In the United States Court of Appeals for the Third Circuit

No. 14–1229

A.S., a minor by SALLEE MILLER, Guardian,
and SALLEE MILLER, Individually,
Appellants,

v.

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

On appeal from the order dated July 26, 2013
of 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

REPLY BRIEF FOR APPELLANTS

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I. INTRODUCTION

In its recently filed Brief for Appellee, defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK") has devoted nearly 12,000 words attempting to defend its second removal of this case and the district court's refusal to remand this case a second time. Yet in the aftermath of that appellate brief — which is chock full of arguments that are demonstrably incorrect, internally inconsistent, or beside the point — GSK's re-removal of this case and the district court's refusal to remand remain legally indefensible. GSK can point to no other case, before or after its improper re-removal of the nine cases now at issue, in which either a federal district court or a federal appellate court has permitted a re-removed case to remain in federal court under the circumstances presented here.

The following jurisdictional facts are critical to a correct resolution of this appeal. This case has involved a single defendant at all times. The facts entitling GSK to remove this case have been apparent to GSK at all times that this case has been pending, and as GSK concedes none of those facts has changed in any way while this case has been pending. GSK's initial removal of this case asserted that diversity jurisdiction existed based on the

initial pleading because GSK's principal place of business was in Delaware, and GSK's second removal of this case was based on that identical contention.

GSK argues that the final judgment of the U.S. District Court for the Eastern District of Pennsylvania issued on December 14, 2011 remanding this case to state court, *see Patton ex rel. Daniels–Patton* v. *SmithKline Beecham Corp.*, 2011 WL 6210724, at *5 (E.D. Pa. Dec. 14, 2011), was clearly wrong when issued under then–existing U.S. Supreme Court and Third Circuit precedents and was confirmed to be incorrect in this Court's later ruling in *Johnson* v. *SmithKline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013). As a result, GSK contends that it was entitled to remove this case to federal court more than once on the same grounds as originally rejected and that a second federal district judge was entitled to disregard that same federal district court's earlier final judgment rejecting those identical grounds for removal.

As explained herein, none of the arguments that GSK has advanced in its Brief for Appellee entitles GSK to affirmance of the district court's legally erroneous failure to remand this improperly re–removed case.

Focusing first on the big picture, GSK's remarkable and unprecedented argument, if accepted, would blast a gaping hole in the prohibition on the

reviewability of even incorrect 28 U.S.C. §1447(c)–based remands found in 28 U.S.C. §1447(d). According to GSK, although §1447(d) prohibits an appeal or mandamus review of a demonstrably incorrect §1447(c)–based remand order, a defendant may re–remove a case as many times as necessary in search of a federal judge willing to agree that the original removal was proper and that the earlier judge's remand decision was incorrect. At that point, according to GSK, the latter judge's view of the propriety of the original removal controls, and the case must proceed to final judgment in federal court. Surely, if GSK's remarkable reinterpretation of removal law were correct, some defendant somewhere would have successfully invoked that argument before now. The utter absence of any precedent supporting GSK's novel theory speaks volumes in demonstrating its invalidity.

GSK's specific arguments in favor of affirmance fare no better. As this Court recognized in *Doe* v. *American Red Cross*, 14 F.3d 196 (3d Cir. 1993), it is well–established that a defendant is not permitted to remove a case a second time on the same grounds for removal that a district court has previously rejected. GSK's argument that §1446(b) applies only to a defendant's initial removal but not to subsequent removals flies in the face

of the language of that statute and binding case law. The procedures for removal set forth in 28 U.S.C. §1446 apply not only to a defendant's first removal of a case, but also to the second removal and every removal thereafter.

Unless a re–removal complies with the procedural requirements set forth in §1446(b), the case must be remanded to state court if the plaintiff files a timely motion for remand identifying the applicable procedural defects. This Court's ruling in *Doe* establishes as much, because otherwise this Court would have had no need to determine that the Red Cross's federal question re–removal of that case was permissible under §1446(b)'s second paragraph. Here, GSK's re–removal of this case did not comply with the procedural requirements of §1446(b), as plaintiffs demonstrated at length in their opening brief, and plaintiffs filed a timely motion to remand drawing those procedural defects to the district court's attention. The district court's failure to remand this case therefore constituted reversible error.

This Court's ruling in *Doe* also establishes as demonstrably incorrect GSK's argument that §1447(d)'s prohibition on review of a remand order does not apply to a defendant's re–removal of a case. In *Doe*, this Court

recognized that §1447(d) does not allow a defendant to remove a case a second time on the same grounds as previously rejected, and an integral part of this Court's ruling in *Doe* established that the Red Cross's second removal was not predicated on the same grounds as its first removal. By contrast, here GSK openly concedes that both of its removals of this case were based on the same grounds and that the facts from which the removability of this case must be ascertained have remained unchanged during the pendency of this case.

If GSK's arguments had merit, this Court surely could have and would have avoided its complicated justification of the Red Cross's re–removal in *Doe* under the second paragraph of §1446(b). Instead, this Court could simply have held that the re–removal of a case that had been remanded to state court is permitted under the first paragraph of §1446(b) where the first removal had been timely and a newly issued ruling from a higher court establishes that the earlier remand was erroneous. In other words, if correct, GSK's arguments here would have rendered *Doe* a simple case. Yet *Doe* was the antithesis of a simple case, demonstrating the utter lack of merit to GSK's arguments in support of affirmance in this appeal.

For all of these reasons, which are examined in greater detail below, this Court should rule that GSK's re–removal of these nine cases was improper and remand this case to state court for a decision on the merits.

II. ARGUMENT IN REPLY

A. Contrary To GSK's Argument, 28 U.S.C. §1447(d) Prohibits A Defendant's Re–Removal Of A Case On The Same Grounds As Previously Rejected

GSK begins its Brief for Appellee by arguing that the removal statutes were intended to afford a defendant an unfettered opportunity to bring into federal court cases that originally could have been filed in federal court.[1] According to GSK, nothing in those statutes prohibits a defendant from re–removing a case from state court to federal court where the original removal resulted in a remand decision that was incorrect under the law as it existed at the time of the original removal.

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[1] In support of its argument, GSK relies on two recent Ninth Circuit decisions, *Rea* v. *Michaels Stores Inc.*, 742 F.3d 1234 (9th Cir. 2014), and *Roth* v. *CHA Hollywood Med. Ctr. L.P.*, 720 F.3d 1121 (9th Cir. 2013). *Roth* and *Rea* are distinguishable because they involved actions brought under the Class Action Fairness Act of 2005 ("CAFA"), a statute that contains an exception to §1447(d) and imposes no time limitation on the removal of CAFA cases. *See Rea*, 742 F.3d at 1238 ("CAFA explicitly allows review of remand orders 'notwithstanding section 1447(d)'") (quoting 28 U.S.C. §1453(c)(1)); *Roth*, 720 F.3d at 1126.

In advancing that argument, GSK ignores a substantial body of law, recognized by this Court in *Doe*, "reflecting the general view that appellate review of a remand or second removals based on the same grounds [as the original removal] are prohibited." *Doe*, 14 F.3d at 200. In *Doe*, this Court explained:

> Courts have construed Section 1447(d) as prohibiting appeals of remand orders as well as reviews by district courts of their own remands based on the same grounds as the initial removals.

Id. at 199. There is thus no merit to GSK's argument that §1447(d) is limited to precluding only appellate review of remand orders.[2]

Indeed, in a footnote, this Court in *Doe* used the following parenthetical to describe its earlier holding in *Hunt* v. *Acromed Corp.*, 961 F.2d 1079, 1081 (3d Cir. 1992): "a district court may not reconsider a remand when a second notice of removal is based upon the same grounds as the first." *Doe*, 14 F.3d

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[2] Nor is there any merit to GSK's argument that collateral attacks on remand orders do not violate §1447(d). *See Painters Local Union No. 109 Pension Fund* v. *Smith Barney Inc.*, 133 F.3d 590, 591 (8th Cir. 1998) ("The present action has the same issues and the same parties as the original action. This makes it a collateral attack on the original remand order. It is improper for the Fund to do collaterally that which it could not do directly."); *New Orleans Pub. Serv., Inc.* v. *Majoue*, 802 F.2d 166, 167–68 (5th Cir. 1986) (holding that §1447(d) barred a defendant from seeking "collateral review of the district court's original order remanding the case for want of subject matter jurisdiction" through a declaratory judgment action).

at 200 n.3; *see also Midlock* v. *Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir. 2005) (citing *Doe* for the proposition that a re–removal of a case is permissible "only 'on grounds different than the first removal'").

The principle that a case cannot be re–removed from state court to federal court on the same ground as originally rejected for removal is well established both within and outside of the Third Circuit. *See Doe*, 14 F.3d at 199–200; *Trans Penn Wax Corp.* v. *McCandless*, 50 F.3d 217, 225 (3d Cir. 1995) ("The district court is also barred from reconsidering its decision if the remand was under §1447(c) and the case thereby falls under the bar of §1447(d)."); *see also St. Paul & C. Ry. Co.* v. *McLean*, 108 U.S. 212, 217 (1883) ("we are of the opinion that a party is not entitled, under existing laws, to file a second petition for the removal upon the same grounds, where, upon the first removal by the same party, the federal court declined to proceed and remanded the suit"); *S.W.S. Erectors, Inc.* v. *Infax, Inc.*, 72 F.3d 489, 492 (5th Cir. 1996) (same); *Seedman* v. *U.S. District Court*, 837 F.2d 413, 414 (9th Cir. 1988) (same); *O'Bryan* v. *Chandler*, 496 F.2d 403, 410 (10th Cir. 1974) ("In *McLean* the Supreme Court held that a second petition to remove could not be granted to the same party upon 'the same grounds' as a first petition."). Indeed, in its Brief for Appellee, GSK concedes (at pages 43–44, citing

S.W.S. Erectors, *supra*) that a defendant is precluded from removing a case twice based on the same grounds.

GSK's appellate brief repeatedly acknowledges that its second removal of this case was based on precisely the same grounds as its first removal. Indeed, GSK's entire "relation back" argument, in an attempt to justify the timeliness of its re–removal of this case under the first paragraph of §1446(b), is predicated on the identical nature of both removals and the supposed propriety of the first removal. Plaintiffs agree that the jurisdictional facts on which GSK based its re–removal were unchanged from the jurisdictional facts on which GSK based its original removal. Moreover, this Court's ruling in *Johnson* did not alter those jurisdictional facts, nor did *Johnson* authorize GSK to re–remove this case in the same way that the U.S. Supreme Court's ruling in *American National Red Cross* v. *S.G.*, 505 U.S. 247 (1992), expressly authorized the Red Cross to re–remove the case at issue in *Doe*.

Freely allowing re–removal whenever a defendant believes that the initial remand ruling was incorrect would eviscerate the prohibition on review of even patently incorrect remand orders issued under §1447(c) that §1447(d) imposes. In *Feidt* v. *Owens Corning Fiberglas Corp.*, 153 F.3d 124,

216 (3d Cir. 1998) (internal quotation omitted), this Court recognized that "section 1447(d) prohibits review of remand orders whether erroneous or not * * * ."

GSK attempts to portray the consequences of accepting its arguments for affirmance as limited, but the true scope of GSK's position is nothing short of revolutionary, allowing re–removal to succeed in any case that had been erroneously remanded. Moreover, even if this Court could limit its holding to cases in which an intervening higher court decision established that an earlier remand was erroneous, that would still allow re–removals in numerous categories of cases, whenever a new binding higher court decision established that a district court's prior determination as to citizenship, amount in controversy, fraudulent joinder of a defendant, fraudulent misjoinder of plaintiffs, or the existence of a federal question was incorrect.

As the First Circuit explained in *FDIC* v. *Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979) (per curiam) (internal citation omitted): "[O]nce a district court has decided to remand a case and has so notified the state court, the district judge is without power to take any further action. This is true no matter how erroneous the district judge may later decide his remand

decision was." Ten years earlier, in *In re La Providencia Devel. Corp.*, 406 F.2d 251, 253 (1st Cir. 1969), the First Circuit recognized, construing §1447(d), that "nothing could be more inclusive than the phrase 'on appeal or otherwise.' The district court has one shot [to decide the propriety of removal], right or wrong." Here, GSK's re–removal is the functional equivalent of the post–remand amended notice of removal that this Court rejected in *Hunt* pursuant to §1447(d). *See Hunt*, 961 F.2d at 1081–82.

Plaintiffs have already demonstrated the falsity of GSK's arguments that re–removals on the same grounds as the original removal are generally permitted and that §1447(d) does not prohibit such re–removals. Yet GSK goes further, maintaining that only the law of the case doctrine can serve to prevent the re–removal of a case that was erroneously remanded on the same grounds by a different federal district judge.

GSK favors that approach because, although §1447(d) does not have exceptions for remands legally erroneous when entered or remands established to be legally erroneous based on later developments, the law of the case doctrine does recognize those exceptions. *See ACLU* v. *Mukasey*, 534 F.3d 181, 188 (3d Cir. 2008) (recognizing exceptions to the law of the case doctrine for "an intervening change in the law"; where "new evidence

has become available"; or where "reconsideration is necessary to prevent clear error or a manifest injustice").[3] In contrast to the strict prohibition on review of even clearly erroneous remand orders that Congress enacted in §1447(d), GSK's preferred alternate approach does little to protect the sanctity of an earlier remand order in the case of a re–removal.

If re–removal could eradicate remands that were clearly wrong when issued and remands rendered incorrect based on later legal developments, then GSK unquestionably has discovered a detour around the absolute prohibition of §1447(d) that no other defendant saddled with an erroneous remand order has ever recognized or sought to exploit.

A far more likely and reasonable explanation for the absence of any directly on–point precedent supporting GSK's ambitious, unfettered entitlement–to–re–removal argument is that the argument has no merit

[3] GSK, in its appellate brief, does not clearly state whether it is relying on the "intervening change in the law" or the "preventing clear error or a manifest injustice" exception to the law of the case doctrine in contending that its re–removal of this case was proper. However, GSK's brief asserts repeatedly that Judge Savage's original 2011 remand of this case was plainly erroneous when it occurred given the U.S. Supreme Court's ruling in *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181 (2010), and this Court's ruling in *Zambelli Fireworks Mfg. Co.* v. *Wood*, 592 F.3d 412, 420 (3d Cir. 2010). GSK has thus foreclosed itself from contending that this Court's ruling in *Johnson* constituted an "intervening change in the law."

whatsoever. In *Hunt*, this Court recognized with good reason the need to be wary of arguments that "would, as a practical matter, create a large exception to the jurisdictional bar of 28 U.S.C. §1447(d)." 961 F.2d at 1082. Here, accepting GSK's law of the case argument as the only limitation on repetitive re–removals surely would have that undesirable effect.

GSK's attempt to invoke the law of the case doctrine also suffers from at least one other flaw. GSK is not merely claiming that a second federal district judge can revisit an order of an earlier federal district judge in the same still–pending case. Rather, here GSK asserts that the second judge presiding over a separate, second civil action can revisit the correctness of the final judgment of the earlier judge in an earlier, no–longer–pending civil action. GSK's law of the case argument concerns two separate civil actions, one that GSK removed to federal court in 2011 (which resulted in a final judgment remanding the case to state court in 2011) and another that GSK removed to federal court in 2013. The 2013 removal was assigned a 2013 docket number, instead of reopening the docket of the 2011 case.

In *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996), the U.S. Supreme Court held that a federal district court's order remanding a case to state court constitutes a final judgment of the district court. Thus, GSK is asking

a second, coordinate federal district judge to disregard or retroactively invalidate the final judgment entered in the earlier action, which is something that the law of the case doctrine simply does not permit.

As the U.S. Supreme Court held in *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398–402 (1981), an earlier final judgment cannot be ignored or eviscerated "by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case" simply by re–filing a second, identical lawsuit in a federal district court. Yet that is exactly what GSK says it can do here, by re–removing this case notwithstanding the federal district court's earlier final judgment rejecting the very same grounds for removal that GSK continues to trumpet.

For the reasons explained above, GSK's argument that second and subsequent removals are freely authorized and must be upheld in the absence of any statutory prohibition is incorrect. Rather, the law is clear, both within the Third Circuit and elsewhere, that the re–removal of a case on the same grounds as a defendant's original removal is prohibited. And, as this Court's rulings in *Doe* and *Hunt* and the rulings of other courts recognize, this prohibition on same–grounds re–removals traces its origin to §1447(d), whose applicability this Court has properly refused to

narrowly limit only to direct appeals and mandamus review of remand orders. Therefore, GSK's arguments that it could freely re–remove this case on the same grounds as originally rejected or that §1447(d) did not prohibit its second removal are both demonstrably false and should be rejected.

B. This Court's Ruling In *Doe* Establishes That GSK Is Wrong In Arguing That Only A Defendant's Initial Removal Of A Case, And Not Its Re–Removal Of The Case, Must Satisfy 28 U.S.C. §1446(b)

Another equally remarkable facet of GSK's argument for affirmance posits that only a defendant's initial removal of a case from state to federal court, and not any subsequent re–removals, needs to comply with the procedural requirements set forth in 28 U.S.C. §1446(b). But GSK's effort to shift the spotlight from the procedural requirements of proper removal to shine exclusively on the existence of subject–matter jurisdiction cannot succeed, because for a re–removal of a case to be proper (and thus not subject to being remanded to state court on a plaintiff's timely filed motion to remand) the defendant must satisfy both the procedural and jurisdictional requirements for removal.

Here, plaintiffs indisputably filed a timely motion to remand identifying the procedural and jurisdictional defects at issue in this appeal following

GSK's improper re–removal of this case from state court to federal court, and thus there is no argument that the plaintiffs' right to obtain the remand of this case to state court has been waived or otherwise forfeited.

Although GSK is correct that §1446(b) does not expressly mention "second" removals, it is equally true that §1446(b) does not expressly mention "first" removals. Rather, the express language of §1446(b), the full text of which is attached as Exhibit C to the Brief for Appellants, makes clear that its procedural requirements apply to any removal of a civil case from state court to federal court, regardless of whether the removal was the first, second, or 100th in a given case. Notably, this Court's ruling in *Doe* confirms plaintiffs' point, because even though the Red Cross had originally removed that case to federal court based on federal question jurisdiction, after which the case was remanded to state court before the U.S. Supreme Court's ruling in *S.G.* caused the Red Cross to re–remove it, this Court did not uphold the Red Cross's re–removal in *Doe* until this Court confirmed that the re–removal satisfied the procedural requirements set forth in the second paragraph of §1446(b).

This Court's discussion in *Doe* concerning whether the Red Cross's re–removal of this case satisfied the requirements of the second paragraph of

§1446(b) demonstrates what a difficult inquiry that question presented. According to GSK's argument in its appeal, however, the arduous undertaking on which this Court embarked in *Doe* to see if the Red Cross's re–removal of the case was permitted under the second paragraph of §1446(b) was entirely superfluous, because only a defendant's initial removal of a case must comply with §1446(b).

Indeed, if GSK's arguments in this appeal were to be accepted, this Court could have decided *Doe* by means of a simple three–step process. First, Red Cross initially removed the case in a timely manner under the first paragraph of §1446(b) based on federal question jurisdiction. Second, the U.S. Supreme Court's ruling in *S.G.* established that the district court's initial remand of the case to state court had been legally erroneous. Third, Red Cross's re–removal of the case related back to its original timely removal of the case under the first paragraph of §1446(b), and now that federal question jurisdiction was indisputably established the case deserved to remain in federal court. The fact that this Court's ruling in *Doe* did not proceed down this simple path demonstrates the fallacy of GSK's argument that §1446(b) does not apply to re–removals of a case from state court to federal court.

To be sure, *Doe* involved this Court's consideration of a certified question under 28 U.S.C. §1292(b). Yet in *Doe*, as here, the federal district court permitted the re–removal in question by denying the plaintiffs' motion to remand, and thus on appeal in *Doe* the plaintiffs were asking this Court to remand that case to state court. The procedural posture giving rise to this Court's decision in *Doe* demonstrates that this Court decided whether the Red Cross's re–removal of this case satisfied the second paragraph of §1446(b) not merely because that was the question that this Court had agreed to review, but also because a negative answer to that question would have resulted in the remand of that case to state court.

In sum, GSK is wrong that re–removals of a case from state court to federal court do not have to satisfy the procedural requirements of 28 U.S.C. §1446(b). Rather, both the plain language of that statute and this Court's ruling in *Doe* establish that re–removals, just like initial removals, must satisfy §1446(b) in order for the case to remain in federal court when faced with a timely filed motion to remand asserting defects in removal procedure.

C. GSK's Arguments That Its Re–Removal Somehow Satisfies Either The First Or Second Paragraph Of §1446(b) Are Without Merit

Before concluding, GSK's Brief for Appellee finally addresses the two questions that have divided the district judges to whom GSK's nine re–removal petitions have been assigned: namely, whether GSK's re–removal was procedurally proper under either the first or second paragraph of the 2011 version of 28 U.S.C. §1446(b).

Plaintiffs devoted the bulk of their opening brief on appeal to addressing those two issues, and plaintiffs are satisfied to rely on their opening brief in response to most of what GSK argues on these points in its Brief for Appellee. A few additional remarks are appropriate, however.

1. With regard to the first paragraph of §1446(b), which requires that the notice of removal in question be filed within 30 days of the defendant's receipt of the plaintiff's initial pleading, which occurred in 2011, GSK says that its re–removal of this case in 2013 should be deemed to satisfy the first paragraph's 30–day removal requirement because the second removal somehow "relates back" to GSK's timely initial removal. Yet as Judge Baylson observed in *Powell ex rel. Powell* v. *SmithKline Beecham Corp.*, 2013 WL 5377852 (E.D. Pa. Sept. 26, 2013), and as plaintiffs' argued below, the

"relation back" cases on which GSK relied involved "leave to amend while the plaintiffs' first motions to remand *were still pending*." *Id.* at *9. By contrast, here GSK was trying to relate back a filing in a second, separate civil action to a filing in an earlier, concluded civil action that resulted in a final judgment *rejecting* the very grounds for removal that GSK is now reasserting.

The need to eviscerate the otherwise conclusive final judgment that Judge Savage's initial remand of this case represents is a critical aspect of GSK's "relation back" argument that GSK's Brief for Appellee essentially ignores. Even if GSK's second removal could somehow relate back to its initial removal for purposes of satisfying the timing requirement contained in the first paragraph of §1446(b), which it cannot for the reasons explained by Judge Baylson, that still does not empower a coordinate federal district judge serving in the Eastern District of Pennsylvania to allow GSK to escape the consequences of Judge Savage's previous rejection, whether correct or incorrect, by means of a final judgment of precisely the same grounds for removal that GSK is again reasserting.

GSK has presented this Court with no case in which the "relation back" doctrine has been employed to render timely under the first paragraph of

§1446(b) the re–removal of a previously remanded case nearly two years later where the grounds for removal had already been considered and rejected as improper when the case was first remanded to state court. Regardless of whether the "relation back" doctrine may sometimes properly be invoked to allow the amendment of a still pending removal notice, applying that doctrine here would create a huge loophole around the 30–day requirement for removing a case based on the initial pleading that Congress enacted in the first paragraph of §1446(b).

Because GSK cannot lawfully invoke the "relation back" doctrine under the circumstances of this case, and because in any event that doctrine does not eviscerate the continuing consequences of Judge Savage's earlier final judgment remanding this case and rejecting these very same grounds for removal, this Court should reject GSK's argument that its re–removal of this case to federal court was proper under the first paragraph of §1446(b).

2. GSK's argument that its re–removal should be viewed as proper under §1446(b)'s second paragraph suffers from four fatal flaws. First, as Judge Baylson cogently observed in *Powell*, GSK "conspicuously omits one of the four factors that the *Doe* court identified" for determining whether

the ruling of a higher court in another case constitutes an "order" for purposes of the second paragraph of §1446(b). 2013 WL 5377852, at *10.

In *Doe*, this Court specifically held that "an order, as manifested through a court decision, must be sufficiently related to a pending case to trigger Section 1446(b) removability." *See Doe*, 14 F.3d at 202–03. According to this Court's ruling in *Doe*, "an order is sufficiently related when * * * the order in the case came from a court superior in the same judicial hierarchy, was directed at a particular defendant and *expressly authorized that same defendant to remove an action against it in another case involving similar facts and legal issues*." *Id.* at 203 (emphasis added).

This Court's ruling in *Johnson* is not "sufficiently related" to this case for purposes of the test this Court announced in *Doe* because *Johnson* does not expressly authorize GSK to remove any case other than *Johnson*, let alone this case. Therefore, pursuant to this Court's ruling in *Doe*, this Court's ruling in *Johnson* does not constitute an "order" under §1446(b)'s second paragraph.

GSK seeks to avoid this inconvenient aspect of this Court's holding in *Doe*, observing that other federal appellate courts have not adopted or acknowledged this specific requirement. Yet while other federal appellate

courts may have the ability to ignore or misread the full scope of this Court's holding in *Doe*, this Court does not. *See Pension Trust Fund for Operating Engineers* v. *Mortgage Asset Securitization Transactions, Inc.*, 730 F.3d 263, 274 n.5 (3d Cir. 2013) ("this panel lacks the authority to overrule a binding precedential opinion of a prior panel").

Because this Court's ruling in *Johnson* does not constitute an order for purposes of the second paragraph of §1446(b) under this Court's holding in *Doe*, GSK's argument that it is capable of satisfying the requirements of the second paragraph of § 1446(b) must be rejected.

The three remaining fatal flaws in GSK's second paragraph argument pertain to GSK's attempt to invoke the doctrine of equitable tolling, which GSK must invoke since its re–removal of this case occurred far outside of the one–year period for removal applicable to diversity cases provided in §1446(b)'s second paragraph.[4]

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[4] GSK's appellate brief asserts that this Court should also employ equitable tolling to hold that GSK's removal was timely under the first paragraph of §1446(b). Plaintiffs' argument, *infra*, establishing that equitable tolling is not available to extend the one–year period for removal under the second paragraph also establishes that equitable tolling is not available to extend the 30–day period for removal under the first paragraph. GSK's second removal of this case occurred on June 26, 2013. Because this case was commenced in state court on September 30, 2011, the

To begin with, GSK's entire equitable tolling argument is based on a non sequitur. The circumstances surrounding the consolidation of remand motions before Judge Savage in no way affected the timing of this Court's ruling in *Johnson*, which ruling was the trigger for GSK's re–removal of this case. Although perhaps it is not surprising that GSK seeks to blame plaintiffs for GSK's having to re–remove this case, the specific timing of GSK's re–removal of this case is not something for which plaintiffs bear any responsibility.

Secondly, GSK's Brief for Appellee repeatedly invokes the mantra of "extraordinary circumstances" concerning the decision of the judges serving on the U.S. District Court for the Eastern District of Pennsylvania to consolidate a series of related remand motions before Judge Savage.

However, GSK's brief only tells part of the story. In fact, it was GSK that initially moved to have the first six cases that it removed in 2010

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time for GSK to remove (or re–remove) this case under the first paragraph of §1446(b) expired in October 2011, while the time for GSK to remove (or re–remove) this case under the second paragraph of §1446(b) expired in September 2012.

Moreover, none of GSK's cited cases permitted equitable tolling based on a change in law. Instead, each of those cases permitted equitable tolling because either voluntary conduct by a plaintiff or court personnel error caused removal to be untimely.

consolidated before a single judge for decision, and Judge Savage was the judge randomly selected for that purpose. *See Maldonado ex rel. Maldonado* v. *Smithkline Beecham Corp.*, 2011 WL 1899280, at *1 (E.D. Pa. May 19, 2011). Yet once Judge Savage decided in the course of ruling on that remand motion that GSK could not remove diversity cases to the U.S. District Court for the Eastern District of Pennsylvania under the forum defendant rule (*see* 28 U.S.C. §1441(b)(2)) because GSK's principal place of business was located in Pennsylvania, GSK changed its tune and began opposing the consolidation of motions to remand other groups of GSK's removed cases before Judge Savage.

Two different Chief Judges serving on the U.S. District Court for the Eastern District of Pennsylvania, Chief Judges Bartle and Joyner, considered GSK's unfairness objections and the competing efficiency concerns. Indeed Chief Judge Bartle, and presumably Chief Judge Joyner as well, went so far as to allow any judge originally assigned to one of these cases to retain it in order to decide the motion to remand if that judge wished to do so. *See Maldonado*, 2011 WL 1899280, at *2.

GSK's allegations of unfairness resulting from the consolidation of remand motions before Judge Savage — a consolidation that GSK itself

requested when the first set of cases were assigned to Judge Savage, before he issued his first ruling on the propriety of the removals — were fully considered and rejected by two Chief Judges serving on the Eastern District of Pennsylvania. If those objections had merit and the consolidations were in fact unfair or somehow in violation of GSK's right to due process, then the consolidations would not have been allowed.

GSK is likewise wrong in contending that plaintiffs' request to have the group of nine cases, including this one, assigned to Judge Savage for purposes of deciding plaintiffs' motion to remand guaranteed that these nine cases would be remanded to state court. Notably, as GSK's appellate brief concedes at page 7, GSK did not even object to plaintiffs' request to consolidate *this case* and the other eight related cases in front of Judge Savage, and therefore this Court should deem GSK's equitable tolling argument waived. *See Brenner* v. *Local 514, United Broth. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir. 1991) ("It is well established that failure to raise an issue in the district court constitutes a waiver of the argument."); *Valenti* v. *Mitchell*, 962 F.2d 288, 299 (3d Cir. 1992) (noting the maxim "[e]quity aids the vigilant, not those who rest on their rights").

Nevertheless, before Judge Savage decided that these nine cases should be remanded, he undertook to reconsider whether GSK's principal place of business was located in Pennsylvania in light of GSK's insistence that Judge Savage's earlier remand decisions had reached an erroneous conclusion on that issue. *See Patton ex rel. Daniels–Patton* v. *SmithKline Beecham Corp.*, 2011 WL 6210724 (E.D. Pa. Dec. 14, 2011). Judge Savage gave GSK the opportunity to change his mind regarding his earlier conclusion that GSK's principal place of business was located in Pennsylvania, but after considering GSK's additional arguments Judge Savage's conclusion remained unchanged. *Id.* at *1–*5. What is clear, however, is that Judge Savage did not merely rubber–stamp the remand of this case (or the other eight cases in this identical procedural posture) based on his earlier conclusion regarding GSK's corporate citizenship. *Id.*

It is absurd for GSK to now claim that the understandable decision of the judges serving on the Eastern District of Pennsylvania to avoid unnecessarily incurring the burden of each individually having to decide the complex question of GSK's corporate citizenship somehow constitutes "extraordinary circumstances" entitling GSK to toll the one–year limit on diversity removals. Indeed, it is noteworthy that in none of the nine cases

that GSK re–removed has any of the district judges assigned to those cases ruled that Judge Savage's original remand of these cases resulted from an inequitable process that now entitles GSK to equitably toll the deadlines for removal contained in either of §1446(b)'s two paragraphs.

Lastly, this Court should reject GSK's plea to expand the grounds for equitably tolling the one–year limit found in §1446(b)'s second paragraph for reasons other than plaintiff misconduct, a ground not implicated in this case. As the opening briefs of both parties have noted, in 2012 Congress amended §1446 to resolve a split among the courts concerning whether plaintiff misconduct was a valid ground for tolling the one–year time limit for diversity removals that had been contained in the second paragraph of §1446(b).

In its current form, 28 U.S.C. §1446(c)(1) states, "A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." And section (b)(3) of the current statute contains the provision found in the second paragraph of the 2011 version of §1446(b).

GSK is now asking this Court to recognize an entirely new ground for equitable tolling available under the 2011 version of §1446(b), even though Congress in 2012 was unwilling to recognize any ground for tolling other than plaintiff misconduct. This Court should refuse to expand the grounds for equitable tolling beyond those that Congress in 2012 was willing to recognize. Moreover, the supposed "extraordinary circumstances" involving the consolidation of remand motions before Judge Savage does not provide a basis for equitable tolling even if this Court were otherwise willing to consider recognizing new equitable tolling grounds under §1446.

For the reasons set forth above and in plaintiffs' opening brief, this Court should hold that GSK's re–removal of this case did not satisfy the procedural requirements of either paragraph of the 2011 version of §1446(b).

III. CONCLUSION

For all the foregoing reasons, this Court should reverse the denial of plaintiffs' motion to remand.

Respectfully submitted,

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Dated: June 2, 2014

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Counsel hereby certifies that the electronic copy of this Brief for Appellants is identical to the paper copies filed with the Court.

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Dated: June 2, 2014

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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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