No. _____

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOY L. HALLIBURTON, et al., Plaintiffs,

v.

JOHNSON & JOHNSON and ETHICON, INC.,
Defendants-Petitioners.

No. CIV-13-832-L
(Pottawatomie County Case No. CJ-13-299)

On Appeal from the United States District Court
for the Western District of Oklahoma
(Leonard, J.)

DEFENDANTS-PETITIONERS JOHNSON & JOHNSON AND ETHICON, INC.'S PETITION FOR PERMISSION TO APPEAL

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STATEMENT OF RELATED CASES

Pursuant to 10th Circuit Rule 28(2)(C)(1), Defendants-Petitioners Johnson & Johnson and Ethicon, Inc., advise the Court that they are today filing petitions for permission to appeal identical remand orders issued on October 18, 2013, by the Western District of Oklahoma in the following eleven related cases:

1. *Halliburton, et al. v. Johnson & Johnson, et al.*, CIV-13-832-L
2. *Teague, et al. v. Johnson & Johnson, et al.*, CIV-13-833-L
3. *Wade, et al. v. Johnson & Johnson, et al.*, CIV-13-834-L
4. *Gooch, et al. v. Johnson & Johnson, et al.*, CIV-13-836-L
5. *Albritton, et al. v. Johnson & Johnson, et al.*, CIV-13-838-L
6. *McCaughtry, et al. v. Johnson & Johnson, et al.*, CIV-13-839-L
7. *Killsfirst, et al. v. Johnson & Johnson, et al.*, CIV-13-840-L
8. *States, et al. v. Johnson & Johnson, et al.*, CIV-13-841-L.
9. *Page, et al. v. Johnson & Johnson, et al.*, CIV-13-844-L
10. *Anderson, et al. v. Johnson & Johnson, et al.*, CIV-13-845-L
11. *Spears, et al. v. Johnson & Johnson, et al.*, CIV-13-846-L

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel of record for defendants certify to the best of their knowledge and belief as follows:

Defendant Ethicon, Inc., is a wholly-owned subsidiary of defendant Johnson & Johnson. Defendant Johnson & Johnson has no parent companies, and there is no publicly held corporation holding 10% or more of its stock.

Pursuant to 28 U.S.C. § 1453(c) and Federal Rule of Appellate Procedure 5, Defendants-Petitioners Johnson & Johnson and Ethicon, Inc., request leave to appeal identical remand orders issued by the Western District of Oklahoma in eleven related cases[1] on October 18, 2013.

I. STATEMENT OF THE CASE

Over the course of three days, 650 plaintiffs from 26 states and the Commonwealth of Puerto Rico filed eleven cases in the District Court of Pottawatomie County, Oklahoma against defendants, alleging that they suffered injuries from pelvic mesh surgical devices manufactured by defendant Ethicon, Inc. ("Ethicon"). The plaintiffs' eleven petitions were virtually identical and were filed by the same plaintiffs' counsel, in the same state court, before the same judge.

[1] *Halliburton, et al. v. Johnson & Johnson, et al.*, CIV-13-832-L (48 plaintiffs from 13 states); *Wade, et al. v. Johnson & Johnson, et al.*, CIV-13-834-L (49 plaintiffs from 13 states); *McCaughtry, et al. v. Johnson & Johnson, et al.*, CIV-13-839-L (51 plaintiffs from 14 states and Puerto Rico); *Page, et al. v. Johnson & Johnson, et al.*, CIV-13-844-L (50 plaintiffs from 14 states); *Anderson, et al. v. Johnson & Johnson, et al.*, CIV-13-845-L (51 plaintiffs from 13 states); *Teague, et al. v. Johnson & Johnson, et al.*, CIV-13-833-L (50 plaintiffs from 15 states); *Albritton, et al. v. Johnson & Johnson, et al.*, CIV-13-838-L (48 plaintiffs from 14 states); *Spears, et al. v. Johnson & Johnson, et al.*, CIV-13-846-L (76 plaintiffs from 17 states); *Gooch, et al. v. Johnson & Johnson, et al.*, CIV-13-836-L (76 plaintiffs from 20 states); *Killsfirst, et al. v. Johnson & Johnson, et al.*, CIV-13-840-L (75 plaintiffs from 20 states); *States, et al. v. Johnson & Johnson, et al.*, CIV-13-841-L (76 plaintiffs from 17 states).

In an effort to avoid federal jurisdiction over their claims as a mass action under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), the 650 plaintiffs divided their claims so that each of the eleven actions included fewer than 100 plaintiffs. But the aggregate result—650 identical claims in front of the same judge in the same Oklahoma county—constitutes an implicit proposal for a joint trial under CAFA. And in a transparent effort to eliminate diversity of citizenship from the two New Jersey defendants and avoid federal jurisdiction over the diverse plaintiffs' claims, each petition included at least one New Jersey plaintiff. Yet nothing about the New Jersey plaintiffs' claims has any connection to the State of Oklahoma.

Defendants timely removed all eleven cases[2] to the United States District Court for the Western District of Oklahoma, pursuant to 28 U.S.C. §§ 1332(a), (d)(11), 1441, *et seq.*, and 1453, because there are two independent statutory bases

[2] Originally, twelve cases were filed on behalf of 702 plaintiffs, but plaintiffs did not move to remand one of the cases, *Bridgewater, et al. v. Johnson & Johnson, et al.*, CIV-13-843-L (52 plaintiffs from 15 states), and the JPML transferred *Bridgewater* to the United States District Court for the Southern District of West Virginia for consolidated or coordinated pretrial proceedings in *In re Ethicon, Inc., Pelvic Repair System Products Liability Litigation*, MDL No. 2327. *See Bridgewater* Conditional Transfer Order (Exhs. at A718). Defendants moved to stay all proceedings in the eleven other cases, but the district court denied the motions for stay as moot when it remanded the cases to Pottawatomie County. *See* Order at 13-14 (Exhs. at A13-A14).

for federal jurisdiction over plaintiffs' claims. First, CAFA provides for federal jurisdiction of the claims of more than 100 plaintiffs where the plaintiffs either explicitly or implicitly propose that any part of their claims be tried jointly. Here, by filing eleven actions in the same state court, before the same state court judge, with the same counsel and virtually identical petitions, the 650 plaintiffs all but guaranteed that at least some part of their claims would be decided on an aggregate basis, satisfying CAFA's 100-person threshold for mass actions. By doing so, plaintiffs sought to evade not only the letter of the law, but the intent of Congress, which enacted CAFA to ensure that "plaintiffs' lawyers who prefer to litigate in state courts [were no longer able] to easily 'game the system' and avoid removal of large interstate class actions to federal court." S. Rep. No. 109-14, at 10, reprinted in 2005 U.S.C.C.A.N. 3, 11.

Second, when considering the citizenship of only the properly joined plaintiffs, the district court plainly has diversity jurisdiction under §1332(a). Plaintiffs should not be permitted to deprive these non-resident defendants of their federal constitutional right to a federal forum by the misjoinder of token New Jersey residents who have no connection to the Oklahoma forum. Though plaintiffs assert that joinder is proper because their claims arise out of the same transaction or occurrence, the face of each one of their petitions reveals that,

beyond the fact that each plaintiff was implanted with one of ten pelvic mesh products manufactured by New Jersey defendant Ethicon, their claims have no connection to Oklahoma or to the other plaintiffs whatsoever. For this reason, the New Jersey plaintiffs' claims should have been severed from the petitions and remanded to state court, with the district court maintaining jurisdiction over the remaining, diverse plaintiffs' claims. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds by Cohen v. Office Depot*, 204 F.3d 1069 (11th Cir. 2000).

The district court nevertheless remanded these eleven cases to Pottawatomie County by identical orders entered on October 18, 2013. For the reasons explained here, if allowed to stand, the district court's ruling would allow plaintiffs to do exactly what Congress sought to prevent when it enacted CAFA: to "game the system" in order to avoid federal jurisdiction over mass actions, in this case through the artifice of segregating plaintiffs into buckets of just under 100 persons per case in a jurisdiction where at least some rulings on triable issues are all but assured to apply across the cookie-cutter petitions. Indeed, a single ruling by the state trial court on a single substantive legal issue in any of the eleven cases has the potential to apply to all 650 plaintiffs' causes of action. Just as importantly, the district courts in the Tenth Circuit should not be left without authority to remedy

fraudulent misjoinder of plaintiffs by exercising federal jurisdiction where it plainly lies.

This Court has never addressed the two questions presented in this Petition. For the reasons that follow, defendants respectfully request that it grant review and, after briefing and oral argument, reverse the district court's remand orders.

II. STATEMENT OF JURISDICTION

Defendants removed these cases to federal court pursuant to 28 U.S.C. §§ 1332(a), 1332(d)(11), 1441, and 1453. *See*, *e.g.*, *Halliburton* Notice of Removal (Exhs. at A15). In an October 18, 2013, order, the district court remanded the cases for lack of subject matter jurisdiction. *See* Order at 13-14 (Exhs. at A13-A14). The United States Code provides defendants a right to seek interlocutory review of the remand of a case removed to federal court pursuant to CAFA. *See* 28 U.S.C. § 1453(c). In addition, this Court has discretion to exercise pendent jurisdiction to review non-CAFA bases for jurisdiction in appeals brought pursuant to § 1453. *See Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1247 (10th Cir. 2009) (noting that the court was "free to consider any potential error in the district court's decision, not just a mistake in application of the Class Action Fairness Act" and that when a statute authorizes interlocutory appellate review, the district court's entire decision comes before the court for review) (citing *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996), and *Brill v. Countrywide Home*

Loans, Inc., 427 F.3d 446, 451-52 (7th Cir. 2005)). Defendants now timely file this Petition for leave to appeal the remand order pursuant to 28 U.S.C. § 1453 and Federal Rule of Appellate Procedure 5.

III. QUESTIONS PRESENTED

1. Where plaintiffs filed eleven virtually identical petitions on behalf of 650 individuals in the same jurisdiction before the same trial judge, did the district court err in holding that plaintiffs had not implicitly proposed a mass action of more than 100 persons pursuant to CAFA, 28 U.S.C. § 1332(d)(11)(B)?

2. Where diverse plaintiffs joined their claims against New Jersey defendants with token New Jersey plaintiffs who had no connection to Oklahoma, did the district court err in finding that it lacked authority to sever the fraudulently misjoined plaintiffs and retain jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1332(a)?

IV. RELIEF SOUGHT

Defendants seek an order granting permission to appeal and, upon briefing and oral argument, an order reversing the district court's remand orders with instructions to retain jurisdiction.

V. REASONS FOR GRANTING THE PETITION

In deciding whether to grant review of an order remanding a mass action under CAFA, the Court may consider a number of factors, including:

> (1) the presence of an important CAFA-related question; (2) whether the question is 'unsettled'; (3) whether the question, at first glance, appears to be either incorrectly decided or at least fairly debatable; (4) whether the question is consequential to the resolution of the particular case; (5) whether the question is likely to evade effective review if left for consideration only after final judgment; (6) whether the question is likely to recur; (7) whether the application arises from a decision or order that is sufficiently final to position the case for intelligent review; and (8) whether the probable harm to the applicant should an immediate appeal be refused [outweighs] the probable harm to the other parties should an immediate appeal be entertained.

BP Am., Inc. v. Okla. ex rel. Edmondson, 613 F.3d 1029, 1034 (10th Cir. 2010) (quoting *Coll. of Dental Surgeons v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 39 (1st Cir. 2009)). Each of the eight factors strongly supports review of the two questions presented here.

A. The Court Should Accept Review to Determine Whether Plaintiffs Implicitly Proposed a Joint Trial of More Than 100 Plaintiffs' Claims When They Filed Eleven Actions on Behalf of 650 Plaintiffs Before a Single State Court Judge.

The "primary objective" of CAFA is to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting CAFA). In furtherance of CAFA's "primary objective," Congress provided federal subject matter jurisdiction over "mass actions," which are defined as "any civil action[s] . . . in which monetary relief claims of 100 or more persons *are proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact." 28

U.S.C. § 1332(d)(11)(B)(i) (emphasis added). This Court has never addressed what constitutes a proposal for a joint trial under § 1332(d), but the importance of this question is evidenced by the extent to which plaintiffs' tactic, were it permitted, would subvert the statutory objective and Congress's intent.

Courts that have addressed joint trial proposals under CAFA have emphasized that a proposal is just that; a trial need not actually be ordered or occur. *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008) ("It does not matter whether a trial covering 100 or more plaintiffs actually ensues; the statutory question is whether one has been proposed."); *Visendi v. Bank of Am., N.A.*, No. 13-16747, 2013 U.S. App. LEXIS 21505, at *8 (9th Cir. Oct. 23, 2013) ("Whether Plaintiffs' claims ultimately proceed to a joint trial is irrelevant."). Nor must a joint trial be proposed on all elements of plaintiffs' claims; rather, "this provision is intended to mean a situation in which it is proposed or ordered that claims be tried jointly in any respect." 151 Cong. Rec. H723, H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner). Just as importantly, a proposal for a joint trial can be implicit. *See In re Abbott Labs., Inc.*, 698 F.3d 568, 572 (7th Cir. 2012). Accordingly, where more than 100 persons split their claims against a defendant across multiple cases such that each complaint covers fewer than 100 persons, plaintiffs' request for consolidation of

the cases before a single court can constitute an implicit proposal for a joint trial—and therefore a mass action under CAFA—even where the plaintiffs vigorously dispute this conclusion. *Id.* at 572-73.

In *Abbott*, several hundred plaintiffs filed ten lawsuits in Illinois state courts in three counties, alleging they suffered personal injuries as a result of a prescription medication manufactured by the defendant. *Id.* at 570. The plaintiffs then moved to consolidate and transfer the cases to a single state court, averring that the cases presented common questions of law and fact and that consolidation would prevent duplicative pre-trial proceedings and inconsistent rulings. *Id.* at 571. Despite the plaintiffs' position that they never "address[ed] how the trials of the various claims in the cases would be conducted, other than proposing that they all take place in [the same court]," the Seventh Circuit held that the plaintiffs had implicitly proposed a joint trial, in part because "a joint trial can take different forms as long as the plaintiffs' claims are being determined jointly." *Id.* at 572-73. The court explained:

> [A] joint trial does not have to encompass relief. For example, a trial on liability could be limited to a few plaintiffs, after which a separate trial on damages could be held. Similarly, we have said that a trial that involved only 10 exemplary plaintiffs, followed by application of issue or claim preclusion to 134 more plaintiffs without another trial, is one in which the claims of 100 or more persons are being tried jointly. In short, a joint trial can take different forms as long as the plaintiffs' claims are being determined jointly.

Id. at 573 (internal quotation marks and citations omitted).

The *Abbott* court's decision was consistent with the Sixth Circuit's reasoning in *Freeman v. Blue Ridge Paper Products*, 551 F.3d 405 (6th Cir. 2008). There, the court held that the 300 property owners could not avoid CAFA jurisdiction by dividing their claims into five separate cases covering different six-month time intervals. While the amount-in-controversy in each of the five individual cases was less than the $5 million CAFA threshold, the court held that "[i]f such pure structuring permits class plaintiffs to avoid CAFA, then Congress's obvious purpose in passing the statute—to allow defendants to defend large interstate class actions in federal court—can be avoided almost at will, as long as state law permits suits to be broken up on some basis." 551 F.3d at 407. Just as the *Freeman* complaints were "identical in all respects except for the artificially broken up time periods," *id.*, the state court petitions here are identical in all respects except for the names of the multiple plaintiffs listed on each case caption. And just as in *Freeman*, if the division of 650 plaintiffs into batches of less than 100 per case allowed plaintiffs to avoid CAFA, Congress's purpose would likewise be subject to evasion "almost at will."

For the same reasons, under the facts here it was erroneous for the district court to credit plaintiffs' "announcement of their intention not to jointly try the

cases." Order at 12-13 (Exhs. at A12-A13). A simple declaration that plaintiffs had no intention to jointly try two or more of the eleven cases says nothing about the practical result of their tactic, because it fails to account for the legal effect or impact of plaintiffs' decision to put 650 plaintiffs' claims before the same state court judge in eleven identical petitions. *See In re Abbott*, 698 F.3d at 573; *Romo v. Teva Pharms. USA, Inc.*, No. 13-56310, 2013 U.S. App. LEXIS 19527, at *17-18 (9th Cir. Sept. 24, 2013) (Gould, J., dissenting) ("joint trial" can take different forms, and proposal for joint trial can exist even where plaintiffs do not use the magic words, "joint trial").[3] To find otherwise would allow exactly the kind of "at will" evasion of CAFA jurisdiction that the *Abbott* and *Freeman* courts prohibited.

Nor does the district court's observation that courts considering similar issues have reached inconsistent conclusions weigh against review of the district court's decision. *See* Order at 12 (Exhs. at A12). As an initial matter, the cases cited by the district court are distinguishable and inconsistent with superseding Supreme Court precedent. Three of the cases pre-date the Supreme Court's

[3] In *Romo*, where a rehearing application is pending, the majority interpreted a specific California state statute, finding that invocation of the statute's pretrial procedures fell short of a proposal for a joint trial. *See* 2013 U.S. App. LEXIS 19527, at*5-14.

decision in *Standard Fire*,[4] and one of those three involved decidedly different allegations than those at issue here. *See Abrahamsen v. ConocoPhillips Co.*, 503 F. App'x 157, 159 (3d Cir. 2012) (plaintiffs asserted claims for injuries suffered on various different "rigs, platforms and vessels"). While *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013), was decided after the Supreme Court's *Standard Fire* opinion, the Eleventh Circuit erroneously sought to distinguish *Standard Fire* on the ground that it concerned the amount-in-controversy requirement and not the 100-person threshold even though both are components of Section 1332(d). 720 F.3d at 885-86. But the Supreme Court made it clear that federal courts should not "exalt form over substance" by allowing plaintiffs to engage in tactics that run counter to CAFA's objectives. 133 S. Ct. at 1350. *Scimone* goes directly against this directive, just as the Ninth Circuit did in its pre-*Standard Fire* decision in *Tanoh*, where reference to plaintiffs as "masters of their complaint" put form over substance and allowed jurisdictional manipulation. *See Tanoh*, 561 F.3d at 953.

Even if decisions rejecting CAFA jurisdiction were not distinguishable, the fact that the federal appellate courts have reached inconsistent results when considering mass action jurisdiction under CAFA is all the more reason for this

[4] *Abrahamsen v. ConocoPhillips, Co.*, 503 F. Exhs. 157 (3d Cir. 2012); *Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009).

Court, which has never considered the question presented, to accept this appeal. *See BP Am., Inc.*, 613 F.3d at 1034-35 (considering, among other factors, "whether the question is 'unsettled'" and "whether the question is likely to recur" when deciding whether to accept an appeal raising a CAFA jurisdictional issue). CAFA's congressional "Sponsors believ[ed] it [] important to create a . . . body of clear and consistent guidance for district courts that will be interpreting [CAFA] and would particularly encourage appellate courts to review cases that raise jurisdictional issues likely to arise in future cases." 151 Cong. Rec. at H729. It is especially important here, where there has been such a transparent effort to avoid federal jurisdiction and thwart Congress's objectives. Each of plaintiffs' eleven identical petitions demands a single trial of all claims, alleging that joinder of the claims "is proper because the claims arise out of a series of transactions or occurrences and there are questions of law and fact common to Plaintiffs' claims." *See, e.g.*, *Halliburton* Pet. ¶ 16 (citing Okla. Stat. tit. 12, § 2020 (2013)) (Exhs. at A51).

For plaintiffs to argue that the eleven cases will proceed to trial without any overlap of issues or commonly applicable rulings defies practical reality. *See In re Abbott*, 698 F.3d at 573. The "removal provisions [of CAFA] attempt to put an end to the type of gaming engaged in by plaintiffs' lawyers to keep cases in State

court [and] should thus be interpreted with this intent in mind." 151 Cong. Rec. at H729. The Court should accept this appeal and rule accordingly.

B. This Court Should Accept Review to Determine Whether District Courts Have Authority to Sever Fraudulently Misjoined Claims and Retain Jurisdiction Over Diverse Plaintiffs.

The district court noted in its Remand Order that "[w]hile the Court of Appeals for the Tenth Circuit has long recognized the doctrine of fraudulent joinder of defendants, it has not adopted the doctrine of fraudulent misjoinder, much less extended that doctrine to the joinder of claims by different plaintiffs." Order at 8 (Exhs. at A8). "[L]ack[ing] guidance by the Tenth Circuit," the district court declined to exercise the authority to sever the fraudulently misjoined claims and retain jurisdiction over the remaining diverse plaintiffs. *Id.* at 10 (Exhs. at A10). This Court should grant review to provide district courts the guidance they require.

The Supreme Court has long recognized that the right of removal was intended to provide defendants the same protections from local prejudice in state court that diversity jurisdiction provides to plaintiffs. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) ("The judicial power . . . was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be

entitled to try their rights, or assert their privileges, before the same forum."). Accordingly, a party must not be permitted to engage in manipulative attempts to defeat diversity jurisdiction. Indeed, as the Tenth Circuit has explained, "it is well settled that upon allegations of fraudulent joinder designed to prevent removal, federal courts may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal." *Smoot v. Chi., R. I. & P. R.R.*, 378 F.2d 879, 881-82 (10th Cir. 1967). A federal court's scrutiny of forum manipulation and plaintiffs' attempts to deprive an out-of-state defendant of its constitutional right to a federal forum, even where the practice on its face appears permissible, requires that the federal court not "exalt form over substance" or sanction practices that "run directly counter to [the jurisdictional statute's] primary objective." *Standard Fire Ins. Co.*, 133 S. Ct. at 1350.

Plaintiffs' inclusion of token New Jersey residents in these cases is precisely the type of manipulative artifice that the Supreme Court prohibits. *See id.*; *see also Tapscott* 77 F.3d at 1360. Indeed, "fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction." *In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002) (citing *Tapscott*, 77 F.3d at 1360). Accordingly, while this Court has yet to adopt the fraudulent misjoinder doctrine, other federal appellate courts and numerous

trial courts have. *See, e.g.*, *Tapscott*, 77 F.3d at 1360; *Greene v. Wyeth*, 344 F. Supp. 2d 674, 684-85 (D. Nev. 2004) ("[T]he [fraudulent misjoinder] rule is a logical extension of the established precedent that a plaintiff may not fraudulently join a defendant in order to defeat diversity jurisdiction in federal court." (internal citations omitted)); *Grennell v. W. S. Life Ins. Co.*, 298 F. Supp. 2d 390, 396 (S.D. W. Va. 2004) (holding diversity of citizenship jurisdiction cannot be defeated "through . . . joining nondiverse plaintiffs"). As one court put it, "[t]he premise which underlies the concept of fraudulent misjoinder is that diverse defendants ought not be deprived of their right to a federal forum by such a contrivance as this." *Reed v. Am. Med. Sec. Grp., Inc*., 324 F. Supp. 2d 798, 805 (S.D. Miss. 2004).

The district court's failure to address the fraudulently misjoined plaintiffs here undermines defendants' right to a federal forum as well as the joinder principles of the Federal Rules of Civil Procedure. To support the proper joinder of multiple plaintiffs under Fed. R. Civ. P. 20(a), a logical relationship must exist among the plaintiffs' claims. *See Jacobs v. Watson Pharms., Inc.*, No. 10-CV-120-TCK-TLW, 2011 U.S. Dist. LEXIS 61250, at *6 (N.D. Okla. June 7, 2011). In *Jacobs*, a prescription pharmaceutical case, the district court noted that "complicated cases involving implanted devices, surgeries by various doctors

across the country, . . . or other claims involving more individualized facts" are not "case[s] involv[ing] fairly simple allegations that lend[] themselves to joinder." *Id.* at *13-14; *see also Cumba v. Merck & Co., Inc.*, No. 08-CV-2328, 2009 U.S. Dist. LEXIS 41132, at *4 (D.N.J. May 10, 2009) ("The majority of courts to address joinder in the context of drug liability cases have found that basing joinder merely on the fact that the plaintiffs ingested the same drug and sustained injuries as a result thereof is insufficient to satisfy Rule 20(a)'s 'same transaction' requirement.").

Here, aside from the basic fact that each plaintiff was implanted with one of ten pelvic mesh products manufactured by defendant Ethicon, plaintiffs allege no factual connection among their claims. *See, e.g.*, *Halliburton* Pet. (Exhs. at A48-A78). Plaintiffs were implanted with various combinations of ten different products developed by different entities in different countries over the course of many years, with distinct labeling that changed over time. *See, e.g.*, *id.* ¶¶ 3-4 (Exhs. at A49). Plaintiffs allege a broad array of distinct injuries, none of which are attributed to specific plaintiffs, each of whom has a unique medical history, including highly individualized conditions their medical devices were intended to treat. *See, e.g.*, *id.* ¶ 37 (Exhs. at A59). In addition, in each of the cases only a

maximum of three plaintiffs has any apparent connection to the state of Oklahoma. *See* Summary Table (Exhs. at A35).[5]

Although egregiousness is not strictly required for a showing of fraudulent misjoinder, its presence warrants close scrutiny and is strongly suggestive of impropriety. Plaintiffs' forum shopping is blatant on the face of each petition, where a few token New Jersey plaintiffs filed their claims in Oklahoma despite the fact that the evidence and witnesses pertinent to their claims reside in New Jersey. Notwithstanding the pending pelvic mesh litigation in their home state, in which their attorneys are active participants, the New Jersey residents have joined a multi-party lawsuit 1,500 miles away, in Pottawatomie County, Oklahoma. In the absence of an allegation that the New Jersey residents have any substantive connection to the state of Oklahoma, it takes no great leap of logic to appreciate that the New Jersey residents have joined this action for the sole purpose of defeating federal diversity jurisdiction.

Under these circumstances, the New Jersey residents are fraudulently misjoined. Yet the district court declined to apply the *Tapscott* doctrine of

[5] By combining their claims into eleven actions rather than 650 individual lawsuits in Oklahoma state court, these 650 plaintiffs, the vast majority of whom are not residents of the State of Oklahoma, have avoided paying the $223.70 filing fee they would owe for each separate petition, a total of $142,944.30 in filing fees otherwise owed to the state courts of Oklahoma.

fraudulent misjoinder, citing "unsettled questions," concluding that "district courts appear to be equally divided on the applicability of the doctrine," and noting "confusion" about when misjoinder is so egregious as to constitute fraudulent misjoinder. Order at 9 (Exhs. at A9) (quoting *Palmer v. Davol, Inc.*, 2008 WL 5377991, at *3 (D.R.I. Dec. 23, 2008)).[6] But this confusion, which the district court inexplicably characterized as "severe[] critici[sm]," *id.* at 8 (Exhs. at A8), is a compelling reason for the Court to address this question. *See BP Am., Inc.*, 613 F.3d at 1034 (review warranted for "unsettled" questions). If it does so, it will find no confusion as to the egregiousness of plaintiffs' jurisdictional manipulation here, where the inclusion of token New Jersey plaintiffs with no connection to the State of Oklahoma constitutes fraudulent misjoinder.

[6] The district court also suggested that Federal Rule of Civil Procedure 82 bars federal courts from "fashion[ing] subject matter jurisdiction" using rules of joinder and severance. *See* Order at 10 (Exhs. at A10). But it is "well settled" that federal courts may address fraudulent joinder. *See, e.g.*, *Smoot*, 378 F.2d at 881-82 (affirming denial of motion to remand). And in any event, the case the district court cited fails to support its conclusion. In *Jamison v. Purdue Pharma Co.*, the court held that "if . . . claims were *properly joined under state law when the suit was originally filed*," the district court violates Rule 82 by severing the claims. 251 F. Supp. 2d 1315, 1321 n. 6 (S.D. Miss. 2003) (emphasis in original). Contrary to the district court's suggestion, *Jamison* says nothing about the federal courts' authority to sever claims that were fraudulently joined in state court. *See Tapscott*, 77 F.3d at 1360 (upholding district court's severance of fraudulently misjoined claims).

VI. CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court grant this Petition for review and reverse the Order of the United States District Court for the Western District of Oklahoma (Leonard, J.), entered on October 18, 2013.

Dated: October 28, 2013

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*Application for admission pending

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1. This brief complies with the volume limitations of Fed. R. App. P. 5(c) because this brief is 20 pages in length, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

/s/ Amy Sherry Fischer

CERTIFICATE OF COMPLIANCE WITH RULE 25.5

This brief complies with the privacy redaction requirements of 10th Cir. R. 25.5 because this brief contains no private data that is required to be redacted.

/s/ Amy Sherry Fischer

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I hereby certify that I have filed the foregoing via the Court's CM/ECF system on October 28, 2013. A true and correct copy of the same was sent on October 28, 2013, by Electronic Mail to the following counsel of record:

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