UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

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

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

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I

INTRODUCTION

Plaintiffs are highly dismissive of Defendants' request for 1292(b) certification of this Court's August 6 Order and urge the Court to summarily deny the request. The August 6 Order, however, is neither a routine attempt to deal with the procedural difficulties posed by a post-answer Rule 12(b)(6) motion nor a short-hand way to deny Defendants' motion to dismiss on the merits. In fact, Plaintiffs' efforts to re-characterize this Court's Order underscore – in perhaps the strongest way possible – that there is a need for immediate appellate review.

To begin with, if the August 6 Order just turned on the procedural propriety of a post-answer Rule 12 motion, then what has happened in this case is inexplicable. If procedural propriety was the issue, this Court would not have discussed and set the Rule 12 motion briefing schedule at multiple status conferences, or granted Defendants' first Rule 12 motion to strike the class allegations. Similarly, the Court would not have needed to discuss or cite *In re Traysol* in its Order, nor declare that "substantial leniency" must be applied when adjudicating a Rule 12(b) motion in the context of a Master Complaint. Moreover, if the issue really were just the procedural propriety of a post-answer Rule 12(b) motion, this Court would have addressed Defendants' alternative Rule 12(e) motion, or treated Defendants' Rule 12(b) motion as a Rule 12(c) motion for judgment on the pleadings (as the Eighth Circuit has done), and then followed on by addressing the merits of each of Plaintiffs' causes of action. *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"). None of these steps, however, took place and any notion that the August 6 Order turned on "procedural impropriety" thus fails.

Plaintiffs' alternate description – that is, that the August 6th Order in fact was a ruling on the merits holding that each and every one of Plaintiffs' Master Complaint causes of action to be sufficient under Rule 9, *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009), and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) – makes the case for Section 1292(b) certification even more compelling. In that respect, the truncated analysis in the August 6th Order stands in marked contrast to the exhaustive element-by-element and claim-by-claim examination undertaken in *Iqbal* and *Twombly*. Indeed, it even stands in contrast to the far more detailed analysis (and conclusions) of *In re Traysol* itself. Further, if the August 6th Order truly constitutes a merits ruling, Plaintiffs will turn around and next argue that it compels the denial of every pleading motion brought against an individual complaint, whether motion for judgment on the pleadings or motion to dismiss newly-filed actions. Adopting that reasoning would deprive Defendants of their ability to obtain any meaningful review under the standards mandated by Rule 9, *Iqbal* and *Twombly* and, independently of those cases, would raise substantial Due Process concerns on its own.

In short, whether nominally procedural, nominally substantive, or both, this Court's August 6 Order quite dramatically altered the legal landscape for Rule 12 motions made in response to a master complaint in an MDL. As Plaintiffs' opposition makes clear, this Court's ruling, one way or another, provides that controlling pleading standards are not applicable to an MDL master complaint – whether as a matter of timing of the motion or by loosening the Rule 9, *Twombly* and *Iqbal* standards for cases gathered in MDLs. There is no avoiding, therefore, that the August 6th Order decided a controlling legal question (the standards applied in reviewing an MDL Rule 12 motion to dismiss) about which there is substantial difference of opinion (do Rule 9, *Iqbal* and *Twombly* apply with all their rigor or not). The basic question of the Court's power to make this dramatic change in legal rights and obligations in an MDL – whether viewed as procedural or substantive – merits Section 1292(b) certification. *See In re Showa Denko K.K. L-Tryptophan Prod. Liab. Litig.-II*, 953 F.2d 162, 165-66 (4th Cir. 1992) (even administrative order of MDL court warranted Section 1292(b) interlocutory appeal; large number of affected

MDL cases magnified its impact, and order raised questions about whether MDL court's order exceeded its powers through administrative ruling that altered parties' rights). Given the impact of that order on the further management of these proceedings, certification for appeal is warranted for the benefit of the parties and this Court.

II

ARGUMENT

A. Under Defendants' Understanding Of The August 6th Order, It Should Be Certified For Immediate Interlocutory Appeal

This Court's August 6, 2009 order explicitly stated (1) that "Organon had already filed answers in the individual lawsuits which precluded any 12(b) motion practice"; and (2) 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." August 6, 2009 Order (Docket No. 231), at 3. In so holding, this Court cited *In re Traysol*, MDL 1928, 2009 WL 577726 (S.D. Fla. Mar. 5, 2009), because it "for the most part rejected motion practice against the master consolidated complaint" and concluded that the sufficiency of such claims "should be assessed with substantial leniency" on a motion to dismiss, meaning they "could go forward and would be more appropriately challenged at the summary judgment stage of the litigation." 8/6/09 Order, at 2.

As Defendants read it, either:

> (1) The August 6th Order concluded that Rule 12 motions are inappropriate for MDL master complaints, which are "simply meant to be an administrative tool" without force in any individual case, and are "more appropriately challenged at the summary judgment stage" following discovery. 8/6/09 Order, at 2; or

> (2) The August 6th Order evaluated the sufficiency of the complaint under a "substantial leniency" standard that bears no resemblance to the more rigorous inquiry that Rule 9, *Twombly* and *Iqbal* would demand.

Under either reading, the August 6th Order singles out Defendants and their motion to dismiss for treatment different from other defendants, simply because they are in an MDL and challenging a master complaint. Whether Rule 12 motions may be directed at an MDL master complaint like the one here, and what legal standards govern any such motion, are precisely the type of important and controlling legal questions suitable for Section 1292(b) certification.

The grounds for difference of opinion also appear from the face of the order as well. The case the August 6th Order relies on, *In re Traysol*, concluded that "strict application of Rule 9(b)" should not be "applied in an MDL product liability claim" regardless of how it is applied in other cases. *In re Traysol*, 2009 WL 577726, at *6. This Court's order and *In re Traysol* thus reflect a significant departure from other courts, which decide Rule 12 motions against MDL master complaints, and apply Rule 9, *Twombly* and *Iqbal* in their original formulations to them as well. *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).

Plaintiffs cite two cases – *Abels v. Garmers Comm. Corp*., 259 F.2d 910 (8th Cir. 2001) and *Gregory v. Dillards*, 494 F.3d 694 (8th 2007) – to argue that there is no substantial dispute on the legal standard governing master complaint pleading challenges because the August 6th Order and *In re Traysol* are in keeping with Eighth Circuit precedent. Neither case mutes the dispute in any respect. *Abels*, of course, predates both *Twombly* and *Iqbal*, and whatever it may have suggested, the Supreme Court now has expressly rejected the notion that discovery and summary judgment are an adequate substitute for a legally sufficient complaint or that district

courts can loosen pleading requirements as they see appropriate. *See Iqbal*, 129 S. Ct at 1953 (rejecting argument that "Rule 8 should be tempered" where discovery is 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."). *Gregory*, for its part, has been vacated and replaced by an en banc decision, 565 F.3d 464 (8th Cir. 2009), that affirmed the pleading dismissal of most of plaintiffs' claims without waiting for discovery and summary judgment.

Moreover, immediate resolution of these disputed issues will materially advance the termination of this litigation. Contrary to Plaintiffs' arguments that rulings narrowing the pleadings do nothing except cause needless delay, narrowing the issues before trial ***is the whole point*** of creating an MDL. As the Federal Judicial Center puts it, "the sine qua non of managing complex litigation is defining the issues in the litigation," and probably an MDL judge's "most important function in the early stages of litigation management" is "to press the parties to identify, define, and narrow the issues." Manual For Complex Litigation (Fourth) § 11.13. The real inefficiencies in an MDL arise not when an MDL court embraces its duty to "press the parties to identify, define and narrow the issues," but rather when the MDL court allows a deficient complaint bloated with untenable claims to justify uncontrolled discovery, or requires that dozens or hundreds of individual proceedings take the place of joint resolution of common issues. This Court's Order accordingly satisfies each prerequisite warranting immediate appellate review.

B. Under Plaintiffs' Understanding Of The August 6th Order, It Should Be Certified For Immediate Interlocutory Appeal

As noted above, Plaintiffs' opposition principally takes issue with Defendants' construction of the August 6th Order and contends that the order did in fact "analyze the requirements of *Twombly* and *Iqbal*" *sub silentio* (through its citation to *In re Traysol*) and

"found that Plaintiffs' Master Complaint satisfies *Twombly*." Plaintiffs' Response to Defendants' Motion For Certification Of Order Denying Motion To Dismiss Master Complaint For Interlocutory Appeal (Docket No. 240), at 2, 5. Plaintiffs' reading of the August 6th Order is not plausible.

First, the language of the August 6th Order is to the contrary. Instead of discussing the merits of Defendants' motion to dismiss the Master Complaint, it mentions that answers are already on file, discovery and summary judgment are sufficient procedures for addressing the merits, and that *In re Traysol* rejected Rule 12 challenges to MDL master complaints in favor of a "substantial leniency" approach.

Second, *In re Traysol* predated *Iqbal*, so it could not have analyzed *Iqbal*'s requirements, and it could not have accounted for the *Iqbal*'s emphatic rejection of doubters who claimed *Twombly* had limited application, could be replaced by discovery and a good summary judgment motion, and could be applied on a sliding scale. *See Iqbal*, 129 S. Ct at 1953.

Third, the citation to *In re Traysol* in the August 6th Order cannot mean that this Court followed it to find the Master Complaint here compliant with *Twombly*. *See* Plaintiffs' Response to Defendants' Motion For Certification Of Order Denying Motion To Dismiss Master Complaint For Interlocutory Appeal, at 8-9. This is so because contrary to the August 6th Order, *In re Traysol* quoted and examined plaintiffs' allegations paragraph-by-paragraph, count-by-count and then ***dismissed*** several of them, even after assessing the fraud claims "with substantial leniency." Thus, while Plaintiffs may say that "this Court has adopted Judge Middlebrooks' ruling that . . . fraud pleadings are more lenient and satisfy Fed. R. Civ. P. 9 when the evidence is within the control of the Defendants" [*id.* at 6], Judge Middlebrooks actually dismissed fraud

claims like those Plaintiffs assert here,[1] because claims "that a Plaintiff or a Plaintiffs' physician relied on fraudulent or misleading statements made directly to them" depend on information that "lies largely in the possession of Plaintiffs' physicians" and so "must be pled with particularity." *In re Traysol*, 2009 WL 577726, at *8-*9.

In any event, as also noted above, if Plaintiffs are right that the August 6th Order is on the merits, that strengthens the reasons for certifying the order for interlocutory appeal. To start with, any merits ruling would inevitably constitute a controlling question of law because it includes the standard-setting components Defendants see in the order (the limits on motion practice against master complaints, the adequacy of discovery and summary judgment as a substitute, and the sufficiency of lenient assessments) plus a determination that courts need not analyze a master complaint at any depth if they do reach the merits. The nature of this decision is legal, not factual; it also is not a question of mere pleading etiquette, but one that has a material impact on this MDL and the controlling legal standards. *See* 16 Wright, et al., *Federal Practice and Procedure 2d*, § 3929 at 365 (1996); *see also In re Showa Denko*, 953 F.2d 162 (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).

[1] *See* Defendants' Reply to Response to Motion for Leave to Dismiss the Master Consolidated Complaint for Individuals or for a More Definite Statement (Docket No. 162), at 14-19.

Further, if the August 6th Order were a merits ruling, there would be substantial cause for differing opinions on it. If the August 6th Order is a cursory merits ruling, it differs dramatically from *In re Traysol*, 2009 WL 577726, at *8-*9, which considered the master complaint allegations in considerable depth before dismissing a number of them, and *Iqbal* and *Twombly,* which similarly dove deeply into the relevant pleadings. And, as with Defendants' analysis of the August 6th Order, successful resolution of the issues by interlocutory appeal still would be a game-changer. Plaintiffs undoubtedly might be able to reframe a few causes of action that could survive Rule 12 scrutiny, but the numerous junk claims and meritless allegations would fall away. The resulting MDL would be narrow, focused, targeted, and efficient – a proceeding that would deliver on the promise of MDL coordination.

C. Plaintiffs' Flawed Account Of The Procedural History Leading To The August 6th Order Should Not Misdirect The Certification Analysis

Although not essential to the certification issue raised here, Defendants are compelled to correct the record regarding the procedural history of the Master Complaint and the parties' respective positions on it.

Plaintiffs, for example, suggest that "Defendants asserted that the Master Complaint would not replace any individual complaint." *See* Plaintiffs' Response to Defendants' Motion For Certification Of Order Denying Motion To Dismiss Master Complaint For Interlocutory Appeal, at 2. This is false. Defendants moved for a master complaint with the expectation that each Plaintiff ***would retain her individual case and case number***, but that all Plaintiffs (save any who specifically objected) would adopt the Master Complaint as their ***operative pleading***. Defendants thus moved for a master complaint on the ground that:

> Plaintiffs would not be prejudiced by a master consolidated complaint because while "consolidation is permitted as a matter of convenience and economy in administration, [it] does not merge

> the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." . . . ***Hence, a master consolidated complaint merely becomes the operative complaint*** in the case, ***and does not dissolve the individual cases***.

Motion For An Order Directing Plaintiffs To File A Master Consolidated Complaint (Docket No. 37), at 3 (citations omitted; emphasis added).

Plaintiffs also suggest that both parties contemplated that the Master Complaint would not "change the rights of the parties" and was intended just as an "administrative document." But, as Plaintiffs well know, the phrases "change the rights of the parties" and "administrative document" do ***not*** mean that master complaints are meaningless documents that never become the operative pleading for any individual plaintiff. These concepts have nothing to do with the sufficiency or amendatory effect of a master complaint; rather, these concepts relate solely to choice of law and indicate that the parties do not intend the filing of a master complaint to change the law that applies to any given Plaintiff's claims. *See, e.g., In re Guidant Corp. Implantable Defibrillators Prods. Liability Litigation*, 489 F. Supp. 2d 932, 935 (D. Minn. 2007) (explaining that absent a stipulation between the parties, the filing of a master complaint does not make the MDL court the controlling forum for choice of law purposes or alter which state's laws govern plaintiffs' claims); *In re Propulsid Prod. Liab. Litig*., 208 F.R.D. 133, 141-42 (E.D. La. 2002) (master complaint does not effect a forum change for choice of law purposes, and in that sense is an administrative document that does not alter the rights of the parties because it does not alter which state's laws apply).

Finally, although this Court has stated that Plaintiffs never "contemplated that Rule 12(b) motion practice would be pursued by Organon against the master complaint" [8/6/09 Order, at 3], the opposite is true. During status conference discussions about the schedule for responding to the Master Complaint, Plaintiffs' counsel explicitly acknowledged that they "never expected

[Defendants] to waive their motions if they so chose to move" [Transcript of Feb. 19, 2008 Telephone Status Conference (Docket No. 107), at 82:5-83:7]. Plaintiffs' failure to correct the record on this point does not serve anyone, the Court or the parties, well.

III

CONCLUSION

The 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) – whether Rule 9(b) and the Supreme Court's *Iqbal* and *Twombl* decisions control the sufficiency of allegations in a master complaint, or whether 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, as concluded by this Court and *In re Traysol*, 2009 WL 577726. An immediate appeal on this disputed standard 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.

For these reasons, Defendants respectfully request that the Court grant this motion and certify the August 6, 2009 order for immediate appeal as provided in 28 U.S.C. section 1292(b).

DATED: September 4, 2009

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