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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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DOROTHY A. PIERCE,  
  
                                Plaintiff,  
  
          v.  
  
NELSON C. FRINK, M.D.; COOK  
INCORPORATED; COOK  
INCORPORATED a/k/a COOK  
MEDICAL INCORPORATED; COOK  
GROUP INCORPORATED; COOK  
MEDICAL, LLC; and DOES 1  
through 60,  
  
                                Defendants.

CIV. NO 2:17-1731 WBS DB

MEMORANDUM AND ORDER RE:  
DEFENDANTS' MOTION TO SEVER  
CLAIMS, DEFENDANTS' MOTION TO  
STAY, AND PLAINTIFF'S MOTION TO  
REMAND

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Plaintiff Dorothy A. Pierce brought this action against  
defendants Nelson C. Frink ("Frink"); Cook Incorporated; Cook  
Group Incorporated; and Cook Medical, LLC (collectively "Cook")  
seeking relief based on product liability claims in connection  
with a Cook medical device that was implanted into plaintiff by  
Frink. Cook removed the action to this court on the basis of  
diversity jurisdiction. Presently before the court are

1 plaintiff's Motion to remand, Cook's Motion to sever claims  
2 against Frink, and Cook's Motion to stay this case pending  
3 transfer to the Southern District of Indiana.

4 I. Factual and Procedural History

5 On May 5, 2011, Frink, a California citizen, (Notice of  
6 Removal ¶ 15 (Docket No. 1)), implanted plaintiff, also a  
7 California citizen, with a Gunther Tulip, which is an inferior  
8 vena cava ("IVC") filter manufactured and sold by Cook. (Compl.  
9 ¶¶ 14-15 (Docket No. 1-1).) Frink did not contribute to the  
10 design or manufacturing of the Cook IVC filter. Cook is  
11 incorporated in, and has its principal place of business in,  
12 Indiana. (Notice of Removal ¶¶ 11-13.) The Gunther Tulip is now  
13 tilted and perforating into plaintiff's adjacent organs, placing  
14 plaintiff at risk of future migration, perforations, and/or  
15 fractures from the retained filter. (Compl. ¶¶ 17-18.)  
16 Plaintiff will require ongoing medical care and monitoring for  
17 the rest of her life because of this. (Id.)

18 Issues with the Gunther Tulip have resulted in hundreds  
19 of actions across the United States against Cook for their sale  
20 of these purportedly defective devices. The Judicial Panel on  
21 Multidistrict Litigation ("JPML") has consolidated hundreds of  
22 these cases into a federal multidistrict litigation in the United  
23 States District Court for the Southern District of Indiana ("MDL  
24 court"), determining that centralization was appropriate for  
25 cases involving allegations of defects in the various models of  
26 Cook's IVC filters. In re: Cook Medical, Inc., IVC Filters  
27 Marketing, Sales Practices and Prod. Liab. Litig., MDL No. 2570  
28

1 (S.D. Ind. 2017).<sup>1</sup>

2 On July 20, 2017, plaintiff filed suit in Sutter County  
3 Superior Court alleging negligence by Frink in failing to (a)  
4 monitor plaintiff after implantation of the Gunther Tulip and (b)  
5 implement a follow up plan to monitor, assess, or remove the  
6 Gunther Tulip once the device was no longer needed. (Compl. ¶  
7 54.) As to Cook, plaintiff alleged (a) strict liability failure  
8 to warn, (b) strict liability design defect, (c) negligence in  
9 failing to use reasonable care in designing, manufacturing,  
10 marketing, labeling, packaging, and/or selling the Gunther Tulip,  
11 (d) negligence for failure to recall the Gunther Tulip, (e)  
12 breach of express and implied warranties, and (f) negligent  
13 misrepresentation. (Id. ¶¶ 57-97.) The case was removed to  
14 federal court on August 18th, 2017. (Docket No. 1.)

15 On August 22, 2017, the JPML issued a conditional  
16 transfer, stating that this case “involve[s] questions of fact  
17 that are common to the actions previously transferred to the  
18 Southern District of Indiana.” (Cook’s Opp’n to Pl.’s Mot. to  
19 Remand (Docket No. 16), Ex. B, Aug. 22, 2017 MDL Conditional  
20 Transfer Order.) Plaintiff has opposed this order.

21 II. Discussion

22 A. Order of Pending Motions

23 As an initial matter, the court must determine which  
24 motion to entertain first. Generally, jurisdiction is a  
25 preliminary matter that should be resolved before all others.  
26 Smith v. Mail Boxes, Etc., 191 F. Supp. 2d 1155, 1157 (E.D. Cal.

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28 <sup>1</sup> Master Case No. 1:14-ml-2570-RLY-TAB.

1 2002) (“[J]urisdictional issues should be resolved before the  
2 court determines if a stay is appropriate.”). However, the  
3 approach changes when deference to an MDL court will further “the  
4 uniformity, consistency, and predictability in litigation that  
5 underlies the MDL system.” Conroy v. Fresh Del Monte Produce  
6 Inc., 325 F. Supp. 2d 1049, 1053 (N.D. Cal. 2004). The MDL court  
7 can resolve a motion to remand when “the motion raises issues  
8 likely to arise in other actions pending in [the consolidated  
9 action].” Id.; see also In re Vioxx Prods. Liab. Litig., 360 F.  
10 Supp. 2d 1352, 1354 (J.P.M.L. 2005) (“[M]otions to remand ... can  
11 be presented to and decided by the transferee judge.”).

12 Several courts, including this one, have applied the  
13 Conroy methodology when considering simultaneous motions to  
14 remand and stay in the MDL context. See, e.g., Beshear v.  
15 Volkswagen Grp. of Am., Inc., Civ. No. 16-cv-27-GFVT, 2016 WL  
16 3040492, at \*2-6 (E.D. Ky. May 25, 2016); Leeson v. Merck & Co.,  
17 Inc., Civ. No. 2:05-2240 WBS PAN, 2006 WL 3230047, at \*2-4 (E.D.  
18 Cal. Jan. 27, 2006). “First, the court should [scrutinize] the  
19 merits of the motion to remand” and consider it in full if “this  
20 preliminary assessment suggests that removal was improper.”  
21 Conroy, 325 F. Supp. 2d at 1053. Second, “if the jurisdictional  
22 issue appears factually or legally difficult, the court should  
23 determine whether identical or similar jurisdictional issues have  
24 been raised in other cases that have been or may be transferred  
25 to the MDL proceeding.” Id. “[I]f the jurisdictional issue is  
26 both difficult and similar or identical to those in cases  
27 transferred or likely to be transferred, the court should stay  
28 the action.” Id.; see also Meyers v. Bayer AG, 143 F. Supp. 2d

1 1044, 1048-49 (E.D. Wis. 2001).

2 Applying this methodology, the court finds that a stay  
3 is proper. First, in light of Cook's diversity jurisdiction  
4 arguments, "removal was not plainly improper." See Leeson, 2006  
5 WL 3230047, at \*3. Federal diversity jurisdiction exists when  
6 the parties are in complete diversity and the amount in  
7 controversy exceeds \$75,000. Matheson v. Progressive Specialty  
8 Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003). Plaintiff  
9 presents no argument regarding the amount in controversy  
10 requirement or the timeliness of Cook's removal, but instead  
11 argues that Frink's California citizenship defeats complete  
12 diversity. However, district courts have discretion under  
13 Federal Rule of Civil Procedure 21 to retain diversity  
14 jurisdiction over a case by dropping a non-diverse party if that  
15 party is not necessary and indispensable to the case under Rule  
16 19. See Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1022  
17 (9th Cir. 2002). A party is "necessary" if: (1) complete relief  
18 cannot be given to existing parties in the party's absence; (2)  
19 disposition in the party's absence may impair the party's ability  
20 to protect its interest in the controversy; or (3) the party's  
21 absence would expose existing parties to substantial risk of  
22 double or inconsistent obligations. See Fed. R. Civ. P. 19(a).  
23 A party is "indispensable" under Rule 19(b) when "in equity and  
24 good conscience" the action should not be allowed to proceed  
25 without that party. Fed. R. Civ. P. 19(b); see also White v.  
26 Univ. Of Cal., 765 F.3d 1010, 1026-28 (9th Cir. 2014).

27 Cook removed this case to federal court on two  
28 independent theories: (1) the theory that Frink should be severed

1 from the case under Federal Rule of Civil Procedure 21; and (2)  
2 fraudulent misjoinder. Frink appears to be neither necessary nor  
3 indispensable to this action. In Temple v. Synthes Corp., the  
4 Supreme Court held that a physician who performed an implant  
5 surgery was not a necessary party to a product liability action  
6 against the medical device manufacturer. 498 U.S. 5 (1990).  
7 Applying this reasoning, Frink is not necessary for the  
8 resolution of plaintiff's product liability claims here.  
9 Pursuant to Rule 19(b), because Frink is not a necessary party,  
10 he cannot be indispensable. See id. at 8 ("Here, no inquiry  
11 under Rule 19(b) is necessary, because the threshold requirements  
12 of Rule 19(a) have not been satisfied.") Accordingly, the  
13 preliminary assessment required by Conroy does not suggest that  
14 removal was improper or that Cook's diversity jurisdiction  
15 arguments are baseless.

16 Second, the jurisdictional issue here is similar to  
17 jurisdictional issues in cases already transferred to the MDL  
18 court. Cook has already removed and sought transfer of twelve  
19 other IVC filter cases on the basis of fraudulent joinder,  
20 including three in the Ninth Circuit.<sup>2</sup> Some of these cases have

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21 <sup>2</sup> See Osorio v. Cook Group Incorporated et al., Civ. No.  
22 5:17-1146 (C.D. Cal.); Berman-Cheung et al. v. Cook Group  
23 Incorporated et al., Civ. No. 5:17-2564 (N.D. Cal.); Kay v.  
24 Regents of the University of California et al., Civ. No. 3:17-  
25 1512 (S.D. Cal.) (remanded without addressing Cook's motion to  
26 stay or the court's power to sever non-diverse parties); Lowther-  
27 Berman v. Cook Incorporated et al., Civ. No. 2:17-3852, (S.D. W.  
28 Va.); Strickland v. Proffitt et al., Civ. No. 3:17-2059 (N.D.  
Tex.); Schmellick v. Cook Incorporated et al., Civ. No. 2:17-  
2640-WB (E.D. Pa.); Pleasant v. Cook Incorporated et al., Civ.  
No. 3:17-1498 (N.D. Tex.); Givney v. Savage et al., Civ. No.  
3:17-01432 (N.D. Tex.); Jewett v. Baxter et al., Civ. No. 5:17-  
5036 (D.S.D.); Lowicki v. Lung et al., Civ. No. 2:17-1615 (D.

1 already been transferred to the MDL.<sup>3</sup> Furthermore, the JPML  
2 routinely issues conditional transfer orders for cases such as  
3 this one, even where a motion to remand is pending. See, e.g.,  
4 In re: Cook Medical, Inc., IVC Filters Marketing, Sales Practices  
5 and Prods. Liab. Litig., MDL No. 2570 (J.P.M.L. Dec. 7, 2016),  
6 (Docket No. 172) (“We have held that a motion for remand alone  
7 generally is an insufficient basis to vacate a conditional  
8 transfer order. Plaintiff can present her motion for remand to  
9 the transferee judge.”). Consequently, “identical or similar  
10 jurisdictional issues have been raised in other cases that have  
11 been or may be transferred to the MDL proceeding.” Conroy, 325  
12 F. Supp. 2d at 1053

13 Further, this case shares “common question[s] of fact”  
14 with other cases already transferred to the MDL court. 28 U.S.C.  
15 § 1407(a). Plaintiff here, like plaintiffs in the MDL action,  
16 claims injuries allegedly arising from the placement of a Cook  
17 Gunther Tulip into plaintiff. Plaintiff’s allegations are nearly  
18 identical to the allegations plaintiffs in all other cases in the  
19 Cook MDL make--that one of Cook’s IVC filters was defectively  
20 designed and that Cook failed to provide adequate warnings about  
21 the filter. See Compl.; c.f. In re Cook Medical, Inc., IVC  
22 Filters Marketing, Sales Practices, and Prod. Liab. Litig., MDL  
23 No. 2570 (Jan. 28, 2015) (ECF No. 213) (Notice of Filing Master  
24 Consolidated Compl. for Individual Claims).

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25 Nev.) Collins, et al. v. Cook Group Incorporated, et al., Civ.  
26 No. 4:16-2140 (E.D. Mo.); Halinski et al. v. Cook Group  
27 Incorporated et al., Civ. No. 4:16-2141 (E.D. Mo.).

28 <sup>3</sup> See, e.g., Berman-Cheung (N.D. Cal), Osoorio (C.D.  
Cal), Jewett, Lowicki, and Schmellick.

1           Because jurisdiction is a threshold issue and the MDL  
2 court has many cases with pending motions to remand, the MDL  
3 court will necessarily need to rule on the motions to remand. The  
4 Conroy methodology suggests that the court should rule upon  
5 defendants' motion to stay.

6           B.    Motion to Stay

7           The power to stay proceedings "is incidental to the  
8 power inherent in every court to control the disposition of the  
9 cases on its docket with economy of time and effort for itself,  
10 for counsel, and for litigants." Landis v. N. Am. Co., 299 U.S.  
11 248, 254 (1936). Moreover, a stay and deference to the MDL court  
12 are particularly appropriate when the parties contest issues that  
13 are "likely to arise in other actions pending" in the  
14 consolidated proceedings. Conroy, 325 F. Supp. 2d at 1053. In  
15 evaluating whether to stay proceedings, the court is concerned  
16 with balancing competing interests and should consider: "(1)  
17 potential prejudice to the non-moving party; (2) hardship and  
18 inequity to the moving party if the action is not stayed; and (3)  
19 the judicial resources that would be saved by avoiding  
20 duplicative litigation if the cases are in fact consolidated."  
21 Rivers v. Walt Disney Co., 980 F. Supp. 1358, 1360 (C.D. Cal.  
22 1997); see also Landis, 299 U.S. at 254-55; CMAX, Inc. v. Hall,  
23 300 F.2d 265, 268 (9th Cir. 1962).

24           First, as to prejudice to plaintiff, plaintiff argues  
25 that a stay will place her case in the MDL court with hundreds of  
26 other cases where she will be unfairly prejudiced by a delay in  
27 proceedings. (Pls.' Opp'n to Cook's Mot. to Stay 10 (Docket No.  
28 11).) The court is aware that there may be some delay or



1 inconvenience to plaintiff if a stay is granted. However, "if  
2 this case is transferred to the MDL, the efficiencies gained  
3 through the MDL will benefit all parties." Lessard v. Volkswagen  
4 Grp. of Am., Inc., Civ. No. 16-754 WMW TNL, 2016 WL 3004631, at  
5 \*2 (D. Minn. May 24, 2016). Granting a stay will not preclude  
6 plaintiff from seeking remand in the MDL court, and plaintiff may  
7 very well benefit from the perspectives of plaintiffs' counsel in  
8 other cases with pending motions to remand. Further, other  
9 courts have stayed cases pending transfer to an MDL court when  
10 "plaintiffs have not demonstrated any prejudice in the event of a  
11 stay except the slight delay in deciding the remand motion."  
12 See, e.g., Med. Soc'y of N.Y. v. Conn. Gen. Corp., 187 F. Supp.  
13 2d 89, 92 (S.D.N.Y. 2001). Moreover, "[w]hile transfer of a  
14 particular action might inconvenience or delay some parties to  
15 that action, such a transfer often is necessary to further the  
16 expeditious resolution of the litigation taken as a whole."  
17 (Cook's Mem. in Supp. of Mot. to Stay, Ex. A, Aug. 1 JPML  
18 Transfer Order).

19 Second, the potential hardship and inequity to Cook  
20 weighs heavily in favor of a stay. If this court considers and  
21 denies plaintiff's motion to remand, plaintiff may have a second  
22 chance before the MDL court if the case is subsequently  
23 transferred because the MDL court will necessarily need to  
24 address motions to remand in the several cases already  
25 transferred. "[Defendants] should not have to defend against the  
26 same motion repeatedly brought by the same plaintiff." Leeson,  
27 2006 WL 3230047, at \*4. Conversely, if this court determines  
28 that defendants improperly removed this case but the MDL court

1 holds removal was proper in similar cases, defendants will be  
2 stuck with a decision in this case that is inconsistent with the  
3 majority of other similar cases. See A.D. v. Pfizer, Inc., Civ.  
4 No. 13-2466 JST, 2013 WL 3889159, at \*2 (N.D. Cal. July 26, 2013)  
5 (“On the other hand, Defendants would face the risk of  
6 unnecessary proceedings and inconsistent rulings on recurring  
7 questions of law and fact if the case is not stayed.”). Yet  
8 defendants would not be able to appeal an order granting remand.  
9 See Kunzi v. Pan Am. World Airways, Inc., 833 F.2d 1291, 1293  
10 (9th Cir. 1987) (“Remand orders ... are immune from appellate  
11 review ... even if the district court’s jurisdictional decision  
12 was erroneous.”). Denying a stay will also require defendants to  
13 potentially respond to any other pretrial matters raised by  
14 plaintiffs that the MDL court could decide. Each pretrial matter  
15 adjudicated by this court increases the risk of inconsistent  
16 rulings and prejudices defendants’ ability to defend themselves  
17 in the actions with similar allegations and issues. See Pfizer,  
18 2013 WL 3889159, at \*2.

19 Third, judicial economy weighs in favor of a stay. The  
20 goal of the MDL court is to coordinate pretrial management of  
21 actions with common facts. See 28 U.S.C. § 1407. A stay pending  
22 the JPML's decision to consolidate this action in the MDL court  
23 increases efficiency and consistency, especially “when the  
24 pending motions raise issues likely to be raised in other cases.”  
25 Manual for Complex Litigation (Fourth) § 22.35; see Meyers, 143  
26 F. Supp. 2d at 1053 (“[J]udicial economy clearly favors a stay”  
27 when the “other cases present the same or a similar issue.”). “A  
28 majority of courts have concluded that it is often appropriate to

1 stay preliminary pretrial proceedings while a motion to transfer  
2 and consolidate is pending with the MDL Panel because of the  
3 judicial resources that are conserved." Rivers, 980 F. Supp. at  
4 1362. Absent a stay, "this Court will have needlessly expended  
5 its energies familiarizing itself with the intricacies of a case  
6 that would be heard by another judge." Id. at 1360.

7 If this case is transferred to the MDL court, the MDL  
8 court will potentially be in a better position to address  
9 plaintiff's motion to remand and any other pretrial matters.  
10 "Given the fact that hundreds of similar cases have been  
11 transferred already, and the likelihood of many more cases being  
12 in a similar procedural posture, the interests of judicial  
13 economy and the threat of inconsistent rulings outweighs any  
14 potential prejudice to the [plaintiff]." Beshear, 2016 WL  
15 3040492, at \*8. Accordingly, the court will grant defendants'  
16 motion to stay the proceedings pending transfer of this action to  
17 the MDL court.

18 IT IS THEREFORE ORDERED that defendants' Motion to stay  
19 be, and the same hereby is, GRANTED.

20 IT IS FURTHER ORDERED that plaintiff's Motion to remand  
21 be, and the same hereby is, DENIED WITHOUT PREJUDICE.

22 Dated: October 31, 2017



23 **WILLIAM B. SHUBB**  
24 **UNITED STATES DISTRICT JUDGE**