

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
(MILWAUKEE)

LETITIA MALKMUS and
GLEN MALKMUS,

Plaintiffs,

v.

DePUY ORTHOPAEDICS, INC., *et al.*,

Defendants.

) CASE NO. 2:11-CV-00365
)
) MAG. JUDGE AARON E. GOODSTEIN
)
) **DEFENDANTS DEPUY**
) **ORTHOPAEDICS, INC. AND TRP &**
) **ASSOCIATES, LLC'S REPLY BRIEF**
) **IN SUPPORT OF THEIR MOTION TO**
) **STAY PROCEEDINGS PENDING**
) **TRANSFER TO MDL NO. 2197 – IN RE:**
) **DEPUY ORTHOPAEDICS, INC., ASR**
) **HIP IMPLANT PRODUCTS LIABILITY**
) **LITIGATION**

I. INTRODUCTION

In the MDL Panel's December 3, 2010 Transfer Order, it found that the ASR™ Hip Implant cases "involve common questions of fact, and that centralization under 28 U.S.C. § 1407 . . . will serve the convenience of the parties and witnesses, and promote the just and efficient conduct of the litigation." (See Doc. 171, Transfer Order, at 2). It further determined that centralization "will eliminate duplicative discovery, *prevent inconsistent pretrial rulings on discovery and other issues*, and conserve the resources of the parties, their counsel and the judiciary." (*Id.*) As established below, the MDL Panel considers remand motions within the class of "pretrial rulings" requiring consistency.

In opposing Defendants' Motion to Stay this case pending MDL transfer, Plaintiffs do not argue that their cases are factually and legally distinct from the cases already transferred to MDL 2197, but instead argue that the motion should be denied because they have moved for remand. The jurisdictional issues raised in their remand motion, however, demonstrate exactly why the MDL Panel found centralization of the ASR™ hip cases appropriate, and why it transferred them

to Judge Katz for pretrial coordination. (*Id.* at 3.) In fact, to date, ten cases from across the country with pending motions to remand concerning the same, or similar, jurisdictional issues have already been transferred to, and docketed in, MDL 2197 before Judge Katz.¹ Thirty-four other cases are percolating through the system on conditional transfer orders.² As discussed below, eight federal judges have already ruled that the litigation should be stayed in their courts

¹ *In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, MDL No. 2197, Doc. No. 479 (Apr. 18, 2011) (denying eight separate motions to vacate conditional transfer orders, and ordering all eight cases be transferred to the MDL). Seven of the eight cases involve fraudulent joinder issues similar to the one presently before this Court. They include *Slay v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01086-MEF (M.D. Ala.); *Harper v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01087-WKW-CSC (M.D. Ala.); *Patterson v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01088-WKW-SRW (M.D. Ala.); *Taylor v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-00027-MHT-CSC (M.D. Ala.); *Butler v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-04637-KDE-DEK (E.D. La.); *Laman v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-04658-LMA-ALC (E.D. La.). The case of *Milner v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-01085-WC (M.D. Ala.), though transferred to the MDL, has not yet been docketed to the MDL. The three cases previously docketed in the MDL include *Hougas v. DePuy Orthopaedics, Inc.*, Case No. 1:11-dp-20175-DAK (N.D. Ohio); *Beavers v. DePuy Orthopaedics, Inc.*, Case No. 1:11-dp-20175-DAK (N.D. Ohio); and *Hilgers-Luckey v. DePuy Orthopaedics, Inc.*, Case No. 1:11-dp-20387-DAK (N.D. Ohio).

² *Garris v. DePuy Orthopaedics, Inc.*, Case No. 4:11-cv-00042 (E.D. Va.); *Proper v. DePuy Orthopaedics, Inc.*, Case No. 4:11-cv-00217 (W.D. Mo.); *Dio v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00042 (W.D.N.Y.); *Yousey v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00043 (W.D.N.Y.); *LeMarr v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00445-ROS (D. Ariz.); *Beaver v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00869-SCJ (N.D. Ga.); *Davis v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00870-AT (N.D. Ga.); *Gray v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00871-SCJ (N.D. Ga.); *Hershberger v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00944-WSD (N.D. Ga.); *Hinton v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00935-WSD (N.D. Ga.); *Jackson v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00873-ODE (N.D. Ga.); *McClure v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00877-JEC (N.D. Ga.); *McDowell v. DC Medical LLC, et al.*, Case No. 1:11-cv-00939-HTW (N.D. Ga.); *Meaders v. DC Medical LLC, et al.*, Case No. 1:11-cv-00938-ODE (N.D. Ga.); *Sedlar v. DC Medical LLC, et al.*, Case No. 1:11-cv-00936-TCB (N.D. Ga.); *Starling v. DC Medical LLC, et al.*, Case No. 1:11-cv-00883-HTW (N.D. Ga.); *Williams v. DC Medical LLC, et al.*, Case No. 1:11-cv-00940-JOF (N.D. Ga.); *Crawley v. DC Medical LLC, et al.*, Case No. 4:11-cv-00067-BAE-GRS (S.D. Ga.); *Davis v. DC Medical LLC, et al.*, Case No. 1:11-cv-00881-RLV (S.D. Ga.); *King v. DC Medical LLC, et al.*, Case No. 1:11-cv-00882-ODE (S.D. Ga.); *Lebeda v. DC Medical LLC, et al.*, Case No. 1:11-cv-00875-HTW (S.D. Ga.); *Scott v. DC Medical LLC, et al.*, Case No. 1:11-cv-00878-TWT (S.D. Ga.); *Scullin v. DC Medical LLC, et al.*, Case No. 1:11-cv-00879-AT (S.D. Ga.); *Welch v. DC Medical LLC, et al.*, Case No. 1:11-cv-00880-SCJ (S.D. Ga.); *Bryson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00052-TBR (W.D. Ky.); *Carnes v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00046-TBR (W.D. Ky.); *Humphrey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00049-TBR (W.D. Ky.); *Johnson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00045-TBR (W.D. Ky.); *Kimbro v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00051-TBR (W.D. Ky.); *Lacey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00048-TBR (W.D. Ky.); *McElwayne v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00047-TBR (W.D. Ky.); *Thomas v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00050-TBR (W.D. Ky.); *Day v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00501 (D. Nev.); *Rundle v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00634-PMP (D. Nev.).

and that the pending remand motions should be presented to the MDL judge. This Court should do the same.

II. ARGUMENT

Plaintiffs argue that Defendants' motion should be denied because (1) the Court has the authority to deny a stay, and (2) that the Court "must" consider Plaintiffs' Motion to Remand before it rules on Defendants' Motion to Stay. Neither argument supports the denial on Defendants' Motion to Stay. First, as set forth below, the 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. Second, while the Court certainly has the authority to deny Defendants' Motion to Stay, it should not do so here as the majority of federal courts across the country have consistently recognized the MDL Panel's goals and declined to rule on pending remand motions before transfer to the MDL.

A. The MDL Panel Encourages Transferor Courts To Defer Ruling On Motions To Remand Pending MDL Transfer.

Though Plaintiffs urge that this Court consider jurisdictional issues before the case is transferred to the MDL, their attempts to defeat federal jurisdiction and transfer by opposing removal should not preclude staying this action. This is particularly so, given 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.*, Ltr. from JPML to Hon. Ricardo H. Hinojosa (Mar. 21, 2005) ("[W]ait[ing] until the Panel has decided the transfer issue . . . may be especially appropriate if the [remand] motion raises questions likely to arise in other actions in the transferee court and, in the interest of uniformity, might best be decided there if the Panel orders centralization.") (attached as Exhibit A).

In light of this statement, court after court has refused to consider remand motions in cases designated for MDL transfer. *See, e.g., In re Ivy*, 901 F.2d 7, 9 (2d 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.*, No. C 09-6084 WHA, 2010 WL 902780, at *2 (N.D. Cal. Mar. 9, 2010) (deciding remand motion prior to MDL transfer “would unnecessarily duplicate work and could lead to inconsistent results”); *Nielsen v. Merck & Co.*, No. C07-00076 MJJ, 2007 WL 806510, at *2 (N.D. Cal. Mar. 15, 2007) (referencing JPML letter in rejecting plaintiff’s argument that “the Court must first preliminarily consider the merits of the remand motion before . . . considering a stay”); *Hardin v. Merck & Co.*, No. C 07-0070 SBA, 2007 WL 1056790, at *2-3 (N.D. Cal. Apr. 5, 2007) (staying action where plaintiff filed motion to remand given that “the precise issue of the alleged fraudulent joinder . . . is a recurring issue”); *Dowler v. Medicine Shoppe*, No. 2:07-CV-848, 2007 WL 2907519, at *2 (S.D. Ohio Oct. 3, 2007) (staying action and relying in part on JPML’s statement to transferor court, which “suggests that waiting until the Panel has decided the transfer issue may be appropriate in the interest of uniformity”); *Farrow v. Bayer Corp.*, No. 03:04-CV-161-F, slip op. at 1 (M.D. Ala. April 19, 2004) (withholding ruling on remand motion and staying case pending MDL Panel’s decision on MDL transfer).

B. The Court Should Stay This Case Pending MDL Transfer Consistent With the Majority, General Rule.

A majority of courts have indeed consistently recognized that the “general rule is for federal courts to defer ruling on pending [pre-trial] motions . . . in MDL litigation until after the JPMDL has transferred the case to the MDL [court].” *Turner v. Bausch & Lomb Inc.*, No. 8:06-CV-1088, slip op. at 2 (M.D. Fla. July 17, 2006); *Hardin v. Merck & Co.*, C 07-0700 SBA, 2007

WL 1056790, at *2 (N.D. Cal. Apr. 5, 2007); *Jackson v. Johnson & Johnson, Inc.*, No. 01-2113 DA, 2001 WL 34048067, at *6 (W.D. Tenn. Apr. 3, 2001) (similar).³

This view is particularly true where – as here – jurisdictional issues will overlap with other transferred cases. *See Lucas v. Springhill Hosps., Inc.*, No. 08-0520-CG-C, 2009 U.S. Dist. LEXIS 4527, at *2-3 (S.D. Ala. Jan. 22, 2009) (noting that the court “commonly stays such cases even when jurisdictional issues have been raised because such jurisdictional issues are likely to arise in the other cases filed throughout the nation that will be transferred to the MDL Panel and consistency as well as economy are served by having those issues decided by a single court”) (emphasis added); *Gavitt v. Merck & Co.*, No. 2:08-cv-755-FtM-UA-DNF, 2008 U.S. Dist. LEXIS 88421, at *4 (M.D. Fla. Oct. 20, 2008) (stay entered “in an effort to preserve judicial and client resources and to promote consistency and economy with regard to jurisdictional objections”); *Scott v. Bayer Corp.*, No. Civ.A. 03-2888, 2004 WL 63978, at *1-2 (E.D. La. Jan. 12, 2004) (citing 28 U.S.C. § 1407) (“Deference to the MDL court for resolution of [certain pretrial matters] provides the opportunity for the uniformity, consistency, and predictability in litigation that underlies the multidistrict litigation system.”); *see also Hardin v. Merck & Co.*,

³ *See also, e.g., Kline v. Earl Stewart Holdings, LLC*, No. 10-80912-CIV, 2010 WL 3432824, at *2 (S.D. Fla. Aug. 30, 2010) (granting defendant’s motion to stay pending action by MDL Panel); *Miller v. Merck & Co.*, No. 2:08-cv-757, 2008 WL 4642779, at *1 (M.D. Fla. Oct. 20, 2008) (“the Court concludes that the motion to stay should be granted and that the issues raised in the motion for remand should be deferred to the district court presiding over MDL-1657”); *Republic of Venez. ex rel. Garrido v. Philip Morris Cos.*, No. 99-0586-CIV, 1999 WL 33911677, at *1 (S.D. Fla. Apr. 28, 1999) (staying consideration of motion to remand pending transfer by MDL Panel); *Esquivel v. BP Co. N. Am., Inc.*, Nos. B-10-236, B-10-227, B-10-237, 2010 WL 4255911, at *4 (S.D. Tex. Oct. 14, 2010) (reasoning that because “[i]t is . . . manifest that the motions to remand . . . raise issues that will be considered by the MDL court to which Defendants seek transfer of these cases[,] . . . [a] stay would . . . further the twin aims of conserving judicial resources and preserving consistency”); *Mick v. GlaxoSmithKline, PLC*, No. 08-CV-386A, 2008 WL 4147555, at *6 (W.D.N.Y. Sept. 2, 2008) (granting defendants’ motion to stay and deferring plaintiff’s motion to remand pending determination of transfer issue by MDL Panel); *Weinke v. Microsoft Corp.*, 84 F. Supp. 2d 989, 990 (E.D. Wis. 2000) (staying proceedings when remand motions were filed in multiple cases in MDL); *Falgoust v. Microsoft Corp.*, No. Civ.A. 00-0779, 2000 WL 462919, at *2 (E.D. La. Apr. 19, 2000) (staying action when motion to remand raised jurisdictional issue common to cases in MDL court); *Boudreaux v. Metro. Life Ins. Co.*, No. 95-138, slip op. at 2 (E.D. La. Feb. 24, 1995) (staying proceedings when motion to remand presented statute-of-limitations issue that should have been decided by the MDL court).

Inc., No. C 07-0070 SBA, 2007 WL 1056790, at *2-3 (N.D. Cal. Apr. 5, 2007) (staying action notwithstanding plaintiff’s motion to remand because “the precise issue of the alleged fraudulent joinder . . . is a recurring issue”).

The court in *Hagler v. Wyeth*, No. CV-04-A-11-N, 2004 U.S. Dist. LEXIS 28764, at *3 (M.D. Ala. Feb. 23, 2004), explained why staying a case with a pending remand motion until MDL transfer is the most prudent course:

There is similarity in issues involved in remand motions in these cases nationwide, i.e., whether sales representatives and other individual resident defendants have been fraudulently joined to avoid federal jurisdiction. This court recognizes its authority to consider and rule on a Motion to Remand at any time before a final transfer, but finds it more appropriate to await a determination by the MDL Panel in regard to transfer. A transfer to the MDL Court does not result in denial of a motion to remand; it simply leaves the motion for determination by the MDL judge. Because of the similarity of these issues nationally, and in the interests of uniformity and judicial economy, this court finds that the remand motion is best left for consideration and determination by the judge who is considering the same issues on a nationwide basis, in the event the case is ordered transferred.

Id.; accord *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044 (E.D. Wis. 2001).

Moreover, though Plaintiffs cite *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044 (D. Wis. 2001) for the proposition that this action should not be stayed, they gloss over the fact that the court indeed stayed all proceedings, including ruling on the motion to remand, pending the case’s transfer to the MDL because similar remand motions were pending in other cases that had either been, or may soon have been, transferred to the MDL for adjudication. *Id.* at 1053.

The analytical framework proposed in *Meyers* supports staying this case. First, whether Defendant TRP & Associates, LLC has been fraudulently joined in this action is not a matter that can be determined summarily from a brief review of Defendants’ Notice of Removal or Plaintiffs’ Motion for Remand. Rather, the issue is “factually or legally difficult.” *Id.* at 1049.

Second, as discussed above, identical or similar jurisdictional issues are currently pending in the MDL or are likely to be transferred to the MDL proceedings. *See id.* Though this is the first case – of likely many – that involves a matter of Wisconsin law, the MDL judge, who regularly presides over matters of state law when sitting in diversity, is more than qualified to determine these jurisdictional issues on an ongoing basis. *See also In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, MDL No. 2197, Doc. No. 479 (Apr. 18, 2011) (ordering transfer of cases to the MDL, despite pending motions for remand, as the plaintiffs “can present their motions for remand to state court to the transferee judge in these actions”). Finally, the interests of judicial economy, the inequity to Defendants if the case is not stayed, and potential prejudice to Plaintiffs weigh in favor of staying the case. *See id.* As in *Meyers*, there is no reason to believe that transfer to the MDL would injure Plaintiffs, and, even if there was, the “gains in judicial economy from issuing the stay outweigh the burdens to plaintiff.” *See id.* at 1053. As noted above, this is just one of numerous cases set for transfer to the ASR™ Hip Implant MDL proceeding in which plaintiffs have filed motions to remand based on their joinder of a non-diverse sales representative or distributor. Having the MDL court decide the cross-cutting jurisdictional issues raised by these cases will promote judicial economy and also ensure that the cases in this litigation are treated in a uniform manner.

Indeed, faced with nearly identical circumstances and in recognition of these principles, other United States District Courts in ASR™ Hip Implant cases have granted Defendants’ motions to stay and have deferred ruling on remand motions. *See, e.g., Butler v. DePuy Orthopaedics, Inc.*, Order and Reasons attached as Exhibit B (staying all proceedings pending transfer to MDL Court, and expressly finding that deferring ruling on remand motion to MDL Court would “promote judicial efficiency and help to avoid the possibility of inconsistent

decisions.” (Exh. B, at 2)); *Laman v. DePuy Orthopaedics, Inc.*, Order and Reasons attached as Exhibit C (granting defendants’ motion to stay and deferring ruling on plaintiff’s motion to remand to “serve the interests of judicial economy and minimize the risk of inconsistent rulings in related cases.” (Exh. C, at 3)); *Dio v. DePuy Orthopaedics, Inc.*, Decision and Order attached as Exhibit D (granting defendants’ motion to stay and, though allowing plaintiff to prepare and file a motion to remand, staying disposition of that motion pending transfer to the MDL court); *Hougas v. DePuy Orthopaedics, Inc.*, Notification of Docket Entry attached as Exhibit E (granting defendants’ motion to stay; motion to remand pending); *Patterson v. DePuy Orthopaedics, Inc.*, Order attached as Exhibit F (granting defendants’ motion to stay with a limited exception allowing for the filing of a brief opposing remand and a “show cause” filing as to why the stay should be lifted); *Harper v. DePuy Orthopaedics, Inc.* (Order attached as Exhibit G) (same); *LeMarr v. DePuy Orthopaedics, Inc.* (Order attached as Exhibit H); and *Garris v. DePuy Orthopaedics, Inc.* (Order attached as Exhibit I).

III. CONCLUSION

For the foregoing reasons and those set forth in their opening brief, Defendants respectfully request that the Court enter an order staying all proceedings in this action, pending transfer and docketing of this case to MDL 2197: *In Re DePuy Orthopaedics, Inc., ASR Implant Products Liability Litigation*.

Dated: May 2, 2011

Respectfully submitted,

s/CATHERINE A. FAUGHT

Catherine A. Faught (#1038034)

David B. Bartel (#1012817)

Quarles & Brady, LLP

411 East Wisconsin Ave., Suite 2040

Milwaukee, WI 53202

Telephone: (414) 277.5379

Telefax: (414) 978.8645

Catherine.Faught@quarles.com

David.Bartel@quarles.com

Attorneys for Defendants DePuy

Orthopaedics, Inc. and TRP &

Associates, LLC