IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ALBERT LEWIS, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:14-cv-0004
	)	
KANSAS CITY CHIEFS FOOTBALL CLUB, INC.	)	
	)	
	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION DEFENDANT KANSAS CITY CHIEFS FOOTBALL CLUB, INC.'S MOTION TO STAY PROCEEDINGS

Kenneth B. McClain
Lauren E. McClain
Timothy J. Kingsbury
HUMPHREY, FARRINGTON & MCCLAIN
221 West Lexington, Suite 400
Independence, MO 64051
Telephone: (816) 836-5050
Facsimile: (816) 836-8966

Paul D. Anderson
John Klamann
Andrew Schermerhorn
THE KLAMANN LAW FIRM
929 Walnut Street, Suite 800
Kansas City, MO 64105
Telephone: (816) 421-2626
Facsimile: (816) 421-8686

Wm. Dirk Vandever
THE POPHAM LAW FIRM
712 Broadway, Suite 100
Kansas City, Missouri
Telephone: (816) 221-2288
Facsimile: (816) 221-3999

PRELIMINARY STATEMENT

Plaintiffs filed their First Amended Petition on December 21, 2013, in the Circuit Court of Jackson County, Missouri. Defendant Kansas City Chiefs Football Club, Inc. (hereinafter "Defendant" or "Chiefs") removed the case to this Court on January 2, 2014, alleging, without addressing 28.U.S.C. §1445(c), that Plaintiffs' claims involve a federal question. Defendant thereafter notified the Judicial Panel on Multidistrict Litigation (hereinafter "JPML") of the pendency of this case in this Court, and on January 8, 2014, the JPML entered a Conditional Transfer Order, conditionally transferring this case to the Eastern District of Pennsylvania. On January 3, 2014, Defendant filed a Motion to Stay all proceedings in this Court, (Doc. No. 8), and specifically seeks to stay the Court's decision on Plaintiffs' Motion to Remand. (*Id.*at p. 11). Plaintiffs oppose the Motion to Stay and simultaneously file their Motion to Remand.

In its Suggestions in Support of its Motion to Stay, (Doc. No. 9), Defendant insists that Plaintiffs' causes of action, and the facts and legal issues pertaining thereto, are no different than those raised in the numerous actions previously transferred and consolidated in MDL No. 2323. While at first glance, Plaintiffs' causes of action seemingly share some factual issues in common with those actions already centralized in the United States District Court for the Eastern District of Pennsylvania (i.e., it relates to concussive injuries sustained by athletes playing professional football), upon examination, it is quite obviously unlike the previously consolidated cases, sharing almost *no* factual issues with the those cases comprising MDL No. 2323. Indeed, the legal and factual issues raised in this case, *especially as they pertain to Federal jurisdiction*, are *so* dissimilar from those raised by the consolidated cases that identification of this case as a potential tag-along is dubious if not unequivocally erroneous.

In this case, Plaintiffs have sued their former employer, Defendant Chiefs for causes of action which arise under Missouri's Workers' Compensation Law. Because Plaintiffs' claims arise under Missouri's Workers' Compensation laws, they are indisputably "nonremovable" pursuant to 28.U.S.C. §1445(c). Thus, contrary to the assertions made in its Suggestions in Support of its Motion to Stay, this case, unlike all others pending before the Eastern District of Pennsylvania, ***cannot*** be preempted by Section 301 of the Labor Management Relations Act ("LMRA"). Indeed, section 1445(c) ***prevents*** removal of cases, such as this, "arising under" state workers' compensation laws. So as to dissuade the kind of improvident removal as was made here, 28 U.S.C. § 1447(c) provides that an order "remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Plaintiffs therefore respectfully request that the case be promptly remanded in accordance with § 1445(c) and that the Court award Plaintiffs all costs and expenses, including attorney fees, incurred as a result of the removal of this Action.

Ignoring the propriety of its removal of this Action and the implication of § 1445(c), Defendant argues that a stay should be entered to stave off a decision regarding preemption under section 301 of the LMRA. Even assuming, *arguendo*, that this Action was removable to Federal Court, Defendant misapprehends Plaintiffs' causes of action. Plaintiffs' claims are based ***exclusively*** on Missouri law that proscribes conduct and establishes rights and obligations independent of any labor contract.[1] Since § 301 says nothing about the content or validity of

[1] In this action, unlike each of those cited by Defendant, the core question is whether Plaintiffs' employer failed to discharge five specific duties relevant to safety that are imposed on every employer in the State of Missouri:

> (1) to provide a safe workplace; (2) to provide safe equipment in the workplace; (3) to warn employees about the existence of dangers of which the employees could not reasonably be expected to be aware; (4) to provide a sufficient number

state laws that proscribe employer conduct or establish employer obligations, independent of a labor contract, § 301 cannot possibly serve as the basis for federal jurisdiction. Put simply, § 301 does not apply. Therefore, no decision by the Eastern District of Pennsylvania regarding preemption under § 301, whether made in the near or distant future, will have an impact on this case.

Defendant further argues that absent a stay, the Chiefs "may be required to duplicate in this Court the efforts that they are all but certain to undertake in MDL 2323." (Doc. 9 at p. 2). At the outset, Defendant is reminded that it is ***not*** a party in MDL No. 2323. Moreover, discovery proceeding in MDL No. 2323 have been stayed indefinitely, eliminating the risk of duplication in discovery. Even more, where the facts are such that duplication is unlikely given the divergent theories of liability and dissimilar defendants, as in this case, the risk of duplication is entirely absent altogether.

Irrespective of the possibilities that Defendant may be compelled to participate as a non-party in MDL No. 2323, there is no doubt that at this juncture, this Court has the sole authority to consider and decide Plaintiffs' Motion to Remand. *See State of Missouri ex rel. Nixon v. Mylan Labs., Inc.,* 4:06CV603 HEA, 2006 WL 1459772 at 1-2 (E.D. Mo. May 23, 2006); Rule 2.1 of the Judicial Panel on Multidistrict Litigation Rules. Since *this* Court is best suited to decide the propriety of Defendant's removal and since staying this action will unduly prejudice Plaintiffs and serve only to delay the progression of justice, Plaintiffs respectfully request that this Court deny Defendant's Motion to Stay and rule on Plaintiffs' simultaneously filed Motion to Remand.

> of competent fellow employees; and (5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety.

Hansen v. Ritter, 375 S.W.3d 201, 208-09 (Mo. Ct. App. 2012), reh'g and/or transfer denied (July 31, 2012), transfer denied (Sept. 25, 2012) (internal quotation and citations omitted).

ARGUMENT

I. Standard for Granting a Motion to Stay

While a district court has the inherent power to stay its proceedings, *Johnson v. KFC Corp*., 2007 WL 3376750 at 2 (W.D.Mo. Nov. 7, 2007), Plaintiffs submit that this Court must first confront whether removal was proper in the first place. If not, none of the objectives of a stay offered by Defendant in support of its Motion will be realized. Indeed, discovery, rulings and schedules, litigation costs, and the time and effort of all involved will all inevitably accrue, there is no doubt; only they will come to pass after a long, indefinite and unwarranted delay. Where a case is "nonremovable" in the first instance, such as here, the issuance of a stay operates solely as the means by which to effectuate an unjust delay and would be an affront to the limited power granted our Nation's Federal Courts by the Constitution and Congress.

Even assuming, *arguendo*, that this case *was* removable, Defendant nevertheless "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis v. N. Am. Co*., 299 U.S. 248, 255, 57 S. Ct. 163, 166, 81 L. Ed. 153 (1936). Indeed, "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* Moreover, "a court need not automatically stay a case merely because a party has moved the MDL for transfer and consolidation." *Johnson*, 2007 WL 3376750 at 2 (*citing Rivers v. Walt Disney Co.*, 980 F.Supp. 1358, 1360 (C.D.Cal 1997)). Even where a case has been identified as a potential "tag-along," the Court must engage in an analysis of three factors to determine whether a stay is appropriate: (1) potential prejudice to the non-moving party; (2) hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding

duplicative litigation if the cases are in fact consolidated. *See Buie v. Blue Cross & Blue Shield of Kansas City, Inc.*, 05-0534-CV-W-FJG, 2005 WL 2218461 (W.D. Mo. Sept. 13, 2005). These factors all weigh heavily in favor of a denial of Defendant's Motion to Stay.

II. This Action is Nonremovable and Must be Remanded Forthwith

Defendant argues that a stay will result in increased judicial efficiency and avoid possible inconsistent rulings. Defendant's argument wholly relies on a key fallacy: that Plaintiffs' claims are similar to those alleged in the cases currently pending in MDL No. 2323. Defendant fails to appreciate that Plaintiffs' claims are distinctly different from those that have previously been transferred, including the paramount issue of removability.

Whereas in all previous cases transferred to MDL No. 2323, the issue of federal jurisdiction is an open question, in this case, 28.U.S.C. §1445(c) unquestionably resolves the issue. This case, unlike all others before it which have been transferred, is indisputably "Nonremovable." 28.U.S.C. §1445(c). That §1445(c) has never before been raised in cases previously transferred to MDL No. 2323 reveals the uniqueness of this case. This action arises under Missouri's Workers' Compensation Law and involves completely different parties than those which have been consolidated. Without the identity of issues and parties, Defendant's assertion that a stay will serve best the interest of judicial economy and justice dissolves.

Thus, as a threshold issue, it must first be determined whether *any* federal district court may exercise jurisdiction over this case. As is explained more fully in Plaintiffs' Motion to Remand which is incorporated as if set forth fully herein, Defendant has improperly removed Plaintiffs' action to this Court. Indeed, even a cursory review of Plaintiffs' claims reveals that this action belongs solely in Missouri's civil courts.

Without doubt, Plaintiffs' claims arise under Missouri Workers' Compensation Law. Indeed, Plaintiffs' claims allege that they contracted an occupational disease in the State of Missouri while employed by Defendant and/or contracted an occupational disease outside the State of Missouri while under contract of employment made in Missouri. Missouri's Workers' Compensation Law unambiguously states that such claims necessarily arise out of Missouri Workers' Compensation Law. In relevant part, section 287.110(2), entitled "Scope of chapter as to injuries and diseases covered," provides:

> This chapter ***shall apply*** **to** ***all*** injuries received and ***occupational diseases*** contracted in this state, regardless of where the contract of employment was made, and also to ***all*** injuries received and ***occupational diseases*** contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to ***all*** injuries received and ***occupational diseases*** contracted outside of this state where the employee's employment was principally localized in this state within thirteen calendar weeks of the injury or diagnosis of the occupational disease.

R.S.Mo. 287.110(2) (emphasis added).[2] Missouri courts have expressly endorsed that all occupational disease claims arise out of Missouri's Workers' Compensation Law. *See e.g., Amesquita v. Gilster-Mary Lee Corp*., 408 S.W.3d 293, 301 (Mo. Ct. App. 2013) ("Section 287.110 broadly states that: 'This chapter shall apply to all injuries received *and occupational diseases* contracted in this state....' ") (emphasis in the original); *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 28-29 (Mo. Ct. App. 2011)(observing that "repeat-exposure occupational disease claims are covered by and compensable under the Act"). *See also Francis v. Noranda Aluminum, Inc*., 1:12CV0104 JAR, 2013 WL 1090300 (E.D. Mo. Mar. 15, 2013) (observing that the Missouri legislature "expand[ed] the remedies available to victims of occupational injuries and allow[s] them to pursue their claims in circuit court.").

Section 1445(c) clearly states:

[2] Hereinafter, all statutory references, in this section, are to RSMo. 2005.

> … a civil action in any State ***arising under the workmen's compensation laws of such State may not be removed*** to any district court of the United States.

See 28 U.S.C. §1445(c) (emphases added). In determining whether causes of action are removable, Federal courts have consistently held that when claims 'arise under' Missouri's Workers' Compensation law, as they clearly do in this case, they are non-removable. *See Humphrey v. Sequentia,* 58 F.3d 1238, 1245 (8th Cir. 1995); *see also Johnson v. Agco,* 159 F.3d 1114 (8th Cir. 1998). Since Plaintiffs' claims arise under Missouri Workers' Compensation Law, they are "nonremovable" notwithstanding the existence of diversity or a federal question. 28.U.S.C. §1445(c). Thus, this case should be remanded forthwith.

III. Resolution of the Jurisdictional Issue is Best Resolved by a Missouri Court.

Insofar as the issue is not disposed summarily by application of § 1445(c), it remains that the jurisdictional issues raised in this case require analysis of case-specific facts and the application of Missouri law. The uniqueness of this case, arising as it does from Plaintiffs' employment with the Chiefs in the State of Missouri, has never been encountered and is not likely to ever be encountered by the Eastern District of Pennsylvania. As such, the Court presently presiding over MDL No. 2323 is unlikely to have *any* expertise in resolving this case. This Court, however, is perfectly suited to decide the jurisdictional issue.

Indeed, in prior cases involving the application of Missouri law, Federal District Courts have repeatedly observed that resolution by the district court of a motion to remand ***promotes*** judicial economy since a U.S. District Court in Missouri is in a much better position to determine the law of the Eighth Circuit and of its forum state. *See Galati v. Eli Lilly and Co.,* 2005 WL 3533387 (W.D. Mo., 2005).

In *Galati*, the Honorable Judge Laughrey, denied a motion to stay while the case was pending transfer to an MDL. *Id.* In denying the motion to stay, Judge Laughrey expressly

rejected the argument that the resolution of the motion to remand ought to be resolved by the Court presiding over the MDL. *Id.* As that Court aptly put it:

> Far from fostering judicial economy, consolidation of motions to remand in the MDL court would require the U.S. District Court for the Eastern District of New York to consider not only the malpractice law of the several states, but also the current law on fraudulent joinder from the several Circuit Courts of Appeals. **A U.S. District Court in Missouri is in a much better position to determine the law of the Eighth Circuit and of its forum state, both of which it routinely applies in other cases.**

Id. (emphasis added). Judge Laughrey further reasoned:

> If this Court finds joinder is fraudulent, it will sever any non-diverse defendant physician before transfer, freeing the MDL court from delving into myriad jurisdictional issues involving Missouri state law. If this Court finds that the non-diverse physicians have not been fraudulently joined, it will remand the case to the only court with proper jurisdiction. In either event, the efficient resolution of other issues before the MDL court is advanced. Finding greater economy in the immediate resolution of the fraudulent joinder issue, this Court will deny Eli Lilly's Motion to Stay and rule on the pending Motion to Remand.

Id at 2.

Similarly here, it would be inefficient use of judicial resources for the Eastern District of Pennsylvania to analyze Missouri law in order to determine whether this case should be remanded to a Missouri state court. Additionally, a decision to remand Plaintiffs' case on the basis of Missouri law or § 1445(c) does not pose a threat of inconsistent rulings since the issue can only be raised by claimants in Missouri (which is presumably the only State that provides occupational-disease claimants a judicial remedy against their employers). Therefore, in the interest of judicial economy, Defendant's Motion to Stay should be denied and this Court should proceed in granting Plaintiffs' Motion to Remand.

IV. Prejudice to Plaintiffs Exceeds any Hardship to Defendant.

In addition to the factors considered above, in deciding the propriety of a stay, the Court should also consider "the *potential* prejudice to the non-moving party" and "the hardship and inequity to the moving party if the action is not stayed." *See Buie v. Blue Cross & Blue Shield of Kansas City, Inc.*, 05-0534-CV-W-FJG, 2005 WL 2218461 (W.D. Mo. Sept. 13, 2005)(emphasis added). Both of these factors weigh overwhelmingly against Defendant's requested stay.

A. The Potential Prejudice to Plaintiffs is Substantial.

The burden imposed on Plaintiffs if this case is stayed is immeasurably greater than the burden to Defendant if a stay is denied. At the start, Plaintiffs' Motion to Remand, based in part on Congress' unambiguous intent to exclude this case from Federal jurisdiction, will be indefinitely put off while the NFL finalizes a proposed settlement. Any finalized settlement is likely to take years to get approval from the Court, and even then, there is no indication that Plaintiffs will be class members entitled to recover. If a settlement is not ultimately reached, the issues unique to this case will be determined only after the Pennsylvania Court addresses all currently pending Motions to Remand, a feat which could take years.

Having a dispute resolved in a timely manner is fundamental to the United State Civil Justice System. This is reflected in Federal Rule 1 of Civil Procedure which dictates that cases be "administered to secure the just, *speedy*, and inexpensive determination of every action and proceeding." FRCP 1. (emphasis added). Staying this action would effectively deny Plaintiffs their right to have their case heard and determined in a reasonable time.

Defendant's suggestion that "if anything Plaintiffs will benefit from having the transferee court-which is already familiar with these issues decide any such pre-trial motions" is disingenuous. (Doc. 9 at p. 15). As explained above, the MDL court is not likely familiar with

Plaintiffs' claims which present different issues of fact and law than the cases previously transferred to MDL No. 2323. In reality, transfer to the MDL effectively casts Plaintiffs' Motion to Remand into legal purgatory while Plaintiffs' occupational injuries, which include loss of memory, continue to get worse. Justice demands more.

Though Defendant claims a stay would merely preserve the status quo, where, as in this case, there clearly is no Federal jurisdiction, the pendency of this action in Federal Court is not the status quo, it is an abusive legal maneuver which will result in Plaintiffs being effectively denied their constitutional right to have timely access to justice.

B. The Hardship, if any, that is Imposed on Defendant is Minimal.

In stark contrast to the prejudice suffered by Plaintiffs if a stay is granted, any prejudice Defendant might suffer would be nominal and, at worst, a minor inconvenience. As previously explained, Defendant is *not* a party to MDL 2323. Thus, Defendant will be required to brief and argue the entirely unique factual and legal issues contained in Plaintiffs' Motion to Remand whether in this Court or in Pennsylvania. The only substantive difference would be the inevitable postponement of this action should the requested stay be granted. Having to brief a motion sooner rather than later does not constitute the kind of hardship visited upon parties that should be considered and is, in fact, contrary to judicial economy.

Defendant claims also that it will suffer hardship as the result of a lack of consistency and duplicative discovery. Defendant does not disclose, however, that discovery in the consolidated cases has been indefinitely stayed. *In re: Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, Doc. 4 (E.D.P.A. filed March 6, 2012). Thus, the risk of duplication has been eliminated. Even more, where the facts are such that duplication is unlikely

given the divergent theories of liability and dissimilar defendants, as in this case, the risk of duplication is entirely absent.

Moreover, even if, assuming *arguendo*, that discovery was allowed to proceed in the consolidated action, the risk of duplication is nevertheless nonexistent. Plaintiffs in this case have identified as the sole defendant their employer, the Kansas City Chiefs. Therefore, discovery in this case will be confined to ascertaining the extent to which the Chiefs failed to discharge the specific duties relevant to safety that are imposed on it as an employer in the State of Missouri. The consolidated cases, on the other hand, seek to establish that the NFL, a trade organization that did not employ any of the plaintiffs in the consolidated action, knew of, but failed to warn and protect players against the long-term effects associated with concussions and failed to regulate the sport so as to minimize those risks. *See In re: Nat'l Football League Players' Concussion Injury Litig.*, 842 F.Supp. 2d 1387 (J.P.M.L. 2012). If discovery is allowed to proceed in the consolidated action, it would thus be designed to determine first, the extent to which the *NFL* owed a duty to plaintiffs; and second, the extent to which the *NFL* knew of, but concealed the risks of concussive-related injuries. The significant and convoluted issues involving the NFL and the potential implications of a collective bargaining agreement, whether in effect or not, are simply not an issue in this case.

Defendant's argument that it "undoubtedly will be subject to significant, burdensome discovery requests related to those injuries, team policies and procedures regarding medical care and related issues in the event that the MDL 2323 settlement is not effectuated" is equally unavailing. (Doc. 9 at p. 14). Again, though seemingly lost on Defendant, it and the NFL are not the same party. Try as it might, Defendant cannot escape that it, unlike the NFL, was the Plaintiffs' employer owing duties and obligations quite unlike those allegedly owed by the NFL

and others. Thus, even if the Chiefs were forced to participate in discovery in the MDL as a non-party, the likelihood that such discovery would be duplicative of that which would be conducted in this case is entirely speculative and likely false.

IV. CONCLUSION

This Court should deny Defendant's Motion to Stay. It would be a more efficient use of judicial resources for this Court to consider and determine Plaintiffs' Motion to Remand. In addition, the burden to Defendant if the stay was denied is significantly less when compared to the prejudice Plaintiffs would sustain if the stay was granted.

WHEREFORE, Plaintiffs move this Court to DENY Defendant's Motion to Stay and for such further orders as are just and proper.

Respectfully submitted, this 21st day of January, 2014.

THE KLAMANN LAW FIRM, P.A.

/s/ Andrew Schermerhorn

John M. Klamann, MO #29335
Andrew Schermerhorn, MO #62101
Paul D. Anderson, MO #65354
929 Walnut Street, Suite 800
Kansas City, MO 64106
Telephone: (816) 421-2626
Facsimile: (816) 421-8686
jklamann@klamannlaw.com
aschermerhorn@klamannlaw.com
panderson@klamannlaw.com

HUMPHREY, FARRINGTON & McCLAIN, P.C.
Kenneth B. McClain, MO #32430
Lauren E. McClain, MO #65016
Timothy J. Kingsbury, MO #64958
221 West Lexington, Suite 400
Independence, MO 64051
Telephone: (816) 836-5050
Facsimile: (816) 836-8966
kbm@hfmlegal.com
lem@hfmlegal.com

tjk@hfmlegal.com

THE POPHAM LAW FIRM, P.C.
Wm. Dirk Vandever, MO #24463
712 Broadway, Suite 100
Kansas City, MO 64105
Telephone: (816) 221-2288
Facsimile: (816) 221-3999
dvandever@pophamlaw.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Lee M. Baty, Esq.
Theresa A. Otto, Esq.
W. Christopher Hillman, Esq.
BATY, HOLM, NUMRICH & OTTO P.C.
4600 Madison Ave., Suite 210
Kansas City, MO 64112
lbaty@batyholm.com
totto@batyholm.com
chillman@batyholm.com
Telephone: (816) 531-7200
Facsimile: (816) 531-7201

Brad S. Karp
Bruce Birenboim
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
bkarp@paulweiss.com
bbirenboim@paulweiss.com
Telephone: (212) 373-300

ATTORNEYS FOR DEFENDANT