

BEFORE THE UNITED STATES JUDICIAL PANEL  
ON  
MULTIDISTRICT LITIGATION

**In re: DePuy Orthopaedics, Inc. ASR Hip Implant  
Products Liability Litigation**

**MDL NO. 2197**

**MARY BANKS and BETTY COLSTON**

**Plaintiffs**

**v.**

N.D. Texas C.A. No. 3:11-cv-00718-L

**DEPUY ORTHOPAEDICS, INC. et al,**

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**MEMORANDUM IN SUPPORT OF**  
**MOTION TO VACATE CONDITIONAL TRANSFER ORDER 34**

**I. BACKGROUND**

Plaintiffs, MARY BANKS and BETTY COLSTON, filed this action in the District Court of Dallas County, Texas. Plaintiffs' Petition in that court includes valid state law claims against the distributor of the recalled DePuy ASR Hip implant which failed in each plaintiff, requiring revision surgery. A copy of the Plaintiffs' filed Petition is attached hereto as **Exhibit 1**. Despite Texas law permitting suits against distributors of failed orthopedic devices, Defendants removed the action to the Northern District of Texas, claiming the state court defendants had been fraudulently joined. A copy of the Docket Sheet for this action in the Northern District of Texas is attached hereto as **Exhibit 2**. Plaintiffs filed a motion for remand, a copy of which is attached hereto as **Exhibit 3**, demonstrating proper joinder. Briefing on the motion for remand is almost complete at this time.<sup>1</sup>

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<sup>1</sup> Defendants have filed an Opposition to the Motion for Remand and Plaintiffs' Reply is due on May 10, 2011, although Plaintiffs anticipate filing their Reply prior to the deadline.

## II. ARGUMENT

### A. This Panel has found that a transferor court may rule on a motion for remand.

Plaintiffs are aware that this Panel recently ruled on several motions to vacate with respect to this MDL 2197, denying such motions and finding that the transfer of the actions would “serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.” *In Re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Lit.*, Transfer Order at 1 (J.P.M.L. Apr. 18, 2011). Pointing to the fact that the motions to vacate at issue relied primarily on the pendency of motions to remand, this Panel found that “Plaintiffs in these actions can present their motions for remand to the transferee judge.” *Id.* Notably, however, this Panel then continued its ruling, confirming:

Panel Rule 2.1(d) expressly provides that the pendency of a conditional transfer order does not in any way limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand motion is filed and the date that transfer of the action to the MDL is finalized, a court wishing to rule upon that motion (or any other motion) generally has adequate time in which to do so.

*In Re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*, MDL No. 2197, Transfer Order, n. 1 (J.P.M.L. Apr. 18, 2011).

Such finding is, of course, in keeping with Rule 2.1(d) of the Rules of Procedure of this Panel, which Rule states:

The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in any pending federal district court action and does not limit the pretrial jurisdiction of that court.

Rule 2.1(d) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation.

Based upon Rule 2.1(d) and this Panel's plain language in its recent ruling, it is evident that a transferor court may determine a motion for remand even after a conditional transfer order has been issued.

**B. DePuy misrepresents this Panel's instructions by stating this Panel has directed transferor courts to avoid ruling on remand.**

Defendant DePuy has a radically different view of this Panel's position on the consideration of remand motions and the meaning of the recent Transfer Order. In case after case filed across the country, DePuy has sought the stay of actions involving the DePuy ASR Hip Implant pending transfer to MDL 2197. In its motions to stay and subsequent briefing, DePuy has argued vehemently that the transferor courts should not consider motions to remand pending transfer but should instead stay all decisions pending transfer. While plaintiffs have argued that the transferor courts have both the authority, pursuant to Rule 2.1(d) and the obligation to resolve jurisdictional questions prior to entering a stay pending transfer,<sup>2</sup> DePuy has repeatedly and incorrectly informed federal district courts that this Panel has a stated policy

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<sup>2</sup> The United States Supreme Court has declared that a court is to presume that an action lies outside of its limited jurisdiction and answer the first and fundamental question in every case – that of jurisdiction -- even when it is not raised by the parties. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Thus, jurisdiction must be established as a threshold matter. *Steel Co.* at 94-5. (Finding that this requirement “‘springs from the nature and limits of the judicial power of the United States’ and is ‘*inflexible and without exception.*’”) (Emphasis supplied.) Citing a “long and venerable line of cases,” the Supreme Court has instructed that jurisdiction defines the bounds of authorized judicial action:

Without jurisdiction the court cannot proceed *at all* in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the *only* function remaining to the court is that of announcing the fact and dismissing the cause.

*Id.* at 94 (Emphasis supplied).

that transferor courts should avoid ruling on remand. *See e.g.* Replies In Support of Defendants’ Motion to Stay in: *Day v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00501-KJD-RJJ at 3-4; *Milner v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-01085-WC (M.D. Ala.) at 2; *Slay v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01086-MEF (M.D. Ala.) at 2; *Harper v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01087-WKW-CSC (M.D. Ala.) at 2; *Patterson v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01088-WKW-SRW (M.D. Ala.) at 2; *Taylor v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-00027-MHT-CSC (M.D. Ala.) at 2; *LeMarr v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00445-ROS (D. Ariz.); *Beaver v. DC Medical, LLC et al.*, No. 1:11-CV-00869 (N.D.Ga.) at 7; *Davis v. DC Medical, LLC et al.*, No. 1:11-CV-00870 (N.D.Ga.) at 7; *Davis v. DC Medical, LLC et al.*, No.1:11-CV-00881 (N.D.Ga.) at 7; *Gray v. DC Medical, LLC et al.*, No. 1:11-CV-00871(N.D.Ga.) at 7; *Hershberger v. DC Medical, LLC et al.*, No. 1:11-CV-00944 (N.D.Ga.) at 7; *Hinton v. DC Medical, LLC et al.*, No. 1:11-CV-00935 (N.D.Ga.) at 7; *Jackson v. DC Medical, LLC et al.*, No. 1:11-CV-00873 (N.D.Ga.) at 7; *King v. DC Medical, LLC et al.*, No. 1:11-CV-00882 (N.D.Ga.) at 7; *Lebeda v. DC Medical, LLC et al.*, No. 1:11-CV-00875 (N.D.Ga.) at 7; *McClure v. DC Medical, LLC et al.*, No. 1:11-CV-00877 (N.D.Ga.) at 7; *McDowell v. DC Medical, LLC et al.*, No. 1:11-CV-00939 (N.D.Ga.) at 7; *Scott v. DC Medical, LLC et al.*, No. 1:11-CV-00878 (N.D. Ga.); *Scullin v. DC Medical, LLC et al.*, No. 1:11-CV-00879 (N.D.Ga.) at 7; *Sedlar v. DC Medical, LLC et al.*, No. 1:11-CV-00936 (N.D.Ga.) at 7; *Starling v. DC Medical, LLC et al.*, No. 1:11-CV-00883 (N.D.Ga.) at 7; *Welch v. DC Medical, LLC et al.*, No. 1:11-CV-00880 (N.D.Ga.) at 7; *Williams v. DC Medical, LLC et al.*, No. 1:11-CV-00940 (N.D.Ga.) at 7; *Crawley v. DC Medical, LLC, et al.*, No. 4:11-CV-000067 (S.D.Ga.) at 6; and *Proper v. DePuy Orthopaedics, Inc.*, Case No.

4:11-cv-00217 (W.D. Mo.) at 2-3, copies of which are attached hereto as **Exhibits 4 through 29**, respectively.

Thus, in pleadings filed in the District of Nevada, Middle District of Alabama, District of Arizona, Northern District of Georgia, and Southern District of Georgia, DePuy has argued:

[T]he MDL Panel has made it clear that transferor courts should *avoid* ruling on pending remand and other pretrial motions to promote the consistent and efficient resolution of overlapping pretrial matters.

*Id.* (Emphasis original in some but not all citations). Thus, DePuy would have district courts believe that the Panel has directed them to avoid ruling on motions to remand pending transfer to the MDL.<sup>3</sup>

In support of this notion, DePuy has cited the Panel's recent Transfer Order in MDL 2197, stating that in the Transfer Order, the Panel rejected the argument that a district court should consider a motion for remand and not enter a stay pending transfer. *See e.g. Day v. DePuy*, Reply at 4 ("...their attempts to defeat federal jurisdiction and transfer by opposing removal should not preclude staying this action. In fact...the MDL Panel rejected that very argument..."). Similarly in *Beaver v. DePuy*, DePuy cited to the Transfer Order and asserted:

Plaintiff's interpretation of the MDL Panel's intent is belied by an Order recently entered in those decisions. ... To the contrary, this Order makes clear that the Panel intends that the MDL judge should decide jurisdictional issues, including motions to remand...

*Beaver v. DePuy*, Reply at 16.

Despite quoting extensively from the Transfer Order in these pleadings, DePuy omits footnote 1 of the Panel's decision. Thus, DePuy fails to quote that portion of the Order which

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<sup>3</sup> DePuy has further proclaimed that this Panel has recognized that the MDL court is best situated to address remand motions. *Milner v. DePuy*, *Slay v. DePuy*, *Harper v. DePuy*, *Patterson v. DePuy and Taylor v. DePuy*, Replies at 2.

contradicts DePuy's premise that the Panel would mandate a stay without consideration of a motion to remand once the conditional transfer order has been entered. To the contrary, this Panel, in the very Transfer Order cited by DePuy, found:

Panel Rule 2.1(d) expressly provides that the pendency of a conditional transfer order does not in any way limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand motion is filed and the date that transfer of the action to the MDL is finalized, a court wishing to rule upon that motion (or any other motion) generally has adequate time in which to do so.

*In Re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation*, MDL No. 2197, Transfer Order, n. 1 (J.P.M.L. Apr. 18, 2011).

As this litigation plays out across the country, DePuy is also fond of citing to a 2005 letter from the Panel as support for entry of a stay. Thus, in the *Day* case in the District of Nevada, DePuy wrote:

This outcome is consistent with the MDL Panel's *stated preference* that transferor courts defer ruling on remand motions in cases tagged for MDL transfer to ensure uniform treatment of recurring jurisdictional issues. See e.g., Ex. 3, Ltr. From JPML to Hon. Ricardo H. Hinojosa (Mar. 21, 2005).

See Exhibit 4, *Day v. DePuy*, Reply at p. 5 (emphasis supplied). See also, Replies in *Beaver v. DePuy*, *Davis v. DC Medical, LLC et al.*, *Davis v. DC Medical, LLC et al.*, *Gray v. DC Medical, LLC et al.*, *Hershberger v. DC Medical, LLC et al.*, *Hinton v. DC Medical, LLC et al.*, *Jackson v. DC Medical, LLC et al.*, *King v. DC Medical, LLC et al.*, *Lebeda v. DC Medical, LLC et al.*, *McClure v. DC Medical, LLC et al.*, *McDowell v. DC Medical, LLC et al.*, *Scott v. DC Medical, LLC et al.*, *Scullin v. DC Medical, LLC et al.*, *Sedlar v. DC Medical, LLC et al.*, *Starling v. DC Medical, LLC et al.*, *Welch v. DC Medical, LLC et al.*, and *Williams v. DC Medical, LLC et al.*, at n. 17; *Milner v. DePuy*, *Slay v. DePuy*, *Harper v. DePuy*, *Patterson v. DePuy* and *Taylor v.*

*DePuy*, at 3; *LeMarr v. DePuy* at 4-5; *Crawley v. DePuy* at 14 (claiming the MDL Panel has “expressly stated that transferor courts should defer ruling on remand motions.”)

DePuy has even grouped many of these arguments under the subheading, “The MDL Panel Encourages Transferor Courts to Defer Ruling on Motions to Remand Pending MDL Transfer.” *Day v. DePuy* at 4, *Beaver v. DC Medical, LLC et al.*, *Davis v. DC Medical, LLC et al.*, *Davis v. DC Medical, LLC et al.*, *Gray v. DC Medical, LLC et al.*, *Hershberger v. DC Medical, LLC et al.*, *Hinton v. DC Medical, LLC et al.*, *Jackson v. DC Medical, LLC et al.*, *King v. DC Medical, LLC et al.*, *Lebeda v. DC Medical, LLC et al.*, *McClure v. DC Medical, LLC et al.*, *McDowell v. DC Medical, LLC et al.*, *Scott v. DC Medical, LLC et al.*, *Scullin v. DC Medical, LLC et al.*, *Sedlar v. DC Medical, LLC et al.*, *Starling v. DC Medical, LLC et al.*, *Welch v. DC Medical, LLC et al.*, *Williams v. DC Medical, LLC et al.* at 15; *Milner v. DePuy*, *Slay v. DePuy*, *Harper v. DePuy*, *Patterson v. DePuy and Taylor v. DePuy*, at 3; *LeMarr v. DePuy*, at 4; and *Proper v. DePuy*, at 3. Use of this subheading underscores DePuy’s goal in these Replies: to convince district courts that this Panel wants them to stay actions pending transfer and defer ruling on remand motions.

Clearly, Defendant DePuy is misstating this Panel’s position. Through its assertions, oftentimes with no, or incomplete, citations to authority, this Defendant is leading federal district courts to believe that this Panel has a preference and policy in favor of granting stays and against consideration of motions to remand by transferor courts once a conditional transfer order has been entered. Defendant DePuy would have federal district courts comply with this Panel’s purported policy by granting a stay in every case in which the Panel has issued a conditional transfer order.

These claims generally appear in cases in DePuy's Reply Brief in Support of its Motion to Stay. In the present case, Plaintiffs have not yet filed an opposition to the Motion to Stay, which they will file timely, and so there has been no Reply filed. Thus, Plaintiffs have not faced this exact language to date. However, DePuy has made a similar overreaching statement in its Response in Opposition to Plaintiff's Motion to Remand, stating:

The MDL Panel authorized the creation of MDL 2197, in part, so that one federal judge could decide similar jurisdictional issues consistently and efficiently. Accordingly, this Court should defer consideration of Plaintiffs' Motion to Remand pending transfer of this case to MDL 2197.

*See Mary Banks and Betty Colston v. DePuy Orthopaedics, Inc. et al*, Case No. 3:11-cv-00718-L, Defendant DePuy Orthopaedics, Inc.'s Response in Opposition to Plaintiffs' Motion to Remand at 8. Once again, DePuy would have a transferor court believe that it is this Panel's instruction that motions for remand be stayed pending transfer to the MDL. DePuy thus reads into the Rules of Procedure of this Panel, a new rule, contradictory to Rule 2.1(d), which would require a transferor court to enter a stay of any motion for remand upon issuance of the conditional transfer order. Such result, achieved by heavy-handed means, is neither just nor efficient and thus, is not in keeping with the stated goals of an MDL proceeding.

**C. Through its gamesmanship, DePuy uses conditional transfer orders to obtain stays and delay proceedings wasting resources of the parties, counsel and courts.**

District courts entertaining actions which may be related to an MDL proceeding are likely to be persuaded by the opinion of this Panel on issues which come before them when a conditional transfer order has been issued. Defendant DePuy thus engages in gamesmanship when it informs those same courts that this Panel has a "stated preference" that they defer ruling on remand motions pending transfer or that this Panel has "made it clear" that they should "avoid

ruling” on remand motions. *See e.g.*, Exhibit 4, *Day v. DePuy*, Reply at 3-5; *Beaver v. DePuy*, Reply at 7, 15-17. Justice is not served by such means.

Nor is efficiency served when a district court enters a stay, almost automatically, as a result of being informed that it is the preference of this Panel to do so. Rather, the result of such scenario is delay. While the transferor court may consider the motion for remand at a later date, such date may be much later. Matters that are fully briefed could be resolved quickly and efficiently by the transferee court. Such preparation is wasted if the matter is stayed during the months it takes to accomplish transfer and then redrafted for the transferor court.<sup>4</sup> Delay and wasted efforts on the part of the parties, counsel and the transferor court are surely not the results which were sought in the creation of the multidistrict litigation system. Nor is it convenient for the parties, counsel or the MDL presiding Judge to transfer numerous cases to the MDL proceeding for consideration of motions to remand where those same motions were poised for decision until the transferor court was informed that this Panel has made it clear that they should not rule on such motions.

A pattern and practice has emerged in this MDL wherein the issuance of a conditional transfer order by this Panel gives rise to an almost automatic stay in the transferor district court. The resulting unjust and inefficient situation does not comport with the purpose of an MDL proceeding. In vacating the conditional transfer order, this Panel would affirm the true meaning of conditional transfer orders in the MDL system, bringing about a just and efficient result.

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<sup>4</sup> Plaintiffs acknowledge that the majority of the briefing on any pending motions to remand would likely be able to be incorporated in the briefs filed in the MDL. However, at least some research and redrafting will be required to ensure that the briefs are appropriate for the new forum.

### **III. CONCLUSION**

For the foregoing reasons, Plaintiffs would submit that the interests of justice, efficiency, and conservation of resources require that this matter remain pending in the Northern District of Texas. Therefore, this Panel should vacate CTO-34 as it relates to Plaintiffs, MARY BANKS and BETTY COLSTON.

Dated: May 2, 2011

Respectfully submitted,

[/s/ Jennifer Anne Gore Maglio](#)

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#### CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2011, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send notice of electronic filing to all counsel of record and served the unrepresented defendants by facsimile, email, hand-delivery and/or U.S. Mail, postage prepaid and properly addressed.

[/s/ Jennifer Anne Gore Maglio](#)

Jennifer Anne Gore Maglio, Esquire