

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

**IN RE: DEPUY ORTHOPAEDICS, INC.,
ASR HIP IMPLANT PRODUCTS
LIABILITY LITIGATION**

MDL No. 2197

This Document Relates to the Case Identified
Below:

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

LETITIA MALKMUS and GLEN)	NO.: 2:11-cv-00365-AEG
MALKMUS)	
)	
Plaintiffs,)	DEFENDANT DEPUY
)	ORTHOPAEDICS, INC.’S
v.)	OPPOSITION TO PLAINTIFFS’
)	MOTION TO VACATE
DEPUY ORTHOPEDICS, INC. et al.,)	CONDITIONAL TRANSFER ORDER
)	39
Defendants.)	

This case in the end is no different from the others that have come before the Panel in this MDL and many others. Plaintiffs’ core argument – that the Panel cannot transfer this case to MDL 2197 because their remand motion is still pending before the Eastern District of Wisconsin – has now twice been rejected by the Panel in this litigation (*see* May 19, 2011 Transfer Order, at 1; April 18, 2011 Transfer Order, at 1), and indeed runs contrary to long-standing Panel and federal court precedent. For the same reasons set forth in the Panel’s Transfer Orders, the argument fails here.

Plaintiffs’ *ad hominem* attack on the defense briefing in this and other cases does not change the law or the facts and should be rejected out of hand. It is inaccurate, and does nothing

more than present another example of the lengths to which Plaintiffs' counsel will go to keep their cases out of federal court at all costs. Indeed, Plaintiffs' counsel have gone so far as to flaunt – in internet advertisements - their gamesmanship in suing only non-diverse distributors, and no diverse entity responsible for the design of, manufacture of, or warnings accompanying, the ASR™ Hip Implant devices, to avoid removal of their product liability claims to federal court. (*See*, Exhibit A, May 26, 2011 PRWeb Release). This tactic, they advertise, will help plaintiffs because: 1) they can “avoid the ‘class-action-like MDL’” where decisions “may not result in a fair settlement”; 2) unlike the MDL, they can “have their day in [state] court” to explain “how the defective ASR hips affected their health, their jobs, and their families; and 3) they are protected from the unfair MDL proceedings where “the manufacturer of the ASR is attempting to force all patients...because it is legally and financially better for the corporation.” (Exh. A at 1, 2). Simply, like their pleading games, plaintiffs' counsels' attack on the defense briefing here is just another unfounded attempt to block this case from transfer to the MDL, where it properly belongs.

A. This Panel has Determined that a Pending Remand Motion Is Not a Basis for Vacating the Transfer of a Case to MDL 2197.

Based on longstanding authority, this Panel has now twice decided in this litigation that a pending motion to remand is not a basis for vacating the transfer of a case to MDL 2197. (*See* May 19, 2011 Transfer Order, at 1; Apr. 18, 2011 Transfer Order, at 1.) And, it is well-established that the Panel has the authority to transfer cases before final resolution of federal court jurisdictional issues. *Grispino v. New England Mut. Life Ins. Co.*, 358 F.3d 16, 19 n.3 (1st Cir. 2004) (“The fact that there were pending jurisdictional objections did not deprive the MDL panel of the ability to transfer the case.”); *accord In re Bayer Corp. Combination Aspirin Prod. Mktg. & Sales Practices Litig.*, 609 F. Supp. 2d 1379, 1379-80 (J.P.M.L. 2009); *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005) (a pending motion to remand to

state court “is not a sufficient basis” to avoid MDL consolidation; motions to remand “can be presented to and decided by the transferee judge”).

The authority Plaintiffs cite does not change this result. (*See* Doc. 553-1 at 3 and n.2.) The two cases Plaintiffs rely on – *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) and *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) – are procedurally distinguishable from the issue before the Panel. In *Steel*, the issue was whether the merits of the case could be resolved before a final determination as to whether the plaintiff satisfied the requirements for Article III standing. 523 U.S. at 94. In *Kokkonen*, the issue was whether the district court could enforce a settlement agreement – also a final resolution of a case – where no subject matter jurisdiction existed. 511 U.S. at 378. Here, the Panel is not being asked to adjudicate the merits, or fully resolve this case, but to determine whether it can take the simple procedural step of transferring this case to MDL No. 2197 before resolution of plaintiffs’ remand motion. This has been decided, and it most certainly can.

B. Plaintiff’s Add-On Argument – that DePuy Has Misled Courts in Stay Briefing – also Lacks Merit as a Basis to Vacate CTO 39.

DePuy has correctly argued in briefs in this case, and other cases, that there is significant precedent for the proposition that the transferee court/MDL judge is in the best position to decide remand motions involving overlapping jurisdictional issues sharing common facts, thereby promoting the § 1407 goals of consistency and judicial economy. *See Vest v. Allied Packing & Supply, Inc.*, 2011 WL 333241 at *2 (N.D. Cal. Jan. 31, 2011) (granting motion to stay and deferring motion to remand when similar motions would be heard by MDL court); *Franklin v. Merck & Co.*, No2007 WL 791843 at *1 (E.D. Cal. Mar. 14, 2007) (“[T]he interest of judicial economy favors staying this action pending its transfer to the MDL proceeding.”); *Buie v. Blue Cross and Blue Shield of Kansas City, Inc.*, 2005 WL 2218461 at *1 (W.D. Mo. Sept. 13, 2005) (entering a stay in part because the plaintiffs’ motion to remand contained jurisdictional issues

that overlapped with other cases); *Good v. Prudential Life Ins. Co. of Am.*, 5 F. Supp. 2d 804 (N.D. Cal. 1998) (noting that a stay pending transfer to an MDL, despite jurisdictional objections, “would further the aim of judicial efficiency”).¹

And, the Panel has repeatedly informed federal district judges that it may be appropriate for them to defer ruling on a pending remand motion until the Panel has decided whether a case should be transferred to an MDL. (See Exhibit B, March 21, 2005 Letter from JPML to Hon. Ricardo H. Hinojosa (stating that waiting until the Panel resolves the transfer issue “may be especially appropriate if the motion [to remand] raises questions likely to arise in other actions in the transferee court”)); *Dowler v. Medicine Shoppe*, 2007 WL 2907519 at *1 (S.D. Ohio Oct. 3, 2007) (staying all proceedings and discussing a letter received from the Panel suggesting that waiting for transfer resolution “may be appropriate in the interest of uniformity”); *Nielsen v. Merck and Co.*, 2007 WL 806510 at *2 (N.D. Cal. Mar. 15, 2007) (granting the defendant’s motion to stay partially on the basis of a letter from the Panel noting that it may be “especially appropriate” for the court to wait for transfer resolution before ruling on the plaintiff’s motion to remand).

In light of this ample authority, and the long history of district courts exercising their discretion to enter stay orders in a wide range of MDLs, it is preposterous for Plaintiffs to suggest that district courts are only entering stays in this litigation because of DePuy’s alleged misrepresentations of the law and panel precedent.

¹ These citations are just a select sample of cases from other MDLs in which district courts have entered stays and deferred ruling on pre-trial motions until the Panel has transferred the cases to an MDL. See also Exhibit 11 to Defendants’ Reply in Support of Their Motion to Stay in *Beaver v. DC Medical, LLC, et al.*, Case No. 1:11-CV-00869-SCJ (N.D. Ga.), at 9-10 & n.12 for a list of additional cases.

C. The Transfer Of This Case To MDL 2197 Is Proper Under The § 1407 Tripartite Analysis, The Only Proper Test For Determining Whether A Case Should Be Transferred To The MDL.

Under 28 U.S.C. § 1407, a case should be transferred to an MDL where (1) the case shares common questions of fact with the cases previously transferred to the MDL; (2) transfer “will serve the convenience of the parties and witnesses;” and (3) transfer will “promote the just and efficient conduct of the litigation.” (*See In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, December 7, 2010 Transfer Order, Doc. No. 1, at 2.) Because this case and its underlying legal and fact issues are so similar to cases already transferred to and docketed in MDL 2197, its transfer to MDL 2197 is appropriate.

Even a cursory review of Plaintiffs’ complaint demonstrates that they assert the same core factual allegations other plaintiffs have asserted in cases that have already been transferred to MDL 2197. Those include allegations that: 1) Plaintiff was implanted with an ASR™ hip implant (Exh. C at ¶¶ 32, & 35); 2) DePuy was negligent (*id.*, Count I), and made misrepresentations (*id.*, Count V); and 3) the ASR™ XL Acetabular Hip Replacement System and ASR™ Hip Resurfacing System:

- were the subject of a product recall (*id.* at ¶¶ 27-31);
- were defective (*id.* at ¶ 39, 49, & 53); and
- caused Plaintiff to experience personal and serious injury (*id.* at ¶¶ 50, 59, 72, 73, 77, 81, 84, 90, & 92).

Further, on three separate occasions, the Panel has determined that transfer of the ASR™ Hip Implant cases “will serve the convenience of the parties and witnesses” (*See Transfer Orders*, Doc. Nos. 171, 479, & 579.) Plaintiffs fail to show otherwise.² As to the third factor of

² Plaintiffs’ argument that transfer of their case to the MDL would cause undue delay and would inefficiently require the parties to redraft their remand briefing is misplaced and is contradicted by Panel precedent. (Doc. 6, at 9.) *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Lit.*, 560 F.Supp.2d 1365, 1366 (J.P.M.L. 2008) (“Transfer under Section 1407 has

the tripartite analysis, transfer best serves the main goals of § 1407: consistency and judicial economy. It is clear from the Panel's two recent transfer Orders that it believes these goals can best be served by having one judge (the MDL judge) resolve pretrial issues – including overlapping jurisdictional issues – especially when the same issues could easily arise in hundreds of cases across the country. *See also In re Ivy*, 901 F.2d 7, 9 (2nd Cir. 1990) (“Once transferred, the jurisdictional objections can be heard and resolved by a single court and reviewed at the appellate level in due course. Consistency as well as economy is thus served.”); *Camera v. Bayer Corp.*, 2010 WL 902780 at *2 (N.D. Cal.) (deciding remand motion before MDL transfer “would unnecessarily duplicate work and could lead to inconsistent results.”).

Plaintiffs do not discuss the tripartite analysis at all. And so they fail to show how their case – which includes claims against DePuy related to the implantation of ASR™ hip implant devices – is any different from the more than 800 cases already transferred to, or direct-filed in, MDL 2197.

D. Conclusion

This case is no different from those cases involving the ASR™ hip implant devices that the Panel has already transferred to MDL 2197 by invoking a simple long-standing rule: a pending motion to remand does not prevent MDL transfer under 28 U.S.C. § 1407. The legal

the salutary effect of placing related actions before a single judge who can formulate a pretrial program that . . . ensures that pretrial proceedings will be conducted in a streamlined manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties.”); *In re Alfuzosin Hydrochloride Patent Lit.*, 560 F.Supp.2d 1372, 1374 (J.P.M.L. 2008); *In re Brimonidine Patent Lit.*, 507 F.Supp.2d 1381, 1382 (J.P.M.L. 2007); *In re Gadolinium Contrast Dyes Prods. Liab. Lit.*, 536 F.Supp.2d 1380, 1382 (J.P.M.L. 2008) (“Should the transferee judge deem remand of any claims or actions appropriate, procedures are available whereby this may be accomplished with a minimum of delay.”). Indeed, a transferee court, in its discretion, can tailor pretrial proceedings for the convenience of the parties if and when the proceedings become unduly burdensome. *In re Denture Cream Prods. Liab. Litig.*, 624 F. Supp. 2d 1379, 1381 (J.P.M.L. 2009); *In re East of the Rockies Concrete Pipe Antitrust Cases*, 302 F. Supp. 244 (J.P.M.L. 1969).

and factual issues that this case shares with the cases already transferred to MDL 2197 establish that transfer is proper under § 1407. As established above, Plaintiffs' arguments to the contrary lack merit and thus, their Motion to Vacate CTO 39 should be denied.

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Respectfully submitted,

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