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14 UNITED STATES DISTRICT COURT
15 DISTRICT OF NEVADA

16 ANNELIESE RUNDLE, MARTHA
17 BENDER, and KATHERINE GUY,

18 Plaintiffs,

19 vs.

20 DEPUY ORTHOPAEDICS, INC. and
21 PRECISION INSTRUMENTS, INC.,

22 Defendants.

) Case No. 2:11-cv-00634-PMP-GWF

)
)
) **DEFENDANTS' 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**

23 I. INTRODUCTION

24 In the MDL Panel's December 3, 2010 Transfer Order, it found that
25 the ASR™ Hip Implant cases "involve common questions of fact, and that
26 centralization under 28 U.S.C. § 1407 . . . will serve the convenience of the parties
27 and witnesses, and promote the just and efficient conduct of the litigation." (*See*
28 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

1 judiciary." (*Id.*) As established below, the MDL Panel considers remand motions
 2 within the class of "pretrial rulings" requiring consistency.

3 The jurisdictional issues raised in this case demonstrate exactly why
 4 the MDL Panel found centralization of the ASR™ hip cases appropriate, and why
 5 it transferred them to Judge Katz for pretrial coordination. (*Id.* at 3.) In fact, even
 6 at this early stage of the MDL proceedings, ten cases from across the country with
 7 pending motions to remand concerning the same, or similar, jurisdictional issues
 8 have already been transferred to, and docketed in, MDL 2197 before Judge Katz.¹
 9 Further, forty-two other cases with the same, or similar, jurisdictional issues are
 10 percolating through the system on conditional transfer orders.² As discussed

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 12 ¹ *In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, MDL
 13 No. 2197, Doc. No. 479 (Apr. 18, 2011) (denying eight separate motions to vacate
 14 conditional transfer orders, and ordering all eight cases be transferred to the
 15 MDL). Seven of the eight cases involve fraudulent joinder issues similar to the
 16 one presently before this Court. They include *Milner v. DePuy Orthopaedics, Inc.,*
 17 *et al.*, Case No. 2:10-cv-01085-WC (M.D. Ala.); *Slay v. DePuy Orthopaedics, Inc.,*
 18 *Case No. 2:10-cv-01086-MEF (M.D. Ala.); Harper v. DePuy Orthopaedics, Inc.,* Case
 19 *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 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).

20 ² *Garris v. DePuy Orthopaedics, Inc.,* Case No. 4:11-cv-00042 (E.D. Va.);
 21 *Proper v. DePuy Orthopaedics, Inc.,* Case No. 4:11-cv-00217 (W.D. Mo.); *Dio v.*
 22 *DePuy Orthopaedics, Inc., et al.,* Case No. 1:11-cv-00042 (W.D.N.Y.); *Yousey v.*
 23 *DePuy Orthopaedics, Inc., et al.,* Case No. 1:11-cv-00043 (W.D.N.Y.); *LeMarr v.*
 24 *DePuy Orthopaedics, Inc., et al.,* Case No. 2:11-cv-00445-ROS (D. Ariz.); *Beaver v. DC*
 25 *Medical, LLC, et al.,* Case No. 1:11-cv-00869-SCJ (N.D. Ga.); *Davis v. DC Medical,*
 26 *LLC, et al.,* Case No. 1:11-cv-00870-AT (N.D. Ga.); *Gray v. DC Medical, LLC, et al.,*
 27 *Case No. 1:11-cv-00871-SCJ (N.D. Ga.); Hinton v. DC Medical, LLC, et al.,* Case No.
 28 *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.,*

1 below, at least eight federal judges have already ruled that the litigation should be
 2 stayed in their courts and that the pending remand motions should be presented
 3 to the MDL judge. Consequently, and contrary to Plaintiffs' arguments, the Court
 4 both can and should stay these proceedings pending the MDL Panel's transfer
 5 decision.

6 II. ARGUMENT

7 The gist of Plaintiffs' arguments is this: 1) as a jurisdictional matter,
 8 this court must consider Plaintiffs' Motion to Remand before it considers
 9 Defendants' Motion to Stay; and 2) transfer to the MDL Court is unfair and a waste
 10 of judicial resources and thus the Court should immediately rule on Plaintiffs'
 11 pending remand motion. (#10.) Neither argument supports the denial of
 12 Defendants' Motion to Stay. Regardless of Plaintiffs' desire to remain in state
 13 court, the MDL Panel – and this Court – have made clear that transferor courts can
 14 and should *avoid* ruling on pending remand and other pretrial motions to promote
 15 the consistent and efficient resolution of overlapping pretrial matters. Indeed, the
 16 majority of federal courts across the country have consistently recognized the

17
 18 Case No. 1:11-cv-00875-HTW (S.D. Ga.); *Scott v. DC Medical LLC, et al.*, Case No.
 19 1:11-cv-00878-TWT (S.D. Ga.); *Scullin v. DC Medical LLC, et al.*, Case No. 1:11-cv-
 20 00879-AT (S.D. Ga.); *Welch v. DC Medical LLC, et al.*, Case No. 1:11-cv-00880-SCJ
 21 (S.D. Ga.); *Bryson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00052-TBR
 22 (W.D. Ky.); *Carnes v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00046-TBR
 23 (W.D. Ky.); *Humphrey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00049-
 24 TBR (W.D. Ky.); *Johnson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00045-
 25 TBR (W.D. Ky.); *Kimbrow v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00051-
 26 TBR (W.D. Ky.); *Lacey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00048-
 27 TBR (W.D. Ky.); *McElwayne v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-
 28 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.); *Malkmus v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00365
 (E.D. Wis.); *Banks v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00718-L
 (N.D. Tex.); *Wilson v. DC Medical LLC, et al.*, Case No. 1:11-cv-01174-JEC (N.D.
 Ga.); *Gallimore v. DC Medical LLC, et al.*, Case No. 1:11-cv-01173-ODE (N.D. Ga.);
Bailey v. DC Medical LLC, et al., Case No. 1:11-cv-01169-RWS (N.D. Ga.); *Brannon*
v. DC Medical LLC, et al., Case No. 1:11-cv-01170-TCB (N.D. Ga.); *Finley v. DC*
Medical LLC, et al., Case No. 1:11-cv-01171-SCJ (N.D. Ga.); *Lewis v. DC Medical*
LLC, et al., Case No. 1:11-cv-01172-MHS (N.D. Ga.); *Askew v. DC Medical LLC, et*
al., Case No. 1:11-cv-01245-WSD (N.D. Ga.); and *Zaborsky v. DePuy Orthopaedics,*
Inc., et al., Case No. 3:11-cv-00251-JAG (E.D. Va.).

1 MDL Panel's goals and declined to rule on pending remand motions before
2 transfer to an MDL. Consequently, the Court should grant Defendants' Motion to
3 Stay in the interest of encouraging a uniform and efficient resolution of this case.

4 **A. Despite Pending Jurisdictional Issues, This Case Should Be Stayed**
5 **Pending MDL Transfer.**

6 **1. The MDL Panel Encourages Transferor Courts to Defer**
7 **Ruling on Motions to Remand Pending MDL Transfer.**

8 As a threshold matter, Plaintiffs' argument (#10 at pp. 5-10) that this
9 Court must first decide the jurisdictional issues raised in the Motion to Remand
10 before deciding Defendants' Motion to Stay is not only incorrect, but directly
11 conflicts with the fact that the MDL Panel *encourages* transferor courts to defer
12 ruling on motions to remand. *See, e.g.,* Ex. A, Ltr. from MDL Panel to Hon.
13 Ricardo H. Hinojosa (Mar. 21, 2005) ("[W]ait[ing] until the Panel has decided the
14 transfer issue . . . may be especially appropriate if the [remand] motion raises
15 questions likely to arise in other actions in the transferee court and, in the interest
16 of uniformity, might best be decided there if the Panel orders centralization.").

17 In light of the MDL Panel's stated position on the issue, numerous
18 courts in this and other circuits have refused to consider remand motions in cases
19 designated for MDL transfer. *See, e.g., Nielsen v. Merck & Co.*, No. C07-00076 MJJ,
20 2007 WL 806510, at *2 (N.D. Cal. Mar. 15, 2007) (referencing JPML letter in
21 rejecting plaintiff's argument that "the Court must first preliminarily consider the
22 merits of the remand motion before . . . considering a stay"); *Dowler v. Medicine*
23 *Shoppe*, No. 2:07-CV-848, 2007 WL 2907519, at *2 (S.D. Ohio Oct. 3, 2007) (staying
24 action and relying in part on MDL Panel's statement to transferor court, which
25 "suggests that waiting until the Panel has decided the transfer issue may be
26 appropriate in the interest of uniformity"); *Farrow v. Bayer Corp.*, No. 03:04-CV-161-
27 F, slip op. at 1 (M.D. Ala. April 19, 2004) (withholding ruling on remand motion
28 and staying case pending MDL Panel's decision on MDL transfer).

1 **2. This Court Has Previously Stayed Cases Pending MDL**
2 **Transfer.**

3 This Court has repeatedly ordered stays to defer consideration of
4 remand motions in cases designated for MDL transfer. *See, e.g., Ex. B, Batiz v.*
5 *Merck & Co., Inc.*, 2:06-CV-1317-PMP (LRL), hearing transcript at 6 (D. Nev. Jan. 11,
6 2007); *Mangani v. Merck & Co. Inc.*, CV-2-06-0914-KJD-PAL, 2006 WL 2707459, at *1
7 (D. Nev. Sept. 19, 2006).

8 Indeed, in deciding to defer a pending motion to remand, this Court
9 has previously stayed cases pending transfer to the MDL in the Vioxx litigation,
10 despite a pending remand motion, in the interest of "conserving judicial resources,
11 comity, [and] uniformity." *Ex. B, Batiz*, 2:06-CV-1317-PMP (LRL), at 6. As the
12 Court in *Batiz* explained, the MDL system "exist[s] . . . to endeavor to provide
13 uniformity" and "comprehensive resolution." *Id.* at 4. Uniformity is a particularly
14 important concern because, as experience shows, multiple judges, and even judges
15 in the same district, can arrive at "conflicting resolutions" regarding whether to
16 remand similar cases. *Id.* at 5-6. Consequently, "the interest of uniformity . . .
17 weighs in favor of the consolidated treatment that can be had with regard to each
18 state jurisdiction or federal district that finds itself before a judge designated by
19 the MDL panel." *Id.* at 6;³ *see also Mangani v. Merck & Co., Inc.*, CV-2-06-0194-KJD-
20 PAL, 2006 WL 2707459, at *1 (D. Nev. Sept. 19, 2006) (staying case where presence
21 of similar cases before MDL "present[ed] similar factual and legal issues regarding
22 both the effects of Vioxx and remand issues such as fraudulent joinder"); *Avant v.*
23 *Merck & Co.*, 2:06-cv-1313, 2007 WL 203953, at *1 (D. Nev. Jan. 24, 2007) ("The Court
24 finds that the remand issues in this case, including fraudulent joinder, would best

25 _____
26 ³ Though Plaintiffs argue that "the jurisdictional issues presented require
27 an examination of factual issues and the interpretation of Nevada law better
28 performed in Nevada," (#10 at p. 14), this Court emphasized in *Batiz* that there is
no doubt that any judge "state or federal, would be in a position to assess the
application of Nevada law, just as a judge in Nevada would." *Batiz*, 2:06-CV-
1317-PMP (LRL) at 4-5.

1 be decided by the MDL Court."); Ex. C, *Regan v. Merck & Co.*, CV-N-0336-ECR, slip
 2 op. at 5 (D. Nev. 2005) (staying case pending transfer, despite pending remand
 3 motion, in interest of "consistency, economy, and fairness"); Ex. D, *Himmel v. Merck*
 4 *& Co.*, CV-N-05-0334-ECR, slip op. at 5 (D. Nev. 2005) (same).

5 Though Plaintiffs rely on the Manual for Complex Litigation (#10 at
 6 p. 4) to argue that "[t]he transferor court should not automatically stay discovery,"
 7 Plaintiffs omit more pertinent and compelling language in that same section,
 8 which provides:

9 **More often**, however, the Panel has held that the
 10 pendency of potentially dispositive motions is not an
 11 impediment to transfer actions, because such motions can
 12 be addressed to the transferee judge for resolution after
 13 transfer. Furthermore, the pendency of motions raising
 14 questions common to related actions can itself be an
 15 additional justification for transfer (citing to *In re Ivy*, 901
 16 F.2d 7, 9 (2d Cir. 1990)).

17 Manual for Complex Litigation, § 20-131 at p. 221 (2004) (emphasis supplied).

18 **3. The Court Should Stay This Case Pending MDL Transfer**
 19 **Consistent with the Majority, General Rule.**

20 A majority of courts have consistently recognized that the "general
 21 rule is for federal courts to defer ruling on pending [pre-trial] motions . . . in MDL
 22 litigation until after the JPMDL has transferred the case to the MDL [court]."
 23 *Turner v. Bausch & Lomb Inc.*, No. 8:06-CV-1088, slip op. at 2 (M.D. Fla. July 17,
 24 2006); *Hardin v. Merck & Co.*, C 07-0700 SBA, 2007 WL 1056790, at *2 (N.D. Cal.
 25 Apr. 5, 2007); *Jackson v. Johnson & Johnson, Inc.*, No. 01-2113 DA, 2001 WL 34048067,
 26 at *6 (W.D. Tenn. Apr. 3, 2001) (similar).⁴

27 ⁴ See also, e.g., *Kline v. Earl Stewart Holdings, LLC*, No. 10-80912-CIV, 2010
 28 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-

1 The rationale for staying a case pending MDL transfer applies with
2 even greater force in cases where jurisdictional issues overlap with other
3 transferred cases, as they do here. See *Vest v. Allied Packing & Supply, Inc.*, No.
4 C 11-00061, 2011 WL 333241, at *2 (N.D. Cal. Jan. 31, 2011) (granting motion to stay
5 and deferring motion to remand when similar motions would be heard by MDL
6 Court), *Good v. Prudential Life Ins. Co. of Am.*, 5 F. Supp. 2d 804 (N.D. Cal. 1998)
7 (noting that a stay pending transfer to an MDL, despite jurisdictional objections,
8 "would further the aim of judicial efficiency"), and *Franklin v. Merck & Co.*, No.
9 CIV. S-07-58, 2007 WL 791843, at *1 (E.D. Cal. Mar. 14, 2007) ("[T]he interest of
10 judicial economy favors staying this action pending its transfer to the MDL
11 proceeding.").

12 This opportunity for uniformity and efficiency is particularly
13 apparent here because, as noted above, this is just one of numerous cases set for
14 transfer to the ASR™ Hip Implant MDL proceeding in which plaintiffs have filed
15 motions to remand based on their joinder of a non-diverse sales representative or
16 distributor. Thus, having the MDL court decide the cross-cutting jurisdictional
17 issues raised by these cases will promote judicial economy and also ensure that the
18 cases in this litigation are treated in a uniform manner.

19 Indeed, when faced with nearly identical circumstances, other U.S.
20 District Courts in ASR™ Hip Implant cases have granted Defendants' motions to
21 10-237, 2010 WL 4255911, at *4 (S.D. Tex. Oct. 14, 2010) (reasoning that because
22 "[i]t is . . . manifest that the motions to remand . . . raise issues that will be
23 considered by the MDL court to which Defendants seek transfer of these cases[,] .
24 . . [a] stay would . . . further the twin aims of conserving judicial resources and
25 preserving consistency"); *Mick v. GlaxoSmithKline, PLC*, No. 08-CV-386A, 2008 WL
26 4147555, at *6 (W.D.N.Y. Sept. 2, 2008) (granting defendants' motion to stay and
27 deferring plaintiff's motion to remand pending determination of transfer issue by
28 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).


1 stay and have deferred ruling on remand motions. *See, e.g., Ex. E, Butler v. DePuy*
2 *Orthopaedics, Inc.*, Order and Reasons at p. 2 (staying all proceedings pending
3 transfer to MDL Court, and expressly finding that deferring ruling on remand
4 motion to MDL Court would "promote judicial efficiency and help to avoid the
5 possibility of inconsistent decisions."); *Ex. F, Laman v. DePuy Orthopaedics, Inc.*,
6 Order and Reasons at p. 3 (granting defendants' motion to stay and deferring
7 ruling on plaintiff's motion to remand to "serve the interests of judicial economy
8 and minimize the risk of inconsistent rulings in related cases."); *Ex. G, Dio v. DePuy*
9 *Orthopaedics, Inc.*, Decision and Order (granting defendants' motion to stay and,
10 though allowing plaintiff to prepare and file a motion to remand, staying
11 disposition of that motion pending transfer to the MDL court); *Ex. H, Hougas v.*
12 *DePuy Orthopaedics, Inc.*, Notification of Docket Entry (granting defendants'
13 motion to stay; motion to remand pending); *Ex. I, Patterson v. DePuy Orthopaedics,*
14 *Inc.*, Order (granting defendants' motion to stay with a limited exception allowing
15 for the filing of a brief opposing remand and a "show cause" filing as to why the
16 stay should be lifted); *Ex. J, Harper v. DePuy Orthopaedics, Inc.*, Order (same); *Ex. K,*
17 *LeMarr v. DePuy Orthopaedics, Inc.*, Order; *Ex. L, Garris v. DePuy Orthopaedics, Inc.*,
18 Order; *Ex. M, Bailey v. DC Medical, LLC*, Order.

19 III. CONCLUSION

20 For the foregoing reasons and those set forth in their opening brief,
21 Defendants respectfully request that the Court enter an order staying all
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1 proceedings in this action, pending this case's transfer to and docketing in MDL
2 2197: *In Re DePuy Orthopaedics, Inc., ASR Implant Products Liability Litigation.*

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of MORRIS PETERSON, and that the following documents were served via electronic service:

DEFENDANTS' 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

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