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

MADISON POWELL, a Minor, by THERESA POWELL, Guardian, and THERESA POWELL, Individually	§	
Plaintiffs,	§	
	§	Civil Action No. 2:13-cv-03693-MMB
v.	§	
SMITHKLINE BEECHAM CORP. d/b/a GLAXOSMITHKLINE,	§	
Defendant.	§	

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION TO REMAND

The above-captioned Plaintiffs in this action hereby move the Court to remand this case to the Court of Common Pleas Mass Tort Program in Philadelphia, Pennsylvania. As grounds for the Motion, Plaintiffs respectfully show the Court as follows:

I. INTRODUCTION

Only weeks before trial is set in this case in the Philadelphia Court of Common Pleas Mass Tort Program,[1] and after defending this overall litigation for years in state court, seeking dispositive rulings there and undertaking massive discovery efforts there including dozens of depositions around the country, Defendant removed this and eight other similarly situated matters on June 26, 2013.[2] But the removals are improper. Defendant cannot articulate any credible basis to support federal diversity jurisdiction, the only ground upon which Defendant

[1] Trial is set in this case on October 21, 2013.

[2] Because Defendant removed each of the nine cases on identical grounds, filing substantively identical Notices of Removal, Plaintiffs will refer to the "cases" collectively where practical and appropriate.

removes the cases for the second time since they were commenced in state court. Principally, the removals are untimely because the cases have been pending in state court for well over one year. Moreover, Defendant's removals on precisely the same diversity grounds as its prior removals constitutes a prohibited request for this Court to revisit and re-decide its earlier remand decisions. Also, the removal is improper because no voluntary action by the Plaintiffs triggered any new basis for Defendant's removal of the case—and such voluntary action supporting removal is required. Finally, Defendant waived its right to seek removal by invoking the jurisdiction and dispositive rulings of the state court. For all those reasons, as described more fully herein, the Court should remand this case to the Court of Common Pleas Mass Tort Program in Philadelphia, Pennsylvania.

II.
FACTS AND PROCEDURAL HISTORY

On or about June 8, 2011, Plaintiffs originally filed their case in the consolidated Paxil Pregnancy Litigation in the Philadelphia Court of Common Pleas Mass Tort Program, *In re Paxil Pregnancy Cases*, February Term 2007, No. 3220. Plaintiffs allege that Theresa Powell's use of Paxil, a prescription antidepressant manufactured by Defendant GlaxoSmithKline ("Defendant" or "GSK"), while pregnant caused her daughter Madison's critical neural tube defect necessitating major surgery.

GSK originally removed Plaintiffs' case based on federal diversity jurisdiction on July 13, 2011. On December 12, 2011, this Court remanded the case, determining as a matter of law there was not complete diversity of citizenship supporting removal. *See Powell v. SmithKline Beecham Corp.*, No. 11-4457, Dkt # 19 (E.D. Pa. Dec. 12, 2011); *see also 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) (setting forth the grounds for remand in

subsequently removed cases such as *Powell*).

On June 26, 2013, GSK re-removed this case on the basis of a recent opinion by the United States Court of Appeals for the Third Circuit ("Third Circuit") that GSK was a citizen of Delaware, not Pennsylvania. GSK contends that the parties to this case are completely diverse.

III. ARGUMENT

A. Standard

The exercise of removal jurisdiction is governed by 28 U.S.C. § 1441(a). The statute is strictly construed, requiring remand to state court if any doubt exists over whether removal was proper. *See Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26, 29 (3d Cir. 1985). The party seeking removal bears the burden to establish federal jurisdiction. *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990); *Zoren v. Genesis Energy, LP.*, 195 F. Supp. 2d 598, 602 (D. Del. 2002). "'Because lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts resolved in favor of remand.'" *Brown v. Francis*, 75 F.3d 860, 864-65 (3d Cir. 1996) (quoting *Abels*, 770 F.2d at 29); *see also Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999) ("A presumption in favor of remand is necessary because if a federal court reaches the merits of a pending motion in a removed case where subject matter jurisdiction may be lacking it deprives a state court of its right under the Constitution to resolve controversies in its own courts.").

B. Removal of these Cases, Significantly More than One Year After Their Commencement in State Court, Is Untimely and Improper.

GSK tepidly invokes, in part, the second paragraph of 28 U.S.C. § 1446(b), which permits removal of cases from state court as follows:

If the case stated by the initial pleading is not removable, a notice

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

(Emphasis added). Plaintiffs agree that the second paragraph of section 1446(b) applies here – indeed governs – but removal is untimely because GSK seeks to remove on the basis of diversity jurisdiction more than one year after commencement of the action, contrary to section 1446(b)'s plain language.

Unquestionably, each of these cases was initially determined to be "not removable." In March and December of 2011, as well as in January 2012, the district judge remanded each of these cases for lack of diversity jurisdiction, determining as a matter of law that GSK had failed to demonstrate the requisite complete diversity of citizenship.[3] Therefore, "[i]t cannot be said that the case has been subject to removal since the day it was filed in state court"—one of GSK's contentions here—because "such a proposition would contradict" the district judge's "earlier order and end run the non-appealability dictates of 28 U.S.C. § 1447(d)." *Johnson v. America Online, Inc.*, 280 F. Supp. 2d 1018, 1023 (N.D. Cal. 2003) (deeming the district judge's earlier remand at the outset of the case, even when later determined to be incorrect "by subsequent events in the litigation," a determination that the case was initially "not removable"). Indeed, the district judge's initial determinations that the cases were not removable cannot be viewed as

[3] *Powell v. SmithKlineBeecham Corp.*, No. 2:11-cv-04457-MMB, Dkt # 19 (E.D. Pa. Dec. 12, 2011); *Moore v. SmithKlineBeecham Corp.*, No. 2:10-cv-04447-MSG, Dkt # 31 (E.D. Pa. Mar. 24, 2011); *Nieman v. SmithKlineBeecham Corp.*, No. 2:11-cv-04458-RB, Dkt # 18 (E.D. Pa. Dec. 12, 2011); *Cammarota v. SmithKlineBeecham Corp.*, No. 2:11-cv-06642-JP, Dkt # 13 (E.D. Pa. Dec. 14, 2011); *Cintao v. SmithKlineBeecham Corp.*, No. 2:11-cv-06643-RB, Dkt # 13 (E.D. Pa. Dec. 14, 2011); *Guddeck v. SmithKlineBeecham Corp.*, No. 2:11-cv-06645-HB, Dkt # 15 (E.D. Pa. Dec. 14, 2011); *Kenney v. SmithKlineBeecham Corp.*, No. 2:11-cv-06644-MSG, Dkt # 13 (E.D. Pa. Dec. 14, 2011); *Staley v. SmithKlineBeecham Corp.*, No. 2:11-cv-06641-MAM, Dkt # 13 (E.D. Pa. Dec. 14, 2011); *Rader v. SmithKlineBeecham Corp.*, No. 2:11-cv-06637-CDJ, Dkt # 11 (E.D. Pa. Jan. 4, 2012).

anything other than final adjudications of federal jurisdiction because, as *Johnson* notes, section 1447(d) forbids "review" of an "order remanding a case to . . . State court" "on appeal of otherwise." *Johnson*, 280 F. Supp. 2d at 1023. It is well established that section 1447(d) precludes "not only appellate review, but also reconsideration by the district court" of its own remand order. *Harris v. Blue Cross/Blue Shield of Ala., Inc.*, 951 F.2d 325, 330 (11th Cir. 1992) (quoting *In re La Providencia Dev. Corp.*, 406 F.2d 251 (1st Cir. 1969)); *see Burr & Foreman v. Blair*, 470 F.3d 1019, 1034 (11th Cir. 2006) ("***In remanding the case, the district court conceded that it lacked jurisdiction. The court was bound by this decision, whether or not it was correct.***") (emphasis added).[4]

Thus, under 1446(b)'s plain mandate, where "the initial pleading has been adjudicated not removable, . . . any re-removal is subject to the one-year deadline." *Johnson*, 280 F. Supp. 2d at 1023; *see Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 782-83 (7th Cir. 1999) ("[R]emoval may lead to a perfectly justified remand; but when matters change – for example by dismissal of a party whose presence spoiled complete diversity of citizenship, or by a disclosure that the states exceed the jurisdictional amount – the case may be removed, ***provided that it is less than one year old***.") (emphasis added); *see also Leahy v. I-Flow Corp.*, No. 11-976 (MLC), 2011 U.S. Dist. LEXIS 55226, at *2-3 (D.N.J. May 23, 2011); *Hughes v. UPS Supply Chain Solutions, Inc.*, No. 3:09CV-576-S, 2010 U.S. Dist. LEXIS 28936, at *5-7 (W.D. Ky. Mar. 25, 2010); *Advanta Tech., Ltd. v. BP Nutrition, Inc.*, No. 4:08CV00612 ERW, 2008 U.S. Dist. LEXIS 82246, at *7-8, 12-14 (E.D. Mo. Oct. 16, 2008).

Defendant's reliance on *Doe v. American Red Cross*, 14 F.3d 196, 197-98 (3d Cir. 1993), *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 267-68 (5th Cir. 2001), and *Young v. Chubb*

[4] As further discussed *infra* in § III.C, the non-appealability rule itself bars GSK's second removal notice here, brought on the same grounds as the first removal notice.

Group of Insurance Cos., 295 F. Supp. 2d 806, 807-08 (N.D. Ohio 2003) does not alter the above analysis. The one-year limitation on removal under the second paragraph of section 1446(b) was not invoked, discussed, or decided in any of those cases, as GSK admits in part (at 15 n.6). Further, *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), *William v. Ford Motor Co.*, No. 1:12-cv-108, 2012 U.S. Dist. LEXIS 160202, at *3-4 (E.D. Mo. Nov. 8, 2012), and *Lassila v. Werner Co.*, 78 F. Supp. 2d 696, 698-99 (W.D. Mich. 1999) (all cited in ¶¶ 29 & 33) are distinguishable because each of those matters (unlike Plaintiffs' cases here) were initially removable based on diversity, then while the actions were pending in federal court, those plaintiffs' manipulation of the defendants (adding or dismissing defendants) resulted in remand of the cases. Upon subsequent re-removal, those courts held the one-year limitation of section 1446(b) paragraph two did not apply because the cases were all (indisputably) *initially* removable (and not remanded until the plaintiffs took some action that provoked remand). Similarly, *Leslie v. Banctec Service Corp.*, 928 F. Supp. 341, 347 n.6 (S.D.N.Y.) (also cited in ¶¶ 29 & 33) involved a matter that had been removed, then remanded by agreement; when subsequent events resulted in re-removal, the court held that the second paragraph of section 1446(b) did not apply because the "statute was meant to apply to those litigants, who for the first time, file a notice of removal after 1 year." *Id.* at 347. At bottom, none of GSK's cited diversity cases involved an *initial determination by the district court that the cases were "not removable,"* which occurred here.

Lastly, GSK's self-styled "equity" arguments are meritless. To the extent that the Third Circuit has recognized an equitable exception to the one-year limitation of section 1446(b), GSK cites no conduct by Plaintiff—and none can be cited—such as, for example, forum manipulation, *see In re Asbestos Prods. Liab. Litig.*, 673 F. Supp. 2d 358, 364 (E.D. Pa. 2009) and *Tedford v.*

Warner-Lambert Co., 327 F.3d 423, 426-27 (5th Cir. 2003), or purposeful delay serving Defendant, *see Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1317 (9th Cir. 1998), or in providing Defendant the necessary information to support removal, *see Brower v. Staley*, 306 Fed. Appx. 36, 38 (5th Cir. 2008). Further, the Third Circuit in *Ariel Land Owners, Inc. v. Dring*, 351 F.3d 611, 616 (2003) addressed only the question of whether the one-year limitation in section 1446(b) *automatically* divested the district court of jurisdiction *absent* a timely filed motion to remand, and held that it did not—stopping short of actually deciding whether the one-year limitation barred removal in that case if a timely motion to remand had been filed. But, here, there is a timely filed motion to remand urging the Court to enforce the plain language of section 1446(b)'s one-year limitation. Additionally, the Court should discount any "equitable" suggestion that GSK intends to proceed with this case together with "those cases now pending in the Eastern District of Pennsylvania" (in ¶ 41), because GSK has already moved to transfer venue of Plaintiffs' cases to the federal court of Plaintiffs' current residences, outside of Pennsylvania.

As noted above, Plaintiffs' cases were commenced in state court at the latest by September 2011—approximately one year and 9 months ago. The cases were decided as a matter of law to be "not removable" initially. The second paragraph of section 1446(b) therefore governs the timeliness of removal here. Any re-removal by GSK must have been effectuated no later than one year from the date of filing per the express terms of that statute. Because GSK's second removal is untimely, the cases must be remanded to state court.[5]

[5] The scant legislative history regarding Section 1446(b) lends substantial support to Plaintiff's interpretation here. The legislative history provides: "Subsection (b)(2) amends 28 U.S.C. s 1446(b) to establish a one-year limit on removal based on diversity jurisdiction as a means of reducing the opportunity for removal after substantial progress has been made in state court. . . . . Removal late in the proceedings may result in substantial delay and disruption." H.R. REP. NO. 100-889 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 6031-6034; see also 134 CONG. REC. 31064 (1988). Here, as shown *infra* in § III.F, substantial and meaningful progress has been made in this case in state court, and removal comes on the eve of trial.

C. The Court Is Not Permitted to Revisit Its Earlier Remand Decisions on the Same Grounds.

Even if the Court disagrees with Plaintiffs' interpretation and application of the second paragraph of section 1446(b) here, described above, Defendant's removal is nevertheless improper. A defendant is precluded from seeking a second removal on the same ground that it sought the first removal. *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 492 (5th Cir. 1996). At the time this Court issued its final orders of remand in these cases, the Court lost jurisdiction over the matters, as described above (in § III.B). Here, Defendant's second Notices of Removal do not reinvest the Court with jurisdiction over these cases because they do not allege any new or different ground for removal from the original removal petitions—i.e., nothing more than diversity jurisdiction is alleged, just like the first Notices of Removal, and Defendant alleges the same jurisdictional facts. *See Johnson*, 280 F.Supp.2d at 1022. Rather, Defendant relies on evidence that can only predate the filing of the original notice of removal to support its claim that the parties are diverse—its citizenship. In other words, Defendant contends—just as it did in the first Notices of Removal—that it is a resident of Delaware and that the parties are completely diverse. Since Defendant's second Notices of Removal rely upon the same grounds as its initial notices, and since the evidence upon which it relies existed at the time the initial notice was filed and rejected, the second removal is, in effect, a request for review of a remand order already issued by this Court. Such review is absolutely prohibited. 28 U.S.C. § 1447(d) (remand decisions "not reviewable by appeal or otherwise"); *see Godsey v. Miller*, 9 Fed. App'x 380, 384 (6th Cir. 2001) ("Unfortunately for the defendants, even a clearly erroneous decision does not provide us with a license to revisit a remand issue on the basis of a lack of subject-matter jurisdiction." (citing *Page v. City of Southfield*, 45 F.3d 128, 131 (6th Cir. 1995) (holding remand orders are "beyond all power of appellate review, even if based on erroneous principles

or analysis"))); *De la Sancha v. Taco Bell of Am., Inc.*, No. 08-81325-CIV-MARRA, 2008 U.S. Dist. LEXIS 98192, at *4-7 (S.D. Fla. Dec. 4, 2008).

Defendant will undoubtedly cite the Third Circuit's opinion in *Doe v. American Red Cross* as contrary to Plaintiffs' section 1447(d) argument. But that case is unsupportive. In *Doe*, the Third Circuit affirmed the permissibility of the defendant's second removal because it was neither an appeal from the first remand order, nor was it based on the same grounds as the first removal. 14 F.3d at 200. Further, the Third Circuit found it significant that the lower court had initially granted remand "without prejudice to defendant's right to petition for re-removal, contemplating a second removal should the law of this judicial circuit change . . . ." *Id.* (internal quotation marks omitted). Here, no such invitation to revisit this Court's prior remand determinations was left open. Finally, the Third Circuit found it was mandated to follow the Supreme Court's interpretation of the very federal question issue upon which *Doe* was originally removed and remanded. *Id.* As noted, unlike *Doe*, this is a diversity case involving various courts' opinions on GSK's citizenship, not questions of federal law. The Third Circuit, unlike the circumstances here, recognized that it must "yield" to the "specific mandate" and policy considerations of the particular intervening Supreme Court decision. *Id.* at 201. But, *Doe* should not trump section 1447(d)'s prohibition—that neither this Court nor any appeals court may revisit the prior diversity jurisdiction remands—where GSK raises identical grounds for removal in each remand, whether or not the prior remands were mistaken.

D. GSK's Fatally Flawed Overall Interpretation of Section 1446(b) Is Incomprehensible, Much Less Creditable.

GSK argues (in ¶ 28) that their second removals of Plaintiffs' cases are proper under "*both* paragraphs of Section 1446," but that cannot be. The first paragraph of section 1446(b) addresses the removal of a plaintiff's initial pleading within 30 days of defendant's receipt

thereof:

> 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.

28 U.S.C. § 1446(b). GSK primarily and stridently urges the Court that this first paragraph of section 1446(b) governs removal here, primarily to avoid the one-year limitation problems identified by Plaintiffs above (in §§ III.B & III.C). GSK argues (in ¶ 29) that "Plaintiffs' initial pleading – the complaint – was removable," and (in ¶ 32) that the cases were "initially removable" (and, in fact, w[ere] removed . . . ." It is obvious, then, that if the cases were initially removable as GSK contends—and they were not for reasons shown above—then the second paragraph of section 1446(b) *cannot apply at all*. The first and second paragraphs of section 1446(b) are mutually exclusive, as GSK forcefully argues (in ¶¶ 32-34).

Thus, according to GSK's position, the only paragraph of section 1446(b) that might apply here is the first paragraph, requiring removal of the Plaintiffs' initial pleading within 30 days after receipt. But, plainly, that paragraph cannot be controlling, where Plaintiffs' cases have been pending in state court for literally hundreds of days after GSK's receipt of Plaintiffs' initial pleadings. And, GSK's contention that its second Notices of Removal are "in effect, . . . amendment[s] of its original timely filed notice[s]" cannot be credited. As described above (in § III.B), the original remands were fully and finally decided in non-appealable orders dating from March 2011.[6] There is nothing before the Court for GSK to "amend."

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[6] *See* n.3, *supra*.

Further, GSK cites no authority for its fanciful theory that these second removals somehow "relate back" the earlier and finally adjudicated removals. None of the cases Defendant cites supports the proposition that a second notice of removal relates back to the filing date of the first notice of removal where, as here, the case had already been remanded to state court prior to the filing of the second notice of removal. Rather, each of those cases involved an amendment or supplementation of a notice of removal *before a decision was made, or in the decision being made, on a pending motion to remand* filed in response to a notice of removal being amended or supplemented. *See USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 198, 205-06 (3d Cir. 2003) (holding that the district court did not err in deeming a notice of removal amended to correct deficiencies in an order denying remand); *Godonou v. Rondo, Inc.*, No. 12-2113, 2012 U.S. Dist. LEXIS 75676, at *2 (E.D. Pa. May 31, 2012) ("In response to the plaintiffs' motion to remand, defendant Rondo, Inc. filed a motion to amend the notice of removal."); *Xia Zhao v. Skinner Engine Co.*, No. 11-7514, 2012 U.S. Dist. LEXIS 68854, at *7-12 (E.D. Pa. May 16, 2012) (allowing defendant to amend notice of removal to cure technical defects where the amendment was filed in response to a motion to remand on which no ruling had been made); *Monica v. Accurate Lift Truck*, No. 10-730, 2010 U.S. Dist. LEXIS 40480, at *2 (E.D. Pa. Apr. 20, 2010) ("In response to the plaintiffs' motion [to remand], the defendant filed its motion to amend the notice of removal . . . ."). Of course, there is no legal support for the notion that a defendant's first removal effort remains pending interminably, notwithstanding the district court's decision to remand the case—whether or not that decision might later be shown to be in error. *See Johnson*, 280 F. Supp. 2d at 1023.

The time for GSK to remove under the first paragraph of section 1446(b) has long since passed. Removal on that basis is unavailable to GSK now. Further, GSK's Notices of Removal

themselves recognize, removal under the second paragraph of section 1446(b) is also not available if, as GSK repeatedly argues (in ¶¶ 29, 32), the cases were "initially removable."

E. GSK's Removal Violates the Historic Voluntary/Involuntary Rule and the Plaintiffs' Right—Absent Fraud—to Determine Removability.

Notwithstanding the foregoing arguments, a state court case that is initially non-removable cannot subsequently become removable or be transformed into a removable case unless a change occurs that makes it removable as a result of the plaintiff's voluntary act. *Great Northern R. Co. v. Alexander,* 246 U.S. 276, 281-82 (1918); *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996); *People v. Keating*, 986 F.2d 346, 348 (9th Cir. 1993); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 71-72 (7th Cir. 1992); *Insinga v. LaBella*, 845 F.2d 249, 252-53 (11th Cir. 1988); *Self v. General Motors Corp.*, 588 F.2d 655, 657-60 (9th Cir. 1978); *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545 (5th Cir. 1967); *see also White v. Hughes*, 409 F. Supp. 1005, 1008 (W.D. Tenn. 1975).

The longstanding voluntary-involuntary rule is consistent with the well-pleaded complaint doctrine. The basic premise is that because a plaintiff is the master of his own complaint, involuntary changes caused by a party other than the plaintiff cannot make a case removable. *Alexander*, 246 U.S. at 281-82; *Keating*, 986 F.2d at 348; *Insinga*, 845 F.2d at 253; *Self*, 588 F.2d at 656-59. As the United States Court of Appeals for the Eleventh Circuit explained in *Insinga*, 845 F.2d at 253-54, the voluntary-involuntary rule and the well-pleaded complaint doctrine have common origins.

The voluntary-involuntary rule was developed, and is followed most often, in diversity cases. *See, e.g.*, *Whitcomb v. Smithson*, 175 U.S. 635, 638 (1900); *Powers v. Chesapeake & Ohio Ry.*, 169 U.S. 92, 99-101 (1898); *Poulos*, 959 F.2d at 71-72; *Self*, 588 F.2d at 657-58 (discussing history and collecting cases); *Ratcliff v. Fibreboard Corp.*, 819 F. Supp. 584, 586-87 (W.D. Tex.

1992); *see also Morsani v. Major League Baseball*, 79 F. Supp.2d 1331, 1333 n. 5 (M.D. Fla. 1999) (holding that in both federal question and diversity cases, 28 U.S.C. § 1446(b) restricts defendants from removing most cases when the circumstance potentially allowing removal arises through no consequence of the plaintiff's actions).

Here, Defendant removed absent any voluntary act by the Plaintiff. The voluntary/involuntary rule prohibits such removal, and the case should be remanded.

F. GSK Waived Its Right to Remove By Its Conduct of the Litigation in State Court.

A defendant may waive its right to remove if it proceeds to defend the suit in state court. *See Schmitt v. Ins. Co.*, 845 F.2d 1546, 1551 (9th Cir. 1988), *superseded by statute on other grounds*; *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986), *superseded by statute on other grounds*. A key factor in determining whether the defendant's actions in state court constitute a waiver of its right to remove is the defendant's intent to seek a disposition on the merits in state court rather than to maintain the status quo. *Bolivar Sand Co. v. Allied Equip., Inc.*, 631 F. Supp. 171, 173 (W.D. Tenn. 1986); *see Johnson v. Heublin, Inc.*, 227 F.3d 236, 244 (5th Cir. 2000).

Here, as noted, GSK was proceeding rapidly to trial in this case and several others that were concurrently removed, repeatedly invoking the state court's jurisdiction (in often dispositive ways), as well as undertaking scorched-earth discovery pursuant to available state court processes:

- On June 12, 2013, GSK filed motions for summary judgment in the Rader and Nieman cases. (Ex. A.) Such motions are now pending.
- On February 6, 2013, GSK's counsel agreed to new trial settings for three of the removed cases. (Ex. B at 4-13.)
- On March 19, 2013, GSK's counsel argued before the court that they have complied with the Court's 2009 orders regarding production of call notes, personnel files, and Paxil

materials. (Ex. C at 62-64.)

- On March 28, 2013, GSK's counsel states that they have complied with the state court's earlier discovery orders, stating that they have "not, in six years of litigation," been required to do more than the state court's prior orders demanded. (Ex. D at 12.)

- GSK's counsel have suggested seeking or sought court intervention on multiple occasions. (Ex. E.)

- GSK has requested 6 provider specific medical records authorizations in this removed case and 101 such authorizations in the other removed cases.

- GSK has conducted at least 75 depositions in the removed cases since 2012, most occurring this year.

Especially given the aforementioned purpose of the one-year limitation period, which is to "avoid[] a situation where substantial work has been done in state court but must then be disrupted by a sudden shift to federal court," *Darnell*, 2011 U.S. Dist. LEXIS 65036, at *12, this case should be remanded.

IV.
CONCLUSION

For all the foregoing reasons, this case should be remanded to the Court of Common Pleas Mass Tort Program in Philadelphia, Pennsylvania.

Dated: June 28, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on June 28, 2013, a true and correct copy of the foregoing was filed and served via CM/ECF on all counsel of record.

By: /s/ Rosemary Pinto
Rosemary Pinto