UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

IN RE NUVARING PRODUCTS LIABILITY LITIGATION	:	**4:08 MDL 1964 RWS**
	:	
	:	ALL CASES
		Honorable Rodney W. Sippel

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF ORDER DENYING MOTION TO DISMISS MASTER COMPLAINT FOR INTERLOCUTORY APPEAL

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INTRODUCTION

This Court's August 6, 2009 order denying Defendants' motion to dismiss the master complaint raises controlling questions of law as to which there are substantial grounds for difference of opinion. These legal questions bear directly on the standard plaintiffs must meet to survive a Federal Rule of Civil Procedure 9(b) and 12(b)(6) motion to dismiss when their causes of action are contained in a "master complaint" utilized in a federal multi-district litigation (MDL).

If Rule 9(b) and the Supreme Court's *Iqbal v. Ashcroft,* 129 S. Ct. 1937 (2009), and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), decisions control the sufficiency of allegations in a master complaint, as other courts have concluded [*see In re Guidant Corp. Implantable Defibrillators*, 2009 WL 1921902 (D. Minn. July 1, 2009); *In Re Medtronic, Inc. Sprint Fidelis Leads Products Liability Litigation*, 2009 WL 294353 (D.Minn. Feb. 5, 2009)], then the Court's Order represents clear legal error. At the very least, the decision by this Court and by *In re Traysol Products Liability Litig.*— that MDL master complaints are "simply meant to be an administrative tool" to be "assessed with substantial leniency," and are not subject to a pleading challenge in any individual case where a complaint previously was filed — demonstrate that there is substantial ground for difference of opinion in the standard governing a defendant's motion to dismiss in these circumstances. *See* 8/6/09 Order (Docket No. 231), at 2-3; *In re Traysol Products Liability Litig.*, MDL No. 1928, 2009 WL 577726 (Mar. 5, 2009 S.D. Fla.).

An immediate appeal on this disputed pleading construction issue will materially advance the termination of this litigation because the controlling legal issues implicated by the order, if resolved by the Eighth Circuit now, are substantially likely to narrow the claims actually litigated and allow for resolution of the cases in this MDL more rapidly, more efficiently and at a lower

cost. Accordingly, Defendants respectfully request that this Court certify its August 6, 2009 order for immediate appeal as provided in 28 U.S.C. section 1292(b).

II

PROCEDURAL BACKGROUND

In November 2008, just one month after this Court convened the first MDL status conference, Defendants filed a motion seeking utilization of master pleadings. As in all MDLs, the concept was that a master complaint would "bring[] together the common claims and theories of liability presented in the underlying cases" by becoming the "operative complaint" in each case, while at the same time leaving each individual case under its own case number. *See* Motion For An Order Directing Plaintiffs' To File A Master Consolidated Complaint (Docket No. 37), at 1, 3. Traditionally, once an adequate master complaint has been filed by a plaintiffs' steering committee, the MDL court establishes a procedure through which each plaintiff "adopts" the master complaint as an amended complaint in his or her case. *See*, *e.g.*, Federal Judicial Center, Manual For Complex Litigation (Fourth) § 40.52 (2004) (sample mass tort case management order containing exemplar language for procedure through which MDL master complaint is to be adopted, as an amended complaint, in all individual cases, save those where the plaintiff specifically objects).

In particular, Defendants noted that a master complaint would facilitate pretrial case handling, promote judicial economy, and avoid the needless waste of public and private resources, including through motions to dismiss directed at this common pleading. Defendants thus argued that without a master complaint:

> the parties will be forced to file redundant pretrial motions and responses based on these identical claims. For example, ***any Rule 12 motions*** or discovery motions would require an examination of

> the individual complaints. With a master consolidated complaint, however, the parties and the Court would have one operative pleading to examine. A master consolidated complaint would facilitate the filing of consolidated motions and responses.

Motion For An Order Directing Plaintiffs' To File A Master Consolidated Complaint, at 3-4 (emphasis added); *see also*, *e.g.*, Transcript of Dec. 18, 2008 Telephone Status Conference (Docket No. 77), at 23:14-25:3 (contemplating Rule 12(b)(6) motion after filing of master complaint).

After Plaintiffs stipulated, this Court's November 7, 2008 Case Management Order No. 1 directed them to file a master complaint. The Plaintiffs' Steering Committee filed its "Master Consolidated Complaint For Individuals" on February 6, 2009.[1] Defendants' position was that this Master Complaint failed to comply with the pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and the Plaintiffs agreed to a timetable for Defendants to file any type of responsive pleading, including a motion. *See* Transcript of Feb. 19, 2008 Telephone Status

[1] The Court's February 6, 2009 docket entry for the Master Complaint (Docket No. 88) identifies it as an "Amended Complaint" filed by dozens of individual plaintiffs. It states: "AMENDED COMPLAINT MASTER CONSOLIDATED COMPLAINT FOR INDIVIDUALS against defendant all defendants MASTER CONSOLIDATED COMPLAINT FOR INDIVIDUALS, filed by Krysti Michelle Zulpo, Sarah M. Jenn, Stephanie Ferrell Merello, Kristin Smith, Jarrad Smith, Kristen Snethen, John Snethen, Dawn M. Allen, Madeline Poirot, Carlos M. Poirot, Kimberly Meadows, Laterence Meadows, Luann Skeval, Catherine Tanksley, Juliann Harvey, Lauren Axente, Robin L. Smith, Louis Hoskins, Sr, Krystler R. Aikens, Steven C. Aikens, Nico Anne Lese, Paul A. Liss-Emperado, Eugene Emperado, Alishia A. Stombeck, Joshua Stombeck, Gina Baird, Keith Baird, Cassandra L. Rice, Henry Rice, Gregg Stroud, Liz Bailey-Stroud, Angela J. White, Edward R. White, Kim M. Schuster, Lynn K. Smith, Jodi Lipkin, Scott Lipkin, Dana M. Anspach, Cheryl L. Roberts, Michael M. Roberts, Rachel A. Rutherford, Alexis Simmons, Kathryn L. Spalding, Penelope J. Wilkinson, Linda Archer, Billy P. Archer, Lisabeth A. Ramos, Paul Ramos, Xuanlan M. Do, Alysha M. Hall, Carmita T. Purdiman, Ihuoma A. Johnston, Shelli L. Meyer, Malena D. Adkins, Russell D. Adkins, Elizabeth Aluck, Lori A. Boyd, Brian Boyd, Janet Dan, Lauren J. Campbell, Brandon Campbell, Leslye M. Tinson, Rhonda M. Brown, Twila A. Boswell Mitchell, Karhim Benbenu, Danielle L. Beauchamp, Kathryn Reeves, Sara A. Burns, Latoya J. White, Elena M. Price, George W. Price, Tiffany L. Nagle, Arlene Amador, Beth A. Nicholson, Linda Koehler, Tracey M. Curl, Easter M. Brown, Terezre K. Brown, Megan C. Decker, Kevin Decker, Stephanie M. Monsen, Kristina M. Harmon, Joseph Harmon, Lisa M. Clarke, Patrick Clarke, Debra J. Miller, Sarah E. Bye, Michelle D. Lipscomb, Francis F. Lipscomb, Jr, Michelle Henry-Yonkie, Brianne Irons, Zane Moses, Crystal Johnson, Naitasha Hendrickson, Sherrika L. James, Jennifer A. Anderson, Mark A. Anderson, Jr, Kathi Pieramico, Janice Mitchell-McGuire, Rebecca Winder, Todd Winder, Laurie Scata, Joseph Scata.(Kraft, Kristine) (Entered: 02/06/2009)."

Conference (Docket No. 107), at 80:20-81:22; 82:5-83:7 (Plaintiffs' counsel clarifying that the timing discussed was to "respond" to the Master Complaint, not just "answer," because Plaintiffs' "***never expected [Defendants] to waive their motions if they so choose to move***" (emphasis added)). In keeping with a Court-ordered briefing schedule, Defendants then filed two Rule 12 motions challenging the sufficiency of the Master Complaint allegations.

In the first, Defendants moved to strike the class action allegations in the Master Complaint. *See* Defendants' Rule 12 Motion 1 of 2: Defendants' Motion to Strike the Class Action Allegations in the Master Consolidated Complaint for Individuals (Docket No. 135), filed 3/31/09. The Plaintiffs did not oppose this first Rule 12 motion, and by order dated May 19, 2009, this Court granted it, dismissing the class allegations from the Master Complaint. *See* 5/19/09 Order (Docket No. 172).

In the second Rule 12 motion, filed the same day, Defendants sought dismissal of the other allegations in the Master Complaint under Rules 12(b)(6) and 9(b), or a more definite statement per Rule 12(e). *See* Defendants' Motion to Dismiss the Master Consolidated Complaint for Individuals, filed 3/31/09 (Docket No. 138). After granting orders permitting oversize briefs and extensive argument on the sufficiency of Plaintiffs' causes of action, this Court issued its August 6, 2009 order denying the motion to dismiss.

This August 6 order indicated that while Defendants had moved to dismiss the Master Complaint as insufficient under *Iqbal* and *Twombly*, Plaintiffs argued in opposition that (1) any Rule 12(b)(6) motion to dismiss was procedurally barred in cases where Defendants already had

answered, and (2) that the Master Complaint "was never meant to replace the individual complaints." 8/6/09 Order, at 2.[2]

This Court then noted that *In re Traysol Products Liability Litig.*, 2009 WL 277726, had concluded that MDL master complaints are entitled to "substantial leniency" at the motion to dismiss stage. 8/6/09 Order, at 3. Although the Court already had granted Defendants' first Rule 12 motion to dismiss directed at the class allegations, and can treat a post-answer Rule 12(b)(6) motion as a Rule 12(c) motion for judgment on the pleadings if necessary,[3] its August 6 order held:

> [T]he filing of the master consolidated complaint in this action was simply meant to be an administrative tool to place in one document all of the claims at issue in this litigation. Neither Plaintiffs when they consented to filing a master complaint, nor I when I entered the order directing a master complaint to be filed, contemplated that Rule 12(b) motion practice would be pursued by Organon against the master complaint. Organon had already filed answers in the individual lawsuits which precluded any 12(b) motion practice.
> In addition, I find that any clarification Organon seeks regarding the claims asserted in the master consolidated complaint may be addressed through the discovery process in this litigation and ultimately challenged at the summary judgment stage of this case.

8/6/09 Order, at 3.

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[2] Notably, Plaintiffs' opposition brief did ***not*** raise either of these procedural issues --- it only argued the merits of the motion to dismiss, and contended that the Master Complaint was sufficiently pled to survive it. *See* Plaintiffs' Response in Opposition to Defendants' Motions to Dismiss Under Rule 12(b)(6) (Docket No. 155), at 3-23. Plaintiffs did state in passing that answers were on file in many of the MDL and New Jersey state court cases, but within the context of arguing that this suggests that Defendants are sufficiently on notice of their claims and thus should be "direct[ed] to proceed with this litigation by answering the [Master] Complaint." *Id.* at 2. Plaintiffs did not argue that the answers procedurally barred Rule 12 motion practice *See id.*

[3] *See Westcott v. City of Omaha*, 901 F.2d 1486 (8th Cir. 1990) (treating post-answer Rule 12(b)(6) motion as a Rule 12(c) motion, and noting that the "distinction is purely formal, because we review this 12(c) motion under the standard that governs 12(b)(6) motions.").

Given this Court's August 6 order, Defendants are compelled to file, and anticipate filing, Rule 12(c) motions for judgment on the pleadings in each of the more than 150 individual cases already consolidated in the MDL, and Rule 12(b)(6) motions to dismiss any new federal actions as they are filed.[4] Defendants also simultaneously seek certification of the August 6 order for interlocutory appeal so that the Eighth Circuit can address the crucial questions it raises for this MDL proceeding (and all MDL proceedings). There are at least two legal conclusions central to the Court's order: (1) master complaints in an MDL are entitled to substantial leniency and are immune from the pleading requirements of Rule 9(b), *Iqbal* and *Twombly*; and (2) master complaints in an MDL do not become an operative amended pleading in any individual case and are not subject to Rule 12 motion practice.

Both these conclusions have substantial legal consequences for the parties in this MDL and to the efficacy of the MDL itself. In contrast to the directives in Rule 9(b), *Iqbal* and *Twombly*, Defendants here are left without an avenue to attack the sufficiency of the Master Complaint allegations and must instead, under the Court's ruling, incur the costs of discovery and must make motions for summary judgment (or case-by-case pleading challenges). For the reasons set forth below, this Court's order should be certified for immediate appeal consistent with controlling law.

[4] Given that the Court's August 6 order states that the master complaint has not been adopted in any individual case, does not supercede the underlying complaints, and that answers are on file in each individual case, it appears that no master answer is due or need be filed.

III

THIS COURT'S AUGUST 6 ORDER MEETS ALL THREE SECTION 1292(b) CRITERIA

Section 1292(b) authorizes a district judge to certify an interlocutory order for immediate appeal whenever the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see Remmes v. International Flavors & Fragrances, Inc.*, 435 F. Supp. 2d 936, 943 (N.D. Iowa 2006) (describing standard and granting certification despite district court's certainty in correctness of its ruling); *TCF Banking & Savings v. Arthur Young & Co.*, 697 F. Supp. 362, 366 (D. Minn. 1988) (describing certification standard and recognizing that § 1292 is designed to alleviate burdens on courts and litigants); *Saunders v. Ace Mortgage Funding, Inc.*, 2007 WL 2008677 (D. Minn. 2007) (granting certification); *AT&T Communications of Midwest, Inc. v. Qwest Corp.*, 2007 WL 1994047 (D. Minn. 2007) (granting certification). Eighth Circuit precedent reflects that where the requirements for certification are present, as they are in this case, a Section 1292(b) request can and should be granted. *Haug v. Bank of America*, 317 F.3d 832 (8th Cir. 2003) (granting interlocutory review where section's requirements are met); *Harder v. ACACNDS*, 179 F.3d 609 (8th Cir. 1999) (same); *cf. Union County, Iowa v. Piper Jaffray & Co., Inc.*, 525 F.3d 643 (8th Cir. 2008) (appeal dismissed where district court's Section 1292(b) certification was an abuse of discretion).[5]

[5] While the Eighth Circuit noted in *White v. Nix*, 43 F.3d 374 (8th Cir. 1994), and *Union County* that certification should be granted sparingly, other decisions like *Haug* and *Harder* acknowledge the propriety of granting certification when section 1292(b)'s requirements are met.

The order involved here meets the prerequisite of Section 1292(b), and certification thus is warranted.

A. The August 6 Order Indisputably Involves A Controlling Question Of Law

Courts determine the first section 1292(b) criterion — whether an interlocutory order involves a "controlling question of law" — by examining whether immediate appellate review could "avoid protracted and expensive litigation" and "materially affect the eventual outcome of the litigation." *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026-27 (9th Cir. 1982). Stated another way, this means the issue is "serious to the conduct of the litigation, either practically or legally. On the practical level, saving of time of the district court and of expense to the litigants was deemed by the sponsors to be a highly relevant factor." *Katz v. Carte Blanche Corp.* 496 F.2d 747, 755 (3d Cir. 1974), *cert. denied* 419 U.S. 885 (1974); *In re Cement Antitrust Litig.*, 673 F.2d at 1026-27 (orders that would constitute reversible error on final appeal involve controlling questions of law).

Given this pragmatic approach, it perhaps is not surprising that controlling questions of law will more readily be found in "big cases." *See* 16 Wright, et al., *Federal Practice and Procedure 2d*, § 3929 at 365 (1996). Thus, in an MDL setting, many orders will warrant certification and immediate interlocutory review prior to remand. *See In re Showa Denko K.K. L-Tryptophan Products Liab. Litig. II*, 953 F.2d 162 (4th Cir. 1992) (interlocutory review allowed MDL proceeding despite strong policy against piecemeal appeals); *In re Air Crash off Long Island*, 27 F. Supp. 2d 431 (S.D.N.Y. 1998) (quoting 17 James W. Moore, Moore's Federal Practice § 112.06 [e] (3d ed. 1998) for the proposition that in MDL cases "the better practice is to allow . . . appeal prior to remand," and granting certification); *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 479 F. Supp. 1118, 1125 (E.D.N.Y. 1978) (granting certification for

interlocutory review, noting that multidistrict nature of the case clothed the question of liability with significance as a controlling question of law).

Federal law regarding the import and effect of master pleadings in MDL proceedings, and the standard under which the adequacy of MDL master pleadings are to be reviewed, are controlling questions of law. The August 6 order turned on purely legal — not factual — determinations, and the Court's decision controlled whether some or all of Plaintiffs' causes of action could proceed or should be dismissed.

Eighth Circuit jurisprudence reflects this view. In circumstances like those presented in this case — *i.e.*, where the insufficiency of a complaint is dispositive of multiple claims or impacts the scope of discovery and trial — certification for immediate appellate review is appropriate. *See Burt v. Danforth*, 742 F. Supp. 1043 (E.D. Mo. 1990) (granting certification after motion to dismiss denied in part; complex choice-of-law issues were controlling and reversal would materially advance the litigation because it would obviate the need for trial); *School Dist. of Kansas City v. State of Mo.*, 460 F. Supp. 421, 445 (W.D. Mo. 1978) (granting certification of denial of motion to dismiss complaint for failure to state a claim); *Sale v. Waverly-Shell Rock Bd. of Ed.*, 390 F. Supp. 784 (N.D. Iowa 1975) (same).

Accordingly, Section 1292(b)'s first requirement, the need for a controlling legal issue, is satisfied.

B. There Is A Substantial Ground For Difference Of Opinion As To The Pleading Standard Required Of Master Complaints Filed In An MDL

Relying on its characterization of *In re Traysol*'s rejection of "motion practice" against a master consolidated complaint on the ground that the sufficiency of MDL complaint allegations should be "assessed with substantial leniency," this Court's order provides that any clarification

of Plaintiffs' claims in this case can await discovery and summary judgment. 8/6/09 Order, at 3.[6] This Court's order also establishes that the master complaint in this MDL effectively is a nullity because it "was simply meant to be an administrative tool," was not meant to "replace the individual complaints," and was not expected to result in any "Rule 12(b) motion practice." *Id.* at 2, 3.

The Supreme Court recently addressed how lenient federal courts should be when evaluating the legal sufficiency of the allegations in a complaint, and in *Iqbal* and *Twombly*, the resounding answer was "not very." Not only is it "plaintiff's obligation to provide . . . more than labels and conclusions, and a formulaic recitation of the elements of a cause of action," *Twombly*, 550 U.S. at 555, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 129 S. Ct. at 1949. In addition, federal courts are "not bound to accept as true a legal conclusion couched as a factual allegation," and even when factual allegations are pled, federal courts must determine whether they support "a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949-50; *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (*Twombly* requires "facts that affirmatively and plausibly suggest that the pleader has the right he claims.").[7]

These rules apply with all the more force with regard to fraud claims, which are subject to Rule 9(b)'s heightened pleading requirements. For fraud, the Eighth Circuit has recognized that Rule 9 requires allegations of "representative examples" of the alleged fraudulent conduct,

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[6] *In re Traysol*, an unpublished Florida case decided before *Iqbal*, in fact recognized that "leniency must not overreach so as to effect a negation of the policy behind Rule 9" and dismissed some insufficient fraud allegations. 2009 WL 577726, at *9.

[7] A claim is plausible, in turn, when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. This standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Stated another way, "[t]he use of buzzwords, coupled with only vague and conclusory allegations, is insufficient to withstand a motion to dismiss, especially in light of [*Iqbal and Twombly*]." *In re Guidant Corp. Implantable Defibrillators Litig.*, MDL No. 05-1708, 2009 WL 1921902 (D. Minn. July 1, 2009).

as well as allegations of "'such matters as the time, place, contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given thereby.'" *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006); *Commercial Prop. Invs., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639, 644 (8th Cir. 1995).

Other MDL courts have applied *Iqbal* and *Twombly* when evaluating the sufficiency of MDL master complaints, and dismissed claims found wanting under those standards. *See In re Guidant Corp. Implantable Defibrillators*, 2009 WL 1921902 (D. Minn. July 1, 2009); *In Re Medtronic, Inc. Sprint Fidelis Leads Products Liability Litigation*, 2009 WL 294353 (D.Minn. Feb. 5, 2009). That the *In re Traysol* court, and this Court, have concluded that MDL master complaints instead deserve "substantial leniency" demonstrates that there is substantial ground for a difference of opinion about whether Rule 9, *Iqbal* and *Twombly* control, or whether special pleading rules apply in these circumstances.[8]

The concept that MDL plaintiffs need not articulate or clarify their claims until discovery and summary judgment is another area where there is substantial ground for differing opinions. That position, held by *In re Traysol* and this Court, stands in marked contrast to what the Supreme Court has decided. First, the Supreme Court has held that an adequate and sufficient pleading is a mandatory prerequisite to discovery. *See Iqbal*, 129 S. Ct. at 1954 (when a plaintiff's "complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."). And second, the Supreme Court has expressly rejected the notion that discovery and summary judgment are an adequate substitute for a legally sufficient complaint. *See Iqbal*, 129 S. Ct at 1953 (rejecting argument that "Rule 8 should be tempered" where discovery is

[8] This profound disparity in standards, as well as the problems this disparity poses for adjudication of an MDL, already have been noted by at least one commentator. *See* http://druganddevicelaw.blogspot.com/2009/08/moving-to-dismiss-mdl-master-complaints.html (last visited August 17, 2009).

controlled through case management in anticipation of a motion for summary judgment; "the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.").

Considerable authority likewise establishes that MDL master complaints are not simply "administrative tools" but instead are meant to have real impact – operating as amendments to earlier-filed individual complaints which allow the MDL court to efficiently narrow the common claims and issues for discovery and trial. For example, the Judicial Panel on Multidistrict Litigation and the Federal Judicial Center just issued guidance on MDL case management, and suggest that MDL judges provide for both the "filing of a consolidated amended complaint" and "motions to dismiss." *See* The Judicial Panel on Multidistrict Litigation & The Federal Judicial Center, Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges, at 4 (2009) ("Your case management order should include the usual interim breakpoints, e.g., filing of a consolidated amended complaint (where appropriate), filing and briefing on motions to dismiss, . . ."). This is consistent with the Manual For Complex Litigation, which provides the same advice. *See* Manual For Complex Litigation (Fourth) § 11.32 (Judges overseeing complex litigation "should consider ordering that specified pleadings . . . are 'deemed' filed" in other MDL cases . . . . The legal insufficiency of a claim or defense may be raised by motion for failure to state a claim or for partial judgment on the pleadings.").

The conclusion that MDL courts should wait for discovery and summary judgment before weeding out legally insufficient claims, by contrast, stands the purpose of consolidating federal cases into an MDL on its head: "The sine qua non of managing complex litigation is defining the issues in the litigation. The materiality of facts and the scope of discovery (and the trial) cannot be determined without identification and definition of the controverted issues;" thus, if the pleadings are ill-defined, "[p]robably the judge's most important function in the early stages of litigation management is to press the parties to identify, define, and narrow the issues." *Id.* at

§ 11.13. There is, therefore, substantial grounds for a difference of opinion on what procedural impact master complaints have on individual cases consolidated within an MDL, as well as whether the federal pleading standards of Rule 9, *Iqbal* and *Twombly* apply to such master complaints.

C. An Immediate Appeal Of This Court's August 6 Order Will Materially Advance The Termination Of This Litigation

The final Section 1292(b) criterion is whether an interlocutory appeal may materially advance the termination of the litigation. A party can meet this criterion if certification will help resolve significant disputed issues presented in a complex piece of litigation. *See Same Day Surgery Centers v. Montana Regional Orthopedics, LLC*, 2003 WL 1565942, at *3 (D. Minn. 2003); *see also In re Currency Conversion Fee Antitrust Litigation*, 2005 WL 1871012,*5 (S.D.N.Y. Aug. 9, 2005) (interlocutory appeal particularly appropriate for critical threshold issue that would materially advance the ultimate resolution of the case if the appellate court concludes the district court's interpretation of the law is incorrect).

Particularly given the central importance both of the import and effect of master complaint in an MDL, immediate appellate resolution of the legal standard under which MDL complaints must be judged will help resolve significant disputed issues. If the Eighth Circuit views the more rigorous legal standards as controlling, appellate intervention could well result in a termination of a significant portion of the litigation, as Defendants have substantial arguments regarding the infirmities of the Master Complaint's allegations. *See AT&T Communications of Midwest, Inc.*, 2007 WL 1994047, at *2 (granting certification and recognizing that reversal by Eighth Circuit would materially advance the termination of the litigation).

At the very least, it would help clarify how the litigation should proceed with respect to the elements and proof of the common issues and claims in this case. With an MDL, where pre-

trial consolidation means that legal issues can be resolved across dozens of cases at once, interlocutory appellate review is particularly effective – particularly given that the option of appeal after final judgment will mean multiple courts will be asked to decide the same legal question in myriad cases, perhaps with myriad results. For example, *In re Air Crash off Long Island*, 27 F. Supp. 2d 431, recognized that "the better practice" is to allow interlocutory appeals to proceed, prior to remand of an MDL. Similarly, in *Duplan Corp. v. Moulinage et Retorderie de Cavanoz*, 487 F.2d 480, 481 (4th Cir. 1973), the district court certified an order for interlocutory appeal, noting that question of whether work product documents lost its qualified immunity constituted a "question of vital importance" in a multidistrict patent-antitrust proceeding as it controlled the scope of discovery and related depositions. *See also In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 742 (D. Maryland 2003) (even where the court's ruling may not be substantively dispositive, certification appropriate if it will control many aspects of the proceedings in substantial respects, particularly the scope of the discovery in the MDL and related cases).

Here, both the parties and this Court stand to benefit from prompt appellate intervention on the legal principles with a likely dispositive impact on the litigation. Certification under section 1292 (b) is particularly appropriate in these circumstances.

IV

CONCLUSION

This Court's August 6 order meets the requirements of Section 1292(b), and the certification of it will further the salutary purpose of the statute. Defendants thus request that this Court certify the order denying Defendants' motion for immediate appeal and, pursuant to Section 1292(b), deem the order amended to reflect that certification.

DATED: August 17, 2009

Respectfully submitted,

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