

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF MARYLAND**

STATE OF MARYLAND

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Plaintiff

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v.

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**CIVIL ACTION NO. CCB 96-1691**

**PHILIP MORRIS INCORPORATED**  
**(Philip Morris U.S.A.) et. al**

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Defendants

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REMAND**

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REMAND**

The State of Maryland, Plaintiff, by its undersigned attorneys, submits this Memorandum of Law in Support of its Motion seeking an Order to Remand this matter to the Circuit Court for Baltimore City.

**BACKGROUND**

On May 1, 1996, the State of Maryland filed a Complaint and Election for Jury Trial in the Circuit Court for Baltimore City. In its Complaint, the State of Maryland seeks monetary damages, as well as injunctive relief, against the nation's tobacco companies and certain other related defendants to require, among other things, the disclosure of their long-suppressed research on smoking, health and addiction and to disclose the nicotine yields of their products based on machine tests and human confirmation studies for each brand. Complaint pp. 99-100. All thirteen (13) Counts in the Complaint -- alleging liability for violations of the Maryland Consumer Protection Act (Count One); Violation of

Section 11-204(a)(1) of the Maryland Antitrust Act (Count Two); Violation of Section 11-204(a)(2) of the Maryland Antitrust Act (Count Three); Violation of Section 11-204(a)(3) of the Maryland Antitrust Act (Count Four); Restitution Based Upon Unjust Enrichment (Count Five); Breach of Voluntarily Undertaken Duty (Count Six); Fraud and Deceit (Count Seven); Negligent Misrepresentation (Count Eight); Breach of Express Warranty (Count Nine); Breach of Implied Warranty (Count Ten); Negligence (Count Eleven); Strict Liability (Count Twelve); and Conspiracy (Count Thirteen) -- arise under Maryland law. No claim under federal law is alleged in the Complaint, no federal issue is raised, and no federal issue needs to be decided to establish the Defendants' liability under the causes of action alleged in the Complaint.

With the filing of its Complaint, the State of Maryland became the eighth state to file a similar lawsuit within the last two years against the same Defendants sued herein. In two of the other cases -- Commonwealth of Massachusetts v. Philip Morris Inc., et. al No. 96-100014-GAO and Moore v. American Tobacco Co., et al. No. 94-293GR, the defendants sought removal to federal court raising arguments nearly identical to defendants' arguments in this case. The arguments were flatly rejected by the United States District Court for the District of Mississippi and the United States District Court for the District of Massachusetts, which found no subject-matter jurisdiction over the action and remanded the case to Mississippi state court. See Moore v. American Tobacco Co., et al., No. 94-293GR (Order dated August 17, 1994) and Commonwealth of Massachusetts v. American Tobacco Co., et al., No. 96-10014-GAO (Order dated May 20, 1996).<sup>1/</sup>

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1 Copies of the Notices of Removal and the Remand Orders in the Mississippi and Massachusetts action are attached as Exhibits 1 and 2.

Notwithstanding the clear guidance from the opinions of these courts, on May 31, 1996, Defendants filed a joint Notice of Removal, alleging that the action may be removed pursuant to 28 U.S.C. § 1441(b). Defendants advance three grounds in support of this assertion. First, they claim that Counts Two, Three and Four of the Complaint (alleging violations of Section 11-204(a)(1) and 11-204(a)(2) of the Maryland Commercial Law Code Annotated) state claims that arise under federal antitrust law.

The second ground advanced in support of removal is that the State's Complaint arises under the laws of the United States because the State of Maryland seeks recovery of expenditures the State made under the Medicaid Act.

Finally, Defendants assert that the Complaint falls within the original jurisdiction of the Court pursuant to 28 U.S.C. § 1345, alleging that the State's lawsuit is in the nature of an action by the United States, or by an office or agency acting on behalf of the United States, pursuant to an express authorization by an Act of Congress.

These arguments are fundamentally wrong. Under bedrock principles of federal jurisdiction, this action arises exclusively under the principles of state law set forth in the State's complaint. The antitrust claims are brought only under Md. Com. Law Code Ann. § 11-204 and do not assert a federal question. The provisions of federal Medicaid law cited by defendants in the Notice of Removal merely establish conditions on the States for the receipt of federal Medicaid funds. They do not create the purely state-law claims asserted in the complaint, nor do they supply any necessary element of any of these state-law claims. For that reason, this action could not have been brought originally in federal court, and it cannot be removed to this Court. As to Defendants' final argument, this

is an action by the State of Maryland, a sovereign state, to vindicate state law, protect its fiscal integrity, and provide for the general welfare of its citizens. The State is in no sense acting as an instrumentality of the federal government, and defendants' assertion to the contrary is insupportable.

Because the State's claims in this case arise entirely and exclusively under state law, there is no federal subject-matter jurisdiction over this action, and it must be remanded to the Circuit Court for Baltimore City. Retention of this action in federal court would contravene not only well established principles of subject matter jurisdiction, but also principles of federalism and comity that protect the States from interference by the federal courts.

## ARGUMENT

### **I. THIS ACTION DOES NOT ARISE UNDER FEDERAL LAW.**

Despite the State's exclusive reliance on state law in its complaint, the tobacco companies nevertheless claim that removal is proper under 28 U.S.C. § 1441 because the State's claims "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331.<sup>1/</sup> The tobacco companies' arguments run contrary to settled law governing the subject-matter jurisdiction of the federal courts. Under the "well-pleaded complaint" rule, an action arises under federal law only if a federal issue affirmatively appears on the face of the plaintiff's complaint. The State's complaint does not affirmatively rely upon or raise any issue of federal law, and this action is therefore not within the federal subject matter jurisdiction of this Court.

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<sup>2</sup> There can be no jurisdiction based on diversity of citizenship, because the State of Maryland is not a "citizen [ ] of [a] State" under 28 U.S.C. § 1332. See Moor v. County of Alameda, 411 U.S. 693, 717 (1973); State Highway Comm'n of Wyoming v. Utah Constr. Co., 278 U.S. 194, 199-200 (1929).

**A. The Well-Pleaded Complaint Rule Determines the Existence of Federal Subject-Matter Jurisdiction.**

The removal statute on which defendants rely, 28 U.S.C. § 1441, provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed" to federal district court. Id. § 1441(a). Thus, the question whether this action was properly removed turns upon whether the State's complaint could have been brought originally in federal court. See Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." (footnote omitted)); C.A. Wright, A.R. Miller, & E.H. Cooper, 14A Federal Practice & Procedure § 3721 at 189 (1985 ed.).

The burden of establishing federal subject-matter jurisdiction is, of course, on the party seeking removal -- here, the defendant tobacco companies. See id. § 3721 at 209-210; Mulchahy v. Columbia Organic Chemicals Company, Inc., 29 F.3d 148, 151 (4th Cir. 1994); Harford County, Maryland v. Harford Mutual Insurance Company, 749 F. Supp. 701, 702 (D. Md. 1990). "Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction . . . If federal jurisdiction is doubtful, a remand is necessary." Mulchahy, 29 F.3d at 151 (citations omitted).

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3 In addition, the Supreme Court has long emphasized that the removal statute should be strictly construed, in deference to principles of federalism and state autonomy:

Not only does the language of the [removal statute] evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. . . . Due regard for the rightful independence of state governments, which

The tobacco companies contend that this action is within the original federal jurisdiction of this Court under 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." Id. (emphasis added). The test for determining whether an action "arises under" the laws of the United States is the "well-pleaded complaint" rule: "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." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1983); see also Prihoda v. Shpritz, 914 F. Supp. 113, 116 (D. Md. 1996)("The removal issue turns on whether or not the plaintiff's claim `arises under' federal law. To answer this question, one must first consult the `well pleaded Complaint rule.' Under this rule, a cause of action arises under federal law (and is removable) only if a federal question is presented on the face of the plaintiff's properly pleaded Complaint."). The federal issue "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." Gully v. First Nat'l Bank, 299 U.S. 109, 113 (1936); see also Caterpillar Inc., 482 U.S. at 392; American Policyholders Ins. Co. v. Nyacol Products, Inc., 989 F. 2d 1256, 1262 (1st Cir. 1993), cert. denied, 114 S. Ct. 682 (1994); Curran v. Price, 150 F.R.D. 85, 86 (D. Md. 1993)("the presence of a federal defense does not make a case removable, because it is the plaintiff's complaint, not the defendant's defense, that determines whether there is a federal question upon which removal can be premised.").

Under the well-pleaded complaint rule, "the plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar Inc., 482 U.S. at 392

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should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941) (internal quotation omitted).

(footnote omitted). The plaintiff "is entitled to allege only non-federal claims, even though he could have relied also on federal law." Freeman v. Colonial Liquors, Inc., 502 F. Supp. 367, 369 (D. Md. 1980), citing, Great Northern Railway Co. v. Alexander, 246 U.S. 276, 282 (1918).

By the same token, federal defenses to state-claims do not give rise to federal jurisdiction and therefore do not make those state-law claims removable to federal court. "[I]t is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, 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." Caterpillar Inc., 482 U.S. at 393 (emphasis in original); see also Craig v. Government Employees' Insurance Company, 134 F.R.D. 126, 127 (D. Md. 1991)("In this case, the federal question arises in a defensive posture, as a matter of federal preemption, rather than as an element of the plaintiff's claim. In such circumstances, removal is improper, unless the federal defense so completely preempts the field as to make the conclusion inescapable that plaintiff's claim cannot arise other than under federal law . . .").

Thus, federal question jurisdiction can be found only if the federal question is a necessary element of one of the well-pleaded state claims. United Jersey Banks v. Parell, 783 F.2d 360, 366 (3d Cir. 1986), cert. denied, 476 U.S. 1170 (1986); see also Gully, 299 U.S. at 112 ("a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action"). Similarly, the mere presence of a federal program as a backdrop to a claim arising under state law does not "federalize" that claim and bring it within the jurisdiction of the federal courts. See id. at 115-18; Greenfield and Montague Trans. Area v. Donovan, 758 F.2d 22, 25-26 (1st Cir. 1985) (no federal jurisdiction over contract dispute related to federally funded transportation program); Inter-American University of Puerto Rico, Inc. v. Concepcion, 716

F.2d 933, 934-35 (1st Cir. 1983) (federal jurisdiction lacking in suit to collect loans made under federal student loan program).

The only exception to the well-pleaded complaint rule is the "artful pleading" doctrine: A plaintiff cannot disguise as a state claim a cause of action that is necessarily federal in nature. That is, if state law in a particular field is completely preempted by federal law, so that the plaintiff's cause of action is exclusively federal, then the plaintiff's "artful" attempt to characterize that claim as one arising under state law will not defeat federal jurisdiction. See Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 310 (3d Cir. 1994), cert. denied, 115 S. Ct. 1691 (1995); Craig v. Government Employees' Insurance Company, 134 F.R.D. 126, 127 (D. Md. 1991). In such cases, even though the suit "purports to raise only state law claims," it is "necessarily federal in character by virtue of the clearly manifested intent of Congress" to preempt all state law. Metropolitan Life Ins. Co., 481 U.S. at 67.

The artful pleading exception is "necessarily a narrow one," however, "[b]ecause state and federal laws have many overlapping or even identical remedies and because generally [courts] respect a plaintiff's choice between state and federal forums." Hunneman Real Estate Corp. v. Eastern Middlesex Ass'n of Realtors, 860 F. Supp. 906, 909 (D. Mass. 1994) (quoting In re Agent Orange Product Liability Litigation, 996 F.2d 1425, 1430-31 (2d Cir. 1993), cert. denied, 114 U.S. 1125 (1994)). See J.H.W. Sr., Inc. v. Exxon Company, U.S.A., 921 F. Supp. 1436, 1441 (D. Md. 1996) ("In the Fourth Circuit, the artful pleading exception has been recognized, but must be applied sparingly."). State law must be completely preempted, so that the plaintiff in fact has no state-law claims to assert. Only then are the plaintiff's claims necessarily federal. If federal and state law co-exist, then

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4 See Gray v. Chessie System, 588 F. Supp. 1334, 1335-36 (D. Md. 1984):

the plaintiff's selection of state law must be respected and the action cannot be removed to federal court. See Hunneman Real Estate, 860 F. Supp. at 909-11 (holding that claims brought under Massachusetts Antitrust Act did not "necessarily" arise under federal law even though no such claim had ever been asserted under state law and the state statute incorporated federal standards of liability).

**B. The Antitrust Counts Do Not Arise Under Federal Law.**

The Defendants concede that "the Complaint is phrased to allege violations only in the Maryland Antitrust statute," Notice of Removal p. 5. and, as such, attempt to rely on the "artful pleading" doctrine to support removal of this action. As noted, this narrow doctrine requires a showing that federal law has completely preempted the state claims, such that the claims are "necessarily federal."

In California v. ARC America Corp., 490 U.S. 93 (1989), the Supreme Court ruled that federal antitrust statutes do not pre-empt state antitrust statutes, explaining:

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. . . a District Court should, under the doctrine of "artful pleading," examine a Complaint, upon petition by the Defendant, to determine whether the Complaint states, on its face, a Federal claim. This is particularly true where the Federal law has clearly preempted State law on the subject. If the only remedy available to Plaintiff is Federal, because of pre-emption or otherwise, and the State Court necessarily must look to Federal law in passing on the claim, the case is removable regardless of what is in the pleading.

5 The Supreme Court has found complete preemption, and resulting automatic federal jurisdiction, in only two contexts: under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, Avco Corp. v. International Ass'n of Machinists and Aerospace Workers, 390 U.S. 557 (1968); and under the broad preemption provision found in ERISA, 29 U.S.C. §§ 1001 et seq., which was modelled after section 301 of the LMRA. Metropolitan Life Ins. Co., 481 U.S. at 65-66.

When Congress legislates in a field traditionally occupied by the states, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Given the long history of state common-law and statutory remedies against monopolies and unfair business practices it is plain that this is an area traditionally regulated by the States.

Id. at 100-101. Arc America therefore makes it perfectly clear that the state Antitrust claims asserted in this case are neither preempted nor "necessarily" federal.

In Redwood Theatres, Inc. v. Festival Enterprises, Inc., 908 F.2d 477 (9th Cir. 1990), the Ninth Circuit addressed the precise issue presently before this Court. In that case, Redwood Theatres originally filed its Complaint in California Superior Court alleging violations of California's State Antitrust Statute (the "Cartwright Act"). Festival Enterprises removed the case to federal court contending that Redwood's Complaint, when properly construed, advanced claims implicating federal antitrust law and that the "nationwide character" of its motion picture distribution system warranted review of the case in a federal forum. Redwood Theatres filed a Motion to Remand, which was denied by the District Court. Redwood Theatres then filed an interlocutory appeal arguing that the District Court improperly invoked the "artful pleading" doctrine to recharacterize its state antitrust claims as federal in nature. The Ninth Circuit agreed with Redwood Theatres' argument and reversed.

The Ninth Circuit began its discussion of the removal issues with the well established principle that "the party who brings a suit is master to decide what law he will rely upon and if he can maintain his claim on both State and Federal grounds, he may ignore the Federal question and assert only a State law claim and defeat removal." Id. at 479 (other citations omitted). The Ninth Circuit

recognized that the "artful pleading" doctrine provided a narrow exception to the straightforward rules of removal jurisdiction which authorized the Court to "recharacterize the Plaintiff's claims as Federal if the particular conduct complained of is governed exclusively by Federal law," id. (citations omitted), but went on to explain that "this court invokes the doctrine only in exceptional circumstances because doing so raises difficult issues of State and Federal relationships and often yields unsatisfactory results." Id. citing Salvesone v. Western States Bank Card Association, 731 F.2d 1423, 1427 (9th Cir. 1984).

The defendants in Redwood Theatres did not contend that the Sherman Act preempted the Cartwright Act, but argued instead that where an industry is primarily engaged in interstate commerce and would benefit from a national uniformity of antitrust law, then restraints upon that interstate trade fall within the exclusive jurisdiction of the Sherman Act and the federal courts. The Ninth Circuit rejected this argument, explaining:

The Supreme Court, however, has consistently held that "Congress intended the Federal Antitrust Laws to supplement, not displace, Antitrust remedies," California v. ARC America Corp., 490 U.S. 93 (1989); Watson v. Buck, 313 U.S. 387 (1941), and this Court has observed that "[s]tate antitrust laws retain vitality in dealing with matters which significantly affect local interest, even if they also have interstate aspects."

Id. at 479-80 (citations omitted).

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6 The tobacco companies attempt to support their argument by pointing to the Supreme Court's decision in Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981). In Redwood Theatres, however, the Ninth Circuit explained that Moitie case was easily distinguishable:

[i]n Moitie, seven private antitrust actions were brought by plaintiff retail customers charging the owners of various department stores with price-fixing. The actions were consolidated in federal district court and subsequently dismissed for failure to state a claim under the Clayton Act. Plaintiffs in two of the actions attempted to re-file their

When applied to this case, the Ninth Circuit's reasoning in Redwood Theatres makes clear that removal is improper. Counts Two, Three and Four are brought under Maryland's state antitrust statute. Maryland's antitrust statute is not preempted by the Sherman Act. The tobacco companies have failed to provide any support for the proposition that Maryland's application of its antitrust provisions in the manner set forth in the Complaint would violate the Commerce Clause. See Hunneman Real Estate Corp. v. Eastern Middlesex Ass'n Realtors, Inc., 860 F. Supp. 906 (D. Mass. 1994); Moore v. Abbott Laboratories, Inc., 900 F. Supp. 26 (S.D. Miss. 1995). Indeed, the argument against removal is even stronger in this case than in Redwood Theatres because, as in ARC America, the Attorney General's Complaint seeks to enforce the State's historic police powers over conduct of the tobacco companies that has caused significant injury to Maryland.

The tobacco companies' passing reference to Judge Smalkin's opinion in Sun Dun, Inc. of Washington v. Coca-Cola Co., 740 F. Supp 381 (D. Md. 1990) misses the central part of Judge Smalkin's ruling, which was that the D.C. Code's antitrust cause of action for indirect purchasers was not preempted by federal law:

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complaints in state court, making allegations similar to those made in the previous cases, but invoking only state-law remedies. The department store owners promptly removed the two cases to federal court, where they were dismissed on res judicata grounds. The Supreme Court . . . concluded that removal was proper where it appeared that the Plaintiff's had "artfully" recast their claims under state law in order to gain a second shot at recovery. 452 U.S. at 397. . . . Unlike the situation[ ] in Moitie . . . Redwood has never previously filed an antitrust action in Federal Court and no res judicata defense is available to appellees.

908 F.2d at 480.

Although the defendants argued in their motions to dismiss that the Illinois Brick doctrine mandated that the D.C. Code's cause of action for indirect purchasers be preempted by federal law, the Supreme Court has since answered this question squarely to the contrary in ARC America, 109 S. Ct. 1661. In that case, several states brought class actions against various cement manufacturers, alleging a nationwide conspiracy to fix prices. The plaintiffs invoked both federal and states antitrust statutes; the state laws provided a cause of action for indirect purchasers. The Court pointed out that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies," and that consequently "federal antitrust laws do not preempt state law." Id. at 1665. The Court then determined that "nothing in Illinois Brick suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws." Id. 109 S. Ct. at 1666. Consequently, Sun Dun's claims for damages as an indirect purchaser under the D.C. Code are not preempted by federal antitrust laws.

Id. at 396 (emphasis supplied). Thus, the clear holding in Sun Dun was that the plaintiff could base its challenge of interstate anti-competitive conduct on both state and federal antitrust statutes.

The portion of Judge Smalkin's decision referenced in the defendants' Notice of Removal addressed a hypothetical defense that might be raised by the defendant through a summary judgment motion at the conclusion of discovery. See id. at 397. Even if the hypothetical defense identified by Judge Smalkin in Sun Dun applied to this case, which it clearly does not, "the presence of a federal defense does not make a case removable, because it is the plaintiff's complaint, not the defendant's defense, that determines whether there is a federal question upon which removal can be premised." Curran v. Price, 150 F.R.D. 85, 86 (D. Md. 1993). See also State of Texas v. Insurance Services Office, Inc., 699 F. Supp. 601, 605 (W.D. Tex. 1988) ("When the Plaintiff [the Texas Attorney General] actually has a legitimate cause of action which is supported by the common, statutory, or constitutional law of Texas is a question the state court will pass upon in deciding whether Plaintiff may continue to pursue its action. The state court may also have to decide whether Plaintiff's specific claims are preempted under the Clayton Act. These questions may ultimately prove to be

completely dispositive of this entire dispute; nevertheless, the mere implication of federal law does not automatically allow this court to assert federal question jurisdiction over this lawsuit.").

Finally, as the tobacco companies apparently concede, In re Wiring Device Antitrust Litigation, 498 F. Supp. 79 (E.D.N.Y. 1980) is readily distinguishable because in that case the "the longstanding holding of the South Carolina Supreme Court . . . [was] that the state antitrust statute under which plaintiffs have attempted to bring their action applies only to intrastate commerce and does not reach interstate commerce of any kind." Id. at 82. There is no similar limitation placed upon the Maryland Antitrust Act. In fact, the Maryland Antitrust Act makes clear that this exercise of power extends to interstate anti-competitive conduct as well as purely intrastate conduct. See e.g. Md. Com. Law Ann. § 11-202(a)(3) ("[i]t is also the intent of the General Assembly that, in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition within the State, determination of the relevant market or effective area of competition may not be limited by the boundaries of the State.").

The Supreme Court has long recognized that such exercises of state regulatory power are valid. For example, in Exxon Corp. v. Governor of Maryland, the Supreme Court refused to adopt the "novel" argument that, because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gasoline. 437 U.S. 117, 128 (1978). "In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or a burdening of, interstate commerce," the Supreme Court could not conclude that the States were without power under the Commerce Clause to regulate in that area. Id. at 128-29.

In sum, under well-settled Supreme Court precedents, the state Antitrust claims are independent, non-preempted claims that do not give rise to federal jurisdiction under the "artful

pleading" doctrine or otherwise.

**C. The State's Claims Arise Under State Law,  
Not the Federal Medicaid Act.**

The tobacco companies also argue that the claims asserted in the Complaint actually arise under the laws of the United States because those claims are based in the federal Medicaid Act. See Notice of Removal at 8-9. To create the illusion of federal jurisdiction, they cite several provisions of federal Medicaid law setting forth conditions the State must meet in order to be eligible for federal funding. First, the defendants refer to a provision in the Act by which the State must condition eligibility for Medicaid benefits upon the recipient assigning to the State his or her right to payment for medical care from any third party. 42 U.S.C. § 1396a(45), 1396k; 42 C.F.R. §§ 433.145-148. Second, the defendants refer to a provision requiring the State to take "all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services under the [State Medicaid] plan . . ." and to "seek reimbursement for such assistance" where the amount the State can reasonably expect to recover exceeds the costs of recovery. 42 U.S.C. § 1396a(25); 42 C.F.R. §§ 433.135-148. And, third, the defendants refer to a provision requiring that, if a State recovers payments from a liable third party, "the State must pay the Federal government a portion of the reimbursement" based on the amount of the federal contribution to the State program. 42 U.S.C. § 1396b(d); 42 C.F.R. §§ 433.140(c), 433.154.

The relevance of these funding conditions to the Court's subject-matter jurisdiction over the state-law claims in this case is not apparent from the Notice of Removal. In fact, these provisions are irrelevant to the only jurisdictional issue in this case -- whether the claims in the State's Complaint "arise under" state or federal law. The defendant's attempt to manufacture federal jurisdiction under the Medicaid Act is frivolous and should be rejected.

First, to the extent defendants are arguing that these Medicaid provisions create a federal cause of action that the State is asserting in this action, that myth is easily dispelled. Under the federal Medicaid statute, 42 U.S.C. §§ 1396-1396q, each State seeking federal financial participation in its medical assistance program must submit to the United States Department of Health and Human Services a "state plan" containing certain statutorily required features. 42 U.S.C. §§ 1396a(a). See Atkins v. Rivera, 477 U.S. 154, 156-57 (1986). The provisions invoked by defendants merely set forth certain features the State plan must contain as a condition to the State's eligibility for federal Medicaid funds. The provisions do not create a new federal cause of action against third parties who may be liable to the State for Medicaid expenditures.

The third-party reimbursement provision in 42 U.S.C. § 1396a(a)(25), for example, simply imposes an obligation on the State to "take all reasonable measures" to ascertain the liability of third parties to pay "for care and services." This statutory provision neither expressly creates, nor indirectly furnishes any basis for creating by judicial implication, a federal cause of action in favor of the States against such third parties. The only legal basis for the "liability of third parties" referred to by

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7 The defendants' argument is wrong on another level as well. As noted above, the State, as master of its complaint, "can choose to keep its suit in state court if its well-pleaded complaint does not affirmatively rely on federal law." Hunneman Real Estate, 860 F. Supp. at 909. Therefore, even if the Medicaid Act created a federal cause of action -- which it very clearly does not -- the State has not relied on any such cause of action, and it may not serve a basis for federal jurisdiction.

8 Indeed, given the Supreme Court's jurisprudence all but forbidding the judicial creation of "implied" federal causes of action, see Suter v. Artist M., 503 U.S. 347 (1992); Cort v. Ash, 422 U.S. 66 (1975), it would be astonishing if these provisions were found to establish a new federal cause of action against potentially liable third parties. Cf. Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 805-12 (1986) (where Congress did not create federal cause of action, federal jurisdiction is lacking and removal is improper even where plaintiffs expressly alleged the violation of a federal statute as an element of their claim).

section 1396a(25) must therefore be supplied by State law.

Similarly, whether and how a portion of the State's recovery in this action will be paid to the federal government is a matter between the United States and Maryland. It is not an element of the State's claim against the tobacco companies. It is well settled that the mere fact that the federal government has an interest in a portion of a plaintiff's state-law recovery does not "federalize" the underlying state-law claim. See Becote v. South Carolina State Highway Dep't, 308 F. Supp. 1266, 1268 (D.S.C. 1970) (mere fact that United States has right under federal statute to recover against liable third party the value of medical treatment furnished to plaintiff does not create federal jurisdiction over plaintiff's state-law claim). Indeed, under defendants' expansive view of jurisdiction, whenever the recovery in a state-law suit is potentially subject to federal taxation, giving the United States a pecuniary interest in the judgment, the state-law action could be removed to federal court.

Second, to the extent defendants seek to invoke these Medicaid provisions in defense to the State's state-law claims -- the provisions in fact afford them no defenses, but to the extent they argue otherwise -- they fundamentally misunderstand the law of federal jurisdiction. Issues of federal law raised in defense of state-law claims do not create federal jurisdiction. As the Supreme Court has forcefully stated:

[T]he presence of a federal question . . . in a defensive argument does not overcome the

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9 Section 1396a(a)(25) and the corresponding regulations merely outline what, at a minimum, must be included in the State plan to insure that States seek to recover Medicaid expenditures from liable third parties. 42 C.F.R. §§ 433.138(a) ("At a minimum, such [third party reimbursement] measures must include the requirements specified in paragraphs (b) through (k) of this section . . ." (emphasis added)). Section 1396a(a)(25) and its regulations in no way limit how the State may proceed; they certainly do not suggest that the State must proceed by invoking some unspecified federal source of substantive liability.

paramount policies embodied in the well-pleaded complaint rule -- that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that a plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court . . . . [A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.

Caterpillar, Inc., 482 U.S. at 398-99 (emphasis added; footnote omitted); see also Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 841 (1989) (possible federal immunity defense "did not convert Oklahoma tax claims into federal questions"); Franchise Tax Bd. of State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 14 (1983); Greenfield and Montague Trans. Area, 758 F.2d at 27.

Third, it is well-established that the mere presence of a federal statute as a backdrop to what is decidedly a state-law cause of action is not sufficient to confer subject-matter jurisdiction on the federal courts. Thus, the fact that the State's state-law causes of action are consistent with the State's satisfaction of funding conditions in the federal Medicaid statute does not alter their essential character as state-law claims. As the Supreme Court has recognized, there are few state claims that do not bear some attenuated connection to a provision of federal law:

[C]ountless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are . . . necessary and

those that are merely possible. We shall be lost in a maze if we put that compass by.

Gully, 299 U.S. at 118 (Cardozo, J.).

Indeed, this case is much like Mulcahy v. Columbia Organic Chemicals Company, Incorporated, 29 F.3d 148 (4th Cir. 1994) in which the Fourth Circuit held that the plaintiffs' mere reference to federal environmental statutes providing for a private federal remedy in their negligence per se claim against operators of a chemical plant did not support federal subject matter jurisdiction. "The Plaintiffs' citation of federal environment statutes which provide for a private federal remedy is simply not enough to show congressional intent that we exercise federal jurisdiction." Id. at 152.

Similarly, in Inter-American University of Puerto Rico, Inc. v. Concepcion, 716 F.2d 933 (1st Cir. 1983), the First Circuit held that a suit to collect a student loan does not arise under federal law merely because the loan was made pursuant to the National Direct Student Loan Program, 20 U.S.C. § 1087aa-1087ii, even though the federal government made a capital contribution to the loan fund and federal regulations "prescrib[ed] the procedures for making and collecting the loans." Id. at 934. As the First Circuit stated:

It is the nature of the action before the court [i.e., a state-law claim to collect a debt], not the nature of the loan program, that establishes the existence or absence of federal jurisdiction.

Id.; see also Greenfield and Montague Trans. Area, 758 F.2d at 27 (dispute over provision in transportation contract does not arise under federal law even though disputed provision was inserted to meet eligibility requirements for federal funding under Surface Transportation Assistance Act, 49 U.S.C. § 1614).

Once it is apparent that the provisions of Medicaid law raised in the Notice of Removal

neither create nor are necessary elements of any of the State's state-law claims, the only remaining argument available to the cigarette manufacturers is that, by artful pleading, the State has disguised claims that are exclusively federal. For such an argument to prevail, the tobacco companies must establish that this is the "rare case" in which federal law "so completely displaces state causes of action in a particular area that all such claims are necessarily federal in character." American Policyholders, 989 F.2d at 1262 n.10 (emphases added) (quoting Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64)(1987). In other words, the tobacco companies' premise must be that all claims seeking payments made under a state Medicaid program as an element of damages arise exclusively under the Medicaid Act and are therefore within the jurisdiction of the federal courts.

Defendants cite no authority for the extraordinary proposition that the State is preempted by the federal Medicaid Act from bringing an action under state law for damages, and that argument is clearly wrong. The Medicaid program is "a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 502 (1990). "The Medicaid program exemplifies what is often referred to as cooperative federalism." State of Washington v. Bowen, 815 F.2d 549, 557 (9th Cir. 1987) (quoting Harris v. McRae, 448 U.S. 297, 308 (1980)).

Far from completely preempting state law, the federal statute and its implementing regulations plainly contemplate the continued vitality of complementary state law in many areas, including the pursuit of claims under state law against potentially liable third parties. See 42 U.S.C. § 1396a(a)(25); 42 C.F.R. §§ 433.135-.148. Indeed, as noted above, the federal provisions expressly set forth only the "minimum" a State must do to maintain its eligibility for federal funds and do not

themselves supply the substantive legal basis for any reimbursement claim, which therefore must be supplied entirely by state law. Nowhere in the federal provisions cited by the defendants, or in any other federal statute of which the State is aware, is there the slightest suggestion that the States are required to locate some federal as opposed to state cause of action through which to pursue parties potentially liable for Medicaid expenditures.

If defendants' argument were correct, a wide array of ordinary state-law claims would suddenly fall within the jurisdiction of the federal courts. For example, in many tort actions, the damages sought by the injured plaintiff include medical expenses for which the state Medicaid program initially provided compensation. In all of these cases, the State and, ultimately, the federal government have potential interests in the recovery. See, e.g., Miller v. Lankenau Hosp., 618 A.2d 1197 (Pa. Comm. Ct. 1992) (medical malpractice case in which Commonwealth of Pennsylvania intervened to assert interest in Medicaid reimbursement). Similarly, the States seek third-party reimbursement of Medicaid benefits in actions under state law to collect child support from an absent father. See, e.g., Steuben County Dep't of Social Servs. v. Deats, 560 N.Y.S.2d 404, 560 N.E.2d 760 (N.Y. 1990)(action in state Family Court, under state law, to collect from unwed father Medicaid payments made in connection with the birth of his child). Under defendants' theory, these and other garden-variety state-law actions would "arise under" the federal Medicaid Act and would be within the subject-matter jurisdiction of the federal courts.

It is therefore obvious that the tobacco companies cannot meet their heavy burden of demonstrating that the Medicaid statute completely preempts state law, so as to convert the State's

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10 See 42 U.S.C. § 1396a(a)(25)(F) (requiring that State Medicaid plan provide that State will seek reimbursement from third party who has failed to pay child support).

state-law claims into causes of action that are necessarily federal in character. The State's claims, therefore, are precisely what they purport to be -- state claims based on the state-law causes of action set forth in the complaint -- and are not within the jurisdiction of this Court.

The weakness of the tobacco companies' argument is further demonstrated by their reliance on Harlow v. Chin, 405 Mass. 697, 545 N.E.2d 602 (1989), which is in fact irrelevant to the jurisdictional analysis. Harlow was a medical malpractice case in state court; the issue of federal jurisdiction was never raised or discussed. Rather, the court was called upon to interpret a provision of the Massachusetts medical malpractice statute allowing the trial judge to deduct from a damage award certain payments received by the plaintiff from collateral sources. Mass. G.L. c. 231, § 60G. The

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11 Indeed, there is no case holding that the Medicaid Act completely preempts state law and converts all claims touching upon Medicaid benefits into federal causes of action. In State of Washington v. Bowen, 815 F.2d 549 (9th Cir. 1987), the court expressly held that the federal Medicaid Program did not preempt the State of Washington from calculating payment levels based on state community property law. Id. at 557; cf. Vang v. Healy, 804 F. Supp. 79, 82 (E.D. Cal. 1992) (broad delegation to States in federal food stamp regulations of authority to collect food stamp overissuance "cuts squarely against the view that the federal act was intended to preempt any and all state law claims that relate to it").

12 See also American Policyholders, 989 F.2d at 1264 (finding no subject matter jurisdiction and remanding to state court even though action would be dispositive of plaintiffs' potential liability to the United States under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq.); United Jersey Banks v. Parell, 783 F.2d 360, 367 (3d Cir. 1984) (holding that complaint alleging that merger of national banks violated state statutes arose under state law and was not removable, notwithstanding possibility that state statutes conflicted with federal banking laws); Inter-American Univ. of Puerto Rico, Inc., 716 F.2d at 934 (holding that suit to collect student loan issued pursuant to federal loan program arises under state, not federal, law); Hunneman Real Estate, 860 F. Supp. at 909-911 (holding that claims of violation of state antitrust laws are not removable to federal court even though the state statutes incorporate federal standards of liability).

13 A state court, of course, has no occasion to determine whether claims arise under federal law so as to give rise to federal subject-matter jurisdiction, and the court in Harlow was doing no such thing. Moreover, the question of whether the State's claims in this case "arise under" the laws of the United States is a question of federal, not state, law.

statute excluded from this set-off any compensation from any collateral source "whose right of subrogation is based in any federal law." Mass. G.L. c. 231, § 60G(c). The issue was whether Medicaid payments received by the plaintiff fell within this exclusion.

In construing the state-law phrase "based in any federal law" as it is used in Mass. G.L. c. 231, § 60G, the Harlow court appropriately looked to factors altogether different from those that determine whether an action "arises under" federal law as that phrase is used in 28 U.S.C. § 1331. See 545 N.E.2d at 609-11. The court observed that, in order to receive federal Medicaid funding, the Commonwealth is required under 42 U.S.C. 1396a (25) to "pursue recovery of the [Medicaid] funds [expended for plaintiff's care] from legally liable third parties." Id. at 610. The court explained that if these amounts were deducted from a malpractice plaintiff's award under Mass. G.L. c. 231, § 60G, then "the entity which provided the benefit cannot collect that amount from the plaintiff." Id. The court therefore recognized that a narrow construction of subsection 60G(c) -- requiring that Medicaid payments be deducted from an award -- would potentially frustrate compliance with the federal funding condition mandating pursuit of third-party reimbursement of Medicaid expenditures. The court determined that the State Legislature's objective in creating the exception in subsection 60G(c) was "to prevent conflicts between G.L. c. 231, § 60G, and any Federal law, which of course must be supreme." Id. The court found that the State Legislature "chose to use the expansive term 'based in any federal law' rather than the more stringent . . . 'provided for by federal law'" in subsection 60G(c) to achieve this purpose. Id. For these reasons, the court, after carefully delineating that it is Massachusetts' state law that provides the mechanism for recovery of Medicaid expenditures from liable third parties, id. at 610 and n.17, held that "[a] provision that a State receiving Federal money must pursue reimbursement suffices to make the consequent right of subrogation 'based in' Federal law" within the meaning of Mass.

G.L. c. 231, § 60G(c). Id. at 610.

The holding of Harlow v. Chin, therefore, does not in any way indicate that the State's claims in this case "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331. The phrase "based in federal law," which defendants borrow from this state statute, is not part of "[t]he century-old jurisdictional framework governing removal of federal question cases from state into federal courts." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. at 63. The only question in this case is whether the action "arises under" federal law under section 1331, and the narrow meaning of that statutory phrase, set forth in this Memorandum, has been carefully developed by the federal courts over the last century. For the reasons discussed above, the State's claims arise under the state law creating the causes of action set forth in the complaint, and nothing in the Massachusetts court's holding in Harlow v. Chin indicates otherwise.

**II. THIS ACTION IS NOT "IN THE NATURE OF AN ACTION BROUGHT BY OR ON BEHALF OF THE UNITED STATES."**

As an alternative basis for removal under section 1441(a), the tobacco companies make the astonishing claim that this action is "in the nature of an action by or on behalf of the United States," and that original federal jurisdiction therefore lies under 28 U.S.C. § 1345 because the United States may be entitled to a portion of any recovery by the State. See Notice of Removal at 11-13.

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<sup>14</sup> Defendants also rely in their Notice of Removal on Maine Association of Independent Neighborhoods v. Commissioner of Maine Dep't of Human Services ("M.A.I.N."), 876 F.2d 1051 (1st Cir. 1989), a case in which an organization representing low income persons alleged that the State of Maine was administering its welfare program in violation of federal law. Obviously, a suit alleging that the State is administering a public assistance program in violation of a federal statute "arises under" federal law -- indeed, in M.A.I.N., "[a]ll parties . . . agree[d] that [the] action `arises under' federal law." Id. at 1053. M.A.I.N. does not in any way support the assertion of subject matter jurisdiction over this case, in which the State alleges that defendants have violated state law.

Not surprisingly, given the nature of the proposition that this is an action by the United States, the authority cited by the tobacco companies in the notice of removal is utterly unresponsive. The tobacco companies rely primarily on the concurring opinion in Kuehner v. Schmeiker, 717 F.2d 813 (3d Cir. 1983), cert. granted and judgment vacated, 469 U.S. 977 (1984). Kuehner was a suit against federal and state officials, challenging policies of the Social Security Administration that were adopted by federal authorities and merely implemented by the States; the United States Department of Justice appeared in the case on behalf of all defendants. The single concurring judge found that state officials were merely the "alter egos" of the Social Security officers, implementing policies imposed by the federal authorities, so that mandamus jurisdiction could be invoked against the state defendants under 28 U.S.C. § 1361. Id. at 826 (Becker, J., concurring).

This action, in stark contrast, is brought by the Attorney General of Maryland, pursuant to his authority under Maryland law; it is brought exclusively under principles of state law, to recover losses suffered by the State of Maryland. Federal officials played no role whatsoever in the initiation of this litigation, and will play no role in its continued progress. The State is no sense acting as an instrumentality of the United States. Nor is the commencement of this action a ministerial act that the State was required to undertake by federal law.

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15 The majority concluded that the action arose under the Social Security Act and that federal-question jurisdiction existed under 28 U.S.C. § 1331, and therefore did not rely in any way on the concurring judge's "alter ego" theory. See 717 F.2d at 816.

16 Cf. M.A.I.N., 876 F.2d at 1054-55 (rejecting argument that Commissioner of Maine Department of Social Services, in administering AFDC rules and regulations, is, for purposes of removal under 28 U.S.C. § 1442(a) (1), an "officer of the United States or any agency thereof, or person acting under him, . . . act[ing] under color of such office . . .," because "[t]he promulgation of state regulations . . . is clearly an act taken under color of the Commissioner's state office, not under color of federal office" (emphasis in original)); Vang v. Healy, 804 F. Supp. at 82 (rejecting contention that State of California

Second, defendants rely upon two criminal cases for the proposition that the criminal jurisdiction of the United States under 18 U.S.C. § 1001 extends to false statements made to state agencies, if federal funds are involved. E.g., United States v. Baker, 626 F.2d 512, 514 (5th Cir. 1980). Of course, the reach of federal laws enacted by Congress to proscribe criminal conduct touching upon federal interests has nothing whatsoever to do with the subject-matter jurisdiction of the federal courts over civil actions brought by state officials under state law.

More fundamentally, defendants' argument that the State, in bringing this suit, is a mere instrumentality of the federal government, flies in the face of established principles of federalism and state autonomy. As the Supreme Court recently reiterated:

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart.

New York v. United States, 505 U.S. 144, 188 (1992); see also FERV v. Mississippi, 456 U.S. 742, 777 (1982) (O'Connor, J., concurring in part and dissenting in part) ("State legislative and administrative bodies are not field offices of the national bureaucracy . . . . Instead, each state is sovereign within its domain, governing its citizens and providing for their general welfare.").

In bringing this action under state law to recover state losses, the State of Maryland is exercising its authority as a sovereign state. It is in no sense acting as an agent or "alter ego" of the United States, and defendants' baseless argument to the contrary should be rejected.

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is an agent of the federal government in administering the food stamp program in California).

**CONCLUSION**

For the reasons state above, the Court should grant the Plaintiff State of Maryland's  
Motion for Remand.

Respectfully Submitted,

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