

No. 16-11051

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

IN RE: DEPUY ORTHOPAEDICS, INC., PINNACLE HIP IMPLANT PRODUCT
LIABILITY LITIGATION

JAY CHRISTOPHER,
Plaintiff-Appellee-Cross-Appellant;
JACQUELINE CHRISTOPHER,
Plaintiff-Appellee,

– v. –

DEPUY ORTHOPAEDICS, INC. and JOHNSON & JOHNSON,
Defendants-Appellants-Cross-Appellees.
(Continued Caption on Inside Cover)

On appeal from the United States District Court
for the Northern District of Texas
Nos. 14-cv-1994, 11-cv-2800, 12-cv-1672, 11-cv-1941, 13-cv-01071

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF FOR
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA AND PHARMACEUTICAL RESEARCH AND
MANUFACTURERS OF AMERICA (PhRMA) AS *AMICI CURIAE*
SUPPORTING DEFENDANT-APPELLANT JOHNSON & JOHNSON**

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Consolidated with
No. 16-11052

RICHARD KLUSMANN,
Plaintiff-Appellee-Cross-Appellant;
SUSAN KLUSMANN,
Plaintiff-Appellee,

– v. –

DEPUY ORTHOPAEDICS, INC. and JOHNSON & JOHNSON,
Defendants-Appellants-Cross-Appellees.

Consolidated with
No. 16-11053

DONALD GREER,
Plaintiff-Appellee-Cross-Appellant,

– v. –

DEPUY ORTHOPAEDICS, INC. and JOHNSON & JOHNSON,
Defendants-Appellants-Cross Appellees.

Consolidated with
No. 16-11054

ROBERT PETERSON,
Plaintiff-Appellee-Cross-Appellant;
KAREN PETERSON,
Plaintiff-Appellee,

– v. –

DEPUY ORTHOPAEDICS, INC. and JOHNSON & JOHNSON,
Defendants-Appellants-Cross-Appellees.

Consolidated with
No. 16-11056

MARGARET AOKI,
Plaintiff-Appellee-Cross-Appellant,

– v. –

DEPUY ORTHOPAEDICS, INC. and JOHNSON & JOHNSON,
Defendants-Appellants-Cross-Appellees.

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF
OF AMICI CURIAE**

Appellees' opposition to the Chamber's and PhRMA's motion for leave to file an *amicus* brief in this case asserts that the proposed *amicus* brief was "devised for the purpose of avoiding the Court's word limits" on Appellants. Opp. 5. Appellees have no basis for this claim. As the proposed *amicus* brief itself certifies in its very first footnote, no counsel for a party authored this brief in whole or in part.¹ Rather, both the Chamber and PhRMA have strong, independent, institutional interests in personal jurisdiction issues like the one presented in this appeal. *Amici* submitted the brief here to give this Court their perspectives, as two voices of the business community, on one of the many questions presented in the appeal (specific jurisdiction). Their perspectives on this issue have been informed by their extensive involvement in cases presenting personal jurisdiction issues in courts across the country.²

¹ As the Advisory Committee on the Rules has explained, the required disclosure is designed to ensure that counsel will not "us[e] an *amicus* brief to circumvent page limits on parties' briefs"—in part by showing that "the *amicus* itself considers the issue important enough to sustain the cost and effort of filing an *amicus* brief." Fed. R. App. P. 29 advisory committee's note to 2010 amendments.

² See, e.g., *Bristol-Myers Squibb Co. v. Superior Court of Cal. for the Cnty. of S.F.*, No. 16-466 (Sup. Ct. Nov. 10, 2016), *cert. granted*, Jan. 19, 2017 (Chamber and PhRMA separate briefs); *BNSF Ry. Co. v. Tyrrell*, No.

Appellees' protestations that the Chamber and PhRMA failed to disclose connections (real or imagined) with Johnson & Johnson are also without merit. Whether a party being supported by an *amicus* is or is not a member of an organization submitting an *amicus* brief is irrelevant under Rule 29. Indeed, Rule 29 clarifies that it does *not* oblige organizations to disclose membership dues. Fed. R. App. P. 29 advisory committee's note to 2010 amendments. Given that the rule does not compel the disclosure of membership, the rule certainly cannot be construed to require proposed *amici* to disclose every connection between *amici* and the party being supported, *e.g.* that an *amicus* has, in the past, retained the same counsel as the party being supported. *See* Opp. 8.

Appellees' insinuations that the brief is "tainted" (Opp. 8) by Johnson & Johnson's past or current involvement with PhRMA or the

16-405 (Sup. Ct. Oct. 28, 2016), *cert. granted*, Jan. 13, 2017 (Chamber brief); *Koninklijke Philips, N.V. v. Washington*, No. 16-559 (S. Ct. Nov. 28, 2016) (Chamber brief); *Robinson v. Pfizer, Inc.*, No. 16-2524 (8th Cir. Sept. 15, 2016) (Chamber and PhRMA joint brief); *AstraZeneca AB v. Mylan Pharm. Inc.*, No. 15-1460 (Fed. Cir. May 26, 2015) (Chamber and PhRMA separate briefs); *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, No. 15-1456 (Fed. Cir. May 26, 2015) (Chamber and PhRMA separate briefs); *Align Corp. v. Boustred*, No. 2016SC448 (Colo. Sup. Ct. Nov. 14, 2016) (Chamber brief); *Merritt v. Texaco, Inc.*, No. 2016-C-0731 (La. Ct. App. July 18, 2016) (Chamber brief); *Genuine Parts Co. v. Cepec* (Del. Sup. Ct. Nov. 19, 2015) (Chamber brief). For other U.S. Chamber amicus briefs on personal jurisdiction, see <http://www.chamberlitigation.com/cases/issue/jurisdiction-procedure/personal-jurisdiction>.

Chamber are likewise meritless. The mission of the Chamber is to address issues of importance to the broader business community, and the mission of PhRMA is to speak out on issues of importance to the pharmaceutical sector. They would be unable to carry out their respective missions if they were barred from participating as *amici* whenever their organizations have some connection with one of the parties or the parties' counsel. Appellees' proposed rule would effectively ban trade associations from filing amicus briefs, which in turn would impair the capacity of trade associations to exercise their First Amendment rights to speech and to petition the Government.

Finally, Appellees suggest that *amici* sought to deceive them about PhRMA's intention to join the brief by requesting consent only on behalf of the Chamber. The charge that counsel deliberately omitted PhRMA from the request for consent is misplaced; in fact, counsel requesting consent for the Chamber was not aware at the time the request for consent was sent that PhRMA intended to join the Chamber's brief. Moreover, because Appellees refused to consent to the Chamber's proposed brief, there can be no argument that they could have been prejudiced by the addition of PhRMA to the same brief. Indeed, nowhere do Appellees claim that the

addition of PhRMA might have altered their decision to refuse to consent to the brief.

WHEREFORE, *amici* respectfully request that the Court grant their motion for leave to file the proposed brief as *amici curiae*.

Dated: February 13, 2017

Respectfully submitted,

/s/ Archis A. Parasharami

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for the Chamber of Commerce of the United States of America and PhRMA certifies that this reply:

(i) complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 786 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 13, 2017

/s/ Archis A. Parasharami

CERTIFICATE OF SERVICE

I hereby certify that that on February 13, 2017, I electronically filed the foregoing brief using the CM/ECF system, which will send notification of the filing to the attorneys on that system.

Dated: February 13, 2017

/s/ Archis A. Parasharami