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February 14, 2002

Marcia M. Waldron
Acting Clerk
United States Court of Appeals
For the Third Circuit
2100 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Via Federal Express

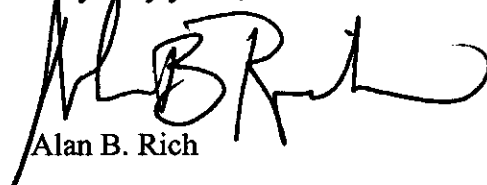
Re: In Re: Federal-Mogul Global, Inc., No. 02-1426

Dear Ms. Waldron:

Enclosed is an original and four (4) copies of Appellee's Motion To Dismiss and Appeal With Request for Expedited Consideration.

This document is being served upon the below listed counsel.

Very truly yours,



Alan B. Rich

ABR/da
enclosures

cc: Christopher Landau, via facsimile 202/879-5200

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 02-1426

In Re

FEDERAL MOGUL GLOBAL, INC.

APPEAL OF:

**DAIMLERCHRYSLER CORPORATION,
FORD MOTOR COMPANY, and
GENERAL MOTORS CORPORATION,**

Appellants.

On Appeal from the
United States District Court for the District of Delaware
Hon. Alfred Wolin, District Judge
Bankruptcy Nos. 01-10578, et seq.

**MOTION TO DISMISS APPEAL
(With Request for Expedited Consideration)**

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CO-COUNSEL FOR APPELLEES

CERTIFICATE OF INTERESTED PERSONS

To the best of the Appellees' knowledge, the Certificate of Interested Persons filed with the Emergency Motion to Stay is accurate. Counsel who are signatories hereto represent thousands of persons whose state court asbestos personal injury cases were removed to the federal courts and provisionally transferred to the court below. Upon request, given the voluminous nature of the information, we will supply the names of all of these plaintiffs.

MOTION TO DISMISS

TO THE HONORABLE COURT OF APPEALS:

The Appellees hereby move to dismiss this appeal, for the following reasons:

First, the district court remanded these cases on equitable grounds under 28 U.S.C. §1452, as well as for absence of subject matter jurisdiction. Under Section 1452 of the Judicial Code, specifically cited in Judge Wolin's Order, an equitable remand is "not reviewable by appeal or otherwise by the court of appeals." *See, e.g., Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129, 116 S.Ct. 494, 497 (1995) ("§ 1452 contains its own provision governing certain types of remands in bankruptcy, see § 1452(b) (authorizing remand 'on any equitable ground' and precluding appellate review of any decision to remand.)"); *Arnold v. Garlock, Inc.*, 2001 WL 1669714, *9 (5th Cir., Dec. 28, 2001) ("once a matter related to a bankruptcy case is equitably remanded, it is not subject to federal appellate review on any basis."); *In the Matter of United States Brass Corp.*, 110 F.3d 1261, 1265-66 (7th Cir. 1997); *In re Cathedral of the Incarnation*, 99 F.3d 66, 68 (2^d Cir. 1996) ("Our finding of non-appealability is governed by § 1452(b)'s command that 'an order entered under this subsection remanding a claim...is not reviewable by appeal or otherwise....'")

Consequently, since this Court cannot review an order equitably remanding a case to state court, the appeal must be dismissed.¹

Second, another basis for the remand of these cases was absence of subject matter jurisdiction. Such remands, whether or not in the context of a bankruptcy case, are not reviewable. *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129, 116 S.Ct. 494, 497(1995) (“If an order remands a bankruptcy case to state court because of...lack of subject matter jurisdiction, then a court of appeals lacks jurisdiction to review that order”); *Spring City Corp. v. American Buildings Co.*, 193 F.3d 165, 169 (3rd Cir. 1999).² Therefore, this appeal must be dismissed.

The Appellees recognize that remands under Section 1447(d) are not “self-executing.”³ However, while the district clerk’s ministerial act of mailing a certified copy of the remand order to the state court may indeed be necessary to reinvest the state court of jurisdiction and finally dispossess the federal district court of

¹ Even if the Notice of Appeal and the Emergency Motion to Stay are transmuted into a Petition for Writ of Mandamus, that does not alter the non-reviewability of the remand order at issue. *See In the Matter of United States Brass Corp.*, 110 F.3d 1261, 1266 (7th Cir. 1997).

² There is no applicable *Thermtron* exception applicable here.

³ *See, e.g., Hunt v. Acromed Corp.*, 961 F.2d 1079, 1081-2 (3rd Cir. 1992). A remand order under Section 1452 is, however, effective when signed. *Arnold v. Garlock, Inc.*, 2001 WL 1669714, *9 (5th Cir., Dec. 28, 2001).

jurisdiction, the act of mailing *vel non* has no bearing on the jurisdiction of the court of appeals, since review of the remand “order” itself is flatly prohibited by Congress. Certainly, it would be non-sensical to attribute to Congress the intent that its clear ban on appellate review of any kind would instead become dependent on the outcome of an unseemly jurisdictional foot-race between the federal district clerk and the appellate court – as one races to mail a certified copy of the remand order to the state court and the other races to enter a “stay” of that order. This would open up a breathtakingly large exception to the jurisdictional bar established by Section 1447(d). This Court has refused this kind of invitation in the past, and should certainly not reverse course here. *See Hunt v. Acromed Corp.*, 961 F.2d 1079, 1082 (3rd Cir. 1992).⁴

Third, the Appellants were well aware of the two-step process established by Judge Wolin to address the transfer and jurisdictional issues – a process which the Auto Makers endorsed and defended all over the country – whereby a provisional order was entered, providing the jurisdictional predicate for Judge Wolin to rule on the issues, to be followed by a decision on the merits of both permanent transfer

⁴ As the Court held: “If we exercised jurisdiction and considered this appeal on the merits we would, as a practical matter, create a large exception to the jurisdictional bar of 28 U.S.C. § 1447(d), as this ruling would effectively permit the appeal of some remand orders not otherwise appealable, under the guise of an appeal from the denial of a motion to amend the notice of removal.”

and all other associated matters, including jurisdiction and abstention. As seen in the exhibits to the Response to the Emergency Motion to Stay, the Auto Makers insisted all over the country that Judge Wolin's *provisional* transfer order in the cases gave the court below jurisdiction to make these remand rulings. Now, however, having made a ruling, albeit one they do not care for, the Auto Makers accuse the court below of acting beyond its powers in remanding the cases to the state courts because the provisional transfer was not first made final. Quite to the contrary, however, once Judge Wolin had the cases before him, whether provisionally or otherwise, the district court was not only *allowed* to remand them, but was *required* by Congress to do so – since all courts have jurisdiction to determine the existence of their own subject matter jurisdiction,⁵ and since Section 1447(c) clearly commands that if “*at any time* it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.” (emphasis added). In addition, this Court has specifically recognized a “transferee” court’s power to remand to the state court from which the case was originally removed. *Bloom v. Barry*, 755 F.2d 356 (3d Cir. 1985). As a result, Judge Wolin’s order was well within his jurisdiction and cannot be construed as falling within the narrow

⁵ See, e.g., *Becton Dickinson and Co. v. Wolckenhauer*, 215 F.3d 340, 343 (3rd Cir. 2000).

Thermtron exception to the bar on appellate jurisdiction over remand orders.

Fourth, to the extent the appellants rely upon the decision relating to *transfer* to establish this Court's appellate jurisdiction, that reliance is misplaced. Transfer decisions are not final orders. Regardless, the ruling on whether the provisional transfer should be made permanent is a legal red herring because the decision was made to remand the cases. The irrelevancy of the transfer decision is laid bare by considering the effect of the opposite ruling below on transfer: had Judge Wolin first made the provisional transfers permanent, and then remanded the cases to the state courts, nothing in the legal landscape would change. The cases would still be just as remanded. Therefore, the transfer decision fails to present this Court with a live case or controversy. *See Hall v. U.S. Fiber & Plastics Corp.*, 476 F.2d 418 (3rd Cir. 1973).

In *Hall*, the outcome of a patent trial was a finding of invalidity and non-infringement. The patentee appealed from the finding of invalidity, but not from the finding of non-infringement. With the finding of non-infringement final, any action taken on the finding of invalidity could not have altered the outcome of the case, since the defendant was conclusively not infringing. Therefore, this Court held that it lacked subject matter jurisdiction over the appeal, and dismissed it. *Id.* at 419-20. Here, as in *Hall*, because the outcome of the transfer motion has no bearing on the

remands of the cases, this Court lacks jurisdiction over any attempt to appeal from that decision. Thus, whether review of the *transfer* decision is available (which it is not considering the lack of a case or controversy concerning it) is immaterial, and cannot be used to boot-strap this otherwise clearly non-reviewable remand order into this Court.

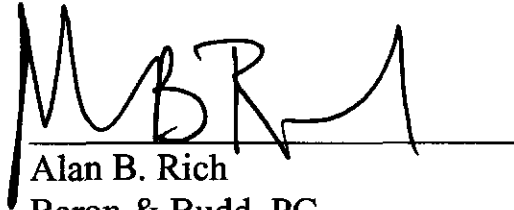
In sum, there is no basis upon which this Court could properly assume jurisdiction over this appeal. Consequently, the Appellees respectfully request that this appeal be DISMISSED.

REQUEST FOR EXPEDITED CONSIDERATION

The Appellees request, pursuant to Local Rule 27.7, that this Motion be given expedited consideration. The Appellees believe that since Judge Wolin's remand order was based in part on Section 1452, that it became immediately effective (*See Arnold, supra*. n. 3). The mere pendency of this appeal, however, will place state courts all over the United States in a state of uncertainty as to whether Judge Wolin's remand of the cases to the state courts have reinvested them with jurisdiction over the cases. In addition, the pendency of the appeal will cause great uncertainty in the local federal district courts where thousands of remand motions remain pending before them as well, and have oral arguments set. In short, the Appellees believe that this appeal must be dismissed. The longer it

pend, the more confusion will result. This matter should be handled on an expedited basis.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MBR', is written over a horizontal line.

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**ATTORNEYS FOR APPELLEES, ASBESTOS VICTIMS WHOSE
CASES WERE REMOVED AND PROVISIONALLY TRANSFERRED**

CERTIFICATE OF SERVICE

I certify that on the 15th day of February, 2002, I served a copy of this Motion by facsimile delivery to the Appellants' counsel of record, Christopher Landau, Kirkland & Ellis, Washington, DC.


Alan B. Rich