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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: SHANNON McCONNELL
PETITIONER

CASE NO. 11- 4265

SHANNON McCONNELL,

Plaintiff,

v.

MARK DEBIASE, INC. d/b/a
JOINT VENTURE, INC., et al.,

Defendants.

District Court Case No.
1:11-dp-22200-DAK

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Hon. David A. Katz

PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

Shannon McConnell, Plaintiff in Case No.1:11-dp-22200-DAK, captioned as *Shannon McConnell, Plaintiff vs. Mark DeBiase, Inc. d/b/a Joint Venture, Inc.* (“Joint Venture”); *DePuy Orthopaedics, Inc.*; *DePuy Inc.*; *DePuy International, Ltd.*; *DePuy Ireland, Ltd.*; *Johnson & Johnson Medical, Ltd.*; *Johnson & Johnson International*; and *Johnson & Johnson* (collectively, “DePuy Defendants”), Defendants, in the United States District Court for the Northern District of Ohio, Western Division, as part of MDL #2197, after transfer from the United States District Court for the Southern District of Florida by the Judicial Panel on Multidistrict Litigation (“the Panel”), petitions this Court to issue a writ of mandamus directing the Panel to vacate its Transfer Order dated October 7, 2011 to effectuate the return of this action to the Southern District of Florida for consideration of Plaintiff’s Motion for Remand and remand to Florida state court.

II. STATEMENT OF THE ISSUE

A writ of mandamus is the appropriate remedy to review the Panel’s clearly erroneous entry of a Transfer Order, which was contrary to this Circuit’s decision in *BancOhio Corp. v. Fox*, 516 F.2d 29 (6th Cir. 1975), transferring this action to MDL #2197 despite the District Courts’ lack of subject matter jurisdiction.

III. STATEMENT OF FACTS

Petitioner, Plaintiff below, is a Florida resident. (Pet. App. A ¶ 2) In April 2011, she filed a Complaint in a Florida state court for injuries she received as a result of the failure of her DePuy ASR Hip Implant. (Pet. App. A ¶¶ 53-61, 68, 74-5, 79, 85, 97-8, 102 and 108) Petitioner's Complaint sets forth solely state law product liability claims. (Pet. App. A) Thus, Plaintiff's Complaint did not raise a federal question. *Id.*

Petitioner sued Joint Venture (the distributor of the DePuy ASR Hip Implant) and the DePuy Defendants. *Id.* Joint Venture is a Florida Corporation. (Pet. App. A ¶ 3; Pet. App. B ¶ 3) The DePuy Defendants are corporations and companies foreign to Florida. (Pet. App. A ¶¶ 5, 7, 10, 12, 14 and 16; Pet. App. C, ¶¶ 5, 7, 10, 12, 14 and 16) Having stated claims against a resident of the state of Florida, no diversity of citizenship existed in Petitioner's state court action. (Pet. App. A)

Defendants answered Petitioner's complaint and admitted that Joint Venture was a distributor of DePuy medical devices in Florida. (Pet. App. B ¶¶ 29-32, 63, 71, 72 and 81; Pet. App. C ¶¶ 29-32 and 63) Under Florida product liability law, a distributor, or any entity within the chain of distribution which profits from the distribution of the product, can be held liable for product failures. *See infra*, §V(D)(5). In her briefs below, Petitioner cited to publicly available documents

wherein Joint Venture and its employees boasted of their role in selling and distributing DePuy medical products. (Pet. App. J 298-299; Pet. App. G 167-171) Such documents showed that Joint Venture priced DePuy products, negotiated contracts with medical providers and called itself a DePuy sales office. (Pet. App. J 298-299) In these documents, Joint Venture employees described their jobs as involving: negotiating new product purchases; preoperative planning; selection of medical device implants; templating upcoming cases; covering surgeries; consulting with physicians in the operating room; providing on site product expertise and selling at the scrub sink. (Pet. App. G 167-171)

Despite Defendants' admissions as to Joint Venture being a distributor of DePuy medical products in Florida, despite the publicly available statements of it and its employees, and despite the clear holdings of Florida courts as to distributor liability, the DePuy Defendants then removed Petitioner's claim to the United States District Court for the Southern District of Florida. (Pet. App. E) Concurrent with removal, Defendants notified the Panel that the action had been identified as a tag along proceeding to MDL #2197, *In re: DePuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, pending in the Northern District of Ohio. (Pet. App. E ¶ 1; Pet. App. F ¶ 3)

The case then proceeded down two parallel tracks – one track before the Panel and one before the District Court. With respect to MDL #2197, the Panel

issued Conditional Transfer Order # 51 within two days of the tag along notice, notifying the parties that the matter would be transferred to the Northern District of Ohio for consolidated proceedings unless Petitioner objected within seven days. (Pet. App. K) Petitioner timely filed her objection, followed by her Motion to Vacate and supporting Memorandum of Law. (Pet. App. L; Pet. App. M; Pet. App. N) Defendants responded to the Motion to Vacate and Petitioner filed her reply. (Pet. App. O; Pet. App. P)

In the District Court, Petitioner filed a Motion for Remand and the Defendants filed a Motion to Stay the proceedings pending transfer to MDL #2197 by the Panel. (Pet. App. G; Pet. App. F) The Motion to Stay was ultimately denied and the parties moved forward on briefing the Motion for Remand. (Pet. App. H)

While briefing on the Motion for Remand was completed, it had not been ruled upon prior to the Panel's hearing on the Motion to Vacate. (Pet. App. Q) On October 7, 2011, before the District Court could enter a ruling as to the Motion for Remand, the Panel denied the Motion to Vacate and transferred Petitioner's suit to the Northern District of Ohio to join MDL #2197. (Pet. App. R)

As federal subject matter jurisdiction has clearly been lacking in this case since its inception, and as the Panel acted to transfer the case to the Northern

District of Ohio notwithstanding such jurisdictional issues, Petitioner seeks the remedy of mandamus from this Court pursuant to 28 U.S.C. §1407(e).

IV. SUMMARY OF THE ARGUMENT

This Circuit has repeatedly enunciated the importance of a court's obligation to determine jurisdiction at the onset of a case, prior to taking further action. Such decisions acknowledge that where a court lacks subject matter jurisdiction, the only order available to it is that of dismissal or remand. In the spirit of these fundamental jurisdictional principles, this Court issued its decision in *BancOhio Corp. v. Fox*, 516 F.2d 29 (6th Cir. 1975), finding that a matter may not be transferred to an MDL absent subject matter jurisdiction.

These fundamental jurisdictional principles have not changed and neither has the law of this Circuit. *BancOhio* remains good law today and its ruling is the controlling law of this Circuit. When the Panel transferred this action to MDL #2197, its Transfer Order conflicted with the *BancOhio* decision. The Panel transferred this matter despite a lack of subject matter jurisdiction. As such, the transfer was clearly erroneous.

The Panel relied on the Second Circuit's decision in *In re Ivy*, 901 F.2d 7 (2d Cir. 1990) as authority to transfer. *In re Ivy* is inapposite. The *Ivy* decision is not the law of this Circuit nor did it analyze the propriety of a transfer to an MDL in light of the fundamental jurisdictional principles which limit a federal court's

power to act. Rather, the *Ivy* opinion found that transfer complied with the terms of the multidistrict litigation statute, which finding directly conflicts with this Court's ruling in *BancOhio* that the statute does not create an exception to basic principles of jurisdiction, removal and remand.

This Court has adopted a balancing test consisting of five guidelines by which it determines whether mandamus is warranted. In this case, these five factors support the issuance of mandamus. Pursuant to 28 U.S.C. §1407, mandamus is the only available and adequate remedy to correct the Panel's erroneous transfer of this action to MDL #2197. An appeal of this issue, even if it were available to Petitioner, could not correct the damage caused by the transfer.

The error raised by this Petition is oft repeated as the Panel regularly transfers cases with pending jurisdictional questions. Moreover, transfers under these circumstances pose important questions of judicial authority.

The Panel's Transfer Order rejected this Court's decision in *BancOhio* and instead adopted the conflicting opinion of the *Ivy* case, thereby raising an important issue for mandamus review. As the issue presented satisfies this Circuit's balancing test, issuance of mandamus is warranted.

V. ARGUMENT

A. The Sixth Circuit has defined when mandamus is an appropriate remedy

This Court has explained that:

The traditional use of the writ of mandamus in aid of appellate jurisdiction... ‘has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.’

In re Acker, 596 F.3d 370, 371 (6th Cir. 2010). Accord *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1077-8 (6th Cir. 1996) and *In re Glass, Molders, Pottery, Plastics & Allied Workers Intern. Union, Local No. 173*, 983 F.2d 725, 727 (6th Cir. 1993). While issuance of this extraordinary writ is largely discretionary, this Court has noted that the writ serves as a safety valve to prevent injustice. *In re American Medical Systems, Inc.*, 75 F.3d at 1077. Thus, “[t]he remedy of mandamus should remain ‘flexible.’” *In re Chimenti*, 79 F.3d 534, 539 (6th Cir. 1996).

In keeping with this goal of flexibility in application, this Court adopted a five prong framework for determining whether mandamus relief is appropriate in *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 303-4 (6th Cir. 1984), considering whether:

- (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.
- (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first).
- (3) The district court's order is clearly erroneous as a matter of law.
- (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
- (5) The district court's order raises new and important problems, or issues of law of first impression.

In re Bendectin Products Liability Litigation, 749 F.2d 300 at 304 quoting *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-5 (9th Cir. 1977). These guidelines continue to be employed by the Court in considering petitions for mandamus. See e.g., *U.S. v. Gomez-Gomez*, 643 F.3d 463, 471 (6th Cir. 2011); *In re Glass, Molders, Pottery, Plastics & Allied Workers Intern. Union, Local No. 173*, 983 F.2d at 727.

In application, this Court balances these five factors to determine if mandamus should issue. See *In re Bendectin Products Liability Litigation*, 749 F.2d at 304 (“In many cases, ‘a proper disposition will often require a balancing of conflicting factors.’”). Accord *In re Glass, Molders, Pottery, Plastics & Allied Workers Intern. Union, Local No. 173*, 983 F.2d at 727; *In re Chimenti*, 79 F.3d at 540. As was explained in *Bendectin*, “Rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable.” *In re Bendectin Products Liability Litigation*, 749 F.2d at 304 quoting *Bauman v. U.S. Dist. Court*, 557 F.2d at 655. Accordingly, not all of the factors are required to be met to merit issuance of the writ. See *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1078 (6th Cir. 1996) (“Thus, the factors in *Bendectin* are considerations to be balanced, not prerequisites that must all be met.”). See also, *In re Chimenti*, 79 F.3d at 540 (“*Bendectin* did not require that every element be met...”).

In the present case, a balancing of these guidelines weighs in favor of the remedy of mandamus. Further, given the lack of subject matter jurisdiction apparent herein, mandamus is an appropriate means to ensure that the Panel below acts within the confines of its prescribed jurisdiction and to prevent injustice to this Petitioner.

B. Petitioner has no other adequate means, such as direct appeal, to attain the relief desired.

Petitioner has no right to appeal the orders of the Panel. Rather, the statute governing multidistrict litigation, 28 U.S.C. §1407, provides for review by extraordinary writ:

No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code... Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district.

See 28 U.S.C. §1407(e). Thus, Petitioner's only means of obtaining relief from the Transfer Order entered by the Panel is to seek the issuance of a writ pursuant to the All Writs Act.¹ *Id.* Such petition for writ must be filed in this Court as this is the appellate court having jurisdiction over the transferee court, the U. S. District Court for the Northern District of Ohio. *Id.*

¹ This Court has previously held that it has the power to issue writs of mandamus pursuant to the All Writs Act, 28 U.S.C. 1651. *In re Bendectin*, 749 F.2d 300, 303 (6th Cir. 1984).

Where, as here, the order at issue is not reviewable by direct appeal, this Court has found that the petitioner has no other means to obtain relief from this Court.² See *In re Glass, Molders, Pottery, Plastics & Allied Workers Intern. Union, Local No. 173*, 983 F.2d at 728 (Finding union had no other means of review where remand order could not be directly appealed and granting petition for writ of mandamus). Having no means of review of the Panel's Transfer Order except by petition for a writ, as authorized by statute, Petitioner herein has no other adequate means of obtaining relief from the Transfer Order.³ For this reason, the first prong of the *Bendectin* balancing test favors issuance of a writ of mandamus.

C. Petitioner will be damaged or prejudiced in a way not correctable on appeal.⁴

Forcing Petitioner to litigate her case in a forum she did not choose “constitutes significant damage ‘not correctable on appeal.’” *In re Chimenti*, 79 F.3d 534, 540 (6th Cir. 1996) (Granting petition for writ of mandamus in action filed in state court and removed to federal court where removal was improper). In this case, as in *Chimenti*, removal was improper, see *infra* §V(D)(5), and Petitioner

² Where a statute provides that relief may be had by petitioning for a writ, this Court has held that normal mandamus standards apply. *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010).

³ Lest further briefing muddies the waters of this issue, Petitioner would emphasize that she is seeking mandamus with respect to the Panel's Transfer Order. As such, mandamus is the only relief permitted by the multidistrict litigation statute, 28 U.S.C. § 1407(e).

⁴ In *Bendectin*, it was noted that this guideline is closely related to the first prong of the test. *In re Bendectin*, 749 F.2d 300, 304 (6th Cir. 1984).

has been forced to litigate her case in two federal courts, neither of which she chose.

Indeed, Petitioner has been damaged by the Panel's Transfer Order in several respects. Petitioner's action has been moved far away from the location of her chosen forum; it has been largely removed from the control of her chosen counsel; it has been further delayed and most importantly, Petitioner has been forced to continue to litigate in a federal forum.

Plaintiff initially filed this action in state court and sought to have her dispute resolved quickly in a local forum. (Pet. App. A) By removal and transfer of this action to the Northern District of Ohio, Plaintiff's litigation has been moved far away from Florida, even far away from the federal court to which she had fully briefed her Motion for Remand prior to transfer. (Pet. App. R) Plaintiff has now been forced to litigate in an unfamiliar forum.

In this new forum to which she has been transferred, Plaintiff can no longer look solely to her chosen counsel for representation. Prior to transfer, Petitioner's chosen counsel was fully responsible for her case and responsive solely to Petitioner in her action. Subsequent to transfer, Petitioner's rights are being represented by the various Petitioners' Committees for the MDL, a group she does not know and did not choose. (Pet. App. V)

Prior to transfer, Petitioner had fully briefed her Motion for Remand and had

awaited the District Court's Order for two months. (Pet. App. D 61) As a result of transfer, it will likely be many more months before Petitioner's Motion for Remand is heard and ruled upon. *See e.g., Rory Ryan, It's Just Not Worth Searching for Welcome Mats with a Kaleidoscope and a Broken Compass*, 75 Tenn. L. Rev. 659, 679-80 (2008) (Discussing the delay impact in cases removed to federal court and transferred to an MDL and highlighting a case in which it took 14 months from the time of removal to the time of remand due in part to the transfer to the MDL).

In the meantime, as she awaits a new court's review and disposition of her Motion for Remand, Petitioner has been forced by the transfer to continue to litigate her case in a federal forum. Since transfer, she has already been ordered by the Northern District of Ohio to participate in the MDL consolidated proceedings. (Pet. App. W)

As explained in greater depth by the Eighth Circuit in *Bell v. Sellevold*, an appeal, even a successful appeal, cannot undo the fact that a party "has been unlawfully compelled to try their case in a federal forum." *Bell v. Sellevold*, 713 F.2d 1396, 1403 (8th Cir. 1983). In *Bell*, a defendant sought a writ of prohibition to command the district court not to exercise "pendent jurisdiction" over state law claims. *Bell v. Sellevold*, 713 F.2d at 1402. Rejecting the argument that any error could be corrected on appeal, the Eighth Circuit explained:

In theory, we suppose it is possible to argue that any error committed could be corrected on defendants' appeal from a final judgment against them, assuming that such a judgment occurs. We disagree with this position for several reasons. First, defendants will not necessarily lose on the merits. If plaintiffs lose, they could appeal, but would presumably not contest the District Court's exercise of "pendent jurisdiction," since they themselves urged that jurisdiction upon the District Court. In that event, the jurisdiction of the state courts over a case properly brought before them would have been usurped, and no remedy would be available. Even if defendants do lose on the merits, we think their right to try their state-law action in the state courts is so fundamental, and so clearly outside the jurisdiction of the federal courts, that they should not be compelled to go through a federal trial. An appeal from an adverse judgment, even a successful appeal, would not undo the fact that defendants had been unlawfully compelled to try their case in a federal forum.

Id. at 1403. Of course, in this case it is Petitioner who has a right to try her action in state court and Defendants who sought removal and the federal forum. Thus, as reasoned in *Bell*, an appeal by the Defendants in this case would not raise the issue of jurisdiction because the Defendants sought the federal forum. In that case, the state court's jurisdiction would have been usurped with no remedy. And if Petitioner should lose and appeal, even if successful, such appeal could not remedy the loss of her fundamental right to try her state law claims in state court.

For these reasons, an appeal would not correct the damage and prejudice to Petitioner resulting from the removal of her case to federal court and subsequent transfer to the Northern District of Ohio as part of MDL #2197. The second factor of the *Bendectin* test thus weighs in favor of the issuance of a writ of mandamus.

D. The Panel's Transfer Order is clearly erroneous as a matter of law.

Following the decisions of the United States Supreme Court and this Sixth Circuit Court of Appeal, the Panel clearly had no authority to transfer this action to MDL #2197 prior to the District Court's determination of the threshold issue of jurisdiction.

1. This Court's decision in *BancOhio Corp. v. Fox* is controlling.

In *BancOhio Corp. v. Fox*, 516 F.2d 29 (6th Cir. 1975), this Court found that an action may not be transferred to an MDL where the federal courts lack subject matter jurisdiction. *BancOhio Corp. v. Fox*, 516 F.2d at 31. The *BancOhio* case came before this Court on a petition for writ of mandamus. *Id.* at 30. This Court found that the lower court lacked subject matter jurisdiction and should have dismissed the case. *Id.* at 31. In *BancOhio*, the Panel had already issued a Conditional Transfer Order seeking to transfer the action to an MDL in California. *Id.* Despite the pending transfer order, this Court found that transfer could not be made absent jurisdiction, reasoning:

Neither does the statute on multidistrict litigation, 28 U.S.C. Sec. 1407, compel a different result. No matter how desirable respondents feel it may be to consolidate in California all litigation in any way related to Equity Funding, there is nothing in the applicable statute to provide an exception to the rules normally governing removal of cases from state courts. *Such a transfer cannot be made unless the district court properly has jurisdiction of the subject matter of the case.*

Id. at 32. (Emphasis supplied). Thus, this Court granted the petition for writ of mandamus. *Id.* at 33.

BancOhio remains the law of this Circuit. It has not been overruled or even questioned by this Court. It has been repeatedly applied by the district courts of this Circuit.⁵ It has been cited for its ruling that a case may not be transferred to an MDL pursuant to 28 U.S.C §1407 unless there is subject matter jurisdiction.⁶ It controls the issues presented.

In reaching its decision in *BancOhio*, this Court embraced the foundational principles of federal subject matter jurisdiction and rejected the notion that the statute on multidistrict litigation, 28 U.S.C. §1407, could have created an exception to the application of such principles.

2. Determination of jurisdiction is a threshold issue for any federal court.

Jurisdiction must be decided at the outset of a case, prior to the court taking any other action. The U. S. Supreme Court has set forth this foundational principle and the courts of this Circuit have faithfully followed it.

The question of a court's jurisdiction over a proceeding is a fundamental question, going to the court's very power to act. The U. S. 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, 118 S.Ct. 1003, 140 L.Ed.2d 210

⁵ See e.g., *Sherwood v. Microsoft Corp.*, 91 F.Supp.2d 1196 (M.D. Tenn. 2000); *Strategic Assets v. Federal Express Corp.*, 190 F.Supp.2d 1065 (M.D. Tenn. 2001).

⁶ See *In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 175 F.Supp.2d 593, n.9 (S.D.N.Y. 2001).

(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, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). *Accord Freeland v. Liberty Mut. Fire Ins. Co.*, 632 F.3d 250, 255 (6th Cir. 2011). Nor may a court’s power “be expanded by judicial decree.” *Id.* 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.⁷ *Steel Co.* at 94; *Kokkonen* at 377. *Accord Metro Hydroelectric Co., LLC v. Metro Parks*, 541 F.3d 605, 610 (6th Cir. 2008).

Thus, the U. S. Supreme Court has declared the requirement that jurisdiction be established as a threshold matter. *Steel Co.* at 94-5. *See also, Scott Air Force Base Properties, LLC v. County of St. Clair, Ill.*, 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

⁷ The Fifth Circuit has emphasized the importance of this axiom to comity with the states:

Where a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect.

Howery v. Allstate Ins. Co., 243 F.3d 912, 916, n.6 (5th Cir. 2001) (Citations omitted).

action...”).

This Circuit has embraced this fundamental principle, applying it even when other legal arguments would distract its jurists from engaging in this basic, foundational analysis first. *See Metro Hydroelectric Co., LLC v. Metro Parks*, 541 F.3d at 610. Thus, the district courts of the Sixth Circuit have proclaimed, “In this Circuit, jurisdictional issues should be decided as soon as practicable.” *Sherwood v. Microsoft Corp.*, 91 F.Supp.2d 1196, 1199 (M.D. Tenn. 2000) *citing Franzel v. Kerr Mfg. Co.*, 959 F.2d 628, 629 (6th Cir. 1992). *Accord Strategic Assets v. Federal Express Corp.*, 190 F.Supp.2d 1065, 1066-7 (M.D. Tenn. 2001).

Relying on this Court’s decision in *BancOhio Corp. v. Fox*, 516 F.2d 29, 31-2 (6th Cir. 1975), these courts have further explained the policy of this Circuit as to a court’s first obligation:

Despite the pendency of multiple similar actions across the country, the Sixth Circuit has warned that a district court’s first obligation is to determine whether the court has subject matter jurisdiction because without such jurisdiction, there is not any action to transfer.

Id.

Thus, in *BancOhio* and other decisions, the courts of this Circuit have confirmed the U.S. Supreme Court’s teaching that issues of subject matter jurisdiction must be considered first in every case.

3. Absent subject matter jurisdiction, a court or, in this case, the Panel has no authority to take any action in the case other than dismissing or remanding the action.

Similarly, the *BancOhio* decision recognized the foundational principle that a federal court has no power to act unless it has subject matter jurisdiction.

Citing a “long and venerable line of cases,” the U. S. 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.

Steel Co. at 94; *Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598, 607 (6th Cir. 2007); *Village of Oakwood v. State Bank & Trust Co.*, 481 F.3d 364, 366-7 (6th Cir. 2007). *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.”).

Absent jurisdiction, a court may not act except to dismiss or remand the action before it. The U. S. Supreme Court has announced this to be a fundamental principle of the separation of powers. *See Steel Co.* at 94 (Finding that this requirement “‘springs from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’”); *Village of Oakwood v. State Bank & Trust Co.*, 481 F.3d at 366.

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 (Cl. Ct. 1991). Referring to U. S. 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*.

Id.

Notably, the decisions which set forth this fundamental principle do not speak in terms of procedural or substantive court action. No such distinction is embraced. For example, in *Schiff*, the court held it could not issue sanctions. *Id.* Sanctions stem from a court's authority to manage its cases and are procedural as opposed to relating to the merits and being substantive in nature. Thus, the cases cited define a court's power to act in absolute terms. Either a court has jurisdiction and the power to preside over a case or it does not. *See e.g., Steel Co.* at 94 (Instructing that when jurisdiction ceases to exist, the only function remaining is to dismiss and the court cannot proceed at all). For this reason, it is irrelevant whether the transfer by the Panel could be cast as procedural versus substantive. As the District Courts lacked jurisdiction, the Panel simply had no authority to act, whether such action was procedural or substantive.

This Circuit has recognized that a federal court must satisfy its first and fundamental duty to determine if it has the power to adjudicate any issues once subject matter jurisdiction is questioned. If a court determines that it lacks

jurisdiction, then it may take no action. The only avenue available to a federal court if it lacks subject matter jurisdiction is to remand the cause to the state court which does have jurisdiction.

In *BancOhio*, this Circuit applied these fundamental principles to an action facing transfer to an MDL. *BancOhio Corp. v. Fox*, 516 F.2d 29, 32 (6th Cir. 1975). Explaining that the multidistrict litigation statute did not change or create an exception to these foundational principles of jurisdiction, this Court found that “a transfer cannot be made unless the district court properly has jurisdiction of the subject matter of the case.” *Id.* As in *BancOhio*, the presence here of a factually related MDL has no bearing on this threshold issue of jurisdiction and a court’s authority to preside over the action – “no matter how desirable [the Panel] feels it may be to consolidate...” *Id.*

For these reasons, which form the very basis of our system of federal jurisprudence, the Panel clearly erred in taking a stance contrary to this Court’s ruling in *BancOhio Corp. v. Fox* and in transferring this action to MDL #2197 prior to the resolution of the question of subject matter jurisdiction.

4. The Second Circuit’s decision in *In re Ivy* contradicts this Court’s precedent, ignores the issue of subject matter jurisdiction and is incorrect.

The Panel cites *In re Ivy*, 901 F.2d 7 (2d Cir. 1990) in support of its transfer of this action and others where subject matter jurisdiction has been questioned.

(Pet. App. R 523-524) In *Ivy*, the Second Circuit denied a petition for writ of mandamus seeking review of an order by the Panel transferring the case to an MDL. *In re Ivy*, 901 F.2d at 8. There can be no doubt that the facts of *In re Ivy* are remarkably similar to those presented instanter.⁸ However, *In re Ivy* framed the question of the Panel's authority to transfer in an entirely different manner than this Court in *BancOhio*.

In *Ivy*, the Second Circuit stated:

Plaintiffs argue that if the removal was improper because of a lack of federal subject matter jurisdiction, then the transfer by the MDL Panel was invalid. We believe that argument mischaracterizes the issue. Section 1407 does not empower the MDL Panel to decide questions going to the jurisdiction or the merits of a case... We believe, therefore that the sole issue before us is *the merits of the transfer viewed against the purposes of the multidistrict statutory scheme*, whether or not there is a pending jurisdictional objection. So viewed, the transfer was entirely unobjectionable.

In re Ivy, 901 F.2d at 9 (Emphasis supplied).

It is apparent from this quote and the analysis that follows it in the *Ivy* opinion that the Second Circuit never considered in *Ivy* whether the Panel had the authority – the basic power to act – to transfer an action where jurisdiction was questioned. Rather, the Second Circuit defined the issue presented as whether 28 U.S.C. §1407, by its terms, permitted the transfer of an action involving a pending

⁸ The court in *Ivy* did note one point on which the facts of this case differ from *Ivy*; that the petitioner in *Ivy* failed to move for a remand in the MDL proceeding. *In re Ivy*, 901 F.2d at 9. In the present case, the Motion for Remand has been transferred to the docket of MDL #2197.

motion for remand. *Id.* at 9. Instead of following this Court’s rulings in *BancOhio* – that an action cannot be transferred unless the district court has subject matter jurisdiction and that §1407 does not change this basic rule, the court in *Ivy* ignored the question of the Panel’s power to act and simply looked at whether the Panel’s actions satisfied the terms of §1407. *Id.*

The Second Circuit examined whether the transfer met the three requirements of §1407 despite the pending jurisdictional questions: (1) whether the actions involve common questions of fact; (2) whether they were pending in more than one jurisdiction; and (3) whether consolidation promoted the “just and efficient” conduct of such actions. *Id.* Within this framework, the Second Circuit determined that the actions did involve common questions of law and fact and that it would promote judicial economy to consolidate the actions. *Id.* As to the pending jurisdictional issues, the court decided that consolidating claims with those issues would promote “consistency as well as economy,” thereby satisfying the requirements of §1407. *Id.*

Thus, the Second Circuit limited its analysis to whether the transfer of cases with pending jurisdictional objections satisfied §1407. *Id.* The court never considered the question of whether the Panel had the power to transfer the action in accordance with fundamental jurisdictional principles. Rather, finding the terms of §1407 met, the *Ivy* decision concluded its analysis and found “that the MDL Panel

has jurisdiction to transfer a case in which a jurisdictional objection is pending.”

Id.

Additionally, although the Second Circuit was aware of this Court’s decision in *BancOhio*, it distinguished that opinion as procedurally different rather than address the substance of this Court’s ruling. *Id.* at 10. Stating that *BancOhio* was “readily distinguishable,” the *Ivy* decision explained that the petitioner in *BancOhio* had been denied two motions – for remand and to dismiss – prior to seeking mandamus, “thereby presenting the ‘exceptional circumstances’ justifying the issuance of the writ.” *Id.*

This Court is bound by its own precedents and not those of other circuits. In this case and in this Circuit, *BancOhio* is controlling. *In re Ivy* is not. However, even if this Court were to look to the *Ivy* decision in considering this matter, it would find that such decision contravenes its opinion in *BancOhio* by finding that §1407 does create an exception to the fundamental principles of subject matter jurisdiction and removal to a federal court; a notion expressly rejected by this Court. *BancOhio Corp. v. Fox*, 516 F.2d at 32. Accordingly, the analysis and holding of *In re Ivy* must be rejected by this Court as well.

- 5. No subject matter jurisdiction exists because Joint Venture, a Florida citizen, was properly joined below and is liable under Florida law as a distributor of the DePuy ASR Hip Implant.**

While Petitioner is not seeking this Court's determination of subject matter jurisdiction in this case, a brief review of applicable Florida law demonstrates that removal in this case was improper and remand to state court is warranted.

In this case, Petitioner, a Florida citizen, sued Joint Venture, a Florida corporation, for claims arising under state product liability law. No diversity jurisdiction exists. However, Defendants removed this action to federal court arguing that Joint Venture was improperly joined. Joinder is proper and remand for lack of subject matter jurisdiction required if the plaintiff has even a possibility of stating a cause of action against a resident defendant. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998). *See also Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989) and *Abels v. State Farm Fire Ins. & Cas. Co.*, 770 F.2d 26, 32 (3d Cir. 1985). Under Florida law, Petitioner has stated product liability claims against Joint Venture. Therefore, removal was improper and the federal courts lack subject matter jurisdiction.

Florida, like other jurisdictions, has expanded the doctrine of strict liability for products to the entire chain of manufacturers, wholesalers, joint ventures, lessors and retailers. *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla.1994) (lessor); *Mobley v. South Florida Beverage Corp.*, 500 So.2d 292 (Fla. 3d DCA 1986) (retailers), *review denied*, 509 So.2d 1117 (Fla.1987);

Visnoski v. J.C. Penney Co., 477 So.2d 29 (Fla. 2d DCA 1985) (joint ventures);
Perry v. Luby Chevrolet, Inc., 446 So.2d 1150 (Fla. 3d DCA 1984) (retailers).

The Florida Supreme Court decision in the case of *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla.1994), best explains Florida law on this subject:

The underlying basis for the doctrine of strict liability is that those entities within a product's distributive chain "who profit from the sale or distribution of [the product] to the public, rather than an innocent person injured by it, should bear the financial burden of even an undetectable product defect." *North Miami General Hosp., Inc. v. Goldberg*, 520 So.2d 650, 651 (Fla. 3d DCA 1988). Those entities are in a better position to ensure the safety of the products they market, to insure against defects in those products, and to spread the cost of any injuries resulting from a defect.

Id. at 1068. Thus, Florida has adopted the doctrine of strict product liability for all parties involved in the chain of distribution who profit from such involvement.

Joint Venture was clearly part of the distributive chain and derived a profit from the product at issue in this case. Plaintiff alleged in her Complaint that Joint Venture was a distributor of the hip implant and Joint Venture admitted that it was a distributor of DePuy medical devices. (Pet. App. A ¶ 32; Pet. App. B ¶¶ 3, 29, 30, 31, 32, 63, 71, 72, and 82) Moreover, numerous publicly available documents illustrate Joint Venture's involvement in the sale and distribution of DePuy medical devices. (Pet. App. J 298-299; Pet. App. G 167-171)

Under the Florida Supreme Court's analysis in *Samuel Friedland* and other Florida cases, there is no question that Joint Venture was part of the distributive chain of the product at issue in this matter. For this reason, removal was improper and Petitioner can easily demonstrate that remand is merited herein.

E. The Panel's Transfer Order is an oft-repeated error.

The Panel regularly transfers actions for which the issue of subject matter jurisdiction has been raised but not resolved. In MDL #2197 alone, the Panel has already denied motions to vacate and entered Transfer Orders in cases with pending jurisdictional issues 45 times. (Pet. App. S; T; U; R; Transfer Orders dated April 18, 2011, May 19, 2011, August 9, 2011, and October 7, 2011)

The Panel has indicated that the district courts could rule on any pending motions for remand prior to transfer. (Pet. App. T, Transfer Order dated May 19, 2011, n.2) Oh would that it were so. Unfortunately, the timing of the transfer proceedings and the realities of the workload facing the federal bench often combine to prevent a district court's consideration of a pending motion prior to transfer. Additionally, defendants argue vehemently that the proceedings should be stayed pending transfer and left to the transferee judge to decide. *See* Pet. App. N 311-317, Memorandum in Support of Motion to Vacate (Citing to numerous instances in which defendants in this MDL informed district courts that the Panel has a stated policy that matters should be stayed pending transfer).

A typical case involving remand and a potential transfer to an MDL follows a timeline by which the Panel's hearing on the motion to vacate occurs fairly close in time to the completion of briefing on a motion to remand. *Compare* JPML R. 6.1 and 7.1 *with* S.D. Fla. L.R. 7.1. Thus, the district court has little time to consider and rule on remand prior to the case being transferred to another court. Add crowded dockets and a very human tendency to avoid expending valuable resources on a matter which is to be transferred and district courts will likely be unable or unwilling to rule on remand prior to the Panel's transfer of the case.

The Panel continues to transfer actions from one district court to another on the authority of *In re Ivy* and its own prior orders. Thus, the Transfer Order from which the Petitioner seeks relief is oft repeated. As this fourth factor weighs in favor of mandamus, issuance of the writ is warranted. *See In re American Medical Systems*, 75 F.3d 1069, 1089 (6th Cir. 1996) (“[D]ecisions that meet part four are particularly prone to mandamus review”) *quoting In re Parker*, 49 F.3d 204, 211 (6th Cir. 1995).

F. The Panel's Transfer Order raises an important problem - not one of first impression for this Court – but one rarely raised.

Petitioner does not attempt to argue that the issues raised by her Petition are issues of first impression. By Petitioner's own argument, *supra*, this Court has addressed her concerns in its decision in *BancOhio Corp. v. Fox*, 516 F.2d 29 (6th

Cir. 1975). Indeed, this Court has stated that the fourth and fifth factors of the *Bendectin* balancing test are “somewhat contradictory” and the “order typically will not satisfy both guidelines.” *In re American Medical Systems, Inc.*, 75 F.3d at 1088. However, proof of either prong along with satisfaction of the other guidelines “is generally sufficient for issuance of the writ.” *Id.*

Notwithstanding the fact that this issue has been brought before this Court previously, it merits review and mandamus because it is an important issue going to the very bedrock of federal jurisprudence – a court’s authority to act when the source of its authority has been questioned.⁹ Mandamus is an appropriate means to review important and unusual questions. *See In re Bendectin Products Liability Litigation*, 749 F.2d 300, 306-7 (6th Cir. 1984) (“The Supreme Court has approved the use of the writ to review unusual and important procedural questions.”); *E.E.O.C. v. K-Mart Corp.*, 694 F.2d 1055, 1061 (6th Cir. 1982) quoting *In re April 1977 Grand Jury Subpoenas*, 573 F.2d 936, 940 (6th Cir. 1978) (“Courts of Appeals...may review in a mandamus proceeding questions of unusual importance necessary to the economical and efficient administration of justice.”).

Moreover, while this Court has previously addressed this issue, it has not considered it since the Second Circuit issued its opinion. In choosing to follow the

⁹ As the First Circuit has stated, “[T]he case for mandamus is particularly compelling where the order poses an elemental question of judicial authority.” *Rosello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 11 (1st Cir. 2005).

Ivy decision rather than this Court, the Panel and parties seeking to effect the transfer of cases to MDLs have all but forgotten this Circuit's precedent in *BancOhio*. See e.g., Pet. App. R 523-524 (Panel Transfer Order citing to *Ivy* but not *BancOhio*) and Pet. App. O 322, DePuy Defendants Opposition to Motion to Vacate (“[I]t is well-established that the Panel has the authority to transfer cases before final resolution of federal court jurisdictional issues.”). So while not new to this Circuit, this request for mandamus does present an important opportunity to affirm the precedential value of a prior decision.

Despite the fact that the issue presented is not one of first impression, due to the importance and unusual nature of the question presented, this factor provides additional support for the grant of mandamus.

VI. CONCLUSION

Each of the five factors enunciated in the *Bendectin* balancing test supports the issuance of mandamus in the present action. For the foregoing reasons, this Court should issue a writ of mandamus compelling the Judicial Panel on Multidistrict Litigation to vacate its Transfer Order dated October 7, 2011 and to take whatever additional actions are necessary to effectuate the transfer of this matter back to the U. S. District Court for the Southern District of Florida for

consideration of Petitioner's Motion for Remand and remand to Florida State Court.

Dated: November 16, 2011

Respectfully submitted,

/s/ Jennifer Anne Gore Maglio

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: SHANNON McCONNELL
PETITIONER

CASE NO. 11-_____

SHANNON McCONNELL,

Plaintiff,

v.

MARK DEBIASE, INC. d/b/a
JOINT VENTURE, INC., et al.,

Defendants.

District Court Case No.
1:11-dp-22200-DAK

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Hon. David A. Katz

PROOF OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Petition for Writ of Mandamus has been provided, via US Mail, at the addresses shown, to the following:

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Cincinnati, OH 45202-3988

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