removed; there was no requirement of an independent claim for which

the court had original jurisdiction. In the instant case, while the absence of the word “original” in §3732(b) may not be determinative, the fact that jurisdiction is dependent on another action conclusively establishes that the jurisdiction is not original.

Dey also argues that the jurisdiction granted is not supplemental because the statute that codified general grants of supplemental jurisdiction – 28 U.S.C. §1367 – uses the word “claims” instead of “actions.” Dey contends that supplemental jurisdiction can only be exercised over state-law claims in an existing federal action. Dey’s contention is simply wrong. The concept of supplemental jurisdiction extends beyond the limits of 28 U.S.C. §1367, which was enacted in 1990. For example, one form of supplemental jurisdiction – pendent-party jurisdiction (or “ancillary jurisdiction”) – traditionally applied to a party which was not otherwise subject to the court’s jurisdiction with an *action* that arose from the same transaction or occurrence as another claim that was properly before the court. See *Black’s Law Dictionary* (definition of jurisdiction - pendent party); *Aldinger v. Howard*, 427 U.S. 1, 9-10 (1976). Regardless of the particular form of jurisdiction that was codified by 31 U.S.C. §3732(b), it cannot be disputed that the jurisdiction is dependent, and thus supplemental. *Aldinger*, 427 U.S. at 10 (stating that an action maintainable because of pendent-party jurisdiction “would not have been ‘an original suit, but ancillary and dependent, supplementary merely to the original suit’”) (citing *Freeman v. Howe*, 24 How. 450, 460, 16 L.Ed. 749 (1861)).

**B. The False Claims Act does not grant any substantive rights to Wisconsin, and thus does not grant original jurisdiction through 28 U.S.C. §1331.**

Dey also contends that original jurisdiction is independently conferred by 28 U.S.C. §1331. Section 1331 states simply that the “district courts shall have original jurisdiction of all civil actions *arising under* the Constitution, laws, or treaties of the United States.”

28 U.S.C. §1331 (emphasis added). Dey asserts that because the False Claims Act is a law of the United States, and because §3732(b) provides the state with the ability to intervene in the federal *qui tam* action, that Wisconsin's case now *arises under* the laws of the United States just as if Wisconsin had alleged a federal cause of action against Dey. Magistrate Judge Kurren properly rejected this argument in Hawaii, noting that if Dey were correct, all grants of supplementary jurisdiction would also be grants of original jurisdiction:

Putting aside the tautological nature of this argument, common sense and basic principles of statutory construction dictate that Dey's argument must be false. If Dey is correct, then all grants of supplemental jurisdiction would also simultaneously be grants of original jurisdiction. Even the supplemental jurisdiction statute itself, 28 U.S.C. §1367, would grant original jurisdiction under Dey's construction of §1331. This is obviously incorrect, and Dey did not pursue this argument at the hearing.

Hawaii order, at 13, n. 4.

Furthermore, it is well established that a statute which merely confers access to the federal courts but does not require the application of substantive federal law does not create "arising under" jurisdiction under §1331. In *In re TMI Litigation Cases Consol. II*, 940 F.2d 832 (3rd Cir. 1991) (a case cited by Dey in its opposition brief), the Third Circuit stated that the "central teaching of *Osborn [v. Bank of the United States]*, 22 U.S. (9 Wheat) 738, 6 L.Ed. 204 (1824)], is that a case cannot be said to arise under a federal statute where that statute is nothing more than a jurisdictional grant...it must do more." *Id.* at 849. The Third Circuit noted the Supreme Court's conclusion that grants of jurisdiction that "merely concern access to the federal courts," do not result create "arising under" jurisdiction. *Id.* at 850. Instead, the statute must create substantive federal law. See also *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 480 (1981) (the Outer Continental Shelf Act (OCSLA), which was enacted to in order to fill gaps in the federal scheme, "borrow[ed] the 'applicable and not inconsistent' laws of the adjacent states

as surrogate federal law”). The *Osborn* rule was affirmed by the Supreme Court in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983) (holding that pure jurisdictional statutes which seek “to do nothing more than grant jurisdiction over a particular class of cases” cannot support Article III “arising under” jurisdiction, and finding that the Foreign Sovereign Immunities Act conferred “arising under” jurisdiction because it “codifie[d] the standards governing foreign sovereign immunity as an aspect of substantive federal law”), and *Mesa v. California*, 489 U.S. 121, 136 (1989) (holding that the federal officer removal statute, 28 U.S.C. §1442(a), is a pure jurisdictional statute that does not support “arising under” jurisdiction in the absence of a federal defense).

In the instant case, §3732(b) merely concerns access to the federal courts but provides no substantive federal law to be applied to Wisconsin’s state claims. Indeed, it is explicitly limited to actions “brought under the laws of any state.” Therefore, §3732(b) “merely concern[s] access to the federal courts,” and accordingly does not create “arising under” jurisdiction under 28 U.S.C. §1331.

**C. Dey’s reliance on *Breuer v. Jim’s Concrete of Brevard, Inc.* is misplaced.**

Dey places great emphasis on *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), yet the case has no application here. *Breuer* examined whether a provision of the federal Fair Labor Standards Act, which stated that an action “may be maintained” in state court, constituted an express exception to 28 U.S.C. §1441(a)’s general removal authorization. *Id.* at 694.<sup>6</sup> Original jurisdiction was assumed in *Breuer* since the claims were brought under a federal statute. At issue in this case is not whether an exception to

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<sup>6</sup> 28 U.S.C. §1441(a) provides: “Except as otherwise expressly provided by Act of Congress, 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 defendants...” (emphasis added).

removal exists, but rather whether 31 U.S.C. §3732(b) confers original jurisdiction in the first place. While it is true that where original jurisdiction exists, an exception to removal must be express, it is also true that the question of whether an action is subject to removal in the first place must be established beyond a doubt. *See Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976) (any doubt regarding jurisdiction should be resolved in favor of remand). *Breuer* therefore does not support Dey's position.

**D. Removal is only proper where the plaintiff could have filed his complaint in federal court at the outset.**

Finally, it is well established that "removal is proper only where the plaintiff could have filed his complaint in federal court at the outset..." *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 641 (9th Cir. 1989). *See also Shafizadeh v. BellSouth Mobility, LLC*, 2006 WL 1866826, \*2 (6th Cir. 2006) ("[i]t is well-covered ground that a state-court defendant may remove a 'civil action' to federal court if the plaintiff 'original[ly]' could have filed the action in federal court"); *Tyree v. Burlington Northern and Santa Fe Ry. Co.*, 973 F.Supp. 786, 791, n. 3 (W.D.Tenn. 1997) ("[a]t a minimum, therefore, in order for a defendant to remove an action to federal court under §1441(a), the Court must find that the plaintiff could have filed his complaint in federal court"); *Lancaster County Office of Aging v. Schoener*, 2003 WL 21282198, \*1 (E.D.Pa. 2003) ("[r]emoval jurisdiction is lacking in this case because plaintiff could not have initially filed its complaint in federal court based on the court's original jurisdiction"). Here, Dey ignores the fact that §3732(b) permits a state to file suit in federal court only where a related federal lawsuit is pending. The federal *qui tam* complaint was unsealed and filed on September 9, 2006. Wisconsin, which filed its action on June 30, 2004, could not have filed its lawsuit in *any* federal court at that time. Accordingly, §3732(b) does not confer original jurisdiction over the Wisconsin action.

**III. The unsealing and service of a similar federal *qui tam* action against defendant Abbott Laboratories on May 26, 2006 makes Dey's removal improper.**

Even if Dey is correct that its receipt of the federal *qui tam* complaint and unsealing order restarted the 30-day removal clock and that 31 U.S.C. §3732(b) confers original federal jurisdiction, removal is still improper. If Dey is correct (which it is not), then the removal clock restarted more than 120 days earlier, when Abbott Laboratories was served with a similar federal *qui tam* complaint against it. Because Abbott failed to remove this case, it waived its right to remove and cannot join in Dey's removal. See remand motion, at 14-16. Dey mischaracterizes the state's argument, asserting that Dey could not have taken steps to remove this action at the time Abbott was served with the federal *qui tam* complaint against it because the action against Abbott did not assert any claims against Dey. Opp., at 24. The state's argument is that Abbott waived its right to remove and may not properly join in Dey's removal.

Although Dey cites *Marano Enterprises v. Z-Teca Restaurants, L.P.*, 254 F.2d 753 (8th Cir. 2001), and *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999), which found that a defendant who fails to remove timely may join the removal of another defendant even after the first defendant's time to remove has elapsed, this is the minority rule and has not been adopted by the Seventh Circuit. The majority rule, first articulated by *Getty Oil Corporation v. Insurance Company of North America*, 841 F.2d 1254 (5th Cir. 1988), is to the contrary, holding that a defendant that fails to timely remove waives its right to remove and may not join the later removal of another defendant. Although the Seventh Circuit has not adopted either rule, see *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994), the majority of district courts in the Seventh Circuit follow the *Getty Oil* holding. See *Auchinleck v. Town of LaGrange*, 167 F.Supp.2d 1066 (E.D. Wis. 2001); *Phoenix Container, L.P. v. Sokoloff*, 83 F.Supp.2d 928 (N.D. Ill. 2000); *Dawn Carrol, Inc. v. Eastern Time Co., Inc.*, 1997 WL 413932 (N.D. Ill. 1997);

*Crowly v. Byrnes*, 1997 WL 83394, at \*1 (N.D.Ill. Feb. 19, 1997); *Higgins v. Kentucky Fried Chicken, WMCR*, 953 F.Supp. 266, 269 (W.D.Wis. 1997); *Scialo v. Scala Packing Co., Inc.*, 821 F.Supp. 1276, 1278 (N.D.Ill. 1993).

Because all defendants must timely remove or consent to removal, *see Roe*, 38 F.3d at 301, and Abbott did not timely remove after its receipt of the federal *qui tam* complaint against it, it waived its right to remove and cannot join in Dey's removal.

**IV. Even if federal jurisdiction exists with respect to the state's claims against Dey, the Court can and should sever the claims against the remaining defendants and remand them to state court.**

Dey is one of 36 pharmaceutical manufacturers named as defendants in this action. Accordingly, even if Dey were to convince this court that the state's claims against it are removable (which they are not), the Court may only retain the state's claims against the remaining 44 defendants by exercising supplemental jurisdiction pursuant to 28 U.S.C. §1367. In its opening brief, the state demonstrated that the Court can, and should, decline to exercise such jurisdiction. *See* remand motion, at 16-18.

Dey's two attacks on the state's argument are neither substantive nor persuasive. First, Dey argues that the state's request for severance is "a transparent attempt to avoid litigating in federal court." *Opp.*, at 26. However, the state is simply requesting that this Court conduct the analysis required by 28 U.S.C. §1367, the federal statute that provides the only basis for jurisdiction over the state's claims against the remaining defendants. The state carefully crafted its complaint in order to litigate its purely state-law claims in its chosen forum -- the Wisconsin state courts. The state chose to file a single lawsuit, rather than 36 separate ones, because it never imagined that Dey, or any other defendant, would file a frivolous removal. If anyone has forum-shopping, it is Dey, which has improperly removed this case (a third time) and seeks to

send it to Boston. Now that Dey has done so, the state is entitled to seek severance of the remaining defendants.

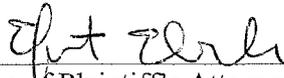
Second, Dey argues that the state cannot seek severance in its remand motion but rather must file a separate motion to sever. *See opp.*, at 26. This argument is similarly without merit. It is entirely appropriate for the state to seek remand of the entire case while making an alternative argument for severance should the Court find that federal jurisdiction exists with respect to the state's claims against Dey. Although the word "sever" does not appear in the name of the state's motion, it is clear that the motion is for remand or, in the alternative, for severance. Accordingly, Dey's request that the state make a separate motion is illogical and would serve no purpose other than delay. Severance would also be appropriate because none of the remaining 35 defendants has filed an opposition to the state's motion (nor joined in Dey's opposition).

#### CONCLUSION

For the foregoing reasons, plaintiff asks the Court to remand this case to the state court and to award it its fees and costs.

Dated this 21<sup>st</sup> day of November, 2006.

Respectfully submitted,



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

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STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 06-C- 0582-C
	)	
AMGEN, INC., <i>et al.</i> ,	)	
	)	
Defendants.	)	

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of Plaintiffs' Reply Brief in Support of Motion to Remand to be served on counsel of record by transmission to LNFS pursuant to Order of the Circuit Court of Dane County, Branch 7, Case Number 04-CV-1709, dated December 20<sup>th</sup>, 2005.

Dated this 21<sup>st</sup> day of November, 2006.

  
\_\_\_\_\_  
Elizabeth Eberle