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No Motion Left Behind: Adjudicating Motions to Remand in Cases Snap Removed to MDLs

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No Motion Left Behind: Adjudicating Motions to Remand in Cases Snap Removed to MDLs

Cover Page Footnote

J.D. Candidate, 2023, University of Georgia School of Law; B.S., 2017, Georgetown University

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NO MOTION LEFT BEHIND: ADJUDICATING MOTIONS TO REMAND IN CASES SNAP REMOVED TO MDLS

Millie Price[*]

Under the current wording of the federal removal statute, 28 U.S.C. § 1441, defendants in some jurisdictions may remove a state action to federal court before an in-state defendant is served. These defendants are taking advantage of the forum defendant rule in 28 U.S.C. § 1441(b)(2). This phenomenon has been coined "snap removals." Three federal courts of appeals allow such removals, whereas many federal district courts say it is improper. The "home" district court might not be the end point for the case, though. Corporate defendants often ask for the case to be transferred to a pending Multidistrict Litigation (MDL) that may be in a district court across the country. Once granted, the plaintiffs will not only find themselves in federal court but also will see their cases consolidated with possibly thousands of others in the MDL. Plaintiffs will likely file motions to remand in the MDL, but as this Note shows, those motions are often left pending indefinitely by the MDL judge. This Note argues that because the current MDL practice provides many problems for individual plaintiffs, special attention should be given to snap removals that end up in an MDL. Further, this Note argues that rulings on motions to remand should be mandatory to ensure that snap-removed plaintiffs have an opportunity to be heard.

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I. INTRODUCTION

Defendants often remove an action from state court to federal court when the case could have been brought in federal court in the first place, such as when there is complete diversity between parties.[1] Diversity jurisdiction "serves to protect out-of-state parties from the perceived prejudices against them in state courts."[2] Notably, the right to removal is not without limitations: the forum defendant rule limits this right if one of the defendants is sued in their home state.[3] If the right to removal protects out-of-state defendants from biased litigation, this issue disappears when the defendants are sued in their home state.[4]

Defendants may take advantage of the forum defendant rule's wording by removing to federal court before the in-state defendant is properly joined and served, a process called "snap removal."[5] Under the snap removal loophole, a case may end up in federal court even though one (or more) of the defendants are "at home," especially because corporate defendants often prefer federal court.[6]

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[1] *See* 28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."); *see also* 28 U.S.C. § 1332(a) (stating that the district courts have original jurisdiction over any civil action "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between" citizens that are not from the same state).

[2] Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. CIN. L. REV. 541, 547 (2018) (stating that federal courts should have jurisdiction over diversity cases because federal courts are more "likely to be impartial between the different States and their citizens").

[3] *See* 28 U.S.C. § 1441(b)(2) ("A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

[4] *See* Nannery, *supra* note 2, at 547 ("The need for protection from potential local bias is absent when a defendant is a citizen of the state in which the case is brought.").

[5] *See* Tex. Brine Co. v. Am. Arb. Ass'n, Inc., 955 F.3d 482, 485 (5th Cir. 2020) (explaining the process of snap removal in the context of the forum defendant rule).

[6] *See, e.g.*, Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 703 (2d Cir. 2019) (explaining that the plaintiff sued defendants Bristol Myers Squibb and Pfizer in defendants' home state of Delaware but defendants removed before they were properly joined and served); *see also* Nannery, *supra* note 2, at 561 (explaining that defendants "prefer consolidated treatment of [their] cases in a federal forum").

Many scholars have examined the snap removal phenomenon,[7] but none has looked at it solely in connection with multidistrict litigation (MDL). Also, while three federal courts of appeals have found snap removals proper under the plain language of the forum defendant rule,[8] the debate is still ongoing and widespread within the district courts.[9]

Imagine a plaintiff sues Purdue Pharma, among other defendants, in a New Mexico state court. Purdue Pharma monitors the electronic state dockets and sees the suit filed. Purdue immediately files a notice of removal before an in-state co-defendant is joined. Then, once in federal court, Purdue asks to be transferred across the country to the Opiate MDL, a consolidation of 3,061 cases in the Northern District of Ohio.[10] After this request is granted, the plaintiff now finds themselves in a federal court across the country alongside thousands of other cases and in front of a judge who has admitted that he does not like ruling on motions to remand.[11] The plaintiff will likely file a motion to remand arguing that removal was improper under the forum defendant rule, but that motion may

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[7] For recent discussions of snap removals, see Nannery, *supra* note 2, at 575–76; Thomas O. Main, Jeffrey W. Stempel & David McClure, *The Elastics of Snap Removal: An Empirical Case Study of Textualism*, 69 CLEV. ST. L. REV. 289, 298 (2021); and Adam B. Sopko, Swift *Removal*, 13 FED. CTS. L. REV. 1, 61 (2021).

[8] *See* Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 153 (3d Cir. 2018) (finding snap removals proper under the removal statute in part because it "does not defy rationality or render the statute nonsensical or superfluous"); *Gibbons*, 919 F.3d at 707 ("Put simply, the result here—that a home-state defendant may in limited circumstances remove actions filed in state court on the basis of diversity of citizenship—is authorized by the text of Section 1441(b)(2) and is neither absurd nor fundamentally unfair."); *Tex. Brine Co.*, 955 F.3d at 487 ("A non-forum defendant may remove an otherwise removable case even when a named defendant who has yet to be 'properly joined and served' is a citizen of the forum state.").

[9] *Compare, e.g.*, Delaughder v. Colonial Pipeline Co., 360 F. Supp. 3d 1372, 1381 (N.D. Ga. 2018) (granting a motion to remand because "[w]hile [defendant] found a possible avenue to take away plaintiff's power to decide the forum for this litigation, the Court cannot overlook the clear gamesmanship present in this case"); *with* Doe v. Daversa Partners, No. 20-cv-3759, 2021 WL 736734, at *3 (D.D.C. Feb. 25, 2021) (finding that "the plain text of the applicable statute governs and permits" snap removals).

[10] U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (2022) [hereinafter MDL DISTRIBUTION REPORT], https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-February-15-2022.pdf.

[11] *See infra* Part IV.

stay pending for years. This Note argues that MDL judges should rule on motions to remand, especially ones about snap removal, because plaintiffs deserve the opportunity to argue the impropriety of snap removals even if the MDL judges ultimately deny their motions.

Once consolidated in front of an MDL judge, "few cases ever return home, and the MDL's gravitational pull over often thousands of cases demolishes all the normal expectations of individual process and federalism."[12] The plaintiff who filed individually in state court has been dragged into litigation with thousands of other cases in a federal district court across the country. Part II of this Note provides an overview of MDL and examines the problems with the current MDL practice. Part III then explains the snap removal phenomenon and details how it often combines with MDLs. Part IV introduces the Opiate MDL. Part V shows that defendants are snap removing into MDLs and explains why MDL judges should rule on plaintiffs' motions to remand. Part V also proposes three related reforms and addresses potential counterarguments.

II. MULTIDISTRICT LITIGATION

MDL is the consolidation of hundreds, often thousands, of individual cases involving the same questions and similar claims in front of one federal district court judge.[13] Congress created MDLs by statute in 1968, enacting 28 U.S.C. § 1407 to promote efficiency in litigation by bringing all similar cases together in one district for more cohesive resolution.[14] Congress hoped that § 1407 would

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[12] Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 4 (2021).

[13] *See* Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. ONLINE 85, 93–94 (2018) (stating that 40% of pending civil cases in the federal docket are in MDLs and that MDLs create "ideal conditions for resolution: a single decisionmaker who can gather all involved parties in a single courtroom").

[14] *See id.* at 87 ("The basic idea [of MDLs] is that it is more efficient to conduct pretrial proceedings in cases involving the same questions only one time and before only one judge, rather than over and over again before many."); Daniel A. Richards, Note, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 314 (2009) (noting that Congress "believed that a truly effective coordinating body would have the power to issue binding orders with respect to case management decisions, and to consolidate proceedings in a single district court for pretrial

"provide centralized management under court supervision of pretrial proceedings of multidistrict litigation."[15] More than half a century later, as of February 2022, there are 424,720 actions pending in 185 MDLs across forty-five federal districts.[16] MDLs range from the most common products liability cases to less frequent antitrust, sales practices, intellectual property, and common disaster cases.[17]

A. FROM ONE TO 1,000

MDL consolidates an unlimited amount of separately filed cases across the country under one federal judge.[18] Consolidation of thousands of cases is a big decision, so in § 1407 Congress created the Judicial Panel on Multidistrict Litigation (JPML) to determine "[w]hen civil actions involving one or more common questions of fact are pending in different districts" and should thus be consolidated in front of one district court judge.[19] The JPML "consist[s] of seven circuit and district judges designated . . . by the Chief Justice of the United States."[20]

Specifically, these seven judges determine whether the transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[21] Section 1407 lays out two routes to MDL: either (1) the JPML transfers the case, or (2) a party to the case files a motion to the JPML asking for

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proceedings," becoming the origins of the MDL system). Specifically, Congress responded to the success of the consolidation of thousands of cases against electrical equipment manufacturers for antitrust law violations. *See* H.R. REP. NO. 90-1130, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899 (explaining that more than 1,800 actions were filed in thirty-three federal district courts and the ensuing consolidation was successful because all cases were closed).

[15] H.R. REP. NO. 90-1130, *supra* note 14, at 2.

[16] MDL DISTRIBUTION REPORT, *supra* note 10.

[17] *See* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT – DOCKET TYPE SUMMARY, (2022), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-February-15-2022.pdf (noting that 61 out of the total 185 active MDLs, or about one-third, are products liability related, 47 relate to antitrust, 21 to sales practices, 8 to intellectual property, and 3 to common disaster).

[18] *See* MDL DISTRIBUTION REPORT, *supra* note 10 (providing that up to thousands of cases may be in an MDL at one time).

[19] 28 U.S.C. § 1407(a).

[20] *Id.* § 1407(d).

[21] *Id.* § 1407(a).

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transfer to the MDL court.[22] Once transferred, a case joins what is often hundreds, and sometimes thousands, of similar actions before one district court judge who could be across the country.[23] Once in the MDL court, the plaintiff's counsel is no longer in control of the individual's case because MDL judges appoint a group of lead plaintiffs' counsel to manage the case, replacing the individual attorneys' roles.[24]

In theory, each individual case should only be in the MDL for pretrial proceedings.[25] The MDL statute provides that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred."[26] Therefore, at the end of pretrial proceedings, an individual case should return to its initial district with its original plaintiff's counsel back in charge.[27]

B. PROBLEMS WITH THE CURRENT MDL SYSTEM

Many scholars have pointed out a number of problems in the current MDL practice, suggesting why individual plaintiffs often prefer to stay away from MDL.[28] First, if the court awards a plaintiff a money judgment while in the MDL, the lead plaintiff's counsel will receive a portion of the settlement, taking away a percentage from

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[22] *Id.* § 1407(c)(i)–(ii).

[23] *See* Gluck & Burch, *supra* note 12, at 13 ("Cases transferred into the MDL often come from around the country . . . ."); MDL DISTRIBUTION REPORT, *supra* note 10 (showing the number of individual cases pending in one MDL).

[24] *See* Gluck & Burch, *supra* note 12, at 13 ("Then MDL judges appoint plaintiffs' leadership. . . . Plaintiffs themselves have no say in who the judge chooses.").

[25] *See* 28 U.S.C. § 1407(a) (providing that similar actions pending in different districts "may be transferred to any district for coordinated or consolidated pretrial proceedings").

[26] *Id.*

[27] *See* Gluck & Burch, *supra* note 12, at 13 ("[Plaintiffs] regain control only in the unlikely event of remand to their home jurisdictions.").

[28] *See, e.g.*, George M. Fleming & Jessica Kasischke, *MDL Practice: Avoiding the Black Hole*, 56 S. TEX. L. REV. 71, 76 (2014) (noting that MDL does not follow the obligation of remand and explaining that "[t]he actual practice is very different from the design envisioned by Congress"); Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014) (contending that MDL practice differs from the prescriptions of the MDL statute by noting that transfer into an MDL is "typically a one-way ticket").

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the plaintiff's counsel for the individual case.[29] Yet, these individual plaintiff's counsels, who see only part of the monetary award, are the lucky ones: once a case is sucked into an MDL, the case may lay dormant for years, delaying litigants' day in court.[30] This leads to a second major problem with MDL practice. Many lawyers and litigants see MDLs as "black holes" because cases often sit in their respective MDLs for years with no movement.[31] Even though the MDL statute calls for remand back to the home forum at the end of pretrial proceedings, this procedure has proven to be a fiction.[32] Since the creation of MDL in 1968, just 1.8% of all civil actions consolidated in MDLs have been remanded.[33] In fact, Judge Robreno, who has presided over the Asbestos MDL since 2008,[34] explains that "[a]s a matter of judicial culture, remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case."[35] Last, MDLs are often criticized for limiting the opportunity for appellate review.[36] Because MDLs involve only

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[29] *See* Nannery, *supra* note 2, at 544 ("In the MDL, most pre-trial discovery will be handled by other plaintiff's attorneys who will receive a portion of any settlement or judgment [the individual] plaintiff is awarded." (footnote omitted)).

[30] *See* Fleming & Kasischke, *supra* note 28, at 76–77 (explaining that a transferred case "can be retained in the transferee court for a considerable period of time").

[31] *See, e.g.*, *id.* at 72 (noting that many cases tend to become stagnant once in an MDL).

[32] *See* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 143–44 (2013) ("In reality . . . once the cases are consolidated they rarely are remanded to the transferor court."); DeLaventura v. Columbia Acorn Tr., 417 F. Supp. 2d. 147, 150 (D. Mass. 2006) ("Many cases are transferred out of their home courts and away from local juries, but few—very few—ever return for trial.").

[33] *See* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407: FISCAL YEAR 2020 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf (providing that from 1968 until September 30, 2020 there had been 953,641 individual cases in MDLs but only 17,104 had been remanded for trial).

[34] *See* Robreno, *supra* note 32, at 126 ("On October 1, 2008, the MDL Panel designated the Honorable Eduardo C. Robreno . . . to preside over [the Asbestos MDL]."); *see also MDL 875 In Re:* Asbestos Products Liability Litigation (No. VI), U.S. DIST. CT. E. DIST. OF PA., https://www.paed.uscourts.gov/documents2/mdl/mdl875 (last visited Mar. 7, 2022) (explaining that the Asbestos MDL formed in 1991 to consolidate cases "relating to personal injury damages caused by asbestos products").

[35] Robreno, *supra* note 32, at 144.

[36] *See* Gluck & Burch, *supra* note 12, at 10 (explaining that MDL rulings are rarely subject to appellate reviews because they are usually only pretrial orders).

pretrial litigation, there are fewer appealable final orders.[37] This structure leads judges to engage in "creative case management" and "means that little decisional law has developed to guide MDL judges and litigants."[38] Because of these problems with MDL practice, it is no surprise that many plaintiffs with MDL-related cases try to avoid landing in MDL by filing in state court.[39] Nonetheless, the state court case can still end up before an MDL judge when defendants engage in sneaky removal tactics.[40]

III. SNAP REMOVALS

Recently, scholars have given significant attention to the snap removal "loophole" in federal removal procedure.[41] As a general rule, "[a] defendant may remove a civil case brought in state court to the federal district court in which the case could have been brought."[42] Snap removals occur when defendants take advantage of the forum defendant rule by filing a notice of removal before an in-state defendant is served.[43] The U.S. Supreme Court has recognized that "the plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."[44] But after snap removing, the defendant has picked federal court over the plaintiff's initial preference for state court, and the plaintiff is no longer the master of the claim.[45]

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[37] *See id.* at 20 ("But few MDL issues ever reach the appellate courts. In part, this is because MDL judges preside over pretrial litigation, meaning that there are fewer final orders that are appealable . . . .").

[38] *Id.*

[39] *See infra* Section III.B.

[40] *See infra* Part III.

[41] *See supra* note 7 (providing examples of recent scholarly articles on snap removals).

[42] Tex. Brine Co. v. Am. Arb. Ass'n, Inc., 955 F.3d 482, 485 (5th Cir. 2020) (citing 28 U.S.C. § 1441(a)).

[43] *See* Nannery, *supra* note 2, at 544–54 (describing snap removals as a "forum-shopping strategy . . . to move a properly filed state court action to a federal forum of the defendants' choosing").

[44] Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

[45] *See* Sopko, *supra* note 7, at 5 ("[Snap removal] expands federal courts' reach and provides defendants with the means to 'get away' from state courts . . . ." (footnote omitted) (quoting Serafini v. Sw. Airlines Co., 485 F. Supp. 3d 697, 698 (N.D. Tex. 2020))).

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A. THE TRICKINESS OF SNAP REMOVALS

The snap removal technique is mainly used by in-state defendants and corporations.[46] Say an Alabama plaintiff files in Georgia state court naming three defendants: two Florida corporations and one Georgia corporation. Before the Georgia defendant is served, one of the Florida defendants monitoring the docket immediately removes the case.[47] The Florida defendant files an answer before the plaintiff can voluntarily dismiss the case under Federal Rule of Civil Procedure 41(a)(1)(A)(i). The case is now in federal court, and the plaintiff eventually serves all three parties. Now, the plaintiff only can file a motion to remand in the federal court and hope for the best.[48]

By snap removing, the Florida defendant took advantage of the forum defendant rule in the federal removal statute by removing before its in-state codefendant was "properly joined and served."[49] The forum defendant rule limits removal by stating that an action otherwise removable under diversity jurisdiction "may not be removed if any of the parties in interest *properly joined and served* as defendants is a citizen of the State in which such action is brought."[50] Currently, there is disagreement within the federal district courts over whether snap removals are proper under the removal statute.[51] The few circuit courts that have weighed in on

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[46] *Id.* at 4–5 ("[T]he device is used primarily by in-state defendants and almost exclusively by corporations.").

[47] Snap removals have increased in recent years because electronic docketing makes it easier for defendants to learn that a plaintiff filed a case against them even though the defendant has not yet been served. *See* Nannery, *supra* note 2, at 545 ("The snap removal strategy has been used by defendants for more than twenty years, but its use increased substantially with the advent of electronic case filing systems, which allow defendants to easily monitor cases filed against them." (footnote omitted)).

[48] *See* 28 U.S.C. § 1447(c) ("A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).").

[49] *Id.* § 1441(b)(2) (stating the forum defendant limitation on removals); *see, e.g.*, Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 149–50 (3d Cir. 2018) (describing how an Illinois plaintiff filed suit in Pennsylvania state court against a Pennsylvania defendant who promptly removed the case before process was served).

[50] 28 U.S.C. § 1441(b)(2) (emphasis added).

[51] *Compare* Delaughder v. Colonial Pipeline Co., 360 F. Supp. 3d 1372, 1381 (N.D. Ga. 2018) (finding that snap removal was not procedurally proper), *and* Little v. Wyndham Worldwide

this debate have upheld snap removal as a valid means of removal to federal court, leaving most defendants free to keep snap removing.[52]

B. MDLS AND SNAP REMOVALS

What if once the defendant snap removes to federal court, it immediately files a motion to transfer to a pending MDL? This Note focuses on the combination of snap removal and MDLs. If the snap-removed case relates to an existing MDL, then the defendant can ask the JPML to transfer the case to the MDL court.[53] Once the JPML grants such a motion, the plaintiff's case is suddenly in a foreign federal court, rather than the state court it initially chose.[54] And the case is potentially one of thousands consolidated before this federal district judge, meaning that the plaintiff is no longer the master of their claim.[55] Snap removals are often used by corporate defendants in products liability cases, and fittingly, products

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Operations, Inc., 251 F. Supp. 3d 1215, 1221 (M.D. Tenn. 2017) ("[S]nap removal thwarts the purpose of the forum defendant rule."), *with* Doe v. Daversa Partners, No. 20-cv-3759, 2021 WL 736734, at *3 (D.D.C. Feb. 25, 2021) (finding snap removals permissible under the language of the forum defendant rule). For more examples of inconsistencies, see W. Bend Mut. Ins. Co. v. MSPPR, LLC, No. 20-cv-03308, 2021 WL 463259, at *2 (N.D. Ill. Feb. 9, 2021) (explaining division in the Northern District of Illinois alone on snap removals and ultimately adhering to the plain language of § 1441(b)(2) to uphold snap removals).

[52] *See Encompass*, 902 F.3d at 153–54 (upholding snap removals under the forum defendant rule and stating that "the outcome is not so outlandish as to constitute an absurd or bizarre result"); Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 707 (2d Cir. 2019) (upholding snap removals and stating they are "neither absurd nor fundamentally unfair"); Tex. Brine Co. v. Am. Arb. Ass'n, Inc., 955 F.3d 482, 487 (5th Cir. 2020) (upholding snap removals and explaining that the text is unambiguous).

[53] *See* Nannery, *supra* note 2, at 544 (explaining the process a defendant undertakes to move an action to an MDL court after a snap removal); *see also* 28 U.S.C. § 1407(c)(ii) ("Proceedings for the transfer of an action . . . may be initiated by . . . motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings . . . may be appropriate.").

[54] *See* Nannery, *supra* note 2, at 544 ("The MDL could be lodged in any federal district court in the country.").

[55] *See supra* note 16 and accompanying text. The Supreme Court has described the plaintiff as "the master of the claim" and explained that the plaintiff may choose where to file the case after considering whether there will be a basis for removal to federal court. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

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liability is the most common type of MDL.[56] In fact, products liability cases make up thirty percent of current pending MDLs.[57] The corporate defendants "prefer consolidated treatment of [their] cases in a federal forum" because many MDL judges are settlement-oriented, meaning that defendants can often avoid large jury verdicts.[58] Moreover, the evidence shows that defendants often combine snap removal and consolidation into an MDL: defendants "sought to consolidate 72% of snap-removed cases between 2012 and 2014."[59] Ten percent of all snap-removed cases eventually *did* become part of an existing MDL.[60]

Once a defendant removes to federal court, the case remains in federal court even if there is no basis for subject matter jurisdiction.[61] Removal is unique in the world of federal civil procedure in that the defendant does not need to wait for a judge to rule on a "motion" for removal.[62] But if the plaintiff wants to return the case to state court, they must now head to the federal court

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[56] *See* Nannery, *supra* note 2, at 561 (explaining that snap removals are "most often used by defendant corporations that are sued by individuals in product liability cases, usually involving a pharmaceutical or medical device"); U.S. JUD. PANEL ON MULTIDISTRICT LITIG., UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION CALENDAR YEAR STATISTICS: JANUARY THROUGH DECEMBER 2020 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics%202020.pdf (providing a pie chart showing the distribution of pending MDLs by type and finding that products liability cases totaled thirty-three percent of existing MDLs).

[57] *See supra* note 17 and accompanying text.

[58] Nannery, *supra* note 2, at 561; *see* Gluck & Burch, *supra* note 12, at 4 (describing MDLs as containing a "relentless drive to global settlement"); *infra* Section V.C.

[59] Nannery, *supra* note 2, at 562.

[60] *See id.* at 564 (showing that seven percent of snap-removed cases were "[t]ransferred to an existing MDL proceeding," two percent were assigned to an MDL judge after "[n]otice filed of potential tagalong action," and one percent became part of the MDL later).

[61] *See, e.g.*, Caterpillar Inc. v. Lewis, 519 U.S. 61, 64 (1996) (describing a case that was removed to federal court when diversity jurisdiction did not exist and the district court denied the plaintiff's subsequent motion to remand in the federal court).

[62] *See* 28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . ."); *see also, e.g.*, Life at Clifton Glen v. Lanier, No. 1:18-CV-04184, 2018 WL 6839265, at *1 (N.D. Ga. Dec. 10, 2018) (describing how a plaintiff filed in state court and a pro se defendant removed to federal court even though there was no subject matter jurisdiction, leading to the federal court remanding the case).

because the state court no longer has any power over the case.[63] So, what can the plaintiff do if they suddenly finds themselves in federal court? They can file a motion to remand their individual case to state court.[64]

Motions to remand ask the court to return the case from its federal removal destination to the original state court of filing.[65] Most motions to remand argue that the federal court lacks subject matter jurisdiction over the case, and therefore the case should go back to state court.[66] A motion to remand completes the circle: state court to federal court and back to state court again. As a general rule, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[67] Once in the MDL, a plaintiff may file a motion to remand their individual case to state court "on the grounds that removal was improper pursuant to the forum defendant rule."[68] When a case is removed to federal court—and is on its way to the MDL—the in-state defendant finally may be properly served in the

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[63] *See* Dye v. Sexton, 695 F. App'x 482, 484 (11th Cir. 2017) (showing that the plaintiff filed a motion to remand in the federal court to get the case back to the original state court that the plaintiff filed in).

[64] *See* 28 U.S.C. § 1447(c) (describing the procedures for filing a motion to remand a case back to state court after it has been removed).

[65] *See* 32A AM. JUR. 2D *Federal Courts* § 1371, Westlaw (database updated Feb. 2022) [hereinafter *Federal Courts*] (explaining that remand means going back to state court from federal court). It is important to distinguish a motion to remand, as discussed in this Note, with a motion for a suggestion of remand. When filed in an MDL court, a motion for a suggestion of remand asks the court to return the case to the original federal court. *See* Thomas P. Cartmell, *MDL Remand: Plaintiffs' Perspective*, 89 UMKC L. REV. 983, 983 (2021) (noting that remand back to the transferor court is the "final frontier of the MDL journey"). A motion for a suggestion of remand typically occurs at the at the end of pre-trial litigation, the theoretical end point for individual MDL cases. *See id.* at 986 ("Remands happen at the conclusion of MDLs when parties are unable to settle cases . . . .").

[66] *See Federal Courts*, *supra* note 65, § 1371 ("[I]f at any time before final judgment it appears that federal subject matter jurisdiction is absent, the federal district court must remand that case to the state court."). Motions to remand also may be grounded on procedural errors such as untimeliness, in which case the motion must be made within thirty days of the filing of the notice of removal. *Id.*; *see also* 28 U.S.C. § 1447(c) ("A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).").

[67] 28 U.S.C. § 1447(c).

[68] Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 150 (3d Cir. 2018).

action.[69] In their motion to remand, the plaintiff can argue that removal was improper because the action consists of a forum defendant who is at home in the state court in which the plaintiff originally filed.[70] Therefore, the plaintiff has filed a motion with a reasonable belief that remand is proper and that the motion is not frivolous.[71] Now in an MDL, the plaintiff might not receive the obvious next step after filing a motion: a ruling on that motion.[72]

Generally, once a motion has been filed in federal court, the parties wait for the judge's ruling on it.[73] This may take months—or even years—but a ruling is usually forthcoming; the judge does not ignore the pending motion.[74] The prestige of being selected as an MDL judge leads many to feel like "cowboy[s]-on-the-frontier."[75] This mentality, in turn, may lead to "[w]ild procedural innovation."[76] For example, an MDL judge may feel so powerful, so untouchable, that they do not rule on pending motions to remand.[77] A case may be filed in state court, removed to the closest federal district court, and then transferred to an MDL federal district court

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[69] *See* Nannery, *supra* note 2, at 550 (explaining that defendants who snap remove argue that the "forum defendant was not 'properly joined *and served*' at the time of removal" (quoting 28 U.S.C. § 1441(b)(2))).

[70] *See, e.g.*, *Encompass*, 902 F.3d at 153 (noting that the plaintiff argued in their motion to remand that "it is 'inconceivable' that Congress intended the 'properly joined and served' language to permit an in-state defendant to remove an action by delaying formal service of process").

[71] *See, e.g.*, Anderson v. CitiMortgage, Inc., 519 F. App'x 415, 416, 418 (8th Cir. 2013) (finding that the plaintiff's motion to remand was filed in bad faith and without legal justification).

[72] *See* Nannery, *supra* note 2, at 544 (describing that an original state court plaintiff, now an MDL plaintiff, might linger in the MDL for years with "no ruling on [their] motion to remand to state court").

[73] *See Motion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining motion as "[a] written or oral application requesting a court to make a specified *ruling* or order" (emphasis added)).

[74] *See, e.g.*, Nannery, *supra* note 2, at 569–70 (finding that, based on a study of 219 cases, "[t]he median time for a ruling on a motion to remand was sixty-five days," and the longest was over four years).

[75] Gluck & Burch, *supra* note 12, at 20.

[76] *Id.* at 21.

[77] *See* E. Farish Percy, *It's Time for Congress to Snap to It and Amend 28 U.S.C. §1441(1)(B)(2) to Prohibit Snap Removals That Circumvent the Forum Defendant Rule*, 73 RUTGERS U. L. REV. 579, 623–24 (2021) ("The plaintiff is likely to view the MDL as 'a black hole' where any ruling on the motion to remand is likely to be delayed." (citing Fleming & Kasischke, *supra* note 28, at 71–72)).

across the country.[78] The plaintiff's "case could sit in the MDL court for years, with no movement on [their] individual case, and no ruling on [their] motion to remand to state court."[79]

In one study on snap-removed cases, Professor Percy found seventeen instances of cases beginning their forum journeys with snap removals and ending in an MDL federal court.[80] These cases reached the end of their forum journeys for now, and "the motions to remand are still pending almost six months after transfer" because the MDL judge has not ruled on them.[81]

In another study, Professor Nannery measured how long plaintiffs waited for rulings on their motions to remand in snap-removed cases, including ones not in MDL courts.[82] Beyond finding a long median wait time, the study showed that "[d]istrict court judges did not always rule on motions to remand."[83] Specifically, the study found three cases in which a motion to remand was still sitting on the docket, and *all* were in MDL courts.[84] In these three cases, the plaintiffs had been waiting between two-and-a-half and four years for a ruling.[85] The study showed that "[t]he MDL cases remained in federal district court much longer, on average."[86] The change from the plaintiff's perspective is drastic: they have gone from a chosen state court, to the district court where the state court is located, and then to a different federal district court as part of an MDL proceeding.[87]

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[78] *See supra* Section III.B.

[79] Nannery, *supra* note 2, at 544.

[80] *See* Percy, *supra* note 77, at 623–24 (finding that 17 cases out of the 355 studied were snap removed into an MDL).

[81] *Id.* at 624.

[82] *See* Nannery, *supra* note 2, at 569–70 (examining motions to remand filed in 219 snap-removed cases between 2012 and 2014).

[83] *Id.* at 569–70 ("The median time for a ruling on a motion to remand was sixty-five days.").

[84] *See id.* at 570 ("There are three cases in which district court judges still have not ruled on motion[s] to remand. . . . All three cases are currently pending in MDL transferee courts.").

[85] *See id.* ("Plaintiffs in these cases have been waiting between 932 and 1,441 days, or between two-and-a-half and almost four years, since they first moved to remand on forum defendant grounds . . . .").

[86] *Id.* at 572.

[87] *See supra* Section III.B.

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IV. THE OPIATES MDL

One MDL in the Northern District of Ohio has been noted as "extraordinary."[88] This is the Opiates MDL: an MDL against manufacturers, pill-mill doctors, and distributors that, as of February 15, 2022, has 3,061 cases consolidated in front of Judge Dan A. Polster, U.S. District Judge for the Northern District of Ohio.[89] The claims vary, but most form around a central allegation that "manufacturers of prescription opioids grossly misrepresented the risks of long-term use of those drugs for persons with chronic pain, and distributors failed to properly monitor suspicious orders of those prescription drugs."[90] The plaintiffs allege that these failures by defendants "contributed to the current opioid epidemic."[91] The opioid epidemic concerns "[t]he misuse of and addiction to opioids—including prescription pain relievers, heroin, and synthetic opioids such as fentanyl" and "is a serious national crisis that affects public health as well as social and economic welfare."[92]

The Opiates MDL is the thirteenth largest MDL in the United States.[93] The JPML formed the Opiates MDL on December 5, 2017, finding that "the actions in this litigation involve common questions of fact, and that centralization . . . will serve the convenience of the

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[88] Gluck & Burch, *supra* note 12, at 21 ("MDL, thanks to *Opiates*, is extraordinary again.").

[89] *See id.* at 22 (describing the opiate litigation as "[c]asting a wide[] net" and including pill-mill doctors, distributors, and manufacturers); MDL DISTRIBUTION REPORT, *supra* note 10 (noting that the Opiate MDL in front of Judge Polster has 3,061 actions pending in it as of February 15, 2022).

[90] *National Prescription Opiate Litigation*, U.S. DIST. CT. N. DIST. OHIO, https://www.ohnd.uscourts.gov/mdl-2804 (last visited Mar. 7, 2022).

[91] *Id.* In 2017, the United States Department of Health and Human Services declared a public health emergency due to the prevalent misuse of opiates along with the increasing number of deaths from drug overdose. *See About the Epidemic*, U.S. DEP'T. HEALTH & HUM. SERVS., https://www.hhs.gov/opioids/about-the-epidemic/index.html (last visited Mar. 7, 2022) (describing the opioid epidemic by the numbers, including that 70,630 people have died from drug overdose in 2019 alone).

[92] *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (Mar. 11, 2021), https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis.

[93] *See* MDL DISTRIBUTION REPORT, *supra* note 10 (providing the Opiate MDL as the thirteenth largest MDL as of February 15, 2022). Currently, the largest MDL is the 3M Combat Arms Earplug MDL with 288,601 actions pending. *Id.* 3M is an outlier in the MDL world because the second largest MDL has 37,453 actions pending. *Id.*

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parties and witnesses and promote the just and efficient conduct of the litigation."[94] The JPML picked Ohio because of its centralized location within the United States and its experience dealing with the opioid epidemic in recent years.[95] The JPML chose Judge Polster because of his previous MDL experience, stating that they "have no doubt that Judge Polster will steer this litigation on a prudent course."[96]

In the past four years of the Opiates MDL, Judge Polster has been surprisingly honest about his plan to push for an early settlement.[97] He has promoted ambitious timelines while expressing his distaste for bringing any of the cases to trial.[98] But his desire for early settlement has not been the only thing that Judge Polster has been unusually forthright about. He has admitted that he does not like to rule on motions to remand from individual cases in the MDL, stating:

> My thought is to just leave them hanging for a while. The cases are in the MDL, and my objective is to get my hands around this and see if there is some—maybe some framework for some resolution, and if so, it is much more preferable to have more cases in the MDL, the more the better, rather than having them out there in individual state courts where there can't be any coordination. So it was my thought just to not do anything with those motions to remand at the present time. . . . [I]t is my thought just to keep those pending.

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[94] *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1378 (J.P.M.L. 2017).

[95] *See id.* at 1379 (stating that "[t]he Northern District of Ohio presents a geographically central and accessible forum" and has been dealing closely with the opioid epidemic in recent years).

[96] *Id.* at 1379–80.

[97] *See* Gluck & Burch, *supra* note 12, at 25 ("During [Judge Polster's] first teleconference he told the parties, with surprising candor, that he planned to seek an early settlement and did not want to preside over trials . . . ."); Transcript of Teleconference Proceedings at 42, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Dec. 13, 2017), ECF No. 10 ("I think the best use of my time and my abilities will be to help see if there is some sort of resolution we can reach. I think that's why the MDL panel picked me.").

[98] *See* Gluck & Burch, *supra* note 12, at 26 (stating that Judge Polster's "goal was to 'do something meaningful to abate this crisis'" in one year and that going to trials would be admitting failure).

> Everyone is here, and we will see what we can do, and if, you know, if I have got to deal with them in the future, I will figure out some way to deal with them but not to worry about that now.[99]

Later in the same teleconference, Judge Polster clearly stated, "I don't want anyone filing anything . . . I don't want any more motions to remand."[100] Judge Polster then ended the teleconference by putting a moratorium on filing all substantive motions for sixty days[101] and later clarified that the moratorium included motions to remand.[102] Recently, the Sixth Circuit granted a writ of mandamus ordering Judge Polster to address five municipal petitioners' motions for remand.[103] The court explained that while some delay may be proper early in an MDL, now that the MDL is no longer new, Polster should rule on the petitioners' motions for remand.[104] Although there is no mention of snap removals in the court's order, this is a step in the right direction to full, and mandatory, adjudication on motions to remand in MDLs.

The Opiate MDL, combined with Judge Polster's forthrightness, pulls back the curtain to reveal MDL judges' attitudes on motions to remand. These attitudes ensure that even when the motion to remand is in a snap-removed case, the plaintiff has little hope of returning to the state court of initial filing.

V. ANALYSIS

This Note focuses on a specific layer of judicial resistance that comes from MDL judges who fail to rule on motions to remand from individual cases in their MDLs, especially when such cases were

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[99] Transcript of Teleconference Proceedings, *supra* note 97, at 15, 17.

[100] *Id.* at 44.

[101] *See id.* at 47 (explaining that Judge Polster enacted a moratorium on all substantive case filings for sixty days).

[102] Order Regarding Remands at 1, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Feb. 16, 2018), ECF No. 130.

[103] *See In re* Harris Cnty., No. 21-3637, 2022 U.S. App. LEXIS 6411, at *1, *7 (6th Cir. Mar. 11, 2022) (listing the petitioners as three counties in Texas and two cities in New Mexico and ultimately granting their mandamus petition).

[104] *See id.* at *6 (noting that although early on in the litigation MDL courts are given wide latitude to manage their dockets, the Opiate MDL is "no longer at the outset of this litigation").

snap removed from state court to federal court. For the plaintiff in an MDL, supposedly the master of their claim, their day in court is now muddled with thousands of other plaintiffs' days in court. Furthermore, the plaintiff in an MDL will likely have to wait much longer for resolution there than they would have in state court.[105] For example, the Opiate MDL began in 2017, and the Asbestos MDL formed in 1991; both MDLs remain unresolved.[106] Our judicial system is founded on principles of fairness—for example, the forum defendant rule exists because it is fair for a defendant to litigate in their home state.[107] Maintaining equal access to courts is vital to upholding these fairness ideals. When a plaintiff files in state court and, from their perspective, magically winds up in an MDL, their confidence, and ultimately the public's confidence, in our court system erodes as plaintiffs must surrender to the preferences of docket-monitoring corporate defendants.[108]

MDL judges should rule on motions to remand, particularly in snap-removed cases. This Part first briefly looks at examples of defendants who are snap removing to MDLs. Then, this Part explains why it is better for MDL judges to rule on motions to remand, especially when the case was snap removed. Next, this Part suggests some reforms to nudge MDL judges towards adjudicating

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[105] *See* Nannery, *supra* note 2, at 569–70 (finding three cases where a district court judge had not yet ruled on a motion to remand when the case was snap removed into an MDL).

[106] *See* Robreno, *supra* note 32, at 126 ("On October 1, 2008, the MDL Panel designated the Honorable Eduardo C. Robreno . . . to preside over [the Asbestos MDL]."); *see also supra* note 34 and accompanying text.

[107] *See* Sopko, *supra* note 7, at 9 ("Congress's intent in drafting [the removal statute] in general and the forum defendant rule in particular was to prevent bias. Specifically, judges and scholars argue the purpose was to prevent state court bias against out-of-state defendants by providing a means to access a neutral federal forum. The presence of a forum defendant obviates such a need."); *see also* Gentile v. Biogen Idec, Inc., 934 F. Supp. 2d 313, 319 (D. Mass. 2013) (explaining that diversity jurisdiction exists to protect out of state defendants from bias in favor of forum defendants but that "the protection-from-bias rationale behind the removal power evaporates when the defendant seeking removal is a citizen of the forum state").

[108] The importance of the public understanding the court system, along with having trust and confidence in the system, has long been promoted as a goal of the federal judiciary. *See, e.g.*, *Issue 2: Preserving Public Trust, Confidence, and Understanding*, U.S. CTS., https://www.uscourts.gov/statistics-reports/issue-2-preserving-public-trust-confidence-and-understanding (last visited Mar. 7, 2022) (describing four strategies to increase public trust, confidence, and understanding in the United States court system).

these motions. Last, this Part addresses potential counterarguments.

A. SNAP REMOVAL TO MDL DATA

Snap removal to MDL occurs frequently enough to warrant discussion about whether this is a proper mechanism for defendants to use to maneuver into an MDL.[109] It even occurred in the Second Circuit in *Gibbons v. Bristol-Myers Squibb Co.*, one of the most high-profile snap removal cases.[110] The Second, Third, and Fifth Circuits are the only circuits to have weighed in on the propriety of snap removals; all three courts ruled that snap removals are permissible under the plain language of the forum defendant rule.[111] In *Gibbons*, the plaintiffs sued Delaware corporations Bristol Myers Squibb Co. and Pfizer Inc. in Delaware state court.[112] But the defendants removed prior to service of process, and the case was transferred to the Eliquis MDL in the Southern District of New York.[113] After the MDL judge denied the plaintiff's motion to remand, the Second Circuit heard the case on appeal and ruled that snap removals are proper.[114]

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[109] *See e.g.*, Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 704 (2d. Cir. 2019) (explaining that a snap-removed case was eventually transferred to the Eliquis MDL); Percy, *supra* note 77, at 624 (finding seventeen cases that were snap removed and transferred to an MDL across the country in one study).

[110] *Gibbons*, 919 F.3d at 704 (providing that plaintiffs' asserted that "the district court . . . incorrectly denied motions to remand forty-four of the sixty-four cases before it," or about sixty-nine percent).

[111] *See* cases cited *supra* note 52; 28 U.S.C. § 1441(b)(2) (outlining the forum defendant rule); *see also Gibbons*, 919 F.3d at 705 (contending that § 1441(b)(2) "plainly provides that an action may not be removed to federal court on the basis of diversity of citizenship once a home-state has been '*properly* joined and *served*'" (quoting 28 U.S.C. § 1441(b)(2))); Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 152 (3d Cir. 2018) ("[W]e conclude that the language of the forum defendant rule in section 1441(b)(2) is unambiguous.").

[112] *Gibbons*, 919 F.3d at 702–03.

[113] *Id.* at 703 (explaining that two days after the plaintiffs filed suit in Delaware court and before the defendants were served, the defendants removed to federal court and requested that the case be transferred to the Eliquis MDL).

[114] *Id.* at 704, 707 ("We . . . have no reason to depart from the statute's express language and must affirm the district court's denial of Plaintiffs' motions to remand.").

Beyond *Gibbons*, according to a study done by Professor Percy, Sanofi U.S. Services (among other defendants) snap removed seventeen individual cases originally filed against them in New Jersey state court before any defendant was served in the matter.[115] Then, the removing defendants requested that each case be transferred to the *In re Taxotere (Docetaxel) Products Liability Litigation* MDL in the Eastern District of Louisiana.[116] Once in the MDL, the plaintiffs moved to remand in each case, arguing that removal was improper under the forum defendant rule, but the plaintiffs' motions remained pending in the MDL after six months.[117]

MDLs make up over sixty percent of the federal civil docket[118] — within this massive number of cases, snap removal will likely become more common as (1) the defense bar recognizes the benefits and employs it as a strategy[119] and (2) electronic docket monitoring by defendants becomes easier.[120] As such, MDL judges should rule on motions to remand when the plaintiff argues that the case was removed improperly under the forum defendant rule so that plaintiffs receive resolution more quickly. The judge may deny the motion, meaning that the plaintiff will be stuck in the MDL "black hole."[121] Or the motion may be granted, and the plaintiff returns to

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[115] *See* Percy, *supra* note 77, at 623–24 ("A[] . . . problem arises when cases are removed and the defendant seeks to have the case transferred to an existing federal MDL action while plaintiff's motion to remand is pending. . . . In seventeen of the cases identified by the study, this issue was raised.").

[116] *See id.* app. at 731–46, 748 (explaining that defendants in each of the seventeen cases sought transfer to the Eastern District of Louisiana where the MDL was pending).

[117] *See id.* app. at 731 (showing that the plaintiff moved to remand the seventeen cases on the basis that the snap removal was improper); *see also id.* at 624 ("The cases were transferred to the MDL action where the motions to remand are still pending almost six months after transfer.").

[118] *See Fact Sheet*, RULES 4 MDLS, https://www.rules4mdls.com/fact-sheet (last visited Mar. 7, 2022) ("The Federal Civil Caseload is Concentrated in MDLs: As of September 30, 2020, there were 521,927 civil cases pending in the federal district court system. Of those, 327,204 cases sat within 176 MDLs and accounted for 62.7 percent of federal civil cases."). Furthermore, the concentration of MDLs in the federal civil docket has increased from sixteen percent in 2002 to now over sixty percent in 2020. *Id.*

[119] *But see* Jeffrey W. Stempel, Thomas O. Main & David McClure, *Snap Removal: Concept; Cause; Cacophony; and Cure*, 72 BAYLOR L. REV. 423, 475 n.158 (explaining that snap removing into MDLs "appears not to account for much snap removal practice by defendants").

[120] *See supra* note 47 and accompanying text.

[121] Fleming & Kasischke, *supra* note 28, at 72.

state court, master of their claim once again. Either way, the plaintiff deserves a ruling on their motion to remand.

B. MDL JUDGES SHOULD RULE ON SNAP-REMOVED MOTIONS TO REMAND

While the debate on snap removals in federal courts seems to be heading towards acceptance, many district courts, whose circuit courts have yet to weigh in, have found snap removals to be improper.[122] For example, one district court found that snap removals went against the purpose of the forum defendant rule of preventing gamesmanship.[123] But these rulings generally do not concern snap-removed cases that wind up in an MDL; usually, the cases are snap removed to local federal court and stay there.[124] Adding the extra step of transfer to an MDL after a case is snap removed should change the snap-removal analysis so that it leans in favor of the plaintiff, and towards fairness, rather than toward the snap-removing defendant.

Plaintiffs' experiences in individual federal litigation are vastly different from those of plaintiffs subsumed in MDLs alongside thousands of other cases. When defendants snap remove themselves all the way into an MDL, the plaintiff becomes the "master of nothing."[125] The plaintiff, and plaintiff's counsel, must now sit back because the MDL lead plaintiff's counsel are in charge.[126] This

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[122] *See supra* notes 51–52 and accompanying text.

[123] *See* Delaughder v. Colonial Pipeline Co., 360 F. Supp. 3d 1372, 1381 (N.D. Ga. 2018) ("[T]his decision is meant to close an absurd loophole in the forum-defendant rule and to uphold the purpose and integrity of the rule.").

[124] *See* Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 149 (3d Cir. 2018) (explaining that the plaintiffs filed suit in Pennsylvania state court and the defendants snap removed to the United States District Court for the Western District of Pennsylvania); Tex. Brine Co. v. Am. Arb. Ass'n, 955 F.3d 482, 484–85 (5th Cir. 2020) (explaining that the plaintiffs filed suit in Louisiana state court and the defendants snap removed to the United States District Court for the Eastern District of Louisiana). *But see* Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 702–04 (2d Cir. 2019) (explaining that the case in controversy was snap removed from Delaware state court eventually into the Eliquis MDL in the Southern District of New York).

[125] Caterpillar Inc. v. Williams, 482 U.S. 386, 399 (1987) (stating that the "plaintiff would be master of nothing" if federal defenses could provide a basis of removal).

[126] *See* Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1272 (2017) [hereinafter Bradt & Rave,

representative structure is a significant difference between non-MDL snap-removed cases and cases snap removed to an MDL. In both situations, the plaintiff is no longer in the court of their choice, but at least in non-MDL snap-removed cases, the plaintiff has control over their case with the lawyer of their choosing.

Further, as many scholars have noted, MDLs are "black hole[s]," and the plaintiff will be lucky to find resolution within the first two years.[127] From the lack of appellate review to potentially forcing a plaintiff to sit for years without movement on their case, it is no surprise that most plaintiffs who originally filed in state court do not want to be caught in an MDL, whereas most defendants would rather be in the slow-moving MDL.[128] For example, defendant Bristol Meyers Squibb "enthusiastically endorsed the MDL process."[129] Defendants like Bristol Meyers Squibb often seek consolidation in an MDL because most "MDLs are resolved . . . by global settlement agreement."[130] On the plaintiff's side, all decisions about their case now lie with the MDL's lead plaintiff counsels—counsels that the snap-removed plaintiff did not choose to represent them.[131]

The Information-Forcing Role] ("[I]ndividual claimants—and the lawyers they have retained to represent them—have very little input into the [lead plaintiff counsel's] choices."); *see also* Gluck & Burch, *supra* note 12, at 13 (noting that the MDL judges appoint lead plaintiff's counsel, meaning that "[p]laintiffs themselves have no say in who the judge chooses").

[127] *See* Fleming & Kasischke, *supra* note 28, at 71–72 (finding that MDLs tend to become "black hole[s]" due to "the small number of MDL judges managing such a large share of active cases").

[128] *See* Gluck & Burch, *supra* note 12, at 5 (stating that MDL judges are "largely shielded from appellate review"); Sopko, *supra* note 7, at 44 ("Corporate defendants . . . largely prefer removing actions to avail themselves of federal procedural rules. . . . Additionally, defense attorneys often seek federal jurisdiction to get into MDL."); *see also infra* note 138 (showing why some plaintiffs do not want to be in the Opiate MDL).

[129] Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Meyers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1254 (2018). In fact, Bristol Meyers Squibb admitted that if plaintiffs were not allowed to aggregate in California state court, it was likely that the cases either would not be filed or would be filed, removed, and transferred an MDL. *See id.* (remarking that defendants who want to prevent aggregation might "move the cases into federal court before a *friendlier audience*" (emphasis added)).

[130] Bradt & Rave, *The Information-Forcing Role*, *supra* note 126, at 1270.

[131] *See id.* at 1272 ("[M]any claimants lack crucial information about their cases, particularly given that they may have been transferred to a far-flung forum not of their

To take one salient example, Judge Polster's attitude towards ruling on motions to remand in the ongoing Opiate MDL is dangerous to snap-removed plaintiffs who end up in the Opiate MDL.[132] The plaintiffs likely will file a motion to remand arguing that the removal was improper under the forum defendant rule. Judge Polster may agree or disagree, but it is likely that the plaintiffs will never know. Plaintiffs who end up in an MDL across the country deserve rulings on their motions to remand. Their argument is not a frivolous one; many district courts across the country have ruled that snap removals are improper.[133] The law is yet to be settled in many circuits, including the Sixth Circuit, which controls Ohio federal courts and thus the Opiate MDL.[134]

In the MDL context, motions to remand reflect a plaintiff's wish to return to their district's federal court.[135] Judge Polster weighs efficiency heavily in his approach, and he would prefer consolidation to sending cases back to their home courts.[136] Considering this preference, Judge Polster, and likely other MDL judges, decide to leave motions to remand pending.[137] This practice harms snap-removed plaintiffs who are caught up in this apathy towards

choosing and that, for all intents and purposes, their claims are being prosecuted by lawyers chosen by the MDL judge."); *see also supra* note 126 and accompanying text.

[132] *See supra* note 99 and accompanying text (explaining Judge Polster's admittance of preferring not to rule on motions to remand).

[133] *See, e.g.*, Delaughder v. Colonial Pipeline Co., 360 F. Supp. 3d 1372, 1381 (N.D. Ga. 2018) (finding that snap removal was not procedurally proper); Little v. Wyndham Worldwide Operations, Inc., 251 F. Supp. 3d 1215, 1221 (M.D. Tenn. 2017) ("[S]nap removal thwarts the purpose of the forum defendant rule."); Norwegian Air Shuttle ASA v. Boeing Co., 530 F. Supp. 3d 764, 770 (N.D. Ill. 2021) ("[T]he snap-removal loophole essentially writes the forum-defendant rule out of existence for any defendants with the resources and wherewithal to monitor exhaustively local court filings."); Deutsche Bank Nat'l Tr. Co. v. Old Republic Title Ins. Grp., Inc., 532 F. Supp. 3d 1004, 1018 (D. Nev. 2021) ("Snap removal is not a result that Congress contemplated or intended, and permitting it would obviate the forum defendant rule's purpose.").

[134] *See supra* note 52 (explaining that only the Second, Third, and Fifth Circuits have ruled on the propriety of snap removals).

[135] *See, e.g.*, *In re* Wilson, 451 F.3d 161, 163 (3d Cir. 2006) (explaining that the MDL judge denied a motion to remand in which the plaintiffs argued that pretrial proceedings had concluded, warranting a remand under § 1407(a)).

[136] *See supra* note 99 and accompanying text.

[137] *See* Transcript of Teleconference Proceedings, *supra* note 97, at 15 ("My thought is to just leave them hanging for a while.").

motions to remand. Plaintiffs arguing about snap removal deserve rulings on their motions to remand in the MDL.

Importantly, plaintiffs facing motions to stay pending transfer to an MDL are now aware of Judge Polster's tendency to leave motions to remand sitting. His stance worries them while also bolstering their argument that the JPML should not transfer their cases into the MDL.[138] Although district courts admit that this worry is valid, courts continue to grant defendants' motions to stay until the case is transferred to the MDL.[139] Under the current system, although a "plaintiff will likely endure some delay in the adjudication of its remand motion," plaintiffs are sent forward into the MDL with no resolution of their motions in sight.[140]

Because plaintiffs have a valid argument, and because they are the masters of their claims, they deserve resolution on their motions to remand in MDLs. By not ruling on motions to remand, MDL judges are ignoring many core tenets of the American civil legal system, such as recognizing plaintiffs as the masters of their claims and ensuring that everyone has access to the court system.[141] Specifically, snap removals to MDLs totally disrupt a plaintiff's

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[138] *See, e.g.*, Bd. of Cnty. Comm'rs v. Purdue Pharma L.P., No. 18-cv-459, 2018 WL 5973752, at *3 (N.D. Okla. Nov. 14, 2018) ("The plaintiff argues that it will be prejudiced by the delay in the hearing of its motion to remand. . . . The plaintiff argues that it will be 'irreparably harmed' by a transfer to the MDL because 'Judge Polster of the MDL has held he will not act on any motions to remand and placed a moratorium on filing such motions.'" (citation omitted)); City of Santa Fe v. Purdue Pharma L.P., No. 19-1105, 2020 WL 671008, at *2 (D.N.M. Feb. 11, 2020) ("In light of the MDL District Judge's moratorium on filing motions to remand, Plaintiff fears that the MDL court will indefinitely delay ruling on the pending Motion to Remand.").

[139] *See City of Santa Fe*, 2020 WL 671008, at *2 (granting defendant's motion to stay proceedings pending likely transfer to the Opiate MDL while admitting that "[i]f the JPML transfers the action to the MDL, . . . Plaintiff will endure some delay in obtaining a ruling on the Motion to Remand").

[140] *Bd. of Cnty. Comm'rs*, 2018 WL 5973752, at *3.

[141] *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (noting that the well-pleaded complaint rule "makes the plaintiff the master of the claim"); Ringgold-Lockhart v. Cnty. of L.A., 761 F.3d 1057, 1061 (9th Cir. 2014) ("Restricting access to the courts is . . . a serious matter. '[T]he right of access to the courts is a fundamental right protected by the constitution.'" (alteration in original) (quoting Delew v. Wagner, 143 F.3d 1219, 1222 (9th Cir. 1998))).

control over their claim.[142] Ending up in a thousand-case MDL with no movement and no direct representation is not sufficient access to the courts.

The gravity of the consequences to hopeful state court plaintiffs snap removed to a federal MDL, along with the valid controversy surrounding their remand argument, justifies reforms to ensure that plaintiffs have an opportunity to be heard.[143] Otherwise, they are stuck with thousands of other cases in an MDL and no resolution on their motions to remand.

C. POTENTIAL REFORMS TO ENSURE MDL JUDGES RULE ON SNAP-REMOVED MOTIONS TO REMAND

This Note suggests three reforms to the current MDL system to ensure that plaintiffs who originally filed in state court, were removed to their home federal court, and then transferred across the country to an MDL with thousands of cases, get their day in court. First, the MDL subcommittee on Civil Rules should make ruling on motions to remand in MDLs mandatory within a certain length of time after filing, such as ten months. Ten months, more than the normal six months for non-MDL motions, would consider MDL judges' heavier workload and allow them plenty of time to adjudicate the motions. The Advisory Committee on Civil Rules created the MDL subcommittee in 2018 to improve MDL management.[144] The subcommittee holds public hearings to discuss potential rule changes for MDLs, ranging anywhere from issues of

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[142] *See* Gluck & Burch, *supra* note 12, at 13 ("The end result is a [plaintiff] who may find herself represented by multiple lawyers and law firms, most of whom she has limited or no interaction with.").

[143] A few other scholars have posited that snap removals, when combined with MDLs, present an entirely different and larger problem for plaintiffs. *See, e.g.*, Stempel et al., *supra* note 119, at 459 n.126 ("[L]arge scale complex litigation subject to MDL consolidation may present the most sympathetic case for snap removal to the extent it represents defendant[s'] desire to remove (by whatever means necessary) in order to seek consolidation and case administration efficiency rather than merely a more favorable forum in spite of the lack of risk of prejudice against the forum state defendant.").

[144] *See* Jenifer J. Norwalk, Comment, *The Case Against MDL Rulemaking*, 169 U. PA. L. REV. 275, 277 (2021) (explaining the origins of the MDL subcommittee).

interlocutory appellate review to oversight of the settlement and remand processes.[145]

Although the subcommittee has mentioned the fiction of MDL remands, it has not enacted any rules to ensure that MDL judges adjudicate motions to remand.[146] The MDL subcommittee should adopt a straightforward rule that MDL motions for remand must be ruled on within a certain amount of time. This would ensure that snap-removed plaintiffs who find themselves among thousands of other cases in a faraway district court would have the chance to not only argue against snap removal but also to receive rulings on their motions. The Sixth Circuit's recent order telling Judge Polster to promptly rule on a few pending motions to remand in the Opiate MDL recognizes the issue of these unduly long pending motions.[147] A rule by the MDL subcommittee would mirror the Sixth Circuit's order and ensure adjudication on all pending motions to remand in MDLs, not just a few in only one MDL.

Second, and relatedly, the six-month list should be expanded to include motions to remand in MDLs. The six-month list is a case management tool that every U.S. District Court uses.[148] Every March 31 and September 30, the clerk of each federal district court compiles a list of motions on each judge's docket "that have been pending for more than 'six months.'"[149] Then, the list is sent to the Administrative Office of the Courts and posted online for the public to access.[150] Congress created the list to push the courts to be more

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[145] ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S., AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 142 (2018), https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

[146] *See* Christopher G. Campbell & Matt Holian, *Exploring Ways to Improve MDL Management: Key Takeaways from the MDL Subcommittee Biannual Session*, DLA PIPER (Nov. 5, 2018), https://www.dlapiper.com/en/us/insights/publications/2018/11/exploring-ways-to-improve-mdl-management (listing the priorities of the MDL subcommittee without addressing MDL judge selection or remand timeline concerns).

[147] *See In re* Harris Cnty., No. 21-3637, 2022 U.S. App. LEXIS 6411, at *6 (6th Cir. Mar. 11, 2022) ("Petitioners' motions [to remand] have been pending an unduly long time.").

[148] *See* Miguel F. P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 375 (2020) (describing how the six-month list functions and stating that the "every United States District Court" uses the list).

[149] *Id.*

[150] *Id.* at 376 (noting that judges can also append a "reasons code" to justify the delay).

efficient in ruling on pending motions.[151] The list achieves this purpose because "[j]udges are acutely aware of the List and its deadlines."[152] One study examining the dockets of many federal district courts confirmed this finding, noting that the six-month list improves speed in adjudications.[153]

Another study, however, found that the list reduces accuracy among judges and leads to lower-quality decisions.[154] Even if true, because MDLs are sufficiently different from typical cases, the six-month list would not likely lead to such perverse incentives for a couple of reasons. First, because MDLs are prestigious and an honor for judges to oversee,[155] MDL judges are less likely to rule on motions too quickly without giving them the proper attention. Also, as Judge Polster admitted, MDL judges often leave motions to remand pending.[156] Therefore, MDL judges need an extra push to ensure that they rule on motions to remand within the MDL, especially ones in which the plaintiff argues that the defendant improperly snap removed. The timeframe may be increased from six months because of the colossal nature of MDLs, but nevertheless, MDL judges should have some kind of equivalent public "list" to push them towards adjudication.

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[151] *See id.* at 374 ("[T]he List was from its inception widely understood as a modest shaming mechanism meant to put pressure on judges to manage their dockets more efficiently by identifying judicial laggards.").

[152] *Id.* at 375.

[153] Jonathan B. Petkun, Nudges for Judges: An Empirical Analysis of the "Six-Month List" 7 (August 31, 2021) (unpublished manuscript), https://jbpetkun.github.io/pages/working_papers/Petkun_JMP_20210831.pdf (determining that the six-month list is particularly effective in providing quicker resolutions of summary judgment motions).

[154] *See* de Figueiredo et al., *supra* note 148, at 368, 371 (noting that there is "suggestive evidence that the List negatively affects accuracy" and that the quality of judges' work adjudicating motions decreases as the judges "speed up their work to meet deadline pressures"). *But see* Petkun, *supra* note 153, at 7 (finding "only mixed evidence of effects on the quality of adjudications" by the six-month list).

[155] *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1698 (2017) (noting that being selected for MDL assignment "is a mark of prestige" among federal district court judges); Burch, *supra* note 28, at 417 (explaining that judges often campaign for MDL assignments because "they involve interesting facts, media attention, and some of the nation's most talented attorneys").

[156] *See supra* note 99 and accompanying text.

Last, as a potential alternative to the previous suggestions, a requirement that local district judges rule on potential MDL cases with pending motions to remand back to state court before the cases are transferred to an MDL could have similar effects.[157] This proposal would ensure that the motion to remand is adjudicated quickly and before the case is combined with thousands of others, each likely with its own motion(s), in front of the MDL judge.[158] Also, a local district judge is better suited to interpret any local law that may appear in a motion to remand.[159] This requirement would reduce the MDL judge's workload while ensuring a timely ruling on the plaintiff's motion to remand regarding snap removal.

D. ADDRESSING POSSIBLE RESPONSES AND COUNTERARGUMENTS

The counterarguments from scholars all center around the idea that consolidation in an MDL is more efficient than litigating similar cases separately across the country.[160] One group of scholars mentions that snap removals may foster consolidation and efficiency.[161] Another scholar suggests that if consolidating cases in

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[157] Currently, "the 'general rule is for federal courts to defer ruling on pending motions to remand in MDL litigation until after the JPMDL has transferred the case to the MDL panel.'" Krieger v. Merck & Co., No. 05-CV-6338, 2005 WL 2921640, at *1 (W.D.N.Y. Nov. 4, 2005) (citing Jackson v. Johnson & Johnson, Inc., No. 01-2113, 2001 WL 34048067, at *6 (W.D. Tenn. Apr. 3, 2001)). This proposal suggests reversing this general rule so that the motion to remand is heard *before* the case is transferred to the MDL.

[158] *See, e.g.*, *id.* at *2 (noting that nearly one thousand cases in the *In re Vioxx Products Liability Litigation* have been stayed pending MDL transfers, including 125 with pending motions to remand).

[159] David Goodnight, *Chaos on Appeal: The Tenth Circuit's Local Judge Rule*, 67 DENV. U. L. REV. 515, 515 (1990) ("[Appellate judges] afford district court decisions on unclear questions some degree of deference, primarily on the ground that the district judge has special expertise with state law.").

[160] *See, e.g.*, Stempel et al., *supra* note 119, at 475 n.158 ("Once in federal court, such litigation is more easily subject to MDL . . . that is more difficult where similar cases are strewn through 50 state court systems as well as 94 federal district courts.").

[161] *See id.* ("Snap removal—which can be done in ultimate *Flash Boys* style by large pharmaceutical or chemical companies subject to frequent and related litigation—may foster consolidation."). These authors go on to say that they do not find this view persuasive in part because it does not seem to lead to many big defendants snap removing into an MDL. *Id.* But snap removal into an MDL happens already, and the defense bar could consciously promote snap removal as a strategic tool at any time. It is better to end this practice soon before it gets out of control.

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federal court in front of one judge is preferred for efficiency reasons, then "Congress could choose to expressly expand the right of removal in diversity cases that are related to a pending MDL litigation, notwithstanding the presence of a forum defendant."[162]

But it is hard to reconcile the efficiency goals of MDL consolidation with the "black hole" reality: in many cases, plaintiffs sit in an MDL with no movement on their cases for years.[163] The current MDL practice does not foster efficiency; therefore, there is no benefit to allowing snap removal into MDLs. When a case is snap removed into an MDL, it joins a slow-moving mass that is often geared towards settlement, whether the plaintiff likes it or not. Snap removals to MDLs undermine the primary goal of our legal system—justice—by allowing large defendants to game the system, depriving plaintiffs of speedy dispositions and counsel of their choice.[164] Because of the current problems in MDL practice,[165] defendants should not be allowed to snap remove themselves all the way from state court to a federal MDL court across the country.

VI. CONCLUSION

Defendants have long been taking advantage of the snap removal loophole in the forum defendant rule to remove an action from state court to the federal court in that district. Now, many defendants take snap removals a step too far by asking for transfer to a pending MDL in a federal district court that may be across the country and may have thousands of other cases. The consequences of this transfer can be dire for plaintiffs who initially filed in state courts and now hope to argue their motions for remand in the MDL court. Once in the MDL, snap-removed plaintiffs could sit for years without resolution of their cases. Their motions to remand may be ignored because MDL judges prefer consolidation to remand, simply for efficiency reasons.

Moving forward, the MDL subcommittee should address the detrimental combination of snap removals and MDLs. Also, Congress should extend the federal six-month list to include MDL

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[162] Nannery, *supra* note 2, at 577.

[163] *See supra* notes 30–31 and accompanying text.

[164] *See supra* note 126 and accompanying text.

[165] *See supra* Section II.B.

motions to remand and consider requiring district judges to rule on any motions to remand before a case is transferred to an MDL. Until MDL judges are pushed to rule on motions to remand, they will delay—and potentially ignore indefinitely—such motions, and plaintiffs will be stuck among thousands of cases in a federal district court across the country.

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