

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(Miami Division)

CASE NO. 1:11-cv-22025-AJ

SHANNON MCCONNELL,

Plaintiff,

v.

MARK DEBIASE, INC. d/b/a
JOINT VENTURE, INC.; DePUY
ORTHOPAEDICS, INC.; DEPUY INC.;
DEPUY INTERNATIONAL, LTD.; DEPUY
IRELAND, LTD.; JOHNSON & JOHNSON
MEDICAL, LTD.; JOHNSON & JOHNSON
INTERNATIONAL; and JOHNSON &
JOHNSON,

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION
FOR RECONSIDERATION**

Plaintiff's Motion for Reconsideration offers no new or compelling reason for this Court to reconsider and reverse its decision to stay this case pending the MDL Panel's transfer decision. This Court correctly based its Order staying the case on the omnipresent authority from this and other jurisdictions holding that courts may—and in the interest of judicial efficiency, *should*—stay cases like this one pending the MDL Panel's transfer decision where a plaintiff's remand motion presents the same or similar jurisdictional issues as other cases transferred to the MDL.

Plaintiff has not only briefed her Motion for Reconsideration, but also has attached a brief opposing Defendants' Motion to Stay. Accordingly, Defendants have incorporated their reply to all of those arguments into this brief.

I. The Clerical Error Plaintiff Identified Does Not Warrant Reconsideration.

The driving force behind Plaintiff's Motion for Reconsideration is a clerical error by which a docket entry mistakenly appeared, reporting:

"MEMORANDUM in Support re 3 MOTION to Stay by Shannon McConnell.
See image at DE 4 (lk) (Entered: 06/14/2011)."

No such memorandum was filed. There is, however, no indication that this error affected this Court's decision to grant Defendants' Motion to Stay. For that reason alone, this Court should deny Plaintiff's Motion for Reconsideration.

This Court explained the basis for its ruling in an Order granting Defendants' Motion to Stay, and that basis was *not* the entry of a clerical error on the docket. Instead, the Court relied on authority from this very district stating that "[i]t is common practice for courts to stay an action pending a transfer decision by the JPML." Order at 1 (citing *Bonenfant v. R.J. Reynolds Tobacco Co.*, No. 07-60301-Civ-Zloch, 2007 WL 2409980, at *1 (S.D. Fla. July 31, 2007)). Nowhere in the Order did the Court indicate that it mistakenly believed that Defendants' Motion was unopposed, much less that the lack of opposition prompted the stay. Accordingly, this clerical error, which apparently had no impact on the Court's decision, should not cause this Court to reconsider its Order.

II. Despite Plaintiff's Jurisdictional Objection, This Case Should Remain Stayed Pending MDL Transfer.

In opposing a stay, Plaintiff does not argue that her case is factually or legally distinct from the cases already transferred to MDL 2197, but instead argues that the case should not have

been stayed because she moved for remand. The jurisdictional issues raised in that remand motion, however, demonstrate exactly why the MDL Panel found centralization of the ASR™ Hip Implant cases appropriate, and why it transferred them to Judge Katz for pretrial coordination. In fact, to date, 28 cases from across the country with pending motions to remand concerning the same or similar jurisdictional issues have already been transferred to MDL 2197 before Judge Katz.¹ At least 21 other cases are percolating through the system on conditional transfer orders.² And as discussed below, 11 federal judges have already ruled that the litigation

¹ Of the 28 cases, seven proceeded to the MDL on conditional transfer orders that were unopposed by plaintiffs: *Hougas v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-dp-20175-DAK (N.D. Ohio); *Beavers v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-dp-20175-DAK (N.D. Ohio); *Hilgers-Luckey v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-dp-20387-DAK (N.D. Ohio); *Sorrentino-Galello v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-dp-20537-DAK (N.D. Ohio); *Harrison v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-dp-20979-DAK (N.D. Ohio); *Brignac v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-dp-21008-DAK (N.D. Ohio); and *Scholle v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-dp-21005-DAK (N.D. Ohio). In the remaining 21 cases, the JPML denied plaintiffs' motions to vacate the pending conditional transfer orders and transferred them to the MDL, holding that issues of fraudulent joinder can be decided by the MDL judge: *Milner v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-01085-WC (M.D. Ala.); *Slay v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01086-MEF (M.D. Ala.); *Harper v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01087-WKW-CSC (M.D. Ala.); *Patterson v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-01088-WKW-SRW (M.D. Ala.); *Taylor v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-00027-MHT-CSC (M.D. Ala.); *Bulter v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:10-cv-04637-KDE-DEK (E.D. La.); *Laman v. DePuy Orthopaedics, Inc.*, Case No. 2:10-cv-04658-LMA-ALC (E.D. La.); *LeMarr v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00445-ROS (D. Ariz.); *Beaver v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00869-SCJ (N.D. Ga.); *Davis v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00870-AT (N.D. Ga.); *Gray v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00871-SCJ (N.D. Ga.); *Jackson v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00873-ODE (N.D. Ga.); *Lebeda v. DC Medical LLC, et al.*, Case No. 1:11-cv-00875-HTW (S.D. Ga.); *Scott v. DC Medical LLC, et al.*, Case No. 1:11-cv-00878-TWT (S.D. Ga.); *Scullin v. DC Medical LLC, et al.*, Case No. 1:11-cv-00879-AT (S.D. Ga.); *Welch v. DC Medical LLC, et al.*, Case No. 1:11-cv-00880-SCJ (S.D. Ga.); *Davis v. DC Medical LLC, et al.*, Case No. 1:11-cv-00881-RLV (S.D. Ga.); *King v. DC Medical LLC, et al.*, Case No. 1:11-cv-00882-ODE (S.D. Ga.); *Dio v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00042 (W.D.N.Y.); *Yousey v. DePuy Orthopaedics, Inc., et al.*, Case No. 1:11-cv-00043 (W.D.N.Y.); and *Garris v. DePuy Orthopaedics, Inc.*, Case No. 4:11-cv-00042 (E.D. Va.). (See *In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, MDL No. 2197, Doc No. 579 (May 19, 2011); *In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, MDL No. 2197, Doc. No. 479 (Apr. 18, 2011)).

² *McClure v. DC Medical, LLC, et al.*, Case No. 1:11-cv-00877-JEC (N.D. Ga.); *McDowell v. DC Medical LLC, et al.*, Case No. 1:11-cv-00939-HTW (N.D. Ga.); *Williams v. DC Medical LLC, et al.*, Case No. 1:11-cv-00940-JOF (N.D. Ga.); *Bryson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00052-TBR (W.D. Ky.); *Carnes v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00046-TBR (W.D. Ky.); *Humphrey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00049-TBR (W.D. Ky.); *Johnson v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00045-TBR (W.D. Ky.); *Kimbrow v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00051-TBR (W.D. Ky.); *Lacey v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00048-TBR (W.D. Ky.); *McElwayne v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00047-TBR (W.D. Ky.); *Thomas v. DePuy Orthopaedics, Inc., et al.*, Case No. 5:11-cv-00050-TBR (W.D. Ky.); *Day v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00501 (D. Nev.); *Rundle v. DePuy Orthopaedics, Inc., et al.*, Case No. 2:11-cv-00634-PMP (D. Nev.); *Banks v. DePuy Orthopaedics, Inc., et al.*

should be stayed in their courts and that pending remand motions should be presented to the MDL judge. For these reasons, this Court's stay order should remain in place.

Plaintiff, however, argues that: (1) this Court has the authority to deny a stay, and (2) that, in any event, this Court lacks jurisdiction to enter a stay unless it first considers Plaintiff's Motion for Remand. The first point is undisputed; this Court had the authority to either grant or deny the stay, but correctly relied on the wide array of authority encouraging courts to exercise that discretion to *grant* stays pending an MDL Panel transfer decision. Plaintiff's second argument, however, both contradicts the MDL Panel's stated preference that transferor courts defer ruling on remand motions in cases tagged for MDL transfer *and* is out of step with the widespread authority from this and other courts conforming to the practice of staying litigation pending an MDL Panel transfer decision.

A. Courts have the authority to stay litigation, even where jurisdictional objections are pending, until the MDL Panel issues a transfer decision.

The thrust of Plaintiff's argument against a stay is that this Court "must" decide Plaintiff's remand motion before entering a stay. Her rationale is that jurisdiction is a "threshold matter" so that the Court may not rule on Defendants' Motion to Stay until it first determines the jurisdictional issue. (*See* Doc. 10-2 at 6-7). This view has been soundly rejected by courts across the country.

The leading decision rejecting Plaintiff's approach is *In re Ivy v. Diamond Shamrock Chems. Co.*, where the court held "that the MDL Panel has jurisdiction to transfer a case in

al., Case No. 3:11-cv-00718-L (N.D. Tex.); *Wilson v. DC Medical LLC, et al.*, Case No. 1:11-cv-01174-JEC (N.D. Ga.); *Gallimore v. DC Medical LLC, et al.*, Case No. 1:11-cv-01173-ODE (N.D. Ga.); *Bailey v. DC Medical LLC, et al.*, Case No. 1:11-cv-01169-RWS (N.D. Ga.); *Finley v. DC Medical LLC, et al.*, Case No. 1:11-cv-01171-SCJ (N.D. Ga.); *Lewis v. DC Medical LLC, et al.*, Case No. 1:11-cv-01172-MHS (N.D. Ga.); *Zaborsky v. DePuy Orthopaedics, Inc., et al.*, Case No. 3:11-cv-00251-JAG (E.D. Va.); and *Honeycutt v. DePuy Orthopaedics, Inc.*, Case No. 7:11-cv-00081-KKC (E.D. Ky.).

which a jurisdictional objection is pending.” 901 F.2d 7, 9 (2d Cir. 1990). The *Ivy* Court explained, then referring to the Agent Orange litigation, that:

Agent Orange cases are particularly well-suited for multidistrict transfer, even where their presence in federal court is subject to a pending jurisdictional objection. The jurisdictional issue in question is easily capable of arising in hundreds or even thousands of cases in district courts throughout the nation. That issue, however, involves common questions of law and fact, some or all of which relate to the Agent Orange class action and settlement. . . . Once transferred, the jurisdictional objections can be heard and resolved by a single court and reviewed at the appellate level in due course. Consistency as well as economy is thus served.

Id. at 9 (comparing to *United States v. United Mine Workers*, 330 U.S. 258, 290 (1947), where the Supreme Court held that a district court has authority to issue an injunction while jurisdictional questions are pending). That reasoning is directly applicable to the DePuy ASR™ litigation, where the same jurisdictional issue (fraudulent joinder of non-diverse defendants) continues to arise in courts nationwide.

Federal district courts around the country follow the *Ivy* Court’s reasoning and hold that they have jurisdiction to stay cases pending transfer to an MDL court. *See, e.g., Ayers v. Conagra Foods, Inc.*, No. H-08-3723, 2009 WL 982472, at *1 (S.D. Tex. Apr. 9, 2009) (staying case pending MDL Panel’s transfer decision where “[t]he issues involved in the motion to remand based on lack of subject-matter jurisdiction . . . are likely to be common to issues raised in other transferred cases.”); *Gavitt v. Merck & Co.*, No. 2:08-cv-755-FtM-UA-DNF, 2008 WL 4642782, at *1 (M.D. Fla. Oct. 20, 2008) (staying the case pending MDL Panel decision while citing *Ivy*, 901 F.2d at 9, for the proposition ““that the MDL panel has jurisdiction to transfer a case in which a jurisdictional objection is pending.””).

B. The MDL Panel encourages transferor courts to defer ruling on Motions to Remand pending MDL transfer.

This Court's decision to stay this case pending a transfer decision by the MDL Panel is consistent with the MDL Panel's stated preference that transferor courts defer ruling on remand motions in cases tagged for MDL transfer to ensure uniform treatment of recurring jurisdictional issues. *See, e.g.*, Ltr. From JPML to Hon. Ricardo H. Hinojosa (Mar. 21, 2005) (“[W]ait[ing] until the Panel has decided the transfer issue . . . may be especially appropriate if the [remand] motion raises questions likely to arise in other actions in the transferee court and, in the interest of uniformity, might best be decided there if the Panel orders centralization.”) (attached as Exhibit A).

In light of the MDL Panel's preference, court after court has refused to consider motions based on objections to subject-matter jurisdiction in cases designated for MDL transfer. This is because, as the *Ivy* Court explained, “[o]nce transferred, the jurisdictional objections can be heard and resolved by a single court and reviewed at the appellate level in due course.” *Ivy*, 901 F.2d at 9. Accordingly, courts have routinely applied their discretion in a manner that defers to the MDL Panel's preference, conserves judicial resources, and promotes overall efficiency. *See, e.g.*, *Fontanilles v. Merck & Co.*, No. 04-22799-CIV, 2004 WL 5569871, at *1 (S.D. Fla. Dec. 15, 2004) (“This Court acknowledges that it has jurisdiction to resolve the Plaintiff's motion to remand prior to a transfer to an MDL order becoming final. However, this Court also has discretion to decline to decide the motion to remand while awaiting the MDL Panel's decision on transfer.”); *Nielsen v. Merck & Co.*, No. C07-00076 MJJ, 2007 WL 806510, at *2 (N.D. Cal. Mar. 15, 2007) (referencing MDL Panel letter in rejecting plaintiff's argument that “the court must first preliminarily consider the merits of the remand motion before . . . considering a stay.”).

C. **The Court correctly stayed this case pending MDL transfer consistent with the majority rule.**

A majority of courts (including federal district courts within the State of Florida) have consistently recognized that the “general rule is for federal courts to defer ruling on pending [pre-trial] motions . . . in MDL litigation until after the JPMDL has transferred the case to the MDL [court].” *Turner v. Bausch & Lomb Inc.*, No. 8:06-CV-1088, slip op. at 2 (M.D. Fla. July 17, 2006); *see also, e.g., Hardin v. Merck & Co.*, No. C 07-0070 SBA, 2007 WL 1056790, at *2-3 (N.D. Cal. Apr. 5, 2007) (staying action where plaintiff filed motion to remand given that “the precise issue of the alleged fraudulent joinder . . . is a recurring issue.”); *Kline v. Earl Stewart Holdings, LLC*, No. 10-80912-CIV, 2010 WL 3432824, at *2 (S.D. Fla. Aug. 30, 2010) (granting defendant’s motion to stay pending action by MDL Panel); *Miller v. Merck & Co.*, No. 2:08-cv-757, 2008 WL 4642779, at *1 (M.D. Fla. Oct. 20, 2008) (“[T]he Court concludes that the motion to stay should be granted and that the issues raised in the motion for remand should be deferred to the district court presiding over MDL-1657.”); *Republic of Venez. ex rel. Garrido v. Philip Morris Cos.*, No. 99-0586-CIV, 1999 WL 33911677, at *1 (S.D. Fla. Apr. 28, 1999) (staying consideration of motion to remand pending transfer by MDL Panel.”).

The rationale for staying a case pending MDL transfer applies with even greater force in cases where jurisdictional issues overlap with other transferred cases, as they do here. *See Lucas v. Springhill Hosps., Inc.*, No. 08-0520-CG-C, 2009 WL 160418, at *1 (S.D. Ala. Jan. 22, 2009) (noting that courts “commonly stay[] such cases even when jurisdictional issues have been raised because such jurisdictional issues are likely to arise in the other cases filed throughout the nation that will be transferred to the MDL Panel and consistency as well as economy are served by having those issues decided by a single court.”) (emphasis added); *Gavitt*, 2008 WL 4642782 at *2 (stay entered “in an effort to preserve judicial and client resources and to promote consistency

and economy with regard to jurisdictional objections”); *Scott v. Bayer Corp.*, No. Civ.A. 03-2888, 2004 WL 63978, at *1-2 (E.D. La. Jan. 12, 2004) (citing 28 U.S.C. § 1407) (“Deference to the MDL court for resolution of [certain pretrial matters] provides the opportunity for the uniformity, consistency, and predictability in litigation that underlies the multidistrict litigation system.”).

This opportunity for uniformity and efficiency is particularly apparent here because, as noted above, this is just one of numerous cases set for transfer to the ASR™ Hip Implant MDL proceeding in which plaintiffs have filed motions to remand based on their joinder of a non-diverse sales representative or distributor. Thus, having the MDL court decide the cross-cutting jurisdictional issues raised by these cases will promote judicial economy and also ensure that the cases in this litigation are treated in a uniform manner. This very reasoning was particularly well-stated by the court in *Hagler v. Wyeth*, No. CV-04-A-11-N, 2004 U.S. Dist. LEXIS 28764, at *3 (M.D. Ala. Feb. 23, 2004):

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

And while Plaintiff relies on the Manual for Complex Litigation to counter the MDL Panel’s preference and argue that “[t]he transferor court should not automatically stay discovery,” (Doc. 10-2 at 4), Plaintiffs omit more pertinent and compelling language in that same section, which provides:

More often, however, the Panel has held that the pendency of potentially dispositive motions is not an impediment to transfer actions, because such motions can be addressed to the transferee judge for resolution after transfer. Furthermore, the pendency of motions raising questions *common to related actions* can itself be an additional justification for transfer.

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

Moreover, the authority Plaintiff cites is not to the contrary. Her focus on a June 13, 2011 decision issued by the Eastern District of Wisconsin in *Malkmus v. DePuy Orthopaedics, Inc.* is misplaced in that the *Malkmus* court stands only for the proposition that a district court has the *discretion* to choose not to stay a case and to instead rule on the remand motion itself. Indeed, when faced with nearly identical circumstances, other U.S. District Courts in ASR™ Hip Implant cases have granted Defendants' motions to stay and deferred ruling on remand motions. *See, e.g., Butler v. DePuy Orthopaedics, Inc.*, Order and Reasons attached as Exhibit B (staying all proceedings pending transfer to MDL Court, and expressly finding that deferring ruling on remand motion to MDL Court would "promote judicial efficiency and help to avoid the possibility of inconsistent decisions." (Exh. B, at 2)); *Laman v. DePuy Orthopaedics, Inc.*, Order and Reasons attached as Exhibit C (granting defendants' motion to stay and deferring ruling on plaintiff's motion to remand to "serve the interests of judicial economy and minimize the risk of inconsistent rulings in related cases." (Exh. C, at 3)); *Dio v. DePuy Orthopaedics, Inc.*, Decision and Order attached as Exhibit D (granting defendants' motion to stay and, though allowing plaintiff to prepare and file a motion to remand, staying disposition of that motion pending transfer to the MDL court); *Hougas v. DePuy Orthopaedics, Inc.*, Notification of Docket Entry attached as Exhibit E (granting defendants' motion to stay; motion to remand pending); *Patterson v. DePuy Orthopaedics, Inc.*, Order attached as Exhibit F (granting defendants' motion to stay with a limited exception allowing for the filing of a brief opposing remand and a "show

cause” filing as to why the stay should be lifted); *Harper v. DePuy Orthopaedics, Inc.*, Order attached as Exhibit G (same); *LeMarr v. DePuy Orthopaedics, Inc.*, Order attached as Exhibit H; *Garris v. DePuy Orthopaedics, Inc.*, Order attached as Exhibit I; *Bailey v. DC Medical, LLC*, Order attached as Exhibit J; *Zaborsky v. DePuy Orthopaedics, Inc.*, Order attached as Exhibit K; and *Honeycutt v. DePuy Orthopaedics, Inc.*, Order attached as Exhibit L.

CONCLUSION

This Court’s decision to stay the case “[b]ecause it appears likely that this matter will be transferred to the MDL in the Northern District of Ohio” is not only the decision most likely to further judicial efficiency and consistency, but also is a correct application of this Court’s discretion to enter a stay pending the MDL Panel’s transfer decision. Plaintiff has provided no compelling reason for this Court to reconsider its decision, much less reverse it. Defendants therefore respectfully request that this Court deny Plaintiff’s Motion for Reconsideration.

Alternatively, if this Court grants Plaintiff’s Motion for Reconsideration and lifts the stay, Defendants request that this Court grant them seven days from the lifting of the stay to file a brief opposing Plaintiff’s Motion for Remand.

Dated: July 1, 2011

Respectfully submitted,

/s/ Neville M. Leslie

Jeffrey B. Shapiro (Fla. Bar No. 484113)

jbshapiro@arnstein.com

Neville M. Leslie (Fla. Bar No. 0107492)

nmleslie@arnstein.com

ARNSTEIN & LEHR LLP

Suite 3600, 200 S. Biscayne Blvd.

Miami, Florida 33131

Telephone (305) 428-4500

Facsimile: (305) 374-4744

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by Notice of Electronic filing generated by CM/ECF or in some other authorized manner on July 1st, 2011, on all counsel of record on the Service List below:

Service List

Altom M. Maglio, Esq.
Maglio Christopher & Toale, P.C.
1751 Mound Street, Second Floor
Sarasota, Florida 34236
Telephone: (941) 952-5242
Facsimile: (941) 952-5042
Email: amm@mctplaw.com

Counsel for Plaintiff

/s/ Neville M. Leslie
Neville M. Leslie (Fla. Bar No. 0107492)

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