UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEON M. HEREFORD, Administrator of the Estate of Countess Galloway, deceased, Appellee, v. BROOMALL OPERATING COMPANY LP, doing business as Broomall Rehabilitation and Nursing Center, et al., Appellants, and JOHN DOES, 1-5, Fictitious Defendant(s), Appellee.	No. 22-7005 (LEAD CASE) Consolidated with Nos. 22-7006, 22-7007, and 22-7008

REPLY IN SUPPORT OF APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

In opposing Appellees' motion to dismiss, Broomall misstates what the Pennsylvania district court did in these cases. The district court did *not* hold that Broomall (or its employees or former employees) could be sued for acts and omissions leading to the deaths of Appellees' loved ones.

Rather, it held that the question whether Broomall could be sued is one for the Pennsylvania state courts. Specifically, rejecting Broomall's claims of fraudulent joinder and complete preemption, the district court held that it lacked subject-matter jurisdiction over this action, including jurisdiction to resolve whether any immunity defenses apply, and accordingly terminated all remaining motions as moot.

In its appeal, Broomall asks *this* Court to address immunity issues that the district court held that it lacked jurisdiction to address. This Court can do so, however, only if the district court erred in holding that the federal courts lack jurisdiction over this action. But as Broomall *concedes*, the jurisdictional holding of the district court is unreviewable under 28 U.S.C. § 1447(d). This Court thus cannot proceed to the merits inquiries that Broomall requests it address. Broomall must raise its immunity and other arguments on remand in state court.

I. Section 1447(d) applies to the order on appeal in its entirety.

Broomall acknowledges that this Court cannot review the district court's remand order. Opp'n at 2. Nonetheless, it asserts that "[t]he law of this jurisdiction is that review of orders in conjunction with remand are not barred by section 1447(d)." Opp'n at 12. Broomall misunderstands

the law.

In *City of Waco v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140, 143 (1934), the Supreme Court held that an order issued in conjunction with a remand order was reviewable because it was "separable" and preceded "in logic and in fact" the district court's jurisdictional finding. The order at issue was a dismissal of a claim over which the court had held that it did have removal jurisdiction; and it was only after that claim was dismissed that the court remanded because it lacked jurisdiction over the remainder of the case. *Id.* at 142. Moreover, the decision on that issue would be conclusive on the petitioner in the state courts if not reversed on appeal. *Id.* at 143–44.

Sixty years later, in *Kimbro v. Velten*, 30 F.3d 1501 (D.C. Cir. 1994), this Court cited the Supreme Court's decision in *Waco* for the proposition that "§ 1447(d) does not bar appellate review of an order made in conjunction with a remand to state court, even one that was a basis for the decision to remand,"—as long as that order meets the *Waco* test, which the Court then proceeded to apply to the order before it. *Id*. at 1503. Thus, Broomall is wrong that this Court adopted a rule that *all* orders made in conjunction with a remand to state court fall outside section

1447(d). Rather, 1447(d) bars review where "it is impossible to disaggregate the order [on appeal] from the remand order itself." *Denizen Dev., L.L.C. v. Saxon*, 850 F. App'x 7, 8 (D.C. Cir. 2021) (quoting *Agostini v. Piper Aircraft Corp.*, 729 F.3d 350, 355 (3d Cir. 2013)).

The order on appeal plainly fails the *Waco* test. Here, the district court, before remanding, did not conclusively dispose of any claims over which it had jurisdiction; rather, it concluded that there was no claim before it over which it had jurisdiction. First, as to the motion to dismiss, Broomall does not even attempt to explain how the determination that a motion to dismiss is moot because the court has remanded for lack of jurisdiction is segregable from the remand for lack of jurisdiction. Second, as to the joinder issue, Broomall states that the "District Court's decision here to allow the joinder of the individual defendants is separable in logic and in fact from the District Court's remand order." Opp'n at 14. That assertion, however, is contradicted by the district court's opinion.

The court's discussion contains two sections: (1) "Federal Question Jurisdiction," Motion Ex. A. 3–6, and (2) "Diversity Jurisdiction," *id.* 6–13. Its discussion of the propriety of "joinder of the individual defendants" comes in the second section—addressing "whether Plaintiffs' amended

complaint which names individual, non-diverse defendants, and thereby defeats diversity jurisdiction, is proper, or should instead be deemed an instance of fraudulent joinder." *Id.* at 6. Nothing in the opinion supports the suggestion that this discussion is separable "in logic and in fact" into a concededly unreviewable ruling that the case must be remanded because the nondiverse parties were not fraudulently joined, and an assertedly reviewable ruling on Broomall's motion to strike the individual defendants as parties.[1] Far from being logically separate from and antecedent to the remand determination, the denial of the motion to strike followed from that determination.

Broomall repeatedly criticizes the district court's decision on the merits. Although Appellees disagree with those criticisms, the disagreement is not presented here, because "§ 1447(d)'s jurisdictional bar applies with equal force to unassailably correct and manifestly, inarguably erroneous orders of remand." *In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 585 (4th Cir. 2006) (cleaned up).

[1] Even if the denial of the motion to strike were not barred by section 1447(d), it would not be reviewable under 28 U.S.C. § 1291, because, as explained below and in Appellees' motion, it is not a final order, and neither the PREP Act nor the collateral order doctrine provides an applicable finality exception.

II. The PREP Act does not provide an exception to section 1447(d).

As the Third, Fifth, and Ninth Circuits have held, the PREP Act does not provide a basis for removing negligence actions like Appellees' from state to federal court. *See Mitchell v. Advanced HCS, L.L.C.*, __ F.4th __, 2022 WL 714888, at *2–4 (5th Cir. Mar. 10, 2022); *Saldana v. Glenhaven Healthcare LLC*, __ F.4th __, 2022 WL 518989, at *5 (9th Cir. Feb. 22, 2022); *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 407–13 (3d Cir. 2021), *petition for rehearing en banc denied* (Feb. 7, 2022). And as explained in Appellees' motion, at 21–24, the PREP Act's provision for interlocutory appeals, 42 U.S.C. § 247d-6d(e)(10), provides an exception to the finality requirement of 28 U.S.C. § 1291; it does not set forth an implied exception to section 1447(d).

Broomall does not directly dispute these points of law, resting entirely on its argument that the section 1447(d) bar does not apply because "the rulings under review are not remand decisions," but are "rulings on motions to dismiss," Opp'n at 10, and thus no exception to 1447(d) is necessary. As explained above, though, section 1447(d) applies to both the non-merits, mootness-based denial without prejudice of the motions to dismiss, and to the denial of the motion to strike, which is

inseparable from the remand.

Moreover, even to the extent that § 247d-6d(e)(10) provides an exception to the finality requirement of 28 U.S.C. § 1291, that provision, by its plain text, does not apply to motions to strike pursuant to Federal Rule of Civil Procedure 12(f). *See* Motion at 19–26. Despite Broomall's attempts to elide the distinction, *see, e.g.*, Opp'n at 8 (stating it "moved to dismiss the individual Appellants pursuant to Rule 12(f) motions to strike"), that provision cannot not provide a basis for appellate jurisdiction here.

III. The collateral order doctrine is irrelevant here.

As explained in Appellees' motion and explicitly recognized by five courts of appeals, the collateral order doctrine does not provide an end run around section 1447(d). *See* Motion 16–17 (collecting cases). Broomall does not respond to this point.

Broomall does respond to Appellees' point that the collateral order doctrine, even if it *were* an exception to section 1447(d), is inapplicable. Opp'n 17–21. But its response is based on its mistaken view that the Pennsylvania district court rejected Broomall's immunity defense. As mandated by Third Circuit precedent, the court held that the immunity

defense is to be decided by Pennsylvania state courts on remand. The district court made no "conclusive" finding about immunity, much less one that would be "effectively unreviewable on appeal from the final judgment," as required to trigger the collateral order doctrine. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009).

To the extent that Broomall suggests, in the guise of a collateral order argument, that the PREP Act provides "immunity" "from civil process in any venue except in the U.S. District Court for the District of Columbia," Opp'n 21, that suggestion is an attempt to rehash its losing argument below that the desire to raise PREP Act immunity gives rise to federal subject-matter jurisdiction under the complete preemption doctrine. Broomall does not contest that the district court's determination that its claims are not completely preempted is subject to the section 1447(d) bar. *See, e.g.*, *Carlson v. Arrowhead Concrete Works, Inc.*, 445 F.3d 1046, 1054 (8th Cir. 2006); *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322–23 (4th Cir. 1993); *Whitman v. Raley's*, 886 F.2d 1177, 1181–92 (9th Cir. 1989).

CONCLUSION

The district court did not hold that Broomall lacked immunity from

suit. It held that Broomall should have directed its immunity argument to the Pennsylvania state court, which is the sole court with jurisdiction to address it. This Court should do the same and dismiss Broomall's appeal.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(a)(d)(2) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 1,551 words.

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 it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14-point Century Schoolbook.

March 17, 2022

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