

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

SHANNON McCONNELL,)	CASE NO. 1:11-dp-22200
)	
Plaintiff,)	
)	
v.)	DEFENDANTS' RESPONSE TO
)	PLAINTIFF'S MOTION FOR
MARK DEBIASE, INC., et al.,)	RECONSIDERATION OF AMENDED
)	CMO 5
Defendants.)	

INTRODUCTION

This matter was transferred from the United States District Court for the Southern District of Florida on October 11, 2011 (Doc. 18). Pursuant to this Court's Amended Case Management Order ("CMO") 5, Plaintiff was required to submit a one-page information sheet within 30 days of transfer—on or before November 10, 2011. (*See* MDL Doc. 181.) Instead, Plaintiff has filed a Motion to Reconsider Amended CMO 5, alleging that she should not have to participate in the MDL proceedings because her "pending" Motion to Remand deprives this Court of jurisdiction. (Doc. 19 at 1, 3.)

Plaintiff's Motion is without merit because: (1) there is no pending Motion to Remand (*see* CMO 11., MDL Doc. 299); and (2) even if there were, this Court has jurisdiction to apply and enforce its case management orders. *See, e.g., Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006) ("jurisdiction is vital only if the court proposes to issue a judgment on the merits")).

Indeed, the power to enforce orders that are collateral to the merits of a transferred action is essential to the ability of MDL courts to carry out their primary function.

I. Plaintiff's Motion Is Moot Because, Under CMO 11, Plaintiff Has No Pending Objection to Subject Matter Jurisdiction.

Plaintiff's Motion for Reconsideration is premised on the existence of a pending motion to remand, which Plaintiff contends this Court must resolve before she can be required "to affirmatively participate in this proceeding." (See Doc. 19 at 1, 3). Her request is moot. Case Management Order 11 (MDL Doc. 299) vacates and supersedes "[a]ll pending motions filed in the transferor courts." To date, Plaintiff has not re-filed her motion for remand in this Court. Accordingly, she has no pending jurisdictional challenge, and so lacks a basis on which to seek "reconsideration pending remand to state court."

But even if Plaintiff were to refile her Motion to Remand in this Court, her attempt to evade basic disclosure obligations is meritless.

II. This Court May Enforce Orders Collateral to the Merits, Such as Amended CMO 5, Without First Determining Subject Matter Jurisdiction.

A. MDL courts have inherent power to issue orders "collateral to the merits" to coordinate and manage their dockets.

The principle that courts have jurisdiction to issue orders collateral to the merits is consistent with the discretion and inherent authority district courts have generally—and particularly in MDL cases—to manage their dockets through pretrial discovery orders. Such authority easily extends to the enforcement of pretrial orders during the pendency of remand motions.

District courts possess inherent authority to issue orders calculated to coordinate and manage their dockets. *See, e.g., Ebbing v. Butler County, Ohio*, No. 1:09-cv-39, 2010 WL 4118105, at *1 (S.D. Ohio May 21, 2010) ("District courts have the inherent power . . . to

manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”) (citing *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962)). That authority becomes even more important when a court takes on the responsibilities of coordinating MDL proceedings, vested with discretion from the Judicial Panel on Multidistrict Litigation to manage all pre-trial aspects of thousands of cases at once. *See In re: Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354 (JPML 2005) (explaining that the MDL Court has broad discretion to “employ any number of pre-trial techniques—such as establishing separate discovery and/or motion tracks—to efficiently manage” litigation).

The very jurisdictional issue raised by Plaintiff was thoroughly examined in an appeal to the United States Court of Appeals for the Second Circuit from the *In re Zyprexa* MDL. *See In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113 (2d Cir. 2010). There, the MDL court had imposed a “Common Benefit Fund” order requiring plaintiffs to place three percent of their gross recovery into an escrow fund for the benefit of any lawyer who worked for the common benefit of the federal-court plaintiffs. *See id.* at 120. The appellant, a law firm, represented plaintiffs in cases with pending motions for remand based on the alleged absence of subject matter jurisdiction. Just like Plaintiff here, the firm argued that the MDL could not enforce its pre-trial order against those plaintiffs unless the court first resolved the pending jurisdictional challenges. When the court rejected that argument, the firm appealed and (like Plaintiff here) sought mandamus relief.

The majority dismissed the appeal for lack of jurisdiction and declined to reach the merits of the law firm’s arguments. 594 F.3d at 119. But the majority expressed “sympathy with the carefully reasoned concurring views of Judge Kaplan” on those merits. *Id.* The concurring opinion first confirms the well-established rule that while a federal court must make a

jurisdictional determination “before it reaches the merits,” courts are “empowered to issue non-dispositive orders between the filing of the action and its ultimate determination on the merits.” *Id.* at 126 (citing *Sinochem*, 549 U.S. at 431; *United States v. United Mine Workers of Am.*, 330 U.S. 258, 290 (1947)). Because the common benefit order entered by the *Zyprexa* MDL was “collateral to the merits” it was “well within the district court’s power.” *Id.* at 127.

Having established the authority of the court to enter the common benefit order, the concurring judge proceeds to explain why it is “comfortably within the bounds of its discretion,” and even advisable for district courts “to defer consideration of . . . jurisdictional challenges”:

A district judge managing such a complex situation reasonably may conclude that **the court’s time, especially early in the litigation, is better spent on activities other than deciding hundreds of individual remand motions.** It often would be appropriate to conclude that many of the cases in which such motions are filed are likely to settle and that **the expenditure of judicial resources on remand motions likely would be wasted.** Moreover, even if an MDL or comparable court dealt immediately with remand motions pending at a given moment, new cases and new remand motions are likely to be filed throughout the pendency of the litigation. Deciding each motion prior to addressing other issues common to all or most cases therefore could **require a significant expenditure of judicial time and resources, derailing the progress of the litigation as a whole.**

Id. at 128 (emphasis added). The delays associated with deciding motions for remand early “could well frustrate the purpose of MDLs, which is ‘to promote just and efficient conduct’ of actions involving common questions of fact.” *Id.* (citing 28 U.S.C. § 1407).

The “broad discretion that inheres in [a court’s] docket management function” during the pendency of remand motions (*id.*) easily encompasses orders like this Court’s Amended CMO 5. In the *Zyprexa* MDL, for example, the district court entered an order requiring that plaintiffs, “including those whose cases are subject to a pending remand motion,” comply with a case management order requiring plaintiffs to file “fact sheets.” *In re: Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 275 (E.D.N.Y. 2006) (“Every case currently before this court must comply with all of the court’s, magistrate judge’s, and special masters’ orders, even if a motion to

remand is pending.”). Likewise, the court in the *In re: Diet Drugs* MDL required plaintiffs with pending remand motions to “comply with their obligations to produce in a timely manner completed Fact Sheets, Medical Authorizations, and Lists of Medical Providers” in accordance with the court’s pre-trial orders. *In re: Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, 2004 WL 785069, at *5 (E.D. Pa. Mar. 24, 2004).

In summary, this Court, like all district courts, has inherent power to issue pre-trial orders designed to efficiently manage the complex docket before it. That this court manages an MDL proceeding only emphasizes the need to employ these orders. And, as the foregoing authority establishes, this Court may enforce those orders *without* first resolving pending challenges to subject matter jurisdiction.

B. The authority Plaintiff cites does not require a district court to decide jurisdiction before issuing non-merits orders.

The gist of Plaintiff’s jurisdictional argument is: (1) motions to remand challenge a court’s jurisdiction; and (2) “[a]bsent jurisdiction, a court may not act except to dismiss or remand the action before it” (Doc. 19 at 5); ergo, (3) Plaintiff has no obligation to comply with Amended CMO 5 or otherwise participate in this action until this Court resolves her motion to remand. The essential flaw in Plaintiff’s syllogism is its assumption that a court cannot rule on matters collateral to the merits notwithstanding the pendency of a jurisdictional challenge. *See Willy v. Coastal Corp.*, 503 U.S. 131 137-138 (1992) (an order “collateral to the merits” is valid even if the court is later found not to have subject matter jurisdiction: “[t]he interest in having rules of procedure obeyed . . . does not disappear upon a subsequent determination that the court was without jurisdiction”); *Sinochem*. 549 U.S. at 1041 (“jurisdiction is vital only if the court proposes to issue a judgment on the merits”) (citation and punctuation omitted).

The cases that Plaintiff cites (Doc. 19 at 4) do not disagree. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) refuses to reach the merits of a contract dispute arising out of a settlement because “[e]nforcement of the settlement agreement . . . is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.” *Id.* at 378. *Nat’l Assoc. for the Advancement of Colored People v. City of Kyle, Texas*, 626 F.3d 233 (5th Cir. 2010) bases its holding on its characterization of jurisdiction as the “power to declare the law”—a merits issue, while *Covenant Media of North Carolina, L.L.C. v. City of Monroe, North Carolina*, 285 F. App’x 30, 33 (4th Cir. 2008) holds: “We agree that it is inappropriate to first consider the *merits* of a claim when determining whether a party has standing under Article III of the Constitution.”) (emphasis added).

Other authorities cited by Plaintiff are either no longer good law or are overstated. Plaintiff, for example, relies on a 1991 Court of Claims decision, *Schiff v. United States*, 24 Cl. Ct. 249 (Ct. Cl. 1991), (Doc. 19 at 5) to argue that a court has no authority to impose Rule 11 sanctions where subject matter jurisdiction is lacking. (See Doc. 19 at 5). Ten years after *Schiff*, however, the Supreme Court *upheld* Rule 11 sanctions notwithstanding a subsequent finding that the district court lacked subject matter jurisdiction. *Willy*, 503 U.S. 131 (1992). Similarly, the Supreme Court’s 1998 decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), was distinguished in *Sinochem*. 549 U.S. at 431 (“While *Steel Co.* confirmed that jurisdictional questions ordinarily must precede merits determinations in dispositional order, *Ruhrgas* [*AG v. Marathon Oil Co.*, 526 U.S. 574 (1999)] held that there is no mandatory ‘sequencing of jurisdictional issues.’”).

Succinctly, the correct rule is that a court may issue non-merits orders, but not a merits decision, without first deciding a pending motion for remand based on the alleged absence of subject matter jurisdiction.

CONCLUSION

Even if Plaintiff complied with CMO 11 and re-filed her motion for remand, her pending jurisdictional challenge *still* would not insulate her from the need to comply with Amended CMO 5. This Court need not determine whether it has subject matter jurisdiction over Plaintiff's case before enforcing its case management orders. Accordingly, for the reasons explained above, this Court should deny Plaintiff's Motion for Reconsideration.

Respectfully submitted,

Susan M. Sharko
DRINKER BIDDLE & REATH LLP
500 Campus Drive
Florham Park, New Jersey 07932
Telephone: 973.360.1100
Facsimile: 973.360.9831
E-mail: susan.sharko@dbr.com

/s/Kristen L. Mayer
Robert C. Tucker (0013098)
S. Peter Voudouris (0059957)
Kristen L. Mayer (0055505)
Michael J. Ruttinger (0083850)
TUCKER ELLIS & WEST LLP
925 Euclid Avenue, Suite 1150
Cleveland, Ohio 44115-1414
Telephone: 216.592.5000
Facsimile: 216.592.5009
E-mail: robert.tucker@tuckerellis.com
peter.voudouris@tuckerellis.com
kristen.mayer@tuckerellis.com
michael.ruttinger@tuckerellis.com

*Attorneys for Defendants DePuy International Ltd., DePuy Ireland, Ltd.,
DePuy Orthopaedics, Inc., DePuy Inc., Johnson & Johnson, Johnson & Johnson
International and Johnson & Johnson Medical, Ltd.*

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2011, a copy of the foregoing *Defendants'* *Response to Plaintiff's Motion for Reconsideration* was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Kristen L. Mayer

Robert C. Tucker (0013098)

S. Peter Voudouris (0059957)

Kristen L. Mayer (0055505)

Michael J. Ruttinger (0083850)

TUCKER ELLIS & WEST LLP

925 Euclid Avenue, Suite 1150

Cleveland, Ohio 44115-1414

Telephone: 216.592.5000

Facsimile: 216.592.5009

E-mail: robert.tucker@tuckerellis.com

peter.voudouris@tuckerellis.com

kristen.mayer@tuckerellis.com

michael.ruttinger@tuckerellis.com

Attorneys for Defendants DePuy International Ltd., DePuy Ireland, Ltd., DePuy Orthopaedics, Inc., DePuy Inc., Johnson & Johnson, Johnson & Johnson International, and Johnson & Johnson Medical, Ltd.