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

BRIEF FOR APPELLANTS AND
VOLUME ONE OF THE JOINT APPENDIX
(Pages 1a–11a)

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Adam Peavy
BAILEY PEAVY BAILEY PLLC
440 Louisiana Street, Suite 2100
Houston, TX 77002
(713) 425–7100

Counsel for plaintiffs/appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

TABLE OF EXHIBITS

I. INTRODUCTION

In 2011, when this case began in Pennsylvania state court, 28 U.S.C. §1446(b) governed the removal of cases from state court to federal court based on diversity of citizenship jurisdiction. The version of §1446(b) in effect in 2011, consisting of two paragraphs, provided in full:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [28 USCS §1332] more than 1 year after commencement of the action.

28 U.S.C. §1446(b).

Applicable to a diversity case such as this, §1446(b) contains two requirements: first, if the case is removable based on the initial pleading, a notice of removal must be filed within 30 days; and second, if the case was

not removable based on the initial pleading, the case must be removed within 30 days after the defendant has received notice that the case has become removable, except that in any event "a case may not be removed on the basis of [diversity] jurisdiction * * * more than 1 year after commencement of the action."

Here, defendant/respondent SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK") originally removed this case from state court in the Philadelphia Court of Common Pleas to federal court in the U.S. District Court for the Eastern District of Pennsylvania, asserting the existence of diversity jurisdiction, within 30 days of receiving service of plaintiffs' complaint. Plaintiffs promptly moved to remand, arguing that, because Pennsylvania was GSK's principal place of business, complete diversity was lacking (as plaintiffs in this case are themselves Pennsylvania citizens) and the forum–defendant rule prevented GSK from removing a case filed in Pennsylvania state court to federal court based on diversity jurisdiction.

On December 14, 2011, U.S. District Judge Timothy J. Savage remanded this case to state court, determining as a matter of law that removal was improper because GSK was a citizen of Pennsylvania and the forum–

defendant rule barred removal. *See Patton ex rel. Daniels–Patton* v. *SmithKline Beecham Corp.*, 2011 WL 6210724, at *5 (E.D. Pa. Dec. 14, 2011).

On June 7, 2013, this Court ruled in an entirely separate case that Delaware, rather than Pennsylvania, was GSK's principal place of business for purposes of diversity of citizenship jurisdiction. *See Johnson* v. *SmithKline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013). Fewer than 20 days later, on June 26, 2013, GSK re–removed this case to federal court, reasserting that diversity jurisdiction existed based on plaintiffs' initial state court pleading because *Johnson* confirmed that Delaware, rather than Pennsylvania, was the location of GSK's principal place of business.

Although GSK is correct that federal courts under the jurisdiction of the Third Circuit can no longer consider GSK to be a Pennsylvania citizen in the aftermath of *Johnson*, GSK's re–removal of this case was untimely, and the district court erred in failing to grant plaintiffs' motion to remand. GSK's second removal of this case from state to federal court was untimely under both paragraphs of the 2011 version of 28 U.S.C. §1446(b) quoted above.

The first paragraph of §1446(b) did not justify GSK's second removal, because that second removal occurred far longer than 30 days after GSK's

receipt of plaintiffs' initial state court pleading. Moreover, although GSK's original removal based on diversity jurisdiction occurred within the time limit imposed under §1446(b)'s first paragraph, Judge Savage remanded this case based on his conclusion that diversity jurisdiction was lacking and that GSK's removal violated the forum–defendant rule. Judge Savage's remand for lack of subject–matter jurisdiction and defect in removal procedure is the very type of remand as to which 28 U.S.C. §1447(d) prescribes that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

Furthermore, the second paragraph of §1446(b) did not justify GSK's re–removal of this case from state to federal court, most obviously because that second paragraph imposes a one–year maximum time limit on diversity removals starting from when the case had been commenced in state court. Because GSK's diversity re–removal of this case occurred far longer than one year after plaintiffs had commenced this case in state court, the second paragraph of §1446(b) likewise failed to provide any basis for this case to remain in federal court as the result of GSK's untimely re–removal.

This is one of nine cases that GSK re–removed from Pennsylvania state court to the U.S. District Court for the Eastern District of Pennsylvania under identical procedural circumstances. Although the federal district judges assigned to certain of these nine cases have agreed with plaintiffs that GSK's second removals were untimely and thus improper, the district judge presiding over this case denied plaintiffs' motion to remand, thereby allowing GSK's re–removal to stand. Because the district court erred in so ruling, and because of a need for uniform rulings in all nine of these similarly situated cases, plaintiffs pursued an interlocutory appeal by permission, which the district court certified and this Court then granted. Plaintiffs respectfully request that this Court rule that GSK's re–removal of these nine cases was improper and untimely, thereby remanding this case to state court for a decision on the merits.

II. STATEMENT OF SUBJECT–MATTER AND APPELLATE JURISDICTION

The central thrust of plaintiffs' appeal is that the district court lacks subject–matter jurisdiction over this action because it was not properly re–removed to federal court. The U.S. District Court for the Eastern District of

Pennsylvania's December 14, 2011 order remanding this action to state court divested federal jurisdiction over this action. App.273a. That remand order was and remains non–reviewable pursuant to 28 U.S.C. §1447(d).

This Court's decision in *Johnson* v. *SmithKline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013), does not provide any basis for overturning the original remand ruling, given §1447(d) prohibition on reviewing the remand "on appeal or otherwise." Moreover, even if this Court's ruling in *Johnson* constituted an "order" affording a basis for re–removing this case pursuant to §1446(b)'s second paragraph, the one–year time limit on diversity–based removals contained in that very same paragraph stands as an insurmountable obstacle to the re–removal of this case more than one year after it began in state court.

This Court possesses appellate jurisdiction pursuant to 28 U.S.C. §1292(b). On December 12, 2013, the district court issued an order amending the July 26, 2013 order denying remand and certifying that order for interlocutory appeal pursuant to 28 U.S.C. §1292(b). App.4a. On December 23, 2013, plaintiffs/appellants filed a petition for permission to appeal in this Court, which this Court granted on January 24, 2014. App.1a.

III. STATEMENT OF THE ISSUE ON APPEAL

Whether a defendant may remove a case a second time based on diversity jurisdiction more than one year after the commencement of the case?

Where preserved: *See* Plaintiffs' motion to remand and supporting brief. App.316a–33a.

IV. STATEMENT OF RELATED CASES AND PROCEEDINGS

On June 26, 2013, GSK re–removed this case and eight other similarly situated Paxil birth defect cases from the Philadelphia Court of Common Pleas to the U.S. District Court for the Eastern District of Pennsylvania on the same grounds. App.29a. All nine of these cases had been commenced in Pennsylvania state court far longer than a year before June 26, 2013. App.82a–87a. Two days after GSK's re–removal of those cases, a substantively identical motion to remand was filed in each case by plaintiffs' counsel. App.316a. Unlike the first time the cases were removed, when a single U.S. District Judge granted a remand motion applicable to all nine cases, this time the cases were distributed to various U.S. District Judges serving in the Eastern District of Pennsylvania.

On July 24, 2013, Senior District Judge Harvey Bartle III denied the plaintiffs' motion to remand in one of the re–removed cases. *See Guddeck* v. *SmithKline Beecham Corp.*, 957 F. Supp. 2d 622 (E.D. Pa. 2013). On August 7 and August 9, 2013, motions to remand were denied in two other re–removed cases by Senior District Judge Ronald L. Buckwalter also based on *Guddeck*. *See I.C.* v. *SmithKline Beecham Corp.*, No. 2:13–cv–3695–RB, Order at 1–2 (E.D. Pa. Aug. 7, 2013) (attached hereto as Exhibit A); *M.N.* v. *SmithKline Beecham Corp.*, No. 2:13–cv–3681–RB, Order at 1 (E.D. Pa. Aug. 9, 2013) (attached hereto as Exhibit B).

The following month saw separate rulings from two other judges serving in the Eastern District of Pennsylvania holding, in express conflict with the three above–mentioned decisions and the decision in this case, that remand was necessary because the cases were not removed within the time limit provided under the pre–2012 version of the second paragraph of 28 U.S.C. §1446(b).[1] On September 9, 2013, a substantively identical motion

[1] The removal amendments enacted by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 do not apply here because plaintiffs' case was commenced in state court before January 6, 2012. *See* Pub. L. 112–63, Dec. 7, 2011 (providing that amendments shall take effect 30 days after enactment of the Act and apply to cases commenced after that date). Citations in this Brief for Appellants are to the version of 28 U.S.C. §1446(b)

to remand as filed in this case was granted by Senior District Judge John R. Padova in *Cammarota ex rel. Hallock* v. *SmithKline Beecham Corp.*, 2013 WL 4787305 (E.D. Pa. Sept. 9, 2013), another of the nine re–removed Paxil birth defect cases.[2] Then, on September 26, 2013, a substantively identical motion to remand was granted by Senior District Judge Michael M. Baylson in yet another of the re–removed cases, *Powell ex rel. Powell* v. *SmithKline Beecham Corp.*, 2013 WL 5377852 (E.D. Pa. Sept. 26, 2013). Motions to remand are pending, yet to be decided, in the three other Paxil birth defect cases GSK re–removed on June 26, 2013. Those three cases have been stayed pending this appeal.

---

in effect during the year 2011, when plaintiffs' case was commenced. For this Court's convenience, a copy of the version of 28 U.S.C. §1446(b) in effect in 2011 is attached hereto as Exhibit C.

[2] On December 16, 2013, Judge Padova denied GSK's motion for reconsideration of his order remanding that case to state court. *See Cammarota ex rel. Hallock* v. *SmithKline Beecham Corp.*, 2013 WL 6632523 (E.D. Pa. Dec. 16, 2013).

V. STATEMENT OF THE CASE

A. Relevant Procedural History

On September 30, 2011, plaintiffs initiated this lawsuit against GSK in the consolidated Paxil Pregnancy Litigation in the Philadelphia Court of Common Pleas Mass Tort Program, *In re Paxil Pregnancy Cases*, February Term 2007, No. 3220. App.82a–87a. GSK originally removed this case to the U.S. District Court for the Eastern District of Pennsylvania on October 24, 2011, within 30 days of the original service of process, based on diversity jurisdiction. App.103a–15a. Thereafter, plaintiffs filed a timely motion to remand.

On December 14, 2011, U.S. District Judge Timothy J. Savage remanded this case to state court, determining as a matter of law that removal was improper because GSK was a citizen of Pennsylvania. *See Patton*, 2011 WL 6210724, at *5. Consequently, diversity jurisdiction was lacking, because plaintiffs were themselves both Pennsylvania citizens (App.153a–54a), and the forum–defendant rule barred removal. Plaintiffs' case thereafter proceeded through discovery in state court, and trial was set for November 4, 2013. App.319a.

On June 26, 2013, a little over four months before the scheduled start of trial in state court, GSK re–removed this case to the U.S. District Court for the Eastern District of Pennsylvania, once again on the sole ground of diversity of citizenship, this time predicated in part on *Johnson*, a personal injury case involving the drug thalidomide in which this Court held on interlocutory appeal by permission that Delaware, not Pennsylvania, was GSK's principal place of business. *See* 724 F.3d at 360; App.29a–47a. On July 26, 2013, plaintiffs' timely motion to remand was denied by Senior District Judge Mary A. McLaughlin based on the reasons set forth by Senior District Judge Bartle in the *Guddeck* decision. App.2a–3a.

After plaintiffs' case was transferred to the U.S. District Court for the Middle District of Pennsylvania, Chief District Court Judge Christopher C. Conner issued an order on December 12, 2013 amending the July 26, 2013 order denying remand and certifying that order for interlocutory appeal pursuant to 28 U.S.C. §1292(b) for the reasons Judge Conner set forth in an accompanying memorandum opinion. App.4a–11a.

On December 23, 2013, plaintiffs/appellants filed a petition for permission to appeal with this Court, which this Court granted on January 24, 2014. App.1a.

B. Relevant Factual History

Plaintiffs allege that plaintiff Sallee Miller's use of Paxil (a prescription antidepressant manufactured by GSK) during her pregnancy caused her son's critical heart defect, necessitating major heart surgery. App.85a. Plaintiffs further allege that GSK knew or should have known of Paxil's increased risk of birth defects when ingested by pregnant women but failed to warn of the increased risk. App.86a.

Following Judge Savage's December 2011 remand order, the parties engaged in extensive discovery in the Philadelphia Court of Common Pleas in this case and the other eight Paxil birth defect cases that GSK later re–removed on June 26, 2013. App.319a, 331a–32a. In this case alone, GSK requested eight provider–specific medical records authorizations. App.332a. In total, GSK requested ninety–nine provider–specific medical records authorizations in the re–removed cases and conducted at least seventy–five depositions. App.332a. When GSK re–removed this case, fact discovery had ended in state court, plaintiffs had served their expert reports, and less than four months remained until the start of the scheduled November 4, 2013 trial. App.319a. In two of the other re–removed cases,

GSK had already filed motions for summary judgment in the state court proceedings. App.331a.

In its original notice of removal filed in October 2011, GSK argued that removal was proper under §1446(b)'s first paragraph because this case was removable based on the initial pleading. App.103a–15a. In its second notice of removal, GSK asserted that re–removal of this action was proper under both the first and second paragraphs of §1446(b) because, in the aftermath of this Court's ruling in *Johnson*, this case was removable based on the initial pleading. App.29a–47a.

VI. SUMMARY OF THE ARGUMENT

The district court committed reversible error in denying plaintiffs' motion to remand. Judge Savage's original December 2011 remand order divested federal jurisdiction over this action. That determination is not subject to review "by appeal or otherwise" because it was based on a lack of subject–matter jurisdiction and a defect in removal procedure. *See* 28 U.S.C. §1447(d). Here, Judge McLaughlin violated §1447(d)'s prohibition on the review of remand orders by retroactively invalidating Judge Savage's determination that this case as originally filed was not removable

based on the very same initial pleading. This case also was not re–removable under the terms of §1446(b)'s first paragraph because far more than 30 days had passed between GSK's receipt of plaintiffs' initial pleading in this case and GSK's second removal of this case from state to federal court.

GSK's re–removal of this case is likewise improper under §1446(b)'s second paragraph, for three reasons. First, this Court's *Johnson* decision does not qualify as an "order" under the second paragraph because this Court in *Johnson* did not expressly authorize GSK to remove any other case, let alone this case. Therefore, this case did not become removable when *Johnson* was issued. Second, even if *Johnson* established the existence of diversity jurisdiction over this case, GSK's re–removal is nevertheless barred by the second paragraph's one–year limitation on the removal of cases based on diversity jurisdiction. Third, the circumstances here do not warrant equitable tolling of the one–year limitation because, as even GSK itself concedes, plaintiffs engaged in no misconduct to prevent GSK from timely re–removing this case.

Because GSK's re–removal of this case fails to satisfy either paragraph of the 2011 version of 28 U.S.C. §1446(b), the district court erred

in failing to grant plaintiffs' timely motion to remand. Accordingly, this Court should reverse the district court's order denying plaintiffs' motion to remand and order this case returned to state court.

VII. ARGUMENT

A. The District Court Erred As A Matter Of Law In Denying Plaintiffs' Motion To Remand

1. Standard of review

This Court exercises plenary review of a district court's denial of a motion to remand when the ruling is based on a legal question, as it is here. *Ario* v. *Underwriting Members of Syndicate 53 of Lloyds*, 618 F.3d 277, 287 (3d Cir. 2010). The federal removal statute is "strictly construed against removal and all doubts should be resolved in favor of remand." *Steel Valley Auth.* v. *Union Switch & Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987).

2. The district court erred by permitting GSK's re–removal under the first paragraph of 28 U.S.C. §1446(b)

The procedure for removal is set forth in 28 U.S.C. §1446. The first paragraph of §1446(b) requires a defendant to file a notice of removal "within thirty days after the receipt by the defendant, through service or

otherwise, of a copy of the initial pleading . . . ." *Id.* GSK did precisely this in 2011, resulting in Judge Savage's remand of this case for lack of diversity jurisdiction and violation of the forum–defendant prohibition on diversity–based removals.

The second paragraph of §1446(b) permits later removal of an action that was not initially removable if one of several enumerated events occurs and no more than one year has passed since the action began:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. §1446(b) (second paragraph).

To avoid the one–year limitation on diversity jurisdiction removals in §1446(b)'s second paragraph, Judge McLaughlin erroneously agreed with Senior District Judge Bartle's decision in *Guddeck* that GSK's 2013 re–removal of this case was permitted by §1446(b)'s first paragraph because this case was "initially removable" and GSK's re–removal is "simply a way of effectuating [GSK's] timely and proper first removal." App.2a–3a.

This constituted reversible error due to §1447(d)'s jurisdictional bar on review "on appeal or otherwise" of Judge Savage's December 2011 remand order. *See, e.g.*, *Agostini* v. *Piper Aircraft Corp.*, 729 F.3d 350, 356 (3d Cir. 2013) (holding that §1447(d) precludes reconsideration of a remand order after a certified copy of the order is sent to the state court clerk). Judge McLaughlin also erred in overlooking that GSK's re–removal of this case was untimely, because GSK's re–removal did not occur within 30 days of GSK's receipt of the initial pleading in this case.

a. The district court violated 28 U.S.C. §1447(d) by permitting GSK's re–removal under §1446(b)'s first paragraph

Judge Savage's December 2011 remand order expressly determined that GSK "cannot remove" this case and eight other related cases from the Philadelphia Court of Common Pleas to the U.S. District Court for the Eastern District of Pennsylvania because GSK was a citizen of Pennsylvania. *Patton*, 2011 WL 6210724, at *5; *see* 28 U.S.C. §1441(b)(2) ("A civil action otherwise removable solely on the basis of jurisdiction under 1332(a) of this title *may not be removed* if any of the . . . defendants is a citizen of the State in which such action is brought.") (emphasis added).

Judge Savage thus remanded this case to the Philadelphia Court of Common Pleas pursuant to 28 U.S.C. §1447(c) based on his determination that this case was not removable. *Patton*, 2011 WL 6210724, at *5; *see Hudson United Bank* v. *LiTenda Mortg. Corp.*, 142 F.3d 151, 157 (3d Cir. 1998) (§1447(c) remands occur "when a federal court has no rightful authority to adjudicate a case that has been removed from state court").

Judge McLaughlin's retroactive determination following GSK's re–removal that this case had indeed been initially removable based on diversity of citizenship "invalidate[d] Judge Savage's non–reviewable conclusion to the contrary." *Powell*, 2013 WL 5377852, at *6; *id.* ("For the first paragraph to apply, [a] Court must override Judge Savage's determination as to the removability of the initial pleading."). By means of her refusal to remand this case, Judge McLaughlin concluded that Judge Savage "was wrong, not just now in light of new law, but *at the moment [he] entered the order*." *Id.*

Under §1447(d), Judge Savage's remand order is "not reviewable on appeal or otherwise." *See Things Remembered* v. *Petrarca*, 516 U.S. 124, 127 (1995) (explaining that "remands based on grounds specified in §1447(c) are immune from review under §1447(d)"). Therefore, Judge Savage's

"initial determination that removal was inappropriate" is "a nonreviewable one." *Hudson United Bank*, 142 F.3d at 157. Judge Savage's remand order may not be reconsidered or vacated even if it was wrongly decided. *See Agostini*, 729 F.3d at 356 ("Once mailed, the [remand] order may not be reconsidered."); *Hunt* v. *Acromed Corp.*, 961 F.2d 1079, 1081 (3d Cir. 1992) (explaining that a federal court "cannot vacate the [remand] order once entered," even if persuaded that the order was "erroneous").

Yet that is exactly what Judge McLaughlin did here. The *Guddeck* decision, which Judge McLaughlin followed in denying plaintiffs' motion to remand this case, deemed Judge Savage's remand order a "nullity" that "cannot continue to stand" in light of *Johnson*. 957 F. Supp. 2d at 626. That approach was impermissible, Judge Baylson correctly recognized in *Powell*, because "[a]lthough all district courts in this Circuit are now bound by *Johnson*'s holding that GSK is a Delaware citizen, that does not make a prior judicial decision a 'nullity' and treating it as such ignores §1447(d)'s command that remand orders not be subject to review or reconsideration." *Powell*, 2013 WL 5377852, at *6. As Judge Baylson perceptively reasoned in *Powell*, this Court's ruling in *Johnson* only "affirmed Judge Diamond's [denial of the] motion to remand in the case before [this Court in *Johnson*]"

and "said nothing about Judge Savage's order, or any other cases that GSK is currently defending." *Id.* at *4.

By nullifying Judge Savage's remand order and allowing GSK to effectuate its original removal, the district court violated §1447(d)'s "jurisdictional bar." *Cook* v. *Wikler*, 320 F.3d 431, 438 (3d Cir. 2003). "It is axiomatic that remanding a case to state court terminates the jurisdiction of a federal . . . district court over that case." *Hunt*, 961 F.2d at 1081. When a certified copy of Judge Savage's remand order was mailed to the Clerk of the Philadelphia Court of Common Pleas, federal courts were "completely divested of jurisdiction" over this case. *Id.*; *see Agostini*, 729 F.3d at 356 ("At the moment of mailing — the jurisdictional event — the remand order became unreviewable 'on appeal or otherwise.'" (quoting 28 U.S.C. §1447(d)).

Here, Judge McLaughlin improperly permitted GSK to re–remove this case under §1446(b)'s first paragraph on the ground that the case stated by the initial pleading was removable based on diversity jurisdiction — which was the same ground on which GSK based its original removal and the same ground Judge Savage had already rejected.

b. This Court's *Doe* decision does not support permitting GSK's re–removal under §1446(b)'s first paragraph

The *Guddeck* decision, whose reasoning Judge McLaughlin adopted in denying the remand of this case, mistakenly relies on this Court's decision in *Doe* v. *American Red Cross*, 14 F.3d 196 (3d Cir. 1993), in support of its retroactive invalidation of Judge Savage's 2011 remand order.

In *Doe*, the American Red Cross and the American National Red Cross removed a case on the ground that the Red Cross's congressional charter conferred federal question jurisdiction. 14 F.3d at 197–99. The district court applied controlling law and granted the plaintiffs' motion to remand. *Id.* at 199. Later, the U.S. Supreme Court issued a decision in a different case, *American National Red Cross* v. *S.G.*, 505 U.S. 247 (1992). The *S.G.* decision held that the Red Cross's congressional charter conferred federal question jurisdiction and expressly stated that the Red Cross "'is thereby authorized to removal from state to federal court of *any* state–law action it *is* defending.'" *Doe*, 14 F.3d at 197 (quoting *S.G.*, 505 U.S. at 248).

When the Red Cross re–removed the *Doe* case, the plaintiffs filed a motion to remand, arguing that re–removal of the case on the same ground as the original removal violated §1447(d)'s bar on the review of remand

orders and that *S.G.* was not an "order" under §1446(b)'s second paragraph. 14 F.3d at 199. This Court affirmed the district court's denial of remand, concluding that the Red Cross's re–removal in reliance on the second paragraph of 28 U.S.C. §1446(b) did not violate §1447(d) and that *S.G.* was "the order from the [Supreme] Court from which it may first be ascertained that the case[] *had become removable*" under the second paragraph of §1446(b). 14 F.3d at 200–02 (emphasis added).

According to the *Guddeck* decision, *Doe* "explained" that "a defendant may file a second removal notice within thirty days after a court 'superior in the same judicial hierarchy' concludes that a remand was erroneous in a different action where the defendant in both cases is the same and both cases involve the same or similar factual and legal scenario." 957 F. Supp. 2d at 626. However, *Doe* held that "to trigger Section 1446(b) removability[,]" an order must come "from a court superior in the same judicial hierarchy, [be] directed at a particular defendant ***and expressly authorize[] that same defendant to remove an action against it in another case*** involving similar facts and legal issues." *Doe*, 14 F.3d at 203 (emphasis added).

The *S.G.* decision that "trigger[ed] Section 1446(b) removability" in *Doe* was viewed by this Court "not simply as an order emanating from an unrelated action but rather as an unequivocal order directed to a party to the pending litigation, explicitly authorizing it to remove any cases it is defending." *Doe*, 14 F.3d at 202. In contrast, *Johnson* does not expressly authorize GSK to remove any other case pending against it, let alone this case. *Johnson* only "affirmed Judge Diamond's [denial of the] motion to remand in the case before [this Court in *Johnson*]," and "said nothing about Judge Savage's order, or any other cases that GSK is currently defending." *Powell*, 2013 WL 5377852, at *4.

Nor does *Doe* support the *Guddeck* decision's apparent conclusion that GSK's §1446(b) *first paragraph* re–removal can be based on GSK's original removal without violating §1447(d). As this Court's opinion in *Doe* makes clear, the Red Cross in *Doe* relied solely on the second paragraph of §1446(b) in arguing that its re–removal was proper. *See* 14 F.3d at 198–99. In *Doe*, this Court concluded that §1447(d) did not bar the Red Cross's §1446(b) *second paragraph* re–removal because: (1) the unique procedural history of *S.G.* involved Supreme Court review of a district court's remand order issued after a court of appeals reversed the district court's denial of

remand; (2) the Red Cross relied on a "new and definitive source, the intervening order of the highest court in the land" and sought neither "a second removal based on the same grounds as the first" nor "review in the district court of its original removal"; and (3) "the *specific* commands of the [Supreme] Court in *S.G.* derogate[d] from any possible contrary interpretation of the *general* provision in Section 1447(d)." *Doe*, 14 F.3d at 200–01. This Court also noted that the original remand order in *Doe* was granted without prejudice to the Red Cross's right to petition for re–removal. *Id.* at 200.

The only parallel for purposes of this case between *Doe* and *Johnson* is that *Johnson* constitutes a new and definitive source establishing that GSK's principal place of business is not located in Pennsylvania. Yet in *Doe*, the Red Cross's second paragraph re–removal was not based on the same ground as its original removal; rather, the re–removal was based solely on the *S.G.* decision, which the Red Cross argued was "an 'order or other paper' making th[e] action one which has become removable." *Id.* at 199. Indeed, in *S.G.*, the U.S. Supreme Court specifically recognized that the Red Cross has the ability to remove from state court to federal court "*any* state–law action it *is* defending." *S.G.*, 505 U.S. at 248 (emphasis added). By

contrast, GSK's first paragraph re–removal is not based solely on *Johnson*, because *Johnson* contains no similarly broad language permitting GSK to remove every case that is pending in state court against GSK. Thus, GSK cannot rely on *Johnson* alone to re–remove this case. At most, this Court's ruling in *Johnson* eradicated the impediment to diversity jurisdiction and removal under the forum–defendant rule that had precluded GSK's original removal of this case, but GSK still must rely on its argument that this case was removable based on the initial pleading due to the existence of diversity jurisdiction (the identical ground GSK relied on in its original removals) as the sole and exclusive ground for re–removing these cases.

In *Doe*, this Court applied the second paragraph of §1446(b) to the Red Cross's re–removal based on *S.G.* and concluded that *S.G.* showed that the cases the Red Cross was defending "had become removable," *Doe*, 14 F.3d at 202. As here, the *Doe* case had previously been remanded on the ground that the case was not removable based on the initial pleading. *See id.* at 199. The *Doe* case became re–removable because the Supreme Court in *S.G.* expressly authorized removal of the previously remanded case. *See id.* at 200–02.

This Court's application in *Doe* of the second paragraph of §1446(b) to a re–removal based on a subsequent change in the law is consistent with the approach uniformly taken by other courts. "Such courts have invariably applied the *second* paragraph, which is significant because the second paragraph governs where the 'initial pleading is *not* removable.'" *Powell*, 2013 WL 5377852, at *7; *see also id.* (citing *Green* v. *R.J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001); *Williams* v. *Nat'l Heritage Realty Inc.*, 489 F. Supp. 2d 595 (N.D. Miss. 2007); *Young* v. *Chubb Group of Ins. Cos.*, 295 F. Supp. 2d 806 (N.D. Ohio 2003)).

Lastly, *Doe* did not address the timing of the Red Cross's re–removal because that re–removal was based on federal question jurisdiction and, therefore, was not subject to §1446(b) second paragraph's one–year limitation on diversity jurisdiction removals and the related policy considerations. *See* 28 U.S.C. §1446(b). As such, *Doe* cannot be read to allow an "order" to trigger re–removal where, as here, re–removal is based on diversity jurisdiction and more than one year has elapsed since the case began. *See Powell*, 2013 WL 5377852, at *8.

c. The same defendant should not be permitted to re–remove a case under §1446(b)'s first paragraph outside of the original 30–day period for removal provided in that paragraph

According to the *Guddeck* decision, there is "no reason" why this Court "would not allow a second notice of removal pursuant to the first paragraph of §1446(b) under the circumstances presented." 957 F. Supp. 2d at 626. On the contrary, for the reasons that follow, the district court in *Guddeck* improperly disregarded numerous dispositive reasons why a defendant's second removal under 1446(b)'s first paragraph outside of the original 30–day removal period provided in that paragraph cannot operate to properly remove a case from state to federal court.

A violation of §1447(d) will always occur when, as here, the same defendant is allowed to re–remove a case under the first paragraph of §1446(b) on the same grounds as the original removal after a non–reviewable remand order has been issued. For the first paragraph to apply to such a re–removal, the original remand order's non–reviewable determination that the case was not initially removable would have to be retroactively invalidated in violation of §1447(d)'s jurisdictional bar. *See Powell*, 2013 WL 5377852, at *6; *see also Hudson United Bank*, 142 F.3d at 156 (§1447(d) "divests the federal courts of jurisdiction to review a district

court's remand order when the order is based on a defect in removal procedure or lack of subject matter jurisdiction").

Section 1447(d) was enacted "to prevent a party to a state lawsuit from using federal removal provisions and appeals as a tool to introduce substantial delay into a state action." *Hudson United Bank*, 142 F.3d at 156; *see id.* at 157 (§1447(c) "provides a quick, permanent, and mandatory remedy to return a case to state court"). Congress's intent, as reflected in the text of §1447(d), would be thwarted by permitting a defendant to re–remove a case under §1446(b)'s first paragraph on the same grounds as asserted in support of the original removal.

Further, the first paragraph of §1446(b) only allows a defendant to remove a case "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading . . . ." 28 U.S.C. §1446(b). GSK's re–removal of this case unquestionably did not comport with the first paragraph's mandatory 30–day time limit. *See Hunt* v. *Acromed Corp.*, 961 F.2d 1079, 1080 (3d Cir. 1992) (recognizing that the first paragraph of §1446(b) requires the defendant to file its notice of removal within 30 days of service of the initial pleading). In contrast, the second paragraph allows a defendant to remove a case at a later time based

on "an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable . . . ." 28 U.S.C. §1446(b). The second paragraph applies "[i]f the case stated by the initial pleading is not removable," encompassing both cases in which remand was initially granted and cases not initially removed. *Id.*

The plain language of §1446(b) sets forth the two procedural paths for removal, one at the outset of a case under the first paragraph and one at a later juncture under the second paragraph based on certain new developments. To permit later removals under the first paragraph based on subsequent court decisions would require the subsequent developments specified in the second paragraph to be read into the first paragraph. Yet the first paragraph contains no mention of those subsequent developments, and the first paragraph only permits removal of a case within the first 30 days after the initial pleading had been served on the defendant. *See, e.g.*, *Brierly* v. *Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999) (the one–year limitation "can only be interpreted to modify the antecedent clause to which it is attached").

Allowing re–removals under the first paragraph is also contrary to Congress's intent for the second paragraph's one–year limitation to prevent

the "substantial delay and disruption" caused when a case is removed based on diversity jurisdiction "after substantial progress has been made in state court." H.R. Rep. No. 100–889, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032–33. That is precisely what happened here. After Judge Savage remanded this case in December 2011, the parties conducted extensive discovery in state court for more than a year and were beyond the close of fact discovery, plaintiffs had produced their expert reports, and less than four months remained before the scheduled start of trial when GSK re–removed this case in June 2013.

The same type of substantial disruption and delay after considerable progress in state court will undoubtedly occur if defendants are permitted to re–remove cases based on diversity jurisdiction any time the law changes. Defendants should not be allowed to circumvent the second paragraph's one–year limitation, or violate 28 U.S.C. §1447(d), by somehow conjuring up the ghost of an already rejected notice of removal that had been filed within thirty days after receipt of the initial pleading.

d. Cases involving the "later–served" defendant rule do not support permitting GSK's re–removal under §1446(b)'s first paragraph

The *Guddeck* decision that Judge McLaughlin adopted in holding that GSK's re–removal was proper relied on a line of inapposite cases involving "later–served" defendants. *See* 957 F. Supp. 2d at 624–25. Those cases address the question whether the second paragraph's one–year limitation applies to a later–served defendant's first paragraph diversity jurisdiction removal within 30 days of service of the initial pleading. The question arose because the plaintiff either added a new defendant or served a defendant more than a year after the cases began. These later–served defendant cases are inapplicable here, because this case has from the outset only involved a single defendant.

Other federal appellate courts have held that the one–year limitation applies to second paragraph removals but not to first paragraph removals, because the limitation only appears in the second paragraph and the cases were initially removable in accordance with the first paragraph of §1446(b) from the perspective of the later–served defendant(s). *See Brown* v. *Tokio Marine & Fire Ins. Co.*, 284 F.3d 871, 872–73 (8th Cir. 2002); *Brierly*, 184 F.3d at 530–35; *Ritchey* v. *Upjohn Drug Co.*, 139 F.3d 1313, 1315–16 (9th Cir. 1998).

"Under the later served defendant rule, the thirty–day window for removing a case upon receiving the initial pleading is renewed every time the plaintiff serves a complaint on a new defendant." *Powell*, 2013 WL 5377852, at *8.

With the 2011 amendments to §1446(b), Congress clarified that the one–year limitation applies to second paragraph removals but not to first paragraph removals. Plaintiffs have never maintained that the one–year limitation in the second paragraph should apply to a first paragraph removal because the first paragraph does not apply here — GSK's 2013 re–removal did not occur within thirty days of service of the initial pleading in 2011.

None of the cases cited in the *Guddeck* decision involves a first paragraph re–removal by the same defendant after a remand order initially determined at the pleading stage that the case was not removable.

3. GSK's re–removal is improper under §1446(b)'s second paragraph

The *Johnson* decision does not qualify as an "order . . . from which it may first be ascertained that th[is] case is one which is or has become

removable." 28 U.S.C. §1446(b). In *Doe*, this Court 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).

Johnson is not "sufficiently related" to this case because *Johnson* does not expressly authorize GSK to remove any other case, 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.

Moreover, even assuming *arguendo* that *Johnson* qualifies as an "order" under §1446(b)'s second paragraph, GSK's re–removal remains untimely. The second paragraph states that "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action." 28 U.S.C. §1446(b); *see Roth* v. *CHA Hollywood Med. Ctr. L.P.*, 720 F.3d 1121, 1123 (9th Cir. 2013) ("In a non–

CAFA diversity case, . . . a notice of removal must be filed, in any event, within one year of the commencement of the action."). GSK's re–removal based on diversity jurisdiction is time–barred under the second paragraph because it occurred nearly two years after this case began.

4. Circumstances do not warrant equitable tolling of the one–year limitation on diversity jurisdiction removals under §1446(b)'s second paragraph

There is no statutory exception to the flat prohibition on diversity jurisdiction removals under §1446(b)'s second paragraph that occur more than a year after a case began. Based on this Court's holding in *Ariel Land Owners, Inc.* v. *Dring*, 351 F.3d 611, 615–16 (3d Cir. 2003), that the one–year limitation is procedural, several district courts in this Circuit have assumed that the one–year limitation can be equitably tolled under certain circumstances. *See, e.g., In re Asbestos Prods. Liab. Litig. (No. VI)*, 673 F. Supp. 2d 358, 364 (E.D. Pa. 2009). Even if the second paragraph's one–year limit can be equitably tolled, §1446(b)'s language indicates that any equitable exception should be narrow in scope.

Equitable tolling is unwarranted here because it is undisputed that plaintiffs engaged in no misconduct to prevent timely removal. App.434a.

"In determining whether to equitably toll the one–year time limit, previous courts have invariably focused on whether the plaintiff's intentional conduct was the cause of the untimely removal." *Powell*, 2013 WL 5377852, at *11. In *Tedford* v. *Warner–Lambert Co.*, 327 F.3d 423, 428–29 (5th Cir. 2003), the Fifth Circuit explained: "Where a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercising its rights, equity may require that the one–year limit in §1446(b) be extended."

Congress's 2011 amendment to §1446(b)'s one–year limitation indicates that Congress intended to limit equitable tolling to instances of plaintiff misconduct. The amended statute, which became effective on January 6, 2012, provides that an action may not be removed based on diversity jurisdiction after one year "unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. §1446(c)(1) (2012).

A new equitable exception should not be created for re–removals based on subsequent changes in the law. A change in the law is an "event completely outside the control of the plaintiff" and does not come within the one and only established exception — misconduct by the plaintiff that

prevented the defendant from effectuating timely removal — to the one–year limitation. *Williams*, 489 F. Supp. 2d at 596 (holding that a change in the law did not provide an equitable basis for tolling the one–year limitation); *see also Rhodes* v. *Mariner Health Care, Inc.*, 516 F. Supp. 2d 611, 615 (S.D. Miss. 2007) (same). "[C]hanges in the law are precisely the sort of events that §1446(b)'s one–year limitations period is designed to preclude." *Williams*, 489 F. Supp. 2d at 597. Otherwise, "removal issues would be subject to constant re–litigation as the underlying [legal] standards [a]re altered by judicial decisions and statutory enactments." *Id.*

When Congress enacted the one–year limitation on diversity jurisdiction removals under §1446(b)'s second paragraph, Congress concluded that a "modest curtailment in access to diversity jurisdiction" was necessary to prevent the "substantial delay and disruption" when, as here, a case is removed "after substantial progress has been made in state court." H.R. Rep. No. 100–889, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032–33. "Congress has thus contemplated the 'harm' that [GSK] will suffer if the case is remanded back to state court. A judicially–created exception to prevent this harm would frustrate the legislative design." *Powell*, 2013 WL 5377852, at *12.

Moreover, "in prohibiting review of remand orders," §1447(d) "contemplates that district courts may err in remanding cases." *Feidt* v. *Owens Corning Fiberglas Corp.*, 153 F.3d 124, 128 (3d Cir. 1998); *see also In re La Providencia Dev. Corp.*, 406 F.2d 251, 252 (1st Cir. 1969) ("The action must not ricochet back and forth [from state to federal court] depending upon the most recent determination of a federal court."). "Federalism principles further support a narrow interpretation of the removal statute, as narrow interpretations give '[d]ue regard for the rightful independence of state governments' to 'provide for the determination of controversies in their courts.'" *Powell*, 2013 WL 5377852, at *12 (quoting *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 109 (1941) (alteration in original)).

VIII. CONCLUSION

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

Respectfully submitted,

Dated: April 15, 2014

/s/ Howard J. Bashman
Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Adam Peavy
Bailey Peavy Bailey PLLC
440 Louisiana Street, Suite 2100
Houston, TX 77002
(713) 425–7100

Counsel for plaintiffs/appellants

CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type–volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,601 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: April 15, 2014

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: April 15, 2014

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

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

A virus check was performed on the PDF electronic file of this brief using McAfee virus scan software.

Dated: April 15, 2014

/s/ Howard J. Bashman
Howard J. Bashman

TABLE OF EXHIBITS

EXHIBIT A

19

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

I.C., a Minor, by MARIA PINO and THOMAS CINTAO, Guardians, and MARIA PINO and THOMAS CINTAO, Individually Plaintiffs,	:	CIVIL ACTION NO. 13-3681
v.	:	
SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE, Defendant	:	

FILED
AUG 7 2013
MICHAEL E. KUNZ, Clerk
By Dep. Clerk

MEMORANDUM

Before the court is Plaintiffs' Motion to Remand. As Plaintiffs' counsel has pointed out, there are nine cases having "the same exact remand issue." They are:

1. *Kenney v. GSK*, Civil Action No. 13-3675 (Judge Mitchell S. Goldberg)
2. *Moore v. GSK*, Civil Action No. 13-3676 (Judge Mitchell S. Goldberg)
3. *Cammarota v. GSK*, Civil Action No. 13-3677 (Judge John R. Padova)
4. *Cintao v. GSK*, Civil Action No. 13-3681 (Judge Ronald L. Buckwalter)
5. *Staley v. GSK*, Civil Action No. 13-3684 (Judge Mary A. McLaughlin)
6. *Powell v. GSK*, Civil Action No. 13-3693 (Judge Michael M. Baylson)
7. *Rader v. GSK*, Civil Action No. 13-3694 (Judge C. Darnell Jones II)
8. *Nieman v. GSK*, Civil Action No. 13-3695 (Judge Ronald L. Buckwalter)
9. *Guddeck v. GSK*, Civil Action No. 13-3696 (Judge Harvey Bartle III)

Recently, two judges of this court (Bartle and McLaughlin) have denied Plaintiffs' Motion by opinions and orders dated July 24, 2013 and July 26, 2013. Having reviewed those opinions as well as the briefs filed in this case, I too will deny the Motion to Remand.

AND NOW, this 7th day of August, 2013, upon consideration of Plaintiffs' Motion to Remand and Defendant's Response thereto, it is hereby **ORDERED** that said Motion (Docket No. 4) is **DENIED**.

BY THE COURT:

RONALD L. BUCKWALTER, S. J.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

M.N., a Minor, by ELAINE NIEMAN, Guardian, and ELAINE NIEMAN, Individually, Plaintiffs,	:	CIVIL ACTION
	:	NO. 13-3695
v.	:	
SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE, Defendant	:	

ORDER

AND NOW, this 7th day of August, 2013, upon consideration of Plaintiffs' Motion to Remand, and Defendant's Response thereto, it is hereby **ORDERED** that said Motion (Docket No. 4) is **DENIED** for the same reasons as outlined in this court's order regarding Plaintiffs' Motion to Remand in *Cintao v. GSK*, Civil Action No. 13-3681.

BY THE COURT:

s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, S. J.

EXHIBIT C

*** ARCHIVE DATA ***

*** CURRENT THROUGH PL 111-383, APPROVED 1/7/2011 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 89. DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

28 USCS § 1446

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to *Rule 11 of the Federal Rules of Civil Procedure* and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this *title [28 USCS § 1332*] more than 1 year after commencement of the action.

(c) (1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a wavier of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930 [*19 USCS § 1337(c)*], the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act [*19 USCS § 1337*].

HISTORY:

(June 25, 1948, ch 646, 62 Stat. 939; May 24, 1949, ch 139, § 83, 63 Stat. 101; Sept. 29, 1965, P.L. 89-215, 79 Stat. 887; July 30, 1977, P.L. 95-78, § 3, 91 Stat. 321; Nov. 19, 1988, P.L. 100-702, Title X, § 1016(b), 102 Stat. 4669; Dec. 9, 1991, P.L. 102-198, § 10(a), 105 Stat. 1626; Dec. 8, 1994, P.L. 103-465, Title III, Subtitle C, § 321(b)(2), 108 Stat. 4946; Oct. 19, 1996, P.L. 104-317, Title VI, § 603, 110 Stat. 3857.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

1948 Act

Based on *title 28, U.S.C., 1940 ed., §§ 72, 74, 75, 76* (May 3, 1911, ch. 231, §§ 29, 31, 32, 33, 36 Stat. 1095, 1097; Aug. 23, 1916, ch. 399, 39 Stat. 532; July 30, 1977, Pub. L. 95-78, § 3, 91 Stat. 321.)

Section consolidates portions of sections 74, 75, and 76 with *section 72 of title 28, U.S.C.*, 1940 ed., with important changes of substance and phraseology.

Subsection (a), providing for the filing of the removal petition in the district court, is substituted for the requirement of sections 72 and 74 of title 28, U.S.C., 1940 ed., that the petition be filed in the State court. This conforms to the method prescribed by *section 76 of title 28, U.S.C.*, 1940 ed., and to the recommendation of United States District Judges Calvin W. Chesnut and T. Waties Warring approved by the Committee of the Judicial Conference on the Revision of the Judicial Code.

Subsection (b) makes uniform the time for filing petitions to remove all civil actions within twenty days after commencement of action or service of process whichever is later, instead of "at any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead" as

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

JOINT APPENDIX
Volume One of Two
(Pages 1a–11a)

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Adam Peavy
BAILEY PEAVY BAILEY PLLC
440 Louisiana Street, Suite 2100
Houston, TX 77002
(713) 425–7100

Counsel for plaintiffs/appellants

TABLE OF CONTENTS

Page

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

01/07/2014
BCO-039

No. 13-8096

A.S., a minor, by Sallee Miller, Guardian; SALLEE MILLER, Individually,
Petitioners

v.

SMITHKLINE BEECHAM CORPORATION, d/b/a GlaxoSmithKline
(M.D. Pa. No. 1-13-cv-02382)

Present: AMBRO, CHAGARES & VANASKIE, Circuit Judges

1. Petition for Permission to Appeal under 28 U.S.C. Section 1292(b) filed by Petitioners A.S. and Sallee Miller;

2. Response filed by Respondent SmithKline Beecham to original proceeding Petition 1292(b) Permission to Appeal; and

3. Motion by Petitioners for Leave to File Reply In Support of Petition for Permission to Appeal under 28 U.S.C. Section 1292(b) With Reply Attached.

Respectfully,
Clerk/smw

_____ORDER_____

The foregoing motions for leave to appeal and for leave to file reply in support of petition for leave to appeal are hereby granted.

By the Court,

s/ Thomas I. Vanaskie
Circuit Judge

Dated: January 24, 2014
Smw/cc: Jeffrey S. Bucholtz, Esq.
Joseph O'Neil, Esq.
Rosemary Pinto, Esq.
Adam D. Peavy, Esq.
W. Harris Junell, Esq.
Howard J. Bashman, Esq.

A True Copy:

Marcia M. Waldron

Marcia M. Waldron, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.S., A Minor, by SALLEE MILLER, Guardian, and SALLEE MILLER, Individually	:	CIVIL ACTION
v.	:	
SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE	:	NO. 13-3684

ORDER

AND NOW, this 26th day of July, 2013, upon consideration of the plaintiffs' Motion to Remand (Docket No. 3); the defendant's response (Docket No. 9); and the plaintiffs' reply (Docket No. 11), it is HEREBY ORDERED for the reasons stated in a recent memorandum by the Honorable Harvey Bartle, III denying a nearly identical motion to remand in Guddeck v. SmithKline Beecham Corp., No. 2:13-cv-03696, July 24, 2013 (Docket No. 13), that the plaintiff's motion is DENIED.

The Court notes that the unusual procedural history of this case presented intricate removal issues that may well have limited application in other circumstances. As the plaintiffs concede, the United State Court of Appeals for the Third Circuit's decision in Lucier v. SmithKline Beecham Corp., 2013 WL 2456043 (3d Cir. June 7, 2013), established that the defendant is a citizen of Delaware based on the same record on that issue in the instant case. Therefore, the Court concludes that the case

was initially removable and that the defendant's second removal notice was simply a way of effectuating the timely and proper first removal.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

A.S., a minor by SALLEE MILLER, Guardian, and SALLEE MILLER, Individually,	:	**CIVIL ACTION NO. 1:13-CV-2382**
	:	**(Chief Judge Conner)**
Plaintiffs,	:	
	:	
v.	:	
	:	
SMITHKLINE BEECHAM CORPORATION, d/b/a GlaxoSmithKline,	:	
	:	
	:	
Defendant	:	

ORDER

AND NOW, this 12th day of December, 2013, upon consideration of plaintiffs' motion (Doc. 37) to amend and certify the court's order for interlocutory review pursuant to 28 U.S.C. § 1292(b) and for a temporary stay, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. Plaintiffs' motion (Doc. 37) to amend and certify the court's order for interlocutory appeal is GRANTED. The order of the court (Doc. 15), dated July 26, 2013, is hereby AMENDED by adding as follows: The following question is CERTIFIED for interlocutory review pursuant to 28 U.S.C. § 1292(b):

   > Whether a defendant may remove a case a second time based on diversity jurisdiction more than one year after the commencement of the case?

2. This matter is STAYED pending any appeal, if accepted by the United States Court of Appeals for the Third Circuit.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

A.S., a minor by SALLEE MILLER, Guardian, and SALLEE MILLER, Individually,	:	**CIVIL ACTION NO. 1:13-CV-2382**
	:	**(Chief Judge Conner)**
Plaintiffs,	:	
v.	:	
SMITHKLINE BEECHAM CORPORATION, d/b/a GlaxoSmithKline,	:	
Defendant	:	

MEMORANDUM

Presently before the court is plaintiffs' motion (Doc. 37) to amend and certify the court's order for interlocutory review pursuant to 28 U.S.C. § 1292(b) and for a temporary stay. For the reasons that follow, the court will grant the motion.

I. Factual Background and Procedural History

Plaintiffs A.S., a minor, and Sallee Miller have sued defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK"), for damages from injuries allegedly incurred due to Sallee Miller's ingestion of the antidepressant drug Paxil during her pregnancy with A.S. (Doc. 1 at 5-9).

This case has a lengthy and complicated procedural history. Plaintiffs originally filed a complaint as part of the consolidated Paxil Pregnancy Litigation in the Philadelphia Court of Common Pleas Mass Tort Program. (Id. at 5). On October 24, 2011, GSK removed plaintiffs' case to the Eastern District of Pennsylvania based on federal diversity jurisdiction. (Id. at 7). It was initially assigned to the Honorable

Mary A. McLaughlin but was later consolidated with eight other removed Paxil cases. (Id.) The consolidated cases were assigned to the Honorable Timothy J. Savage for the disposition of identical remand motions. (Id.) On December 14, 2011, Judge Savage remanded the cases because he determined that GSK is a Pennsylvania citizen, and that GSK cannot remove a case from Pennsylvania state court on the basis of federal diversity jurisdiction. See Patton *ex rel.* Daniels-Patton v. SmithKline Beecham Corp., Civ. A. No. 11-6641, 2011 WL 6210724 (E.D. Pa. Dec. 14, 2011).

Judges in the Eastern District reached conflicting decisions concerning GSK's citizenship, and, ultimately, an Eastern District court certified the issue for interlocutory review. See Johnson v. SmithKline Beecham Corp., 853 F. Supp. 2d 487 (E.D. Pa. 2012). On June 7, 2013, the Third Circuit held that GSK is a citizen of Delaware, thus providing the basis for removal to federal court. Johnson v. SmithKline Beecham Corp., 724 F.3d 337 (3d Cir. 2013). Accordingly, GSK re-removed this case and eight others on the basis of federal diversity jurisdiction on June 26, 2013. (Doc. 1). Plaintiffs' counsel filed an identical motion to remand in each case two days later. (Doc. 3).

Plaintiffs assert that GSK's second removal is barred under 28 U.S.C. § 1446(b) as it existed at the time the action was filed.[1] Specifically, plaintiffs allege that GSK's second removal is untimely under 28 U.S.C. § 1446(b) because it occurred more than

[1] The Federal Courts Jurisdiction and Venue Clarification Act of 2011, which made changes to § 1446, does not apply to the instant matter because this case was filed prior to the effective date of the Act. See Pub. L. No. 112-63, 125 Stat. 758 (codified as amended in various sections of 28 U.S.C.).

one year after commencement of the action. (Doc. 3-1 at 4). Judge McLaughlin denied plaintiffs' motion to remand on July 26, 2013. (Doc. 15). The court relied principally upon the reasons provided in a recent memorandum by the Honorable Harvey Bartle, III, who denied a motion to remand in another Paxil case. See Guddeck v. SmithKline Beecham Corp., Civ. A. No. 13-3696, __ F. Supp. 2d __, 2013 WL 3833252 (E.D. Pa. July 24, 2013).[2] Judge McLaughlin also granted GSK's motion to transfer venue to this court on August 16, 2013. (Doc. 19).

On August 7, 2013, the Honorable Ronald L. Buckwalter denied motions to remand in two of the other removed Paxil cases. See Cintao v. SmithKline Beecham Corp., Civ. A. No. 13-3681 (E.D. Pa. Aug. 7, 2013); Nieman v. SmithKline Beecham Corp., Civ. A. No. 13-3695 (E.D. Pa. Aug. 7, 2013). The Honorable John R. Padova and the Honorable Michael M. Baylson granted motions to remand in another two. See Cammarota v. SmithKline Beecham Corp., Civ. A. No. 13-3677, 2013 WL 4787305 (E.D. Pa. Sept. 9, 2013); Powell v. SmithKline Beecham Corp., Civ. A. No. 13-3693, 2013 WL 5377852 (E.D. Pa. Sept. 26, 2013). Obviously, these decisions create a split of authority within the Eastern District of Pennsylvania. Motions to remand in the remaining Paxil cases are pending. (Doc. 46 at 4).

Judge Buckwalter denied the plaintiffs' motions to certify for interlocutory review in Cintao and Nieman on October 9, 2013. Judge Buckwalter reasoned that an

[2] The plaintiffs did not seek a motion to certify for interlocutory review in Guddeck. Guddeck has since been transferred to the District of Minnesota. (Doc. 46 at 11).

interlocutory appeal would not materially advance the ultimate termination of the litigation because "even if successful, the plaintiffs will still be awaiting a trial, albeit not in federal court." See Cintao, Civ. A. No. 13-3681, slip op. at 2 (E.D. Pa. Oct. 9, 2013).

On October 17, 2013, plaintiffs filed the instant motion (Doc. 37) to certify Judge McLaughlin's order (Doc. 15) denying plaintiffs' motion to remand for interlocutory review. Plaintiffs request certification of the following issue for interlocutory appeal:

> Whether a defendant may remove a case a second time based on diversity jurisdiction more than one year after the commencement of the case, where a final remand order determining the case is not removable had already been issued and the plaintiff has not prevented timely removal?

During the pendency of the instant motion, specifically on November 7, 2013, the Third Circuit denied the plaintiffs' petitions for writs of mandamus in Cintao and Niemen. See Cintao v. SmithKline Beecham Corp., Civ. A. No. 13-4192 (3d Cir. Nov. 7, 2013); Nieman v. SmithKline Beecham Corp., Civ. A. No. 13-4193 (3d Cir. Nov. 7, 2013).[3]

II. Discussion

The court may certify an order for interlocutory review if 1) the decision concerns "a controlling question of law;" 2) there is "a substantial ground for difference of opinion" on that question; and 3) an immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Plaintiffs,

[3] Cintao has been transferred to the Southern District of Florida. (Doc. 46 at 11). Nieman has been transferred to the District of South Dakota. (Id.)

GSK, and the court agree that the order disposing of plaintiffs' motion to remand satisfies the first two elements necessary for certification. (See Docs. 46 at 1-2, 48 at 1-2). It is undisputed that there is a split of authority on a controlling question of law, namely, whether GSK may remove the action for a second time based on diversity jurisdiction more than one year after commencement of the action pursuant to 28 U.S.C. § 1446(b). However, GSK asserts that an immediate appeal would actually delay the ultimate termination of the litigation. (Doc. 46 at 6-9). Moreover, GSK posits that there are no "exceptional circumstances" present and that the instant motion is untimely. (Id. at 9-15).

GSK argues that an immediate appeal would delay the ultimate termination of the litigation because the parties have already substantially prepared for trial, which is currently scheduled for August 2014. (Doc. 46 at 6-9). In examining this issue, the court must analyze whether an appeal could eliminate the need for a trial, simplify a case by foreclosing complex issues, or enable the parties to complete discovery more quickly or at less expense. Knipe v. SmithKline Beecham, 583 F. Supp. 2d 553, 600 (E.D. Pa. 2008). In the case *sub judice*, the parties already conducted substantial discovery in state court, and were four months away from a trial date prior to GSK's second removal. (Doc. 46 at 8). However, in this court, discovery is ongoing, the parties still have an opportunity to file dispositive motions, and trial is not scheduled for another eight and a half months. Moreover, there is a likelihood that the parties will attempt to revisit prior state court rulings concerning the admissibility of evidence

and expert witness testimony because different evidentiary and procedural standards apply in federal court.

If plaintiffs are successful, an immediate appeal and remand to state court would be significantly less time-consuming and expensive than if the parties had to conduct a federal trial, an appeal, and then another state trial. On the other hand, the court recognizes that if plaintiffs are not successful on appeal, an immediate appeal would represent a considerable expense and delay of the litigation. The court notes, however, that § 1292(b) requires the court to analyze whether an immediate appeal *may* materially advance the termination of the litigation, not whether an immediate appeal definitively *will* advance the termination of the litigation. An immediate appeal may materially advance the ultimate termination of this litigation if plaintiffs are successful on appeal; thus, the court finds that plaintiffs have satisfied the statutory criteria of § 1292(b).

GSK also argues that the court should deny certification because of a lack of "exceptional" circumstances. Indeed, the court has the discretion to deny certification even if the parties satisfy all of § 1292(b)'s requirements. Bachowski v. Usery, 545 F.2d 363, 368 (3d Cir. 1976). The court should only certify issues for interlocutory appeal in "exceptional" cases to avoid "piecemeal review and its attendant delays and waste of time." Katz v. Carte Blanche Corp., 496 F.2d 747, 764 (3d Cir. 1974). This case presents a unique issue of civil procedure that involves a split of authority and has the potential to arise in future disputes. A decision on this issue will also immediately affect the eight other Paxil cases removed to federal court. The removed cases are

potentially subject to a myriad of different rules and regulations than the hundreds of Paxil cases already tried or settled in Pennsylvania state court. GSK is correct that three of those eight cases have been transferred to district courts outside the controlling authority of the Third Circuit, but nevertheless, a Third Circuit opinion on this issue would be strong persuasive authority in those districts. Thus, exceptional circumstances are present and certification is warranted.[4]

III. Conclusion

For the foregoing reasons, the court will grant plaintiffs' motion (Doc. 37) to amend and certify the court's order for interlocutory review and for a temporary stay. An appropriate order follows.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

Dated: December 12, 2013

[4] GSK's argument that plaintiffs' motion is untimely is also unavailing. The court may amend and certify an order for interlocutory appeal at any time. Kenworthy v. Hargrove, 826 F. Supp. 138, 140 (E.D. Pa. 1993). Plaintiffs were reasonably awaiting the outcome of similar motions to certify in Cintao and Nieman. Plaintiffs filed the instant motion on October 17, 2013, eight days after Judge Buckwalter's denial of those motions.

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:

Lisa S. Blatt

Sarah M. Harris

R. Stanton Jones

Dated: April 15, 2014

/s/ Howard J. Bashman
Howard J. Bashman