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Gregory L. Halperin

Covington & Burling LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
T +1 212 841 1166
ghalperin@cov.com

By E-mail

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The Honorable Robin L. Rosenberg
Chair, Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Written Testimony on Proposed Rule 16.1(c)(5)

Dear Judge Rosenberg and Members of the Civil Rules Advisory Committee:

I am a partner at Covington & Burling LLP, where I represent clients in complex product liability and mass tort litigation, often in federal MDLs and analogous centralized proceedings in state courts. I appreciate the chance to speak briefly about proposed Rule 16.1(c)(5), which identifies "consolidated pleadings" as a matter to potentially be addressed in the initial MDL management conference report.

Large MDLs often substitute individualized complaints with a "master complaint" containing allegations common to all plaintiffs and a "short-form complaint" containing allegations specific to each plaintiff. This process undoubtedly introduces efficiencies, as plaintiffs are absolved of the need to draft individualized complaints, and defendants are correspondingly absolved of the need to serve individualized answers.[1] But there is no "MDL exception" to the Federal Rules of Civil Procedure.[2] As the Sixth Circuit colorfully put it, "MDLs

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[1] *See, e.g.*, *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 860 F. App'x 886, 888 (5th Cir. 2021) ("To streamline this multidistrict litigation, the district court directed the plaintiffs to file a master complaint collectively and to file short-form complaints individually."); *Nelson v. C.R. Bard, Inc.*, 553 F. Supp. 3d 343, 349 (S.D. Miss. 2021) (noting that court "ordered the use of Short Form Complaints as a manner of efficiently managing thousands of cases for pre-trial proceedings"); *Perez v. Am. Med. Sys. Inc.*, 461 F. Supp. 3d 488, 494 (W.D. Tex. 2020) (short-form complaint process "was created in order to streamline pleadings in the MDL"); *In re Nat'l Prescription Opiate Litig.*, 2019 WL 264900, at *2 (N.D. Ohio Jan. 18, 2019) ("The goal of the Short-Form Complaint is to streamline the amendment process, reduce the burden on the parties and the Court, and increase judicial efficiency.").

[2] *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.").

are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance."[3] And the Federal Rules do not condone sacrificing fairness for efficiency. Indeed, Rule 1 lists justice first in its list of goals.[4]

A complaint is not a mere box-checking exercise. Complaints serve two critical purposes: (1) providing defendants "fair notice of what the . . . claim is and the grounds upon which it rests"[5]; and (2) permitting defendants an opportunity, before costly and burdensome discovery, to challenge the legal sufficiency of the claims.[6] Unfortunately, some courts have implemented master and short-form complaints in a manner fundamentally at odds with both of these protections.

If Rule 16.1 ultimately recommends consideration of "[w]hether consolidated pleadings should be prepared," the Advisory Committee Notes should explain that the master and short-form complaints, taken together, must satisfy Rule 8 and, where applicable, Rule 9(b), and that Defendants must be afforded an opportunity to seek dismissal of the master complaint under Rule 12.

I. The Use of Consolidated Pleadings Should Not Relax the Pleading Requirements that Govern All Civil Actions in Federal Court.

Rule 8 — and where it applies, Rule 9(b) — applies to "all civil actions and proceedings in the United States district courts" by virtue of Rule 1.[7] Because the master complaint necessarily

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[3] *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020); *see also, e.g.*, *In re Paraquat Prods. Liab. Litig.*, 2021 WL 9793339, at *1 (S.D. Ill. Nov. 10, 2021) ("[A]n MDL court must adhere to the Federal Rules of Civil Procedure."); *In re Zofran (Ondansetron) Prods. Liab. Litig.*, 2017 WL 1458193, at *5 (D. Mass. Apr. 24, 2017) ("The creation of an MDL proceeding does not suspend the requirements of the Federal Rules of Civil Procedure, nor does it change or lower the[m].").

[4] *See* Fed. R. Civ. P. 1 ("These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

[5] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

[6] *Id.* at 559 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management' . . . . [I]t is self-evident that the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage,' much less 'lucid instructions to juries'; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.").

[7] Fed. R. Civ. P. 1.

lacks allegations about any particular plaintiff, the short-form complaint must contain sufficient *individualized* facts that, taken together with the general allegations in the master complaint, provide Defendants fair notice under Rule 8.[8] Several years ago, in the Zostavax MDL, the court dismissed 173 complaints because they were "full of boilerplate language unrelated to the individual case."[9] But *Zostavax* is the exception, not the rule. As the MDL Subcommittee has recognized, "MDL courts using master complaints may initially require nothing more of claimants than the pleading equivalent of 'count me in,' deferring individualized details until later."[10] The Subcommittee noted that "[o]ne could argue that such pleadings do not comply with Rule 8(a)(2), which requires a 'showing that the pleader is entitled to relief.'"[11]

I agree that "count-me-in" short-form complaints do not comply with Rule 8. Outside the setting of an MDL, if a plaintiff were to file a complaint alleging that use of a medicine caused them harm, without facts regarding the plaintiff's usage of the medicine (including timing of use), how the medicine is alleged to be defective, or the nature and timing of the injury alleged, there can be little doubt that the complaint would be dismissed.[12] Yet in an MDL, such

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[8] *See, e.g.*, *In re Flint Water Cases*, 2019 WL 3530874, at *40 n.31 (E.D. Mich. Aug. 2, 2019) ("Combined, the amended master and short-form complaints contain enough factual matter to put Veolia on adequate notice . . . .").

[9] *In re Zostavax (Zostar Vaccine Live) Prods. Liab. Litig.*, 2019 WL 2137427, at *1 (E.D. Pa. May 2, 2019).

[10] Advisory Comm. on Civil Rules, *MDL Subcommittee Report* 148 (Nov. 1, 2018), https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf; *see also* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 Cornell L. Rev. 1835, 1853–54 (2022) ("MDLs use master complaints with generic allegations and short-form complaints that often mean shoehorning plaintiffs' story into a six-page check-the-box form."); Lauren E. Godshall, *Direct Filing in Multidistrict Litigation: Limiting Venue Options and Choice of Law for Plaintiffs*, 29 Geo. Mason L. Rev. 3, 14 (2021) ("*Zostavax* is unusual in this regard, and many MDLs are allowing the filing of standardized short form complaints.").

[11] Advisory Comm. on Civil Rules, *MDL Subcommittee Report*, *supra*, at 148.

[12] *See, e.g.*, *In re Prempro Prod. Liab. Litig.*, 2008 WL 3200772, at *1 (E.D. Ark. Aug. 5, 2008) ("The current Complaint is an excellent example of the generic, omnidirectional complaints of which I have repeatedly expressed disfavor. At 77 pages, it is long on the history of [hormone replacement therapy], but short on the application of that history to the specific plaintiff. In fact, the complaint lacks any specificity regarding Plaintiffs' use of hormone therapy and fails to directly link any Plaintiff with any of the defendants, other than broad boilerplate language. As an example, the complaint states that '[b]ecause of her use of HRT drugs, [Plaintiff] was diagnosed with breast cancer.' Simply claiming that you took hormone therapy and suing every hormone therapy manufacturer is not enough." (alterations in original)).

short-form complaints are routine.[13]

The problem is compounded in MDLs involving multiple defendants or multiple injuries, which seem to be becoming more common. For instance, in the *Johnson & Johnson Talcum Powder MDL*, the master complaint alleged that "Plaintiffs were diagnosed with various forms of cancer of the female reproductive system,"[14] yet the short-form complaint simply required a plaintiff to allege that she experienced "a talcum powder product(s) injury" — without any specification of *what* that injury was.[15] This basic Rule 8(a)(2) information was reserved for a plaintiff profile form that was not ordered until 3.5 years into the litigation and, even then, initially for only a subset of plaintiffs.[16]

The concern is also heightened where MDLs involve claims involving fraud or mistake, which Rule 9(b) requires to be pled with particularity.[17] Complying with Rule 9(b) necessarily requires individualized facts: what alleged misstatements the plaintiff heard, when the plaintiff heard them, and how the plaintiff relied on them.[18] Yet some courts have permitted plaintiffs to plead fraud claims via short-form complaint by checking a box to "opt-in" to the fraud allegations in the master complaint without supplementing the master complaint with

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[13] *See, e.g.*, Pretrial Order No. 79, *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-md-02327 (S.D. W. Va. Nov. 14, 2013), ECF No. 932.

[14] Pls.' Master Long-Form Compl., *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Prods. Liab. Litig.*, No. 3:16-md-02738 (D.N.J. Jan. 5, 2017), ECF No. 82.

[15] Case Management Order No. 2, *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Prods. Liab. Litig.*, No. 3:16-md-02738 (D.N.J. Feb. 7, 2017), ECF No. 102.

[16] Order, *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Prods. Liab. Litig.*, No. 3:16-md-02738 (D.N.J. May 26, 2020), ECF No. 13428 (directing completion of profile form for 1,000 randomly-selected cases); *see also* Pl.'s Profile Form Order (Apr. 20, 2021), ECF No. 19911 (directing all plaintiffs to complete profile form within 330 days).

[17] *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

[18] *Compare In re Trasylol Prods. Liab. Litig.*, 2008 WL 5190987 (Aug. 15, 2008) ("MDL plaintiffs, like all other federal plaintiffs, must plead with particularity 'the circumstances constituting fraud'"; one purpose of a SFC is to "present[] adequate particulars for any fraud claim"); *In re Zofran (Ondansetron) Prods. Liab. Litig.*, 2017 WL 1458193, at *6 (D. Mass. Apr. 24, 2017) ("[A]ny particularized allegation of fraud applicable only as to an individual — for example, a claim that a specific sales representative made a misrepresentation to a specific physician, who then prescribed the product to the plaintiff mother — should normally be set forth in the individual short-form complaint.").

individualized allegations.[19]

Rule 7 identifies the "only" pleadings that are "allowed," and "consolidated pleadings" are absent from the list. If Rule 16.1 is intended for the first time to expressly authorize this often-used pleading form, the Advisory Committee Notes should provide much-needed guidance that master and short-form complaints must collectively meet the pleading requirements attendant to Rule 7(a)(1) complaints.

II. Consolidated Pleadings Should Not Prevent Defendants from Moving to Dismiss Master Complaints that Fail to State a Claim.

The Federal Rules of Civil Procedure require more than simply notice to the defendant of the claims they face; they require that the defendant be permitted an early opportunity to challenge the legal sufficiency of those claims.[20] Yet without guidance in the Federal Rules, courts have taken varying approaches to motions to dismiss consolidated pleadings.[21] Some courts have interpreted master complaints as administrative devices and thereby barred defendants from filing motions to dismiss them. For instance, in the ongoing *Acetaminophen ASD-ADHD MDL*, the court directed that "motions to dismiss should be brought against particular complaints and not against the master complaint."[22] Others have permitted motions to dismiss, but "assess[ed] the sufficiency of plaintiffs' claims with substantial leniency."[23] Finally, some courts have held that "the Master Complaint is not immune from a motion to dismiss under Rule 12(b)(6)."[24]

In light of Rule 1 and the purposes of MDL proceedings — to "promote the just and efficient conduct" of civil actions pending in different districts[25] — the third approach is the

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[19] *See, e.g.*, Short-Form Compl., *In re Juul Labs, Inc., Marketing, Sales Practices, and Prods. Liabl. Litig.*, No. 3:19-md-02913 (N.D. Cal. Mar. 27, 2020), ECF No. 405.

[20] *See* Fed. R. Civ. P. 12(b)(6) ("[A] party may assert the following defenses by motion: . . . failure to state a claim upon which relief can be granted . . . .").

[21] *See In re Digitek Prods. Liab. Litig.*, 2009 WL 2433468, at *8 (S.D.W. Va. Aug. 3, 2009) ("[I]t is uncertain how a master complaint should be treated when it is challenged via Rule 12(b)(6) . . . .").

[22] *In re Acetaminophen ASD-ADHD Prods. Liab. Litig.*, 2023 WL 3026412, at *2 n.2 (S.D.N.Y. Apr. 20, 2023).

[23] *In re Trasylol Prods. Liab. Litig.*, 2009 WL 577726, at *8 (S.D. Fla. Mar. 5, 2009); *see also In re Allergan Biocell Textured Breast Implant Prods. Liab. Litig.*, 537 F. Supp. 3d 679, 720 (D.N.J. 2021) ("The Court Will Review the [Master Long-Form Personal Injury Complaint] with Leniency.").

[24] *In re Atrium Med. Corp.*, 2018 WL 11397878, at *5 (D.N.H. Jan. 8, 2018).

[25] 28 U.S.C. § 1407(a).

correct one. Nothing in the Federal Rules supports putting the court's thumb on the scale against dismissal, simply because lawyers have recruited hundreds or thousands of plaintiffs to bring the same claims. The MDL Subcommittee has commented extensively on the "Field of Dreams" problem — that the creation of an MDL itself generates claims.[26] And requiring defendants to file identical motions to dismiss hundreds or thousands of individual cases is neither just nor efficient. Where a motion to dismiss "raises issues common to all plaintiffs" that do not "require case-specific rulings to determine the sufficiency of each individual plaintiff's factual allegations," Defendants should be allowed to file a motion to dismiss the master complaint.[27] Where a motion to dismiss involves case-specific facts, it should be filed against the short-form complaint.

If the Federal Rules are going to encourage consideration of "consolidated pleadings," the Advisory Committee Notes should clarify that those consolidated pleadings are not immune from challenge under Rule 12(b)(6) or subject to a standard of review that is different from any other complaint filed in federal court.

Sincerely,

Gregory L. Halperin

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[26] *See, e.g.*, Advisory Comm. on Civil Rules, *MDL Subcommittee Report*, *supra*, at 143.

[27] *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, 2012 WL 3582708, at *3–4 (N.D. Ill. Aug. 16, 2012) ("Where defendants bring a motion to dismiss that raises issues common to all plaintiffs, however, the administrative nature of a Master Complaint does not necessarily preclude 12(b)(6) motion practice.").