No. 14-1229

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

v.

SMITHKLINE BEECHAM CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

BRIEF OF APPELLEE

Andrew T. Bayman
Stephen B. Devereaux
Robert K. Woo, Jr.
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, GA 30309-3521
(404) 572-4600
abayman@kslaw.com

Jeffrey S. Bucholtz
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4707
(202) 737-0500
jbucholtz@kslaw.com

Lisa S. Blatt
Sarah M. Harris
R. Stanton Jones
Elisabeth S. Theodore*
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

*Admitted only in Maryland;
supervised by members of the DC bar

Counsel for Appellee GlaxoSmithKline LLC, f/k/a SmithKline Beecham Corporation, d/b/a GlaxoSmithKline

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Rule 26.1, defendant-appellee respectfully submits the following disclosure statement.

GlaxoSmithKline LLC ("GSK"), formerly SmithKline Beecham Corporation d/b/a GlaxoSmithKline, is owned, through several layers of wholly-owned subsidiaries, by GlaxoSmithKline plc, a publicly traded public limited company organized under the laws of England. To the knowledge of GSK and GSK plc, no shareholder of GSK plc owns ten percent or more of its outstanding shares. However, Bank of New York Mellon acts as a Depository with respect to Ordinary Share American Depository Receipts ("ADR") representing shares in GSK plc. In its depository capacity, Bank of New York Mellon is the holder, but not the beneficial owner, of more than ten percent of the outstanding shares in GSK plc on behalf of the ADR owners who are the beneficial owners of the shares. To the knowledge of GSK plc, none of those ADR owners owns ten percent or more of its outstanding shares.

Dated: May 15, 2014

/s/ Lisa S. Blatt
Lisa S. Blatt

Attorney for Appellee
GlaxoSmithKline LLC, f/k/a SmithKline Beecham Corporation, d/b/a GlaxoSmithKline

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JURISDICTIONAL STATEMENT

On June 26, 2013, GlaxoSmithKline LLC ("GSK") removed this case to federal court under 28 U.S.C. § 1441(a) from the Philadelphia Court of Common Pleas. This was GSK's second removal of this case, and it followed this Court's decision in *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013), which held that GSK is a Delaware citizen and is diverse from a Pennsylvania plaintiff for purposes of 28 U.S.C. § 1332(a). As discussed below, 28 U.S.C. § 1447(d) did not divest the district court of jurisdiction over the removal.

This Court has jurisdiction under 28 U.S.C. § 1292(b) to review the district court's memorandum opinion and order of July 26, 2013, denying appellants' motion to remand to state court. App.2a-3a. On January 24, 2014, this Court granted permission to appeal. App.1a.

STATEMENT OF THE ISSUE

Whether the district court correctly upheld GSK's second removal of this case to federal court, where diversity jurisdiction indisputably exists and the non-jurisdictional time limits in 28 U.S.C. § 1446(b) do not preclude the removal.

STATEMENT OF RELATED CASES

This Court in *Johnson* analyzed the earlier remand order in this case, *Patton ex rel. Daniels-Patton v. SmithKline Beecham Corp.*, No. 11-5965, 2011 WL 6210724 (E.D. Pa. Dec. 14, 2011) (remanding this case and others consolidated under the lead case *Patton*), as well as remand orders in related cases against GSK:

Brewer v. SmithKline Beecham Corp., 774 F. Supp. 2d 720 (E.D. Pa. 2011), and *Maldonado ex rel. Maldonado v. SmithKline Beecham Corp.*, 841 F. Supp. 2d 890, 897 (E.D. Pa. 2011). *Johnson*, 724 F.3d at 349-52 & nn.13 & 14. In addition, eight other cases raised the same question as this appeal concerning GSK's right to remove cases a second time in light of the *Johnson* decision. App.31a & n.2. Three of those cases have been transferred to district courts outside this Circuit: *Guddeck v. SmithKline Beecham Corp.*, No. 13-cv-02508 (D. Minn.), *Cintao v. SmithKline Beecham Corp.*, No. 13-cv-24095 (S.D. Fla.), and *Nieman v. SmithKline Beecham Corp.*, No. 13-1022 (D.S.D.).

STATEMENT OF THE CASE

A. The *Johnson* Case

On August 26, 2011, a Pennsylvania citizen and a Louisiana citizen sued GSK in the Philadelphia Court of Common Pleas, alleging that GSK was responsible for injuries arising from their mothers' ingestion of thalidomide during pregnancy. *Johnson*, 724 F.3d at 340. On September 14, 2011, GSK removed *Johnson* to the Eastern District of Pennsylvania based on diversity jurisdiction, explaining that GSK had been a Delaware citizen since 2009. Briefly stated, in 2009, SmithKline Beecham Corporation dissolved and became GSK, a limited liability company whose sole member, GlaxoSmithKline Holdings (Americas) Inc.

("GSK Holdings"), is a holding company. GSK Holdings is incorporated in Delaware, and its board of directors makes managerial decisions in Delaware.

GSK's removal notice explained that under *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010), as an LLC GSK's citizenship depended exclusively on the citizenship of its sole member, GSK Holdings, a corporation. And under *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), a corporation's principal place of business—and thus its citizenship—is defined by its "nerve center . . . where the corporation's officers direct, control, and coordinate the corporation's activities." *Id.* at 1192. Because GSK Holdings is incorporated in Delaware and its board directs GSK Holdings's activities from Delaware, *Hertz* and *Zambelli* dictated that GSK Holdings, and thus GSK, were Delaware citizens—and that the case was removable. *Johnson*, 724 F.3d at 347-57.

Plaintiffs nonetheless moved to remand based on the district court decision in *Brewer v. SmithKline Beecham Corp.*, 774 F. Supp. 2d 720 (E.D. Pa. 2011). In *Brewer*, Judge Timothy Savage held that courts should determine GSK's citizenship by "look[ing] to the 'nerve center' of the limited liability company" GSK, rather than its member, GSK Holdings. *Id.* at 722. Because most GSK operations were in Pennsylvania, Judge Savage held that GSK's "nerve center" was in Pennsylvania, and that GSK and GSK Holdings were Pennsylvania citizens. *Id.* That decision created a split within the Eastern District, since Judge Mary

McLaughlin had held that GSK Holdings and GSK were Delaware citizens. *White v. SmithKline Beecham Corp.*, No. 10-2141, 2010 WL 3119926, at *5 (E.D. Pa. Aug. 6, 2010).

On March 29, 2012, the district court denied remand, holding that GSK was a Delaware citizen. In light of the divisions within the Eastern District of Pennsylvania, this Court on May 22, 2012 accepted interlocutory review. *Johnson*, 724 F.3d at 344-45. On June 7, 2013, this Court held that GSK Holdings is a Delaware citizen because it is incorporated and headquartered in Delaware. *Id.* at 356. This Court further held that GSK is a Delaware citizen, because, as stated, GSK in 2009 converted to an LLC and took on the citizenship of GSK Holdings, and "the formal conversion of SmithKline Beecham to GSK LLC changes the jurisdictional calculus." *Id.* at 352. The Court accordingly held that diversity jurisdiction existed and no defendant "was, at the time of removal [September 14, 2011] a citizen of" Pennsylvania. *Id.* at 340, 360.

B. GSK's First Removal of This Case

The present case against GSK began on September 30, 2011, when plaintiffs A.S. and his mother, Sallee Miller, sued GSK in the Philadelphia Court of Common Pleas. Plaintiffs asserted state law tort claims for injuries to A.S. allegedly resulting from Miller's ingestion of Paxil during pregnancy. As in *Johnson*, the complaint alleged that the parties were not diverse because GSK, like

plaintiffs, was a Pennsylvania citizen. App.84a-85a (short-form complaint); *accord* App.53a (master long-form complaint).[1]

GSK removed this case to the Eastern District of Pennsylvania within 30 days of receiving plaintiffs' complaint, making the same arguments in support of diversity jurisdiction as GSK made in *Johnson*. App.103a-114a (Oct. 24, 2011 removal notice).[2] This case was randomly assigned to Judge McLaughlin, who previously had held that GSK and GSK Holdings were Delaware citizens. *Supra* p. 3-4 (citing *White*, 2010 WL 3119926, at *5). Plaintiffs moved to remand based on Judge Savage's decision in *Brewer*. Pls.' Mot. to Remand at 2-3, *A.S. v. SmithKline Beecham Corp.*, No. 2:11-cv-6641, Dkt. # 4 (Oct. 26, 2011). Plaintiffs' October 26, 2011 motion depended so heavily on *Brewer* that in lieu of a detailed brief, plaintiffs attached *Brewer* and sought remand "[f]or all the reasons set forth in [*Brewer* by] Judge Savage." *Id.* at 4.

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[1] All Paxil cases before the Philadelphia Court of Common Pleas are consolidated in a Mass Torts Program under which a single judge presides over pretrial activity before assignment to other judges for trial. Plaintiffs initiate new cases by filling out a short-form complaint, *i.e.*, a form with blanks for plaintiffs' names and check-boxes for the type of Paxil ingested, the prescribing physician, alleged side effects, and a menu of claims that plaintiffs can pursue.

[2] It is undisputed that this case satisfies the amount-in-controversy requirement for diversity jurisdiction. App.110a-113a.

Apparently because Judge McLaughlin had held in *White* that GSK and GSK Holdings were Delaware citizens, plaintiffs simultaneously moved to consolidate this case and all other Paxil cases before Judge Savage. Plaintiffs justified their preference for Judge Savage by explaining that he had previously held that "GSK was a citizen of Pennsylvania and had improperly removed [other] cases." Pls' Mem. of Law in Supp. of Mot. to Consolidate at 1, *A.S. v. SmithKline Beecham Corp.*, No. 2:11-cv-6641, Dkt. # 5 (Oct. 26, 2011). According to plaintiffs, Judge Savage's "unique familiarity with facts and legal issues" meant that he alone should decide any remand motions for "judicial economy and the interest of consistent rulings." *Id.* at 7-8. Plaintiffs in every other Paxil case against GSK within the Eastern District (all represented by the same counsel) successfully moved to consolidate at least 30 cases before Judge Savage on these same grounds. *See generally* Defs' Resp. to Pls' Mot. to Consolidate at 3-6, *Byrd v. SmithKline Beecham*, No. 2:11-cv-07065, Dkt. # 10 (Dec. 23, 2011) (describing history).

GSK strenuously objected to consolidation before Judge Savage. The company explained that in light of the split on the issue within the Eastern District, plaintiffs were engaged in a "transparent attempt to end the debate on this issue by referring all future remand decisions to the one judge who has already ruled their way" and were "nothing more than judge shopping." Defs' Resp. to Pls' Mot. to

Consolidate at 2, *Maldonado ex rel. Maldonado v. SmithKline Beecham Corp.*, No. 2:11-cv-2812, Dkt. # 10 (May 13, 2011). GSK further objected that it would be "fundamentally unfair" to transfer the removal notices from Judge McLaughlin to Judge Savage when Judge McLaughlin had also spent time considering GSK's citizenship and had reached the opposite conclusion from Judge Savage. *Id.* (discussing *White*, 2010 WL 3119926). GSK urged that "consolidation in the manner requested by Plaintiffs could effectively deny GSK any appellate remedy and leave unresolved the existing and conflicting conclusions in this district." *Id.* But the court repeatedly rejected GSK's objections. *See* Mem. Order, *Maldonado*, No. 2:11-cv-2812, Dkt. # 15 (May 18, 2011) (consolidation order by Bartle, C.J.); Order, *Baker v. SmithKline Beecham Corp.*, No. 2:11-cv-4078, Dkt. # 9 (Aug. 1, 2011) (consolidation order by Joyner, C.J.). Because further objections were futile, GSK thereafter ceased opposing consolidation and thus did not oppose plaintiffs' October 26, 2011 motion for consolidation in this case.

On November 17, 2011, the court consolidated this case with eight other Paxil cases and transferred them all to Judge Savage. App.272a (Nov. 17, 2011 consolidation order by Joyner, C.J.). Over GSK's objection, Judge Savage remanded this case and all related Paxil cases to state court. *Patton*, 2011 WL 6210724, at *1 (remanding this case and others consolidated under the lead case *Patton*). Rejecting GSK's arguments that *Brewer* "misapplied the 'nerve center'

test announced in *Hertz* . . . and the citizenship test established in *Zambelli*," Judge Savage granted remand based on his view that *Brewer* "was correctly decided." *Id.*; *Maldonado*, 841 F. Supp. 2d 890 (verbatim decision remanding 21 other Paxil cases). This case returned to state court on January 4, 2012. Remark, *A.S. v. SmithKline Beecham Corp.*, 2:11-cv-6641 (Jan. 4, 2012).

C. GSK's Second Removal of This Case

As stated, this Court held on June 7, 2013, that GSK was a Delaware citizen. *Johnson*, 724 F.3d at 360. Not only that: the Court repudiated *Patton*, *i.e.*, Judge Savage's remand decision in this case. This Court stressed that the *Johnson* plaintiffs' "explanations for why they believe GSK Holdings' nerve center is in Pennsylvania" derived from "a trilogy of opinions"—*Patton*, *Maldonado*, and *Brewer*—"authored by [Judge] Savage." *Id.* at 349 & n.13. *Johnson* further observed that Judge Savage's decisions had been "rejected in at least two district court cases" and adopted by "no other districts." *Id.* at 350 n.14.

As to *Brewer* (and by extension, *Patton* and *Maldonado*), *Johnson* found "that the record does not support [*Brewer*'s] description of GSK Holdings' relationship to GSK LLC." *Id.* at 350. *Johnson* held that *Brewer*'s analysis "turn[s] our holding in *Zambelli* upside down," *id.*, and "reject[ed]" *Brewer*'s reasoning as "contrary to the approach required by the Supreme Court in *Carden* and by us in *Zambelli*." *Id.* at 352. *Johnson* concluded that *Brewer*'s "argument

that we must look to GSK LLC's activities to identify GSK Holdings' nerve center also ignores the well-established rule that a parent corporation maintains separate citizenship from a subsidiary." *Id.* at 351. And while *Maldonado* (and *Patton*, which repeated *Maldonado* verbatim) derided "treating GSK Holdings' headquarters location as determinative of GSK LLC's citizenship" as "'exalt[ing] form over substance,'" *Johnson* deemed that rule "entirely consistent with the Supreme Court's approach to jurisdictional questions." *Id.* at 352 (quoting *Maldonado*, 841 F. Supp. 2d at 897).

On June 26, 2013—less than 30 days after this Court decided *Johnson*—GSK again removed this case and eight identically-situated cases previously consolidated with this one. App.32a, 45a-46a. GSK observed that "twenty-one other cases" that GSK had removed had been stayed pending *Johnson* and would now proceed in federal court. App.44a. GSK stressed, "There is no equitable reason why this case, which GSK timely and properly removed . . . and which was remanded by Judge Savage prior to the Third Circuit's decision . . . should be situated any differently." App.44a-45a. Plaintiffs sought remand, arguing that GSK's removal was untimely under 28 U.S.C. § 1446(b). App.320a.[3]

[3] This time, the nine cases GSK removed were not consolidated before Judge Savage; each remand motion was instead decided by a randomly-assigned judge.

The district court below (McLaughlin, J.) upheld GSK's second removal, explaining that based on *Johnson*, "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." App.2a-3a. The court endorsed Judge Bartle's reasoning upholding GSK's second removal of another case, *Guddeck*, that Judge Savage had remanded. App.2a (citing *Guddeck v. SmithKline Beecham Corp.*, No. 2:13-cv-03696 (Jul. 24, 2013)). In allowing the second removal, *Guddeck* explained "there [was] no dispute that the parties are of diverse citizenship" and that the district court had subject-matter jurisdiction. Mem. Op. at 3, *Guddeck*, No. 2:13-cv-03696, Dkt. # 13 (July 24, 2013). *Guddeck* further found that GSK's second removal was timely because "GSK removed this action in 2011 within thirty days after receipt of the complaint as permitted under the first paragraph of § 1446(b)," but "was rebuffed by the District Court which, as it turned out, erroneously remanded the action to the state court." *Id.* at 8. But *Johnson* "provided a new and different ground for a second notice of removal." *Id.* at 8-9. *Guddeck* accordingly saw "no reason why [this Court] would not allow a second notice of removal pursuant to the first paragraph of § 1446(b)." *Id.* at 9-10.

Judge McLaughlin transferred this case to the Middle District of Pennsylvania, where plaintiffs reside. On December 12, 2013, Chief Judge

Christopher Conner certified the removal issue for interlocutory review, App.4a-11a, and on January 24, 2014, this Court accepted this appeal. App.1a.

SUMMARY OF ARGUMENT

Congress enacted a default rule favoring removal that controls this appeal: A defendant is entitled to remove any civil case over which federal courts have subject-matter jurisdiction *unless Congress expressly provided otherwise*. 28 U.S.C. § 1441(a). Here, Section 1441(a) authorized GSK's second removal because diversity jurisdiction indisputably exists. The burden is therefore on plaintiffs to identify express statutory language *prohibiting* removal.

Plaintiffs fall far short of satisfying that burden. Plaintiffs invoke Section 1446(b), but GSK's original removal unquestionably complied with all procedures and time periods under Section 1446(b), and nothing in Section 1446(b) expressly prohibits GSK from removing this case for a second time. Section 1446(b)'s first paragraph requires a defendant to file a notice of removal within 30 days of receiving the complaint. GSK did that. GSK's initial removal was thwarted by plaintiffs' successful effort to get this case transferred to Judge Savage, who had already ruled that remand was required. This Court in *Johnson* then confirmed that this case is and always was removable, and that the remand decision in this case was contrary to Supreme Court and Third Circuit precedent. GSK properly re-removed this case in light of *Johnson*.

Nothing in Section 1446(b)'s first paragraph prohibits GSK's second removal in these circumstances, and the provision's second paragraph, which governs only cases that were "not [initially] removable," does not apply. This Court should affirm the district court. As Judge Bartle aptly concluded, "Surely the District Court's incorrect ruling and remand of this action is a nullity and cannot continue to stand now that the Court of Appeals has spoken that the removal was and is proper." *Guddeck*, Mem. Op. at 9; *accord* App.2a-3a.

Even were this Court to hold that Section 1446(b) sets forth the exclusive periods and conditions for re-removal, GSK's second removal was proper under either paragraph of Section 1446(b). GSK's second removal is timely under the first paragraph because the second removal relates back to GSK's timely initial removal. As the court below explained, "the case was initially removable and . . . the defendant's second removal notice was simply a way of effectuating the timely and proper first removal." App.2a-3a.

Alternatively, if the Court were to conclude that this case was not initially removable, GSK's second removal complied with the second paragraph. That provision requires removal within 30 days of an "order" making the case removable. 28 U.S.C. § 1446(b). *Johnson* is such an "order" triggering GSK's right to remove, and GSK removed this case within 30 days of *Johnson*. The second paragraph's one-year time limit on removals is non-jurisdictional and thus

subject to equitable tolling. The exceptional circumstances of this case warrant tolling to permit GSK's second removal.

Plaintiffs' remaining objections lack merit. Plaintiffs rely on Section 1447(d), which states that remand orders are "not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). But that text does not prohibit a second removal, much less expressly so. The text, rather, prohibits parties from appealing or filing petitions for mandamus to vacate a remand order. GSK did not do that here. Nor does a second removal conflict with the spirit of that provision. It is well-settled that courts may second-guess the merits of remand decisions in collateral proceedings without running afoul of Section 1447(d).

Plaintiffs' policy objections fare no better. Allowing this removal would not open the door to second removals based on diversity jurisdiction any time the law changes. The rare circumstances of this case are unlikely to recur in future cases. And affirmance would leave intact a host of limitations that would foreclose most re-removals based on changes in the law. Nor does GSK's second removal conflict with Congress's desire to limit the deadline for removal in diversity cases to one year after the complaint. Congress limited removals for cases over a year old only in cases that are *not* initially removable. This case has always belonged in federal court; GSK properly removed the case at the outset; and its second removal does not violate any express provision of law.

STANDARD OF REVIEW

This Court reviews *de novo* decisions concerning the meaning of various provisions of the removal statutes, 28 U.S.C. § 1441 *et seq.* *Doe v. Am. Red Cross*, 14 F.3d 196, 199 (3d Cir. 1993).

ARGUMENT

I. GSK PROPERLY RE-REMOVED THIS CASE UNDER SECTION 1441(a)

Section 1441(a) authorizes defendants to remove a case based on diversity jurisdiction, unless another statute expressly prohibits the removal. Diversity jurisdiction exists here, and plaintiffs do not argue to the contrary. Neither Section 1446(b) nor any other statute prohibits GSK's removal, much less expressly so. Section 1446(b), on which plaintiffs rely, establishes procedural requirements with which GSK complied. The second removal was therefore proper.

A. Section 1441(a) Authorized GSK's Second Removal Because Diversity Jurisdiction Indisputably Exists

A clear default rule governs this case: "*Except as otherwise expressly provided by an Act of Congress*, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant." 28 U.S.C. § 1441(a) (emphasis added).

Section 1441(a)'s meaning is indisputable. "A statute that begins with 'Except as otherwise provided by law' creates a general rule that applies unless contradicted in some other provision." *United States v. Providence Journal Co.*,

485 U.S. 693, 705 n.9 (1988). And since 1948, when Congress adopted the current version of Section 1441(a), "there has been no question that whenever the subject matter of an action qualifies it for removal, *the burden is on plaintiff to find an express exception*" to removal. *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003) (emphasis added). This "rule—that a plaintiff bears the burden of demonstrating an exception to removability—follows from the structure of a statute providing for removability absent an express exception." *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 154 (3d Cir. 2009).[4] Thus, when diversity jurisdiction exists, "removability is the norm." 14B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3721 (4th ed. 2014).

It is beyond dispute that diversity jurisdiction exists here. *Johnson* confirmed that GSK was always entitled to remove this case. App.2a. *Johnson* held that GSK is a Delaware citizen, and that GSK had a right to remove a case based on diversity jurisdiction with a non-Delaware citizen. And as *Johnson* observed for the removal in that case, "Diversity of citizenship must have existed at the time the complaint was filed . . . and at the time of removal." 724 F.3d at

[4] *Accord CalPERS v. WorldCom, Inc.*, 368 F.3d 86, 105-06 (2d Cir. 2004); *Borough of W. Mifflin v. Lancaster*, 45 F.3d 780, 784-85 (3d Cir. 1995); *Resolution Trust Corp. v. Lightfoot*, 938 F.2d 65, 67 (7th Cir. 1991); *Dorsey v. City of Detroit*, 858 F.2d 338, 341 (6th Cir. 1988); *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986); *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 459-60 (5th Cir. 1982).

346. *Johnson* necessarily held that GSK was a Delaware citizen at least as of August 26, 2011—when the *Johnson* complaint was filed—and on September 14, 2011, when GSK removed *Johnson*. *See id.* at 340. Under *Johnson*, GSK certainly was a Delaware citizen when plaintiffs brought this suit on September 30, 2011. Any other conclusion would be nonsensical, since GSK's citizenship has not changed since 2009. Accordingly, this case is and always was removable under Section 1441(a), and unless plaintiffs can show that some other statute expressly prohibits GSK's removal, this appeal is at an end.

B. Section 1446(b) Does Not Prohibit GSK's Second Removal

GSK's first removal complied with Section 1446(b), and nothing in that provision bars GSK's second removal, much less expressly so.

1. Section 1446's first paragraph states:

> 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.[5]

[5] All citations are to the version of 28 U.S.C. § 1446 in effect when plaintiffs sued on September 30, 2011. Because plaintiffs' case began before January 6, 2012—the effective date of the amendments enacted by the Federal Courts Jurisdiction and Venue Clarification Act of 2011—those amendments are inapplicable. *See* Pub. L. 112-63 (2011).

Section 1446(b)'s second paragraph, in turn, provides:

> 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 [diversity jurisdiction] . . . more than 1 year after commencement of the action.

Because a defendant's right of removal may be limited only at Congress's express direction, *see* 28 U.S.C. § 1441(a), plaintiffs must point to something in Section 1446(b)'s text that prohibits GSK's second removal.

The first paragraph creates no such obstacle. The first paragraph requires a defendant to remove a case within 30 days of receiving the complaint. GSK's initial removal complied with that requirement. But the first paragraph does not impose any time requirements on successive removals, and is silent as to whether a defendant may re-remove an initially removable case based on further developments after an initial, timely, but unsuccessful removal.

Section 1446(b)'s second paragraph likewise does not expressly bar a second removal. As plaintiffs apparently agree (Br. 31-32), that paragraph by its terms applies only to cases that were "not initially removable." 28 U.S.C. § 1446(b); *accord Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005); *Brown v. Tokio Marine & Fire Ins. Co.*, 284 F.3d 871, 872-73 (8th Cir. 2002). As Judge Bartle aptly explained, "the second paragraph of § 1446(b) with

its time limitation is not relevant because the action was initially removable as *Johnson* has made clear." *Guddeck*, Mem. Op. at 10; *accord* App.2a-3a.

Plaintiffs argue that this case was not initially removable because Judge Savage so held, and remanded this case on December 11, 2011. Br. 17-18. That argument flies in the face of *Johnson*'s holding that GSK was a Delaware citizen since 2009, and at a minimum since August 2011—*i.e.*, well before Judge Savage remanded this case. Moreover, *Johnson* expressly rejected the reasoning and factual findings of all of Judge Savage's remand decisions. *Supra* pp. 8-9.

Not only that: "[T]he jurisdiction of the court depends upon the state of things at the time of the action brought." *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570 (2004) (internal quotation marks omitted). That rule applies to the state of both the facts and law at the time of the complaint. *See id.* at 579 (applying existing law on citizenship of unincorporated associations to determine parties' citizenship as of complaint); *Rea v. Michaels Stores, Inc.*, 742 F.3d 1234, 1238 (9th Cir. 2014) (per curiam) (applying then-governing Ninth Circuit caselaw at the time of the complaint to conclude that case was not initially removable). Governing Supreme Court and Third Circuit precedent at the time of plaintiffs' September 2011 complaint dictated that GSK and GSK Holdings were Delaware, not Pennsylvania, citizens. *Johnson*, 724 F.3d at 348-60. And the only other then-extant authority holding to the contrary—Judge Savage's decision in

Brewer—was irrelevant: a district court decision "is not binding precedent in . . . the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (internal quotation marks omitted). Even before *Johnson*, diversity thus was clear from the facts set forth in plaintiffs' complaint and GSK's initial removal notice. *See Dahl v. R.J. Reynolds Tobacco Co.*, 478 F.3d 965, 970 (8th Cir. 2007) (case was initially removable because defendant could ascertain removability based on facts and law at the time of the complaint); *LaCaffinie v. Standard Fire Ins. Co.*, No. 10-207, 2010 WL 2207986, at *4 (W.D. Pa. May 28, 2010) (same).[6]

2. GSK's second removal is consistent with Congress's policy concerns in enacting Sections 1441(a) and 1446(b): to encourage defendants to swiftly exercise their right of removal when that right exists. GSK not only had the right to remove this case from the moment it was filed; under Section 1446(b)'s first paragraph, GSK *had* to remove this case within 30 days, or GSK would lose its right to remove. When plaintiffs filed their complaint, *Hertz* and *Zambelli* established that the case was removable under Section 1441(a). But Section

[6] The initial pleadings include jurisdictional facts the defendant discloses in the removal notice. *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 758-60 (11th Cir. 2010); *Lovern v. Gen. Motors Corp.*, 121 F.3d 160, 162 (4th Cir. 1997); *see also* 14B *Federal Practice & Procedure* § 3723 (4th ed. 2014). If courts were required to look only at the complaint, plaintiffs could defeat removal by alleging inaccurate facts about the defendant's citizenship in the complaint.

1446(b) "place[s] strict limits on a defendant who is put on notice of removability by a plaintiff. A defendant should not be able to ignore pleadings . . . from which removability may be ascertained and seek removal only when it becomes strategically advantageous for it to do so." *Roth v. CHA Hollywood Med. Ctr.*, 720 F.3d 1121, 1125 (9th Cir. 2013); *accord Johnson v. Nat'l Consolidation Servs., LLC*, No. 12-5803, 2013 WL 638600, at *3 (E.D. Pa. Feb. 21, 2013).

GSK thus properly filed its initial removal notice. That initial notice unquestionably complied with Section 1446(b)'s 30-day timeframe and set out a manifestly correct basis for removal. App.2a-3a. Plaintiffs' efforts to consolidate all of GSK's removal notices before Judge Savage, *see supra* pp. 6-7, frustrated GSK's clear right under Section 1441(a) to remove this case and dozens of others. Judge Savage rejected GSK's removal notice and remanded this case (and many others) to state court on a legal theory that violated Supreme Court and Third Circuit precedents, as *Johnson* held. 724 F.3d at 349-52, 355-56. After this Court repudiated the basis for Judge Savage's remand in this very case, GSK swiftly filed a second notice of removal.

GSK has the right under Section 1441(a) to remove this case, and nothing in Section 1446(b) bars GSK's second removal. Moreover, GSK may remove any future case brought by non-Delaware plaintiffs to federal court (provided the amount in controversy is sufficiently high). To perpetuate the myth that this case

is not removable, and to frustrate GSK's statutory right to have this case heard in federal court, would subvert Section 1441(a)'s conferral of a right to remove cases absent an express prohibition.

C. Plaintiffs' Interpretation of Section 1446(b) Is Incorrect

1. Plaintiffs are demonstrably wrong that one of Section 1446(b)'s two paragraphs must expressly "justify" or "permit" re-removal. *E.g.*, Br. 3-4, 14-15, 29. *Section 1441(a)* is the relevant statute authorizing removal. A second removal that Section 1441(a) authorizes need not be separately authorized by Section 1446(b). Put differently, Section 1446(b)'s two paragraphs are not "authorizations to remove" and thus they "do not otherwise affect the time" when the defendant must file a second notice of removal. *Roth*, 720 F.3d at 1123.[7]

Plaintiffs' theory also cannot be squared with their concession that second removals are sometimes allowed, Br. 21-22, or the fact that courts have upheld second removals in cases where diversity jurisdiction always existed, Br. 31-32. Section 1446(b)'s text addresses neither scenario, and thus plaintiffs' theory would cause a sea change in the law.

[7] The Ninth Circuit's opinion in *Roth* implied that the one-year limitation would apply to all removals based on ordinary diversity jurisdiction, rather than merely to removals of cases not initially removable. 720 F.3d at 1126. This was not only dicta, but also wrong in light of Section 1446(b)'s plain text—as plaintiffs acknowledge (Br. 31-32).

Basic tenets of statutory construction further rebut the notion that Section 1446(b) bars GSK's re-removal because the statutory text does not expressly allow it. In contrast with Section 1446(b)'s silence on re-removal, Section 1445 tellingly mandates that in criminal cases, "a second notice [of removal] may be filed only on grounds not existing at the time of the original notice." 28 U.S.C. § 1455(b)(2). Congress knew how to draft a categorical rule curtailing all successive removals; had Congress intended to do so in civil cases, it had ready language available. But Section 1446(b)'s silence speaks volumes, and "can't reasonably be understood to reflect a prohibition" on "multiple petitions for removal." *Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 782 (7th Cir. 1999); *cf. Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013).

Similarly, this Court has interpreted another provision in the removal statutes, Section 1447(c), as a non-exclusive list of conditions and time limits. Section 1447(c) states that a remand motion based on "any defect [in removal procedure] . . . must be made within 30 days after the filing of the notice of removal," and permits remand motions based on a lack of subject-matter jurisdiction at any time. 28 U.S.C. § 1447(c); *see Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1212 (3d Cir. 1991). Section 1447(c) thus is silent as to motions to remand on any other basis, and does not specify when such motions must be filed. In *Foster*, this Court rejected the defendant's argument that Section

1447(c) barred a remand notice based on the defendant's alleged waiver of its right to remove, because the notice was filed beyond the 30-day window. 933 F.3d at 1212-13. This Court was not persuaded by extensive legislative history indicating that remand motions based on *any* ground other than subject-matter jurisdiction must be filed within 30 days. *Id.* This Court instead found it dispositive that Section 1447(c)'s text "could not be clearer" in placing time limits *only* on motions invoking specific grounds for remand. *Id.* at 1213. So too here. Section 1446(b) similarly places time limits *only* on removals that fall under expressly-identified circumstances—not on re-removals that do not violate Section 1446(b)'s text.

Substantial precedent further confirms that Section 1446(b)'s text does not prohibit re-removal or set forth exclusive conditions for removal. "The removal statute does not categorically prohibit the filing of a second removal petition following remand." *Brown v. Jevic*, 575 F.3d 322, 328 (3d Cir. 2009) (quoting *Doe*, 14 F.3d at 200). Courts outside this Circuit have upheld second (and even third) removals in cases where diversity jurisdiction always existed, but the initial removal attempt was unsuccessful—even if defendants remove the case more than a year after the complaint was filed.[8]

[8] *E.g.*, *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534-35 (6th Cir. 1999) (initial, unsuccessful removal attempt by initial defendants did not bar re-removal by later-served defendant); *Williams v. Ford Motor Co.*, No. 1:12-cv-108, 2012 WL 5458919 (E.D. Mo. Nov. 8, 2012) (case was initially removable, but

Likewise, Section 1446(b) does not address whether a defendant may re-remove a case based on an intervening judicial decision, but the Ninth Circuit recently upheld a defendant's re-removal of a case based on an intervening Supreme Court decision. *Rea*, 724 F.3d at 1237-38. There, the defendant initially removed a case that was not removable under controlling circuit precedent; the defendant removed the case again after the Supreme Court abrogated that precedent. In upholding the second removal, the Ninth Circuit explained that "the two 30–day periods [in Section 1446(b)] are not the exclusive periods for removal" such that the defendant was barred from removing a second time. *Id.* at 1238. Because the intervening Supreme Court decision did not trigger a 30-day deadline under either paragraph, the Ninth Circuit held that the defendant properly re-removed the case.

In sum, plaintiffs are plainly incorrect in contending that Section 1446(b) only allows removals that its text expressly "justifies" or "permits." Br. 3-4, 14-

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was remanded when plaintiffs added non-diverse defendant; case could be re-removed more than one year after complaint upon dismissal of non-diverse defendant)*; Darnell v. Hoelscher Inc.*, No. 11-cv-449, 2011 WL 2461951 (S.D. Ill. June 20, 2011) (similar); *Lasilla v. Werner Co.*, 78 F. Supp. 2d 696, 698-99 (W.D. Mich. 1999) (similar). Section 1446(b)'s text does not authorize any of the re-removals in these cases, which illustrate that re-removals are permissible notwithstanding the absence of express authorization.

15, 29. And plaintiffs give no explanation, let alone a principled one, for the notion that re-removals are permissible, just not here.

2. Plaintiffs argue that Section 1446(b) should be narrowly construed to bar GSK's second removal. Br. 15, 37. But again, Section 1441(a) requires an *express prohibition* of removal. And the canon disfavoring removal applies at most only when subject-matter jurisdiction is questionable. *E.g., Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004); *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1262 (3d Cir. 1994). If "the removal statute should be strictly construed" against removal, that is only because "*[a] lack of jurisdiction* would make any decree in the case void and the continuation of the litigation in federal court futile." *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985) (emphasis added); *accord Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987).

That rationale plainly has no force where, as here, subject-matter jurisdiction under Section 1332 is clear and the question is whether Section 1446(b), a non-jurisdictional provision, bars GSK's removal. Applying a presumption against removal to a case like this would run afoul of the hallowed rule that "federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (quotations omitted). Absent doubts as to jurisdiction, "the federal court should be cautious about

directing remand too easily lest it erroneously deprive a removing defendant of the statutory right to a federal forum." 14B *Federal Practice & Procedure* § 3721.

Plaintiffs further assert that Section 1446(b) should be narrowly construed to promote deference to state courts, quoting *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). Br. 37. But the Supreme Court in *Breuer* rejected that same argument over a decade ago. There, the Court dismissed the very quote from *Shamrock* that plaintiffs rely on here, *i.e.*, that "'the policy of the successive acts of Congress . . . is one calling for the strict construction of [removal legislation]'" to give "[d]ue regard for the rightful independence of state governments.'" *Breuer*, 538 U.S. at 697 (quoting *Shamrock*, 313 U.S. at 108-09). The Supreme Court explained: "[W]hatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development," *i.e.*, by Congress's 1948 amendment of Section 1441(a) "requiring any exception to the general removability rule to be express." *Id.* at 697-98.

II. IN THE ALTERNATIVE, GSK'S SECOND REMOVAL IS TIMELY AND PROPER UNDER EITHER PARAGRAPH OF SECTION 1446(b)

Even were this Court to conclude that Section 1446(b) must separately authorize GSK's re-removal, either paragraph of Section 1446(b) does so. Section 1446(b) sets non-jurisdictional, procedural time limits. *Ariel Land Owners, Inc. v. Dring*, 351 F.3d 611, 613-14 (3d Cir. 2003). The usual equitable exceptions apply. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990); *United States v.*

Terlingo, 327 F.3d 216, 219 (3d Cir. 2003). GSK's second removal is timely under Section 1446(b)'s first paragraph because GSK's second removal notice relates back to GSK's unquestionably timely first removal notice. Alternatively, GSK's second removal complies with Section 1446(b)'s first paragraph because the 30-day rule in that paragraph should be equitably tolled in light of GSK's diligence and the extraordinary circumstances of this case.

If this Court instead concluded that this case was not initially removable and falls within Section 1446(b)'s second paragraph, GSK's second removal is still timely. The one-year limitation in Section 1446(b)'s second paragraph may be equitably tolled, and should be here.

A. Under the First Paragraph, GSK's Second Removal Relates Back to GSK's First Removal

Section 1446(b)'s first paragraph authorizes GSK's second removal and establishes that GSK's re-removal is timely, because the second notice relates back to GSK's timely-filed initial removal notice. A subsequently filed or amended removal notice is proper and timely under Section 1446(b) if it "relates back" to an earlier-filed notice. *Hendrix v. New Amsterdam Cas. Co.*, 390 F.2d 299, 300-01 (10th Cir. 1968) (citing cases).

GSK's second notice fits comfortably within the "relation back" rule this Court applied in *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190 (3d Cir. 2003). There, the defendant initially and timely removed based on diversity jurisdiction,

and the district court denied remand. *Id.* at 197. After an intervening Supreme Court decision undercut the defendant's specific rationale for diversity jurisdiction, the plaintiff filed another motion to remand. In response, the defendant offered a new explanation for why diversity jurisdiction existed, and the district court denied remand on that basis. *Id.* at 199-200. This Court held that the new explanation was timely because the initial removal notice was timely, and because the defendant "did not add new jurisdictional facts and did not rely on a basis of jurisdiction different from that originally alleged." *Id.* at 205. Instead, "[a]ll it did was amend the [initial] allegation in light of an intervening clarification in the law." *Id.*; *see id.* at 206 n.12 (citing cases holding that amendments to removal notices relate back to original, timely-filed notice); *accord Miller v. Principal Life Ins. Co.*, 189 F. Supp. 2d 254, 257-58 (E.D. Pa. 2002); *Willingham v. Morgan*, 395 U.S. 402, 408 n.3 (1969); *Lazuka v. FDIC*, 931 F.2d 1530, 1538 (5th Cir. 1991).

Similarly, GSK's second removal notice relates back to its first because the first notice was timely and because GSK promptly filed its second notice after *Johnson*. As the district court below observed, GSK's "second removal notice was simply a way of effectuating the timely and proper first removal." App.3a; *accord Guddeck*, Mem. Op. at 9-10. Moreover, the new notice "did not add new jurisdictional facts and did not rely on a basis of jurisdiction different from that originally alleged," but instead "amended [the original notice] in light of an

intervening" decision by a higher court. *USX Corp.*, 345 F.3d at 205. "It is well-established that the touchstone for relation back is fair notice," *Glover v. F.D.I.C.*, 698 F.3d 139, 146 (3d Cir. 2012), and plaintiffs were on notice from the outset of this suit both that GSK sought removal and that GSK's entitlement to removal relied on its Delaware citizenship. That is "all the notice that [the 30-day rule was] intended to provide." *Id.* (internal quotation marks omitted).

Relation back is thus appropriate under Federal Rule of Civil Procedure 15(c), which is "liberally construed," *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1543 (8th Cir. 1996), and requires only that the new pleading "asser[t] a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading." Fed. R. Civ. P. 15(c). Even aside from Rule 15, relation back is justified under this Court's broad equitable powers. Relation back is "a well recognized doctrine" long pre-dating the Federal Rules that "has its roots in the former federal equity practice and a number of state codes." *Scarborough v. Principi*, 541 U.S. 401, 418 (2004) (citations and internal quotation marks omitted); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 n.11 (1980). Under this Court's equitable powers, "'[t]he court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading, or record to be amended, or material supplement matter to be set forth in an amended or supplemental pleading.'" *Scarborough*, 541 U.S. at 418

n.5 (quoting Fed. Equity R. 19 (1912)); *see id.* (citing state rules permitting relation back "[a]t any time before final judgment in a civil action").

This case warrants the exercise of those equitable powers. Plaintiffs maneuvered to consolidate GSK's timely and meritorious removal notice before a district judge whom plaintiffs surmised would erroneously rule against GSK and whose decision GSK could not directly appeal. Relation back serves the "equitable notion that dispositive decisions should be based on the merits rather than technicalities," *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1022 (7th Cir. 2013) (internal quotation marks omitted), and refusing GSK its rightful federal forum in this case would privilege a technicality over the undisputed merits.

Below, plaintiffs contended that GSK's second removal notice did not relate back because the initial notice was no longer pending when GSK filed its second notice. But plaintiffs' opening brief does not renew that argument, and for good reason. A wealth of cases in this circuit and elsewhere hold that a prior motion need not be pending for a new motion to relate back. Rather, the test is whether the *underlying case* is still pending—and so long as it is, this Court "refuse[s] to indulge the myth that [the dismissed filing] never existed" and cannot serve to toll a statute of limitations. *Brennan v. Kulick*, 407 F.3d 603, 607 (3d Cir. 2005).

Thus, a complaint filed in federal court can relate back to a complaint filed in state court, even if the state complaint was dismissed by the time the defendant

removed the case to federal court. *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402, 410-11 (7th Cir. 1989). A new complaint also "relate[s] back to the timely filing of the original complaint" when the district court "erred in dismissing that original complaint but correctly did not dismiss the entire action." *Luevano*, 722 F.3d at 1017. What matters is that the "action remains pending" in *some* court. *Id.* at 1022. Relation back is unavailable only if the underlying *suit* is dismissed, and a "dismissal without prejudice of an *action* (or 'case') . . . is a different matter" for purposes of relation back than the "dismissal without prejudice of a *complaint*." *Ciralsky v. CIA*, 355 F.3d 661, 666, 672 (D.C. Cir. 2004). So long as the action remains open, "the plaintiff is free to amend his pleading" and relate it back to the original complaint—even if that complaint was dismissed, and even if the new pleading would be untimely absent relation back. *Id.* at 666 (internal quotation marks omitted).

This case was still pending when GSK filed both removal notices (and it is still pending today). GSK did everything possible to preserve its clear right to remove this case to a federal forum, and that right should be upheld. Even if GSK's second removal notice did not relate back to its initial notice, GSK's re-removal is timely under the first paragraph. As described below, *infra* pp. 35-40, both the 30-day time limit in Section 1446(b)'s first paragraph and the one-year time limit in the second paragraph are subject to equitable tolling, which is

warranted given the exceptional circumstances here. Thus, GSK's second removal should be treated as if it were timely filed within the first paragraph's initial 30-day window.

B. GSK's Second Removal Is Proper Under the Second Paragraph

1. Johnson *Is an "Order" That Triggered GSK's Right to Remove Within 30 Days*

Under Section 1446's second paragraph, parties may remove cases that were not initially removable within 30 days of receiving "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). As stated, this paragraph does not apply because, as GSK always knew and *Johnson* confirms, this case was initially removable. *Supra* pp. 17-19. But even were the second paragraph relevant, the *Johnson* decision is an "order," and GSK timely removed this case within 30 days of *Johnson*'s issuance.

Johnson qualifies as an "order" under this Court's decision in *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993). There, this Court "h[e]ld that because the Appellee here [the Red Cross] was the critical party in *American National Red Cross v. S.G.*"—the case in which the asserted order was entered—"and 'filed a notice of removal within thirty days'" of *S.G.*'s issuance, the Red Cross could "file for re-removal." *Id.* at 198. This Court explained that "an order . . . [is] sufficiently related to a pending case to trigger Section 1446(b)

removability . . . when, as here, 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 202-03.[9]

So too here: GSK "was the critical party" in *Johnson* and removed this case within 30 days of *Johnson*'s issuance. *Johnson* "came from a court superior in the same judicial hierarchy"; this Court is superior to the district court. *Johnson* "was directed at a particular defendant," GSK. And *Johnson* "expressly authorized that same defendant to remove an action against it in another case involving similar facts and legal issues" to this one. *Johnson* held "removal proper" because "[t]he District Court . . . had original jurisdiction" over a case that, like this one, pitted GSK—a Delaware citizen—against a Pennsylvania plaintiff. 724 F.3d at 360. The factual and legal similarities between *Johnson* and this case are remarkable. In both cases, Pennsylvania plaintiffs sued GSK in the Philadelphia Court of Common Pleas for the same type of personal injury claims. GSK sought removal on the exact same grounds, and plaintiffs filed strikingly similar remand motions

[9] In *Doe*, the parties assumed that the dispositive issue was whether re-removal fell under Section 1446(b)'s second paragraph, but this Court made clear that it was not deciding any issue beyond whether *Doe* satisfied the definition of an "order." 14 F.3d at 198. This Court thus did not resolve whether the original case had been removable at the time of the complaint.

based on Judge Savage's *Brewer* decision. The cases even involved the same record and jurisdictional facts supporting removal—culminating in *Johnson*'s discussion and repudiation of the very remand in this case. *See supra* pp. 8-9.

Plaintiffs puzzlingly assert that "*Johnson* is not 'sufficiently related' to this case because *Johnson* does not expressly authorize GSK to remove any other case, let alone this case." Br. 33. But *Johnson* expressly held that the removal in that case was "proper" because diversity jurisdiction existed between GSK and Pennsylvania citizens as of 2009. 724 F.3d at 340-41, 346, 352, 360. In other words, *Johnson* held, GSK was a Delaware citizen, and entitled to remove cases filed against it by Pennsylvania citizens, well before plaintiffs filed this suit on September 30, 2011. Moreover, in doing so, *Johnson* expressly rejected the analysis in *Patton*, Judge Savage's order remanding *this case*. 724 F.3d at 349-52. If *Johnson*'s reasoning was not express authorization for GSK's removal in this case and others—cases involving the exact same facts and legal issues—it is hard to imagine what magic words this Court could have used to be clearer.

Plaintiffs' reading of *Doe* also diverges from how other courts have interpreted and applied *Doe*. The Fifth Circuit held that a decision in a different case involving the same defendants was an "order" even though it "did not explicitly discuss removal," because the case "involved a similar factual situation and legal conclusion" and the "effect of the decision" was to establish

removability. *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 268 (5th Cir. 2001). And a district court held that a Sixth Circuit decision was an "order" under *Doe* because it involved the same defendant and "similar facts and legal issues regarding the removability of [certain Ohio tort] actions"—but did not even consider whether the Sixth Circuit expressly authorized removal. *Young v. Chubb Grp. of Ins. Cos.*, 295 F. Supp. 2d 806, 808 (N.D. Ohio 2003).

2. *The One-Year Time Limit Should Be Equitably Tolled*

The time limits in both paragraphs of Section 1446(b) are subject to equitable tolling. It is well-settled that the 30-day time limit in the first paragraph is "subject to equitable considerations." *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426 n.8 (5th Cir. 2003) (citing cases). And plaintiffs do not dispute that the one-year time limit in the second paragraph "can be equitably tolled in certain circumstances"; indeed, plaintiffs recognize many cases that have so held. Br. 34.

This case comfortably satisfies the requirements for equitable tolling. "Generally a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Here, GSK diligently pursued its right to remove. Critically, GSK timely filed its first removal notice within 30 days of receiving plaintiffs' complaint, thus putting plaintiffs on notice that the case was removable. GSK

vigorously objected to plaintiffs' motion to remand this case. When this Court decided *Johnson*, GSK again removed this case within 30 days.

Moreover, extraordinary circumstances thwarted GSK's initial removal. Judge Savage erroneously remanded dozens of Paxil cases. Over GSK's repeated objections, plaintiffs consolidated remand proceedings before Judge Savage, while other judges in the Eastern District disagreed with his analysis and denied remand. This case was transferred from Judge McLaughlin, who previously held that GSK was a Delaware citizen, to Judge Savage, who previously held that GSK was a Pennsylvania citizen. GSK was thus deprived of the opportunity to let the law develop and to obtain appellate review in the normal course.

Plaintiffs argue that Section 1446(b)'s time limits can be equitably tolled *only* in "instances of plaintiff misconduct." Br. 35. The Supreme Court has repeatedly rejected that narrow view of equitable tolling. Examples of cases where equitable tolling are warranted include *either* "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, *or* where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 (emphasis added). And *Holland v. Florida*, 560 U.S. 631 (2010), rejected as "too rigid" a *per se* rule limiting equitable tolling in the habeas context only to certain narrow circumstances. *Id.* at 649. Rather, "the exercise of a court's equity powers

. . . must be made on a case-by-case basis." *Id.* at 649-50 (internal quotation marks omitted). "The flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices." *Id.* (alterations and internal quotation marks omitted).

Numerous courts have equitably tolled Section 1446(b)'s time limits where exceptional circumstances unrelated to plaintiff misconduct prevented a timely removal. In *Wise Co., Inc. v. Daily Bread, LLC*, No. 2:11-cv-00868, 2012 WL 681789 (D. Utah Feb. 29, 2012), the district court equitably tolled the 30-day time limit in Section 1446(b)'s first paragraph when the defendants were served with the complaint, but the clerk mistakenly informed them that the plaintiff had not filed the complaint, meaning the court would deem the complaint dismissed. *Id.* at *1. Upon learning that the plaintiff properly filed the complaint, the defendants promptly removed, but by then more than 30 days had elapsed. *Id.* Although the plaintiff had done nothing wrong, the court tolled the 30-day period because "Defendants' tardiness in removing this case to federal court is the result of no fault of their own. Their good faith in promptly removing the case after being notified of the properly filed complaint lends further support to an equitable extension of time for removal." *Id.* at *4.

Courts have equitably tolled the second paragraph's one-year limitation when "removal was proper, even though it occurred over a year past the filing date of the state court petition, and even though the court made no finding of bad faith on the part of the plaintiff." *Villaje Del Rio, Ltd. v. Colina Del Rio, LP*, No. SA-07-CA-947, 2008 WL 2229469, at *2 (W.D. Tex. May 28, 2008) (discussing *Shiver v. Sprintcom, Inc.*, 167 F. Supp. 2d 962 (S.D. Tex. 2001)). In *Shiver*, the defendant removed based on diversity jurisdiction nearly two years after the plaintiff filed the suit, when the plaintiff dropped the only non-diverse defendant. 167 F. Supp. 2d at 963-64. The court allowed equitable tolling because the *defendant's* "own conduct conformed to equitable principles," by being "vigilant in removing the lawsuit at the earliest time possible." *Id.* And the removal would not "lead to undue delay, unfair prejudice, or in any way deprive [the plaintiff] of his day in court," even though the defendant removed "beyond the eleventh hour"—on "the eve of trial." *Id.* Further examples abound in which courts have equitably tolled the time limits in Section 1446(b)'s first and second paragraphs absent plaintiff misconduct.[10]

[10] *E.g.*, *Loftin v. Rush*, 767 F.2d 800, 805-06 (11th Cir. 1985), *abrogated on other grounds by statute* (equitably tolling second paragraph's 30-day time limit because court was "unwilling to allow a modal defect to pretermit [its] substantive inquiry" into state court's "void default judgment"); *Farm & City Ins. Co. v. Johnson*, 190 F. Supp. 2d 1232, 1236-37 (D. Kan. 2002) (equitably tolling second paragraph's 30-day time limit in garnishment action, explaining "the court has the power to

Plaintiffs argue that "§1446(b)'s language indicates that any equitable exception should be narrow in scope." Br. 34. But plaintiffs never identify what language supposedly restricts tolling, or why it should exclude defendants who diligently pursued removal but were stymied by the circumstances of this case. Plaintiffs note that Congress in 2011 amended the removal statute to suspend Section 1446(b)'s one-year limit if "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). But that amendment sheds no light on the circumstances in which tolling was (and is) available under the pre-2011 version of the statute.

Finally, plaintiffs are wrong that *Tedford*, 327 F.3d 423, limited equitable tolling to instances of plaintiff misconduct. Br. 35. While the facts of *Tedford* involved plaintiff misconduct, the Fifth Circuit stated only that "the conduct of the parties may affect whether it is equitable to strictly apply the one-year limit," while citing multiple cases that applied tolling absent plaintiff misconduct. 327 F.3d at 426 & n.8. *Tedford* did not disturb the Fifth Circuit's longstanding view that in the

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retain a case untimely removed"); *Greene v. Mobil Oil Corp.*, 66 F. Supp. 2d 822, 824-25 (E.D. Tex. 1999) (equitably tolling second paragraph's one-year time limit where plaintiffs amended complaint to add 1,200 new plaintiffs more than a year after filing suit); *Vogel v. U.S. Office Prods. Co.*, 56 F. Supp. 2d 859, 865 (W.D. Mich. 1999), *rev'd on other grounds*, 258 F.3d 509 (6th Cir. 2001) (equitably tolling first paragraph's 30-day time limit to allow re-removal where initial removal notice "simply disappeared," even though plaintiffs had not "engaged in behavior which might estop them from pursuit of remand").

removal context, "it is within the equitable power of the court to consider . . . exceptional circumstances on a case-by-case basis." *Doe v. Kerwood*, 969 F.2d 165, 169 (5th Cir. 1992).

III. PLAINTIFFS' OTHER OBJECTIONS LACK MERIT

A. Section 1447(d) Does Not Bar GSK's Second Removal

Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Plaintiffs sweepingly argue that Section 1447(d) bars courts from making any "retroactive determination" that a remand decision "was wrong, not just now in light of new law, but *at the moment [the district judge] entered the order*." Br. 18 (quoting *Powell ex rel. Powell v. SmithKline Beecham Corp.*, No. 13-3693, 2013 WL 5377852, at *6 (E.D. Pa. Sept. 26, 2013)); *see id.* at 5-6. Plaintiffs thus argue that no court may second guess whether diversity jurisdiction is present here because "Judge Savage had already rejected" that "same ground." *Id.* at 20. This argument does not withstand scrutiny.

1. As a threshold matter, Section 1447(d) does not expressly limit a second removal. "Neither § 1447(c) nor anything else in the sections of the Judicial Code devoted to removal forbids successive removals." *Benson*, 188 F.3d at 782. Remand orders are not unreviewable *per se*, they are "unreviewable on appeal or otherwise." In other words, Section 1447(d) precludes an appellate court

from acting upon the district court's remand order itself. A second removal, in contrast, does not seek relief from an appellate court. GSK's second removal thus was not an "appeal" of Judge Savage's remand decision—it was not "[a] proceeding undertaken to have a decision reconsidered by a higher authority." Black's Law Dictionary (9th ed. 2009).

Nor does GSK's second removal "otherwise" seek review of Judge Savage's remand order. "[W]rits of mandamus [are] the 'or otherwise' referred to in the statute." *Balazik v. Cnty. of Dauphin*, 44 F.3d 209, 212 (3d Cir. 1995); *accord Midlock v. Apple Vacations W., Inc.*, 406 F.3d 453, 456 (7th Cir. 2005) ("otherwise" refers to "other ways of obtaining *appellate* review," not "review by another district judge"); *Matter of Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) ("[M]andamus is the 'or otherwise' of which § 1447(d) speaks."). Congress used "or otherwise" (and earlier, analogous language) to eliminate the rule "[p]rior to 1875 [that] a remand order was regarded as a nonfinal order reviewable by mandamus, but not by appeal." *Georgia v. Rachel*, 384 U.S. 780, 786 n.6 (1966).[11] Section 1447(d) does not prohibit a district court from entertaining a second removal.

[11] In *Agostini v. Piper Aircraft Corp.*, 729 F.3d 350 (3d Cir. 2013), cited by plaintiffs (Br. 17, 19), this Court held that it lacked jurisdiction to review the denial of a motion to reconsider a remand order, which the district court had denied just before formally transferring jurisdiction over the case to state court. *Id.* at 355.

2. Plaintiffs' expansive view of Section 1447(d) proves too much, and that provision thus cannot bear the weight they place on it. Under plaintiffs' view, no court could review the merits of a remand order once the case returns to state court. Yet it is well-settled that Section 1447(d) does not, for instance, bar Supreme Court review of appellate decisions ordering remand. In *American National Red Cross v. S.G.*, 505 U.S. 247 (1992)—the intervening decision in *Doe*—the Court granted *certiorari* over objections that Section 1447(d) bars any federal court from reviewing the validity of the remand decision once the case returns to state court. Br. of Resps. in Opp. to Cert. at 3-6, *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247 (1992) (No. 91-594), 1991 WL 11008937, at *3-6 (U.S.). *S.G.* then repudiated the exact basis for the remand, which was that the federal courts lacked subject-matter jurisdiction because the Red Cross Charter did not create a federal question. 505 U.S. at 249-50, 252-57; *see also Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947) (holding that predecessor version of Section 1447(d) did not bar Supreme Court review of a court of appeals' reversal of a denial of remand).

This Court held that appellate review of the motion to reconsider necessarily would entail appellate review of the underlying remand order. *Id.* at 354. Here, by contrast, GSK's second removal did not seek relief from any appellate court.

Plaintiffs' view of Section 1447(d) similarly cannot be squared with *Johnson*. Plaintiffs trivialize *Johnson* as a decision that "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'" in this case. Br. 19-20 (quoting *Powell*, 2013 WL 5377852, at *4); *see id.* at 23. But *Johnson* was not so limited. *Johnson* repeatedly mentioned *Patton*—Judge Savage's remand order in this case—as part of a "trilogy of opinions" that formed the cornerstone of plaintiffs' arguments. 724 F.3d at 349 & n.13. *Johnson* rejected Judge Savage's basis for remanding this case, and held—contrary to Judge Savage—that diversity jurisdiction existed between GSK and a Pennsylvania plaintiff well before *Patton* issued on December 11, 2011. *See id.* at 340, 346-47, 360; *supra* pp. 2-4.

3. To be sure, in most cases, "trying to obtain a second opinion on removability . . . is not permissible." *Midlock*, 406 F.3d at 456. But that is "not . . . because section 1447(d) states that an order of remand . . . 'is not reviewable on appeal *or otherwise*.'" *Id.* Rather, "the first remand, *because it establishes the law of the case*, may be revisited only when intervening events justify that step." *Id.* at 456-57 (citing *Benson*, 188 F.3d at 783) (emphasis added and internal quotation marks omitted); *see Doe*, 14 F.3d at 200. In other words, "once a case is remanded . . . a defendant is precluded only from seeking a second removal *on the*

same ground." *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 492 (5th Cir. 1996).

Judge Savage's remand decision is not "law of the case" because this Court's subsequent decision in *Johnson* "constitutes supervening legal authority." *In re W.R. Grace & Co.*, 591 F.3d 164, 174 (3d Cir. 2009). *Johnson* thus created a new ground for removal. This Court held as much in *Doe*. There, the Red Cross initially removed on the ground that the Red Cross charter conferred original jurisdiction over the case. 14 F.3d at 200. The district court rejected that argument and remanded. *Id.* But "[w]hile the case was pending in state court, the Supreme Court . . . [held in *S.G.*] that the Red Cross charter permitted removal," and the Red Cross removed the case again. *Id.*

On appeal, this Court approved the Red Cross's second removal, rejecting the plaintiffs' argument that Section 1447(d) bars all re-removals. *Id.* Because the second removal notice "did not rehash [defendant's] original argument, but instead cited as its authority a new and definitive source, the intervening order of the highest court in the land," this Court held that the second removal was "based on grounds different than the first removal." *Id.* This Court thus saw "no reason why [it] . . . could not properly determine that the Court's earlier order of remand, which has now been demonstrated to have been decided erroneously, should be reversed, and that [defendant] is now permitted to remove the case." *Id.*; *accord*

Rea, 742 F.3d at 1238 (even if Section 1447(d) applied, it would not bar defendant's re-removal because intervening Supreme Court decision "is a relevant change of circumstances") (quotation marks omitted).[12]

"The parallels to *Doe* in the present case are striking." *Guddeck*, Mem. Op. at 8. GSK's first removal notice was based on *Hertz* and *Zambelli*. App.103a-114a. As in *Doe*, GSK's second removal notice "did not rehash [its] original argument," and "instead cited as its authority a new and definitive source, the intervening order" in *Johnson*. In *Doe*, the intervening decision in *S.G.* held that the Red Cross could invoke federal question jurisdiction. Here, *Johnson* held that GSK could invoke diversity jurisdiction. In *Doe*, this Court concluded that *S.G.* "demonstrated" that "the Court's earlier order of remand" was "decided erroneously." 14 F.3d at 200. Likewise, *Johnson* "in effect reversed the District Court . . . in this case," and "involved not only the same defendant as in this action but also similar facts and legal issues." *Guddeck*, Mem. Op. at 8. *Johnson* thus

[12] *Doe* offered two other grounds for rejecting the argument that under Section 1447(d), "a case once remanded may never be removed." 14 F.3d at 200. *Doe* noted that *S.G.* itself reviewed the validity of a remand after the case returned to state court. *Id.* *Doe* also stated "[a] third, independent reason" for rejecting the notion that Section 1447(d) barred re-removals, *i.e.*, that *S.G.* gave a "*specific* and unequivocal direction" that the Red Cross could remove all cases it was defending. *Id.* at 200-01. But that is just another way of saying that Section 1447(d) does not bar retroactive review of the validity of remand decisions, since the Supreme Court cannot circumvent Section 1447(d) just by issuing specific directions.

"provided a new and different ground for a second notice of removal." *Id.* at 8-9; *accord* App.2a-3a.

Plaintiffs downplay *Doe* by claiming that it rested on the fact that the re-removal there fit within Section 1446(b)'s second paragraph. Br. 23-25. But *Doe* repeatedly expressed that its analysis of Section 1447(d) had nothing to do with Section 1446(b). The *Doe* plaintiffs argued in the alternative that "the initial remand . . . was not reviewable under Section 1447(d) and, second, even if the remand was reviewable," it was untimely "pursuant to Section 1446(b), because *S.G.* does not constitute an 'order or other paper.'" 14 F.3d at 199. This Court thus treated the two arguments as completely distinct, stating that whether Section 1447(d) is "a bar to removal" was "a threshold matter" that dealt with the broader question whether "a case once remanded may never again be removed"—not whether Section 1446(b) covered the second removal. *Id.* at 199-200. *Doe*'s analysis of Section 1447(d) never mentioned Section 1446(b). *Id.* at 200-01. And *Doe* made the independence of its two holdings explicit by concluding, "Having determined that Section 1447(d) is not a bar to removal, we now turn to Section 1446(b) to decide whether the order implementing the Court's decision in *S.G.* constitutes an 'order.'" *Id.* at 201.

B. Plaintiffs' Policy Concerns Are Unwarranted

Plaintiffs suggest that affirmance would allow defendants to "re-remove cases based on diversity jurisdiction any time the law changes." Br. 30. Even if true, that would hardly open the floodgates to re-removals. The odds that a defendant's removal attempt will fail and that the law will change during the pendency of a case are exceedingly low, as the paucity of such cases suggests.

Regardless, affirmance would leave intact a host of limitations that would foreclose most re-removals based on changes in the law. Upholding GSK's removal here would not affect the rule that any case that was *not* initially removable can only become removable based on an intervening change of law if the decision meets *Doe*'s criteria for an "order." That situation is so unusual that the last time those conditions were satisfied was in 2003—over a decade ago. *See Young*, 295 F. Supp. 2d at 808. Upholding GSK's removal would also confirm all the limitations that make successful re-removals rare. It is exceedingly unlikely that an intervening decision will involve the same defendant, same facts, and same record as the re-removed case. It is even less likely that the intervening judicial decision will establish that the exact remand order at issue was wrongly decided. As the district court recognized, far from inviting a torrent of removals, this case presents "intricate removal issues that may well have limited application in other circumstances." App.2a.

Plaintiffs also object that affirmance could cause "substantial disruption and delay after considerable progress in state court," undercutting Congress's purported intent as expressed in the legislative history. Br. 30. But as plaintiffs acknowledge, that concern applies only to Section 1446(b)'s *second paragraph*, and specifically relates to Congress's rationale for setting a one-year limit on defendants' ability to remove diversity-jurisdiction cases that were not initially removable. *Id.* at 29-30, 36. There is no basis to extend that policy to any other removals. At most, the legislative history suggests that Congress was concerned with a particular type of case in which substantial progress in state court was likely to have been made—and that Congress decided against legislating more broadly. Moreover, as the many cases recognizing exceptions to the one-year rule indicate, *supra* pp. 37-38 & n.10, equitable considerations in specific cases routinely override policy concerns even when those concerns apply.

Further, policy concerns about the progress of litigation in state court are insufficient to defeat GSK's statutory right to remove this case. Trial was still many months away when this Court decided *Johnson* and GSK promptly exercised its right to re-remove this case. Courts have repeatedly upheld removals of cases that were much closer to trial than this one, explaining that "[p]laintiff's claim of prejudice by removal on the eve of trial is insufficient to compel remand since an action may be properly remanded only for the specific reasons delineated in the

controlling statute." *Gottlieb v. Firestone Steel Prods. Co.*, 524 F. Supp. 1137, 1140 (E.D. Pa. 1981); *accord Shiver*, 167 F. Supp. 2d at 963-64; *Jackson v. Miss. Farm Bureau Mut. Ins. Co.*, 947 F. Supp. 252, 257 (S.D. Miss. 1996); *Resolution Trust Corp. v. Harrison*, 871 F. Supp. 523, 527 (D. Mass. 1994). And this case presents compelling countervailing concerns: a major purpose of the removal statute is to allow defendants to promptly remove cases over which federal courts have jurisdiction. GSK's right to do so was stymied by plaintiffs' efforts to consolidate this case before Judge Savage and an ensuing remand decision that *Johnson* effectively invalidated. GSK's second removal rights that wrong.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Dated: May 15, 2014

Respectfully submitted,

/s/ Lisa S. Blatt

Andrew T. Bayman
Stephen B. Devereaux
Robert K. Woo, Jr.
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, GA 30309-3521
(404) 572-4600
abayman@kslaw.com

Jeffrey S. Bucholtz
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4707
(202) 737-0500
jbucholtz@kslaw.com

Lisa S. Blatt
Sarah M. Harris
R. Stanton Jones
Elisabeth S. Theodore*
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

*Admitted only in Maryland; supervised by members of the DC bar

Counsel for Appellee GlaxoSmithKline LLC, f/k/a SmithKline Beecham Corporation, d/b/a GlaxoSmithKline

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Brief of Appellees:

(1) contains 11,917 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font;

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Dated: May 15, 2014

/s/ Lisa S. Blatt
Lisa S. Blatt

CERTIFICATE OF BAR MEMBERSHIP

I certify, pursuant to Third Circuit Rule 28.3(d), that I am a member of the Bar of this Court.

Dated: May 15, 2014

/s/ Lisa S. Blatt
Lisa S. Blatt

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2014, I electronically filed the foregoing *Brief of Appellee* with the Clerk of the Court for the United States Court of Appeals for the Third Circuit via the Court's appellate CM/ECF system. Participants in the case who were registered CM/ECF users were served by the CM/ECF system at that time.

Further, I hereby certify that on May 15, 2014, I served ten (10) paper copies on the Clerk of the Court for the United States Court of Appeals for the Third Circuit via Federal Express Priority Overnight. I also served one paper copy via Federal Express Priority Overnight on the following:

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

Dated: May 15, 2014

/s/ Lisa S. Blatt
Lisa S. Blatt