No. 19-1818

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATE OF RHODE ISLAND,

Plaintiff-Appellee,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS LLC; DOES 1-100,

Defendants-Appellants,

GETTY PETROLEUM MARKETING, INC.,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND, NO. 18-CV-00395-WES-LDA (WILLIAM E. SMITH, CHIEF JUDGE)

BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK, OREGON, VERMONT, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

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INTERESTS OF AMICUS CURIAE

Amici Massachusetts, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Vermont, and Washington, (Amici States), as sovereigns, have a unique interest in maintaining their state courts' authority to develop and enforce requirements of state statutory and common law—including monetary remedies—in cases brought against commercial entities causing harm to and within their jurisdictions. That interest is particularly apparent where a state itself is the plaintiff, because "considerations of comity" disfavor federal courts "snatch[ing] cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Construction Laborers Vacation Tr.*, 463 U.S. 1, 21 n.22 (1983). And it extends to classic state-law tort claims like the ones at issue here: claims brought in state court to vindicate Rhode Island's interests in redressing climate change-related harms within the state that it alleges are caused by the conduct of fossil fuel producers, marketers, and distributors. Indeed, climate change already is having a variety of costly impacts within our states, and those impacts are expected to worsen.

Amici States have a strong interest in "preserving the 'dignity' to which [they] are entitled 'as residuary sovereigns and joint participants in the governance of the Nation.'" *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011) (quoting *Alden v. Maine*, 527 U.S. 706, 713-14 (1999)). Preserving

that dignity includes ensuring that their prerogative, as sovereign entities, to enforce state law in state courts is respected, "unless some clear rule demands" otherwise. *Franchise Tax Bd.*, 463 U.S. at 21 n.22. The enforcement of state law in state courts often implicates national or even international interests, but that fact alone has never supplied a sufficient basis for overriding a state's choice to remedy state-law violations in its own courts. Federal courts have thus rejected claims to remove state-led actions for state-law violations arising from, for example, the international Volkswagen "diesel-gate" vehicle emissions cheating scandal,[1] the national subprime mortgage lender housing and economy-wide crisis,[2] and the national opioid sales and marketing health epidemic.[3] Like these widespread crises, states

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[1] *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672, 2017 WL 2258757 (N.D. Cal. May 23, 2017); Arnold W. Reitze Jr., *The Volkswagen Air Pollution Emissions Litigation*, 46 Envtl. L. Rep. 10564, 10566-68 (2016) (noting both federal and state enforcement and the important role of states).

[2] *E.g.*, *Massachusetts v. Fremont Inv. & Loan*, Civ. A. No. 07-11965-GAO, 2007 WL 4571162 (D. Mass. Dec. 26, 2007); *see also* Mark Totten, *The Enforcers & The Great Recession*, 36 Cardozo L. Rev. 1611, 1612 (2015) ("No one played a more vital role in responding to the worst economic crisis since the Great Depression than a small band of attorneys general.").

[3] *E.g.*, *New Mexico ex rel. Balderas v. Purdue Pharma L.P.*, 323 F. Supp. 3d 1242, 1245, 1251 (D.N.M. 2018); *see also Town of Randolph v. Purdue Pharma L.P.*, Civ. A. No. 19-cv-10813-ADB, 2019 WL 2394253 (D. Mass. June 6, 2019); *City of Worcester v. Purdue Pharma L.P.*, Civ. A. No. 18-11958-TSH (D. Mass. Nov. 21, 2018) (Doc. No. 36); Lenny Bernstein, *Five More States Take Legal Action Against Purdue Pharma for Opioid Crisis*, Wash. Post, May 16, 2019, https://tinyurl.com/y6yrljkb (noting actions by forty-five states).

also have "a legitimate interest in combatting the adverse effects of climate change on their residents," despite the global nature of the crisis, *see American Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018), and many states are exercising their sovereign authority to do so. *Infra* Argument C.2.b. A rule like the one the oil company defendant-appellants (Companies) advocate here—that pins removal jurisdiction to the implication of national or international interests—is contrary to settled precedent and, if accepted, would work immeasurable damage to states' guarded sovereign prerogative to pursue their state-law claims in state courts in environmental and non-environmental cases alike.

This Court should affirm the District Court's well-reasoned decision to remand Rhode Island's state-law claims to Rhode Island's properly chosen forum—state court. First, Rhode Island's claims do not necessarily raise any federal issue, much less one that warrants the exercise of jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Second, the doctrine of complete preemption does not support federal jurisdiction. And third, there is no merit to the notion that Rhode Island's claims belong in federal court because they inherently "arise under" federal common law. Even if that kind of argument could theoretically supply an independent basis for removal—which it cannot—the interest in combating climate change is not uniquely federal.

ARGUMENT

The Well-Pleaded Complaint Rule Compels Affirmance of the District Court's Remand Decision.

The right to remove is construed narrowly against removal, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941), and "the 'claim of sovereign protection from removal arises in its most powerful form,'" where, as here, the removed action is one brought by a state in state court to enforce state-law, *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (citation omitted); *see also LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011); *West Virginia*, 646 F.3d at 178-79. The Companies assert that federal question jurisdiction applies because Rhode Island's claims "arise under" federal law. Appellants' Opening Br. (Br.) 15. But the Companies cannot satisfy their burden to show that removal is appropriate here. *Danca v. Private Health Care Sys.*, 185 F.3d 1, 4 (1st Cir. 1999) (removal statutes are "strictly construed" and the "defendants have the burden of showing the federal court's jurisdiction"); *see Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921).

The "well-pleaded complaint" rule presents an insurmountable burden for the Companies' argument because, as the District Court correctly held, Rhode Island's state-law claims do not actually arise under federal law. That rule is a "powerful doctrine" that "severely limits the ... cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court, thereby avoiding

more-or-less automatically a number of potentially serious federal-state conflicts." *Franchise Tax Bd.*, 463 U.S. at 9-10. A plaintiff is "master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see also*, *e.g.*, *López–Muñoz v. Triple–S Salud, Inc.*, 754 F.3d 1, 5 (1st Cir. 2014). Even an "obvious" preemption defense does not create removal jurisdiction; instead, a preemption defense is to be raised in, and adjudicated by, state court. *López–Muñoz*, 754 F.3d at 6. Indeed, it is well settled that "[m]inimal respect for the state processes ... precludes any *presumption* that state courts will not safeguard federal constitutional rights." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

The exceptions to the well-pleaded complaint rule are narrow, 14C C.A. Wright & A.R. Miller, Federal Practice and Procedure § 3722.1 (4th ed. 2018): a defendant may remove a case where a nominally state-law claim "necessarily raise[s]" a substantial and disputed federal issue that a federal court can entertain without disturbing the federal-state judicial balance, *Grable*, 545 U.S. at 313-14, or, alternatively, a defendant may remove a case on the basis of "complete preemption." *E.g.*, *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 45 (1st Cir. 2008); *Prince v. Sears Holdings Corp.*, 848 F.3d 173, 177 (4th Cir. 2017). But as the District Court determined, neither of those two exceptions applies here. This Court should reject

the Companies' invitation to create a new, legally-unsupported exception to the well-pleaded complaint rule.

A. *Grable* Jurisdiction Does Not Warrant Reversal.

Federal jurisdiction under *Grable*—the first recognized exception to the well-pleaded complaint rule—is limited to a "special and small category" of cases. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). *Grable* jurisdiction exists only when "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id*. Here, Rhode Island's claims do not "necessarily raise[]" any federal issue at all, let alone one that is actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Thus, the District Court correctly concluded that these tightly circumscribed criteria do "not exist here, because the Companies have not located 'a right or immunity created by the Constitution or laws of the United States' that is 'an element and an essential one, of ... [Rhode Island]'s cause[s] of action.'" Br. Add-81 (citing *Gully v. First Nat. Bank*, 299 U.S. 109, 112 (1936)).

Rhode Island's complaint also does not "necessarily raise[]" a federal issue. While the Companies argue that Rhode Island's claims touch upon various "federal interests" implicated by climate change such as national security, foreign affairs, energy policy, economic policy, and environmental regulation, Br. 31, that is beside

the point; these federal *interests* are not federal *issues* for the court to resolve. Rather, to be "necessarily raised," the federal claims must "turn on substantial questions of federal law." *Grable*, 545 U.S. at 312. In *Grable*, for instance, compliance with federal law was "an essential element of ... [plaintiff's state-law] quiet title claim." *Id*. at 314-15. Indeed, "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharms. v. Thompson*, 478 U.S. 804, 813 (1986). That is so even where, unlike here, the state-law claim "references a federal ... statute," because a contrary rule "would herald[] a potentially enormous shift of traditionally state cases into federal courts." *Nevada*, 672 F.3d. at 676 (quoting *Grable*, 545 U.S. at 319). Claims giving rise to *Grable* jurisdiction are thus a "slim category" in which, among other things, resolution of the federal question is "necessary." *Gunn*, 568 U.S. at 258.

Here, by contrast, federal law is not an "essential element" of any of Rhode Island's claims. Instead, Rhode Island's claims are state-law tort claims—Rhode Island seeks money damages for local harms resulting from the Companies' alleged tortious conduct in producing, marketing, and distributing fossil fuels and seeks abatement of the nuisance the Companies allegedly have caused. Joint Appendix (JA) 23-27. The "rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal." Br. Add-81.

Rhode Island's claims—like virtually all state-law claims, even ones with a federal regulatory backdrop—turn on issues of state law, not federal law. *See Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 909-10, 912 (7th Cir. 2007) (remanding tort claims regarding airline crash despite "national regulation of many aspects of air travel"). And simply "gestur[ing] to federal law and federal concerns in a generalized way" does not raise any substantial or actually disputed federal issue that may justify federal jurisdiction. *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018), *appeal docketed*, No. 18-15499 (9th Cir. May 27, 2018).

The Companies are likewise wrong to contend that Rhode Island's public nuisance claim raises federal issues because Rhode Island may have to show that the harm from the Companies' conduct outweighs its utility. Br. 31-33. That determination does not "necessarily" require resolution of any federal law issue either. The federal laws the Companies cite regarding cost-benefit analysis of certain *potential* federal greenhouse gas control programs are inapposite, because the analysis they require does not establish the utility of state efforts to address climate change impacts in their own states. *See id*. at 32 (citing 42 U.S.C. §§ 13384, 13389(c)(1)). Indeed, a state court can evaluate the impact of the Companies' conduct (including its harm and its utility), consider the relevance of any federal regulatory backdrop, make a determination as to the unreasonableness of the

Companies' conduct, and craft an appropriate remedy, all without resolving any federal issue within the meaning of *Grable*.

State courts across the country have applied nuisance law in environmental cases, even when federal law also regulates the conduct at issue. *E.g.*, *Hoffman v. United Iron & Metal Co.*, 671 A.2d 55, 68-69 (Md. Ct. App. 1996) (affirming maintenance of state common-law nuisance claim against a facility that was subject to federal and state air pollution regulation); *see Washington Suburban Sanitary Comm'n v. CAE-Link Corp.*, 622 A.2d 745, 753-57 (Md. Ct. App. 1993) (upholding plaintiff's nuisance claims that sewage sludge processing plant, constructed pursuant to federal court orders, interfered with neighboring landowners' use and enjoyment of their property); *Biddix v. Henredon Furniture Indus.*, 331 S.E.2d 717, 720-24 (N.C. Ct. App. 1985) (allowing plaintiffs to maintain common-law nuisance claims for discharges impairing water quality even where defendant's conduct was regulated by both the state and federal Clean Water Acts). Likewise, the Sixth Circuit rejected a claim that the federal Clean Air Act preempted a plaintiff's claims that federally-regulated ethanol emissions from a nearby, out-of-state whiskey distillery created a nuisance. *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 686 (6th Cir. 2015).

Federal courts have also recognized that it is appropriate for state courts to decide complex environmental cases—even ones that may touch on federal issues.

For instance, the Second Circuit remanded claims brought in state court against corporations that had used methyl tertiary butyl ether (MTBE) as a gasoline additive. *In re MTBE Prods. Liab. Litig.*, 488 F.3d 112, 136 (2d Cir. 2007). Relying on a Supreme Court decision in the *Grable* line of case law, the Second Circuit held that the mere fact that defendants "refer to federal legislation by way of a defense" was insufficient to establish federal jurisdiction. *Id*. at 135 (citing *Merrell Dow*, 478 U.S. 813).

Finally, federal jurisdiction under *Grable* is not appropriate here because removal of Rhode Island's state-law claims would disrupt the federal-state balance that Congress struck. State courts are the most appropriate venue for state-law tort claims. *See*, *e.g.*, *Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 194 (4th Cir. 2002) (stressing that "state common law torts ... are traditional areas of state authority"). And as the Supreme Court has explained, when, as in the case here, there is "no federal cause of action and no preemption of state remedies," Congress likely intended for the claims to be heard in state court. *Grable*, 545 U.S. at 318.

B. The Clean Air Act Cannot Support Removal on Complete Preemption Grounds.

The Companies' alternative "complete preemption" argument fares no better. *See* Br. 48-52. Complete preemption may support removal jurisdiction because it allows "what a plaintiff calls a state law claim to be *recharacterized* as a federal claim." *Fayard*, 533 F.3d at 45. Ordinary preemption, by contrast, is "merely a

defense and is not a basis for removal." *Id*. Complete preemption is an exceedingly narrow doctrine and has no applicability to the types of claims alleged by Rhode Island here. Moreover, the Companies' argument, that the purely state-law claims in this case are completely preempted, would stretch the doctrine to severely constrain states' recognized authority to protect their residents' health and welfare. *See IMS Health Inc. v. Mills*, 616 F.3d 7, 28, 44 (1st Cir. 2010) (noting that states retain authority under their police powers to regulate matters of local concern and are vested with the responsibility of protecting the health, safety, and welfare of their citizens).

Complete preemption applies only in the rarest of circumstances. The defendant must establish that Congress both: (i) intended to displace the state-law cause of action; and (ii) provided a substitute federal cause of action. *See Caterpillar*, 482 U.S. at 393. Complete preemption thus exists only where the conduct at issue is subject to exclusive federal regulation and where federal law provides a federal cause of action. *Fayard*, 533 F.3d at 46. As stated by the District Court, "Congress, not the federal courts, initiates this 'extreme and unusual mechanism.'" Br. Add-76 (quoting *Fayard*, 533 F.3d at 47-49). And only with regard to three federal statutes—the Labor Management Act, the Employees Retirement Income Security Act, and the National Bank Act—has the Supreme Court actually held that Congress provided the "exclusive cause of action" for the

conduct at issue so as to justify removal based on the doctrine of complete preemption. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8-9 (2003).[4]

The complete preemption doctrine does not provide a basis for removal here. First, Congress plainly did not intend for the Clean Air Act to displace Rhode Island's state-law claims. In fact, the Act declares that "air pollution prevention ... is the primary responsibility of States and local governments," 42 U.S.C. § 7401(a)(3), and it includes two broad savings clauses that expressly preserve non-Clean Air Act claims. The first, the citizen suit savings clause, provides (among other things) that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." *Id*. at § 7604(e). The second, the states' rights savings clause, provides generally that "nothing in ... [the Clean Air Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of

[4] Given its narrowness, courts have rejected complete preemption arguments where federal environmental statutes are at issue. *See In re MTBE*, 488 F.3d at 135 (no Clean Air Act complete preemption); *ARCO Envtl. Remediation, L.L.C. v. Department of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (no complete preemption under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)); *City of Chesapeake v. Sutton Enters.*, 138 F.R.D. 468, 475-78 (E.D. Va. 1990) (no complete preemption under CERCLA or the Toxic Substances Control Act).

air pollution," except that certain state or local emission standards *may not be less stringent* than their federal counterparts. *Id*. at § 7416. Section 7416 "clearly encompasses common law standards." *Merrick*, 805 F.3d at 690; *see also In re MTBE*, 488 F.3d at 135 (holding that Clean Air Act did not completely preempt state law MTBE groundwater claims). Indeed, the Act's savings clause is "sweeping and explicit." *American Fuel & Petrochem. Mfrs. v. O'Keeffe*, 134 F. Supp. 3d 1270, 1285-86 (D. Or. 2015), *aff'd*, 903 F.3d 903 (9th Cir. 2018).

Second, Congress did not provide a substitute federal-law cause of action here, as required to establish complete preemption. *Fayard*, 533 F.3d at 46. The Companies' complete preemption argument rests on the fact that the Clean Air Act regulates, or enables EPA to regulate, emissions of greenhouse gases and other pollutants. Br. 48-52. But Rhode Island has not sued the Companies as *emitters* of greenhouse gases. Instead, it has sued them as producers, marketers, and distributors of fossil fuels, on state common-law and statutory theories that would be every bit as applicable to producers, marketers, and distributors of other products. The Companies fail to explain how the Clean Air Act could completely preempt state-law claims arising out that conduct when the Act does not even regulate it. *See*, *e.g*., *King v. Marriott Int'l, Inc*., 337 F.3d 421, 425 (4th Cir. 2003). Nor could they: even with respect to ordinary preemption, the Supreme Court has explained: "[t]here is no federal pre-emption in vacuo, without a constitutional text or a federal statute to

assert it." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). The Companies point to no "enacted statutory text" that would support complete preemption of Rhode Island's claims here.

C. There Is No Other Basis for Treating Rhode Island's State-Law Claims As If They Arise Under Federal Law.

Unable to satisfy the two established exceptions above, the Companies attempt to avoid the well-pleaded complaint rule altogether. Rhode Island's state-law claims, they say, are *really* federal common-law claims and thus arise under federal law for purposes of the removal statute. Br. 15-31. The Companies make that claim even though the Clean Air Act has displaced *federal* common law with respect to greenhouse gas emissions. Br. 27-29. The Companies' contention is misguided for at least three reasons.

1. The Companies' Argument Is Merely an Alternative Preemption Argument and Cannot Support Removal.

The thrust of the Companies' argument is that (i) federal law provides the only rule of decision for the kinds of claims that Rhode Island has asserted in its complaint, and (ii) for that reason, Rhode Island's claims should be treated as arising under federal law. *See* Br. 15. But that argument simply repackages the Companies' complete preemption arguments. *See*, *e.g.*, *Fayard*, 533 F.3d at 45 (explaining that under complete preemption "what a plaintiff calls a state law claim is to be *recharacterized* as a federal claim," and that, "[b]y contrast, ordinary preemption—

i.e., that a state claim conflicts with a federal statute—is merely a *defense* and is not a basis for removal"). As explained above, the Companies' complete preemption argument is meritless, and that conclusion applies with even more force in its repackaged form, which does not rely on any congressional enactment.[5]

To be sure, the Companies' arguments may be an attempt to invoke ordinary preemption, for their argument is that federal law bars the state-law remedies that Rhode Island seeks. *See* Br. 15. Yet, a federal-law preemption defense does not permit removal. *See Caterpillar*, 482 U.S. at 386. Thus, on remand to the state court, the Companies are free to argue that some combination of the Clean Air Act and federal common law means that Rhode Island's claims are not viable. But that, like other federal-law issues not present on the face of Rhode Island's well-pleaded complaint, is a matter for the state court to resolve.

2. Rhode Island's Well-Pleaded Claims Are Not Federal in Any Event.

Even if it were possible to establish federal jurisdiction on the sort of alternative ground that the Companies proffer, which it is not, remand is still

[5] The Companies attempt to frame their "arising under federal law" argument as a choice-of-law issue. Br. 16-19. They provide no legal basis for this argument, and there is none. Legal grounds must exist for exercising federal jurisdiction, and as discussed herein, when a well-pleaded complaint raises only state-law claims, those claims are not removable unless *Grable* jurisdiction exists or the state-law claims are completely preempted.

required. Contrary to the Companies' argument, Rhode Island's state-law tort law claims do not arise under federal common law. The interest in combating and adapting to climate change is not exclusively federal, and it is immaterial that climate change involves transboundary emissions.

a. Addressing Climate Change Harms Is Not a "Uniquely Federal Interest."

The Supreme Court has explained that there are "a few areas, involving 'uniquely federal interests,' [that] are so committed by the Constitution and the laws of the United States to federal control that state law is pre-empted and replaced'" by federal common law. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citation omitted). But such unique federal interests giving rise to federal common law is the exception—not the rule—and climate change harms are not an area that falls within that exception.

The Companies' argument to the contrary rests principally on the idea that climate change is a national problem requiring a national solution. *See* Br. 24. That the problem and its solutions include national and global dimensions, however, does not mean that they present a "uniquely federal interest[]." *Boyle*, 487 U.S. at 504. In fact, as explained above, states often play a vital role in addressing concerns in their states with national implications. *See supra* pp.2-3. The opioid crisis is one prominent and tragic example. In that context, states and local governments, including Massachusetts, are pursuing state-law claims against companies that

manufacture, market, and sell opioids to state residents for violating state laws. The defendants' attempts to remove some of those cases, too, were rejected despite the epidemic's national scope. *See*, *e.g.*, *New Mexico*, 323 F. Supp. 3d at 1245, 1251; *Town of Randolph*, 2019 WL 2394253, *1. Just like with the opioid crisis, the consequences of climate change often are felt locally, *see*, *e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007), and state and local governments play a critical role in crafting and implementing solutions.

Rising sea levels, for example, are a global phenomenon—but that phenomenon often takes a local toll.[6] Over the past half century, sea levels in the Northeast have been increasing three to four times faster than the global average.[7] Rhode Island, a low-lying coastal state, is experiencing and will continue to experience greater sea level rise than the global average, and its topography, geography, and land use patterns make it particularly susceptible to harm from sea level rise. *See* JA-26. The direct effects of rising temperature also are felt locally. Urban development means that temperatures often are highest in densely populated inner-city neighborhoods, which can increase the health risk to sensitive populations

[6] *E.g.*, Nestor Ramos, *Seven Things We Learned Researching Climate Change on Cape Cod*, Boston Globe, Sept. 27, 2019, https://www.bostonglobe.com/metro/2019/09/26/things-learned-researching-climate-change-cape-cod/ydI10vGJ7ummlw1JQLxSAL/story.html.

[7] Rhode Island Sea Grant, Sea Level Rise in Rhode Island: Trends and Impacts (Jan 2013), https://tinyurl.com/ty2fveq.

like the elderly, children, and people with preexisting pulmonary conditions.[8] Whatever measures are undertaken, the cost of sea-level and temperature rise to state and local governments will be massive.[9]

States, for their part, have long been recognized as having the power to combat environmental harms, including harms caused by air pollution. *See*, *e.g.*, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-43 (1960) (local regulation of ships' smoke "clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power"). As to climate change in particular, one court of appeals recently deemed it "well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents." *American Fuel*, 903 F.3d at 913 (citing *Massachusetts*, 549 U.S. at 522-23); *see id*. (noting that states' "broad police powers" allow them "to protect the health of citizens in the state").

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[8] *See* Nadja Popovich & Christopher Flavelle, *Summer in the City Is Hot, but Some Neighborhoods Suffer More*, N.Y. Times, Aug. 9, 2019, https://tinyurl.com/trap8ro.

[9] *See*, *e.g.*, II U.S GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 1321 (2018), https://tinyurl.com/y9d26rjl ("Nationally, estimates of adaptation costs range from tens to hundreds of billions of dollars per year."); *id*. at 760 (describing $235 million spent by Charleston, South Carolina as of 2016 to respond to increased flooding); U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 379 (2014), https://tinyurl.com/y9mc4zj7 (estimating cumulative costs from sea level rise in Boston alone as high as $94 billion through 2100).

And indeed states have used their police powers to do just that, recognizing that they lack the luxury of waiting for a comprehensive solution to come from the federal government.[10] Rhode Island has produced a detailed study on the impacts of climate change on it, which contains numerous, detailed recommendations for increasing the state's resiliency that the state plans to begin implementing in the near term.[11] Rhode Island has also developed the online "Storm Tools," which shows the effects of sea level rise on the Rhode Island shoreline down to effects on specific street addresses.[12] And, in 2004, Rhode Island established a Renewable Energy Standard, which requires the state's retail electricity providers to supply 38.5% of their electricity sales from renewable resources by 2035 to curb the emission of greenhouse gases. *See* R.I. Gen Laws § 39-26-4.

Massachusetts, which has long been a leader in tackling climate change, has also taken a variety of steps designed to reduce greenhouse gas emissions and

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[10] The overwhelming scientific consensus is that immediate and continual progress toward a near-zero greenhouse gas emission economy by mid-century is necessary to avoid catastrophic consequences. *See*, *e.g.*, Myles Allen et al., Summary for Policymakers 12-15 *in* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), https://tinyurl.com/y5yf2lsh.

[11] Rhode Island, Resilient Rhody: An Actionable Vision for Addressing the Impacts of Climate Change in Rhode Island (2018), http://climatechange.ri.gov/documents/resilientrhody18.pdf.

[12] Rhode Island Shoreline Change Special Area Mgmt. Plan, STORMTOOLS, https://www.beachsamp.org/stormtools/.

facilitate the transition to less carbon-intensive forms of energy.[13] In 1997, Massachusetts created a Renewable Portfolio Standard (RPS) to require a percentage of the state's electricity to come from renewable sources, Mass. Gen. Laws. ch. 25A, § 11F, and, in 2001 it was the first state to cap CO_2 emissions from fossil-fueled power plants. 310 Code of Mass. Regulations (C.M.R.) § 7.29(a)(5).[14] In 2008, Massachusetts enacted the Global Warming Solutions Act "to address the grave threats that climate change poses to the health, economy, and natural resources of the Commonwealth." *New England Power Generators Ass'n v. Department of Envtl. Prot.*, 480 Mass. 398, 399, 105 N.E.3d 1156, 1157 (2018) (citing Mass. Gen. Laws. ch. 21N, §§ 1-9). Pursuant to that Act, Massachusetts has established a declining limit on in-state power-plant emissions through 2050, 310 C.M.R. § 7.74, while requiring an increasing amount of clean electricity to be sold annually to Massachusetts consumers, *id*. at § 7.75.

Many other states have also taken measures to mandate emissions reductions or reduce their carbon footprint. California, for example, has codified its objective to reduce greenhouse emissions to 40% below 1990 levels by 2030.[15] Maryland's recently-updated RPS requires utility companies to provide at least 50% of

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[13] *See, e.g.*, Ken Kimmell & Laurie Burt, *Massachusetts Takes on Climate Change*, 27 UCLA J. Envtl. L. & Pol'y 295, 296-97 (2009).

[14] Kimmell & Burt, *supra* note 13, at 313 n.24.

[15] Cal. Health & Safety Code, § 38500 et seq.

electricity from renewable sources by 2030,[16] New York law requires 70% of retail electricity sales to come from renewable sources by 2030,[17] and Connecticut has required utilities to obtain 40% of their energy from renewable sources by 2030.[18] Oregon has adopted a Clean Fuels Program to reduce the carbon intensity of fuel.[19] And New Jersey's Global Warming Response Act requires reductions in carbon dioxide emissions—culminating in a 2050 level that is 80% lower than 2006—and establishes funding for climate-related projects and initiatives.[20] Delaware similarly requires utilities to obtain 25% of their electricity from renewable sources, and 3.5% from solar, by 2025.[21]

States also have collaborated on successful regional efforts to reduce greenhouse gas emissions through market-based systems. Rhode Island, Maryland, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, and

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[16] Clean Energy Jobs Act, 2019 Md. Laws. ch. 757 (S.B. 516) (to be codified at Md. Code Ann., Pub. Util. § 7-702).

[17] N.Y. Climate Leadership and Community Protection Act, 2019 McKinney's Sess. Law News of N.Y. ch. 106 (S. 6599).

[18] Conn. Gen. Stat. §§ 16-245a, 16-245n.

[19] Or. Rev. Stat. §§ 468A.265 to 468A.277; Or. Admin. R. 340-253-0000 to 340.253.8100; *see American Fuel*, 903 F.3d 903 (rejecting challenge to Oregon's Clean Fuels Program).

[20] N.J. Stat. Ann. §§ 26:2C-37 to -58.

[21] 26 Del. C. § 354(a).

Vermont participate in the Regional Greenhouse Gas Initiative,[22] a regional cap-and-trade program that uses an increasingly stringent carbon emissions cap to reduce carbon pollution from power plants.[23] Participating states have reduced carbon emissions from the electricity generating sector by 40% since the program launched.[24]

The compatibility of state regulation with federal efforts to address climate change is also borne out by the breadth of climate change cases that state courts already hear. A database maintained by the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter Kaye Scholer LLP lists 326 past and ongoing lawsuits throughout the country raising state-law claims related to climate change, more than 90% of which are being or have been adjudicated in state courts or before state agencies.[25] The claims in these cases derive from a wide range of

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[22] In June 2019, New Jersey finalized regulations to establish a market-based program to reduce greenhouse gas emissions. The state will resume participating in RGGI on January 1, 2020.

[23] *See* Regional Greenhouse Gas Initiative, Elements of RGGI, https://www.rggi.org/program-overview-and-design/elements (last visited Dec. 10, 2019).

[24] Acadia Center, Outpacing the Nation: RGGI's Environmental and Economic Success 3 (Sept. 2017), http://acadiacenter.org/wp-content/uploads/2017/09/Acadia-Center_RGGI-Report_Outpacing-the-Nation.pdf.

[25] Sabin Center for Climate Change and the Environment and Arnold & Porter Kaye Scholer LLP, U.S. Climate Change Litigation: State Law Claims, Climate Change Litigation Database, http://climatecasechart.com/case-category/state-law-claims/ (last visited Dec. 10, 2019).

state laws. For example, state courts routinely address climate change in the context of challenges to land-use decisions under state equivalents to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-12. *See*, *e.g.*, *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts*, 397 P. 3d 989 (Cal. 2017). State courts also adjudicate the operation and validity of states' regulatory efforts to reduce greenhouse gas emissions. *See*, *e.g.*, *California Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 613-14 (Ct. App. 2017) (upholding California's economy-wide cap-and-trade program); *New England Power*, 105 N.E.3d at 1167 (upholding Massachusetts' declining limits for greenhouse gas emissions from power plants). As with these and other cases, Rhode Island's state courts can and should hear Rhode Island's claims under state law.

The instant case does not seek to alter climate change policy or regulate greenhouse gas emissions, and the complaint challenges no regulation, permit, treaty, contract, or international behavior. Nor does it seek abatement relief outside of Rhode Island's borders. Rather, the tort claims fall squarely within Rhode Island's police power to redress tortious conduct by non-governmental actors. Thus, treating these claims as arising under state law, not federal common law, is consistent with how courts have treated other suits against sellers and manufacturers of products. It is well-settled that such suits do not present federal issues warranting application of federal common law—even if important federal interests are raised,

and even if a product is sold or causes injury in many states. *See*, *e.g.*, *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc) (state law, not federal common law, governed in cases against asbestos manufacturers); *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 995 (2d Cir. 1980) (state law, not federal common law, governed class action tort case against producers of Agent Orange on behalf of millions of soldiers, despite federal interest in veterans' health).

b. That Climate Change Involves Transboundary Pollution Does Not Mean Rhode Island's Claims Arise Under Federal Common Law.

Despite the foregoing, the Companies insist that Rhode Island's claims must arise under federal common law because they relate to transboundary pollution. *See*, *e.g.*, Br. 19-22. The Companies are wrong for three principal reasons.

First, even if it were appropriate to treat Rhode Island's claims as transboundary-emissions claims, Supreme Court precedent establishes that federal common law would not categorically govern. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)—a suit involving ordinary preemption, not complete preemption, and thus not implicating removal jurisdiction—the Court declined to hold all state-law claims against out-of-state polluters preempted. *Id.* at 497. Consistent with the outcome of *Ouellette*, the Court in *American Electric Power Company v. Connecticut*, 564 U.S. 410 (2011) (*AEP*), after finding that the Clean Air Act had displaced any federal common law that might have existed for

curtailment of greenhouse gas emissions, expressly *declined* to invalidate the plaintiffs' state-law nuisance claims. *Id*. at 429. Instead, it remanded for the lower court to consider the availability of state nuisance law to remedy the defendants' conduct. *See id*. Thus, the Companies' argument that interstate-greenhouse gas emission claims arise under federal common law is nonsensical after *AEP*.

Second, *Native Village of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012) also does not support the Companies. *Kivalina* involved nuisance claims brought against energy companies, in federal court, under both federal and state common law. *Id*. at 853, 859. In dismissing the federal-law claims, the District Court declined to exercise supplemental jurisdiction over the state-law claims, which it "dismissed without prejudice to their presentation in a state court action." *Native Village of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863, 882-83 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849. The court of appeals, in turn, merely applied *AEP* to hold that the federal common-law claims had been displaced by the Clean Air Act, not that the plaintiff's state-law claims arose under federal common law. *Kivalina*, 696 F.3d at 856.[26] And the concurrence stressed that "[d]isplacement

[26] Remarkably, the Companies argue that federal common law should supply the decisional law in this case even though many of them argued successfully in *Kivalina* that federal common law on this issue had been displaced. Br. of ExxonMobil et al. at 56-61, *Kivalina*, 696 F.3d 849 (No. 09-17490), 2010 WL 3299982. The Companies may not "assume a contrary position" here. *Gens v. Resolution Trust Corp.*, 112 F.3d 569, 572-73 (1st Cir. 1997).

of the federal common law does not leave those injured by air pollution without a remedy," because "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." *Id*. at 866 (Pro, J., concurring).

Third, unlike in *AEP* and *Kivalina,* Rhode Island is not suing the Companies as emitters of pollutants. Rather, it is suing them as producers, marketers, and distributors of products the use of which results in the emission of those pollutants. And, again, Rhode Island is doing so based on well-established state law tort theories. Thus, the legal principles that may govern a suit against (say) an air pollution source for its transboundary emissions of greenhouse gases do not govern Rhode Island's claims.

Thus, far from dictating that Rhode Island's claims give rise to federal jurisdiction because they allegedly "arise under" federal law, case law and commonsense counsel that Rhode Island's state-law claims must be returned to state court where they were first raised. "Restraint is particularly appropriate" here, "in light of the Supreme Court's directive that removal statutes should be 'strictly construed,' … and the sovereignty concerns that arise when a case brought by a state in its own courts is removed to federal court." *LG Display*, 665 F.3d at 774 (citation omitted).

CONCLUSION

The District Court's order remanding this case to Rhode Island state court should be affirmed.

Dated: January 2, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a) and Fed. R. App. P. 29(a)(5), because this brief contains 6,390 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point, Times New Roman-style font.

Dated: January 2, 2020
Boston, Mass.

/s/ Seth Schofield
Seth Schofield
Counsel for the Commonwealth of Massachusetts

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on January 2, 2020, and that parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: January 2, 2020
Boston, Mass.

/s/ Seth Schofield
Seth Schofield
Counsel for the Commonwealth of Massachusetts

Addendum

ADDENDUM TABLE OF CONTENTS

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UNPUBLISHED DISTRICT COURT OPINIONS AND ORDERS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CITY OF WORCESTER, a Massachusetts municipal corporation, **Plaintiff,** **v.** **PURDUE PHARMA L.P., d/b/a PURDUE PHARMA (DELAWARE) LIMITED PARTNERSHIP; PURDUE PHARMA INC.; THE PURDUE FREDERICK COMPANY, INC.; TEVA PHARMACEUTICALS USA, INC.; CEPHALON, INC.; COLLEGIUM PHARMACEUTICAL, INC.; JOHNSON& JOHNSON; JANSSEN PHARMACEUTICALS, INC.; ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. n/k/a JANSSEN PHARMACEUTICALS, INC.; ENDO HEALTH SOLUTIONS INC.; ENDO PHARMACEUTICALS, INC.; ALLERGAN PLC f/k/a/ ACTAVIS PLC; ACTAVIS, INC. f/k/a WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES; INC.; ACTAVIS LLC; ACTAVIS PHARMA, INC. f/k/a WATSON PHARMA, INC.; MALLINCKRODT PLC; MALLINCKRODT LLC; and INSYS THERAPEUTICS, INC.,** **Manufacturer Defendants,** **and** **MCKESSON CORPORATION; CARDINAL HEALTH, INC.; AMERISOURCEBERGEN DRUG CORPORATION,** **Distributor Defendants,**	**CIVIL ACTION** **NO. 18-11958-TSH**

and)
JOHN KAPOOR,)
)
Individual defendants.)
_____)

ORDER AND MEMORANDUM ON PLAINTIFF'S EMERGENCY MOTION TO REMAND TO STATE COURT AND DEFENDANTS' MOTION TO STAY (Docket Nos. 22 & 27)

November 21, 2018

HILLMAN, D.J.

The City of Worcester, Massachusetts ("Plaintiff") initiated this action in Massachusetts Superior Court asserting several claims for the manufacture and distribution of opioids throughout Worcester against Purdue Pharma, L.P., Purdue Pharma Inc., The Purdue Frederick Company, Inc., Teva Pharmaceuticals USA, Inc. Cephalon, Inc. Collegium Pharmaceutical, Inc., Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., Endo Health Solutions, Inc., Endo Pharmaceuticals, Inc., Allergan PLC, Watson Laboratories, Inc., Actavis LLC, Actavis Pharma, Inc., Mallinckrodt PLC, Mallinckrodt LLC, INSYS Therapeutics, Inc., McKesson Corporation, Cardinal Health, Inc., AmerisourceBergen Drug Corporation ("ABDC"), and John Kapoor. Defendant ABDC then removed the case to this Court. Plaintiff thereafter filed a motion to remand the case back to state court (Docket No. 22). In addition, Defendants ABDC, McKesson Corporation, and Cardinal Health, Inc. ("Defendants") have filed a motion to stay (Docket No. 27). For the reasons below, Plaintiff's motion is ***granted*** and Defendants' motion is ***denied***.

Background

On July 30, 2018, Plaintiff filed this suit in Massachusetts Superior Court. The Complaint asserts seven state law causes of action against a group of prescription opioid distributors,

manufacturers, and one opioid industry executive. The City of Worcester seeks abatement, restitution, civil penalties, disgorgement of profits, and damages in connection with an allegedly unlawful scheme by Defendants to expand their market and sales of opioid prescription products in the Commonwealth. According to Plaintiff, the manufacturers promoted opioids for the treatment of chronic pain, falsely, knowingly, recklessly, and negligently denied or downplayed the risk of addiction, and exaggerated the benefits of prolonged opioid use. Further, the distributors negligently, knowingly, and recklessly continued to distribute drugs to third parties, despite their knowledge that the drugs would be used for diversion rather than legitimate medical needs.

Defendant ABDC removed this case on September 17, 2018, arguing that the state law claims presented federal questions that made federal question jurisdiction proper. On September 26, 2018, the JPML issued a conditional transfer order which transferred this case to the MDL Court. Plaintiff subsequently filed this motion to remand the case to state court before it is transferred to the MDL Court and "consigned to an indefinite moratorium." (Docket No. 22, at 8).

Motion to Stay

As an initial matter, Defendants have requested that the Court stay the litigation, including the motion to remand, pending transfer to MDL Court. That Court, Defendants argue, can then decide whether to remand this case to back to state court. According to Defendants, a stay would promote judicial efficiency, avert the hardships of proceeding in a different forum on Defendants, and would not prejudice Plaintiff because any delay would be minimal.

As to Defendants' first argument, a preliminary evaluation of jurisdiction may in fact better serve judicial economy. *See, e.g., Waters v. Bausch & Lomb, Inc.*, 2006 WL 8433439, *2 (S.D. Fla. Jul. 28, 2006) ("Many district courts have held that the interests of judicial economy are best served by giving at least preliminary scrutiny to the merits of a motion to remand, even

where a motion to transfer is pending before the JPML."); *McGrew v. Schering-Plough Corp.*, 2001 WL 950890, at *3 (D. Kan. Aug. 6, 2001) ("For purposes of judicial economy, the jurisdictional issues should be resolved immediately[,]" before action by the MDL panel (citation omitted)). This is especially true when, as here and discussed below, the absence of jurisdiction is patently obvious. *See* Manual for Complex Litigation, Fourth § 22.35 ("The reasons for stay diminish, however, . . . if the absence of federal jurisdiction is clear. Judicial economy may then be served by resolving specific issues and declining to stay the proceedings.").

Moreover, because federal question jurisdiction is lacking, Defendants will inevitably be required to proceed in different forum. Thus, the hardship that Defendants attempt to evade by staying the proceedings is in fact unavoidable. Finally, I find that Plaintiff would be prejudiced by a stay. The court in *Hilbert v. Aeroquip, Inc.*, found

> no reason to require the plaintiffs to suffer the undeniable delays inherent in all MDL asbestos cases unless there is federal jurisdiction. To undergo such a lengthy process to find out that there is no federal jurisdiction would be a travesty of justice given Mr. Hilbert's medical condition.

486 F. Supp. 2d 135, 142 (D. Mass. 2007). The same reasoning applies here. Needlessly causing delays when there is clearly no jurisdiction would similarly constitute a travesty of justice. Accordingly, the motion to stay is denied and the Court will consider the motion to remand.

Jurisdictional Standard

A civil action brought in state court may be removed to federal district court only if the federal court would have had original jurisdiction over the claim. 28 U.S.C. 1441(a); *see City of Chicago v. Int'l Coll. Of Surgeons*, 522 U.S. 156, 163, 118 S.Ct. 523 (1997) ("The propriety of removal . . . depends on whether the case originally could have been filed in the federal court."). The removing party bears the burden of establishing federal jurisdiction. *BIW Deceived v. Local*

S6, Indus. Union of Marine & Shipbuilding Workers of Am., IAMAW Dist. Lodge 4, 132 F.3d 824, 831 (1st Cir. 1997); *Amoche v. Guar. Trust Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009).

"As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6, 123 S.Ct. 2058 (2003); *see also Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542 (1987) ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law."). Typically, "a case arises under federal law when federal law creates the cause of action asserted." *Gunn v. Minton*, 568 U.S. 251, 257, 133 S.Ct. 1059 (2013); *see also American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585 (1916) ("A suit arises under the law that creates the cause of action.").

But there is a "special and small category" of cases that allow federal courts to exercise jurisdiction when no federal claims appear on the face of a plaintiff's complaint. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699, 126 S.Ct. 2121 (2006). Federal jurisdiction is appropriate "where the vindication of a right under state law necessarily turned on some construction of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9, 103 S.Ct. 2841 (1983). Thus, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258, 133 S.Ct. 1059.

Discussion

Because the first prong of the *Gunn* test, whether a federal issue is necessarily raised, resolves this dispute, I start and end my analysis there.

The necessity requirement of federal question jurisdiction is met if the "vindication of a right under state law necessarily turns on some construction of federal law." *Merrell Dow Pharms. v. Thompson*, 478 U.S. 804, 808-09, 106 S.Ct. 3229 (1986). "[A] claim supported by alternative theories in the complaint may not form the basis for [federal] jurisdiction unless [federal] law is essential to each of those theories." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 810, 108 S.Ct. 2116 (1988) (interpreting "identical language" in 28 U.S.C. §§ 1331 and 1338 and "quite naturally appl[ying] the same test" to both); *see also Cabana v. Forcier*, 148 F. Supp. 2d 110, 114 (D. Mass. 2001) ("When a state law cause of action is supported by alternate theories, federal law must be essential to each of those theories to confer federal questions jurisdiction."); *Narragansett Indian Tribe v. Rhode Island Department of Transportation*, 903 F.3d 26, 32 (1st Cir. 2018) ("But the mere fact that a claim or defense requires an explanation of a federal statutory scheme as background does not mean that a complaint "'necessarily raise[s] a stated federal issue.'" (quoting *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314, 125 S.Ct. 2363 (2005)) (alteration in original)).

In *Grable*, the Supreme Court found a federal issue was necessarily raised. 545 U.S. at 314-15, 125 S.Ct. 2363. In that case, the IRS seized the plaintiff's property to satisfy federal back taxes and sold it to the defendant. *Id.* at 310, 125 S.Ct. 2363. The plaintiff sued in state court alleging that the defendant's title was invalid because federal law obliged the IRS to give the plaintiff notice of the sale by personal service, not certified mail. *Id.* at 311, 125 S.Ct. 2363. The defendant removed the case to federal court claiming that the plaintiff's claim depended on an interpretation of federal tax law. *Id.* The Court explained that the plaintiff's quiet title claim was premised on the "essential element" of an alleged "failure by the IRS to give it adequate notice, as defined by federal law." *Id.* at 314-15, 125 S.Ct. 2363. Indeed, the federal form of notice issue

was "*the only legal or factual issue contested* in the case." *Id.* at 315, 125 S.Ct. 2363 (emphasis added); *see also Rhode Island Fishermen's All., Inc. v. Rhode Island Dep't Of Envtl. Mgmt.*, 585 F.3d 42, 49 (1st Cir. 2009) (finding a federal issue necessarily raised where the plaintiffs' "asserted right to relief under state law requires resolution of a federal question . . . Thus, it *is not logically possible* for the plaintiffs to prevail on this cause of action without affirmatively answering the embedded question." (emphasis added)).

Here, on the other hand, no federal issue is necessarily raised. First, Plaintiff's Complaint contains seven claims, each of which is predicated on violations of Massachusetts statutory and common law. While Plaintiff's Complaint does reference federal law, it relies on the alleged violation of the Controlled Substances Act ("CSA") only insofar as it evidences common law negligence. Thus, unlike the situation in *Grable*, the embedded federal question in this case is not the only legal or factual dispute and unlike *Rhode Island Fisherman's*, Plaintiff can succeed without any reliance on federal law. Resolution of the federal issue is not necessary because in addition to having specific statutory duties under the CSA, Defendants concurrently had a common law duty to exercise reasonable care when distributing the drugs. Therefore, a court could resolve all of Plaintiff's claims without any analysis of the CSA.

Defendants contend that Plaintiff is required to rely on the federal issue to prevail because Plaintiff makes negligence per se claims. However, not only does Plaintiff not allege that Defendants' violations of the CSA constitute negligence per se, Plaintiff cannot.[1] Massachusetts

[1] Moreover, even if Plaintiff's claims were premised on a theory of negligence per se and therefore necessarily depended on resolution of the federal issue, *Merrell Dow* would counsel against federal jurisdiction. In that case, one of the plaintiff's claims necessarily relied on violation of federal law to prove the defendant was negligent per se. 478 U.S. at 806, 106 S.Ct. 3229. Indeed, "[n]o other basis for finding petitioner negligent was asserted." *Id.* at 823, 106 S.Ct. 3229 (Brennan, J. dissenting). The Court nonetheless declined to exercise federal question jurisdiction because (1) "the presence of a claimed violation of the statue as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction," *id.* at 814, 106 S.Ct. 3229, and (2) the FDCA, like the federal statute here, provided

courts have "repeatedly reaffirmed the principle that negligence per se does not exist as a cause of action independent from a general negligence action because violation of the statute can only be some evidence of the defendant's negligence." *Deutsche Lufthansa AG v. Mass. Port Authority*, 2018 WL 3466938, at *2 (D. Mass. July 18, 2018); *see also Lev v. Beverly Enterprises-Massachusetts, Inc.*, 457 Mass. 234, 245 (2010) ("It is only where a duty of care exists that the violation of a statue, ordinance, regulation, or policy is relevant because it constitutes some evidence of a defendant's negligence."); *Juliano v. Simpson*, 461 Mass. 527, 532 (2012) (Massachusetts "does not follow the doctrine of negligence per se."); *Bennet v. Eagle Brook Country Store, Inc.*, 408 Mass. 355, 359 (1990) ("[V]iolation of a statute . . . is only some evidence of the defendant's negligence as to all consequences the statute was intended to prevent."). Therefore, as noted above, Plaintiff merely argues that violations of federal law provide evidence of common law negligence. This evidence, however, is neither necessary nor sufficient for Plaintiff to prevail on its claims.

Because Plaintiff is not required to prove Defendants violated federal law to prevail, a federal question is not necessarily presented. Therefore, this Court does not have federal question jurisdiction.[2]

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no private right of action—an indication that Congress did not anticipate that federal courts would "nevertheless exercise federal-question jurisdiction and provide remedies for that federal statute." *Id.* at 812, 106 S.Ct. 3229. Thus, even if Plaintiff only relied on the breach of the CSA to support their common law negligence claim, although resolution of a federal issue would be necessary, federal jurisdiction would still likely be improper. *See Uintah County, Utah v. Purdue Pharma, L.P.*, 2018 WL 37 47847, at * 6 (D. Utah Aug. 7, 2018) ("But even if Plaintiffs relied only on a breach of the federal CSA for a given state law claim against the Distributors to establish . . . their state law claims . . . the court likely still would not find the presence of a substantial issue of federal law. Doing otherwise . . . would seemingly flout *Merrell Dow*, in which the Supreme Court found no federal subject matter jurisdiction under analogous facts where plaintiffs directly claimed the defendant's alleged breach of a federal drug labeling statute established the defendant had been negligent per se and that negligence was the proximate cause of the injuries alleged in the consolidated cases.").

[2] Several other district courts have held, in cases almost identical to the one here, that federal question jurisdiction was not proper. *See Delaware ex rel. Denn v. Purdue Pharma, L.P.*, 2018 WL 1942363, at *3 (D. Del. Apr. 25, 2018) ("[I]t is possible for Plaintiff to show Defendants acted unreasonably without

Conclusion

For the reasons stated above, Plaintiff's motion to remand to state court (Docket No. 22) is ***granted*** and Defendants' motion to stay (Docket No. 27) is ***denied***.

SO ORDERED

/s/ Timothy S. Hillman
TIMOTHY S. HILLMAN
DISTRICT JUDGE

reference to the FCSA."); *New Mexico ex rel. Balderas v. Purdue Pharma, L.P.*, 2018 WL 2943246, at *6 (D.N.M. June 12, 2018) ("New Mexico state law provides alternate theories for a finding of liability against McKesson and its codefendants because the Complaint implicates numerous alleged duties under state law."); *West Virginia ex rel. Morrisey v. McKesson Corp.*, 2017 WL 357307 (S.D. W. Va. Jan. 24, 2017) (holding a federal issue not necessarily raised as "plaintiffs' complaint alleges violations of numerous duties implicated by state law."); *Uintah County, Utah*, 2018 WL 3747847, at *5 ("Plaintiffs assert only state law claims, and provide bases for the claims which do not arise out of or necessarily depend on an interpretation of a disputed CSA provision."); *Weber County, Utah v. Purdue Pharma, L.P.*, 2018 WL 3747846, at *5 (D. Utah Aug. 7, 2018) (same).

Defendant attempts to distinguish many of these cases by noting that they "involve claims alleging violations of state laws that impose duties on distributors, such as requirements to report prescription drug diversions to state regulatory bodies." (Docket No. 26, at 10). Here, on the other hand, Plaintiff primarily relies on common law principles to argue that Defendant's conduct was unlawful and "cannot identify any state law duty that could support its claims that Distributors over-distributed controlled substances into Massachusetts." *Id* at 12. This is a distinction without a difference—whether Plaintiff's claims are based on statutory or common law, the only relevant inquiry is whether they necessarily raise a federal issue. They do not.

2017 WL 2258757
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION
This Order Relates To: Dkt. Nos. 2002, 2267, 2443, 2445, 2599, 2627, 2738, 2814, 2816, 2826, 2829, 2832

MDL No. 2672 CRB (JSC)
|
Signed 05/23/2017

ORDER GRANTING STATES' MOTIONS TO REMAND

CHARLES R. BREYER, United States District Judge

***1** Currently before the Court are 12 motions to remand, respectively filed by the State Attorneys General of Alabama, Illinois, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Mexico, Ohio, Oklahoma, Tennessee, and Vermont (the "States"). Each State filed a complaint in state court, alleging that Volkswagen violated state law by using a defeat device in certain model TDI diesel engine vehicles. Volkswagen removed the cases, asserting federal question subject-matter jurisdiction under 28 U.S.C. § 1331.

As the removing party, Volkswagen bears the burden of demonstrating that this Court has jurisdiction over the States' cases. Volkswagen contends that the States' complaints support "arising under" jurisdiction under § 1331 because: (1) at least some of the statutes reference EPA regulations; (2) all of the States' factual allegations rely on Volkswagen's use of a "defeat device," a term defined only in EPA regulations; and (3) many of the States' claims conflict with the Clean Air Act's division of enforcement authority between states and the federal government.

Ultimately, none of these grounds supports "arising under" jurisdiction. While some of the state statutes at issue do reference EPA regulations, and the States' factual allegations do rely on Volkswagen's use of a defeat device, the mere presence of these federal components—which are not disputed and in most instances are not elements of the States' claims—is insufficient to support "arising under" jurisdiction. Further, irrespective of the merit of Volkswagen's argument that the States' claims conflict with the Clean Air Act, this argument is a preemption defense, which does not give rise to federal subject-matter jurisdiction. For these reasons, the Court GRANTS the States' motions to remand.

BACKGROUND

I. Factual Background

Between 2009 and 2015, Volkswagen sold nearly 600,000 Volkswagen-, Audi-, and Porsche-branded TDI "clean diesel" vehicles in the United States, which it marketed as being environmentally friendly, fuel efficient, and high performing. Unbeknownst to consumers and regulatory authorities, Volkswagen installed a software defeat device in these cars that allows the vehicles to evade United States Environmental Protection Agency ("EPA") and California Air Resources Board ("CARB") emissions test procedures. The defeat device senses whether the vehicle is undergoing emissions testing or being operated on the road. During emissions testing, the defeat device produces regulation-compliant results. When the vehicle is on the road, the defeat device reduces

the effectiveness of the vehicles' emissions control systems. Only by installing the defeat device in its vehicles was Volkswagen able to obtain Certificates of Conformity from EPA and Executive Orders from CARB for its 2.0- and 3.0-liter TDI diesel engine vehicles; in fact, these vehicles release nitrogen oxides (NOx) at a factor of up to 40 times permitted limits.

II. Procedural Background

The public learned of Volkswagen's deliberate use of a defeat device in the fall of 2015. Litigation quickly ensued, and many of those actions were consolidated and assigned to this Court as a multidistrict litigation ("MDL"). Among the lawsuits assigned to this Court were 17 cases filed by State Attorneys General, asserting violations of state law and naming as defendants Volkswagen AG; Volkswagen Group of America, Inc.; Audi AG; Porsche AG; and Porsche Cars of North America, Inc., and in some cases also Audi of America LLC; Volkswagen Group of America Chattanooga Operations, LLC; and Martin Winterkorn, former CEO of Volkswagen AG (collectively, "Volkswagen" or "Defendants"). Sixteen of the State cases were originally filed in state court and later removed by Volkswagen. The seventeenth was filed by the Wyoming Attorney General in the United States District Court, District of Wyoming, and later transferred to this Court. (*See* Case No. 3:16-cv-06646-CRB.)

***2** After Volkswagen removed 16 of the State cases, Attorneys General of some of those States filed motions to remand. On July 7, 2016, however, this Court stayed all remand motions until after the fairness hearing regarding the 2.0-liter class action settlement. (*See* Pretrial Order No. 22, Dkt. No. 1643.) On January 5, 2017, the Court lifted the stay and set January 31, 2017 as the deadline for all opening briefs. (Dkt. No. 2640.) On or before January 31, the Attorneys General of the 16 States that originally filed complaints in state court filed or joined briefs in support of their motions to remand. Four of the States (Maine, Massachusetts, New York, and Pennsylvania) subsequently entered into a settlement with Volkswagen that resolved their claims, leaving the Court with 12 outstanding remand motions.[1] (Dkt. No. 3126.)

[1] Vermont is also a party to the settlement agreement. The agreement, however, resolved only environmental claims, and Vermont continues to bring consumer-protection claims against Volkswagen. (*See* Dkt. No. 3114 at 2-3.)

The States can be divided into two groups. The first includes States that have not adopted CARB emissions standards. These States refer to themselves as "Non-177 States"—signifying that they have chosen not to follow CARB standards in lieu of EPA standards, as permitted by Section 177 of the Clean Air Act. (*See* Dkt. No. 2834.) The Non-177 States are Alabama, Illinois, Minnesota, Missouri, Montana, New Hampshire, Ohio, Oklahoma, and Tennessee. The second group of States includes those that have adopted CARB standards (the "177 States"). (Dkt. No. 2832.) Maryland and Vermont are the only pure 177 States, while New Mexico is a hybrid 177 State—having adopted CARB emissions standards, but only during a limited time period statewide, and during a more extensive time period in Bernalillo County. (Dkt. No. 2829.)

Category	States
Non-177 States	Alabama, Illinois, Minnesota, Missouri, Montana, New Hampshire, Ohio, Oklahoma, Tennessee
177 States	Maryland, New Mexico (hybrid), Vermont

III. Claims Background

A. Exclusively Non-177 State Claims

The Non-177 States' claims can be divided into four categories: (1) anti-tampering; (2) inspection and maintenance (I&M); (3) environmental; and (4) consumer-protection claims.

1. Anti-Tampering Claims

Seven of nine Non-177 States bring claims against Volkswagen under state statutes that prohibit tampering with vehicle emission control systems. As an example, Alabama law provides that:

> No person shall cause, suffer, allow, or permit the removal, disconnection, and/or disabling of ... [an] exhaust emission control system ... which has been installed on a motor vehicle.

ADEM Admin. Code R. 335-3-9-.06. In its complaint, Alabama asserts that Volkswagen violated this provision by installing a defeat device in its vehicles, which caused each vehicle's exhaust emission control systems—*e.g.*, its diesel particulate filters—to be disconnected or disabled "each and every time the subject vehicle was operating outside of dyno testing conditions." (Dkt. No. 2834-2 at 15, 28.)

The other Non-177 States' anti-tampering statutes are materially the same as Alabama's, although some also rely in part on federal motor vehicle standards. For example, Illinois law provides that:

> Except as permitted or authorized by law, no person shall ... remove, dismantle or otherwise cause to be inoperative any equipment or feature constituting an operational element of the air pollution control systems or mechanisms of a motor vehicle *as required by rules or regulations of the Board and the United States Environmental Protection Agency* to be maintained in or on the vehicle.

35 Ill. Adm. Code § 240.102 (emphasis added). In its complaint, Illinois contends that, by installing a defeat device in its vehicles, Volkswagen rendered inoperative air pollution

control systems that were required to be maintained in order for its vehicles to comply with the EPA's Tier 2 and Tier 3 NOx emissions standards. (Dkt. No. 2834-2 at 153.)

2. Tennessee's Inspection and Maintenance Claim

***3** In addition to an anti-tampering claim, Tennessee brings a claim against Volkswagen under its I&M laws.[2] Generally, I&M laws require vehicles to undergo periodic emissions testing to ensure they are being properly maintained. In this case, Tennessee contends that Volkswagen violated an I&M provision that prohibits any person from "knowingly ... [f]alsif[ying], tamper[ing] with, or render[ing] inaccurate any monitoring device or method required to be maintained or followed[.]" Tenn. Code Ann. § 68-201-112(a)(3). Tennessee alleges that Volkswagen violated this provision by using a defeat device in its vehicles, which falsified, tampered with, or rendered inaccurate each vehicle's "on-board diagnostics system[s']" assessment of true emissions performance during annual I&M testing. (Dkt. No. 2834-2 at 68, 73-74.)

[2] Volkswagen contends that Missouri also filed an I&M claim. While Missouri does discuss its I&M program in the background section of its complaint, neither of its two causes of action are actually for violations of that program. (*See* Dkt. No. 2834-2 at 115-16.)

3. Missouri's Environmental Claims

Missouri filed two claims against Volkswagen under its environmental protection laws.[3] The first is for violation of a Missouri regulation providing that:

> No person shall cause or permit the installation or use of any device or any means which, without resulting in reduction in the total amount of air contaminant emitted, conceal or dilute an emission or air contaminant which violates a rule of the Missouri Air Conservation Commission.

10 CSR § 10-6.150. In its complaint, Missouri asserts that Volkswagen violated this regulation by installing a device in its vehicles that concealed NOx emission levels greater than those permitted by the Missouri Air Conservation Commission. (Dkt. No. 2834-2 at 115.) Missouri's NOx standards mirror the EPA's NAAQS standards. (*See generally id.* at 86-95.)

[3] Volkswagen contends that Ohio also filed claims against it under state environmental laws. (Dkt. No. 2988 at 20.) While Ohio does bring claims under its Air Pollution Control Statute, the claims are anti-tampering not environmental claims. (*See* Dkt. No. 2834-2 at 140-44.)

Missouri's second claim is for unlawful emission of an air contaminant. The relevant statute provides that:

> It is unlawful for any person to cause or permit any air pollution by emission of any air contaminant from any air contaminant source located in Missouri, in violation of

> sections 643.010 to 643.190, or any rule promulgated by the commission.

Mo. Rev. Stat. § 643.151. Missouri asserts that Volkswagen violated this provision by installing a defeat device in its vehicles, which concealed emissions during vehicle inspections, but "caused or permitted an elevation in the level of NOx, a regulated air contaminant, that discharged from the [vehicles] during normal on-road operation." (Dkt. No. 2834-2 at 116.)

B. Exclusively 177 State Claims

1. CARB Emissions Standards Claims

Maryland and New Mexico bring claims against Volkswagen for violation of CARB emissions standards. They allege that Volkswagen violated CARB standards by delivering to, and offering for sale in their respective states, vehicles equipped with a defeat device, which rendered invalid the vehicles' CARB certifications and caused the vehicles to emit excess emissions. (Dkt. No. 3116-3 at 50-55 (N.M. Compl.); Dkt. No. 2858 at 84-91 (Md. Compl.).)

New Mexico, as noted above, is a hybrid 177 State and consequently bases its CARB emissions claims on only a subset of the TDI diesel vehicles Volkswagen sold in the State. In 2007, New Mexico adopted CARB standards statewide to be applied to vehicle model year 2011 and later. But in 2010, New Mexico repealed the statewide CARB standards, effective January 31, 2011. *See* N.M. Admin. Code § 20.2.88.101 (adopting California standards statewide starting with model year 2011); *id.* § 20.2.88.14 (waiving "all requirements of this part" through January 1, 2016); N.M. Register, Vol. XXIV, No. 23 (Dec. 13, 2013) (repealing Statewide Emissions Standards). In 2008, however, the State's Environmental Improvement Board separately adopted CARB standards for vehicles sold in Bernalillo County (which includes the city of Albuquerque), starting with model year 2011. CARB standards remain in effect Bernalillo County. (*See* Dkt. No. 3116-3 at 52.)

C. Consumer Protection Act Claims

***4** New Mexico (Hybrid 177 State), Oklahoma (Non-177 State), and Vermont (177 State) also bring consumer-protection claims against Volkswagen. In their complaints, they allege that Volkswagen advertised and marketed its TDI diesel engine vehicles as "clean diesels" and as environmentally friendly, when in fact Volkswagen knew—because of its use of a defeat device—that its vehicles emitted NOx at rates well above applicable emissions standards. (*See* Dkt. No. 2816-3 at 37-39 (Okla. Compl.); Dkt. No. 3116-3 at 62-66 (N.M. Compl.); Dkt. No. 2832-5 at 83-85 (Vt. Compl.).) Volkswagen's actions, the States assert, were unfair and deceptive, and violated various enumerated provisions of their respective consumer protection acts. (*See* Dkt. No. 2816-3 at 37 (citing 15 Okla. Stat. § 753(5), (7), (8) & (20)); Dkt. No. 3116-3 at 62-66 (citing N.M. Stat. § 57-12-2); Dkt. No. 2832-5 at 83-84 (citing V.S.A. § 2453(a)).)

D. Common Law Nuisance Claim

New Mexico also brings a common law nuisance claim. It alleges that, by selling vehicles that emitted NOx in excess of allowed limits, Volkswagen "unreasonably interfere[d] with the public's common right to clean air, and clean water, and thus [committed a] common law public nuisance." (Dkt. No. 3116-3 at 67.)

E. Remedies

All of the States (Non-177 and 177) seek monetary penalties from Volkswagen for

violation of their state laws. The amount of penalties sought varies by state, but as examples, Alabama and Ohio each seek penalties of up to $25,000 for each day of each violation of their anti-tampering laws. (Dkt. No. 2834-2 at 28 (Ala. Compl.), *id.* at 145 (Ohio Compl.).) Oklahoma seeks penalties of up to $10,000 per violation of its consumer protection act. (Dkt. No. 2816-3 at 40.) And New Mexico seeks $15,000 in penalties for each violation of its incorporated CARB emissions standards. (Dkt. No. 3116-3 at 62.)

A number of the States also seek injunctive relief. For example, Maryland seeks to enjoin Volkswagen from selling into the state any new vehicle equipped with a defeat device or not eligible for sale pursuant to Maryland's emissions and environmental standards (which mirror CARB standards). (Dkt. No. 2858 at 90.) Illinois and Montana seek to enjoin future violations of their anti-tampering laws. (Dkt. No. 2834-2 at 154 (Ill. Compl.); *id.* at 197 (Mont. Compl.).) Oklahoma and Vermont seek to enjoin Volkswagen from engaging in the conduct they allege violates their respective consumer protection acts, including the use of a defeat device to mislead consumers with respect to environmental benefits, and (in the case of Vermont) delivering or offering vehicles for sale that are not covered by a CARB Executive Order. (Dkt. No. 2816-3 at 39 (Okla. Compl.); Dkt. No. 2832-5 at 86-87 (Vt. Compl.).) And other States seek equitable relief as deemed appropriate by the Court. (*See, e.g.*, Dkt. No. 2834-2 at 29 (Ala. Compl.); Dkt. No. 2834-2 at 53(N.H. Compl.).)

Claims	**States**	**177/Non-177**
Anti-Tampering	Alabama, Illinois, Minnesota, Montana, New Hampshire, Ohio, Tennessee	Non-177 States
Inspection and Maintenance (I&M)	Tennessee	Non-177 State
Environmental	Missouri	Non-177 State
CARB Emissions	Maryland, New Mexico	177 and Hybrid 177 State
Consumer Protection Act	New Mexico, Oklahoma, Vermont	177, Hybrid 177, and Non-177 State
Common Law Nuisance	New Mexico	Hybrid 177 State

LEGAL STANDARD

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). And once removed, the defendant "has the burden to establish that removal is proper." *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1034 (9th Cir. 2008).

A party may file an action originally in federal court if the diversity requirements are established, or if the claims "aris[e] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. For statutory purposes, a case can "aris[e] under" federal law in two ways. First, "a case arises under federal law when federal law creates the cause of action asserted." *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013). Second, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005)).

***5** This latter form of "arising under" jurisdiction recognizes that "in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal interests." *Grable*, 545 U.S. at 312. In *Grable*, for example, the plaintiff filed a state action to quiet title to real property, which he asserted had been seized and sold by the IRS without proper notice. *Id.* at 310-11. In affirming the lower court determinations that removal was proper, the Supreme Court reasoned that "[t]he meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court." *Id.* at 315. The Court also reasoned that whether the plaintiff received adequate notice under the tax code was "an essential element of [his] quiet title claim;" indeed, "it appear[ed] to be the only ... issue contested in the case." *Id.*

The Supreme Court has since noted that *Grable* and cases like it are exceptional, as only a "special and small category" of state-law claims give rise to federal-question jurisdiction. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006). In other words, "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813 (1986). In determining which state-law claims trigger federal-question jurisdiction, courts must bring a " 'common-sense accommodation of judgment to [the] kaleidoscopic situations' that present a federal issue, in 'a selective process that picks the substantial causes out of the web and lays the other ones aside.' " *Grable*, 545 U.S. at 313 (alteration in original) (quoting *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 117-18 (1936)).

Whatever difficulty may be involved in determining whether a state-law claim gives rise to federal jurisdiction, it is clear that "arising under" jurisdiction cannot be established "on the basis of a federal defense, including the defense of pre-emption." *Caterpillar*, 482 U.S. at 393. This is so "even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id.* Only in the rare instance in which an area of state law has been completely preempted by a federal statute does preemption provide a key to federal court. In such circumstances, the court is "obligated to construe the complaint as raising a federal claim and therefore 'arising under' federal law." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 947 (9th Cir. 2014).

DISCUSSION

Volkswagen argues that federal-question jurisdiction exists because the States' "state-law claims ... implicate significant federal issues." *Grable*, 545 U.S. at 312. The claims do not, or to the extent they do, the federal issues Volkswagen identifies are federal defenses that do not give rise to federal-question jurisdiction.

I. Applying *Grable* to the States' Claims

A. The Exclusively Non-177 State Claims

1. Anti-Tampering Claims

Volkswagen contends that the States' anti-tampering claims raise three federal issues. Specifically, that the court hearing these claims will need to: (1) interpret the term "defeat device," which is defined only by federal law; (2) interpret EPA emissions regulations, which are incorporated into some of the States' anti-tampering statutes; and (3) determine whether the claims are permitted under the Clean Air Act. None of these alleged federal issues supports federal-question jurisdiction.

a) *Interpreting the term "defeat device"*

Volkswagen is correct that "defeat device" is defined only in federal regulations. *See* 40 C.F.R. § 86.1803-01. But its focus on this term misconstrues the anti-tampering claims. A "defeat device" is not an element under any of the States' anti-tampering statutes. The Alabama law, for example, provides only that:

> ***6** No person shall cause, suffer, allow, or permit the removal, disconnection, and/or disabling of ... [an] exhaust emission control system ... which has been installed on a motor vehicle.

ADEM Admin. Code R. 335-3-9-.06. (Dkt. No. 2834-2 at 29.)

Absent is a requirement that the "removal, disconnection, and/or disabling" of an emission control system be performed by a "defeat device." Rather, the act triggering liability could, for example, be performed by someone using their hands to physically disconnect a vehicle's emission control system. *See United States v. Econ. Muffler & Tire Ctr., Inc.*, 762 F. Supp. 1242, 1244 (E.D. Va. 1991) (anti-tampering violation where repair shop replaced factory-installed three-way catalytic converters with two-way catalytic converters). Thus, even though the States' claims are based on factual allegations that Volkswagen used a defeat device in its vehicles, to prevail the States do not need to prove that the defeat device qualifies as a "defeat device" under the Clean Air Act. Instead, the States simply need to demonstrate that Volkswagen installed a device, whether or not a "defeat device" under federal law, and that the device had the effect of removing, disconnecting, or disability an emission control system. Volkswagen's "defeat device" argument therefore fails under the first *Grable* prong, as it does not "necessarily raise a stated federal issue." 545 U.S. at 314.

b) *Interpreting EPA emissions regulations*

Volkswagen contends that a court would also need to interpret EPA emissions regulations to resolve the States' anti-tampering claims. As noted above, some of the States' anti-tampering statutes do incorporate EPA regulations. For example, Illinois law requires the tampering to affect an air pollution control system installed on a motor vehicle "as required by rules or regulations of the ... United States Environmental Protection Agency." 35 Ill. Adm. Code § 240.102. But this argument fails under *Grable*'s second and third prongs—the issue identified is not actually disputed or substantial. 545 U.S. at 314.

Within the context of *Grable*, a federal issue is disputed if it is "the primary focus of the Complaint," not "merely ... a peripheral issue." *Hawaii v. Abbott Labs., Inc.*, 469 F. Supp. 2d 842, 853 (D. Haw. 2006); *see also Grable*, 545 U.S. at 315 (the federal issue "appear[ed] to be the only legal or factual issue contested in the case"); *Gunn*, 133 S. Ct. at 1065 (the federal issue was "the central point of dispute"); *R.I. Fishermen's Alliance, Inc. v. R.I. Dep't of Envtl. Mgmt.*, 585 F.3d 42, 51 (1st Cir. 2009) (the federal issue was "hotly contested"). Here, Volkswagen has not identified *any* actual dispute, much less one of primary importance, with respect to whether its defeat device interfered with emissions control systems installed on a motor vehicle "as required by the rules or regulations of the ... [EPA]." 35 Ill. Adm. Code § 240.102.

Relatedly, the "substantiality inquiry looks to the importance of the issue to the federal system as a whole." *Gunn*, 133 S. Ct. at 1066. A federal issue may be substantial, for example, where: (1) the "state adjudication would undermine the development of a uniform body of [federal] law," *id.* at 1067; or, (2) where the case presents "a nearly pure issue of law ... that could be settled once and for all and thereafter govern numerous [federal] cases," as opposed to "a fact-bound and situation-specific" one. *Empire*, 547 U.S. at 700-01 (internal quotation marks omitted). Determining whether Volkswagen's air pollution control systems were installed "as required by rules or regulations of the ... [EPA]" would be "fact-bound and situation-specific," *id.* at 701, as it would involve comparing the particular control systems at issue to the relevant EPA regulations. As a result, it is difficult to see how such an inquiry could "settle[ ] once and for all" a "nearly pure issue of law." *Id.* at 700.

***7** The district court in *Lougy v. Volkswagen Group of America, Inc.*, No. 16-cv-1670, 2016 WL 3067686 (D.N.J. May 19, 2016), came to a similar conclusion in determining that a claim by New Jersey under the State's Air Pollution Control Act (based on Volkswagen's use of a defeat device) did not support "arising under" jurisdiction.[4] There, the court reasoned that "even assuming that a violation of a federal regulation were a necessary element of [New Jersey's] NJAPCA claim as [Volkswagen] argue[s], if the question is only whether [Volkswagen] abided by the regulation and *interpretation* of the federal regulation is not in dispute, there is no *Grable* jurisdiction." 2016 WL 3067686, at *3 (emphasis in original) (internal quotation marks omitted). The same holds true here. Volkswagen has not identified any issue, much less a substantial one, requiring interpretation of EPA regulations.[5]

[4] Because the New Jersey district court remanded the State's case, it was not transferred to this Court as part of the MDL.

[5] The Non-177 States argue that, because the federal issues Volkswagen identifies would be fact-bound and situation-specific, the Court does not need to even apply *Grable*, which they contend is a test to be applied only when there is a pure issue of law. (Dkt. No. 2834 at 18-19.) This goes too far. That a fact-bound and situation-specific federal issue may not be substantial enough to support *Grable* jurisdiction does not mean that the Court should not even conduct the *Grable* analysis. *Empire*, the case the Non-177 States cite for this point, does not hold as much. Rather, the Court there reasoned only that, because a federal issue was fact-bound and situation-specific, it was distinguishable

from the federal issue in *Grable*. *See Empire*, 547 U.S. at 699-701.

c) *Determining whether the anti-tampering claims are permitted under the Clean Air Act*

Volkswagen finally argues that the States' anti-tampering claims give rise to federal-question jurisdiction because a court will need to resolve whether these claims are permitted under the Clean Air Act.

As background, Section 209 of the Clean Air Act prohibits states—except those that adopt California's CARB standards—from adopting or attempting to enforce "any standard relating to the control of emissions from ***new motor vehicles***." 42 U.S.C. § 7543(a) (emphasis added); *see also id.* § 7507 (setting forth the California exception). Section 209 "was intended to have a broad preemptive effect" and to foreclose state-law claims "relating to" emissions by new vehicles. *In re Office of Attorney Gen. of State of N.Y.*, 269 A.2d 1, 8-10 (N.Y. App. Div. 2000). The Clean Air Act also specifies, however, that states are not denied "the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d). In other words, the federal government generally regulates "new" motor vehicles, while the states regulate "in-use" motor vehicles. *See, e.g.*, *Sims v. Fla. Dep't of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1463 n.8 (11th Cir. 1989) ("[S]ection 7543(d) of the Clean Air Act further indicates Congress's intent to exclusively enforce federal emission standards relating to new automobiles before their initial sale because the statute specifically allows the state to regulate automobile use and operation subsequent to the initial sale.").

Relying on the Clean Air Act's division of enforcement power, Volkswagen argues that the States' anti-tampering claims, as applied, are an attempt to regulate new motor vehicles. Specifically, Volkswagen contends that the act that gave rise to the States' anti-tampering claims was Volkswagen installing a defeat device in its new vehicles—which occurred before those vehicles left the manufacturer. Because states are permitted to impose only "in-use" regulations on motor vehicles, Volkswagen contends that the court hearing these claims will need to determine "whether the CAA allows an 'in-use' claim to be predicated on a 'defeat device' installed at the time of manufacture." (VW Op., Dkt. No. 2988 at 19-20.)

***8** The Non-177 States disagree with Volkswagen's interpretation of their anti-tampering claims. They contend that the act that ultimately gave rise to their claims was not the installation of the defeat device, but rather the operation of the defeat device while the vehicles were in use. That is, each and every time the vehicles at issue operated outside of a testing environment, the defeat device disconnected or disabled the vehicles' emission control systems, which constituted tampering. (*See* Non-177 States' Reply, Dkt. No. 3113 ("This 'tampering' occurs when the defeat device switches off the emissions control system during normal driving conditions—*i.e.* while a registered vehicle is in use.").)

Putting aside the merits of the States' and Volkswagen's arguments, it is clear that Volkswagen's argument is a federal defense. Volkswagen is essentially arguing that Section 7543 of the Clean Air Act preempts the States' anti-tampering claims. However, "[t]he well-pleaded complaint rule means that 'a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption.' " *Retail Prop. Trust*, 768 F.3d at 947 (emphasis in original) (quoting

Caterpillar, 482 U.S. at 393). And while the doctrine of complete preemption provides an exception to this rule, *see id.*, Volkswagen does not argue that the Clean Air Act completely preempts the States' claims.

The New Jersey district court in *Lougy*, 2016 WL 3067686, rejected a similar argument made by Volkswagen in support of removal of New Jersey's anti-tampering and emissions-based claims. Volkswagen argued there that, "by seeking to bring claims predicated on [its] alleged installation of defeat devices causing the subject vehicles to circumvent new-car emissions regulations—conduct the CAA directly prohibits—Plaintiffs' action necessarily requires resolution of the predicate federal question whether this kind of suit has been authorized by Congress and the EPA to be enforced by New Jersey, rather than the EPA." *Id.* at *2. In rejecting this argument, the district court held that, even assuming Volkswagen's argument had merit, "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *Id.* at 3 (emphasis in original).

The Court agrees with the reasoning in *Lougy*. Volkswagen's argument that the States' anti-tampering claims are barred by the Clean Air Act is a preemption defense and does not give rise to federal-question jurisdiction.

2. Tennessee's Inspection and Maintenance Claim

Volkswagen's arguments for why Tennessee's I&M claim gives rise to federal-question jurisdiction are the same as those it puts forward for the anti-tampering claims. It contends that (1) because Tennessee's I&M claim is based on Volkswagen's use of a "defeat device," the claim implicates federal law; and (2) a court will need to decide if the I&M statute, as applied, is an "in-use" or a "new" vehicle regulation under the Clean Air Act.

As with the anti-tampering claims, the use of a "defeat device" is not an element of Tennessee's I&M statute, which prohibits any person from "knowingly ... [f]alsif[ying], tamper[ing] with, or render[ing] inaccurate any monitoring device or method required to be maintained or followed[.]" Tenn. Code Ann. § 68-201-112(a)(3). (Dkt. No. 2834-2 at 73.) Although Tennessee alleges that Volkswagen tampered with its vehicles' on-board diagnostics systems by using a defeat device, the State will not need to prove that the device Volkswagen used was in fact a "defeat device" as that term is defined by federal regulations. Rather, the State needs to demonstrate only that, by installing a device in its vehicles—whether qualifying as an EPA defined "defeat device" or not—Volkswagen tampered with a vehicle monitoring device or method required to be maintained.

***9** Further, whether Tennessee's I&M claim, as applied, is preempted by Section 209 of the Clean Air Act, as a "new" vehicle regulation, is a federal defense that does not give rise to federal-question jurisdiction. *Retail Prop. Trust*, 768 F.3d at 947. Tennessee's I&M claim therefore does not "raise a stated federal issue," much less one that is actually in dispute. *Grable*, 545 U.S. at 314.

3. Missouri's Environmental Claims

Missouri's claims are different from the other Non-177 States' anti-tampering claims, in that Missouri's claims target emissions of certain contaminants, rather than tampering with emission control systems. In its first claim, Missouri argues that Volkswagen violated a state regulation by installing a defeat device in its vehicles, which concealed that the vehicles were emitting NOx at levels above those permitted by the Missouri Air Conservation Commission. (Dkt. No. 2834-2 at 115 (citing 10 CSR § 10-6.150).) And in its second claim, Missouri similarly asserts that Volkswagen

violated a state statute by installing a device designed to conceal or dilute emissions during vehicle inspections, which "caused or permitted an elevation in the level of NOx, a regulated air contaminant, that discharged from the [vehicles] during normal on-road operation." (Dkt. No. 2834-2 at 116 (citing Mo. Rev. Stat. § 643.151).)

Missouri's NOx standards mirror the EPA's NAAQS standards, (*see* Mo. Compl., Dkt. No. 2834-2 at 86-95), and the Clean Air Act permits states to create "enforceable emissions limitations and other control measures ... as may be necessary or appropriate" to meet the NAAQS standards. 42 U.S.C. § 7410(a)(2)(A)-(B). What Volkswagen challenges is not the standards generally, but their alleged application to "new" motor vehicles in violation of Section 7543's preemption provision. *See id.* § 7543(a) ("No State ... shall adopt *or attempt to enforce* any standard relating to the control of emissions from *new motor vehicles* ...." (emphasis added)). In other words, the federal issue identified by Volkswagen with respect to Missouri's claims is materially the same as the one discussed above. It is a federal defense, because the adjudication of Missouri's claims will only *require* answering the preemption question *if* Volkswagen raises it as a defense. As a federal defense, Volkswagen's argument does not support "arising under" jurisdiction. *Caterpillar*, 482 U.S. at 393.

Ormet Corp. v. Ohio Power Co., 98 F.3d 799 (4th Cir. 1996), a case cited by Volkswagen, does not lead to a different conclusion. There, a manufacturer brought a claim in federal court against an electric utility company, asserting that under the parties' agreement the manufacturer was a "participating owner" of the utility company's pollution-emitting units under Section 408(i) of the Clean Air Act. *Id.* at 803. Because the court needed to "interpret both the Act and the contract" to decide whether the manufacturer was an owner as defined in the Act, it concluded that "arising under" jurisdiction existed. *Id.* at 807. To resolve Missouri's environmental claims here, however, a court does not need to interpret federal law unless Volkswagen raises preemption as a defense.

B. Exclusively 177 State Claims

1. CARB Emissions Standards Claims

Only Maryland and New Mexico bring claims against Volkswagen for violation of CARB emissions standards. And Volkswagen does not argue that Maryland's CARB-based claims raise federal issues. Unlike Non-177 States, the Clean Air Act permits states that have adopted California's standards to adopt and enforce their own "new motor vehicle" emission standards, so long as those standards are "identical to the California standards." 42 U.S.C. § 7507. As a result, Volkswagen's "in use" versus "new vehicle" preemption defense would not apply to Maryland's claims.[6]

[6] Volkswagen does, however, challenge the remedies sought by Maryland, as well as the other States. (*See infra* at 20-22.)

***10** Volkswagen does, however, challenge New Mexico's CARB-based claims. The basis for its challenge stems from the fact that New Mexico did not adopt CARB standards uniformly, statewide, for all of the vehicles at issue. Volkswagen contends that New Mexico's partial adoption of CARB standards raises, as a federal issue, whether the Clean Air Act permits a subdivision of a state (like Bernalillo County) to adopt CARB's new-vehicle standards, while the State applies EPA standards everywhere else. (Dkt. No. 2987 at 15.)

Volkswagen's argument is essentially that New Mexico's law—adopting CARB standards only in Bernalillo County—is invalid under the Clean Air Act. But this is again a federal defense, and consequently not grounds for removal. *See Caterpillar*, 482 U.S. at 393; *Retail Prop. Trust*, 768 F.3d at 947.

Fishermen's Alliance, 585 F.3d 42, a First Circuit case cited by Volkswagen, is distinguishable, because there the plaintiffs' state-law claim had an embedded federal question. The state law provided that "retroactive control dates are prohibited ... unless expressly required by federal law." *Id.* at 49 (quoting R.I. Gen. Laws § 20-2.1-9). In concluding that a claim under this statute necessarily raised a federal issue, the First Circuit reasoned that "it is not logically possible for the plaintiffs to prevail ... without affirmatively answering the embedded question of whether federal law ... 'expressly required' the use of retroactive control dates." *Id.* Here, in contrast, New Mexico's state law provides only that "no motor vehicle manufacturer ... shall deliver for sale ... [a] new passenger car ... unless the vehicle is certified to California standards." (Dkt. No. 3116-3 at 60 (quoting N.M.A.C. § 20.2.88.101.A).) Only if Volkswagen asserts as a defense that New Mexico's law violates the Clean Air Act will a federal question be raised.

C. Consumer Protection Act Claims

Volkswagen also contends that New Mexico and Oklahoma's consumer-protection claims raise federal issues supporting "arising under" jurisdiction. As noted above, these States allege that Volkswagen advertised and marketed its TDI diesel engine vehicles as "clean diesels" and as environmentally friendly, when in fact Volkswagen knew—because of its use of a defeat device—that its vehicles emitted NOx at rates well above applicable emissions standards. (*See* Dkt. 2816-3 at 37-39 (Okla. Compl.); Dkt. No. 3116-3 at 62-66 (N.M. Compl.).) Volkswagen's actions, the States assert, were unfair and deceptive, and violated their respective consumer protection acts. (*See* Dkt. No. 2816-3 at 37 (citing 15 Okla. Stat. § 753(5), (7), (8) & (20)); Dkt. No. 3116-3 at 62-66 (citing N.M. Stat. § 57-12-2).)

Volkswagen contends that these claims depend in part on a finding that its vehicles emitted NOx at rates above applicable emission standards. And because Oklahoma is a Non-177 State, and New Mexico is a Hybrid-177 State, Volkswagen contends that the "applicable emission standards" for Oklahoma (and for parts of New Mexico) are federal EPA standards. Thus, Volkswagen argues that a court will need to determine if Volkswagen's conduct did in fact violate EPA standards, which raises a federal question.

While Oklahoma and New Mexico's claims refer to "applicable emission standards," proving that Volkswagen violated these standards is not an element of their consumer-protection claims. Rather, the States' statutes generally prohibit unfair and deceptive practices, such as knowingly making false representations as to the characteristics or benefits of particular goods. (*See id.*) And here, the States allege that Volkswagen represented that its diesel cars were "clean diesel," "green," "environmentally-friendly," and "eco-friendly," when in fact Volkswagen knew that its vehicles produced high levels of NOx. (Dkt. No. 3116-3 at 64 (N.M. Compl.); *see also* Dkt. 2816-3 at 38 (Okla. Compl.).) That the levels of NOx produced exceeded EPA standards is undoubtedly evidence that Volkswagen's vehicles were not environmentally friendly, but the States would not be required to make that showing to succeed on their claims. Instead, for example, the States could call an expert witness who could review the vehicles' emissions data, compare that data to that of other vehicles, and

opine as to whether Volkswagen's vehicles would reasonably be considered "clean diesel" or "eco-friendly" vehicles. Whether Volkswagen's representations were unfair or deceptive is the ultimate question, not whether Volkswagen's vehicles violated EPA emissions regulations.

***11** The district court in *Arizona ex rel. Brnovich v. Volkswagen AG*, 193 F. Supp. 3d 1025 (D. Ariz. 2016), came to the same conclusion in granting Arizona's motion to remand a consumer-protection claim that was based on Volkswagen's use of a defeat device. Arizona alleged that Volkswagen "had engaged in deceptive and unfair business practices by creating and installing defeat devices in its Clean Diesel vehicles," and that "the advertising, marketing, selling, and leasing of vehicles as 'Clean Diesels' violated the [Arizona] Consumer Fraud Act." *Id.* at 1027 (internal quotation marks omitted). In rejecting Volkswagen's argument that Arizona's state-law claim supported *Grable* jurisdiction, the court reasoned that "Arizona could prevail on [its] claim even if it were to drop all mentions of federal law, regulations, and standards from its complaint," because "Arizona might prevail simply by comparing the Clean Diesel vehicles to gasoline powered vehicles and proving ... Volkswagen's advertisements and statements were misleading." *Id.* at 1029. The same is true here. New Mexico and Oklahoma do not need to prove that Volkswagen's vehicles violated EPA emissions standards to prove that Volkswagen made deceptive representations about the environmental characteristics of its cars. The States' consumer-protection claims therefore do not "necessarily raise" a federal issue. *Grable*, 545 U.S. at 314.

Not only do the States' consumer-protection claims not raise a federal issue, but even if they did, the issue would not be substantial or disputed. *See Gunn*, 133 S. Ct. at 1066; *Empire*, 547 U.S. at 700-01. As with the States' anti-tampering claims, determining whether Volkswagen's vehicles' NOx emissions violated EPA emissions standards would be a "fact-bound and situation-specific" inquiry that would be unlikely to "settle[ ] once and for all" a "nearly pure issue of law." *Empire*, 547 U.S. at 700; *see also Lougy*, 2016 WL 3067686 at *3. And similar to the States' anti-tampering claims, Volkswagen has not identified any actual dispute with respect to whether its vehicles violated EPA regulations. Because Oklahoma and New Mexico's consumer-protection claims do not necessarily require resolution of a substantial and disputed federal issue, they do not support "arising under" jurisdiction. *Grable*, 545 U.S. at 315.

D. Common Law Nuisance Claim

Volkswagen's argument for why New Mexico's common law nuisance claim gives rise to federal-question jurisdiction is the same as the one it makes for New Mexico and Oklahoma's consumer-protection claims: that a court will need to interpret EPA regulations to resolve the claim. This is not so. As with the consumer-protection claims, EPA non-compliant emissions are not an element of New Mexico's nuisance claim. Rather, New Mexico needs to prove only that Volkswagen's emissions (EPA compliant or not) "interfere[d] with the public's common right to clean air, and clean water." (Dkt. No. 3116-3 at 67.) EPA non-compliant emissions may be good evidence of that, but they are not the only possible evidence. The claim therefore does not "necessarily raise a stated federal issue." *Grable*, 545 U.S. at 314.

E. Remedies

Finally, Volkswagen argues that "arising under" jurisdiction is independently proper because the monetary penalties and injunctive relief sought

by the States (both Section 177 and Non-177) seek to remedy federal violations or conflict with the Clean Air Act's regulatory scheme. (Dkt. No. 2988 at 36-47.)

1. Monetary Penalties

Volkswagen contends that the requested monetary penalties "uniformly exceed the penalties imposed by the EPA or that are even permitted under California's standards," and that the States' demands "would enmesh state courts in the resolution of federal questions as to whether the penalty demands are consistent with, or permissible under, the federal scheme." (Dkt. No. 2988 at 41.)

While the potential size and range of penalties the States seek may be a legitimate concern for Volkswagen, Volkswagen has not cited any authority that supports that its argument is anything other than a federal defense. Volkswagen relies on *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), for the proposition that a state can disrupt a federal scheme just as much "through an award of damages as through some form of preventative relief," and on *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, 475 U.S. at 288-89 (1986), where the Court held that a state labor law sanction "diminishe[d] the [National Labor Relations] Board's control over enforcement of [the NLRA]." In neither case, however, did the Court hold that a state claim gave rise to federal-question jurisdiction because a state penalty scheme conflicted with federal law.

***12** In *Gould*, Wisconsin prohibited state procurement agents from purchasing products sold by firms included on a list of labor-law violators. A Delaware corporation placed on Wisconsin's list filed an action in federal court for injunctive and declaratory relief, arguing that Wisconsin's scheme was preempted by the National Labor Relations Act. 475 U.S. at 284-85. Preemption was the basis for relief, not a federal defense asserted in response to a state-law claim.

In *Garmon*, the Supreme Court addressed on direct review whether a *state* court had jurisdiction to award damages arising from union activity, the oversight of which was delegated to the National Labor Relations Board by the NLRA. 359 U.S. at 238-39. The Court in *Garmon* had no reason to consider whether a federal court would have jurisdiction over a state-law claim based upon a federal defense with respect to a state-law penalty scheme.

Because Volkswagen's argument against the States' penalty schemes is a federal defense, it cannot serve as the basis for removal. *See Caterpillar*, 482 U.S. at 393; *Retail Property Trust*, 768 F.3d at 947-48.

2. Injunctive Relief

Volkswagen contends that the States' requested injunctive relief would permanently inject state courts into assessing whether Volkswagen's future vehicles contain "defeat devices," emit "excessive" NOx, or otherwise comply with emissions standards, and would disrupt the federal system by creating the risk that state courts would impose standards or requirements differing from the federal and California standards. (Dkt. No. 2988 at 39.)

As an initial matter, it is not clear that the States' requested relief would lead to these results. Maryland, as a 177 State, seeks to enforce standards that are identical to California's, and the Clean Air Act expressly empowers 177 States to "enforce" CARB emissions standards under their own state laws. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. N.Y. State Dept. of Envtl. Conservation*, 79 F.3d 1298, 1305 (2d Cir. 1996) ("Although the 'piggyback' provision [of Section 177] requires

states to adopt standards identical to those in place in California to avoid preemption, there is no such identicality requirement for the mechanism employed to enforce those standards."). As for the Non-177 States, such as Illinois and Montana, the injunctions they seek are to prevent future violations of their state anti-tampering statutes, which, as noted above, do not raise federal issues.

Nonetheless, even if Volkswagen correctly characterizes the States' requests for injunctive relief, its argument again is a preemption defense—specifically, that the Clean Air Act prohibits the States from enjoining conduct that the EPA or California are given authority to enforce. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), a case Volkswagen relies on, does not support a different conclusion. There, the Supreme Court reaffirmed the holding of *Ex parte Young*, 209 U.S. 123 (1908), that, notwithstanding the Eleventh Amendment, "federal jurisdiction [exists] over a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law." *Seminole Tribe*, 517 U.S. at 73. The States' cases here are not against state officials; nor do the States' claims affirmatively seek to end continuing violations of federal law. *Seminole Tribe* therefore does not advance Volkswagen's opposition to remand.

F. The fourth *Grable* factor

***13** Because Volkswagen has not established that the States' claims "necessarily raise a stated federal issue, actually disputed and substantial," it has not demonstrated that this Court has federal subject-matter jurisdiction under 28 U.S.C. § 1331. *Grable*, 545 U.S. at 314. Having failed to establish the first three prongs of *Grable*, the Court need not consider the fourth, which is whether "a federal forum may entertain [the state-law claim] without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* This prong serves as a "possible veto" to federal jurisdiction, which does not need to be applied here. *Id.* at 313.

* * *

In light of the foregoing analysis, the Court concludes that none of the States' claims support federal-question jurisdiction. While some of the state statutes at issue reference EPA regulations, and the States' factual allegations are premised on Volkswagen's use of a defeat device, the mere presence of these federal components is insufficient to support "arising under" jurisdiction, given that the applicability of these components is not disputed and in most instances these components are not elements of the States' claims. Further, Volkswagen's argument that the States' claims conflict with the Clean Air Act is a preemption defense, which does not give rise to federal subject-matter jurisdiction. Because subject-matter jurisdiction is lacking, the Court GRANTS the States' motions to remand.

II. Attorneys' Fees

"An order remanding [a] case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal." 28 U.S.C § 1447(c). At least some States argue that the Court should award attorneys' fees here under § 1447. (*See, e.g.*, Dkt. No. 2816 at 16-17 (Okla. Compl.).)

The Supreme Court has held that, "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). That is, even if a removing party's arguments are determined to be "losers," they are "not objectively unreasonable solely because [they] lack merit." *Lussier v. Dollar Tree Stores, Inc.*,

518 F.3d 1062, 1065 (9th Cir. 2008). Here, almost all of the arguments Volkswagen makes for federal jurisdiction are federal defenses, or rely on federal regulations that are not in dispute. Nonetheless, courts have recognized that "[c]ases [analyzing *Grable* jurisdiction] require courts to venture into a murky jurisprudence," *Fishermen's Alliance*, 585 F.3d at 45, and there was no precedent on point that unquestionably foreclosed Volkswagen's claims. Under these circumstances, the Court concludes that Volkswagen's removal of the States' complaints was not objectively unreasonable and therefore does not award fees.

IT IS SO ORDERED.

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United States District Court, D. Massachusetts.

Commonwealth of MASSACHUSETTS, Plaintiff,
v.
FREMONT INVESTMENT & LOAN and Fremont General Corporation, Defendants.

Civil Action No. 07–11965–GAO.
|
Dec. 26, 2007.

Attorneys and Law Firms

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OPINION AND ORDER

GEORGE A. O'TOOLE, JR., District Judge.

I. Background

***1** The Commonwealth of Massachusetts ("the Commonwealth") brought this action in the Massachusetts Superior Court against Fremont Investment & Loan and Fremont General Corporation (collectively "Fremont") alleging that various of Fremont's practices related to sub-prime mortgage loans constituted unfair or deceptive acts or practices in violation of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, § 2. Fremont removed the case to this Court pursuant to 28 U.S.C. §§ 1441 and 1446, asserting that a federal question sufficient to support jurisdiction exists because some of the relief sought in the complaint may or does conflict with an FDIC Order to Cease and Desist (the "FDIC Order") entered against Fremont on March 7, 2007.[1] The FDIC Order was issued pursuant to 12 U.S.C. § 1818, which includes the restriction that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. § 1818(i)(1). The federal question, according to Fremont, is whether and to what extent the FDIC Order and § 1818(i)(1) limit the relief that may ultimately be granted should the Commonwealth prevail on its complaint.

[1] Specifically, Fremont argues that an order requiring it to "repurchase those Massachusetts loans derived from Fremont's unfair or deceptive acts or practices," or to "modify[ ] any terms of Fremont's unlawful loan agreements as may be necessary to conform such loan agreements to Massachusetts legal standards of fair dealing and fair lending," as prayed for in the Commonwealth's complaint (Compl.39.), would conflict with provisions of the FDIC Order.

The Commonwealth has now moved to remand the action for lack of jurisdiction, and has also sought attorneys' fees and expenses relating to the motion to remand. It argues, first, that the federal question posed by Fremont is merely a defense (and therefore insufficient to support subject matter jurisdiction), and second, that no necessary conflict exists between the FDIC Order and the relief sought, because the Savings

Clause of the FDIC Order expressly permits the Commonwealth to seek and obtain relief and because it is possible to grant relief of the type sought by the Commonwealth without conflict with the terms of the Order. Because this second argument involves answering the federal question—whether and to what extent the FDIC Order precludes any particular relief that might be sought by the Commonwealth—it can be set aside in favor of this question: Do the state-law claims "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities"? *See Grable & Sons v. Metal Prod., Inc. v. Darue Eng'g & Mfg.,* 545 U.S. 308, 314 (2005). As discussed below, I conclude that this case does not pose a federal question that can provide the basis for subject matter jurisdiction.

II. Federal–Question Jurisdiction

A state court action may only be removed to federal court if it could originally have been filed in federal court. *See* 28 U.S.C. § 1441. There is a basis for federal-question jurisdiction, 28 U.S.C. § 1331, when an action "aris[es] under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331. Fremont, as the removing party, bears the burden of establishing subject matter jurisdiction, and the removal statute must be strictly construed. *See, e.g., Danca v. Private Health care Sys. Inc.,* 185 F.3d 1, 4 (1st Cir.1999); *BIW Deceived v. Local S6,* 132 F.3d 824, 831 (1st Cir.1997).

***2** The "well-pleaded complaint" rule requires that the federal question be evident from the "face of the complaint, unaided by the answer or by the petition for removal." *Gully v. First National Bank,* 299 U.S. 109, 112 (1936); *see Rossello–Gonzalez v. Calderon–Serra,* 398 F.3d 1, 10 (1st Cir.2004). It must be an "element, and an essential one" of the cause of action and "[a] genuine and present controversy, not merely a possible or conjectural one...." *Gully,* 299 U.S. at 112. A defense that raises a federal question is not sufficient to support jurisdiction. *Franchise Tax Bd. of the State of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,* 463 U.S. 1, 10 (1983); *Louisville & Nashville R.Co. v. Mottley,* 211 U.S. 149, 152 (1908). A defense such as federal preemption, therefore, is not a basis for removal, even if the defense is anticipated in the complaint, and even if it is the only true issue in the case. *See Caterpillar Inc. v. Williams,* 482 U.S. 386, 392–93 (1987); *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63–64 (1987).

Where the complaint contains only claims under state law, there are two exceptions to the well-pleaded complaint rule that regard the claim as "arising under" federal law within the meaning of 28 U.S.C. § 1331. If the state-law claims are "so completely pre-empt[ed] ... that any civil complaint raising this select group of claims is necessarily federal in character," then it can be the basis for federal-question jurisdiction. *Metropolitan Life,* 481 U.S. at 63–64. Additionally, by what is sometimes called "federal ingredient" jurisdiction, *Rossello–Gonzalez,* 398 F.3d at 12, federal-question jurisdiction may exist "if a well-pleaded complaint establishe[s] that [the plaintiff's] right to relief under state law requires resolution of a substantial question of federal law." *Franchise Tax. Bd.,* 463 U.S. at 13.

The First Circuit has noted that this "federal ingredient" theory of jurisdiction is "controversial," and explained that:

> The Supreme Court has periodically affirmed this basis for jurisdiction in the abstract (*Smith v. Kansas City Title & Trust Co.,* 255

> U.S. 180 (1921), is the most famous example), occasionally cast doubt upon it, rarely applied it in practice, and left the scope of the concept unclear. Perhaps the best one can say is that this basis endures in principle but should be applied with caution and various qualifications.

Almond v. Capital Properties, Inc., 212 F.3d 20, 23 (1st Cir.2000) (footnote omitted).

In *Grable,* the Supreme Court confirmed that federal cause of action is not always required as a condition for exercising federal-question jurisdiction if significant federal issues are implicated in the plaintiff's state law claims. *See id.* at 312; *e.g. Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804, 808–09 (1986); *Franchise Tax Bd.*, 463 U.S. at 9 (1983); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921). The Court held that there was federal-question jurisdiction over a state court action to quiet title where the outcome turned on whether the IRS had failed to notify the plaintiff of the seizure of its property in the exact manner required by 26 U.S.C. § 6335. *See* 545 U.S. at 311. Grable's claim to superior title was premised on the failure of the IRS to give adequate notice, and accordingly whether the IRS complied with the federal statute was an essential element of the claim. *See id.* The interpretation of the federal statute prescribing the notice to be given by the IRS was the only issue disputed in the case, and it was an important issue of federal law that merited resolution by a federal court. *Id.* at 315. In this case, Fremont has expressly declined to argue preemption as the basis for federal-question jurisdiction. (*See* Defs.' Consol. Mem. of Law in Opp. to the Commonwealth's Mot. to Remand, and Mot. for Award of Att'ys Fees and Expenses 2, 12.) Instead, Fremont argues that federal-question jurisdiction exists per *Grable,* because the whether the equitable relief sought by the Commonwealth is permissible in light of the FDIC Order presents what it claims is a substantial and disputed issue that is necessarily raised by the state-law claim. *See id.* at 314.

***3** The flaw in Fremont's argument is that, if there is any conflict between the FDIC Order and any relief ultimately awarded in state court, there is a problem only to the extent that the state-awarded relief were to be preempted by the federal statute, 12 U.S.C. 1818(i)(1). Accordingly, the precise outer boundaries of "federal ingredient" jurisdiction need not be delineated here. It suffices to say that *Grable* does not invade the area of less-than-complete preemption already pronounced an insufficient basis for federal-question jurisdiction *See Caterpillar,* 482 U.S. at 392–93; *Metropolitan Life,* 481 U.S. at 63–64. Since Fremont has expressly disavowed any preemption argument (which in any event would likely fail because 12 U.S.C. 1818(i)(1), by its own terms, does not have the extraordinary and complete preemptive force that is required to support federal-question jurisdiction, *see Caterpillar,* 482 U.S. at 392–93; *Metropolitan Life,* 481 U.S. at 63–64), there is no basis for this Court to exercise subject matter jurisdiction.

Moreover, even were I to consider the application of the *Grable* analysis to this case in a vacuum, Fremont's argument is "too much of a stretch to support removal." *See Metheny v. Becker,* 352 F.3d 458, 461 (1st Cir.2003) The federal question here does not appear to be a necessary or essential element of the Commonwealth's claim. Rather, it would only arise after the Commonwealth had first succeeded in proving the elements of a violation of Chapter 93A. *See Grable,* 545 U.S. at 314–15; *Gully,* 299 U.S. at 112. Regardless of

whether the limiting effect of the FDIC Order could be properly labeled a "defense," it seems clear that if a potential conflict between the relief sought in a state claim and some federal law could support federal-question jurisdiction, there would be a drastic expansion of federal jurisdiction that would have to be judged inconsistent with the Supreme Court's disinclination to "treat[ ] 'federal issue' as a password opening federal courts to any state action embracing a point of federal law." *See Grable*, 545 U.S. at 314. It is better to give heed to the First Circuit's monition that this "federal ingredient" theory of jurisdiction should be "applied with caution." *Almond*, 212 F.3d at 23.

III. Attorney Fees and Costs

The Commonwealth also seeks attorneys' fees and expenses pursuant to 28 U.S.C. § 1447(c), which states that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The test for whether awarding fees under § 1447(c) is appropriate is whether the removing party had an "objectively reasonable basis for removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Because the issues of federal jurisdiction are so complex—indeed, "a remarkably tangled corner of the law," *Almond*, 212 F.3d at 22—it cannot be said that Fremont's arguments, though ultimately incorrect, were objectively unreasonable. An award of fees is not appropriate.

IV. Conclusion

***4** For the foregoing reasons, the Commonwealth's Motion to Remand (dkt. no. 4) is GRANTED, and the Clerk is directed forthwith to transmit the case to the Superior Court. The Motion for Award of Attorneys' Fees and Expenses Relating to its Motion to Remand (dkt. no. 6) is DENIED.

It is SO ORDERED.

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TOWN OF RANDOLPH, Plaintiff,
v.
PURDUE PHARMA L.P. d/b/a Purdue Pharma (Delaware) Limited Partnership, et al., Defendants.

Civil Action No. 19-cv-10813-ADB
|
Signed 06/06/2019

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MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION TO REMAND

BURROUGHS, D.J.

***1** Before the Court is Plaintiff Town of Randolph's ("Plaintiff" or "Town of Randolph") motion to remand. [ECF No. 14]. For the reasons set forth below, Plaintiff's motion to remand is GRANTED. Accordingly, this action is remanded to the Massachusetts Superior Court for Norfolk County ("Superior Court").

I. BACKGROUND

On March 22, 2019, the Town of Randolph filed an action in Superior Court alleging a variety of state law claims against Defendants,[1] all related to the prescribing of opioid medications. See [ECF No. 1-1 ("Complaint" or "Compl.")]. Defendants are corporate entities and individuals involved in the manufacture and distribution of opioid medications. See [id. ¶¶ 3, 14]. The Complaint, in seven counts, alleges public nuisance, common law fraud, negligent misrepresentation, negligence, violations of Massachusetts General Laws ch. 93A, § 11 ("Chapter 93A"), unjust enrichment, and civil conspiracy and seeks $ 10,000,000 in damages. [Id. ¶¶ 517–81; id. at 192]. The damages sought are for "municipal expenditures" resulting from the opioid epidemic, including the costs of providing health, social, and law enforcement services to residents of the Town of Randolph as well as related costs from decreased tax revenue and diminished property values. See [id. ¶¶ 448–516; id. at 192].

[1] The Defendants in this action are Purdue Pharma L.P. d/b/a Purdue Pharma (Delaware) Limited Partnership; Purdue Pharma Inc.; The Purdue Frederick Company, Inc.; Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Collegium

Pharmaceutical, Inc.; Johnson & Johnson; Janssen Pharmaceuticals, Inc.; Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc.; Endo Health Solutions, Inc.; Endo Pharmaceuticals, Inc.; Allergan PLC f/k/a Actavis PLC; Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc.; Watson Laboratories, Inc.; Actavis LLC; Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.; Mallinckrodt PLC; Mallinckrodt LLC; Insys Therapeutics, Inc.; McKesson Corporation; Cardinal Health, Inc.; Amerisource Bergen Drug Corporation; CVS Health Corporation; CVS Pharmacy, Inc.; Rite Aid Corporation; Rite Aid of Massachusetts, Inc.; Walgreens Boots Alliance, Inc.; Walgreen Eastern Co., Inc.; Walgreens Mail Service, L.L.C.; Walgreens Of Massachusetts, L.L.C.; Walgreens Specialty Pharmacy, L.L.C.; Walmart, Inc.; Wal-Mart.Com USA L.L.C.; Wal-Mart Stores East, Inc.; Wal-Mart-Stores East, L.P.; John Kapoor; Richard Sackler; Theresa Sackler; Kathie Sackler; Jonathan Sackler; Mortimer D.A. Sackler, Beverly Sackler; David Sackler; and, Ilene Sackler Lefcourt. [Compl. at 1–2].

On April 22, 2019, Defendant CVS Health Corporation ("CVS") removed this action pursuant to the Class Action Fairness Act ("CAFA").[2] [ECF No. 1 at 1 (citing 28 U.S.C. §§ 1332(d)(2), 1453)]. The notice of removal asserted that the action "is removable under CAFA because the lawsuit is essentially a class action lawsuit, litigation of this case in federal court promotes CAFA's overall purpose, and CAFA's statutory requirements are satisfied." [Id. at 2].

[2] The following defendants had previously stipulated that they would not seek to remove the action to federal court: Rite Aid Corporation; Rite Aid of Massachusetts, Inc.; Walmart, Inc.; Wal-Mart.Com, USA L.L.C.; Wal-Mart Stores East, Inc.; Wal-Mart Stores East, L.P.; Walgreens Boots Alliance, Inc.; Walgreens Eastern Co., Inc.; Walgreens Mail Service, L.L.C.; Walgreens Of Massachusetts, L.L.C.; Walgreens Specialty Pharmacy, L.L.C. [ECF No. 26-5 at 79–82].

***2** On May 2, 2019, the Judicial Panel on Multidistrict Litigation ("JPML") issued a Conditional Transfer Order conditionally transferring this action into the national opioid multidistrict litigation administered by Judge Dan A. Polster of the Northern District of Ohio ("MDL"). [ECF No. 14-2]. It is anticipated that the JPML will make a final decision on transfer at its upcoming session on July 25, 2019 following briefing on the Plaintiff's motion to vacate the conditional transfer order. See [ECF No. 28-1 at 3–4 (providing JPML briefing schedule)].

On May 2, 2019, Plaintiff filed an emergency motion to remand the case to Superior Court on the ground that this Court lacks subject-matter jurisdiction over this action. See [ECF No. 14]. CVS opposes remand and filed a motion to stay on May 3, 2019 in which it argued for a temporary stay pending a decision from the JPML on transfer. See [ECF Nos. 17, 28]. Plaintiff opposed the motion to stay on May 10, 2019. [ECF No. 27].[3]

[3] CVS's motion to stay [ECF No. 17] is denied as moot in light of the Court's adjudication of the motion to remand. If the Court had addressed the merits of the

stay motion, it would have denied it for substantially the same reasons as articulated by Judge Hillman in Worcester v. Purdue Pharma, No. 18-cv-11958-TSH (D. Mass.). See [ECF No. 14-6 at 4–5 (observing that "a preliminary evaluation of jurisdiction may in fact better serve judicial economy" than awaiting a decision on transfer from the JPML where the absence of jurisdiction is clear)].

II. LEGAL STANDARD

A defendant seeking removal bears the burden of showing that the federal court has jurisdiction. See Danca v. Private Health Care Sys., Inc., 185 F.3d 1, 4 (1st Cir. 1999). Here, CVS argues that this Court has federal question jurisdiction over the instant action pursuant to 28 U.S.C. § 1332(d)(2), which grants district courts original jurisdiction over class actions meeting four statutory requirements. See [ECF No. 1 ¶¶ 16–31]. First, to be removable under § 1332(d)(2), an action must be a "class action," which is defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). Second, there must be minimal diversity among the parties. Id. § 1332(d)(2). Third, the aggregated claims of individual class members must exceed $ 5 million, id. § 1332(d)(2), (6), and fourth, the proposed class must contain 100 or more members, id. § 1332(d)(5).

III. DISCUSSION

The parties agree that the Complaint was not filed pursuant to Federal Rule of Civil Procedure 23 ("Rule 23") or the Commonwealth's analogous rule, Massachusetts Rule of Civil Procedure 23, and dispute only whether any of the causes of action in the Complaint invoke a "similar State statute ... authorizing an action to be brought by 1 or more representative persons as a class action." See 28 U.S.C. § 1332(d)(1)(B); [ECF No. 1 ¶¶ 16–23; ECF No. 14 at 14–15].

CVS contends that "this case essentially is a class action" despite the fact that "Plaintiff has not alleged a putative class action on the face of its Complaint." [ECF No. 1 ¶ 17]. CVS interprets Plaintiff to be "acting as a representative for a class of residents who were allegedly harmed, either directly or indirectly, by Defendants' purported misconduct." [Id. ¶ 21]. CVS supports its argument with caselaw holding that "where a lawsuit 'resembl[es] a class action' by asserting claims both individually and on behalf of others, CAFA removal has been found proper." [Id. ¶ 20 (quoting Badeaux v. Goodell, 358 F. Supp. 3d 562, 567 (E.D. La. 2019))].

***3** Plaintiff responds that the instant action cannot qualify as a class action under § 1332(d) because the statute under which the action was brought, Chapter 93A, is not a "similar State statute." See 28 U.S.C. § 1332(d)(1)(B); [ECF No. 14 at 14–15]. Plaintiff further argues that it would not be possible for it to bring a class action under Chapter 93A on behalf of the Town of Randolph's residents because the injuries suffered by Plaintiff differ from the injuries suffered by its residents. [ECF No. 14 at 15].

The only statutory claim in the Complaint, brought under Chapter 93A, alleges that certain of the Defendants made "false, misleading, and deceptive statements ... to prescribers, consumers, payors, and Plaintiff," "engaged in false, untrue, and misleading marketing.... with the intent that the Town of Randolph and its residents would rely on" the false statements, and should have reasonably foreseen that "such reliance would result in the use of opioid

prescriptions ... that would cause death or severe harm to users and harm to the Town." [Compl. ¶¶ 568–73]. The alleged damages are losses sustained by the Town of Randolph. See [id. ¶ 573] (alleging that the Town of Randolph has "sustained ascertainable losses as a direct and proximate result" of certain of Defendants' unfair and deceptive business practices). The Town of Randolph states in the Complaint that it "brings this action on its own behalf and as *parens patriae* in the public interest on behalf of its residents." [Id. ¶ 45].

By its terms, Chapter 93A, which targets unfair and deceptive acts and practices, permits representative actions:

> Any persons entitled to bring such action [under ch. 93A, § 11] may, if the use or employment of the unfair method of competition or the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective, practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such a manner as the court directs.

Mass. Gen. Laws. ch. 93A, § 11. Because Chapter 93A clearly allows representative actions, or "an action ... brought by 1 or more representative persons as a class action," the Court must determine whether it also is "similar" to Rule 23. See 28 U.S.C. § 1332(d)(1)(B).

To certify a class action under Rule 23, a plaintiff must demonstrate the following: that "the class is so numerous that joinder of all members is impracticable," that "there are questions of law or fact common to the class," that "claims or defenses of the representative parties are typical of the claims or defenses of the class," and that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). In addition, a plaintiff who meets these threshold requirements must also demonstrate that he or she seeks to represent one of the three types of class actions delineated in Rule 23(b). Fed. R. Civ. P. 23(b). The most common class action type requires a court finding "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." See Fed. R. Civ. P. 23(b)(3).

***4** The question of whether Chapter 93A is "similar" to Rule 23 for purposes of 28 U.S.C. § 1332(d)(1)(B) has not been squarely addressed by the First Circuit. Since CAFA was enacted other courts in this district have been faced with remand motions in removed cases involving Chapter 93A claims, but the issue presented has typically concerned the amount-in-controversy

requirement of CAFA. See, e.g., Williams v. Am. Honda Fin. Corp., 14-cv-12859-LTS, 2014 WL 5494914 (D. Mass. Oct. 30, 2014); Gomes v. Midland Funding, LLC, 839 F. Supp. 2d 417 (D. Mass. 2012); Mack v. Wells Fargo Bank, N.A., 11-cv-40020-FDS, 2011 WL 1344194 (D. Mass. Apr. 8, 2011). Historically, the complaints in these cases clearly identified the suit as a class action, but did not necessarily proceed expressly under Massachusetts Rule of Civil Procedure 23. See, e.g., Compl., Williams, No. 14-cv-12859-LTS (D. Mass. July 3, 2014), ECF No. 1-3; Compl., Gomes, No. 11-cv-11053-NMG (D. Mass. June 13, 2011), ECF No. 1-1; First Am. Compl., Mack, No. 11-cv-40020-FDS (D. Mass. Jan. 24, 2011), ECF No. 1-4.

In cases since 2014, however, seemingly most of the cases removed under CAFA have expressly proceeded under both Chapter 93A and Massachusetts Rule of Civil Procedure 23, thus eliminating the "similar State statute" inquiry the Court faces here. See, e.g., Compl., Craw v. Hometown Am., LLC, No. 18-cv-12149-LTS (D. Mass. Oct. 15, 2018), ECF No. 1-1; Compl., Garick v. Mercedes-Benz USA, LLC, No. 17-cv-12042-IT (D. Mass. Oct. 18, 2017), ECF No. 1-1; Compl., Isaac v. Ashley Furniture Indus., Inc., No. 17-cv-11827-RGS, at *1 (D. Mass. Sept. 22, 2017), ECF No. 1-1. The Court attributes some of this change in practice to the Massachusetts Supreme Judicial Court ("SJC") decision in Bellermann v. Fitchburg Gas & Electric Light Co., 18 N.E.3d 1050 (Mass. 2014), which identified critical differences between the requirements for Chapter 93A and Rule 23 class actions. 18 N.E.3d 1050, 1059–60 (Mass. 2014).

In Bellermann, the SJC compared the requirements of class certification under Chapter 93A and Rule 23 and observed that:

> Although the requirements of [Federal R]ule 23(a) provide a "useful framework" for considering class certification under G.L. c. 93A, the similarity requirements of the rule do not equate with the requirement of G.L. c. 93A that the plaintiffs be "similarly situated" and have suffered a "similar injury" as members of the class they seek to represent. The class action provisions of G.L. c. 93A also have "a more mandatory tone" than does rule 23 in that they omit the predominance and superiority elements of rule 23(b), but a judge retains some discretion to consider these factors in determining whether putative class members are "similarly situated" and have suffered a "similar injury."

Id. (internal citations omitted). The SJC's interpretation of the requirements of Chapter 93A controls. See Needleman v. Bohlen, 602 F.2d 1, 3 (1st Cir. 1979) ("We, of course, are bound by the SJC's rulings on Massachusetts law."). Accordingly, the Court concludes that under Bellermann, this Chapter 93A action was not brought under a "similar State statute" to Rule 23 for purposes of removal under CAFA because, although Chapter 93A shares some similar language with Rule 23, it deviates in what is required for class certification.

Furthermore, even if the Court were to conclude that the class action provisions of Chapter 93A were sufficiently similar to Rule 23, Plaintiff has not attempted to invoke the class action provisions of Chapter 93A. See [Compl. ¶ 45].

This case is not a lawsuit that "resembl[es] a class action" by asserting claims both individually and on behalf of others. See Badeaux, 358 F. Supp. 3d at 567. The Complaint only claims losses suffered by Plaintiff and omits both class-specific allegations and a definition of a proposed class.[4]

[4] Because Plaintiff only alleges damages suffered as a municipality, even assuming *arguendo* that removal of Chapter 93A class actions under CAFA was proper and that Plaintiff sought to proceed as a class, there is nothing in the Complaint to suggest that any such class has larger membership than one, which by itself would preclude removal under CAFA. See [ECF No. 14 at 15].

***5** Plaintiff further evidences its intention not to proceed as a representative action by bringing this action as *parens patriae*. [Compl. ¶ 45]. CVS correctly observes in its opposition brief that the doctrine of *parens patriae* is not applicable to towns, like Plaintiff, which are political subdivisions of Massachusetts. See [ECF No. 28 at 8–9]; see also Town of Brookline v. Operation Rescue, 762 F. Supp. 1521, 1524 (D. Mass. 1991) ("*Parens patriae* standing is not available to political subdivisions of the state."). CVS does not challenge Plaintiff's standing to bring this action in light of the unavailability of *parens patriae*, but instead reasons that if this action is not a *parens patriae* suit, then it must be a class action. See [ECF No 28 at 10–11 ("But because Plaintiff cannot bring a *parens patriae* suit to vindicate quasi-sovereign interests, this action can only be construed as representative in nature. And the only viable type of representative lawsuit on behalf of a municipality's citizens is a 'class action' as defined by CAFA." (internal citations omitted))]. CVS's reasoning presents a false dichotomy and fails to account for the possibility that Plaintiff may bring a suit under Chapter 93A to recover damage to itself without bringing a class action. See Mass. Gen. Laws ch. 93A, § 11 (stating that those with standing to bring a claim under Section 11 "may ... bring the action on behalf of himself and such other similarly injured and situated persons" but not requiring it).

Allowing remand in the instant case is not in contravention of the seven actions CVS identifies in its notice of removal as "resembl[ing]" the instant action and "removed under CAFA and transferred to the Opiate MDL." [ECF No. 1 ¶ 5]. As Plaintiff observes, none of these actions addressed the CAFA claim on the merits. See [ECF No. 14 at 8 nn.11–13]. In three of the actions, the presiding judge, Chief Judge Edmund A. Sargus of the Southern District of Ohio, declined to rule on the merits of the remand motion and deferred the decision to Judge Polster. See [id. at 8 n.11]. In three other actions, two presiding judges chose to stay the cases before them pending the JPML's decision on transfer. See [id. at 8 n.12]. In the seventh action, the case was transferred to the MDL before the plaintiff sought remand. See [id. at 8 n.13].[5]

[5] The fourteen additional cases identified by CVS in the papers submitted with its opposition brief also did not address the CAFA claim on the merits. See [ECF No. 28-6]. Thirteen of these cases were stayed pending a decision on transfer by the JMPL while a motion to remand was pending. See [id.]. One of the cases appears to have been removed to the Northern District of Ohio where it became part of the MDL; no motion to remand was filed. See [id. (listing City of Findlay v. Purdue Pharma L.P., et al., No. 1:18-op-46339 (N.D. Ohio))].

This Court, squarely presented with the merits of removal under CAFA, concludes that it lacks jurisdiction over this action and that remand, rather than awaiting a decision on transfer from the JPML, is the appropriate course of action as well as the most efficient use of judicial resources.

IV. CONCLUSION

Accordingly, removal of this action was improper because the Court lacks subject-matter jurisdiction over the claims presented. Plaintiff's motion to remand [ECF No. 14] is, therefore, GRANTED. CVS's motion to stay [ECF No. 17] is DENIED as moot. This action is remanded to the Massachusetts Superior Court for Norfolk County.

SO ORDERED.

All Citations

Slip Copy, 2019 WL 2394253