No. 13-8096

IN THE

United States Court of Appeals for the Third Circuit

A.S., a Minor, by SALLEE MILLER, Guardian, and SALLEE MILLER, Individually,

Plaintiffs-Petitioners,

v.

SMITHKLINE BEECHAM CORPORATION d/b/a GlaxoSmithKline,

Defendant-Respondent.

On Petition for Permission to Appeal From the United States District Court for the Middle District of Pennsylvania in Case No. 1:13-CV-2382

DEFENDANT'S OPPOSITION TO PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(B)

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Defendant GlaxoSmithKline LLC, formerly SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK"), respectfully submits this opposition to Plaintiffs' petition for permission to appeal the order below denying their motion to remand this case to the Court of Common Pleas of Philadelphia County.

INTRODUCTION

This case does not present exceptional circumstances that warrant interlocutory appeal. The district court's order denying remand arises in a highly unusual set of circumstances, and any decision this Court could issue reviewing that order would be of correspondingly limited precedential value. There is no reason to accept Plaintiffs' invitation to short-cut the ordinary litigation process and reach out to decide what Judge Mary A. McLaughlin correctly described as "intricate removal issues that may well have limited application in other circumstances." *A.S. v. SmithKline Beecham Corp.*, No. 13-3684, July 26, 2013 Order at 1 (E.D. Pa. July 26, 2013) (attached as Exhibit A).

The question certified by Chief Judge Conner – after Judge McLaughlin transferred the case to Plaintiffs' home district following her denial of their remand motion – involves the application of this Court's "extremely confined" holding 20 years ago in *Doe v. American Red Cross*, 14 F.3d 196 (1993). In that case, this Court held that 28 U.S.C. § 1447(d) does not bar a second removal of a case that was initially removable but was erroneously remanded, where subsequent

precedent from a higher court involving the same defendant and the same removal issue makes clear that the remand was erroneous. This Court recognized in *Doe* that such a situation was highly unusual, *see id*. at 202-03 (emphasizing the "unique circumstances" of the case and "the narrow compass we follow today"), and this Court was correct: it took 20 years after *Doe* for such a fact pattern to reappear. Plaintiffs' wishful description of the removal issue in this case as one "of great legal and practical importance" that "will have considerable precedential and authoritative value in numerous other cases," Pet. at 1, simply ignores this reality.

Given how rarely the question certified by Chief Judge Conner arises, this case does not present the "exceptional circumstances" that would justify the "piecemeal review and its attendant delays and waste of time" created by interlocutory appeal. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 764 (3d Cir. 1974); *see also Sporck v. Peil*, 759 F.2d 312, 315 n.4 (3d Cir. 1985). The removal issue on which Plaintiffs seek this Court's extraordinary review exists in only six cases within this Circuit, and there is no reason to expect that the issue will arise frequently in new cases. If this Court devoted its resources to allowing this proposed appeal, it would be to issue a decision with exceedingly limited precedential value.

Moreover, accepting this interlocutory appeal at this time would disserve the statutory criterion of "materially advanc[ing] the ultimate termination of [this] litigation." 28 U.S.C. § 1292(b). As Judge Ronald L. Buckwalter explained in denying motions by plaintiffs to certify orders denying remand in two similar Paxil pregnancy cases, allowing appeal now would not materially advance the ultimate resolution of the cases because they are close to trial and even a successful appeal would not avert trial. This case is in the same posture; in fact, on the trial schedule that previously had governed these cases in state court, this case fell in between the two cases in which Judge Buckwalter denied certification. This case is nearly ready for trial, and the prospect that Plaintiffs will have to try it in federal court rather than state court is not an exceptional circumstance that justifies interlocutory appeal. GSK respectfully requests that the Court deny Plaintiffs' petition.

QUESTION PRESENTED

GSK submits the following as the question presented by the order denying remand[1]:

> Whether the one-year limit on diversity removals in the second paragraph of 28 U.S.C. § 1446(b) applies to a case that was initially removable and that the defendant timely removed within 30 days of receipt of the initial pleading.

[1] If this Court were to grant permission to appeal, it would not be "limited to the specific questions certified by the District Court." *NVE Inc. v. HHS*, 436 F.3d 182, 196 (3d Cir. 2006).

STATEMENT OF FACTS

Plaintiffs Sallee Miller and A.S. are Pennsylvania citizens who initiated this case on September 30, 2011 by filing a complaint in the consolidated Paxil Pregnancy Litigation in the Philadelphia Court of Common Pleas, *In re Paxil Pregnancy Cases*, February Term 2007, No. 3220. Plaintiffs served GSK with the complaint on October 19, 2011. *See* GSK's June 26, 2013 Notice of Removal ("GSK's Notice of Removal") at ¶ 7 (attached as Exhibit B). Five days later, GSK removed the case to the Eastern District of Pennsylvania based on diversity jurisdiction because GSK is a citizen of Delaware. *Id.* at ¶ 8. Plaintiffs do not dispute that GSK timely removed this case within 30 days of service of the complaint. *See* Pet. at 3-4.

The case was initially assigned to Judge McLaughlin but was subsequently assigned to Judge Timothy J. Savage for purposes of deciding Plaintiffs' motion to remand. Ex. B, GSK's Notice of Removal at ¶ 10. On December 14, 2011, Judge Savage remanded Plaintiffs' case on the erroneous ground that GSK was a citizen of Pennsylvania. *See Patton v. SmithKline Beecham Corp*., 2011 U.S. Dist. LEXIS 143724, at *5-6 (E.D. Pa. Dec. 14, 2011).

On June 7, 2013, this Court issued its decision in *Johnson v. SmithKline Beecham Corp*., 724 F.3d 337 (3d Cir. 2013), in which this Court held that GSK is a citizen of Delaware and affirmed GSK's removal of a case like this one in which

one of the plaintiffs was a citizen of Pennsylvania. *See id*. at 340. Within 30 days after *Johnson*, GSK filed a second notice of removal in this case and eight others.

This case was again assigned to, and this time remained before, Judge McLaughlin, who denied Plaintiffs' second motion to remand. Judge McLaughlin held that, based on this Court's decision in *Johnson*, "the case was initially removable" and "[GSK's] second removal notice was simply a way of effectuating the timely and proper first removal." Ex. A, *A.S.*, July 26, 2013 Order at 1-2. Because this case was initially removable, the one-year limit on diversity removals in § 1446(b) did not bar GSK's second removal. *See Guddeck v. SmithKline Beecham Corp*., No. 13-3696, 2013 U.S. Dist. LEXIS 103904, at *13 (E.D. Pa. July 24, 2013) (denying identical motion to remand and reasoning that the one-year limit did not bar removal because "the second paragraph of § 1446(b) with its time limitation is not relevant because the action was initially removable as *Johnson* has made clear") (Bartle, J.) (attached as Exhibit C); Ex. A, *A.S.*, July 26, 2013 Order at 1 (denying remand for reasons set forth in Judge Bartle's opinion in *Guddeck*).[2]

[2] Every court of appeals to have considered the issue has held that the one-year limit does not apply to cases that were initially removable. *See, e.g., Brown v. Tokio Marine Fire Ins. Co.*, 284 F.3d 871, 873 (8th Cir. 2002) ("rules of usage and statutory construction lead inevitably to the conclusion that the one-year limitation period modifies only the second paragraph of § 1446(b), and therefore only applies to cases that were not removable to federal court when originally filed").

Judge McLaughlin did not state in her order that it satisfied the criteria for interlocutory review. To the contrary, she seemingly anticipated Plaintiffs' request for certification in observing that the "intricate removal issues" presented by the confluence of Judge Savage's erroneous initial remand and this Court's directly on-point holding in *Johnson* involving the same defendant and the same issue "may well have limited application in other circumstances." Ex. A, *A.S.*, July 26, 2013 Order at 1. Judge McLaughlin then transferred this case to the Middle District of Pennsylvania, Plaintiffs' home district. Four and a half months later, Chief Judge Conner, to whom the case was assigned upon transfer, granted Plaintiffs' motion to certify Judge McLaughlin's order. *A.S. v. SmithKline Beecham Corp.*, No. 13-2382, Dec. 12, 2013 Order at 1 (M.D. Pa. Dec. 12, 2013) (attached as Exhibit D).

In addition to Judge McLaughlin, two other judges in the Eastern District of Pennsylvania have denied remand in three other cases that GSK removed on the same grounds. As noted above, Judge Bartle denied remand in *Guddeck*. Judge Buckwalter denied remand in two additional cases. *See Cintao v. SmithKline Beecham Corp*., No. 13-3681 (E.D. Pa. Aug. 7, 2013) (attached as Exhibit E); *Nieman v. SmithKline Beecham Corp.*, No. 13-3695 (E.D. Pa. Aug. 7, 2013)

(attached as Exhibit F).[3] Judge Bartle and Judge Buckwalter also granted GSK's motions to transfer those cases to the plaintiffs' home districts, and *Guddeck*, *Cintao*, and *Nieman* are now pending, respectively, in the District of Minnesota, the Southern District of Florida, and the District of South Dakota, and are thus no longer within the Third Circuit. Like Judge McLaughlin, neither Judge Bartle nor Judge Buckwalter stated in the orders denying remand that they satisfied the criteria for interlocutory review.

While Plaintiffs mention throughout their petition that Judge Michael M. Baylson certified his order granting remand in *Powell* for interlocutory review, (*see* Pet. at 1, 7, 9, 18, 20),[4] Plaintiffs omit that Judge Buckwalter denied motions to certify his orders denying remand in *Cintao* and *Nieman* for interlocutory review. Judge Buckwalter found that interlocutory review would not materially advance the ultimate termination of the litigation because discovery was almost complete, the cases were ready to proceed to trial, and even if the plaintiffs were to succeed on an interlocutory appeal, they "w[ould] still be awaiting a trial." *See*

[3] Plaintiffs' motions to remand have been granted in two cases: *Cammarota v. SmithKline Beecham Corp.*, No. 13-3677 (E.D. Pa. Sep. 9, 2013); and *Powell v. SmithKline Beecham Corp.*, No. 13-3693 (E.D. Pa. Sep. 26, 2013). Plaintiffs' motions to remand in the remaining three cases are still pending.

[4] Judge Baylson certified his order granting remand on December 19, 2013. No petition for permission to appeal the order was filed in this Court within the ten-day time period for such petitions.

Cintao, No. 13-3681, Memorandum at 1-2 (E.D. Pa. Oct. 8, 2013) (attached as Exhibit G); *Nieman*, No. 13-3695, Order (E.D. Pa. Oct. 8, 2013) (attached as Exhibit H).

Plaintiffs also omit that this Court previously has denied petitions for writs of mandamus in *Cintao* and *Nieman* that asked this Court to review the same question that Plaintiffs ask the Court to review here. *See Cintao v. SmithKline Beecham Corp.*, No. 13-4192 (3d Cir. Nov. 7, 2013) (attached as Exhibit I); *Nieman v.SmithKline Beecham Corp.*, No. 13-4193 (3d Cir. Nov. 7, 2013) (attached as Exhibit J). This Court denied those petitions without comment and without requesting a response from GSK.

REASONS FOR DENYING PLAINTIFFS' PETITION

The Court should deny Plaintiffs' petition. The Supreme Court has cautioned that only "exceptional circumstances" warrant a departure from the "basic policy of postponing appellate review until entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-77 (1978); *see also, e.g.*, *Milbert v. Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958) (certification is "to be used sparingly" and is appropriate "only in exceptional cases. . .[it] is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation"). There are no such exceptional circumstances here,

because the appeal sought by Plaintiffs would have only minimal precedential value.

Moreover, an immediate appeal would not materially advance the ultimate termination of the litigation as required by § 1292(b). *See Milbert*, 260 F.2d at 433 (stating that this Court must independently find that the requirements for interlocutory appeal are satisfied). This case is almost ready for trial, and delaying that trial for an interlocutory appeal would delay, not advance, the termination of the litigation. Plaintiffs' arguments for remand were fully considered by the district court, and this Court can review the district court's decision in the ordinary course on appeal after final judgment if that turns out to be necessary. The need to try the case in federal court is not an exceptional circumstance or a cognizable hardship; indeed, Plaintiffs may win (or the case may settle) and this Court may thus never need to review the district court's denial of remand. There is no justification for canceling an approaching trial to reach out to decide on interlocutory appeal an issue that the Court may never need to decide – especially where that issue is so closely tied to an unusual set of circumstances that the Court's decision would have little precedential value.

I. THERE ARE NO EXCEPTIONAL CIRCUMSTANCES THAT WARRANT INTERLOCUTORY REVIEW

Even where the statutory criteria for interlocutory review are satisfied, the petitioner "still ha[s] the burden of persuading the court of appeals that exceptional

circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand*, 437 U.S. at 475; *see also Sporck v. Peil*, 759 F.2d 312, 315 n.4 (3d Cir. 1985) (interlocutory appeals are only available for "exceptional" cases); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1208 (3d Cir. 1979) (same); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 764 (3d Cir. 1974) (same); *Milbert*, 260 F.2d at 433 (same). Plaintiffs argue that exceptional circumstances are present for four reasons: (1) the case involves an issue that "has the potential to arise in future disputes"; (2) a decision on this issue would "also immediately affect the eight other Paxil cases removed to federal court"; (3) this case may be subject to "different rules and regulations" than other cases that GSK has tried or settled; and (4) interlocutory review may protect Plaintiffs from an "unnecessary trial[] and the harm resulting therefrom." Pet. at 18-19. None of this rises to the level of exceptional circumstances that warrant interlocutory review.

First, the question presented here does not present "exceptional circumstances" because it is the result of an unusual set of facts and is not likely to arise in future cases. *See, e.g., Parcel Tankers, Inc. v. Formosa Plastics Corp.*, 764 F.2d 1153, 1155-56 (5th Cir. 1985) (vacating decision of motions panel to grant permission to appeal because the order did not present "an issue of general importance" and interlocutory review "would burden the Court without providing a

precedent useful to future litigants"). The removal at issue here follows the path marked by this Court 20 years ago in *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993). 28 U.S.C. § 1447(d) bars review of an order granting remand "on appeal or otherwise." In *Doe*, this Court held that § 1447(d) did not bar a second removal if it was based on a later decision from a court "superior in the same judicial hierarchy," directed at the same defendant, and involving the same issue. *Id*. at 203.[5] The Court emphasized the "unique circumstances" presented by that fact pattern and the "extremely confined" nature of its holding. *Id*. at 202-03.

The Court's description was prescient: for 20 years, *Doe* truly was unique in the Third Circuit. No reported case presented similar facts.[6] Then, on June 7, 2013, this Court decided *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013). In *Johnson*, this Court found that GSK was a citizen solely of Delaware and thus able to remove cases from Pennsylvania state courts without being blocked by the forum-defendant rule of 28 U.S.C. § 1441(b)(2). *See id.* at 340. Because this was a later decision, coming from a court "superior in the same judicial hierarchy" to the Eastern District of Pennsylvania, directed at the same

[5] There have not been any changes to § 1447(d) since this Court analyzed it in *Doe*.

[6] Even outside of the Third Circuit, we are aware of only two reported cases presenting similar facts in the last 20 years. *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 267-68 (5th Cir. 2001); *Young v. Chubb Group of Ins. Cos.*, 295 F. Supp. 2d 806, 807-08 (N.D. Ohio 2003).

defendant GSK, and involving the same removal issue, GSK removed this case and eight others for a second time on the basis of *Doe*.[7] Three judges in the Eastern District of Pennsylvania agreed with GSK and denied plaintiffs' subsequent remand motions in four cases.

As one of those judges observed, "[t]he parallels to *Doe* in the present case are striking":

> As explained in *Doe*, 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 when the defendant in both cases is the same and both cases involve the same or a similar factual and legal scenario. That is exactly what happened here.

Ex. C, *Guddeck*, 2013 U.S. Dist. LEXIS 103904, at *1-2. Indeed, the narrowness of the *Doe* exception led the district court in the instant case to note that "this case presented intricate removal issues that may well have limited application in other circumstances." Ex. A, *A.S.*, July 26, 2013 Order at 1. Plaintiffs' attempt to extrapolate these rare circumstances to any and all cases in which a defendant files

[7] GSK also argued that these removals were proper on additional grounds, including that a party may remove a case outside of the two 30-day periods in § 1446(b) where, as here, it does not fail to timely remove the case when it would be required to do so under § 1446(b). *See Roth v. CHA Hollywood Med. Ctr., L.P.*, No. 13-55771, 2013 U.S. App. LEXIS 13224, at *2 (9th Cir. June 27, 2013). GSK also argued that if the second paragraph of § 1446(b) and its one-year limitation on diversity removals applied, the court should apply an equitable exception. *See Ariel Land Owners v. Dring*, 351 F.3d 611, 616 (3d Cir. 2003) (holding that the one-year limit is a procedural bar, not jurisdictional).

a second notice of removal "based on the occurrence of some post-remand event," Pet. at 1, ignores both this Court's emphasis in *Doe* itself of the unusual nature of the circumstances and the fact that very few similar cases have arisen in the 20 years since *Doe*.

This case is also very different from the exceptional circumstances in *Johnson* and *Doe*, on which Plaintiffs seek to rely. The question of GSK's citizenship existed in every case brought against GSK, and with hundreds of cases brought against GSK in the Court of Common Pleas in Philadelphia, the issue was plainly of broad importance. *See Johnson v. Smithkline Beecham Corp.*, 853 F. Supp. 2d 487, 497 (E.D. Pa. 2012) ("Without guidance from the Third Circuit, Judges of this Court will undoubtedly continue to disagree in the numerous cases involving the GSK Defendants and similarly situated parties."). Indeed, before this Court resolved that citizenship issue, over 50 cases were remanded from the Eastern District of Pennsylvania to that court – erroneously, as it turned out. And because plaintiffs continued to file new cases against GSK in the Philadelphia Court of Common Pleas – at least while they thought GSK would not succeed in removing them – the citizenship issue was of continuing importance. The removal issue in *Doe* likewise was of broad importance, involving at least 40 pending district court cases. *Doe*, 14 F.3d at 197. By contrast, the fact-bound question

whether GSK can remove cases in the wake of *Johnson* that were erroneously remanded before *Johnson* applies to a maximum universe of only nine cases.

Second, the likely impact of a decision by this Court would not even extend to all nine of those cases. Three of the nine (*Guddeck*, *Cintao*, and *Nieman*) have been transferred out of this Circuit, so a decision by this Court would not necessarily affect them at all. Indeed, the district court in one of those transferred cases denied the plaintiffs' request to stay that case, noting that the benefit to that court of a potential interlocutory appeal was "purely speculative." *Guddeck*, No. 13-2508, slip op. at 7-8 (D. Minn. Nov. 18, 2013) (denying motion to stay because it was unknown "how long one could reasonably expect potential requests for review thereof to the Third Circuit would take to be resolved" and plaintiffs were therefore "asking for an indefinite stay of the present case, based on a purely speculative benefit to this Court") (attached as Exhibit K).

Third, the fact that this case may be subject to "different rules and regulations" – the Federal Rules rather than the rules applicable in the Court of Common Pleas – than other Paxil cases is not remotely an extraordinary circumstance. Since *Johnson* was decided, these same Plaintiffs' counsel have voluntarily filed 7 other Paxil pregnancy cases involving over 75 plaintiffs from more than 30 states in state courts in Missouri and California, apparently preferring those forums to the Eastern District of Pennsylvania. Paxil pregnancy cases thus

will proceed under a variety of "rules and regulations" because of plaintiffs' litigation choices, regardless of anything this Court might do here.

Finally, if this Court allowed an interlocutory appeal every time a plaintiff argued that it might avoid a "possibly unnecessary trial[] and the harm resulting therefrom," then every order denying remand would be subject to interlocutory appeal. In fact, the opposite is true. It is far more common in this Circuit to deny certification of such orders. *See N.J. Dep't of Treasury, Div. of Inv. v. Fuld*, 604 F.3d 816, 824 (3d Cir. 2010) (holding that order denying remand was not appealable as a collateral order and noting that the Court had also denied permission to appeal the order under § 1292(b)); *see also, e.g.*, *Delalla v. Hanover Ins.*, No. 09-2340, 2010 U.S. Dist. LEXIS 2797, at *13 (D.N.J. Jan. 14, 2010) (denying certification of order denying remand); *Koken v. Pension Benefit Guar. Corp.*, 381 F. Supp. 2d 437, 443 (E.D. Pa. 2005) (same); *Carducci v. Aetna U.S. Healthcare*, No. 01-4675, 2002 U.S. Dist. LEXIS 19748, at *11 (D.N.J. July 24, 2002) (same); *Snook v. Penn State Geisinger Health Plan*, No. 4:CV-00-1339, 2002 U.S. Dist. LEXIS 25695, at *16 (M.D. Pa. Mar. 4, 2002) (same); *Eisenman v. Continental Airlines*, No. 96-1368, 1997 U.S. Dist. LEXIS 17607, at *6 (D.N.J. July 31, 1997) (same); *Mears v. McNeil-PPC, Inc.*, No. 95-3820, 1995 U.S. Dist. LEXIS 17138, at *5 (E.D. Pa. Nov. 15, 1995) (same); *Singh v. Daimler-Benz, AG*,

800 F. Supp. 260, 263 (E.D. Pa. 1992) (same). Thus, the denial of remand does not itself constitute an "exceptional circumstance" warranting interlocutory appeal.

II. INTERLOCUTORY REVIEW WILL NOT MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION

Interlocutory review is potentially appropriate under § 1292(b) only if an immediate appeal may materially advance the ultimate termination of the litigation. Even "if the district court is so persuaded" to certify an interlocutory order, "nonetheless, the appellate court must do more than give a pro forma 'rubber-stamp' approval of the district court's certificate." *In re Heddendorf*, 263 F.2d 887, 888 (1st Cir. 1959); *see also, e.g.*, *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005) (disagreeing with district court that immediate appeal may materially advance the ultimate termination of the litigation and denying interlocutory review); *McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1262 (11th Cir. 2004) (same); *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002) (same).

Before Chief Judge Conner's December 12 certification of Judge McLaughlin's July 26 order denying remand, the parties were completing what minimal fact discovery remained and were scheduled to then proceed to expert discovery, dispositive motions, and trial in August 2014. Judge Buckwalter explained in denying nearly identical requests for certification that interlocutory

review would not materially advance the ultimate resolution of the litigation because discovery was almost complete and the cases could soon proceed to trial. *See* Ex. G, *Cintao*, Oct. 8, 2013 Memorandum at 2; Ex. H, *Nieman*, Oct. 8, 2013 Order at 1. Judge Buckwalter's reasoning is consistent with that of other district courts in this Circuit. *See, e.g.*, *Knopick v. Downey*, No. 09-1287, 2013 U.S. Dist. LEXIS 150514, at *14-15 (M.D. Pa. Oct. 21, 2013) ("where discovery has been ongoing and the case is nearly ready for trial, an interlocutory appeal can hardly advance the ultimate termination of the litigation"); *Pease v. Lycoming Engines*, No. 10-843, 2012 U.S. Dist. LEXIS 59118, at *2 (M.D. Pa. Apr. 27, 2012) (certification would not materially advance the ultimate termination of the litigation because "the vast majority of pre-trial work has been completed and [] the trial of this matter can be accomplished with dispatch, subject to standard scheduling issues").[8]

This case is in the same posture as the cases decided by Judge Buckwalter. While all three of the cases were pending in state court, the case management order deadlines in this case trailed those in *Cintao* and preceded those in *Nieman*. Accordingly, granting Plaintiffs' petition would not materially advance the resolution of this case for the same reasons that interlocutory review would not

[8] This Court does not appear to have addressed whether putting a case that is close to trial on hold for an interlocutory appeal can be squared with § 1292(b)'s "materially advance" requirement.

materially advance the ultimate resolution of *Cintao* and *Nieman*. *See also, e.g.*, *McFarlin*, 381 F.3d at 1259 (for interlocutory review of a question to be warranted, "the answer to that question must substantially reduce the amount of litigation left in the case").

Chief Judge Conner reasoned that certification may materially advance the ultimate termination of this litigation because "[i]f 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." Ex. D, *A.S.*, Dec. 12, 2013 Order at 1. This reasoning proves far too much, because it is always true that allowing an appeal earlier could materially advance the ultimate termination of the litigation by ensuring that the litigation proceeds with the benefit of the appellate court's views and thus will not need to be redone after reversal on a final-judgment appeal. But there are good reasons why waiting until after final judgment is nonetheless almost always required, *see Coopers & Lybrand*, 437 U.S. at 471 (noting the "debilitating effect on judicial administration caused by piecemeal appeal"), and the potential "burden of relitigation" is insufficient to justify interlocutory appeal. *Morgan v. Ford Motor Co.*, No. 06-1080, 2007 U.S. Dist. LEXIS 5455, at *25 (D.N.J. Jan. 25, 2007) (possibility that a second trial in state court may be necessary if order

denying remand is reversed on final-judgment appeal does not satisfy materially-advance requirement).

Finally, judicial economy weighs against granting Plaintiffs' petition for an additional reason: because Judge McLaughlin's denial of remand involves only issues of removal procedure and not of subject-matter jurisdiction, this Court may never need to address that decision. *See Farina v. Nokia, Inc.*, 625 F.3d 97, 114 (3d Cir. 2010). Plaintiffs could win this case in federal court and thus not appeal to complain about the denial of remand, or this case could settle. Rather than guarantee a lengthy delay of a nearly trial-ready case by reaching out to decide a rarely-arising issue, this Court should follow the ordinary rule and wait to review the district court's denial of remand if and when it becomes necessary to do so on a final-judgment appeal.[9]

CONCLUSION

For the reasons set forth above, there is nothing exceptional about the circumstances here that would justify departing from the ordinary course of

[9] An interlocutory appeal would likely stretch into 2015, well past this case's August 2014 trial date. In *Johnson*, the case that established that GSK was a citizen of Delaware, fifteen months passed between certification (in March 2012) and this Court's decision (in June 2013). *See also, e.g., In re Hypodermic Prods. Antitrust Litig.*, 484 Fed. Appx. 669 (3d Cir. 2012) (seventeen months between certification and this Court's decision); *Greenspan v. ADT Sec. Servs.*, 444 Fed. Appx. 566 (3d Cir. 2011) (eighteen months between certification and this Court's decision).

litigation to delay this case for an interlocutory appeal that would have minimal precedential value. Accordingly, GSK respectfully requests that the Court deny Plaintiffs' petition.

DATED: January 6, 2014

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

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

Dated: January 6, 2014 /s/ Joseph E. O'Neil

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of janaury, 2014, I caused to be served via ECF Filing and/or overnight delivery a true and correct copy of the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(B)** on the following counsel:

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Exhibit A

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.

Exhibit B

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

A[redacted] S[redacted], a Minor, by SALLEE MILLER, Guardian, and SALLEE MILLER, Individually	:	
Plaintiffs,	:	
vs.	:	**Civil Action No.:**
SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE	:	
Defendants.	:	

NOTICE OF REMOVAL

Defendant GlaxoSmithKline LLC, formerly SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK"), named defendant in the above-captioned matter, pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, hereby removes this case from the Court of Common Pleas of Philadelphia County, Pennsylvania, to the United States District Court for the Eastern District of Pennsylvania, respectfully showing as follows:

1.

On or about September 30, 2011, Plaintiffs A[redacted] S[redacted] and Sallee Miller ("Plaintiffs") filed a Civil Action Short-Form Complaint ("Short-Form Complaint") in the consolidated Paxil Pregnancy litigation before the Honorable Arnold L. New in the Philadelphia Court of Common Pleas Mass Tort Program, In re Paxil Pregnancy Cases, February Term 2007, No. 3220 ("Paxil Pregnancy MTP").[1]

[1] Pursuant to Case Management Order No. 1 in the Paxil Pregnancy MTP, all newly filed cases in the Philadelphia Court of Common Pleas are initiated by the filing of a Writ of Summons or a Short-Form Complaint. Short Form Complaints filed in the Paxil Pregnancy MTP incorporate by reference the Plaintiff's General Master Long-Form Complaint ("Long-Form Complaint"), filed on March 7, 2007. (See Long-Form Complaint, ¶ 1.) (See

2.

Plaintiffs' Short-Form Complaint initiated the civil action styled A[redacted] S[redacted], a Minor, by Sallee Miller, Guardian and Sallee Miller, Individually v. SmithKline Beecham Corporation, September Term 2011, No. 003686.

3.

Plaintiffs' Short-Form Complaint asserts claims predicated on Sallee Miller's alleged use of Paxil®, paroxetine hydrochloride ("Paxil"), a prescription medication manufactured by GSK and approved by the United States Food and Drug Administration ("FDA").

4.

As shown below, this Court has original subject matter jurisdiction over this civil action pursuant to 28 U.S.C. § 1332, and the action may be removed to this Court under 28 U.S.C. §1441 because there is complete diversity of citizenship between Plaintiffs and GSK and the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs.

5.

By filing this Notice of Removal, GSK does not waive any jurisdictional or other defenses that might be available to it.

6.

Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of all process, pleadings, and accompanying documents served on GSK are attached hereto as "Exhibit B", which is incorporated herein by reference.

Long-Form Complaint, ¶ 1) (attached as Exhibit A).

PROCEDURAL HISTORY

7.

GSK was served with Plaintiffs' Short-Form Complaint on October 19, 2011.

8.

On October 24, 2011, GSK timely removed this case to the United States District Court for the Eastern District of Pennsylvania.

9.

GSK removed this case on the grounds that complete diversity existed between the parties and that, because GSK is a citizen of the State of Delaware, the resident-defendant rule did not bar removal. *See* October 24, 2011 Notice of Removal, Case No. 11-6641.

10.

Plaintiffs' case was initially assigned to Judge Mary A. McLaughlin. On November 17, 2011, Chief Judge J. Curtis Joyner entered an order consolidating Plaintiffs' case with other cases that GSK had removed on the same grounds. The consolidated cases were assigned to Judge Timothy J. Savage for the purpose of deciding motions to remand.

11.

On December 14, 2011, Judge Savage entered an order remanding Plaintiffs' case. See Patton v. SmithKline Beecham Corp., 2011 U.S. Dist. LEXIS 143724 (E.D. Pa. Dec. 14, 2011).[2] Judge Savage held that GSK is a citizen of Pennsylvania and that the its removal of the case was barred by the resident-defendant rule. See id. at *17-18.

[2] Plaintiffs' case was one of nine cases that were subject to the remand order in Patton. Prior to Patton, Judge Savage remanded other cases in which GSK is a defendant on the same grounds in Maldonado v. SmithKline Beecham Corp., 841 F. Supp. 2d 890 (E.D. Pa. 2011) and Brewer v. SmithKline Beecham Corp., 774 F. Supp. 2d 721 (E.D. Pa. 2011).

12.

Shortly thereafter, three judges of this District reached conflicting decisions on the question of GSK's citizenship, and the issue was certified to the Third Circuit for interlocutory appeal. See Johnson v. SmithKline Beecham Corp. et al., 853 F. Supp. 2d 487, 491 (E.D. Pa. 2012).

13.

On June 7, 2013, the Third Circuit held that GSK is a citizen of Delaware. Lucier v. SmithKline Beecham Corp., --- F.3d ---, 2013 WL 2456043, at *17 (3d Cir. June 7, 2013).[3]

DIVERSITY OF CITIZENSHIP

14.

Defendant GSK is a limited liability company. The sole member of Defendant GSK is GlaxoSmithKline Holdings (Americas) Inc. ("GSK Holdings"), a Delaware corporation with its principal place of business in Delaware. Under the Third Circuit's decision in Lucier, accordingly, GSK is a Delaware citizen.[4]

15.

At the time this action was commenced, Plaintiffs were citizens and residents of the State of Pennsylvania. (Short-Form Complaint, ¶ 2.)

16.

Therefore, complete diversity of citizenship exists between Plaintiffs and Defendant GSK.

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[3] The interlocutory appeal heard by the Third Circuit involved plaintiffs Glenda Johnson and Steve Lucier. While the district court issued its decision under the name Johnson, the Third Circuit issued its decision under the name Lucier. Accordingly, all subsequent references in this Notice of Removal are to Lucier.

[4] Because SmithKline Beecham Corporation converted into GlaxoSmithKline LLC, SmithKline Beecham Corporation is a nominal party whose citizenship is disregarded for purposes of diversity jurisdiction, and only the citizenship of GlaxoSmithKline LLC is relevant. See Lucier, 2013 WL 2456043, at *15-16.

RESIDENT-DEFENDANT RULE

17.

Removal of this action is not barred by the resident-defendant rule set forth in 28 U.S.C. § 1441(b) because GSK is not a citizen of Pennsylvania (the state in which this action was brought), but rather is a citizen of Delaware. See Lucier, 2013 WL 2456043, at *17.

AMOUNT-IN-CONTROVERSY

18.

Plaintiffs assert claims against GSK under the following fifteen theories: (1) breach of express warranty; (2) breach of implied warranty; (3) fraud; (4) intentional infliction of emotional distress; (5) loss of consortium; (6) negligence; (7) negligence *per se*; (8) negligent pharmacovigilance; (9) failure to warn; (10) negligent misrepresentation; (11) punitive damages; (12) strict products liability; (13) loss of income; (14) medical expenses; and (15) design defect. Each cause of action seeks damages for injuries allegedly caused by ingestion of Paxil. (Short-Form Complaint, ¶ 7.)

19.

The Short-Form Complaint alleges that Sallee Miller took Paxil while she was pregnant with A[redacted] S[redacted] (See id. at ¶ 3.)

20.

Plaintiffs allege that Sallee Miller's ingestion of Paxil caused A[redacted] S[redacted] to develop a congenital birth defect. (See id. at ¶ 5.)

21.

Plaintiffs allege that as a direct and proximate result of Sallee Miller's ingestion of Paxil, A[redacted] S[redacted] suffered and will continue to suffer physical injury and has sustained economic

damages, including medical expenses, loss of earnings and earning capacity, loss of enjoyment of life, and shortened life expectancy. (See Long-Form Complaint, ¶¶ 103-05, 110).

22.

Plaintiffs further allege that A[redacted]S[redacted] has and continues to suffer economic damage in the form of pain and suffering, mental anguish, embarrassment and humiliation, disfigurement, and permanent and ongoing psychological damage. (See id. at ¶¶ 103-05, 107-09.) According to the Third Circuit, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience' constitutes the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." Nelson v. Keefer, 451 F.2d 289, 294 (3d Cir. 1971), quoted in Ciancaglione v. Sutherlin, No. Civ.A.04-CV-2249, 2004 WL 2040342, *3 (E.D. Pa. Sept. 13, 2004).

23.

Plaintiffs allege that GSK's actions were "performed willfully, intentionally, and with reckless disregard for the rights of Plaintiffs and the public" such that they are entitled to punitive or exemplary damages. (See Long Form Complaint, ¶¶ 114-15; see also Short-Form Complaint, ¶ 7.)

24.

Plaintiffs selected "More than $50,000" as the amount-in-controversy on the Civil Cover Sheet filed with their Short Form Complaint. Where a complaint does not limit its request to a precise monetary amount, the district court makes "an independent appraisal of the value of the claim." Angus v. Shiley, Inc., 989 F.2d 142, 146 (3d Cir. 1993). In such a case, the party seeking removal need only demonstrate by a preponderance of the evidence that the amount-in-controversy exceeds $75,000.00. Frederico v. Home Depot, 507 F.3d 188, 194-96 (3d Cir.

2007). The amount-in-controversy may be evidenced by demonstrating that the claims, as asserted in the plaintiff's complaint, are likely above the jurisdictional minimum. See id. at 197.

25.

Claims similar to those asserted by Plaintiffs have been held to establish, on their face, that the amount-in-controversy exceeds the jurisdictional requirement. See, e.g., Masterson v. Apotex Corp., 07-61665-CIV, 2008 WL 2047979, *3 (S.D. Fla. May 13, 2008) (in case alleging birth defects caused by generic paroxetine, court concluded that sufficient evidence existed that the amount-in-controversy exceeded $75,000 based upon allegations in complaint of congenital birth defects and "pain and suffering, mental anguish, embarrassment, humiliation, disfigurement, loss of enjoyment of the pleasure of life, as well as past and future general and specific damages, including future medical care" arising from the birth defects); Phillips v. Severn Trent Envtl. Servs., Inc., No. 07-3889, 2007 WL 2757131, *2 (E.D. La. Sept. 19, 2007) (amount-in-controversy requirement of $5 million, per CAFA, met in class action based upon size of class and "categories of serious damages", including birth defects, mental anguish, and present and future medical expenses); see also Varzally v. Sears, Roebuck & Co., 09-CV-6137, 2010 WL 3212482, *2 (E.D. Pa. July 30, 2010) (allegations in product liability complaint met amount-in-controversy requirement because a "reasonable reading of plaintiff's claims suggests that he could recover in excess of $75,000 for damages sustained as a result of ongoing 'medical problems'").

26.

In other cases involving allegations of congenital defects, juries in Pennsylvania and other jurisdictions nationwide have awarded plaintiffs in excess of $75,000 in damages. See, e.g., White v. Behlke, No. 03 CV 2663 (Pa. Com. Pl., 45th Judicial Dist., Lackawanna Co. Nov.

17, 2008) (awarding $20.5 million in damages for birth defects caused by defendant doctor's malpractice); see also Estrada v. Univ. of South Fla. Board of Trustees, No. 06-CA-000625 (Fla. Cir., Hillsborough Co. July 23, 2007) (awarding $23.55 million in damages as a result of a doctor's malpractice that resulted in plaintiff's child being born with birth defects); McCarell v. Hoffman-LaRoche Inc., No. ATL-L-1951-03-MT (N.J. Super., Atlantic Co., May 29, 2007) (awarding $2.619 million as a result of the defendant manufacturer's alleged failure to adequately warn about the risk of birth defects associated with its acne drug); Lindstrom v. Han, No. 1994-L-013821 (Ill. Cir., Cook Cnty. March 20, 2000) (awarding $4,502,312 verdict for doctor's negligent treatment of plaintiff during the first trimester of pregnancy, which caused child to be born with a birth defect); Tobin v. Astra Pharmaceutical, Inc., No. 88-0350-L(CS) (D. Ky. March 8, 1991) (awarding $4,508,399 to compensate plaintiff for congestive heart failure and heart transplant allegedly caused by use of defendant's prescription medication during pregnancy).

27.

Given the nature and extent of Plaintiffs' injuries and damages as alleged in the Short-Form Complaint, the amount-in-controversy exceeds $75,000.00, exclusive of interests and costs. See Angus, 989 F.2d at 146 ("[T]he amount in controversy is not measured by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated."); State Farm Mut., Auto. Ins. Co. v. Tz'doko V'CHESED of Klausenberg, 543 F. Supp. 2d 424, 432 n.5 (E.D. Pa. 2008) (same).

REMOVAL IS TIMELY

28.

The first paragraph of Section 1446(b) provides that "[t]he 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] 28 U.S.C. § 1446(b).

The second paragraph of Section 1446(b) provides that "[i]f 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 more than 1 year after commencement of the action."

The removal here is timely under both paragraphs of Section 1446 and is supported by closely analogous Third Circuit precedent.

29.

First, removal of Plaintiffs' case is timely under the first paragraph of 28 U.S.C. § 1446(b). Plaintiffs' initial pleading — the complaint — was removable. GSK timely removed this case within 30 days after service of the initial pleading. See supra, ¶¶ 7-8. GSK is also filing this notice of removal within 30 days after the Third Circuit's decision in Lucier, which establishes that the case was incorrectly remanded to state court. Courts have held that removal is timely when a defendant's first removal was proper, the case was later remanded, and the defendant removed the case for a second time within 30 days when grounds for removal existed

[5] Because Plaintiffs' case was commenced in state court before January 6, 2012, the removal amendments enacted by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 do not apply here, and citations are to the version of 28 U.S.C. § 1446(b) in force in 2011 when Plaintiffs' case was commenced. *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).

again. See, e.g., Williams v. Ford Motor Co., No. 1:12-cv-108, 2012 U.S. Dist. LEXIS 160202, at *3-4 (E.D. Mo. Nov. 8, 2012) (denying motion to remand case which, over the course of twenty-five months, was removed upon receipt of the initial pleading, remanded, and then removed for a second time and in which the defendant argued that "it removed the case within 30 days of both the initial pleading and the dismissal of the sole non-diverse defendant" and therefore was "in compliance with the requirements of § 1446(b)"); Lassila v. Werner Co., 78 F. Supp. 2d 696, 698-99 (W.D. Mich. 1999) (rejecting argument that "the 30-day deadline provides an overarching time limit upon the defendant's ability to remove, rather than merely requiring defendant to file notice of removal within 30 days after the action meets the requirements for removal" and holding that case was properly removed which, over the course of fourteen months, was removed upon receipt of the initial pleading, remanded, and then removed for a second time within 30 days of diversity being restored); Leslie v. Banctec Service Corp., 928 F. Supp. 341, 347 n.6 (S.D.N.Y. 1996) (second removal timely where, over the course of fifteen months, the defendant removed the case when the initial pleading was received, filed an amended notice of removal promptly when the basis of federal jurisdiction applicable to the original removal changed, and then removed the case for a second time within 30 days of receiving correspondence showing that the case had been erroneously remanded because "all three notices were filed within the thirty day deadline").

30.

Additionally, courts have held that where, as here, a second notice of removal serves only to amplify the grounds for removal already stated in the original notice, the contents of the second notice of removal relate back to the filing date of the first notice of removal. See, e.g., USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 205-06 (3d Cir. 2003) (district court did not abuse

its discretion by permitting amendment of notice of removal that "did not add new jurisdictional facts and did not rely on a basis of jurisdiction different from that originally alleged" but simply "amplified" the bases in the original notice); Godonou v. Rondo, Inc., No. 12-2113, 2012 U.S. Dist. LEXIS 75676, at *2-3 (E.D. Pa. May 31, 2012) (permitting party who timely removed case to amend its notice of removal after expiration of the 30-day period in order to clarify bases for removal); Xia Zhao v. Skinner Engine Co., No. 11-7514, 2012 U.S. Dist. LEXIS 68854, at *7-9 (E.D. Pa. May 16, 2012) (same); Monica v. Accurate Lift Truck, No. 10-730, 2010 U.S. Dist. LEXIS 40480, at *6-7 (E.D. Pa. Apr. 20, 2010) (same).

31.

Here, GSK's second notice of removal is, in effect, an amendment of its original timely filed notice, different only in that it adds the Lucier case as additional (and dispositive) support to amplify the bases for removal in its original notice (i.e., that GSK is a citizen of Delaware). Accordingly, this second notice is timely under the first paragraph of § 1446(b) because it relates back to the original notice.

32.

Removal under the first paragraph of Section 1446(b) is not barred by the provision in the second paragraph that states: "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [diversity jurisdiction] more than 1 year after commencement of the action." Where, as here, the case was initially removable (and, in fact, was removed), the one-year rule does not apply because, on the face of Section 1446(b), the rule only applies "[i]f the case stated by the initial pleading ***is not initially removable***." 28 U.S.C. § 1446(b) (emphasis added); see, e.g., Brown v. Tokio Marine Fire Ins. Co., 284 F.3d 871 (8th Cir. 2002) (agreeing with the three other circuits that had addressed the issue that "rules of usage and statutory

construction lead inevitably to the conclusion that the one-year limitation period modifies only the second paragraph of § 1446(b), and therefore only applies to cases that were not removable to federal court when originally filed"); Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 534-35 (6th Cir. 1999) ("If Congress had intended to place a one-year limitation on removal of all diversity cases, it surely would have chosen less obscure and counter-intuitive wording to accomplish that purpose. . . [w]e hold that the one-year limitation on removal of diversity cases applies only to those that were not initially removable . . . ."); New York Life Ins. Co. v Deshotel et al., 142 F.3d 873, 886 (5th Cir. 1998) ("Courts applying the one-year limitation to the first paragraph of Section 1446(b) can do so only by distorting its ordinary meaning. . . [t]hey, in effect, must rewrite the statute. For if the statute is read as written, it is not plausible that Congress intended to affect the statement of the first paragraph by creating an exception to that made by the second paragraph."); Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1316-17 (9th Cir. 1998) ("The first paragraph of § 1446(b) addresses a defendant's right to promptly remove when he is served. The second paragraph addresses a defendant's right to remove beyond the initial period of 30 days, if the case only becomes removable sometime after the initial commencement of the action. Only the latter type of removal is barred by the one-year exception. . . if Congress had intended the except clause to apply to both paragraphs of § 1446(b), it could easily have accomplished that result without requiring readers of the statute to rely on exotic grammatical usage."); Hannah v. Am. Home Prods. Corp., No. 03-20376, 2004 U.S. Dist. LEXIS 12239, at *13 (E.D. Pa. June 18, 2004) (rejecting argument that removal of case based on diversity jurisdiction more than two years after filing of complaint was untimely and holding that removal was not barred by the one-year limit in 28 U.S.C. § 1446(b) because the case stated by the initial pleading was removable).

33.

Applying this reasoning, courts have held that the one-year provision in the second paragraph of 28 U.S.C. § 1446(b) does not bar a defendant from removing a case on the basis of diversity jurisdiction a second time after more than one year if the case was removable based on its initial pleading. See, e.g., Darnell v. Hoelscher Inc., No. 11-cv-449-JPG-PMF, 2011 U.S. Dist. LEXIS 65036, at *10-11 (S.D. Ill. June 20, 2011) (case properly removed on basis of diversity jurisdiction a second time more than one year after complaint was filed because the case stated by the initial pleading was removable and the one-year limit in 28 U.S.C. § 1446(b) therefore did not apply); Williams, 2012 U.S. Dist. LEXIS 160202, at *3-4 (same); Lassila, 78 F. Supp. 2d at 698-699 (same); Leslie, 928 F. Supp. at 346-47 (S.D.N.Y. 1996) (same).

34.

Courts have further reasoned that the amendments to 28 U.S.C. § 1446(b) enacted by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (while not applicable here, *see supra* at ¶ 28 n.3) provide further evidence that Congress did not intend the one-year limitation to apply to a case that is removable based on its initial pleading under § 1446(b) because the amendments remove the one-year limit from § 1446(b) and place it in a new, separate subsection that is codified at 28 U.S.C. § 1446(c)(1). See, e.g., LaPosta v. Lyle, No. 5:11CV177, 2012 U.S. Dist. LEXIS 67898, at*10-15 (N.D. W.Va. May 16, 2012) (analyzing the version of § 1446(b) that pre-dated the amendments, concluding that "no reasonable interpretation of the statute could lead to a conclusion that the one-year limitation applies to cases which were removable from the time of their filing," and further reasoning that the amendments "work[ed] to clarify Congress's original intent regarding the one-year rule, as it shows that the limitation has no application to cases removed under the first paragraph of § 1446, or what is now § 1446(b)(1) under the

amended version of the statute"); Selman v. Pfizer, Inc., No. 11-cv-1400-HU, 2011 U.S. Dist. LEXIS 145019, at *12-13 (D. Or. Dec. 16, 2011) (noting that "cases that are removable at the commencement of a lawsuit are analyzed under the first paragraph of § 1446(b) and are not affected by the one-year time limit set forth in the second paragraph" and that "Congress's recent amendment to § 1446 separates the two paragraphs of § 1446(b) into distinct subsections, thereby clarifying that the one-year time limit indeed applies only to cases that are not removable based on their initial pleadings.").

35.

Second, and alternatively, the removal of Plaintiffs' case is timely even if it is governed by the second paragraph of 28 U.S.C. § 1446(b). Under the second paragraph, GSK would have a new 30-day window within which to remove the case because the Third Circuit's decision in Lucier that GSK is a citizen of Delaware constitutes an order "from which it may first be ascertained that the case is or has become removable."

36.

The Third Circuit's opinion in Doe v. American Red Cross, 14 F.3d 196 (3d Cir. 1993), supports the removal of Plaintiffs' case because the Third Circuit's holding in Lucier establishes that GSK's first removal of Plaintiffs' case was proper. At issue in Doe were cases that were originally filed in the Philadelphia Court of Common Pleas, removed to the Eastern District of Pennsylvania, remanded to the Philadelphia Court of Common Pleas, and that the defendant sought to remove a second time to the Eastern District of Pennsylvania. 14 F.3d at 197-98. The Third Circuit held that the defendant's second removal was timely and proper under the second paragraph of § 1446(b) because a higher court had held in another case in which the defendant was a party, and in which the defendant asserted the same basis for removal, that the case was

properly in federal court. See id. at 198-99.

37.

As the Third Circuit made clear in Lucier, there is no longer any doubt that GSK is a Delaware citizen. Thus, this case was incorrectly remanded to state court, and as in Doe, a subsequent legal decision (i.e., Lucier) established that the case is now removable.

38.

Decisions from other jurisdictions are in accord. See, e.g., Green v. R.J. Reynolds Tobacco Co., 274 F.3d 263, 267-68 (5th Cir. 2001) (district court properly denied motion to remand case that had been previously remanded and was removed a second time after the Fifth Circuit ruled in another case involving the same defendant that the grounds for the first removal were proper) (citing Doe); Young v. Chubb Group of Ins. Cos., 295 F. Supp. 2d 806, 807-08 (N.D. Ohio 2003) (denying motion to remand case that was removed a second time after the Sixth Circuit ruled in another case involving the same defendant that the grounds for the first removal were proper and rejecting the plaintiff's argument that the second removal was improper as "without merit") (citing Doe).[6]

39.

Even if this case was somehow "not removable" when originally served and removed, the one-year limit in the second paragraph of 28 U.S.C. § 1446(b) should not apply because it would be fundamentally unfair to enforce it under the circumstances here. See, e.g., In re Asbestos Prods. Liab. Litig., 673 F. Supp. 2d 358, 364 (E.D. Pa. 2009) (noting that the Third Circuit has held that the one-year limit is a procedural bar, not jurisdictional, thereby "open[ing] the door to

[6] Because federal jurisdiction in Doe was not on premised on diversity jurisdiction, Doe did not address whether the one-year rule would apply. Nor did Doe address the separate question of whether the case was initially removable. See Doe, 14 F.3d at 198 (explaining that its holding was based on an interpretation of the term "order" in § 1446(b) and that "[i]t is not necessary for us to go any further; it is not necessary for us to interpret any language in Section 1446(b) other than the term 'order'").

an examination of equitable considerations in deciding whether to allow exceptions to the one year limitation on removal") (citing Ariel Land Owners v. Dring, 351 F.3d 611, 616 (3d Cir. 2003)). GSK respectfully submits that an equitable exception is warranted here given the unusual status of these cases. Cf. id. at 365 (declining to apply an equitable exception because the court found that, unlike GSK, "the defendants were content to let the cases languish in state court, failing to use all procedural devices available to facilitate compliance with the one year requirement of § 1446(b)") (internal quotation omitted).

40.

As the Third Circuit made clear in Lucier, this case was initially removable, and was, in fact, properly and timely removed, and was incorrectly remanded. Under those unusual circumstances, it is both arbitrary and unfair to impose the one-year time limit simply because it took the district and appellate courts more than a year after the case was filed to settle the question of GSK's citizenship.

41.

It is also important to note that GSK removed twenty-one other cases from Pennsylvania state court to this District that were stayed once the issue of GSK's citizenship was certified to Third Circuit. These stayed cases, plus another nine cases that were removed for the first time after the Third Circuit issued its opinion in Lucier, will now undoubtedly go forward in federal court.[7] There is no equitable reason why this case, which GSK timely and properly removed on

[7] See Yeatts v. SmithKline Beecham Corp. et al., No. 11-6711 (Mar. 29, 2012 Order, Dkt. # 58) (staying case pending the Third Circuit's decision in Johnson); Murray v. SmithKline Beecham Corp. et al., No. 11-3510 (Mar. 29, 2012 Order, Dkt. # 89) (staying case pending the Third Circuit's decision in Johnson); Plascencia v. GlaxoSmithKline LLC, No. 12-1005 (Apr. 2, 2012 Order, Dkt. # 13) (staying case pending the Third Circuit's decision in Johnson); Martinez v. GlaxoSmithKline LLC, No. 12-1003 (Apr. 10, 2012 Order, Dkt. # 12) (staying case pending the Third Circuit's decision in Johnson); Minor v. GlaxoSmithKline LLC, No. 12-1004 (Apr. 11, 2012 Order, Dkt. # 20) (staying case pending the Third Circuit's decision in Johnson); Yazzie v. GlaxoSmithKline LLC, No. 12-1006 (Apr. 12, 2012 Order, Dkt. # 24) (staying case pending the Third Circuit's decision in Johnson); McCraw v. GlaxoSmithKline LLC, No. 12-2119 (Apr. 27, 2012 Order, Dkt. # 7) (staying case pending the Third

October 24, 2011, and which was remanded by Judge Savage prior to the Third Circuit's decision in Lucier, should be situated any differently than those cases now pending in the Eastern District of Pennsylvania.[8]

THE REQUIREMENTS OF §§ 1332, 1441, AND 1446 HAVE BEEN MET

42.

This Court has jurisdiction over this matter based on diversity of citizenship pursuant to 28 U.S.C. § 1332, and removal of this action to this Court is not barred by the resident-defendant rule set forth in 28 U.S.C. § 1441(b) because GSK is not a citizen of Pennsylvania. See Lucier,

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Circuit's decision in Johnson); Spence v. Avantor Performance Materials et al., No. 12-4542 (Aug. 22, 2012 Order, Dkt. # 16) (staying case pending the Third Circuit's decision in Johnson); Trahan v. SmithKline Beecham Corp., No. 12-5413 (Sept. 27, 2012 Order, Dkt. # 7) (staying case pending the Third Circuit's decision in Johnson); Lyng v. SmithKline Beecham Corp., No. 12-5414 (Sept. 27, 2012 Order, Dkt. # 7) (staying case pending the Third Circuit's decision in Johnson); Johnson v. GlaxoSmithKline LLC, et al., No. 12-5455 (Oct. 15, 2012 Order, Dkt. # 18) (staying case pending the Third Circuit's decision in Johnson); Gunn v. Avantor Performance Materials, et al., No. 12-6431 (Dec. 12, 2012 Order, Dkt. # 19) (staying case pending the Third Circuit's decision in Johnson); Charleston v. Avantor Performance Materials, et al., No. (Jan. 11, 2013 Order, Dkt. # 24) (staying case pending the Third Circuit's decision in Johnson); Weitzel v. SmithKline Beecham Corp., No. 13-806 (Feb. 15, 2013 Order, Dkt. # 4) (staying case pending the Third Circuit's decision in Johnson); Rodriguez v. SmithKline Beecham Corp., No. 13-1504 (Apr. 18, 2013 Order, Dkt. # 8) (staying case pending the Third Circuit's decision in Johnson); Copley v. SmithKline Beecham Corp., No. 13-1505 (Apr. 18, 2013 Order, Dkt. # 8) (staying case pending the Third Circuit's decision in Johnson); Dixon v. SmithKline Beecham Corp., No. 13-1506 (Apr. 18, 2013 Order, Dkt. # 8) (staying case pending the Third Circuit's decision in Johnson); Warden v. SmithKline Beecham Corp., No. 13-1507 (Apr. 18, 2013 Order, Dkt. # 8) (staying case pending the Third Circuit's decision in Johnson); Spataro v. SmithKline Beecham Corp., No. 13-1389 (May 1, 2013 Order, Dkt. #11) (staying case pending Third Circuit's decision in Johnson); Joaquin v. SmithKline Beecham Corp., No. 13-2530 (May 24, 2013 Order, Dkt. # 8); Paga v. SmithKline Beecham Corp., No. 13-2531 (May 24, 2013 Order, Dkt. # 8) (staying case pending the Third Circuit's decision in Johnson); Lastly v. SmithKline Beecham Corp., No. 13-2532 (May 24, 2013 Order, Dkt. # 8) (staying case pending the Third Circuit's decision in Johnson); Carter v. SmithKline Beecham Corp., No. 13-3386 (June 18, 2013 Notice of Removal, Dkt. # 1); Shaw v. SmithKline Beecham Corp., No. 13-3387 (June 18, 2013 Notice of Removal, Dkt. # 1); Benge v. SmithKline Beecham Corp., No. 13-3388 (June 18, 2013 Notice of Removal, Dkt. # 1); Carter v. SmithKline Beecham Corp., No. 13-3389 (June 18, 2013 Notice of Removal, Dkt. # 1); Ravenel v. SmithKline Beecham Corp., No. 13-3990 (June 18, 2013 Notice of Removal, Dkt. # 1); Nelson v. SmithKline Beecham Corp., No. 13-3391 (June 18, 2013 Notice of Removal, Dkt. # 1); Ligon v. SmithKline Beecham Corp., No. 13-3392 (June 18, 2013 Notice of Removal, Dkt. # 1); Springel v. SmithKline Beecham Corp., No. 13-3393 (June 18, 2013 Notice of Removal, Dkt. # 1); Santana v. SmithKline Beecham Corp., No. 13-3394 (June 18, 2013 Notice of Removal, Dkt. # 1).

[8] With the notices of removal filed today, no cases remain in the Paxil Pregnancy MTP. Before today, only nine cases, including this one, were pending in the Paxil Pregnancy MTP. GSK initially removed all of these cases within 30 days of service of the initial pleadings, but then Judge Savage remanded each of them before the Third Circuit issued its opinion settling the district split in Lucier. GSK is filing notices of removal in all nine cases today.

2013 WL 2456043, at *17; White, 2010 U.S. Dist. LEXIS 79520, at *8-9; Hoch, 736 F. Supp. 2d at 221. Removal is both timely and appropriate under § 1446(b).

43.

The United States District Court for the Eastern District of Pennsylvania is the federal judicial district encompassing the Court of Common Pleas of Philadelphia County, Pennsylvania, where Plaintiffs originally filed this suit such that this is the proper federal district for removal of this case to federal court. See 28 U.S.C. § 1441(a).

44.

Accordingly, the present lawsuit may be removed from the Court of Common Pleas of Philadelphia County, Pennsylvania, and brought before the United States District Court for the Eastern District of Pennsylvania, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446.

45.

Pursuant to 28 U.S.C. § 1446(d), GSK will promptly file a copy of this Notice of Removal with the Prothonotary of the Court of Common Pleas of Philadelphia County, Pennsylvania, and will serve a copy of same upon counsel for Plaintiffs.

46.

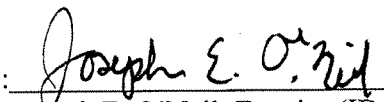
GSK reserves the right to amend or supplement this Notice of Removal.

WHEREFORE, GSK prays that this Notice of Removal be filed; that said action bearing docket number September Term 2011, 003686, from the Court of Common Pleas of Philadelphia County, Pennsylvania, be removed to and proceed in this Court; and that no further proceedings be had in said case in the Court of Common Pleas of Philadelphia County, Pennsylvania.

This 26th day of June, 2013.

Respectfully submitted,

LAVIN O'NEIL RICCI CEDRONE & DISIPIO

By: 

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Attorneys for Defendant GlaxoSmithKline LLC, formerly SmithKline Beecham Corporation d/b/a GlaxoSmithKline

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a copy of the foregoing **NOTICE OF REMOVAL** by depositing a copy of the same in the U.S. Mail, first-class, postage prepaid, and addressed as follows:

Adam D. Peavy, Esquire
W. Harris Junell, Esquire
T. Scott Allen, Esquire
Bailey Perrin Bailey
440 Louisiana Street, Suite 2100
Houston, TX 77002

Rosemary Pinto, Esquire
Feldman & Pinto
1604 Locust Street, FL 2R
Philadelphia, PA 19103

This 26th day of June, 2013.

Carolyn L. McCormack, Esquire

Exhibit C

KAYLEA GUDDECK, et al. v. SMITHKLINE BEECHAM CORP. d/b/a GLAXOSMITHKLINE

CIVIL ACTION NO. 13-3696

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2013 U.S. Dist. LEXIS 103904

July 24, 2013, Decided
July 24, 2013, Filed

SUBSEQUENT HISTORY: Motion granted by, Transferred by *Guddeck v. Smithkline Beecham Corp., 2013 U.S. Dist. LEXIS 115069 (E.D. Pa., Aug. 14, 2013)*

PRIOR HISTORY: *Patton v. SmithKline Beecham Corp., 2011 U.S. Dist. LEXIS 143724 (E.D. Pa., Dec. 14, 2011)*

COUNSEL: [*1] For KAYLEA GUDDECK, A MINOR, BY JULIE GUDDECK, GUARDIAN, JULIE GUDDECK, INDIVIDUALLY, Plaintiffs: ADAM D. PEAVY, T. SCOTT ALLEN, W. HARRIS JUNELL, LEAD ATTORNEYS, BAILEY PERRIN BAILEY, HOUSTON, TX; ROSEMARY PINTO, LEAD ATTORNEY, FELDMAN & PINTO PC, PHILADELPHIA, PA.

For SMITHKLINE BEECHAM CORPORATION, doing business as GLAXOSMITHKLINE, Defendant: JOSEPH E. O'NEIL, LEAD ATTORNEY, CAROLYN L. MCCORMACK, LAVIN, O'NEIL, RICCI, CEDRONE & DISIPIO, PHILADELPHIA, PA.

JUDGES: Harvey Bartle III, J.

OPINION BY: Harvey Bartle III

OPINION

MEMORANDUM

Bartle, J.

Plaintiffs Kaylea Guddeck, a minor, as well as her mother and guardian Julie Guddeck have sued defendant SmithKline Beecham Corp. [1] ("GSK") for personal injuries allegedly suffered as a result of Julie Guddeck's ingestion of defendant's anti-depressant drug Paxil during her pregnancy. Plaintiffs assert that the drug caused Kaylea Guddeck to have a critical neural tube defect necessitating major surgery. They have claims for negligence, breach of warranty, and strict liability. Before the court is the motion of plaintiffs to remand this action to the Court of Common Pleas of Philadelphia County.

1 The current name of the defendant is GlaxoSmithKline, LLC.

This case has had a protracted [*2] procedural history. It was originally filed in the state court on September 30, 2011 and then timely removed based on diversity of citizenship. It was randomly assigned to the undersigned. [2] This was one of a number of similar Paxil actions against GSK which had been removed and assigned to various judges of this court. Plaintiffs thereafter filed a motion to remand in this and other similarly situated cases. On November 17, 2011, then Chief Judge J. Curtis Joyner consolidated the cases

before Judge Timothy J. Savage for the purpose of deciding the remand motions. Judge Savage granted the motions in this and other cases on December 14, 2011 on the ground that GSK was a Pennsylvania citizen and that removal by an in-state defendant was improper under *28 U.S.C. § 1441(b)(2)*. [3] *Patton ex rel. Daniels-Patton v. SmithKline Beecham Corp., 2011 U.S. Dist. LEXIS 143724, 2011 WL 6210724 (E.D. Pa. Dec. 14, 2011)*.

> 2 At that time, this lawsuit was filed as Civil Action No. 11-6645.
>
> 3 Title *28 U.S.C. § 1441(b)(2)* provides: A civil action otherwise removable solely on the basis of the jurisdiction under *section 1332(a)* of this title may not be removed if any of the parties in interest properly joined and served as defendants is [*3] a citizen of the State in which such action is brought.

Thereafter, Judge Paul Diamond in a similar action not consolidated before Judge Savage ruled that GSK was a Delaware citizen and that removal was proper. *Johnson v. SmithKline Beecham Corp., 853 F. Supp. 2d 487, 491 (E.D. Pa. 2012)*. [4] Since his decision conflicted with the decision of Judge Savage, Judge Diamond certified his interlocutory order to the Court of Appeals under *28 U.S.C. § 1292(b)*. The Court of Appeals permitted the appeal to be taken and, agreeing with Judge Diamond, held that GSK was a Delaware citizen and affirmed the removal of the action. *Johnson v. SmithKline Beecham Corp., 724 F.3d 337 , 2013 U.S. App. LEXIS 11501, 2013 WL 2456043 (3d Cir. June 7, 2013)* (hereinafter "Johnson").

> 4 Johnson was a personal injury action involving GSK's drug thalidomide.

On June 26, 2013, less than three weeks after Johnson was handed down by our Court of Appeals, GSK again removed this action from the Court of Common Pleas where it had been pending since it had been remanded in December 2011. Plaintiffs have now countered with their motion to remand.

Currently, there is no dispute that the parties are of diverse citizenship, that the amount in controversy [*4] exceeds $75,000 exclusive of interest and costs, and that GSK is not an in-state defendant. See *28 U.S.C. § 1332* and *§ 1441(b)(2)*. While *28 U.S.C. § 1441* allows for the removal of diversity actions where the defendant is not a citizen of the forum state, *§ 1446* provides the procedures for removal. The sole issue before the court is whether removal is barred under *28 U.S.C. § 1446(b)* as the section existed at the time this action was commenced [5] :

> (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 [*5] 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) (1996) (amended 2011).

> 5 The Federal Courts Jurisdiction and Venue Clarification Act of 2011 made changes with respect to removal in *§ 1446*. Pub. L. No. 112-63. Those amendments do not apply to this action which was begun prior to the effective date of this Act.

Plaintiffs contend that the current notice of removal is untimely. Plaintiffs maintain that the removal notice at issue here was not filed within thirty days after service of the complaint and that in any event removal is barred since it did not occur within one year after September 30, 2011, the date of the commencement of this action in the Court of Common Pleas.

GSK responds with several arguments. It first asserts that the action was timely removed in 2011, that this District Court improperly remanded it, and that it was

timely removed after Johnson was decided by the Court of Appeals. GSK further argues that the one year bar against removal is not applicable since the bar applies only when the case [*6] is not initially removable. According to GSK, the case was removable from the outset and indeed properly removed at that time as the subsequent analysis of the Court of Appeals in Johnson explains. Finally, GSK argues that under the circumstances it would be inequitable to remand.

The parties focus on *Doe v. American Red Cross, 14 F.3d 196, 200 (3d Cir. 1993)*. There, the District Court had remanded an action against the American Red Cross in which the plaintiff alleged he had contracted AIDS from contaminated blood transfusions. The court remanded on the ground that no federal question existed. It said it was doing so without prejudice to defendant's right to petition for re-removal. After remand, the Supreme Court, settling an issue that had long divided the courts, decided in a different action in which the Red Cross had been sued that the federal courts had original jurisdiction over suits against it because of the provisions of its Congressional charter. *American Nat'l Red Cross v. S.G., 505 U.S. 247, 257, 112 S. Ct. 2465, 120 L. Ed. 2d 201 (1992)*.

Within thirty days after the Supreme Court decision, the Red Cross filed a second removal notice in the District Court. Our Court of Appeals upheld the removal. [6] It concluded [*7] that the decision of the Supreme Court involving the same defendant and same factual scenario as in the case pending in the Eastern District of Pennsylvania was an "order" under *§ 1446(b)* from which the Red Cross first ascertained that the action in this court was removable. The Court of Appeals emphasized it was not discussing or construing any other language of *§ 1446*. *Doe, 14 F.3d at 198*.

6 The matter reached the Court of Appeals under *28 U.S.C. § 1292(b)*.

The Court in Doe further decided that a second removal was not barred by *§ 1447(d)* which, with exceptions not relevant here, provides that "an order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise ...." The Court also rejected the argument that a lawsuit once remanded can never again be removed. *Doe, 14 F.3d at 199-200*.

The Doe opinion does require that a second notice of removal must be based on a different ground than the first in order for a second removal to be proper. The Court ruled that the second notice of removal filed by the Red Cross was predicated on a different ground than the first because the second relied upon the Supreme Court decision, which it characterized [*8] as "a new and definitive source." *Doe, 14 F.3d at 200*.

GSK also cites *Brown v. Tokio Marine and Fire Insurance Co., 284 F.3d 871 (8th Cir. 2002)*, a diversity action involving a second removal notice. Plaintiff had been injured in an automobile accident while driving a car leased to her by her employer Toyota Motor Sales ("Toyota"). Plaintiff sued Toyota's insurer in state court. While diversity of citizenship existed, the insurer tried but failed to remove the action to federal court. Later, plaintiff added Toyota as a defendant. Toyota, as a diverse defendant, successfully removed the action. On appeal after conclusion of the action in the District Court, plaintiff argued that removal had occurred more than one year after the commencement of the action in violation of *§ 1446(b)*. Interpreting the statute, the Court of Appeals held that the one year limitation period did not apply because the action had originally been removable, that is, at the time when only plaintiff and Toyota's insurer had been parties. Three other circuits have also reached the same result that the one year bar applies only when the action was not originally removable. *Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1316-17 (9th Cir.)* [*9] cert. denied *525 U.S. 963, 119 S. Ct. 407, 142 L. Ed. 2d 330 (1998)*; *Johnson v. Heublein, Inc., 227 F.3d 236, 241 (5th Cir. 2000)*; *Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 534 (6th Cir. 1999)* cert. denied *528 U.S. 1076, 120 S. Ct. 790, 145 L. Ed. 2d 667 (2000)*. See also *Hannah v. American Home Prods. Corp., 2004 U.S. Dist. LEXIS 12239 (E.D. Pa. Jun. 18, 2004)*; *Roth v. CHA Hollywood Medical Center, 720 F.3d 1121, 2013 U.S. App. LEXIS 13224, 2013 WL 3214941 (9th Cir. Jun. 27, 2013)*. As the Court of Appeals stated in Brierly:

> Based upon ordinary language usage, the qualifying clause--"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" can only be interpreted to modify the antecedent clause to which it is attached, and not previous sections of the text. If Congress had intended to place a one-year limitation on removal of all

> diversity cases, it surely would have chosen less obscure and counter-intuitive wording to accomplish that purpose. In addition, the policy discussion found within the legislative history provides support for this interpretation.... We hold that the one-year limitation on removal of diversity cases applies only to those that were not initially [*10] removable ...."

Brierly, 184 F.3d at 534-35 (footnote omitted) (citations omitted).

We agree with statutory analysis of the Court of Appeals of the Fifth, Sixth, Eighth, and Ninth Circuits. Plaintiff cites no appellate cases to the contrary. Moreover, the subsequent amendments to *§ 1446(b)* by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 confirm this construction. The second paragraph of *§ 1446(b)* as it existed prior to the amendments has now been placed in a separate subsection and clearly has no applicability to what was contained in the first paragraph of *§ 1446(b)*. See, e.g., *§ 1446(b)(3)* & *(c)(1)*; *Selman v. Pfizer, Inc., 2011 U.S. Dist. LEXIS 145019 at 12-13 (D. Or. Dec. 16, 2011)*.

The parallels to Doe in the present case are striking. GSK removed this action in 2011 within thirty days after receipt of the complaint as permitted under the first paragraph of *§ 1446(b)*. Nonetheless, GSK was rebuffed by the District Court which, as it turned out, erroneously remanded the action to the state court. The Court of Appeals in Johnson in effect reversed the District Court, in this case by holding that GSK was a Delaware citizen and that the prohibition in *§ 1441(b)* against [*11] removal by an in-state defendant did not apply since GSK was not a Pennsylvania citizen. The Johnson decision involved not only the same defendant as in this action but also similar facts and legal issues. See *Doe, 14 F.3d at 203*. Further, Johnson provided a new and different ground for a second notice of removal. *Id. at 200*.

It cannot be denied that based on the Court of Appeals decision in *Johnson* GSK correctly removed the action to this court after it received a copy of the initial pleading, that is, the complaint in the state court action. The removal fulfilled all the requirements of the first paragraph of *§ 1446* and was not barred under *§ 1441(b)*. 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. There is nothing in Johnson stating that its application is to be prospective only. See *Doe, 14 F.3d at 201*. As explained in Doe, 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 [*12] same and both cases involve the same or a similar factual and legal scenario. That is exactly what happened here. *Id. at 202-03*. While Doe confined its analysis of *§ 1446(b)* to the term "order" in the section's second paragraph, [7] we see no reason why the Court of Appeals would not allow a second notice of removal pursuant to the first paragraph of *§ 1446(b)* under the circumstances presented.

> 7 The Court stated, "It is not necessary for us to go any further, it is not necessary for us to interpret any language in *Section 1446(b)* other than the term 'order.'" *Doe, 14 F.3d at 198*.

What GSK is doing with its second removal notice is simply effectuating what was a timely and proper first removal. This second removal notice was necessary through no fault of GSK and is permitted under the reasoning in *Doe*. We conclude that GSK has properly removed the action to this court under the first paragraph of *§ 1446(b)*.

Plaintiff relies on the second paragraph of *§ 1446(b)* to bar a second removal to this court and to compel remand to the Court of Common Pleas. That paragraph provides that "if the case stated by the initial pleading is not removable" any removal of a diversity action "more than one year [*13] after commencement of the action" is barred. The action was originally filed in the Court of Common Pleas on September 30, 2011. Although the action had been pending for more than one year before Johnson was decided and the second notice of removal was filed, the second paragraph of *§ 1446(b)* with its time limitation is not relevant because the action was initially removable as Johnson has made clear. See *Brown, 284 F.3d 871*.

The court need not reach the remaining arguments advanced by plaintiffs or by GSK. Accordingly, the motion of plaintiffs to remand this action to the Court of Common Pleas of Philadelphia County will be denied.

ORDER

AND NOW, this 24th day of July, 2013, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of plaintiffs to remand this action to the Court of Common Pleas of Philadelphia County (Doc. #4) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.

Exhibit D

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.

Exhibit E

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, v. SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE, Defendant	:	CIVIL ACTION NO. 13-3681

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 F

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 G

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	:	

MEMORANDUM

BUCKWALTER, S. J. October 9, 2013

Before the court is plaintiffs' motion to amend and certify order for interlocutory review pursuant to 28 U.S.C. § 1292(B).

Both parties agree as to the three matters this court must consider in determining whether to certify:

(1) Is a controlling question of law involved;

(2) Are there substantial grounds for differences of opinion; and

(3) Will an immediate appeal materially advance the ultimate determination of the litigation.

There is a controlling question of law which is whether remand is appropriate. With regard to this question there are substantial grounds for differences of opinion.

Where the motion of plaintiffs must fail is as to the third ground. I am not persuaded that an immediate appeal will materially advance the ultimate determination of the litigation.

The thrust of plaintiffs' argument in this regard, to quote from plaintiffs' brief, is that

certification "may save the parties and the judicial system a substantial amount of time and expense that would be needed for lengthy and costly pretrial and trial proceedings in federal court, revisiting of prior state court rulings and protocols, and then another lengthy and costly trial in state court, as set forth more fully above in the discussion of why the proposed question is a controlling question of law."

At oral argument, defendant disputed plaintiffs' position arguing essentially that, in the present posture of this case (although neither side has offered a definitive review of what that posture might be), the ultimate determination will not be materially advanced since most discovery has been completed, and but for Daubert issues in federal court, the case is close to trial.

Plaintiffs have not offered convincing arguments that somehow a determination of the controlling question relative to remand will materially advance the ultimate resolution of this case which is so close to trial. Both parties agree that this case is almost ready for trial although there is some disagreement as to what discovery has to be completed. (N.T. Oral Argument 10/8/13).

Obviously, a federal court is every bit as capable of trying this case efficiently, competently and promptly. How delaying the trial by seeking an interlocutory appeal will materially advance the ultimate determination is not clear since even if successful, the plaintiffs will still be awaiting a trial, albeit not in federal court.

Interestingly, plaintiffs have not sought certification from the rulings of Judges Bartle and McLaughlin denying remand.

An order follows.

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, v. SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE, Defendant	:	CIVIL ACTION NO. 13-3681

ORDER

AND NOW, this 9th day of October, 2013, upon consideration of Plaintiffs' Motion to Amend and Certify Order for Interlocutory Review Pursuant to 28 U.S.C. § 1292(B), the responses filed thereto, and after oral argument having been held, it is hereby **ORDERED** that said Motion (Docket No. 25) is **DENIED**.

BY THE COURT:

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

Exhibit H

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 9th day of October, 2013, it is hereby **ORDERED** that Plaintiffs' Motion to Amend and Certify Order for Interlocutory Review Pursuant to 28 U.S.C. § 1292(B) (Docket No. 22) is **DENIED** for the reasons set forth in this court's opinion entered this day in Cintao v. SmithKline Beecham Corp., Civil Action No. 13-3681.

BY THE COURT:

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

Exhibit I

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 24, 2013
CCO-009

No. 13-4192

In re: I. C., by MARIA PINO and TOMAS CINTAO, Guardians;
MARIA PINO and TOMAS CINTAO, Individually,
Petitioners

(E.D. Pa. No. 2-13-cv-03681)

Present: FUENTES, JORDAN and SHWARTZ, Circuit Judges

Petition for Writ of Mandamus.

Respectfully,
Clerk/mlr

ORDER

The foregoing is denied.

By the Court,

/s/Julio M. Fuentes
Circuit Judge

Dated: November 7, 2013

cc: Cara J. Luther, Esq.
Adam D. Peavy, Esq.
Rosemary Pinto, Esq.
Andrew T. Bayman, Esq.
Carolyn L. McCormack, Esq.
Joseph O'Neil, Esq.

A True Copy
Marcia M. Waldron

Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

OFFICE OF THE CLERK

MARCIA M. WALDRON

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

November 7, 2013

Michael Kunz
United States District Court for the Eastern District of PennsylvaniaRoom 2609
James A. Byrne United States Courthouse601 Market Street
PhiladelphiaPA19106

RE: In re: I. C.,by Maria Pino and Thomas

Case Number: 13-4192

District Case Number: 2-13-cv-03681

Dear Clerk:

Enclosed please find copies of the following filed today in the above-entitled case:

1. Opinion

2. Certified copy of the Judgment denying the issuance of a writ of mandamus/prohibition.

Please acknowledge receipt of the enclosed copy of this form.

Very truly yours,

Marcia M. Waldron

Marcia M. Waldron, Clerk

By: Maria, Case Manager
267-299-4937

cc:
Andrew T. Bayman, Esq.
Honorable Ronald L. Buckwalter
Cara J. Luther, Esq.
Carolyn L. McCormack, Esq.

Joseph O'Neil, Esq.
Adam D. Peavy, Esq.
Rosemary Pinto, Esq.

Exhibit J

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 24, 2013
CCO-010

No. 13-4193

In re: M. N., by ELAINE NIEMAN, Guardian,
and ELAINE NIEMAN, Individually,
Petitioners

(E.D. Pa. No. 2-13-cv-03695)

Present: FUENTES, JORDAN and SHWARTZ, Circuit Judges

Petition for Writ of Mandamus.

Respectfully,
Clerk/mlr

ORDER

The foregoing is denied.

By the Court,

/s/ *Julio M. Fuentes*
Circuit Judge

Dated: November 7, 2013

cc: T. Scott Allen, Esq.
W. Harris Junell, Esq.
Rosemary Pinto, Esq.
Andrew T. Bayman, Esq.
Carolyn L. McCormack, Esq.
Joseph O'Neil, Esq.

A True Copy
Marcia M. Waldron

Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

Exhibit K

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Kaylea Guddeck and Julie Guddeck, Plaintiffs, v. SmithKline Beecham Corporation, *doing business as GlaxoSmithKline*, Defendant.	No. 13-cv-2508 (MJD/LIB) **ORDER**

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. § 636(b)(1)(A), upon Plaintiffs' Motion for a Temporary Stay. [Docket No. 39]. The Court held a hearing on the Motion on November 7, 2013. For the reasons set forth below, Plaintiff's Motion for a Temporary Stay, [Docket No. 39], is **DENIED**.

I. BACKGROUND

This case is a personal injury and product liability action. Kaylea Guddeck ("Kaylea"), a minor, and Julie Guddeck (together, "Plaintiffs") are residents of Duluth, Minnesota. (Defs.' Mem. Supp. Mot. Transfer [Docket No. 2-2], at 1-2). Prior to Kaylea's birth, Julie Guddeck was proscribed, and consumed, the medication Paxil CR 12.5 mg (the "medication") for anxiety. (Id. at 2). Kaylea was born on August 30, 2004, and since then has been treated by numerous physicians for a neural tube defect that Plaintiffs allege was caused by the medication, which is manufactured by GlaxoSmithKline LLC, formerly known as SmithKline Beecham Corporation

d/b/a GlaxoSmithKline ("Defendant" or "GSK"). (Id. at 1-2; Notice of Removal, Ex. B [Docket No. 1], at 61).

The consolidated "Paxil Pregnancy Cases" were initiated on or about March 5, 2007, in the Court of Common Pleas of Philadelphia County, Pennsylvania (the "State Court"). (Notice of Removal, Ex. A [Docket No. 1], at 25-56). Subsequently, and pursuant to the established procedure for the Paxil Pregnancy Cases, Plaintiffs filed their Short-Form Complaint on or about September 30, 2011, in the State Court. (Id., Ex B. [Docket No. 1], at 57-71). Defendant timely removed to the Eastern District of Pennsylvania on October 24, 2011. (Id. at 7). However, the District Court[1] found that Defendant was a citizen of Pennsylvania and, therefore, that removal was barred by the resident-defendant rule. Patton v. SmithKline Beecham Corp., 2011 U.S. Dist. LEXIS 143724 (E.D. Pa. Dec. 14, 2011). Following Judge Savage's order of remand, the case proceeded in the State Court.

Subsequently, upon conflicting decisions in the Eastern District of Pennsylvania regarding Defendant's citizenship, the issue was certified to the Third Circuit for interlocutory appeal. See Johnson v. SmithKline Beecham Corp., 853 F. Supp. 2d 487, 491 (E.D. Pa. 2012). On June 7, 2013, the Third Circuit held that Defendant was a citizen of Delaware, not Pennsylvania. Lucier v. SmithKline Beecham Corp., 724 F.3d 337 (3d Cir. 2013). In light of the Lucier decision, Defendant again timely removed to Federal Court on June 26, 2013, and on the same day also moved to transfer venue to the District of Minnesota. (Notice of Removal, [Docket No. 1], at 5; Motion to Transfer [Docket No. 2]). Plaintiffs again moved to remand to the State Court and opposed any change in venue. (See Mot. Remand [Docket No. 4]; Pl.'s Resp. Opp. Mot. Transfer [Docket No. 9]). This time, however, the District Court[2] on July 24,

[1] The Hon. Timothy J. Savage presiding over consolidated motions to remand.
[2] The Hon. Harvey Bartle III presiding.

2013, denied the motion to remand, (See Mem. [Docket No. 13], and Order [Docket No. 14]), and subsequently, on August 14, 2013, ordered the transfer of the case to the District of Minnesota. (See Mem. [Docket No. 16], and Order [Docket No. 17]).

On October 24, 2013, Plaintiffs made their Motion for a Temporary Stay, [Docket No. 13] (hereinafter "Motion to Stay"), in which they ask the Court to stay this case pending resolution of certain procedural appeals in other related cases.

II. PLAINTIFF'S MOTION TO STAY [Docket No. 39]

A. Facts

As previously mentioned, following the Third Circuit's decision in Lucier, 724 F.3d 337, Defendant removed this case to Federal Court in the Eastern District of Pennsylvania, and simultaneously sought transfer of this case to the District of Minnesota. Plaintiffs opposed both removal and transfer. In the present case, Judge Bartle denied the Plaintiffs' motion to remand and granted the Defendant's motion to transfer venue to the District of Minnesota. Plaintiffs have not appealed either of those decisions. Defendant made removal and transfer efforts in several other related cases as well—some of which are referenced in Plaintiffs' Motion to Stay now before this Court. The outcomes of the related cases, which are relevant to the issue before this Court in the present Motion to Stay, are as follows:

- **Staley v. SmithKline-Beecham Corp.**, No. 2:13-cv-3684-MAM (E.D. Pa.). On July 26, 2013, the Hon. Mary A. McLaughlin denied the Plaintiffs' motion to remand, and on August 16, 2013, she ordered the case transferred to the Middle District of Pennsylvania, where it is now captioned **A.S. v. SmithKline Beecham Corp.**, No. 1:13-cv-2382-CCC (M.D. Pa.). In that

case, Plaintiffs have moved for a temporary stay and to certify the denial of their motion to remand to the Third Circuit; that motion has been briefed by both parties, but has not been decided.

- **Cintao v. SmithKline Beecham Corp.**, No. 2:13-cv-3681-RB (E.D. Pa.). On August 7, 2013, the Hon. Ronald L. Buckwalter denied the Plaintiffs' motion to remand. Plaintiffs subsequently, on August 19, 2013, filed a motion to certify the order for interlocutory appeal. Judge Buckwalter deined that motion on October 9, 2013, and ordered the case transferred to the Southern District of Florida, where it is now captioned **Cintao v. SmithKlineBeecham Corp.**, No. 1:13-cv-24095-PCH (S.D. Fla.). On October 23, 2013, Plaintiffs filed a petition for mandamus to the Third Circuit seeking to reverse Judge Buckwalter's order and remand the case to Pennsylvania state court; however, the Third Circuit denied that petition without comment. In re: I.C., No. 13-4192 (3d Cir. Nov. 7, 2013).
- **Nieman v. SmithKline Beecham Corp.**, No. 2:13-cv-3695 (E.D. Pa.). On August 7, 2013, the Hon. Ronald L. Buckwalter denied the Plaintiffs' motion to remand. Plaintiffs subsequently, on August 19, 2013, filed a motion to certify the order for interlocutory appeal. Judge Buckwalter denied that motion on October 9, 2013, and ordered the case transferred to the District of South Dakota, where it is now captioned **Nieman v. SmithKline Beecham Corp.**, No. 1:13-cv-1022-CBK (D.S.D.). On October 23, 2013, Plaintiffs filed a petition for mandamus to the Third Circuit seeking to reverse Judge Buckwalter's order and remand the case to Pennsylvania state court; however,

the Third Circuit denied that petition without comment. In re: M.N., No. 13-4193 (3d Cir. Nov. 7, 2013).

- **Cammarota v. SmithKline Beecham Corp.**, No. 2:13-cv-3677-PJ (E.D. Pa.). On September 9, 2013, the Hon. John R. Padova granted Plaintiffs' motion to remand to Pennsylvania state court. Defendant subsequently filed a motion for a temporary stay and a motion for reconsideration of the remand order. Those motions have been briefed, but have not yet been decided, and from the record it appears that Judge Padova has not yet sent a certified copy of the remand order to the state court to effectuate the remand order.[3]
- **Powell v. SmithKline Beecham Corp.**, No. 2:13-cv-3693-MMB (E.D. Pa.). On September 26, 2013, the Hon. Michael M. Baylson denied Defendant's motion to transfer venue and granted Plaintiffs' motion to remand to Pennsylvania state court. Defendant on that same day filed a request (not a motion) for a stay. On October 25, 2013, the Court issued a stay until December 2, 2013, and has scheduled oral argument on November 20, 2013, to consider whether the stay should be extended. From the record it appears that Judge Baylson has not yet sent a certified copy of the remand order to the state court to effectuate the remand order.

[3] In the Third Circuit, a district court retains jurisdiction over a case it has remanded until it mails the remand order to the state court. Agostini v. Piper Aircraft Corp., 729 F.3d 350, ___ (Federal Reporter pagination unavailable), 2013 U.S. App. LEXIS 18457, at *14-15 (3d Cir. Sept. 5, 2013) ("[I]t was not until the certified copy of the remand order was mailed to state court that the mandate of § 1447(c) was fulfilled, triggering § 1447(d). At the moment of mailing — the jurisdictional event — the remand order became unreviewable "on appeal or otherwise." A district court that seeks to preserve the ability to reconsider remand orders issued under § 1447(c), in order to guard against the occasional error in assessing subject-matter jurisdiction, may wish to bear in mind that jurisdiction is not transferred until the Clerk mails a copy of the certified remand order to state court. Once mailed, the order may not be reconsidered.").

B. Standard of Review

In general, "[a] district court possess the power to stay proceedings incidental to the power inherent in every court to control its docket. VData, LLC v. Aetna, Inc., Civ. No. 06-1701 (JNE/SRN), 2006 WL 3392889, at *4 (D. Minn. Nov. 21, 2006) (Erickson, J.) (citing Lunde v. Helms, 989 F.2d 1343, 1345 (8th Cir. 1990) (citing Landis v. North American Co., 299 U.S. 248, 254-55 (1936))). The District of Minnesota has identified three factors to consider when determining whether to grant a motion to stay: "(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a stay will simplify the issues in question; and (3) whether discovery is complete and whether a trial date has been set." Id. at *5 (citing Xerox Corp. v. 3Com Corp., 69 F. Supp. 2d 404, 406 (W.D.N.Y. 1999)).

C. Discussion

In the present case, the three VData factors do not weigh strongly either in favor or against a stay. The Defendant would suffer no "tactical disadvantage" from a stay, so the first factor does not weigh against a stay.[4] Additionally, the case is not so far along that a stay would prove disruptive at a pivotal juncture, so the third factor does not weigh against a stay. However, contrary to the Plaintiffs' view, the stay requested by Plaintiffs does not offer the potential to "simplify the issues in question" in the case, so the second factor weighs against a stay.

Notwithstanding the VData factors, the Court finds there is little, if any, benefit to be gained in the present case by the stay that Plaintiffs propose.

During the Rule 16 scheduling conference previously conducted by the Court, one of the agenda topics for discussion was the amount of discovery remaining in this case. Both parties

[4] Defendant argues that it would be prejudiced by a stay, which would delay discovery and otherwise delay the progression of the case, possibly for months. (Def.'s Resp. [Docket No. 36], at 5). However, that is not the sort of "tactical" prejudice contemplated in VData, and Defendant makes no argument that a stay would disadvantage its *defenses.*

represented to the Court that they had contemplated the need for limited fact and expert discovery in order to complete getting this case ready for trial. Plaintiffs acknowledge that no harm would result from proceeding with the limited remaining fact discovery in this case. However, they argue that proceeding with the limited remaining expert discovery specific to this case would be inefficient because Federal courts and Pennsylvania state courts use different evidentiary standards, arguing that witness depositions taken in anticipation of litigation in Federal court might have to be retaken if this case is ultimately remanded to the State Court. (Pls.' Mem. [Docket No. 44], at 12). However, at the time that Plaintiffs made their present motion, much of their argument rested on the possibility that the Third Circuit would grant their petitions for mandamus in Cintao and Nieman, and that they could use those decisions in support of a motion to send this case back to the Pennsylvania state court. As previously noted, the Third Circuit denied both of those petitions. Since this case was transferred to this District, Plaintiffs have not sought to remand the case back to the Pennsylvania state court; even if they do make such a motion at some point in the future, this Court is not persuaded that exert discovery would need to be redone if Plaintiffs were to succeed on such a motion. Thus, this Court sees little likelihood of harm by proceeding with both the limited remaining fact and expert discovery in this case.

Plaintiffs maintain that a stay would further allow the various procedural issues concerning remand and transfer in the other related cases besides Cintao and Nieman to be resolved, and that the District of Minnesota might then benefit from those results in considering whether the present case should remain in Minnesota. Plaintiffs do not say, nor can they, how long the pending procedural disputes in the related cases will take to resolve at the District Court level, much less how long one could reasonably expect potential requests for review thereof to

the Third Circuit would take to be resolved as well. Plaintiffs are therefore asking for an indefinite stay of the present case, based on a purely speculative benefit to this Court in deciding an issue that is not now before the Court (and may not ever come before the Court) based on at present uncertain outcomes of decisions in other cases pending in other Districts.

Plaintiffs also superficially suggest that the case might progress more quickly if it is ultimately remanded to the State Court, "where fact discovery had already ended and their case was set for trial on January 6, 2014." (Id.). However, Plaintiffs offer no specific or reasonable basis for this Court to believe that expert discovery would progress more quickly in the State Court than in this Court. More to the point, Plaintiffs' argument fails to account for any delay in completing the limited remaining discovery that would be caused by the stay that they propose, and in light of the inherent and considerable delay in resolving the procedural issues in the cases pending in the other Districts which Plaintiffs argue need to be resolved before the indefinite stay on discovery proposed by Plaintiffs in this case could be lifted, it is entirely implausible to suggest that they might somehow be able to keep their January 6, 2014, trial date. Judicial economy is furthered by denial of the stay request and proceeding to complete the limited remaining fact and expert discovery in this case, because even if this case were somehow at some point in the future to be sent back to Pennsylvania, it would be ready for trial (or much more nearly so than if the case sat dormant for an indefinite period of time).

In short, where the question of whether to grant a stay is committed to the discretion of the court, VData, 2006 WL 3392889, at *4, this Court will not grant a stay that would necessarily delay the progression of a case that already has been pending in one court or another for more than two years, and that is not likely to provide any tangible benefit for either the parties or the Court itself.

III. CONCLUSION

For the reasons set forth above and based on all of the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiffs' Motion for a Temporary Stay, [Docket No. 39], is **DENIED**.

BY THE COURT:

Dated: November 18, 2013

s/Leo I. Brisbois
Leo I. Brisbois
U.S. MAGISTRATE JUDGE