In the United States Court of Appeals for the Third Circuit

No. 13–8096

A.S., a minor by SALLEE MILLER, Guardian,
And SALLEE MILLER, Individually,
Plaintiffs/Petitioners,

v.

SMITHKLINE BEECHAM CORP.,
d/b/a GlaxoSmithKline,
Defendant/Respondent.

Petition for Permission to Appeal from the Order Dated July 26, 2013, Issued by U.S. District Judge Mary A. McLaughlin, Certified for Interlocutory Appeal by Permission on December 12, 2013 by Chief U.S. District Judge Christopher C. Conner in Civil Action No. 13–cv–2382 Pending in the U.S. District Court for the Middle District of Pennsylvania

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MOTION OF PLAINTIFFS/PETITIONERS FOR LEAVE TO FILE A REPLY IN SUPPORT OF THEIR PETITION FOR PERMISSION TO APPEAL

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MOTION OF PLAINTIFFS/PETITIONERS FOR LEAVE TO FILE A REPLY IN SUPPORT OF THEIR PETITION FOR PERMISSION TO APPEAL

Plaintiffs/petitioners respectfully request leave to file the attached Reply in support of their pending Petition for Permission to Appeal.

On December 23, 2013, plaintiffs/petitioners timely filed their Petition for Permission to Appeal in accordance with the order of the Chief Judge of the U.S. District Court for the Middle District of Pennsylvania certifying the order in question pursuant to 28 U.S.C. §1292(b).

Reportedly due to electronic filing–related difficulties, defendant/ respondent GSK did not electronically file its Opposition until January 7, 2014, one day after the deadline for filing a timely response. Plaintiffs/ petitioners do not oppose this Court's consideration of the Opposition as though it had been electronically filed in a timely manner.

Nevertheless, GSK's 20–page opposition contains arguments and assertions that may leave this Court with various misimpressions concerning issues material to whether this Court should grant or deny permission to appeal in this matter. To correct those misimpressions, petitioners/plaintiffs have prepared the attached 10–page reply, in 14–point font, in further support of their Petition for Permission to Appeal.

The relevant provisions of the Federal Rules of Appellate Procedure governing petitions for permission to appeal, contained in Fed. R. App. P. 5, do not address whether a reply may be filed in support of a Petition for Permission to Appeal. However, appellate courts routinely allow replies from the party requesting discretionary review in deciding whether to grant such review. Most notably, the party requesting that the U.S. Supreme Court grant a petition for writ of certiorari is allowed to file a reply in support of such a petition. *See* S. Ct. R. 15.6.

The reply that plaintiffs/petitioners have prepared and attached to this motion is limited to 10 pages, half the length of the Petition for Permission to Appeal and GSK's response. The reply is being submitted to this Court one calendar day after GSK's Opposition was electronically filed and fewer than 48 hours after counsel for GSK transmitted the Opposition to counsel for plaintiffs/petitioners by email on the night of Monday, January 6, 2014. Consideration of the reply will not delay this Court's decision whether to grant permission to appeal, and consideration of the reply will allow this Court to reach its decision in a fully informed manner.

For these reasons, counsel for plaintiffs/petitioners respectfully request that this Court grant leave for plaintiffs/petitioners to file the attached

Reply in Support of Petition for Permission to Appeal and that this Court accept the reply as filed in the form attached hereto as of January 8, 2014.

Respectfully submitted,

Dated: January 8, 2014

/s/ Howard J. Bashman

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CERTIFICATE OF SERVICE

I hereby certify that all counsel listed immediately below on this Certificate of Service are Filing Users of the Third Circuit's CM/ECF system, and this document is being served electronically on them by the Notice of Docket Activity:

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Joseph O'Neil

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Robert K. Woo

Dated: January 8, 2014

/s/ Howard J. Bashman
Howard J. Bashman

ATTACHMENT

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REPLY OF PLAINTIFFS/PETITIONERS IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL

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I. INTRODUCTION

Plaintiffs/petitioners respectfully submit this reply in support of their pending Petition for Permission to Appeal to correct several misimpressions that GSK's opposition seeks to convey in asserting that permission to appeal should be denied. This reply addresses the following three important points:

> 1. Even when the question presented is framed as narrowly as possible, as GSK proposes, this case still readily qualifies for interlocutory appeal by permission;
>
> 2. An interlocutory appeal by permission unquestionably will materially advance the ultimate disposition of this case and the eight other related cases that GSK improperly re–removed to federal court under the same circumstances; and
>
> 3. GSK's inability to defend the merits of the unlawful re–removals of these cases confirms that this case presents a clear case for reversal for the reasons explained by Senior U.S. District Judge Michael M. Baylson in *Powell ex rel. Powell* v. *SmithKline Beecham Corp.*, 2013 WL 5377852 (E.D. Pa. Sept. 26, 2013), and by Senior U.S. District Judge John R. Padova in *Cammarota ex rel. Hallock* v. *SmithKline Beecham Corp.*, 2013 WL 4787305 (E.D. Pa. Sept. 9, 2013).

For these reasons and the reasons previously explained, this Court should agree to resolve the merits of the question presented, which has divided federal district judges in this circuit on the critical issue of whether these cases should proceed to final decision in state court or federal court.

II. PERMISSION TO APPEAL SHOULD BE GRANTED

A. Even Framed As Narrowly As Possible, The Question Presented Is Well–Deserving Of Interlocutory Appeal By Permission

The question presented, even when GSK attempts to frame it as narrowly as possible, remains worthy of this Court's review. The question of the applicability of this Court's holding in *Doe* v. *American Red Cross*, 14 F.3d 196 (3d Cir. 1993), allowing the re–removal of a non–diversity case under unique circumstances, to diversity cases such as this is an important and unresolved issue as to which the district judges of this circuit have been and remain divided. Given the large mass tort caseloads that exist in both Pennsylvania and New Jersey, this issue may continue to arise with frequency in the future, given that defendants ordinarily prefer to litigate these cases in federal court, while plaintiffs ordinarily prefer to litigate these cases in state court.

Moreover, even if the issue presented herein only involved these nine cases, that issue would still be worthy of this court's review, because none of these nine cases properly belongs in federal court, and the entire federal court adjudicatory process will thus consist of nothing more than a

prohibited advisory opinion, wasting the time of federal judges and federal jurors and, ultimately, numerous appellate judges.

Repeatedly in its opposition, GSK asserts that the question presented herein will not arise with any more regularity than the question this Court resolved in *Doe*, *supra*, and therefore this Court should not grant permission to appeal here. *Doe*, however, involved a basis for re–removal that was essentially unique to American Red Cross, while the basis for re–removal here — diversity jurisdiction — is a ground for re–removal that is readily available to numerous litigants. In any event, GSK conveniently overlooks that this Court granted a petition for permission to appeal in *Doe* as the basis for appellate jurisdiction in that case. *See Doe*, 14 F.3d at 198. Thus, if GSK is correct that this case is no more deserving of review on petition for permission to appeal than was *Doe*, then this case is surely likewise worthy of this Court's grant of permission to appeal under 28 U.S.C. §1292(b).

B. Permitting An Interlocutory Appeal By Permission Unquestionably Will Materially Advance The Ultimate Disposition Of This Case And The Other Related Cases

Permitting this interlocutory appeal unquestionably will materially advance the ultimate dispositions of this case and the other eight cases in an identical procedural posture, which cases all should proceed to final judgment in the first instance in state, rather than federal, court.

GSK concedes in its opposition that plaintiffs will be able to obtain appellate review of the propriety of the removals of all of these cases once a final judgment exists in each case, and GSK concedes that if plaintiffs prevail at that juncture then these cases will need to be retried from the outset in state court.

Plaintiffs realize that the plaintiffs may prevail in some or all of these cases in federal court, or that these cases could settle while in federal court, but nonetheless counsel for plaintiffs have made a reasoned and well–informed decision that these cases lawfully belong in state court and have greater value there. The fairest and most just settlements are reached in cases where the preceding rulings in those cases are correct or at least have some reasonable prospect of being upheld on appeal, which in no way

describes the district court's failures to remand this case and other similarly situated cases to state court.

Moreover, if plaintiffs are dissatisfied with the outcome of even one case in federal court and appeal that outcome and therein challenge the district court's earlier failure to remand, while GSK appeals the outcomes of all of the other cases, a decision from this Court in the plaintiffs' appeal that none of these cases belonged in federal court may call into serious question the validity of the outcomes of all of these cases.[1]

Lastly on this point, because all of the cases that were not remanded to state court due to GSK's untimely re–removal face the likely outcome that they will need to be retried in state court, the issue of materially expediting the outcome should and indeed must be evaluated by comparing not whether an appeal may delay trial in federal court but whether not allowing an immediate appeal will delay the occurrence of a trial in the only forum where that trial may lawfully occur — state court. It is beyond

[1] Just as GSK has been doggedly persistent in its attempts to have these cases litigated in federal court, it is not beyond GSK's ability to argue later on, in those re–removed cases in which plaintiffs have ultimately prevailed in federal court, that those judgments should be vacated were this Court to rule in a post–final judgment appeal in a case that plaintiffs had lost that none of these cases had been properly re–removed by GSK.

any legitimate doubt that deferring the propriety of the removal issue until a final judgment appeal will seriously delay the start of trial of these cases in state court and will unfairly squander the resources of plaintiffs, their counsel, defendant GSK and its counsel, and federal trial and appellate judges and jurors.

GSK is apparently not concerned about squandering its own resources because it realizes that the farther it can postpone the finish line for these cases, the more leverage GSK will possess and the less value these cases may currently seem to have. But while seeking to place as many roadblocks in plaintiffs' path may be a legitimate litigation strategy for the defense, a defendant's desire to retain illegitimate roadblocks to the lawful resolution of litigation is not a valid reason for an appellate court to deny an otherwise meritorious petition for permission to appeal.[2]

[2] The prompt availability to plaintiffs of a petition for permission to appeal demonstrates that this Court was correct to deny mandamus review of two earlier orders denying plaintiffs' motions to remand. *See United States* v. *Bertoli*, 994 F.2d 1002, 1015 (3d Cir. 1993) (observing that review by writ of mandamus is appropriate only where the petitioner lacks adequate alternate means to obtain relief). However, because the requirements for mandamus review are so much more stringent than the requirements for an interlocutory appeal by permission under §1292(b), this Court's denial of mandamus in no way can or should be viewed as prejudging this matter's suitability for interlocutory appeal by permission.

In the final analysis, GSK's attempts to compare this case to any other case in which an immediate appeal might avoid a retrial miss the mark, because here the question is not simply whether there will need to be a retrial, but rather where the trial itself should occur in the first instance. If this Court were truly to believe that the preference for final judgment appeals in a case such as this, which otherwise satisfies all of the criteria of 28 U.S.C. §1292(b) for interlocutory appeal by permission, is worth the cost of nine unnecessary federal jury trials, followed by nine unnecessary appeals in at least three (and perhaps even more, depending on the outcome of the still–pending remand motions in three related cases) different federal appellate courts, then this Court should deny the petition for permission to appeal.

But the preference for final judgment appeals was intended to preserve, rather than squander, federal judicial resources. Here, it is the granting of this petition for permission to appeal that will serve that purpose far more efficiently than denying permission and requiring otherwise unnecessary federal trials and federal appeals in nine separate cases pending in at least three different federal appellate circuits.

C. GSK's Failure To Advance Any Defense On The Merits Of The District Court's Refusal To Remand This Case Demonstrates That GSK's Re–Removals Of These Cases Are Indefensible On The Merits

Notably, GSK's opposition contains little if any defense on the merits of the district court's failure to remand these cases to state court, and for the reasons explained in the federal district judges' rulings properly granting a remand of certain of these cases, no valid merits reasons exist for these re–removed cases to remain in federal court. *See Powell ex rel. Powell* v. *SmithKline Beecham Corp.*, 2013 WL 5377852 (E.D. Pa. Sept. 26, 2013) (Baylson, J.); *Cammarota ex rel. Hallock* v. *SmithKline Beecham Corp.*, 2013 WL 4787305 (E.D. Pa. Sept. 9, 2013) (Padova, J.).

GSK notes in its opposition that no petition for permission to appeal was filed in the *Powell* case from Judge Baylson's order certifying for appeal by permission his decision to remand that case to state court. But only GSK had standing to appeal from that remand decision, since the ruling gave plaintiffs exactly what they requested. GSK's failure to request permission to appeal in *Powell* demonstrates that GSK is willing to suffer the remand of certain of these cases so long as others of them remain in federal court, because GSK realizes that if this Court were to review at this time the

decisions of several federal district judges to uphold GSK's untimely re–removal of these cases, *none of these cases* would remain in federal court.

Because the district court's decision refusing to remand this case is so plainly indefensible, and because GSK does not even attempt to advance any actual defense of that decision, this is not a case that will take considerable time or effort for this Court to resolve. Thus, GSK's mention of how long other decisions of this Court took in cases initiated via petitions for permission to appeal fails to provide any reliable guideposts.

In any event, plaintiffs are more than willing to consent to expedited briefing and oral argument of this appeal if GSK is truly worried about delay. All that GSK is actually concerned about, however, is postponing this Court's forthcoming all but certain resolution of the re–removal issue in a manner adverse to GSK.

Two highly experienced and well–respected federal district judges who are presiding over cases that reached divergent outcomes on the propriety of GSK's re–removal of these cases to federal court have agreed that the criteria for an immediate appeal by permission are abundantly satisfied here. Those judges are correct, and the petition for permission to appeal should be granted.

III. CONCLUSION

For all the reasons set forth above and in their initial filing, plaintiffs respectfully request that this Court grant their Petition for Permission to Appeal.

Respectfully submitted,

Dated: January 8, 2014

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