

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

WILLIAMS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 02-0556 (RMC)
	)	
PURDUE PHARMA CO., et al.	)	
	)	
Defendants.	)	
	)	

**MEMORANDUM OPINION**

This matter comes before the court on plaintiffs’ motion to remand this matter to the Superior Court of the District of Columbia, where plaintiffs first filed suit. Defendants, having removed the case to federal court, oppose remand. Upon consideration of the brief in support of the motion, defendants’ opposition, plaintiffs’ reply and defendants’ surreply,<sup>1</sup> the underlying complaint and the applicable law, the motion to remand is denied.

**Background Facts**

Robert Williams and Clifford Perry have sued Purdue Pharma Company, Purdue Pharma LP, Purdue Pharma, Inc., Purdue Frederick, P.F. Laboratories, Inc. [collectively “Purdue”], Abbott Laboratories and Abbott Laboratories, Inc. [collectively “Abbott”] for class relief, injunctive relief, refunds, and damages arising from the purchase or receipt of the pain medication OxyContin® ["OxyContin"].<sup>2</sup> Messrs. Williams and Perry seek to represent a class defined as “[a]ll persons who

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<sup>1</sup> Defendants’ motion for leave to file a surreply [15] is hereby granted.

<sup>2</sup> OxyContin, a registered trademark of Purdue Pharma LP, is a Schedule II controlled substance. Schedule II substances are drugs which are approved for medical use in the United States and have the highest abuse potential among drugs so approved. Introduced by Purdue

purchased or received OxyContin in the District of Columbia by prescription from 1995 to the present.” The complaint was first served on Abbott on March 1, 2002, and the defendants timely filed a Notice of Removal, pursuant to 28 U.S.C. §§ 1441, 1442(a) and 1446, on March 21, 2002.

In the complaint, Purdue is alleged to own the patent for OxyContin Tablets and to, *inter alia*, manufacture, advertise, promote, sell and distribute the drug.<sup>3</sup> Abbott allegedly also has been engaged in the manufacture, advertisement, promotion and sale or distribution of OxyContin.<sup>4</sup> Plaintiffs contend that the defendants aggressively marketed and promoted OxyContin through a campaign of misinformation, knowing falsehoods and fraud in violation of The District of Columbia Consumer Protection Procedures Act, D.C. CODE ANN. §§ 28-3901, *et seq.* [“DCCPA”].

Specifically, plaintiffs assert that OxyContin is a synthetic morphine drug that defendants have marketed as providing a “smooth and sustained pain control for 12-hour dosing intervals” with “only a negligible risk, if any, of addiction.” Complaint ¶ 14. Plaintiffs maintain that OxyContin does not have the benefits and effects predicted, that it poses a great risk of addiction, and that the defendants knew these facts and ignored them. Through an alleged campaign of misrepresentation and omission, plaintiffs aver, defendants were able to inflate the price for OxyContin, leading to

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Pharma in 1995, OxyContin is a controlled release formulation of oxycodone, a synthetic morphine pain reliever.

<sup>3</sup> The complaint alleges that P.F. Laboratories, Inc. is a New Jersey corporation with its principal place of business in that State; Purdue Pharma Company is a Delaware corporation; Purdue Frederick Company is a New York corporation that shares Purdue Pharma's principal place of business in Norwalk, Connecticut; and the other Purdue defendants are Delaware corporations with their principal places of business in Stamford, Connecticut.

<sup>4</sup> According to the complaint, Abbott Laboratories is an Illinois corporation with its principal place of business located in North Chicago, Illinois, and Abbott Laboratories, Inc., is a Delaware corporation with its principal place of business at the same location.

approximately one billion dollars in sales in the United States in 2000. A portion of the sales are alleged to have occurred in the District of Columbia. Messrs. Williams and Perry state that they were prescribed OxyContin and purchased it through pharmacies in the District of Columbia.

The plaintiffs charge defendants with violating the DCCPA (Count One) and engaging in a conspiracy to violate the DCCPA (Count Two). With respect to Count One the complaint asserts,

Through their misleading marketing campaign, Defendants have violated the DCCPA, and are liable for a refund of all moneys acquired, for treble damages, or \$1,500 per violations [sic], whichever is greater, and any additional legal and equitable relief as deemed appropriate by this Court.

Complaint ¶ 60. In addition, the complaint seeks punitive damages. Complaint ¶ 61. Count Two alleges a conspiracy among the defendants to use unfair, fraudulent and deceptive business practices and thereby to violate the DCCPA. Further, “As a direct, proximate and legal result of [these alleged] violations . . . , Plaintiffs and class members have suffered, and continue to suffer, common damages.” Complaint ¶ 66. Exemplary damages are also sought on Count Two. Complaint ¶ 67.

In its prayer for relief, the complaint seeks, *inter alia*,

- “[A]ll equitable injunctive and monetary relief and penalties due to Plaintiffs and class members . . . including treble damages and/or the statutory penalty amount;”
- “[T]he refund of all monies spent by Plaintiffs and class members on OxyContin”;
- Punitive damages;
- Interest, costs, expenses and attorneys’ fees; and
- “Such other and further relief as the Court deems just and proper . . . .”

Complaint, VI ¶¶ E-G.

The defendants have not yet filed an answer to the complaint. Instead, as indicated above, they filed a Notice of Removal and brought the case to federal court. Now the question is whether it should stay here or be returned to Superior Court where the plaintiffs would prefer to litigate. As

explained below, the Court finds that it would have had diversity jurisdiction over this matter had it originally been filed in federal court. Therefore, defendants properly exercised their statutory right of removal, and plaintiffs' motion to remand must be denied.

### **Analysis**

“Federal courts are courts of limited jurisdiction,” *Anile Pharmacy, Inc. v. Hoffman-Larouch, Inc.*, No. 99-197, 2000 U.S. Dist. LEXIS 11348, at \*8 (D.D.C. Feb. 1, 2000) (citations omitted), and the court must respect the jurisdiction of state courts if our system of federalism is to work properly. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). The local courts in the District of Columbia are entitled to such respect. *Anile Pharmacy*, 2000 U.S. Dist. LEXIS 11348, at \*19. The burden is on the proponent of federal jurisdiction who must make an “affirmative showing” of the requisite jurisdictional factors. *NOW v. Mut. of Omaha Ins. Co.*, 612 F. Supp. 100, 103 (D.D.C. 1985); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Doubts must be resolved in favor of remand. *See Anile Pharmacy*, 2000 U.S. Dist. LEXIS 11348 at \*19; *NOW*, 612 F. Supp. at 103.

A plaintiff is normally the master of his own complaint and can select his own court, even if it means forgoing remedies that might be available elsewhere. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). If the complaint satisfies the requirements of federal jurisdiction, however, a defendant has a right to have a federal court hear the matter. The defendants cited 28 U.S.C. §§ 1441, 1442 and 1446 as the bases for their removal.<sup>5</sup>

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<sup>5</sup>28 U.S.C. § 1446 sets forth the procedures for removal and there is no dispute regarding the procedural propriety of defendants' notice of removal.

**A. Jurisdiction Under 28 U.S.C. § 1442(a)(1)**

Turning first to § 1442, defendants assert, without explanation, that they are acting under an agency, or officers of an agency of the United States, in manufacturing, promoting, distributing and selling OxyContin and are therefore entitled to remove this action pursuant to § 1442(a)(1). *See* 28 U.S.C. § 1442(a)(1) (allowing removal for state-court suits *against* any officer or agency of the United States “or any person acting under that officer”). The gravamen of the argument is that the pervasive regulation of OxyContin transforms the defendants, otherwise private entities, into persons acting under the auspices of a United States agency or officers of such an agency. These arguments have not had much success elsewhere<sup>6</sup> and they are not persuasive here. Federal regulation, even intense federal regulation, does not transmogrify a private party into a federal officer. *See Ajemba v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, No. 98-713, 1998 U.S. Dist. LEXIS 22297 (D.D.C. 1998) (removal under § 1442(a)(1) requires showing of “direct and detailing control over the defendant”) (quotations omitted); *Russell v. Baxter Healthcare Corp.*, No. 01-2296, 2002 U.S. Dist. LEXIS 8733, at \*24-24 (E.D. LA May 10, 2002) (FDA licensing and regulation of products not sufficiently invasive to permit parties to remove action under federal officer statute). Defendants therefore cannot rely on § 1442(a)(1) as a basis for removal jurisdiction.

**B. Jurisdiction Under 28 U.S.C. § 1441**

Defendants also assert removal jurisdiction under 28 U.S.C. § 1441, which provides 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

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<sup>6</sup>Transcript of hearing, *DeVoe v. P.F. Labs. Inc., et al.*, Case No. 02CV1538 (D.N.J. Aug. 5, 2002) at 10; *McGraw v. Purdue Pharma, LP*, No 1:01-0957 (S.D. W. Va. March 14, 2002) *Brenizer v. Purdue Pharma, L.P., et al.*, No. 01-N-2334-W (N.D. Ala. December 21, 2001).

States for the district and division embracing the place where such action is pending.” 28 U.S.C. §1441(a). The original jurisdiction of a federal district court is, in turn, defined by 28 U.S.C. §§ 1331 and 1332. Section 1331 grants the federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Under § 1332(a), “[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.” 28 U.S.C. § 1332(a). Defendants maintain that this action is properly in federal court on the basis of both federal question and diversity jurisdiction. The Court will address each in turn.

### **1. Federal Question Jurisdiction**

Defendants argue that OxyContin is so highly-regulated by the Food and Drug Administration ["FDA"] and the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.* ["FDCA"], that the plaintiffs’ charges are really attacks on federal law and regulation. Therefore, defendants suggest, this suit “arises under federal law” within the meaning of § 1331. *See* Notice of Removal at ¶ 8 ("Every aspect of the manufacture, promotion, distribution and sale of OxyContin is subject to comprehensive federal regulation."). This argument has been rejected by various other federal courts that have considered the issue,<sup>7</sup> and this Court finds it similarly unpersuasive. Plaintiffs do not attack the federal regulatory scheme but rather the alleged campaign by defendants to market OxyContin aggressively with misinformation and knowingly-false statements. To the extent the complaint can be read to challenge the FDA-approved warning materials included with

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<sup>7</sup>*McGraw v. Purdue Pharma, LP*, No 1:01-0957 (S.D. W. Va. March 14, 2002) ; *Ohler v. Purdue Pharma LP*, No. 01-3061, 2002 U.S. Dist. LEXIS 2368, (E.D. La. Jan. 23, 2002); *McCallister v. Duffield*, 164 F. Supp. 2d 783 (2001); *Brenizer*, No. 01-N-2334-W.

OxyContin, such allegations do not create federal question jurisdiction under the well-pleaded complaint rule. FDA approval of the warnings is a defense that Pharma and Abbott may assert. However, a federal defense does not create original federal jurisdiction, absent complete congressional preemption of the field. *See Caterpillar, Inc. v. Williams*, 438 U.S. 386, 393 (1987). The FDCA contains no right of private enforcement and there is no evidence of congressional intent to preempt the state law causes of action that plaintiffs assert. *See, e.g., Merrell Dow Pharm.. Inc. v. Thompson*, 478 U.S. 804, 814 (1986); *McGraw*, No. 1:01-0557, at 9-10; *Brenizer*, CV-01-N-2334-W, at 17-18. The claims arise under the law of the District of Columbia rather than federal law and § 1331 therefore does not provide a basis for removal.

## **2. Diversity Jurisdiction**

There is no dispute that this suit is between “citizens of different States.” However, the plaintiffs and defendants hotly contest whether the complaint satisfies the amount-in-controversy requirements of § 1332(a). Section 1332 requires that the amount in controversy between the parties be more than \$75,000. The rule has been that each individual member of a putative class must have a claim worth more than \$75,000. *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973); *see also Snyder v. Harris*, 294 U.S. 332, 338 (1969). Claims of individual plaintiffs may not be aggregated to meet the jurisdictional value, unless “all class members have a joint, common or derivative right in a single res and where, but for the class device, the joinder of all interested persons would be essential.” *Bott v. Holiday Univ., Inc.* No. 75-1982, 1976 U.S. Dist. LEXIS 14112, at \*6 (D.D.C. July 14, 1976); *see also Gatherer v. Purdue Pharma LP*, No. CV01-11180 AHM, slip op. at 8 (“The harm experienced by the various members of the public on whose behalf Plaintiff brings her action is not ‘common and undivided’ and therefore may not be aggregated.”); *cf Aetna U.S. Healthcare.*

*Inc. v. HoechstAktiengesellschaft*, 48 F. Supp. 2d 37, 40-43 (D.D.C. 1999) (aggregation proper when plaintiffs sought disgorgement of profits and the total amount of recovery would not depend upon individual plaintiffs' claims but would depend on a sum certain that was a collective right of the group).

The validity of the *Zahn* rule is now uncertain following the 1990 Congressional enactment of 28 U.S.C. § 1367, which gives district courts supplemental jurisdiction over "all other claims that are so related to claims in the action . . . that they form part of the same case or controversy." The Fourth,<sup>8</sup> Fifth,<sup>9</sup> Seventh,<sup>10</sup> and Ninth<sup>11</sup> Circuits have determined that the plain language of § 1367 gives federal courts supplemental jurisdiction over the claims of class members who do not otherwise plead for more than \$75,000 as long as the named plaintiffs do so. These courts have rejected contrary indications in the legislative history because they find the statutory language unambiguous. In contrast, the Third,<sup>12</sup> Eighth,<sup>13</sup> and Tenth<sup>14</sup> Circuits have held that § 1367 does not affect the validity of *Zahn* and that all members of a class must individually have a claim worth more than \$75,000 unless there is a common claim with that value that binds them all.

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<sup>8</sup> *Rosmer v. Pfizer. Inc.*, 263 F. 3d 110, 117-18 (4th Cir. 1999).

<sup>9</sup> *Manguno v. Prudential Property and Casualty Ins. Co.*, 276 F. 3d 720, 723-24 (5th Cir. 2002); *In re Abbott Laboratories*, 51 F.3d 524, 528-29 (5th Cir. 1999).

<sup>10</sup> *Stromberg Metal Works. Inc. v. Press Mechanical. Inc.*, 77 F.3d 928, 930-33 (7th Cir. 1996).

<sup>11</sup> *Gibson v. Chrysler Corp.*, 261 F.3d 927, 938 (9th Cir. 2001).

<sup>12</sup> *Meritcare. Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999).

<sup>13</sup> *Trimble v. Asarco. Inc.*, 232 F.3d 946 (8th Cir. 2000).

<sup>14</sup> *Leonhardt v. Western Sugar Co.*, 160 F. 3d 631 (10th Cir. 1998).

The defendants invite the court to join this debate and to agree with the circuits that allow supplemental jurisdiction to cover those class members whose claims do not meet the \$75,000 threshold. The plaintiffs assert that this Circuit has already ruled that the 1990 amendments to § 1367 did not overrule *Zahn*. See *Women Prisoners of the D.C. Dep't of Corrections v. The District of Columbia*, 93 F.3d 910, 920-21 (D.C. Cir. 1996) (amendments did not change the law of supplemental jurisdiction but “essentially codified” it),<sup>15</sup> see also *Aetna U.S. Healthcare*, 48 F. Supp. 2d at 40 (noting, without discussion, “the general rule that each member of the plaintiff’s class must independently satisfy the jurisdictional amount-in-controversy requirement”).

It is not necessary to wrestle with these conflicting decisions and try to guesstimate what our own circuit court will say on the issue when it is squarely presented. There is a more direct and simple way to resolve the jurisdictional dispute.

“[T]he status of the case as disclosed by the plaintiffs’ complaint is controlling in the case of a removal.” *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938). When the claimed damages are unspecified in amount, the “preponderance of evidence” standard governs to determine the true amount in controversy. *Gafford v. General Elec. Co.*, 997 F.3d 150, 158 (6th Cir. 1993). If the complaint reveals a common and undivided claim that has a value beyond \$75,000, then federal jurisdiction exists.

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<sup>15</sup>Plaintiffs’ references to *Women Prisoners* and *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996) (en banc), are not entirely on point. Both cases note that § 1367 essentially codifies the Supreme Court ruling in *United Mineworkers of America v. Gibbs*, 383 U.S. 715 (1966). These three decisions all concern the court’s discretionary power to assert pendent jurisdiction over state law claims under § 1367(c), rather than the amount in controversy issue that is currently before the Court.

Plaintiffs "do not dispute that disgorgement is a common and undivided claim" but argue that they do not seek disgorgement or any similar relief. *See* Plaintiffs' Reply at 10. The complaint reads otherwise. Paragraph 60 of the complaint specifically claims that the defendants are "liable for a refund of all moneys acquired" as a result of "their misleading marketing campaign" as well as the specific remedies afforded under the DCCPA ("treble damages, or \$1,500 per violation, whichever is greater"). The Prayer for Relief seeks "the refund of all monies spent by Plaintiffs and class members," Compl. ¶ F, and "all equitable injunctive and monetary relief and penalties due to Plaintiffs" under the DCCPA. Compl., VI, ¶ E. The DCCPA itself does not limit its remedies but contains a catch-all provision allowing the court to award "any other relief which the court deems proper." D.C. CODE ANN. §28-3905(k)(1)(F).

Should plaintiffs prove their case, this broad terminology certainly would allow recovery of up to \$1,500 per violation,<sup>16</sup> refunds for all OxyContin medicines actually purchased by each plaintiff, and a generalized "refund of all monies acquired." With a potential class of 5,000-10,000 pain sufferers in the District of Columbia, *see* Memorandum in Support of Motion for Remand at 3, 8 n.5, and recent annual sales of OxyContin in the billions of dollars, *see* Compl. at ¶ 18, the

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<sup>16</sup> The court is faced with a most curious situation. Defendants are arguing that their potential liability on plaintiffs' claims is enormous while the plaintiffs argue that they are not really suing for that much money at all. Defendants argue that the number of "violations" that might be claimed by plaintiffs – for each individual advertisement for OxyContin, each individual doctor visit, each letter mailed concerning the drug – should alone be valued at well over \$75,000. *See United States v. Reader's Digest Assoc.*, 662 F.2d 955, 966-67 (3rd Cir. 1981) (each letter in mass mailing a separate violation); *United States v. Shelton Wholesale. Inc.*, 34 F. Supp. 2d 1147, 1165-66 (W.D. Mo. 1999) (each defective firework device was a separate violation); *Commonwealth v. Fall River Motor Sales. Inc.*, 565 N.E. 2d 1205, 1213 (Mass. 1991) (3 violations found for advertisement placed 3 times). The plaintiffs insist that they are only seeking only recovery under the DCCPA, which they suggest – without quite pinning themselves down – is limited.

complaint seeks a common and undivided remedy of “all moneys acquired” by defendants through OxyContin sales in the District of Columbia. The amount of this recovery would not be affected by the number of plaintiffs, nor by the values of their individual claims. *See Aetna U.S. Healthcare*, 48 F. Supp. 2d at 40-43; *Nat'l Welfare Rights Org. v. Weinberger*, 377 F. Supp. 861, 866 (D.D.C. 1974) (a common and undivided claim exists and aggregation is permissible "when the adversary of the class has no interest in how the claim is to be distributed among the class members.") (citations omitted). Thus, while the complaint is carefully drawn to try to avoid federal jurisdiction, the plaintiffs have described their remedy broadly enough to meet the requirements of §1332 and to allow defendants to remove the case to federal court.

### **Conclusion**

Because this Court would have had diversity jurisdiction over this matter had it originally been filed in federal court, the motion for remand [5] will be DENIED. A separate order will accompany this opinion.

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/s/  
ROSEMARY M. COLLYER  
United States District Judge

Date: February 27, 2003