

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

LARRY G. CURTS,

Plaintiff,

v.

MONSANTO COMPANY,

Defendant.

C.A. No: 17-860-RGA

**DEFENDANT MONSANTO COMPANY’S MOTION FOR
TEMPORARY STAY PENDING JPML RULING ON TRANSFER TO MDL COURT**

Introduction and Procedural History

Plaintiff filed this lawsuit against Monsanto Company (“Monsanto”) for injuries allegedly caused by Monsanto’s Roundup[®]-branded herbicides, which have glyphosate as their active ingredient. Farmers have used glyphosate-based herbicides for decades to increase crop yields. Glyphosate is one of the most thoroughly studied herbicides in the world, and glyphosate-based herbicides have received regulatory approval in more than 160 countries. Since 1974, when Monsanto first introduced a Roundup[®]-branded herbicide to the marketplace, the United States Environmental Protection Agency repeatedly has concluded that glyphosate does not cause cancer. Nevertheless, plaintiff alleges that he developed cancer – specifically, non-Hodgkin’s lymphoma (“NHL”) – caused by exposure to Roundup[®]-branded herbicides.

Numerous federal lawsuits filed by other plaintiffs alleging that they developed NHL due to exposure to Roundup[®]-branded herbicides have been transferred for coordinated multidistrict litigation proceedings to U.S. District Judge Vince Chhabria in the Northern District of California (“the MDL Court”). *See In re Roundup Prods. Liab. Litig.*, No. 3:16-md-02741-VC

(N.D. Cal.).¹ In papers filed with the Judicial Panel on Multidistrict Litigation (“JPML”), Monsanto notified the JPML that this lawsuit should be transferred to the MDL Court. *See* July 3, 2017 Notice of Potential Tag-Along Action (attached, without exhibits, as Exhibit 2). The JPML issued a Conditional Transfer Order for this case (attached as Exhibit 3), but plaintiff objected to the transfer by filing a notice of opposition to the Conditional Transfer Order, so the JPML will issue a ruling regarding transfer after the parties have briefed that issue.²

Monsanto requests that this Court temporarily stay all further proceedings in this case – including any further briefing on plaintiff’s recently filed Motion to Remand to State Court (“Plaintiff’s Remand Motion”), D.I. 4 – pending the JPML’s transfer ruling. As discussed below, stays pending JPML transfer rulings are common in these circumstances, and the JPML has ordered cases transferred to MDL courts over objections based on pending remand motions. For the Roundup[®] litigation, the MDL Court is responsible for managing all pretrial proceedings, so the interests of promoting judicial economy and avoiding inconsistent rulings counsel in favor of issuing the temporary stay requested here. Moreover, various Eastern District of Missouri judges issued stays pending rulings by the JPML regarding transfers to the MDL Court in eight

¹ In October 2016, the JPML transferred to the MDL Court lawsuits alleging that “Roundup, a widely used glyphosate-based herbicide manufactured by Monsanto Company, can cause non-Hodgkin’s lymphoma and that Monsanto failed to warn consumers and regulators about the alleged risks of Roundup.” Transfer Order at 1, *In re Roundup Prods. Liab. Litig.*, MDL No. 2741 (J.P.M.L. Oct. 3, 2016), D.I. 57 (attached as Exhibit 1).

² The JPML has transferred 24 Roundup[®] lawsuits from this Court to Judge Chhabria in the Northern District of California for coordinated or consolidated pretrial multidistrict litigation proceedings. *See* Order Lifting Stay of Conditional Transfer Order, *In re Roundup Prods. Liab. Litig.*, MDL No. 2741 (J.P.M.L. May 31, 2017), D.I. 197 (attached as Exhibit 4). Monsanto removed those 24 lawsuits from the Superior Court of the State of Delaware to this Court on the same basis – diversity jurisdiction and pre-service removal – that Monsanto used to remove the *Larry Curts* Roundup[®] lawsuit to this Court.

Roundup[®] cases removed from Missouri state court.³

Argument

This Court has “discretionary power” and “broad power to stay proceedings.” *Bechtel Corp. v. Local 215, Laborer’s Int’l Union of N. Am.*, 544 F.2d 1207, 1215 (3d Cir. 1976); *see Cost Bros., Inc. v. Travelers Indem. Co.*, 760 F.2d 58, 60 (3d Cir. 1985) (“[T]he decision whether to grant a stay . . . is committed to the district court’s discretion, since it is a matter of the court’s inherent power to conserve judicial resources by controlling its own docket.”).

“Stays of . . . civil actions are common when the issue of transfer is before the JPML.” *Packer v. Power Balance, L.L.C.*, Civil Action No. 11-802 (WJM), 2011 WL 1099001, at *1 (D.N.J. Mar. 22, 2011). Federal courts repeatedly have recognized that it is appropriate to issue a stay pending a JPML transfer ruling in a removed case, even when a remand motion for lack of federal subject matter jurisdiction is pending.⁴ For example, the Second Circuit ruled in favor of

³ *See Ward v. Monsanto Co.*, No. 4:17-cv-01104-CEJ (E.D. Mo. Apr. 27, 2017) (staying Roundup[®] case pending ruling by JPML regarding transfer to MDL Court, after federal question removal/federal officer removal), D.I. 35; *Bates v. Monsanto Co.*, No. 4:17-cv-01111-CDP (E.D. Mo. Apr. 18, 2017) (same), D.I. 27; *Cobb v. Monsanto Co.*, No. 4:17-cv-01105-JMB (E.D. Mo. Apr. 12, 2017) (same), D.I. 26; *O’Brien v. Monsanto Co.*, No. 4:17-cv-01192-CEJ (E.D. Mo. Apr. 10, 2017) (same), D.I. 22; *Feranec v. Monsanto Co.*, No. 4:17-cv-01116-CDP (E.D. Mo. Apr. 7, 2017) (same), D.I. 18; *Montaigne v. Monsanto Co.*, No. 4:17-cv-01109-CDP (E.D. Mo. Apr. 7, 2017) (same), D.I. 24; *Parks v. Monsanto Co.*, No. 4:17-cv-01108-CDP (E.D. Mo. Apr. 7, 2017) (same), D.I. 25; *Salvaggio v. Monsanto Co.*, No. 4:17-cv-01113-CDP (E.D. Mo. Apr. 7, 2017) (same), D.I. 17.

⁴ Here, this Court clearly has subject matter jurisdiction. As shown in Monsanto’s Notice of Removal, D.I. 1, Monsanto removed this case based on diversity jurisdiction in accordance with 28 U.S.C. § 1332(a). Plaintiff’s Remand Motion and supporting Memorandum of Points and Authorities, D.I. 4 & 5, do not contend that diversity of citizenship is absent or that the amount-in-controversy requirement has not been satisfied, so this Court has subject matter jurisdiction. The so-called “forum defendant rule,” 28 U.S.C. § 1441(b)(2), that is central to plaintiff’s Remand Motion is a procedural issue that does not deprive this Court of subject matter jurisdiction. *See Korea Exch. Bank v. Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1995) (holding that district court had diversity jurisdiction and that New Jersey citizen’s removal of case from New Jersey state court after complaint had been served on that New Jersey citizen was “a defect in removal procedure” and “not a jurisdictional defect” (quotation marks omitted)).

a JPML transfer and rejected the argument that the transfer was invalid due to lack of federal subject matter jurisdiction and improper removal: “Once transferred, the jurisdictional objections can be heard and resolved by a single court [presiding over the MDL proceedings]

Consistency as well as economy is thus served.” *In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990)

(emphasis added). Other courts have reached similar conclusions. *See, e.g., Grispino v. New*

England Mut. Life Ins. Co., 358 F.3d 16, 19 n.3 (1st Cir. 2004) (“The fact that there were

pending jurisdictional objections did not deprive the [JPML] of the ability to transfer the case.”

(citing *Ivy*, 901 F.2d at 9)); *Simmons v. GlaxoSmithKline, LLC*, Case No. 4:15CV1397 CDP,

2015 WL 6063926 (E.D. Mo. Oct. 14, 2015) (granting stay pending JPML transfer ruling even

though remand motion had been filed); *Miller v. Bayer Healthcare Pharm. Inc.*, No.

4:15CV1401 CDP, 2015 WL 5572801, at *2 (E.D. Mo. Sept. 22, 2015) (same; holding that “the

circumstances favor allowing the transferee judge to rule on the remand motion if the case is

ultimately transferred to the MDL”); *Gavitt v. Merck & Co.*, No. 2:08-cv-755-FtM-UA-DNF,

2008 WL 4642782 (M.D. Fla. Oct. 20, 2008) (granting stay pending JPML transfer ruling even

though remand motion had been filed).

Moreover, the JPML has held that a pending remand motion does not preclude a transfer

to an MDL court because the MDL court (*i.e.*, the “transferee court”) can decide the remand

motion. *See In re Gadolinium Contrast Dyes Prod. Liab. Litig.*, MDL No. 1909, 2012 WL

7807340, at *1 (J.P.M.L. Apr. 16, 2012) (stating that JPML has “long held that jurisdictional

objections are not an impediment to transfer,” because “[p]laintiff can present his motion for

remand . . . to the transferee court”; ordering transfer over plaintiff’s objection that remand

motion is fully briefed and pending); *In re Darvocet, Darvon & Propoxyphene Prod. Liab. Litig.*,

MDL No. 2226, 2012 WL 7764151, at *1 (J.P.M.L. Apr. 16, 2012) (stating that JPML “often has

held that a pending motion for remand is not a bar to transfer” and that “[t]he transferee judge can rule on plaintiffs’ pending remand motion”); *In re Vioxx Prod. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005) (“The pendency of a motion to remand to state court is not a sufficient basis to avoid inclusion in [28 U.S.C.] Section 1407 proceedings. [The] motions to remand . . . can be presented to and decided by the transferee judge.”).

In accordance with the rulings discussed above, this Court should issue the temporary stay requested here. The stay will promote consistency in pretrial rulings and will ensure that the MDL Court can decide the remand issue presented in this Roundup[®] case, if the JPML decides that transfer is appropriate. Federal district court judges throughout the country are divided regarding whether the forum defendant rule, 28 U.S.C. § 1441(b)(2), does or does not preclude removing a case to federal court before service of process on the in-state defendant. *See, e.g., Stefan v. Bristol-Myers Squibb Co.*, Civil Action No. 13-1662-RGA, 2013 WL 6354588 (D. Del. Dec. 6, 2013) (applying forum defendant rule and remanding lawsuit that was removed before any in-state defendant was served); *Holmstrom v. Harad*, No. 05 C 2714, 2005 WL 1950672 (N.D. Ill. Aug. 11, 2005) (same). *But see, e.g., Munchel v. Wyeth LLC*, Civil Action No. 12-906-LPS, 2012 WL 4050072 (D. Del. Sept. 11, 2012) (applying forum defendant rule and denying remand in lawsuit that was removed before in-state defendant was served); *Terry v. J.D. Streett & Co.*, No. 4:09CV01471 FRB, 2010 WL 3829201 (E.D. Mo. Sept. 23, 2010) (same); *see also* Tom McParland, *Monsanto Quickly Removes Personal Injury Cases to Federal Court*, Delaware Law Weekly (May 5, 2017) (stating that Monsanto’s pre-service removal “exposes an issue that has divided federal judges in the U.S. Court of Appeals for the Third Circuit”) (attached as Exhibit 5).

In light of the JPML’s decision to create the MDL Court to preside over coordinated

pretrial proceedings in the Roundup[®] litigation and in light of the large number of Roundup[®] lawsuits that have been filed and likely will be filed in the future,⁵ it is appropriate for remand motions in the Roundup[®] litigation to be decided based on a single, consistent rule of law applied by the MDL Court. Avoiding inconsistent rulings is an important reason for creating an MDL court and transferring cases to such a court. *See, e.g., Ivy*, 901 F.2d at 9 (stating that “[c]onsistency” is served by transferring cases to an MDL court); *Simmons*, 2015 WL 6063926, at *1 (stating that “the likelihood of inconsistent rulings will be greatly diminished” after cases are transferred to an MDL court and that “[t]he desire to avoid inconsistent rulings guides decisions affecting the MDL process”). In sum, the MDL Court – not federal district court judges all over the country who have reached inconsistent rulings regarding the forum defendant rule – should decide remand motions involving that rule, if the JPML decides to transfer cases in these circumstances. A brief stay is also proper here because it will enable this Court to conserve its resources by deferring any further proceedings until the JPML has decided whether to transfer this case to the MDL Court.

Finally, plaintiff will not be prejudiced by a brief stay. Discovery that has been and is being conducted in the MDL Court will be available to plaintiff regardless of whether this case is remanded or transferred to the MDL Court. The MDL Court has addressed sharing of discovery and coordination with state court Roundup[®] cases, stating that “[i]t is contemplated by the Court and the parties that all discovery conducted in these proceedings may be used in any related state court action, in accordance with that state’s law and rules of evidence . . . , subject to any

⁵ Recently, a plaintiffs’ attorney whose law firm (The Miller Firm LLC) has numerous Roundup[®] cases pending in the MDL Court and in Delaware state court was quoted in a news report as follows: “It would not surprise me in the least if there are 2,000 to 3,000 [Roundup[®]] cases pending by the end of the year.” Holly Yann, *Patients: Roundup gave us cancer as EPA official helped the company*, CNN (updated May 16, 2017), <http://www.cnn.com/2017/05/15/health/roundup-herbicide-cancer-allegations/index.html>.

agreements between the parties, and to all orders regarding the confines of discovery within this MDL and the issuance of similar protective orders and discovery protocols in the state court proceedings.” Pretrial Order No. 7 at 1-2, *In re Roundup Prods. Liab. Litig.*, No. 3:16-md-02741-VC (N.D. Cal. Jan. 10, 2017), D.I. 103. Moreover, if plaintiff has any prejudice-based objections to this case being transferred to the MDL Court, plaintiff will be able to present those arguments to the JPML for consideration before the JPML issues its transfer ruling.

Conclusion

For the foregoing reasons, the Court should grant this motion and issue a temporary stay of all further proceedings in this case, until the JPML has decided whether to transfer this case to the MDL Court.

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Dated: July 14, 2017

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