Nos. 13-6287, 13-6288, 13-6289, 13-6290, 13-6291, 13-6292, 13-6293, 13-6294, 13-6295, 13-6296, & 13-6297

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

In re: JOHNSON & JOHNSON, *et al.*,

Nos. 13-832-L, 13-833-L, 13-834-L, 13-836-L, 13-838-L, 13-839-L, 13-840-L, 13-841-L, 13-844-L, 13-845-L, & 13-846-L

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(LEONARD, J.)

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., IN SUPPORT OF APPELLANTS, SEEKING REVERSAL

GOLDBERG SEGALLA LLP
Attorneys for Amicus Curiae
902 Carnegie Center, Suite 100
Princeton, New Jersey 08540
(609) 986-1300

HUGH F. YOUNG, JR., ESQ.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive, Suite 510
Reston, Virginia 20191
(703) 264-5300

On the Brief:

ANITA HOTCHKISS
MATTHEW S. LERNER
BRENDAN T. FITZPATRICK

Introduction

In accordance with Federal Rules of Appellate Procedure 29, the Product Liability Advisory Council ("PLAC") respectfully moves this Court for leave to file the attached brief of *amicus curiae* in support of Defendants-Appellants. PLAC obtained consent of the attorneys for Defendants-Appellants, Johnson & Johnson and Ethicon, Inc., to file its brief. PLAC endeavored to obtain the consent of Plaintiffs-Appellees, Joy Halliburton et al., but was unable to do so. As Plaintiffs-Appellees refused to consent to the filing of the Amici Curiae brief on behalf of the Chamber of Commerce of the United States of America and PhRMA, it is expected that Plaintiffs-Appellees will not consent to the filing of PLAC's brief. *See*, Fed. R. App. P. 29(a).

Statement of the movant's interest

This brief of *amicus curiae* is being filed on behalf of PLAC, a non-profit association with 103 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate

membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 925 briefs as amicus curiae in both state and federal courts, including this court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix "A".

PLAC believes that this cases addresses the significant issues concerning the statutory right of defendants to remove cases to Federal court. Many of PLAC's members are involved in mass-action litigation or could become embroiled in such litigation and they are especially concerned about the outcome of this case. PLAC wishes to bolster the adoption of the doctrine of fraudulent misjoinder to preserve a defendant's statutory right to remove a case to Federal court. The doctrine of fraudulent misjoinder, which has only been formally recognized and adopted in the Eleventh Circuit Court of Appeals, provides an invaluable procedural defense to protect a defendant's statutory right to removal when confronted with procedural gamesmanship whose sole purpose is to frustrate the rights of defendants. PLAC and its members are concerned by the District Court's ruling as it effectively

condoned a scheme to avoid Federal jurisdiction that could provide a framework for plaintiffs to eviscerate the right of removal.

Statement of relevance of *amicus* brief

Due to its extensive experience advocating on issues involving and attendant to products-liability litigation, PLAC is uniquely qualified to address the doctrine of fraudulent misjoinder in this appeal. In particular, PLAC's brief demonstrates that while plaintiffs are normally free to choose their own forum, they cannot join parties solely for the purpose of defeating federal diversity jurisdiction. And the fraudulent-misjoinder doctrine exists to protect a defendant's statutory right of removal and guard against these abusive pleading practices.

In its proposed brief, PLAC presented two points: first, the doctrine of fraudulent misjoinder protects defendants' statutory right of removal, and should be adopted by this Court; and second, when applying the doctrines, the level of egregiousness need not rise to the level of fraud where the scheme to destroy the right of removal can be found.

PLAC wishes to ensure that the statutory right of removal of its members, as well as all potential defendants in this country, is preserved.

Conclusion

PLAC respectfully asks this Court to grant its application and permit the filing of the attached brief of *amicus curiae*.

Dated: Princeton, New Jersey
January 16, 2014

Respectfully submitted,
Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

By: /s/ Brendan T. Fitzpatrick

Brendan T. Fitzpatrick
GOLDBERG SEGALLA LLP
902 Carnegie Center, Suite 100
Princeton, New Jersey 08540
(609) 986-1300

Hugh F. Young, Jr. Esq.
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr., Suite 510
Reston, Virginia, 20191
(703) 264-5300

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014 I electronically filed the Motion for Leave to File Brief of *Amicus Curiae* Product Liability Advisory Council, Inc. in Support of Appellants, Seeking Reversal using the court's CM/ECF system which will send notification of such filing to the following:

Timothy M. Bunson
Matthew J. Sill
Sill Law Group
14005 North Eastern Avenue
Edmond, OK 73013
(405) 509-6300

Julie L. Rhoades
Matthews and Associates
2905 Sackett Street
Houston, TX 77098
(713) 522-5250

Attorneys for Plaintiffs-Appellees

Andrew McAfee Bowman
Amy S. Fischer
Larry D. Ottaway
Foliart, Huff, Ottaway & Bottom
201 Robert S. Kerr Avenue, 12th Floor
Oklahoma City, OK 73102
(402) 232-4633

Steve Brody
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006-0000
(202) 383-5300

Richard B. Goetz
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

Attorneys for Defendants-Appellants

on this 17th day of January 2014.

/s/ Samantha Collins
Samantha Collins

EXHIBIT A

Nos. 13-6287, 13-6288, 13-6289, 13-6290, 13-6291, 13-6292, 13-6293, 13-6294, 13-6295, 13-6296, & 13-6297

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(LEONARD, J.)

PROPOSED *AMICUS CURIAE* BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC.

GOLDBERG SEGALLA LLP
Attorneys for Amicus Curiae
902 Carnegie Center, Suite 100
Princeton, New Jersey 08540
(609) 986-1300

HUGH F. YOUNG, JR., ESQ.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive, Suite 510
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(703) 264-5300

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Corporate disclosure statement

The Product Liability Advisory Council, Inc. has no parents, subsidiaries, or affiliates.

Rule 29(c)(5) statement

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus curiae Product Liability Advisory Council, Inc. and its counsel hereby state that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person other than an amicus curiae, the members of an amicus curiae, or the counsel of an amicus curiae contributed money that was intended to fund preparing or submitting this brief.

Statement of interest of Amicus Curiae

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 103 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 925 briefs as amicus curiae in both state and federal courts, including this court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix "A".

The adoption of the doctrine of fraudulent misjoinder to preserve a defendant's statutory right to remove a case to Federal court is of utmost importance to PLAC members, who are frequently exposed to mass tort litigation. This doctrine, which has been formally recognized and adopted in the United

States Court of Appeals for the Eleventh Circuit, provides an invaluable procedural defense to protect a defendant's statutory right to removal when confronted with procedural gamesmanship whose sole purpose is to avoid Federal jurisdiction and frustrate the rights of defendants. The district court's ruling effectively condones a scheme that provides a framework for plaintiffs to eviscerate the right of removal and force defendants to litigate mass tort actions, involving matters of interstate commerce with plaintiffs from multiple jurisdictions in state courts rather than in Federal court where they should be adjudicated.

Summary of argument

According to the United States Supreme Court in *Alabama Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906), "Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." Although plaintiffs are generally free to choose their own forum, they cannot join parties solely for the purpose of defeating federal diversity jurisdiction. The fraudulent joinder and misjoinder doctrines—where plaintiffs attempt to defeat removal by misjoining the unrelated claims of non-diverse party plaintiffs or defendants to circumvent diversity jurisdiction—exist to protect a defendant's statutory right of removal and guard against abusive pleading practices.

In this case, over the course of three days, 650 plaintiffs from 26 states and the Commonwealth of Puerto Rico filed eleven complaints in the same county court before the same judge in Oklahoma. All claimed to have been injured because of pelvic-mesh surgical devices the defendant manufactured. The facts show plaintiffs rigged their complaints to avoid Federal courts and deprive defendants of their right of removal. The 650 individual plaintiffs were broken up into groups of less than 100 to avoid the Class Action Fairness Act. Then plaintiffs destroyed diversity jurisdiction by naming at least one plaintiff in each complaint

who is a resident of New Jersey—the same resident state as the defendants. These New Jersey plaintiffs have no connection with the forum state of Oklahoma and, indeed, their cases should logically be heard in the consolidated pelvic mesh litigation in New Jersey, where they live and were treated.

The Eleventh Circuit in *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) created the fraudulent-misjoinder doctrine to remedy this very scenario. If plaintiffs' procedural gamesmanship is permitted to continue, the removal rights of defendants throughout this nation will be meaningless. PLAC respectfully asks this Court to protect defendants' right to removal, codified in 28 U.S.C. § 1441(a), adopt the fraudulent misjoinder doctrine, and reverse the district court's ruling.

Point I

This Court should adopt the fraudulent misjoinder doctrine and reverse the district court's decision that remanded the matter to state court.

With the confluence of the federal removal statute, multi-district product liability litigation, and the doctrine of fraudulent misjoinder, this appeal presents issues of paramount importance in product liability litigation. Under the strategy devised by plaintiffs' counsel, eleven complaints were filed on behalf of 650 plaintiffs from 26 states and the Commonwealth of Puerto Rico with the same judge in the District Court of Pottawatomie County, Oklahoma. All plaintiffs claim injuries caused by pelvic mesh manufactured by Ethicon, Inc. In order to improperly preclude defendants from exercising their statutory right to remove these mass action complaints to Federal court, counsel grouped dissimilar claims with less than 100 party-plaintiffs and included at least one resident of New Jersey in each, thereby eliminating diversity.[1] This procedural tactic poses a significant threat to the rights of product liability defendants involved in litigation throughout this country.

PLAC asks this Court to adopt the doctrine of fraudulent misjoinder as set forth by the United States Court of Appeals for the Eleventh Circuit in *Tapscott*,

[1] Had plaintiffs' counsel filed individual complaints on behalf of each plaintiff in the State of Oklahoma, they would have paid $223.70 per plaintiff.

supra, 77 F.3d at 1360. By following the reasoning in *Tapscott*, this Court should sever the actions commenced by the token New Jersey plaintiffs. The severance will be without prejudice; thus, the New Jersey plaintiffs can commence actions in New Jersey state court. Therefore, this Court's application of fraudulent misjoinder will protect every party's rights.

A. The doctrine of fraudulent misjoinder protects defendants' statutory right of removal and should be adopted by this Court.

Under the federal removal statute, "any civil action brought in a state court of which the district courts of the United States have original jurisdiction may be removed by the defendant or defendants, to the district court." 28 U.S.C. § 1441(a). Federal district courts have original jurisdiction over all civil actions between citizens of different states if the amount in controversy exceeds $75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a)(1). Complete diversity is required. *See, Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978). If an action originally instituted in a state court could have been brought in federal court under diversity jurisdiction, the defendants may remove it to federal court provided certain procedures are followed and certain conditions met. 28 U.S.C. §§ 1441 and 1446. Therefore, a defendant's ability to remove a case to Federal court is a statutory right.

The United States Supreme Court has ruled that "Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." *Alabama Great S. Ry., supra,* 200 U.S. at 218; *cf., Federated Dep't Stores v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (noting the "settled principle" that when assessing federal question jurisdiction courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum").

A strong reason for removal "exists in the supreme importance of" giving a party a "fair trial unbiased and unaffected by local interest, prejudice, or parties." *Chicago, M. & St. P.R. Co. v. Drainage Dist.*, 253 F. 491, 497 (S.D. Iowa 1917). But a more fundamental basis can be found in having every party feel that they had "a fair trial before a tribunal unbiased and unaffected by anything except the merits of the case." *Id.* Therefore, the United States Congress, "provided that, in cases involving substantial amounts, a citizen of one state should, when his rights were brought before the court of another state, have the privilege of transferring the subject matter of litigation into the courts of the United States for trial." *Id.* This right cannot be taken away through procedural chicanery; the Eleventh Circuit in *Tapscott* created the doctrine of fraudulent misjoinder, and a growing number of courts are following its lead.

While similar, the doctrines of fraudulent misjoinder and fraudulent joinder are not identical. Fraudulent joinder, a widely recognized doctrine, usually occurs when a plaintiffs tries to defeat federal jurisdiction and a defendant's right of removal by joining as defendants parties that have no real connection with the matter. *See*, *Dodd v. Fawcett Pubs., Inc.*, 329 F.2d 82, 85 (10th Cir. 1964). In the fraudulent misjoinder scenario, by contrast, a plaintiff has either added claims by other non-diverse plaintiffs or claims against other non-diverse defendants that, while they may be valid, are nevertheless not properly joined under applicable permissive-joinder rules. It typically occurs where diversity is lacking on its face, but a defendant has asked the court to sever the claims involving the non-diverse parties and remand them to state court, while retaining jurisdiction over only the claims where diversity jurisdiction exists. *See*, *In re Propecia (Finasteride) Prods. Liab. Litig.*, 2013 U.S. Dist. LEXIS 117375, at *42 (E.D.N.Y. May 17, 2013).

The doctrine of fraudulent misjoinder is essential to protect product-liability defendants' right to remove actions involving plaintiffs from multiple districts that properly belong in Federal court. The fraudulent misjoinder doctrine is designed to strike a "reasonable balance" between competing policy interests. *See*, 14B Wright & Miller, Federal Practice & Procedure § 3723, pp. 788-93 (3d ed. 1998). On one side of the scale is the plaintiff's right to select the forum and the defendants, as

well as the general interest in confining federal jurisdiction to its appropriate limits. *Id.* On the other side is the defendant's statutory right of removal and associated interest in guarding the removal right against abusive pleading practices. *Id.* Misjoinder has the same effect as fraudulent joinder and may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action. And it is well-settled that a defendant's "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921).

The District Court in this case has allowed plaintiffs to avoid Federal jurisdiction on matters of national importance where plaintiffs improperly added a non-resident in the multi-plaintiff complaint. The non-resident plaintiff has no ties to the forum state and has no other purpose in this matter other than to eliminate diversity jurisdiction. These New Jersey plaintiffs were allegedly injured in New Jersey. They received medical treatment in New Jersey. There is presently litigation in New Jersey involving pelvic mesh.[2] There is no logical justification for these New Jersey plaintiffs to be included in this litigation approximately 1,500

[2] Notice to the Bar, *Centralized Case Management—Pelvic Mesh Litigation*, N.J. Sup. Ct. (Oct. 12, 2010), http://www.judiciary.state.nj.us/notices/2010/n101012b.pdf.

miles from the location of all relevant witnesses, records, and conduct. But by allowing plaintiffs to engage in fraudulent misjoinder, the district court gave its judicial imprimatur to a blueprint that plaintiffs in this Circuit and around the nation will follow to intentionally avoid Federal jurisdiction. Using this improper approach, future plaintiffs in similar litigation will merely have to add a single plaintiff hailing from the same state as a defendant, regardless of the plaintiff's complete lack of or tenuous connections with the forum state. The fraudulent joinder doctrine protects defendants from such inappropriate pleadings.

The fraudulent misjoinder doctrine has its genesis with the Eleventh Circuit's decision in *Tapscott*, *supra*. In *Tapscott*, the plaintiff was an Alabama resident who originally filed his state-law, class-action suit in Alabama state court against four defendants, one of which was an Alabama resident. The plaintiff alleged violations of Alabama Code, common law and statutory fraud, and civil conspiracy arising from the sale of "service contracts" on automobiles sold and financed in Alabama. The first amended complaint alleged identical claims and added 16 named plaintiffs and 22 named defendants.

A second amended complaint named four additional plaintiffs, including Jessie Davis and Sharon West—Alabama residents—and three more named defendants, including Lowe's Home Centers—a North Carolina resident. Unlike

the original and first amended complaints, the second amended complaint alleged violations arising from the sale of "extended service contracts" in connection with the sale of retail products. Lowe's filed a notice of removal to the United States District Court for the Northern District of Alabama.

Addressing the issue of diversity of citizenship, the Eleventh Circuit ruled that while 28 U.S.C. § 1332 requires complete diversity, a lawsuit "may nevertheless be removable if the joinder of non-diverse parties is fraudulent." *Tapscott*, 77 F.3d at 1359 (citations omitted). According to the court, "(m)isjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action." *Id.*, at 1360. And relying upon the Supreme Court's decision in *Wilson, Republic Iron & Steel Co., supra*, the court held that a defendant's "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Id.*

Plaintiffs game-playing in this case is akin to *Tapscott* because the pleadings were engineered for the sole purpose of frustrating the defendants' statutory right of removal. If this conduct is countenanced, plaintiffs in this Circuit and around the country will employ this tactic to destroy the statutory rights of defendants to remove cases to the Federal courts. This is particularly troubling in the area of products liability and mass tort litigation where, like the lawsuits in this case,

defendants are repeatedly sued by hundreds of plaintiffs from multiple jurisdictions.

This Court has not ruled on the application of the doctrine. *See, Lafalier v. State Farm Fire & Cas. Co.*, 391 Fed. Appx. 732, 739 (10th Cir. 2010) ("we need not decide [whether to adopt procedural misjoinder] today, because the record before us does not show that adopting the doctrine would change the result in this case"). But the decision by *Tapscott* is by no means an anomaly as several Court of Appeals Circuits have acknowledged the doctrine and indicated support for its application. For example, the Fifth Circuit has "not directly applied the fraudulent-misjoinder theory, but it has cited *Tapscott* with approval and has acknowledged that fraudulent misjoinder of either defendants or plaintiffs is not permissible to circumvent diversity jurisdiction." *Centaurus Unity v. Lexington Ins. Co.*, 766 F. Supp. 2d 780, 789 (S.D. Tex. 2011) (*citing, In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002) ("Thus, without detracting from the force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction, we do not reach its application in this case."). In *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006), the court cited to *Tapscott* for the proposition that joinder can be improper even if there is no fraud in pleadings and

the plaintiff has the ability to recover against each defendant. And the Ninth Circuit recognized the doctrine and "assume[d], without deciding, that this circuit would accept the doctrines of fraudulent and egregious joinder as applied to plaintiffs." *California Dump Truck Owners Ass'n v. Cummins Engine Co., Inc.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001).

A number of District Courts in other circuits have also applied the doctrine. *See, e.g.*, *Reed v. American Med. Sec. Group, Inc.*, 324 F. Supp. 2d 798, 805 (S.D. Miss. 2004) (in a suit involving a "collection of unrelated plaintiffs suing over unconnected events" the court applied the fraudulent misjoinder doctrine because "diverse defendants ought not be deprived of their right to a federal forum by such a contrivance as this"); *Greene v. Wyeth*, 344 F. Supp. 2d 674, 685 (D. Nev. 2004) (finding that the improper joinder of plaintiffs "frustrated" the defendants' statutory right to removal); and *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 144-48 (S.D.N.Y. 2001) (applying doctrine and remanding only non-diverse plaintiffs).

This Court should follow the trend in tort cases such as this one involving numerous plaintiffs from multiple jurisdictions. Here, the sole purpose for plaintiffs' inclusion of New Jersey plaintiffs who underwent surgery in New Jersey and have no connection to multi-party litigation in Oklahoma is to frustrate the

defendants' statutory right to removal. Thousands of pelvic-mesh, product-liability cases based upon diversity—brought by plaintiffs claiming similar injuries—have been filed in federal district courts throughout the country. Faced with these hundreds of claims, the United States Judicial Panel for Multi-District Litigation ("JPML") established six Multi-District Litigations ("MDLs") for actions against each manufacturer's mesh products in the United States District Court for the Southern District of West Virginia. *See, In re Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, 844 F. Supp. 2d 1359 (J.P.M.L. 2012). The transfer orders filed in *In re Ethicon* show that 40 Federal courts, Puerto Rico, and the District of Columbia have transferred cases to the Ethicon MDL. There is also pelvic-mesh litigation in New Jersey. *See, In re Pelvic Mesh/Gynecare Litig.*, 43 A.3d 1211 (N.J. Super. Ct. App. Div. 2012).

The growing trend shows that district courts are applying the fraudulent misjoinder doctrine in matters where plaintiffs have improperly joined unrelated claims in one action to defeat diversity jurisdiction. And PLAC respectfully asks this Court to reverse the district court's decision and adopt the fraudulent misjoinder doctrine. In applying the doctrine, the claims of the New Jersey plaintiffs should be severed under Fed. R. Civ. P. 21, without prejudice, and the complaints of the remaining plaintiffs removed to Federal court. Once severed, the

New Jersey plaintiffs are free to commence their action in the appropriate forum. Such a ruling upholds the statutory right of removal to all defendants, and also preserves the New Jersey plaintiffs' ability to pursue their claims against the defendants.

B. The level of egregiousness to support a finding of fraudulent misjoinder need not rise to the level of fraud where the court determines there is a scheme to destroy the right of removal.

Here, there is no doubt plaintiffs intended to undermine the defendants' statutory right of removal through procedural gamesmanship: 11 complaints filed over three days with the same County Court and the same judge; 650 plaintiffs broken up into groups of less than 100; at least one Oklahoma resident in each group for jurisdiction; and the most damning evidence of the contrived attempt to impair defendants' rights, at least one New Jersey plaintiff in each group to destroy diversity. Respectfully, while a finding of egregiousness should not be required, the machinations in this case constitute the type of evidence that supports the application of the fraudulent misjoinder doctrine.

Based upon plaintiffs' contrived scheme, this Court should exercise federal jurisdiction and uphold the defendants' removal rights. As this Court has held, "federal courts may look beyond the pleadings to determine if" claims have been joined as "a sham or fraudulent device to prevent removal." *Smoot v. Chicago*

Rock Isl. & Pac. R.R. Co., 378 F.2d 879, 881-82 (10th Cir. 1967). And the lack of any finding of fraud or bad faith comports with this Court's jurisprudence as it has held there "need not involve actual fraud in the technical sense", when considering whether to apply fraudulent joinder. *See, Anderson v. Lehman Bros. Bank, FSB*, 528 Fed. Appx. 793, 795 (10th Cir. 2013) and *Brazell v. Waite*, 525 Fed. Appx. 878, 881 (10th Cir. 2013). Whether the device is fraudulent joinder or misjoinder, it is still the same sham.

Therefore, PLAC submits that, consistent with the rationale of several courts, it is not necessary for the court to find "fraud" or egregiousness in order to apply the doctrine of fraudulent misjoinder. *See, Crockett*, *supra*, 436 F.3d at 533 ("A party…can be improperly joined without being fraudulently joined."); *Greene*, *supra*, 344 F. Supp. 2d at 685 (applying fraudulent misjoinder to sever claims, but holding that "the Court rejects the notion that Plaintiffs have committed an egregious act or a fraud upon the Court"); *Burns v. Western S. Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.D. W.Va. 2004) ("In this district, the 'egregious' nature of the misjoinder is not relevant to the analysis."); *Rezulin*, *supra*, 168 F. Supp. 2d at 147-48 ("While aware that several courts have applied *Tapscott's* egregiousness standard when considering misjoinder of plaintiffs in the context of remand petitions,… this Court respectfully takes another path."). *See also*, *Asher v.*

Minnesota Mining & Mfg. Co., No. 04-CV-522, 2005 U.S. Dist. LEXIS 42266 (E.D. Ky. June 30, 2005) (requiring "something more than 'mere misjoinder'" but disagreeing with those courts requiring a showing of a "'bad faith' attempt to defeat diversity on the part of the plaintiffs"). This latter approach is consistent with the fraudulent joinder analysis, which does not require a finding of "fraud in the common law sense of that term" (*see, Katz v. Costa Armatori, S.p.A.*, 718 F. Supp. 1508, 1513 (S.D. Fla. 1989)), or an examination of the subjective intent behind the preparation or structure of plaintiff's pleading. *See, Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851-52 (3d Cir. 1992).

The decision in the *Rezulin* MDL in the Southern District of New York supports PLAC's position, and its reasoning is compelling. The district court there found that the non-diverse plaintiffs in a number of multi-plaintiff pharmaceutical actions before the court were fraudulently misjoined. *Rezulin*, 168 F. Supp. 2d at 146-48. Each of the actions had originally been commenced in state court and removed by the defendants on the basis of diversity jurisdiction. In one matter, originally filed in Mississippi state court, diverse plaintiffs alleging claims only against drug manufacturers were joined with a single non-diverse plaintiff who asserted claims against both the drug manufacturers and a home health care provider. *Id.*, at 141-42, 144. Relying on decisions in prior pharmaceutical cases,

the court found that the non-diverse plaintiff's claims did not meet the transaction or occurrence requirement in Fed. R. Civ. P. 20. *Id.*, at 145.

One of the cases discussed in *Rezulin* was *In re Diet Drugs* where the court found that eleven plaintiffs from seven different states were fraudulently misjoined because their only connection was that each had ingested one or more diet drugs sold by the defendants. *See, In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 1999 U.S. Dist. LEXIS 11414, at *15 (E.D. Pa. 1999). The facts showed plaintiffs never alleged they received the drugs from the same source or any other similar connection; the complaint was originally filed in Montgomery County, Alabama, where only two plaintiffs actually resided; and the non-resident plaintiffs alleged no contact with Alabama or even the purchase of diet drugs in or near Alabama. *Id.* The court noted that there was no logical basis for the proposed joinder of the non-resident plaintiffs, "particularly… when most of the nonresident Plaintiffs reside in a jurisdiction in which at least one Defendant is a citizen." *Id.* According to the court, "the structure of this pleading is devoid of any redeeming feature as respects the underlying purposes of the joinder rules." *Id.*, at *16. The court concluded that the "joinder of several plaintiffs who have no connection to each other in no way promotes trial convenience or expedites the

adjudication of the asserted claims" and that plaintiffs' complaint "wrongfully deprive[d] Defendants of their right of removal." *Id.*, at *16-7.

The district court in *Rezulin* echoed this decision and found that the misjoined plaintiffs' claims were not "egregious" like the misjoined claims in *Tapscott* in the sense that the claims had "at least an empirical, if not a transactional, relationship to the claims of all the other plaintiffs." *Id.*, at 147. Nonetheless, the court found that where such a claim had the additional element of destroying diversity, it was not necessary to find bad faith to conclude that the claims were fraudulently misjoined. *Id.*, at 147-48. Any benefits flowing from the joinder of this plaintiff's claim were outweighed by the defendant's right of removal. *Id.*, at 147. Thus, the court severed and remanded the claims of the non-diverse plaintiff and allowed the remaining plaintiffs' claims to proceed in the MDL. *Id.*, at 148, 153; *see also, In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 679 (E.D. Pa. 2003) ("we find that under [Rule 20(a)], the claims of the pharmaceutical plaintiffs who had drugs prescribed by different doctors for different time periods do not arise out of the same transaction, occurrence, or series of transactions or occurrences.").

Even if a non-diverse plaintiff may have a valid cause of action against a defendant, that plaintiff may not prevent removal based on diversity of citizenship

if there is no reasonable basis for the joinder of that non-diverse plaintiff with the other plaintiffs. "Such 'procedural misjoinder' would be a plaintiff's purposeful attempt to defeat removal by joining together claims against two or more defendants where the presence of one would defeat removal and where in reality there is no sufficient factual nexus among the claims to satisfy the permissive joinder standard." 14B Wright & Miller, Federal Practice & Procedure § 3723 at 656-57 (3d ed. 1998).

Here, the New Jersey plaintiffs were fraudulently misjoined because they cannot satisfy Rule 20(a). Oklahoma's removal statute (Okla. Stat. tit. 12, § 2020 (2013)) is similar to Rule 20(a). Therefore, in this case it will not make a difference whether state or Federal rules apply. PLAC submits this Court should follow *Tapscott* and apply Federal law. *See also*, *Edwards v. E.I. Du Pont De Nemours & Co.*, 183 F.2d 165, 168 (5th Cir. 1950) ("In procedural matters we are controlled by the Federal Rules of Civil Procedure, 28 U.S.C.A.…We look to the federal statutes as construed by…federal decisions to determine whether the case is removable in whole or in part, all questions of joinder, non-joinder, and misjoinder being for the federal court.") (citations omitted).

Plaintiffs argue they are the masters of their complaints; where to bring to bring them, and whom they can include as parties. This right is not unfettered,

however, but must be balanced against the rights of defendants to defend those complaints in an impartial and appropriate forum. Rule 20(a) governs the "permissive joinder of parties," and it provides that plaintiffs may join any persons if their claims arise out of "the same transaction, occurrence, or series of transactions or occurrences" and if there are "common" questions of law or fact as to all of the persons.[3] Defendants may be joined together only if there is an alleged claim against them "arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a).

Plaintiffs in this case—and indeed, any plaintiffs who employ such a contrived scheme—cannot show a common "transaction." Under the Federal rules, "transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as

[3] Fed. R. Civ. P. 20(a) provides in pertinent part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons… may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

upon their logical relationship. Accordingly, all "logically related" events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926). "Language in a number of decisions suggests that the courts are inclined to find that claims arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the court." 7 Wright, Miller & Kane, Federal Practice and Procedure § 1653 (citations omitted).

There is nothing logical about the joinder of the New Jersey plaintiffs in this case. The non-resident plaintiffs from New Jersey have no connection whatsoever with Oklahoma. The only common factor is that each plaintiff claims to have been injured when she was implanted with one of ten different pelvic mesh products. But the plaintiffs all had different and individual medical histories that required the need for the implantation of the pelvic mesh; they underwent surgeries that were performed by different doctors in different states; they were implanted with various combinations of ten different products developed by different entities in different countries over several years; and significantly, these products had distinct labeling that changed over time. (A. 221a) With no more than three plaintiffs in each

complaint having any semblance of a connection to Oklahoma (A. 206a-7a), plaintiffs cannot satisfy Rule 20(a)'s transaction approach to permissive joinder.

The purpose of the doctrine of "fraudulent misjoinder" or "procedural misjoinder" is to prevent plaintiffs from improperly defeating diversity jurisdiction and protect removal. If plaintiffs can escape the MDL by joining multiple, unconnected, and non-diverse parties in a state court of their choice, they deny defendants their right to removal. *See*, *In re Propecia (Finasteride)*, *supra*, 2013 U.S. Dist. LEXIS 117375, at *42, *53 (the application of fraudulent misjoinder in pharmaceutical actions with multiple plaintiffs cases "does not serve to improperly extend federal jurisdiction, but rather promotes judicial efficiency and prevents manipulation of the court system by" the misjoinder of plaintiffs in states courts where they should have been part of the MDL). PLAC respectfully asks this Court to follow the lead of the Eleventh Circuit in *Tapscott*, *supra*, and adopt the doctrine of fraudulent misjoinder.

Conclusion

The procedural chicanery used by plaintiffs here supports the adoption of the fraudulent misjoinder doctrine. The sole purpose for plaintiffs to have organized the 650 individuals from more than two dozen states into groups of less than 100 and with at least one New Jersey plaintiff in each complaint—the same resident state as the defendants—was to avoid Federal jurisdiction and destroy the defendants' statutory right of removal. If permitted, this contrived procedural scheme will continue to be used by plaintiffs nationally to eviscerate defendants' right of removal in every mass action. Such a result violates the Supreme Court's directive from in *Wilson*, *supra*. The fraudulent misjoinder doctrine protects a defendant's statutory right of removal and guards against these abusive pleading practices, and PLAC respectfully asks this Court to eliminate this procedural subterfuge by adopting the fraudulent misjoinder doctrine and reversing the District Court's decision.

Dated: Princeton, New Jersey
January 16, 2014

Respectfully submitted,
Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

By: /s/ Brendan T. Fitzpatrick
Brendan T. Fitzpatrick
Anita Hotchkiss
Matthew S. Lerner

GOLDBERG SEGALLA LLP
902 Carnegie Center, Suite 100
Princeton, New Jersey 08540
(609) 986-1300

Hugh F. Young, Jr. Esq.
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr., Suite 510
Reston, Virginia, 20191
(703) 264-5300

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,058 words, 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 the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Date: January 16, 2014

/s/ Brendan T. Fitzpatrick

Attorney for Product Liability Advisory Council, Inc.
Goldberg Segalla LLP
902 Carnegie Center, Suite 100
Princeton, New Jersey 08540
bfitzpatrick@goldbergsegalla.com
(609) 986-1300

CERTIFICATE OF COMPLIANCE WITH RULE 25.5

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

Dated: January 16, 2014

/s/ Brendan T. Fitzpatrick

Attorney for Product Liability Advisory Council, Inc.
Goldberg Segalla LLP
902 Carnegie Center, Suite 100
Princeton, New Jersey 08540
bfitzpatrick@goldbergsegalla.com
(609) 986-1300

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/s/ Brendan T. Fitzpatrick

Attorney for Product Liability Advisory Council, Inc.
Goldberg Segalla LLP
902 Carnegie Center, Suite 100
Princeton, New Jersey 08540
bfitzpatrick@goldbergsegalla.com
(609) 986-1300

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014 I electronically filed the Proposed *Amicus Curiae* Brief of Product Liability Advisory Council, Inc. using the court's CM/ECF system which will send notification of such filing to the following, and one copy by Federal Express Next Business Day delivery:

Timothy M. Bunson
Matthew J. Sill
Sill Law Group
14005 North Eastern Avenue
Edmond, OK 73013
(405) 509-6300

Julie L. Rhoades
Matthews and Associates
2905 Sackett Street
Houston, TX 77098
(713) 522-5250

Attorneys for Plaintiffs-Appellees

Andrew McAfee Bowman
Amy S. Fischer
Larry D. Ottaway
Foliart, Huff, Ottaway & Bottom
201 Robert S. Kerr Avenue, 12th Floor
Oklahoma City, OK 73102
(402) 232-4633

Steve Brody
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006-0000
(202) 383-5300

Richard B. Goetz
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

Attorneys for Defendants-Appellants

I also certify that seven copies of the Proposed *Amicus Curiae* Brief of Product Liability Advisory Council, Inc. were submitted via Federal Express Next Business Day Delivery to:

Clerk of Court
United States Court of Appeals, Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

on this 17th day of January 2014.

/s/ Samantha Collins
Samantha Collins

APPENDIX A

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