

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

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STEVE STRANGE, on behalf of )  
himself and all others )  
similarly situated, )  
 )  
Plaintiff, )  
 )  
vs. ) 03 CV 2428 B/P  
 )  
NEXTEL COMMUNICATIONS, NEXTEL )  
WEST CORP., NEXTEL PARTNERS, )  
and DOES 1 through 1000 )  
inclusive, )  
 )  
Defendants. )  
 )

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ORDER DENYING DEFENDANTS' MOTION TO STAY PROCEEDINGS  
PENDING RULING ON TRANSFER AND CONSOLIDATION BY THE  
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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Presently before the court is a motion by the defendants, Nextel Communications, Nextel West Corp., and Nextel Partners (collectively "Nextel"), to stay proceedings, filed on June 17, 2003. Plaintiffs oppose this motion, and filed their response on June 20, 2003. On July 9, 2003, defendants filed a motion for leave to file a reply brief; the reply brief was attached as an exhibit to that motion.<sup>1</sup> The court has reviewed the memoranda of law submitted by the parties, considered the applicable law, and is

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<sup>1</sup>By separate Order dated July 11, 2003, this court granted defendants' motion to file its reply brief.

otherwise fully advised in the premises. For the reasons below, defendants' motion to stay proceedings is DENIED at this time. Defendants may renew their motion for stay after the District Court has ruled on plaintiff's pending motion to remand.

### **I. Background**

On May 2, 2003, the plaintiffs filed a class action complaint against Nextel in the Circuit Court of Shelby County, Tennessee. According to the complaint, the plaintiffs are mobile phone customers of Nextel, many of whom had entered into one or two-year term contracts with Nextel for mobile phone services. The complaint alleges that under the terms of the service contracts, Nextel's customers are permitted to prematurely terminate their contracts without paying a penalty only if Nextel increases its prices during the contract period. The plaintiffs contend that beginning in January 2002, Nextel increased the service charges on its mobile phone services. The increase was described on the customers' invoices as a "Federal-Programs Cost Recovery" fee and was listed under the heading "Unit Taxes, Fees and Assessments." The plaintiffs assert that there is no such government imposed tax, fee, or assessment. Rather, the plaintiffs allege that Nextel listed this increase under the guise of "Unit Taxes, Fees and Assessments" to mislead its customers into believing that this was a government imposed tax or fee which customers were required to pay, and that customers had to incur the price increase rather than

incur a contract termination fee. The four-count complaint contains four state law theories of recovery, including breach of contract, fraud, money had and received, and violations of the Tennessee Consumer Protection Act. See T.C.A. § 47-18-104 *et seq.*

On June 6, 2003, Nextel removed this case to the United States District Court for the Western District of Tennessee. Nextel's basis for removal is that the plaintiffs' complaint contains a substantial federal question and involves a matter - the regulation of rate charges by wireless phone providers - that is completely preempted by federal law. On June 12, 2003, Nextel also filed a motion with the Judicial Panel on Multidistrict Litigation ("JPML").<sup>2</sup> The motion asks the JPML to consolidate this case with thirteen other similar cases pending across the country and to order unified pre-trial management before one district court.

The plaintiffs oppose consolidation and transfer. They also oppose proceeding before this court. On June 26, 2003, the plaintiffs filed a motion to remand, arguing that their four-count complaint does not contain a federal question, and thus, does not belong in federal court. The plaintiffs contend that this court is without jurisdiction to proceed because their complaint contains purely state law claims.

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<sup>2</sup>The JPML, established under 28 U.S.C. § 1407, was designed to centralize in one district all pretrial proceedings in civil cases pending in different districts that involve one or more common questions of fact. See Matter of New York City Mun. Securities Litigation, 572 F.2d 49, 51-52 (2d Cir. 1978).

Before the plaintiffs filed their motion to remand, the defendants filed the instant motion, asking the court to enter an order staying all proceedings in this case until such time that the JPML decides whether or not to consolidate and transfer these mobile phone cases. Nextel argues that a stay will conserve judicial resources, will shield the defendants from inconsistent rulings and having to re-litigate matters, and will not result in any prejudice to the plaintiffs. According to Nextel's request, the order of stay would freeze all aspects of this litigation, including further argument on, and determination by the District Court of, the plaintiff's motion to remand.

## **II. Analysis**

A district court's power to stay proceedings "is incidental to the power inherent in every court to control the disposition of the [cases] on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. American Water Works & Elec. Co., 299 U.S. 249, 254 (1936). When considering a motion to stay a lawsuit, the court must "weigh competing interests and maintain an even balance." Id. at 255-56.

The parties' dueling motions to remand and to stay raise an important question for this court to consider: whether the District Court should rule on the issue of jurisdiction presented in the plaintiffs' motion to remand before the court rules on the motion to stay. Courts that have faced these competing motions disagree

on whether or not litigation should be stayed pending a transfer decision by the JPML. Several courts have granted motions to stay, without first ruling on pending motions to remand. See, e.g., Clark v. Bayer Corp., No. 02-0834, 2002 U.S. Dist. LEXIS 9057 (E.D. La. May 14, 2002); Medical Society of the State of New York v. Connecticut General Corp., 187 F.Supp.2d 89, 91 (S.D.N.Y. 2001); Falgoust v. Microsoft Corp., No. CIV.A.00-0779, 2000 WL 462919, at \*2 (E.D. La. April 19, 2000); Weinke v. Microsoft Corp., 84 F.Supp.2d 989, 990 (E.D. Wisc. 2000); D's Pet Supplies, Inc. v. Microsoft Corp., No. 99-76056, 2000 U.S. Dist. LEXIS 16482, at \*3 (E.D. Mich. Feb. 7, 2000).

Other courts have taken the exact opposite approach, holding that a court should first resolve the issue of jurisdiction presented in the motion to remand before it decides the motion to stay. See, e.g., Smith v. Mail Boxes, Etc., 191 F.Supp.2d 1155, 1157 (E.D. Cal. 2002); Farkas v. Bridgestone/Firestone, Inc., 113 F.Supp.2d 1107, 1115 (W.D. Ky. 2000); Sherwood v. Microsoft Corp., 91 F.Supp.2d 1196, 1199 (M.D. Tenn. 2000); Villarreal v. Chrysler Corp., No. C-95-4414, 1996 WL 116832, at \*1 (N.D. Cal. Mar. 12, 1996); see also Aetna U.S. Healthcare, Inc. v. Aktiengesellschaft, Inc., 48 F.Supp.2d 37, 39 (D.D.C. 1999) (deciding whether removal was proper before deciding whether to stay pending ruling by JPML); Good v. Prudential Ins., 5 F.Supp.2d 804, 809 (N.D. Cal. 1998) (same); Lloyd v. Cabell Huntington Hosp., Inc., 58 F.Supp.2d 694,

696 (S.D. W.Va.1999) ("This Court cannot, however, stay proceedings in an action over which it lacks jurisdiction"); Stern v. Mut. Life Ins. Co. of N.Y., 968 F.Supp. 637 (N.D. Ala. 1997) ("It is incumbent upon a court whose subject matter jurisdiction is questioned to make a determination as to whether it has, or does not have, jurisdiction over the action. This determination involves no issues that the putative transferee court in the multi-district action would be uniquely qualified to address.").

Still other courts have taken a middle-ground approach, employing a three-step analysis that involves making a preliminary assessment of the merits of the motion to remand. See Meyers v. Bayer AG, 143 F.Supp.2d 1044, 1049 (E.D. Wis. 2001); see also Board of Trustees of the Teachers' Retirement System of Illinois v. Worldcom, Inc., 244 F.Supp.2d 900, 906 (N.D. Ill. 2002); Chinn v. Belfer, No. Civ. 02-00131, 2002 WL 31474189, at \*2-3 (D. Ore. June 19, 2002).

In addition to this case law, in two of the fourteen companion cases that are included in Nextel's motion to transfer pending before the JPML, the District Courts have reached different conclusions on the issue of stay. In Freeman v. Nextel South Corp., No. 03CV173 (N.D. Fla. June 17, 2003), the District Court denied defendants' request to stay proceedings relating to plaintiffs' motion to remand, but granted defendants' motion to stay with respect to all other aspects of litigation until the JPML

rules on the motion to transfer. In Daniels & Daniels v. Nextel South Corp., No. 03-80518 (S.D. Fla. July 8, 2003), however, the District Court entered an order staying the litigation pending a ruling from the JPML.

Although all of these cases are instructive, this court's decision, of course, is controlled by the law of this Circuit. "In this Circuit, jurisdictional issues should be decided as soon as practicable." Strategic Assets, Inc. v. Federal Express Corp., 190 F.Supp.2d 1065, 1066 (M.D. Tenn. 2001) (citing Franzel v. Kerr Mfg. Co., 959 F.2d 628, 629 (6th Cir. 1992)); see also Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 (6th Cir. 1999) (in the removal context, "[t]he forum for suit ought to be settled at some time early in the litigation.") (quoting Brown v. Demco, Inc., 792 F.2d 478, 482 (5th Cir. 1986)).

Courts bound by the law of the Sixth Circuit have addressed jurisdictional issues before ruling on motions to stay.<sup>3</sup> See Strategic Assets, Inc. v. Federal Express Corp., 190 F.Supp.2d 1065, 1067 (M.D. Tenn. 2001) ("the Sixth Circuit Court of Appeals has stated that a district court's first obligation is to determine whether the court has subject matter jurisdiction because without such jurisdiction, there is no action to transfer or change

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<sup>3</sup>The one exception is D's Pet Supplies, Inc. v. Microsoft Corp., No. 99-76056, 2000 U.S. Dist. LEXIS 16482 (E.D. Mich. Feb. 7, 2000), where the district court granted defendants' motion to stay. However, the court in D's Pet Supplies did not directly address the issue of jurisdiction.

venue."); Farkas v. Bridgestone/Firestone, Inc., 113 F.Supp.2d 1107, 1115 n.8 (W.D. Ky. 2000) ("the jurisdictional issue must be resolved before deciding whether to stay or transfer the case to the MDL panel."); Sherwood v. Microsoft Corp., 91 F.Supp.2d 1196, 1199 (M.D. Tenn. 2000) ("the Court considers first the plaintiffs' motion to remand that challenges this Court's lack of subject matter jurisdiction over this action. If that motion is granted, then [defendant's] motion to stay is moot."). As the District Court explained in Sherwood,

Despite the pendency of multiple similar actions across the country, the Sixth Circuit has warned that a district court's first obligation is to determine whether the Court has subject matter jurisdiction because without such jurisdiction, there is not any action to transfer. BancOhio Corp. v. Fox, 516 F.2d 29, 31-32 (6th Cir. 1975). "No matter how desirable [the defendant] feel[s] it may be to consolidate . . . all litigation" in a single forum, "[s]uch a transfer cannot be made unless the district court properly has jurisdiction of the subject matter of the case." Id. at 32.

Sherwood, 91 F.Supp.2d at 1199.

Moreover, although the motion to remand is before the District Court (and not this court), the court notes recent developments in two companion cases that were included among the fourteen named in the defendants' Motion to Transfer for Coordination and/or Consolidation: Cherry v. Sprint Spectrum, L.P., No. M-03-080 (S.D. Tex. June 6, 2003), and Gregory v. Sprint Spectrum, L.P., Case No. 03cv0676 (S.D. Cal. Jun. 13, 2003). Defendants admit that these cases contain common allegations and arguments to the one at bar.



See Motion to Transfer For Coordination and/or Consolidation, at 6, In re Wireless Telephone Federal Cost Recovery Litigation, (JPML filed Jun. 12, 2003). In both of these cases, the District Courts granted the plaintiffs' motions to remand for lack of subject matter jurisdiction. See Order of Remand, Cherry v. Sprint Spectrum, L.P., No. M-03-080 (S.D. Tex. June 6, 2003); Order Remanding Action to San Diego Superior Court, Gregory v. Sprint Spectrum, L.P., Case No. 03cv0676 (S.D. Cal. Jun. 13, 2003). Also, in two other cases that involve similar allegations against Nextel - but which were not included in Nextel's motion to transfer<sup>4</sup> - the District Courts granted the plaintiffs' motion to remand as well. See Memorandum Opinion and Order, Hohne v. Nextel West Corp., Case No. 1:03cv573 (N.D. Ohio June 4, 2003); Memorandum and Order, State ex rel. Nixon v. Nextel West Corp., Case No. 4:02cv01845 (E.D. Mo. Feb. 4, 2003).

Without deciding the issue of jurisdiction, which is in the District Court's hands, the fact that four other courts have already entered orders remanding similar cases to state court weighs heavily on this court's decision. See Meyers, 143 F.Supp.2d at 1049 (explaining that "a court should first give preliminary scrutiny to the merits of the motion to remand. If this preliminary assessment suggests that removal was improper, the court should

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<sup>4</sup>These orders of remand were entered on February 4 and June 4, 2003. Nextel's motion to transfer was filed on June 12, 2003.

promptly complete its consideration and remand the case to state court.") A stay at this point in the litigation would unnecessarily delay the District Court's decision on jurisdiction.

### **III. Conclusion**

For the reasons above, defendants' motion to stay proceedings is DENIED at this time. Defendants may renew their motion to stay after the District Court has ruled on plaintiff's pending motion to remand.

IT IS SO ORDERED. Entered this \_\_\_\_ day of July, 2003.

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TU M. PHAM  
UNITED STATES MAGISTRATE JUDGE