

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

SHANNON McCONNELL,

Plaintiff,

Vs.

Case No.: 1:11-cv-22025-AJ

MARK DEBIASE, INC., et al.,

Defendants.

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

This lawsuit was filed in Palm Beach County Circuit Court. The lawsuit was filed in response to the failure of a recalled hip replacement implanted in the Plaintiff's body designed and manufactured by Defendants DePuy Orthopaedics, Inc., DePuy International, Ltd., DePuy Ireland, Ltd., Johnson & Johnson Medical Ltd., Johnson & Johnson International, and Johnson & Johnson ("DePuy") and promoted, distributed, sold, and serviced by Defendant Mark DeBiase, Inc., d/b/a Joint Venture, Inc. ("Joint Venture"). Despite the fact that Joint Venture is a citizen of Florida, Defendants filed a Notice of Removal removing this case from the Circuit Court for Palm Beach County to this Court. Defendants claimed in their Notice of Removal that Joint Venture had been fraudulently joined, thus complete diversity jurisdiction existed, and removal to this Court was proper. Plaintiff promptly filed a Motion to Remand to the Circuit Court for Palm Beach County, Florida, demonstrating that joinder of the in-state Defendant was proper.

Defendants 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") and

Memorandum in Support (“Memo in Supp.”). 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. 51 (“CTO-51”) issued by the Panel on June 9, 2011. CTO-51 has conditionally ordered the transfer of this action to MDL No. 2197, pending in the Northern District of Ohio. CTO-51 will not be entered and will remain conditional, in accordance with the rules of the Panel, to give Plaintiff the right to object to the transfer and be heard by the Panel. (Plaintiff has filed her Notice of Opposition to CTO-51 and will be timely filing her Motion to Vacate CTO-51.)

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 Plaintiff’s pending Motion to 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, many courts, including this Court, have 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 Plaintiff's 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 Plaintiff's Motion for Remand pending the potential transfer of this action to MDL No. 2197.**

The mere pendency of a transfer motion 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 Waters v. Bausch & Lomb, Inc., et al.*, Final Order Granting Motion for Remand; Denying Motion for Attorney's Fees; Denying Motion to Stay at 3, Case No. 06-80547-CIV DIMITROULEAS (S.D. Fla. July 26, 2006), attached hereto as Exhibit "1"; *Wade v. Bausch & Lomb, Inc., et al.*, Order Granting Motion to Remand, Denying Motion for Attorneys' Fees and Denying Motion to Stay, at 2, Case No. 06-80546-CIV-MIDDLEBROOKS/JOHNSON (S.D. Fla. Aug. 16, 2006), attached as Exhibit "2". 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) at 220-221, states:

The transferor court should not automatically stay discovery ...Nor should the court automatically postpone rulings on pending motions, or generally suspend further proceedings... [M]atters such as motions to dismiss or to remand, raising issues unique to the particular case, may be particularly appropriate for resolution before the Panel acts on the motion to transfer. The Panel has sometimes delayed ruling on transfer to permit the court in which the case is pending to decide critical, fully briefed and argued motions.

Thus, even after a conditional transfer order is entered, this Court may still rule on a pending motion to remand. *See e.g., Kopitke v. DePuy Orthopaedics, Inc. and Premier Sales, Inc.*, 2011 WL 856865 (N.D. Ill. Mar. 8, 2011)<sup>1</sup> (District Court denied stay and granted remand after entry of conditional transfer order in suit involving the DePuy ASR hip).<sup>2</sup> Consistent with Rule 2.1, the Seventh Circuit has 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. “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.) For these reasons, this Court has the authority to consider Plaintiffs’ Motion for Remand at this time.

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<sup>1</sup> See Exhibit 3 attached hereto. (Memorandum Opinion and Order, *Kopitke v. DePuy Orthopaedics, Inc. and Premier Sales, Inc.*, Case: 1:11-cv-00912; Document #: 23; Filed: 03/08/11).

<sup>2</sup> Defendants exhort this Court to jump on the bandwagon and join the 104 other federal district courts across the country which have granted stays. Memo in Supp., p.2. Defendants however fail to mention that the majority of the 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, fn. 1 (J.P.M.L. April 18, 2011), attached as Exhibit “4”.<sup>3</sup>

The foregoing Rule and ruling make it clear that the Judicial Panel on Multidistrict Litigation does not encourage courts to defer ruling on motions to remand pending transfer to an MDL nor is it the stated or express preference of the Panel that district courts avoid ruling on motions to remand. Indeed, in the past, the Panel has encouraged district courts to rule on motions for remand prior to transfer. *See Shields v. Bridgestone/Firestone, Inc.*, 232 F.Supp.2d 715 (E. D. Tex., 2002), fn. 1, *citing* Letter from Panel Chairman, dated September 30, 2002, to the court in support of its continuing authority to deny stay and remand case. (“Thus your jurisdiction continues until any transfer becomes effective. If you have a motion pending before you in the action — *particularly a motion to remand to state court* (if the action was removed to your court) — you are *encouraged* to rule on the motion unless you conclude that the motion raises issues likely to arise in other

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<sup>3</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 herein have filed. *See* JPML Rule 7.1, 28 USCA foll. §1407. Plaintiffs then have two weeks to file a Motion to Vacate the CTO. *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-51 will be September 27, 2011. *See* [www.jpml.uscorts.gov](http://www.jpml.uscorts.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-51 in this action.

actions in the transferee court...”) (Emphasis supplied in same manner as emphasis added in *Shields v. Bridgestone/Firestone, Inc.*) See also *Tennessee Consolidated Retirement System v. Citigroup, Inc.*, 2003 WL 22190841 at \*1 (M.D. Tenn. May 9, 2003) citing Letter the court received from the Panel dated April 14, 2003 in support of order denying stay (“If you have a motion pending before you in the action - *particularly a motion to remand to state court...you are encouraged to rule on the motion* unless you conclude that the motion raises issues likely to arise in other actions in the transferee court...”) (Emphasis supplied.) For these reasons, this Court has full authority to consider Plaintiffs’ Motion for Remand at this time.

**II. This Court *must* consider Plaintiff’s Motion for Remand before it may consider Defendants’ Motion to Stay**

Plaintiff filed this action in state court setting forth state law claims against Defendants, including an in-state Defendant Joint Venture. Defendants removed the case to this Court claiming improper joinder. Plaintiff 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 Plaintiff and Defendants have raised the issue of the existence of diversity jurisdiction. 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). A court’s power may not “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. *Steel Co.* at 94; *Kokkonen* at 377. Accord *Howery v. Allstate Ins. Co.*, 243 F. 3d 912, 916 (5th Cir. 2001). See also, *Hughes v. Howmedica Osteonics Corp., et al*, Final Order of Remand at 3, Case No., 07-61721-CIV-ZLOCH (S. D. Fla. December 18, 2007) (“The presumption, in fact, is that a federal court lacks jurisdiction in a particular case until the parties demonstrate that jurisdiction over the subject matter exists.”), attached as Exhibit “5”. 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.)

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 *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.”); *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); and *Jayme v. U. S. Dept. of Homeland Sec.*, Case No. 07-60301-CIV-ZLOCK, 2008 WL 1885797 at \*1, 3 (S.D. Fla. Apr. 28, 2008).

Absent jurisdiction, a court may not act except to dismiss or remand the action before it. 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. *Bancohio Corp. v. Fox*, 516 F2d 29, 32 (6th Cir. 1975) (“No

matter how desirable respondents feel it may be to consolidate [in the MDL]...[s]uch a transfer cannot be made unless the district court properly has jurisdiction of the subject matter of the case.”) As summarized by this District Court, “[I]f this case is not properly in federal court, there is no reason why it should be subject to an MDL transfer in the first place.” See Exhibit 2, *Wade v. Bausch & Lomb, Inc., et al.*, at 2.<sup>4</sup>

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*

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<sup>4</sup> It is anticipated that Defendants will cite the decision in *Bonenfant v. R. J. Reynolds Tobacco Co.*, No. 07-60301-CIV-ZLOCH, 2007 WL 2409980 (S.D. Fla. July 31, 2007) for the principle that courts commonly stay actions pending a transfer decision by the Panel. *Bonenfant* is distinguishable, however, from the present action in that this Court in *Bonenfant* was not presented with both a motion for remand and motion for stay. Lacking the subject matter jurisdiction question, the court in *Bonenfant* had the power to stay the action and no constitutional impetus to deny the stay. In contrast, this action raises jurisdictional issues of Florida law and questions of fact that will not arise in other actions which are pending a Panel transfer decision. Given such jurisdictional questions and this Court’s decisions denying stay in *Waters* and *Wade*, a stay is inappropriate in this case.

*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 multi-district 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 dictated the resolution of Plaintiff's 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 this action pending the possible transfer of this action to MDL No. 2197. Courts which have previously analyzed this argument have rejected it.

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.<sup>5</sup>

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<sup>5</sup> Interestingly, although Defendants claim they seek uniformity and efficiency in all cases due to allegedly identical and overlapping issues, DePuy has not removed all state court cases for inclusion in the MDL. *See, e.g., Rodney Fluharty, et al. v. DePuy Orthopaedics, Inc., et al.,*

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.”); *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 transferee court “to make an assessment of which party should prevail.” *Pennsylvania v. TAP*

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Case No.: CAL11-05784, in the Circuit Court for the Prince of George’s County, Maryland, filed March 4, 2011, which has not been removed. Notably, Defendants have not even removed all state court cases in this District. See, *David Kauthen and Viola Kauthen vs. DePuy Orthopaedics, Inc., et al*, Case No.: 2011CA004158, in the Circuit Court for Palm Beach County, Florida.

*Pharmaceutical Products, Inc.*, 415 F. Supp. 2d 516 at 521. 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.* Thus, there would be no savings in terms of judicial effort by abdicating the present question of jurisdiction to the Northern District of Ohio.

As the District Court for the Eastern District of Wisconsin stated when faced with similar arguments for stay in a recent DePuy ASR Hip Implant case:

As an alternative to denying the plaintiffs' motion to remand, the defendants request that the court withhold resolution and instead conditionally transfer this matter to the MDL court to permit this issue to be considered by that judge. (Docket No. 19 at 2-3) Despite the fact that the defendants indicate that other courts have followed this approach when dealing with similar issues, (Docket No. 19 at 2-3), this court declines to do so.

Although raising the issue of fraudulent joinder might be common in similar actions related to this allegedly defective artificial hip, the resolution of the pending motion for remand depends distinctly upon an interpretation of Wisconsin law. A district court in Wisconsin is generally better equipped to address questions of Wisconsin law than a court in Ohio and as such, the court concludes that conditionally transferring this case to the MDL court would likely result in an unnecessary delay of the plaintiffs' case without leading to a more efficient resolution of the pending motion. One way or another, a federal court is going to have to consider Wisconsin law and decide how it applies to the plaintiffs' case; in the view of this court, it makes the most sense for that burden to be borne by this court rather than kicking the can down the road.

*Malkmus v. DePuy Orthopaedics, Inc., et al*, Case No. 11-C-365, Order Granting Plaintiffs' Motion to Remand at 3, (E.D. Wi. June 13, 2011), attached hereto as Exhibit "6".

Similarly, in a medical product liability action removed to the Western District of Texas, the District Court rejected defense arguments that uniformity and judicial economy would be served by staying the matter pending transfer, stating:

Defendants first argue that this Court should defer ruling on the remand motion to allow the MDL judge to consider the motion because “[r]uling on this remand motion runs the risk of inconsistent decisions by different judges in cases that are in the same state and involve the same issue-which is contrary to federal case law.” The Court disagrees and is of the opinion that judicial efficiency and economy are better served by this Court considering, before the case is transferred to the MDL Court, the Motion to Remand.

*Barragan v. Warner-Lambert Co.*, 216 F. Supp. 2d 627, 630 (W.D. Tex. 2002).

This court has agreed with the Districts cited finding that an MDL court would not be a better forum for a motion to remand but rather that judicial economy would best be served by the district court addressing the motion to remand first and denying the motion to stay. See Exhibit “1”, *Waters v. Bausch & Lomb, Inc., et al.*, at 3 and Exhibit “2”, *Wade v. Bausch & Lomb, Incl., et al.*, at 2. Rather than citing the decisions of this Court in *Wade* and *Waters*, which denied requested stays, Defendants attempt to support their argument for stay by citing solely to cases from the Middle District of Florida and other districts. Such authority is not persuasive in light of the pronouncements of this Court. For these reasons, Defendants assertions’ that principles of uniformity and judicial economy would be served by a stay of the jurisdictional issues pending transfer lack merit.

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 Plaintiff’s Motion for Remand. Defendants make the blanket statement that Plaintiff will not be prejudiced by the stay and

transfer of these proceedings. Defs. Memo in Supp., p. 5. Plaintiff would beg to differ. Plaintiff initially filed this action in state court and sought to have her 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 which are international corporations, have, in essence, sought to move Plaintiff's litigation far away from Florida to an unfamiliar forum for resolution on a timetable driven not by this Florida Plaintiff and her 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 Plaintiff's Motion to Remand, given that the MDL currently has no procedure in place for determining motions for remand. *See* Exhibit "7". Defendants, therefore, strain credulity in characterizing this passage of time as a "short stay." *See* Memo in Supp., p. 5. 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. Memo in Supp., p. 5. To the contrary, Plaintiff would point out that they are confident Defendants will not be required to respond to discovery in this Court. Plaintiff has 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 Plaintiff's Motion for Remand, Plaintiff suggests 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.

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 Plaintiff's Motion for Remand, applying the law of the State of Florida. Surely, such an analysis is easier and more efficiently performed by a federal court sitting in the State of Florida as opposed to a federal judge seated in Ohio. *See 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.") and Exhibit 6, *Malkmus v. DePuy Orthopaedics, Inc., et al*, Case No. 11-C-365, Order Granting Plaintiffs' Motion to Remand (E.D. Wi. June 13, 2011) ("A district court in Wisconsin is generally better equipped to address questions of Wisconsin law than a court in Ohio ... the Court concludes that transferring this case to the MDL would likely result in an unnecessary delay of the plaintiffs' case without leading to a more efficient resolution of the pending motion.") Because this Court is far more familiar with the nuances of Florida law on this topic, as evidenced by the numerous citations to the opinions of the Federal District of Courts of Florida cited in Plaintiff's Memorandum of Law in Support of her Motion for Remand, there would be no savings by abdicating the present question of jurisdiction to the Northern District of Ohio.<sup>6</sup> For these reasons, considerations of fairness would counsel the prompt determination of the jurisdictional question in this forum.

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<sup>6</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. Plaintiff, 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 1 Florida case -- this case. Thus, Defendants' list, while impressive in its length, is not relevant. It does absolutely 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

## 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 Plaintiff's 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.

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does the opposite by underscoring that the MDL will not be called on to make individualized determinations of jurisdiction under Florida law. Therefore, Plaintiff would submit that Defendants' laundry list only supports Plaintiff's position that principles of judicial economy favor a denial of the motion to stay.

**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 on June 17, 2011, on all counsel of record.

Respectfully submitted,

                  / s / Altom M. Maglio

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