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**ATTORNEYS FOR PLAINTIFFS**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ANNELIESE RUNDLE, MARTHA  
BENDER and KATHERINE GUY,

Plaintiffs,

v.

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

Defendants.

Case No.: 2:11-CV-00634

**OPPOSITION TO DEFENDANTS'  
MOTION TO STAY AND  
INCORPORATED  
MEMORANDUM OF LAW**

This lawsuit was filed in Clark County, Nevada. The lawsuit was filed in response to the failure of a recalled hip replacement implanted in the Plaintiffs' bodies which was manufactured by Defendant DePuy Orthopaedics, Inc. ("DePuy") and promoted, distributed, sold, and serviced by Defendant Precision Instruments, Inc.

(“Precision”). Despite the fact that Precision is a citizen of Nevada, Defendants DePuy and Precision filed a Notice of Removal removing this case from the Eighth Judicial District Court for Clark County, Nevada to this Court. Defendants claimed in their Notice of Removal that Precision had been fraudulently joined, thus complete diversity jurisdiction existed, and removal to this Court was proper. Plaintiffs promptly filed a Motion to Remand to the Eighth Judicial District Court for Clark County, Nevada, demonstrating that joinder of the in-state Defendant was proper.

Defendants have now filed a Motion to Stay Pending Transfer to MDL No. 2197 – In Re: DePuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation (“Motion to Stay”). In their Motion to Stay, Defendants state that they have notified the United States Judicial Panel on Multidistrict Litigation (the “Panel”) of this action as related to MDL No. 2197. As a result, this case has been listed on Conditional Transfer Order No. 41 (“CTO-41”) issued by the Panel on April 27, 2011. CTO-41 has conditionally ordered the transfer of this action to MDL No. 2197, pending in the Northern District of Ohio. CTO-41 will not be entered and will remain conditional, in accordance with the rules of the Panel, to give Plaintiffs the right to object to the transfer and be heard by the Panel.

Defendants argue that pending transfer of this matter to the MDL, assuming such transfer occurs, this Court should stay all proceedings in this action, including proceedings relating to Plaintiffs’ pending Motion for Remand. Defendants would have this Court believe that it is in the interest of fairness to the parties, judicial economy and conservation of judicial resources to stay this action at this juncture. At bottom, however, Defendants merely seek to avoid answering to this Court on their claim of fraudulent

joinder and wish to push to another day and a more distant tribunal their heavy burden of showing the existence of diversity jurisdiction despite the presence of an in-state Defendant.

No statute, rule, or policy of the Panel prevents this Court from considering the remand of this matter. In fact, the United States Supreme Court and numerous other courts, including this Court, have ruled that a federal district court must determine its jurisdiction as a threshold matter. Absent jurisdiction, it is axiomatic that a court has no power to act, even to enter a stay.

Nor do concerns of judicial economy mandate the entry of a stay. Jurisdictional issues require an individualized analysis and the application of state law. Considering these factors, this Court has found that the principles of judicial economy and expediency are better served by a determination of jurisdiction as opposed to the entry of a stay.

Thus, this Court is both empowered to and required to deny Defendants' Motion to Stay and take up Plaintiffs' Motion for Remand. In fulfilling its constitutional duty to first determine jurisdiction, this Court will also be promoting the interests of judicial economy and expediency.

**I. This Court has the authority to consider Plaintiffs' Motion for Remand pending the potential transfer of this action to MDL No. 2197.**

The mere pendency of a transfer before the Panel does not in any way limit the jurisdiction of the transferor court to rule upon matters properly presented to it for decision. *General Elec. Co. v. Byrn*, 611 F.2d 670 (7th Cir. 1997). *Accord Greene v. Wyeth*, 344 F. Supp. 2d 674, 677-8 (D. Nev. 2004). This holding is consistent with Rule

2.1(d) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation (formerly Rule 1.5(d)), which 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.

Similarly, the Manual for Complex Litigation, Fourth, § 20-131 (2004) states:

The transferor court should not automatically stay discovery . . . Nor should the court automatically postpone rulings on pending motions, or generally suspend further proceedings.

Thus, even after a conditional transfer order is entered, this Court may still rule on a pending motion to remand. *Greene* at 677-8. *See also, Kopitke v. DePuy Orthopaedics, Inc. and Premier Sales, Inc.*, 2011 WL 856865 (N.D. Ill. Mar. 8, 2011) (District Court denied stay and granted remand after entry of conditional transfer order in suit involving the DePuy ASR hip)<sup>1</sup>. Consistent with Rule 2.1, courts have held that a district court does not exceed its jurisdiction in remanding the action to state court after a conditional transfer order had been filed. *Greene* at 677-8. “We will not require a district court that believes that it lacks subject matter jurisdiction over a case to facilitate a transfer under § 1407, a statute that does not itself confer jurisdiction.” *Illinois Municipal Retirement Fund v. Citigroup, Inc.*, 391 F.3d 844, 852 (7th Cir. 2004) (Finding a conditional transfer order does not in any way limit the pretrial jurisdiction of the district court.).

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<sup>1</sup> Defendants exhort this Court to jump on the bandwagon and join the 95 other federal district courts across the country which have granted stays. Mot.to Stay, pp. 2, 4, n.1. Defendants however fail to mention that the majority of the 95 motions were unopposed.

The Judicial Panel on Multidistrict Litigation recently emphasized that a district court may rule on motions to remand prior to the transfer of an action to MDL 2197, stating:

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. April 18, 2011).<sup>2</sup> For these reasons, this Court has the authority to consider Plaintiffs' Motion for Remand at this time.

**II. This Court *must* consider Plaintiffs' Motion for Remand before it may consider Defendants' Motion to Stay**

Plaintiffs filed this action in state court setting forth state law claims against Defendants, including Precision, an in-state Defendant. Defendants removed the case to this Court claiming improper joinder. Plaintiffs then sought the remand of this case to state court for the reason that the joinder of the in-state Defendant was proper and thus, complete diversity of the parties does not exist to establish diversity jurisdiction. Both Plaintiffs and Defendants have raised the issue of the existence of diversity jurisdiction.

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<sup>2</sup> Defendants fail to explain in their Motion to Stay the time involved in the transfer process. After a Conditional Transfer Order is issued, the parties have the opportunity to file a Notice of Opposition, which Plaintiffs in this case will file. See JPML Rule 7.1, 28 USCA foll. §1407. Plaintiffs will then have two weeks to file a Motion to Vacate CTO-41. *Id.* Defendants then have time to file a brief in opposition to the Motion to Vacate and Plaintiffs may file a reply brief. See JPML Rule 6.1(c) and (d), 28 USCA foll. §1407. Once briefing is complete, the matter is set for consideration by the Panel on one of its bimonthly dockets. See JPML Rule 7.1(f), 28 USCA foll. §1407. After full briefing on this matter, the first available hearing date for the Panel to consider the Motion to Vacate CTO-41 will be July 28, 2011. See [www.jpml.uscourts.gov](http://www.jpml.uscourts.gov) under the Hearing Information tab. Thus, it will be some months before the Panel even considers, let alone rules on, whether to enter CTO-41 in this action.

Accordingly, the issue of whether this Court possesses subject matter jurisdiction over this action is squarely before the Court.

The question of a court's jurisdiction over a proceeding is a fundamental one, going to the court's very power to act. The United States Supreme Court has explained that "jurisdiction is the power to declare the law..." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). As "[f]ederal courts are courts of limited jurisdiction,...[t]hey possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). *Accord Vacek v. U.S. Postal Service*, 447 F. 3d 1248, 1250 (9th Cir. 2006); *Slaughter v. Laboratory Medicine Consultants, Ltd.*, 2011 WL 1486228, \*2 (D. Nev. Apr. 19, 2011); *Nebab v. JFK Financial, Inc.*, 2011 WL939198, \*1 (D. Nev. Mar. 16, 2011). A court's power may not "be expanded by judicial decree." *Kokkonen* at 377. Instead, 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.* at 94; *Kokkonen* at 377; *Vacek* at 1250. *See also, Illinois Municipal Retirement Fund v. Citigroup Inc.*, 391 F. 3d 844, 851 (7th Cir. 2005) (Finding all courts of limited jurisdiction have a fundamental obligation to rule on jurisdiction). Thus, the United States Supreme Court has declared the requirement that jurisdiction 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.) *See also Guerra v. Hertz Corporation*, 504 F. Supp.2d 1014, 1017-18 (D. Nev. 2007) (In which Your Honor explained that "A federal

district court is obligated to ensure that it has jurisdiction over an action, and once it determines it lacks jurisdiction, it has no further power to act.”)

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. *Accord National Association for the Advancement of Colored People v. City of Kyle, Texas*, 626 F. 3d 233, 237 (5th Cir. 2010) (Emphasis supplied in same manner as emphasis added in *NAACP v. Kyle*.) *See also Guerra* at 1017-18 and *Scott Air Force Base Properties, LLC v. County of St. Clair, Illinois*, 548 F. 3d 516, 520 (7th Cir. 2008) (“Indeed, ‘[i]t is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take *any action...*’” (Emphasis supplied). The Ninth Circuit has embraced this principle, explaining:

Nothing is to be more jealously guarded by a court than its jurisdiction. Jurisdiction is what its power rests upon. Without jurisdiction it is nothing...[I]t is imperative that any attempt to impose upon federal jurisdiction by pleadings without legal justification must be vigorously discouraged.

*In Re: Mooney*, 841 F. 2d 1003, 1006 (9th Cir. 1988) (Overruled en banc on other grounds, i.e., issue of whether Circuit’s Rules incorporated Rule 11 of the Federal Rules of Civil Procedure.)

Absent jurisdiction, a court may not act except to dismiss or remand the action before it. *Slaughter v. Laboratory Medicine Consultants, Ltd.*, 2011 WL 1486228, \*2 (D.

Nev. Apr. 19, 2011); *Nebab v. JFK Financial, Inc.*, 2011 WL939198, \*1 (D. Nev. Mar. 16, 2011) (“In cases removed from state court, a federal court that finds a lack of subject matter jurisdiction does not dismiss, but must remand to state court.”) *See also Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 343 F. 2d 905, 908 (8th Cir. 1965) (“A court without jurisdiction has no power to adjudicate but can only dismiss the proceeding for lack of jurisdiction.”) The Supreme Court has announced this precept to be a fundamental principle of the separation of powers. *Steel Co.* at 94.

So well established is the foregoing that the United States Claims Court referred to it as “an age-old rule” when finding it had no authority to impose Rule 11 sanctions where subject matter jurisdiction was lacking. *Schiff v. U.S.*, 24 Cl. Ct. 249, 254 (1991).

Referring to Supreme Court precedent, the *Schiff* court explained:

[W]here the court has no jurisdiction, it has no power to do anything but strike the case from its docket, the matter being *coram non judice*.

Thus, when jurisdiction is lacking, as it is here, we cannot address any issue relating to the merits, *even if it would be in the best interests of justice to do so*.

*Id.* (Emphasis original in first paragraph, supplied in second.)

As this Court’s subject matter jurisdiction has been brought into question, it must satisfy its first and fundamental duty to determine if it has the power to adjudicate any issues in this case. If this Court determines that it lacks jurisdiction, then it may take no action, *even that of granting a stay*. The only avenue available to this Court if it lacks subject matter jurisdiction is to remand this cause to the state court which does have jurisdiction. This Court must abide by this “age-old rule” even if it feels that a stay and transfer to the MDL would be in the best interest of justice.

Other district courts have followed this “age-old rule” in situations similar to that presented here. For example, in *Lloyd v. Cabell Huntington Hospital, Inc.*, the plaintiff filed suit in state court claiming she had been injured by a defective orthopedic medical product. *Lloyd v. Cabell Huntington Hospital, Inc.*, 58 F. Supp. 2d 694, 696 (S.D. W. Va. 1999). The defendant manufacturer removed the case to federal court and the plaintiff sought a remand. *Id.* The defendant then moved for a stay of proceedings pending transfer to an MDL in another district. *Id.* The district court granted the motion to remand and denied the motion to stay as moot, finding:

This Court cannot, however, stay proceedings in an action over which it lacks jurisdiction...If federal jurisdiction is doubtful, remand is necessary.

*Id.*

Similarly, in *Pennsylvania v. TAP Pharmaceutical Products, Inc.*, suit was brought in state court and removed to federal court. *Pennsylvania v. TAP Pharmaceutical Products, Inc.*, 415 F. Supp. 2d 516, 518-19 (E.D. Penn. 2005). Defendants moved to stay the proceedings to transfer the matter to an MDL in the federal district court in Massachusetts while the State of Pennsylvania moved for remand to state court. *Id.* The state argued that the district court in Pennsylvania *must* decide the threshold issue of jurisdiction before deciding the motion to stay. *Id.* at 520-21. The court agreed with the state and concluded “the power to grant a stay is subject to an important limitation: the existence of subject matter jurisdiction.” *Id.* at 521. The court explained that “to adjudicate any pretrial matters, it must satisfy itself that it has the power to do so.” *Id.* Thus, the court held:

Therefore, granting a stay solely based on the existence of a factually-related MDL proceeding, without undertaking an

individualized analysis of subject matter jurisdiction, would run counter to established case law, congressional intent, and JPML Rule [2.1], all of which contemplate a district court will act to resolve threshold jurisdictional concerns.

*Id.* Employing this analytical framework, the district court in Pennsylvania considered and granted the motion for remand but did not adjudicate the motion to stay for the reason that subject matter jurisdiction was lacking. *Id.* at 521, n. 2.

The district court for the Northern District of Alabama reached the same conclusion when presented with a motion for remand and a motion for stay in an action involving multidistrict litigation. In *Stern v. Mutual Life Ins. Co. of New York*, 968 F. Supp. 637, 639 (N.D. Ala. 1997), the district court denied the stay, holding:

If the court lacks jurisdiction over the action *ab initio*, it is without jurisdiction to enter such a stay. It is incumbent upon a court whose subject matter jurisdiction is questioned to make a determination as to whether it has, or does not have, jurisdiction over the action. This determination involves no issues that the putative transferee court in the multi-district action would be uniquely qualified to address. Therefore, defendants' request for a stay of proceedings should be denied.

Like the district courts in the foregoing cases, this Court has a fundamental duty to determine its subject matter jurisdiction before it considers the Motion to Stay. If this Court determines it has no subject matter jurisdiction, it will concurrently have no power through which to adjudicate the Motion to Stay. The presence of a factually related MDL has no bearing on this threshold issue of jurisdiction and this Court's authority to preside over this action. For these reasons, which form the very basis of our system of federal jurisprudence, this Court must rule on Plaintiffs' Motion for Remand prior to considering Defendants' Motion to Stay.

**III. Principles of fairness to the parties, judicial economy and conservation of judicial resources dictate the resolution of Plaintiffs' Motion for Remand in this District Court as opposed to the District Court overseeing MDL No. 2197.**

In their Motion to Stay, Defendants argue that it would be in the interests of uniformity and judicial economy to stay Plaintiff's Motion for Remand pending the possible transfer of this action to MDL No. 2197. Many courts which have previously analyzed this argument, including the jurists of this District,<sup>3</sup> have soundly rejected such argument.

Defendants claim that the cases throughout the country regarding the DePuy ASR Hip are virtually identical and contain many overlapping issues, even jurisdictional issues, which Defendants maintain should be collectively decided in the MDL. The collective approach, while perhaps promoting efficiency in matters such as basic discovery disputes, is not appropriate for determining subject matter jurisdiction. Rather, courts have emphasized that jurisdictional issues are unique to each case and require individualized evaluation. *Illinois Municipal Retirement Fund v. Citigroup Inc.*, 391 F. 3d 844, 851 (7th Cir. 2005) ("Congress has indicated a preference for remands based upon such individualized jurisdictional evaluations and a tolerance for inconsistency.");

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<sup>3</sup> See e.g., *Greene v. Wyeth*, 344 F. Supp. 2d 674, 677-9 (D. Nev. 2004); *Elmore v. Merck & Co., Inc.*, 2007 WL 956893 (D. Nev. Mar. 29, 2007); *Wilson v. Wyeth*, Case No. CV-S-04-0694 JCM (PAL), Order Denying Wyeth Defendants' Motion to Stay, and Remanding Case (D. Nev. Oct. 4, 2004), attached as **Exhibit 1**; *Stracener v. Bayer Corp.*, Case No. CV-S-03-1622-JCM-FJJ, Order (D. Nev. Apr. 7, 2004) (Granting plaintiffs' motion for remand and denying defendants' motion to stay), attached as **Exhibit 2**; *Fisher v. Bayer Corp.*, Case No. CV-S-03-1620 RCJ (LRL), Order (D. Nev. Feb. 26, 2004) (Denying stay as to motion to remand), attached as **Exhibit 3**; *Burres v. Bayer Corp.*, Case No. CV-N-03-711-HDM (RAM), Order (D. Nev. Feb. 23, 2004) (Denying stay as to motion to remand), attached as **Exhibit 4**; *Nicholas v. Wyeth*, Case No. CV-S-04-0820-PMP-PAL, Order (D. Nev. Dec. 3, 2004) (Granting remand as to plaintiffs with claims against Nevada defendants and discussing stay), attached as **Exhibit 5**; *Pink v. Bayer Corp.*, Case No. CV-S-03-1623-PMP (LRL), Order (D. Nev. Feb 27, 2004) (Modifying stay to provide that Court would consider Motion to Remand), attached as **Exhibit 6**; *Estate of Brown v. Merck & Co., Inc.*, CV-S-05-0600-PMP (PAL), Order (D. Nev. July 15, 2005) (Granting remand despite motion to stay pending transfer to MDL), attached as **Exhibit 7**.

*Pennsylvania v. TAP Pharmaceutical Products, Inc.*, 415 F. Supp. 2d 516, 521 (E.D. Penn. 2005) (“Therefore, the existence of subject matter jurisdiction cannot be resolved more efficiently or uniformly in MDL 1456 because it is undisputed that one federal court must make an individualized assessment of the jurisdictional issues in this case.”); *Craft v. United Ins. Co. of America*, 2002 WL 32509283, \*2 (S.D. Miss.) (“These are matters that are unique to this case and should be decided in this court, prior to transfer to another federal forum.”) citing *Dantzler v. American Home Products Corp.*, 2000 WL 34333156, \*2 (N.D. Miss.) (“[M]otions to remand...are based on issues ‘unique to an action’” and “are ‘well suited for decisions prior to the 1407 transfer.’”).

As an individualized evaluation is necessary for a determination of the jurisdictional issues raised, no advantages of uniformity or conservation of judicial resources could be achieved by staying these fundamental jurisdictional issues and permitting them to be decided by the transferee court. Rather, with respect to jurisdictional issues, “the same degree of judicial resources must be expended” in either the transferor or the transferee court “to make an assessment of which party should prevail.” *Pennsylvania v. TAP Pharmaceutical Products, Inc.*, 415 F. Supp. 2d 516 at 521. Thus, the District Court in *TAP Pharmaceutical Products* concluded:

Multi-district litigation undoubtedly conserves judicial resources in many respects, but, in determining the threshold issue of jurisdiction this Court concludes such an inquiry is fundamental to its purpose.

*Id.*

The Federal District Court of Nevada has repeatedly ruled that deciding a motion to remand better serves the interests of judicial economy than staying a matter pending transfer to an MDL. *Fisher v. Bayer Corp.*, Case No. CV-S-03-1620 RCJ (LRL), Order

at p. 3 (D. Nev. Feb 26, 2004) (“Contrary to Bayer’s contention, having this Court decide the motion to remand would better serve the interests of judicial economy. If federal jurisdiction does not exist, the case can be remanded before resources are further expended.”), attached as **Exhibit 3**; *Burres v. Bayer Corp.*, Case No. CV-N-03-711-HDM (RAM), Order at p. 3, (D. Nev. Feb. 23, 2004), attached as **Exhibit 4**; *Elmore v. Merck & Co., Inc.*, 2007 WL 956893, \*2 (D. Nev. Mar. 29, 2007) (“Merck argues that considerations of judicial economy and the avoidance of conflicting rulings should require a stay of the proceedings. This court disagrees.”).

Defendants argue in their Motion to Stay that this Court has previously granted stays despite pending motions for remand. *See* Mot. to Stay, pp. 4-5 *citing* *Batiz v. Merck & Co., Inc.*, 2:06-cv-1317-PMP(LRL), hearing transcript, p. 6 (D. Nev. Jan. 11, 2007) and *Mangani v. Merck & Co., Inc.*, cv-s-06-0914-KJD-PAL, 2006 WL 2707459 at \*1 (D. Nev. Sept. 19, 2006). However, the cases cited herein, *supra*, illustrate that there are many more decisions of this Court which have denied a requested stay and ruled on remand, even pending transfer to an MDL. Moreover, both the *Mangani* decision and the *Batiz* transcript reason that the MDL in those cases, the Vioxx MDL, had been in litigation for some time and so, had ample experience and capacity to determine the issues raised. *Mangani* at \*2; *Batiz* transcript at p. 5. Indeed, the *Batiz* transcript distinguishes a prior decision, *Estate of Brown v. Merck & Co., Inc.*, in which the Court granted remand despite a motion to stay, explaining that it was appropriate to rule on the remand at a time when the MDL was not very far along. *Batiz* transcript at pp. 3-4 *citing* *Brown v. Merck & Co., Inc.*, attached as **Exhibit 7**. The present DePuy ASR Hip Implant MDL is more akin to the Vioxx MDL at the time of the *Brown* decision than at the time

of the *Batiz* transcript. The instant MDL was created only a few months ago, in December of 2010, and is still in its organizational stages. *See* In Re: DePuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation, Docket Report dated April 27, 2011, attached as **Exhibit 8**. Thus, *Brown* is more applicable to the present proceeding than *Batiz* and *Mangani*.

In analyzing motions to stay and motions to remand similar to those filed in this action, this Court has found that the jurisdictional issues presented require an examination of factual issues and the interpretation of Nevada law better performed in Nevada. *Elmore* at \*2; *Greene* at 679. In *Greene*, this Court thus concluded “it is clear that a court within the District of Nevada is best-suited for consideration of the matter.” *Greene* at 679 (Referring to the jurisdictional issues presented by the motion to remand). *See also Dantzler v. American Home Products Corp.*, 2000 WL 34333156, \*2 (N.D. Miss.) (“In this matter, where the pivotal remand issue involves the application of Mississippi law, the undersigned is of the opinion that the remand motion is more appropriately decided in this forum.”) The stay and transfer of this action, as proposed by Defendants, would result in the District Court for the Northern District of Ohio being required to make an individualized assessment of Plaintiffs’ Motion for Remand and apply the law of the State of Nevada. Surely, such an analysis is easier and more efficiently performed by a federal court sitting in the State of Nevada as opposed to a federal judge seated in Ohio. Because this Court is far more familiar with the nuances of Nevada law on this topic, as evidenced by the numerous citations to opinions of this Court contained in Plaintiffs’ Motion to Remand, there would be no savings in terms of judicial effort by abdicating the present question of jurisdiction to the Northern District of

Ohio.<sup>4</sup> For these reasons, Defendants' assertion that principles of judicial economy would be served by a stay pending transfer lack merit.

Additionally, this Court has previously expressed its concern over the delays attendant to a transfer to an MDL and found that considerations of expediency warrant a decision on remand rather than the entry of a stay. In *Elmore v. Merck & Co., Inc.*, Judge Hicks held:

Moreover the court finds that the interest of expediency weighs in favor of determining the motion to remand. It is unknown when the multiligation panel will issue a conditional transfer order to the MDL court. Even once it does so, the plaintiffs are then provided an opportunity to contest the transfer, which will result in proceedings that further delay determination of the motion to remand. As the parties have already advised this court of the issues involved during briefing, it is unnecessary to cause additional delay by staying proceedings so that another court may determine the motion. Therefore, the court will deny Merck's motion to stay and consider Plaintiffs' motion to remand.

*Elmore v. Merck & Co., Inc.*, 2007 WL 956893 (D. Nev. Mar. 29, 2007). *Accord Green v. Wyeth*, 344 F. Supp. 2d 674, 679 (D. Nev. 2004). Similarly, in *Wilson v. Wyeth*, Judge Mahan explained:

Plaintiffs claim that transfer of this case to the MDL court without first deciding the threshold jurisdictional question will result in lengthy delays which would cause undue

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<sup>4</sup> It is anticipated that Defendants will include a laundry list of cases in their Reply brief as examples of how the MDL will be presented with similar jurisdictional issues, which it could then decide collectively. Plaintiffs, having reviewed this list, would note that it is a list of cases in which plaintiffs around the country have opposed the transfer of their actions to the MDL, only a few of which have been actually transferred to the MDL. Additionally, such list contains only 2 Nevada cases, this case and *Day v. DePuy*, Case No. 2:11-cv-00501-KJD-RJJ. (To date, this Court has not ruled on the issues of remand and stay in the *Day* case.) Thus, Defendants' list, filed with fanfare in the *Day* case, while impressive in its length, is not relevant. It does nothing to demonstrate that the MDL, at some undetermined point in the future, will address the same jurisdictional issues as are presented here. In fact, it does the opposite by underscoring that the MDL will not be called on to make individualized determinations of jurisdiction under Nevada law. Therefore, Plaintiffs would submit that Defendants' laundry list only supports Plaintiffs' position that principles of judicial economy favor a denial of the motion to stay.

hardship to these Nevada plaintiffs. This Court agrees, and therefore chooses to decide Plaintiffs' Motion to Remand.

*Wilson v. Wyeth*, Case No. CV-S-04-0694 JCM (PAL), Order Denying Wyeth Defendants' Motion to Stay, and Remanding Case at p. 2, (D. Nev. Oct. 4, 2004), attached as **Exhibit 1**. In *Fisher v. Bayer Corp.*, Judge Jones echoed these concerns, finding:

This Court is likely to address the remand motion before the MDL Court would have such an opportunity, assuming transfer is granted. Contrary to Bayer's contention, having this Court decide the motion to remand would better serve the interests of judicial economy. If federal jurisdiction does not exist, the case can be remanded before resources are further expended.

*Fisher v. Bayer Corp.*, Case No. CV-S-03-1620 RCJ (LRL), Order at p. 3 (D. Nev. Feb. 26, 2004), attached as **Exhibit 3**. Accordingly, it is well settled in this District that given the delays which accompany a transfer to an MDL (as explained, *supra*, in footnote 1), jurisdictional issues should be determined prior to transfer.

Moreover, principles of fairness support the notion that this Court should, in keeping with its fundamental duty to decide the threshold issue of subject matter jurisdiction first, deny the stay requested by Defendants and consider Plaintiffs' Motion for Remand. Defendants make the blanket statement that Plaintiffs will not be prejudiced by the stay and transfer of these proceedings. Defs. Motion to Stay, p. 6. Plaintiffs would beg to differ. Plaintiffs initially filed this action in state court and sought to have their dispute resolved quickly in a local forum. By removal and their attempts to stay this action and transfer it to the Northern District of Ohio, Defendants, who have access to the resources of an international corporation, have, in essence, sought to move Plaintiffs' litigation far away from Nevada to an unfamiliar forum for resolution on a timetable

driven not by these Nevada Plaintiffs and their counsel but by large committees with the inevitable delay attendant to litigation by committee. Notably, it will be several months before this matter is even transferred to the MDL, assuming transfer is granted and not vacated. Several more months will pass, at a minimum, before the MDL could rule on Plaintiffs' Motion for Remand, given that the MDL currently has no procedure in place for determining motions for remand. *See Exhibit 8*. Defendants, therefore, strain credulity in characterizing this passage of time as a "short stay." *See Defs. Motion to Stay*, p. 7. For these reasons, considerations of fairness would counsel the prompt determination of the jurisdictional question in this forum.

Finally, Defendants argue that they would suffer hardship in the absence of a stay by being forced to respond to discovery requests both in this Court and the MDL. *See Defs. Motion to Stay*, p. 7. To the contrary, Plaintiffs would point out that they are confident Defendants will not be required to respond to discovery in this Court. Plaintiffs have objected to a stay for the reason that this Court lacks subject matter jurisdiction to preside over this action. Once this Court hears and rules on Plaintiffs' Motion for Remand, Plaintiffs suggest that the case will be remanded to state court and the issue of Defendants' onerous burden of responding to discovery in this Court will be moot. As Your Honor noted in *Nicholas v. Wyeth*:

In a dispute between Nevada citizens and a Nevada corporation, where the Federal Court lacks both diversity and federal question jurisdiction, the state will provide the more efficient forum for the resolution of their claims. As masters of their Complaint, Plaintiffs Spring, Girard and Daly, citizens of Nevada, have the right to bring this action against Trimline, a Nevada corporation and Self and Levisieur, Nevada citizens, in Nevada state court...

*Nicholas v. Wyeth*, Case No. CV-S-04-0820-PMP-PAL, Order, p. 7 (D. Nev. Dec. 3, 2004) attached as **Exhibit 5**. Likewise, Defendants' discovery concerns will best be resolved in the appropriate forum for this matter, the Eighth Judicial District Court for Clark County, Nevada.

**CONCLUSION**

For the foregoing reasons, this Court has a duty to first consider the fundamental issue of subject matter jurisdiction as raised in Defendants' Notice of Removal and Plaintiffs' Motion for Remand before it may decide the propriety of Defendants' Motion to Stay. Until this Court determines it has the authority to consider the Motion to Stay, Defendants' Motion to Stay should be denied.

DATED: May 1, 2011

Respectfully submitted,

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