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MULTIDISTRICT LITIGATION REFORM:
THE CASE FOR EARLIER APPLICATION OF FEDERAL PLEADING STANDARDS

By
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MULTIDISTRICT LITIGATION REFORM:
THE CASE FOR EARLIER APPLICATION OF FEDERAL PLEADING STANDARDS

INTRODUCTION: THE PROBLEM OF MDL PLEADING

In the context of multidistrict litigation (MDL), the Federal Judicial Center's *Manual for Complex Litigation* does not mention the landmark US Supreme Court decisions *Ashcroft v. Iqbal*[1] or *Bell Atlantic Corp. v. Twombly*,[2] (collectively, "*TwIqbal*"), and discusses Federal Rule of Civil Procedure 8, which governs pleading, only in the context of civil actions under the Racketeer Influenced and Corrupt Organizations Act.[3] The *MDL Standards & Best Practices* guide,[4] published by the Duke Law Center for Judicial Studies, does not discuss pleadings at all, although it does contain a two-page discussion of plaintiff fact sheets (PFS), which it characterizes as "[o]ne of the most useful and efficient initial mechanisms for obtaining individual plaintiff discovery."[5] However, the PFS as a litigation tool is not mentioned in any statute or rule, whereas *TwIqbal* and Rule 8 are binding law.

Given that complaints which are combined into an MDL vary widely based on the filing plaintiffs' law firm, especially when those complaints are originally filed in state court, some MDL judges have flinched from the amount of work that would be required to enforce the basic pleading standards of Rule 8 and *TwIqbal*. The following quotes from MDL courts support that conclusion:

- "[T]he Court does not intend to engage in the process of sorting through thousands of individual claims at the present time to determine which claims have or have not been properly presented."[6]

- "With more than 549 individual actions ... [t]he proper court to hear dispositive motions concerning the sufficiency of plaintiff-specific allegations is the transferor court."[7]

- "[C]ase-specific rulings are neither the purpose, nor the forte, of a court presiding over a multi-district litigation."[8]

- "The MDL procedure is instead designed to maximize efficiency and fairness by minimizing both the sheer number of rulings required."[9]

However, such attitudes contribute to the widespread problem of MDLs becoming warehouses for meritless, unvetted claims that would be quickly dismissed if brought as individualized actions. By refusing early on to require each plaintiff to meet the minimal pleading standards necessary for a case to survive a motion to dismiss, MDL courts expand the number of plaintiffs beyond those with viable causes of action and thus distort the true scope of MDL litigation. This distortion in turn affects other disputes, such as discovery, where the proportionality analysis is skewed by the presence of hundreds or thousands of unvetted plaintiffs. A lower pleading standard empowers plaintiffs' lawyers to "park" a significant number of plaintiffs' claims in an MDL as "inventory." Such unvetted inventory causes the precise harm that the MDL statute, is intended to prevent.

I. USE OF MASTER COMPLAINTS TO AVOID THE FEDERAL RULES

One means of evading *TwIqbal* and Rule 8 has been the "master complaint." In some contexts, "master" documents have a legitimate function in aggregated litigation. The *Manual for Complex Litigation* states:

> Some courts ... have attempted to adopt techniques to facilitate trials in MDL transferee courts—for example, by the filing of a consolidated amended class action complaint, or master complaint, as an original action in the transferee forum. That complaint then may serve as the vehicle for determination of common issues.[10]

However, nothing in the federal statute authorizing MDL,[11] the MANUAL FOR COMPLEX LITIGATION, or any appellate decision governing MDL practice[12] permits an MDL transferee judge to suspend the operation of the Federal Rules of Civil Procedure.[13]

With respect to Rule 8 and MDL master complaints, the great majority of MDL decisions governing such complaints recognize the judicial obligation, when proper motion is brought, to police pleadings—including master complaints—in accordance with Rule 8 standards. In an MDL, "the master complaint is examined for its sufficiency when the defendants file a motion to dismiss."[14]

In cases involving MDL master complaints, "we are bound to apply the pleading standard articulated in [*Twombly* and *Iqbal*]."[15] The *In re Katrina Canal Breaches Litigation*[16] court affirmed judgment on the pleadings against a master complaint that "superseded" the plaintiff's previous complaint.[17] Similarly, portions of the MDL master complaint were dismissed in *Hill v. Ford Motor Co.*, because the "plaintiffs

failed the *TwIqbal* test, as their assertion constituted little more than 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action.'"[18] The *In re FEMA Trailer Formaldehyde Products Liability Litigation* court held that "sufficient facts" were not "alleged to show that standing currently does exist" in the master complaint.[19] Many other MDL proceedings have applied governing Rule 8 standards to master complaints, both before and after the Supreme Court clarified the rules of pleading in *TwIqbal*.[20]

Unfortunately, not all MDL courts have been willing to follow Rule 8 with respect to master complaints in recent years. Some courts have sought to excuse master complaints from compliance with the Federal Rules on the ground that such complaints are mere "administrative tools" or "procedural devices" to which the ordinary rules of pleading do not apply.[21] The result, in too many MDLs, has been exactly the opposite of what multidistrict proceedings are supposed to accomplish. Instead of "just and efficient" resolution[22] of pre-trial proceedings, these courts' refusal to apply the Federal Rules has resulted in thousands of MDL plaintiffs being allowed to continue with actions despite their failure to allege essential facts that are required for individual plaintiffs under the Federal Rules. The longer that meritless claims linger on MDL dockets, the more intense the pressure becomes for MDL defendants to settle.[23]

This "administrative" approach to master complaints arises from misapplication of the law. The initial decisions ascribing an "administrative" nature to master complaints did not involve pleading, or indeed anything having to do with the Federal Rules, but rather occurred in the choice-of-law context.[24] *In re Trasylol Products Liability Litigation*[25] first mentioned pleading in passing, but only as to particularity of fraud allegations under Rule 9(b).[26] With the advent of *TwIqbal*, several MDL courts sought to downgrade master complaints to mere "administrative tools" as a way to avoid applying Rule 8.

Multidistrict litigation regarding prescription medical products is perhaps the most glaring example of MDL courts' refusal to enforce Rule 8. This is no accident. Such litigation is characterized by widespread solicitation of clients through mass media, minimal pre-litigation investigation of facts, cookie-cutter multi-plaintiff complaints with a dearth of any information about each specific plaintiff's claim, and hasty applications to the Judicial Panel for Multi-District Litigation so that MDL status can be touted in future advertising. In such litigation, "the information relevant to plaintiff's condition and the causes therefore are solely available to him," and defendants "have no information as to plaintiff's medical condition, the causes of his condition, or his prognosis."[27]

II. APPLICATION OF RULE 8 TO PLAINTIFF FACT SHEETS, AS A PLEADING SUBSTITUTE

The problems that arise from inefficient application of *TwIqbal* and Rule 8 to individualized pleadings could be resolved if MDL judges look upon appropriately drafted PFS as amended complaints with respect to all plaintiffs' factual allegations. One approach MDL judges should consider is the application of *TwIqbal* and Rule 8 immediately to the legal sufficiency oftransferred causes of action, as standardized by master complaints. Conversely, the adequacy of each plaintiff's factual allegations claims could await the submission of initial PFS. These PFS would not be the 30-page comprehensive histories seen in some MDLs—those could come later where necessary as a form of discovery not governed by Rule 8—but would instead track the requirements of Rule 8, as interpreted by those courts that have applied *TwIqbal* rigorously in relevant individual cases.[28]

For example, in individual litigation involving prescription products, Rule 8 has been held to require that each plaintiff set forth the "who, what, when, and where" of their complaint against the defendants.[29] Complaints must allege: (1) plausible facts identifying the plaintiff as a citizen of a state to establish jurisdiction;[30] (2) facts establishing the identity of the product that the plaintiff used;[31] (3) the nature of the alleged product defect;[32] (4) identification of any alleged statutory or regulatory violations;[33] (5) identification of the language of any express warranty;[34] and (6) facts that plausibly establish that the claimed defect caused harm to the plaintiff.[35] Nor can

"information and belief" allegations be credited under Rule 8, where the information is accessible to the pleader.[36]

Appropriate MDL practices should set a reasonable, but prompt schedule for *TwIqbal* motions based on PFS. One such schedule is set forth in pending legislation that recently passed the House of Representatives.[37] It would require that "within the first 45 days" of the action reaching an MDL court, each MDL plaintiff must provide "a submission sufficient to demonstrate that there is evidentiary support" for her claims. Within 90 days thereafter the MDL court must determine the sufficiency of the submission. Insufficient submissions would be dismissed without prejudice pending the "tender[ing] [of] a sufficient submission" within another 30 days. A second inadequate submission would require dismissal with prejudice.[38] Under Rule 8, this may or may not be an optimal schedule, but this legislation is a strong reminder that, if the judiciary will not clean up the MDL mess, other actors may well do so.

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."[39] MDL case management orders "should include the usual interim breakpoints, *e.g.*, filing of a consolidated amended complaint (where appropriate), filing and briefing on motions to dismiss."[40] "[W]here a defendant moves to dismiss some but not all of the plaintiffs' claims, allow other discovery to proceed while *you decide* the motion."[41] Thus, MDL transferee courts are supposed to reduce the pleadings to those matters

actually in dispute. Use of Rule 8, in conjunction with PFS, is the type of pretrial proceeding MDLs are supposed to handle, since defendants do not have effective remedies of this sort after remand.[42] Using PFS in this way removes current excuses for ignoring Rule 8, since a properly drafted PFS would incorporate all of the facts upon which *TwIqbal* "plausibility" turns.

Currently, it is not unusual in a pharmaceutical product-liability MDL, for instance, for the court to utilize a case management order that requires completion of PFS and provides medical/pharmacy records documenting use of the defendant's product.[43] This process is typically followed by a "deficiency letter" process, under which the defendants must analyze PFS and identify their deficiencies—including such basic shortcomings as not identifying the dates the plaintiff used the defendant's prescribed product or a pharmacy that dispensed the product, and failing to assert the plaintiff suffered from the medical condition which is the subject of the litigation after the ingestion of the product. After receiving a deficiency letter, plaintiffs typically have still more time to correct the deficiencies before any issue can be brought to the court's attention. Unlike Rule 8, the deficiency letter process puts the onus, in time and expense, on defendants to police the adequacy of plaintiffs' responses. Use of Rule 8 as enforcement tool would be much more efficient.

The requirement that a PFS be completed is often accompanied by a mandated medical-record-collection process, in which plaintiffs must provide medical

authorizations. Defendants routinely hire a third-party company to obtain the medical records.[44] Once again, the burden of establishing MDL plaintiffs' claims—assigned to plaintiffs by Rule 8—is effectively shifted to the defendants, who have to pay for the collection of pharmacy and medical records.

Thus, rather than requiring plaintiff's counsel to vet their cases before filing by securing the "who, what, when, and where of their client's potential lawsuit," MDL practice currently imposes that expense on defendants. Defendants must pay for the lawyer and paralegal time to determine basic deficiencies in individual cases, and pay third-party vendors to collect plaintiff records.[45]

III. PLAINTIFF FACT SHEETS AND EQUITABLE COST ALLOCATION

While the PFS process ultimately results in numerous voluntary dismissals and successful motions to dismiss, current MDL practices impose the burden and expense of vetting the plaintiffs on the defendants, rather than requiring plaintiffs' counsel to confirm that their own clients have viable cases before bringing suit in the first instance, as mandated by Federal Rules of Civil Procedure 1, 11, and 12. Indeed, the defendant in *In re Digitek* described the "cost of determining each meritless claim on a case by case basis" as "staggering"—"[D]epletion of insurance proceeds by defense costs incurred by defending meritless cases is an interest that all parties and this Court should recognize."[46]

Ultimately, in *Digitek* the entire MDL proved to be a waste of time and resources, since no plaintiff proved that that the defendant sold any unit of the drug containing the claimed defect.[47] Had the *Digitek* plaintiffs been required to allege individualized exposure and causation, as Rule 8 requires, there would have been no need to waste years of effort in unproductive MDL discovery.

The PFS process and medical-record-collection process becomes particularly burdensome when large groups of plaintiffs are joined together in one complaint and all plaintiffs sue a number of co-defendants who have each manufactured a product in the class of products at issue, requiring defendants to ascertain which plaintiff (if any) has a plausible/viable claim against which defendant. While these cases can be sorted out and whittled down through arduous discovery, MDL courts' failure to uphold *TwIqbal* pleading standards at the outset again shifts to the defendants what should be the plaintiffs' burden to investigate their cases before filing. This is hardly a "just and efficient" result, since it prolongs and perpetuates thousands of cases that should never have been filed in the first instance. Even from a plaintiffs' perspective, current MDL practice means that defendants must expend substantial resources on meritless claims, rather than conserving them for plaintiffs with viable claims.

IV. FIXING THE PROBLEM

The MANUAL FOR COMPLEX LITIGATION should be revised to specify that Rule 8 applies to an initial PFS, and that initial PFS should be treated as a factual amendment

to each plaintiff's complaint. Such a procedure would categorize all treatment of MDL master complaints as "administrative" without violating or nullifying Rule 8,[48] and without preventing early culling of meritless actions from MDL dockets. Conversely, such a reform would allow enforcement of *Twiqbal* standards against a standardized form document, rather than wastefully against heterogeneous complaints on a one-by-one basis.

Courts should not endorse any process that implies the existence of an "MDL exception" to federal pleading standards. A lower bar for MDL litigants disregards the pleading standards required of all litigants by the US Supreme Court and by Congress, both of which approved the language of Rule 8.

This hybrid form of complaint/PFS would achieve the dual goals of (1) ensuring that Rule 8 pleading standards are uniformly applied to all cases and (2) streamlining the pleading process. Under this hybrid system, each plaintiff would still be required to set forth the "who, what when and where" of their individual complaint in a short form complaint, while adopting the general allegations of a master complaint in a check off form. This process would still require *TwIqbal* "plausibility" for each individual plaintiff's cause of action, and thus would provide defendants with enough information to assert potential applicable affirmative defenses as well as potential 12(b)(6) motions.

ENDNOTES

[1] 556 U.S. 662 (2009).

[2] 550 U.S. 544 (2007).

[3] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 35.31, at 702-07 (Fed. Jud. Cntr. 2004).

[4] MDL STANDARDS & BEST PRACTICES (Duke L. Cntr. Sept. 11, 2014).

[5] *Id.* at 11.

[6] *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 808 F. Supp. 2d 943, 965 (E.D. La. 2011), *aff'd on other grounds*, 745 F.3d 157 (5th Cir. 2014).

[7] *In re Zimmer Nexgen Knee Implant Products Liability Litigation*, 2012 WL 3582708, at *4 (N.D. Ill. Aug. 16, 2012).

[8] *In re Nuvaring Products Liability Litigation*, 2009 WL 4825170, at *2 & n.3 (E.D. Mo. Dec. 11, 2009) (refusing to rule on over 200 motions to dismiss; viewing the "goal" of the MDL solely in terms of "expeditious and efficient discovery"); *see In re Nuvaring Products Liability Litigation*, 2009 WL 2425391, at *1 (E.D. Mo. Aug. 6, 2009) (denying all individualized motions to dismiss).

[9] *In re Phenypropanolamine Products Liability Litigation*, 2004 WL 2034587, at *2 (W.D. Wash. Sept. 3, 2004).

[10] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.36, at 373. *See also id.* at § 40.52 ("Sample Orders") (allegations in master complaint "would be suitable for adoption by reference in individual cases").

[11] 21 U.S.C. § 1407.

[12] The US Supreme Court has addressed MDL master complaints only once, in a footnote. *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 905 n.3 (2015) ("Parties may elect to file a 'master complaint' and a corresponding 'consolidated answer,' which supersede prior individual pleadings. In such a case, the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings.").

[13] To the contrary, in Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597, 604-05 (1991), an experienced MDL transferee judge outlined a detailed procedure for deciding—not avoiding—motions to dismiss brought against master complaints.

[14] *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586, 590 (6th Cir. 2013). Thus, MDL plaintiffs "may not sidestep customary jurisdictional rules by saying that the complaint at hand lacked legal effect." *Id.* at 591.

[15] *Ironworkers Local Union 68 v. AstraZeneca Pharmaceuticals, LP*, 634 F.3d 1352, 1359 (11th Cir. 2011) (affirming dismissal of all counts of MDL master complaint for failure to plead "plausible" causation and damages).

[16] 309 F. Appx. 836 (5th Cir. 2009).

[17] *Id*. at 838.

[18] 975 F. Supp. 2d 1351, 1360 (N.D. Ga. 2013) (quoting *TwIqbal*).

[19] 570 F. Supp. 2d 851, 857 (E.D. La. 2008).

[20] *In re Takata Airbag Products Liability Litigation*, 193 F. Supp. 3d 1324, 1332, 1336-42 (S.D. Fla. 2016) (applying *TwIqbal* and dismissing several counts of master complaint); *In re Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico, on April 20, 2010*, 168 F. Supp. 3d 908, 915-17 (E.D. La. 2016) (concluding that all "test-case" plaintiffs in master complaint "failed to plausibly allege valid claims"); *In re New England Compounding Pharmacy, Inc. Products Liability Litigation*, 2014 WL 4322409, at *16 (D. Mass. Aug. 29, 2014) (dismissing master complaint claims under Tennessee law for improper damages); *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, 902 F. Supp. 2d 808, 814 (E.D. La. 2012) (MDL master complaint did not "plausibly allege facts" regarding purported economic loss); *In re FEMA Trailer Formaldehyde Products Liability Litigation*, 838 F. Supp. 2d 497, 506-16 (E.D. La. 2012) (applying *TwIqbal* and dismissing several counts of master complaint); *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 2011 WL 4575696, at *11 (E.D. La. Sept. 30, 2011) (dismissing MDL master complaint); *In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation*, 664 F. Supp. 2d 752, 765-68 (E.D. Mich. 2009) (deciding motions to dismiss against master complaint under nine states' laws); *In re Medtronic, Inc. Sprint Fidelis Leads Products Liability Litigation*, 592 F. Supp. 2d 1147, 1158-62 (D. Minn. 2009) (dismissing 21 counts of MDL master complaint), *aff'd*, 623 F.3d 1200 (8th Cir. 2010); *In re Digitek Products Liability Litigation*, 2009 WL 2433468, at *7, 9 (S.D. W. Va. Aug. 3, 2009) (applying *TwIqbal* standards despite "administrative device" argument; finding master complaint sufficient); *Barasich v. Shell Pipeline Co.*, 2008 WL 6468611, at *1-2 (E.D. La. June 19, 2008) (granting *TwIqbal* motion to dismiss master complaint); *In re ConAgra Peanut Butter Products Liability Litigation*, 2008 WL 2132233, at *4 (N.D. Ga. May 21, 2008) (granting in part and denying in part *Twombly*/*Iqbal* motion to dismiss master complaint); *In re World Trade Center Disaster Site Litigation*, 2008 WL 1927265, at *3 (S.D.N.Y. May 1, 2008) (dismissing master complaint), *reconsideration denied*, 2008 WL 2704317 (S.D.N.Y. July 10, 2008); *In re Katrina Canal Breaches Consolidated Litigation*, 533 F. Supp. 2d 615, 642-43 (E.D. La. 2008) (granting *TwIqbal* motion to dismiss parts of master complaint), *aff'd*, 673 F.3d 381 (5th Cir. 2012); *In re Bausch & Lomb Inc.*, 2007 WL 3046682, at *7 (D.S.C. Oct. 11, 2007) (holding "conclusory statements" concerning injury in master complaint failed *TwIqbal*); *In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation*, 2007 WL 2421480, at *5-10 (E.D. Mich. Aug. 24, 2007) (granting motion to dismiss several counts of master complaint); *In re Educational Testing Service Praxis Principles of Learning & Teaching, Grades 7-12 Litigation*, 517 F. Supp. 2d 832, 840-54 (E.D. La. 2007) (state-specific adjudication of motion to dismiss master complaint); *In re Guidant Corp.*

Implantable Defibrillators Products Liability Litigation, 484 F. Supp. 2d 973, 983 (D. Minn. 2007) (dismissing several counts of master complaint); *Gray v. Derderian*, 464 F. Supp. 2d 105, 109-111 (D.R.I. 2006) (dismissing several defendants from master complaint); *Gray v. Derderian*, 371 F. Supp.2d 98, 104-08 (D.R.I. 2005) (dismissing several counts of master complaint); *In re September 11 Litigation*, 280 F. Supp. 2d 279, 295-313 (S.D.N.Y. 2003) (dismissing parts of master complaint), *interlocutory certification denied*, 2003 WL 22251325, (S.D.N.Y. Oct. 1, 2003); *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 153 F. Supp. 2d 935, 948 (S.D. Ind. 2001) (dismissing several counts of master complaint).

[21] *See*, *e.g.*, *In re Zimmer Nexgen Knee Implant Products Liability Litigation*, 2012 WL 3582708, at *3-4 (N.D. Ill. Aug. 16, 2012).

[22] 28 U.S.C. § 1407.

[23] "[M]ass tort proceedings using the MDL process have become magnets for advertising-driven, poorly investigated (and often patently invalid) personal injury claims." House Report 115-25, "Fairness in Class Action Litigation Act of 2017," at 5 (U.S. House of Rep. March 7, 2017). For example, in the *Phenypropanolamine* MDL more than 300 motions to dismiss were stricken, not because they were unmeritorious, but because they would have required "examining the plaintiffs' individual complaints and applying the applicable state law." *Phenypropanolamine*, 2004 WL 2034587, at *1. Adopting a "narrow role for an MDL transferor court," the court refused to dismiss any action, requiring instead that Rule 8 motions "be refiled with the transferor court upon remand," *id.* at *2—a remand that never took place.

[24] *See In re Mercedes-Benz Tele Aid Contract Litigation*, 257 F.R.D. 46, 56 (D.N.J. 2009); *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 489 F. Supp. 2d 932, 935-36 (D. Minn. 2007); *In re Vioxx Products Liability Litigation*, 239 F.R.D. 450, 454 (E.D. La. 2006); *In re Propulsid Products Liability Litigation*, 208 F.R.D. 133, 141-42 (E.D. La. 2002). These decisions addressed the law applicable to master complaints filed in the MDL forum, and regarded MDL master complaints as "administrative" conveniences so that issues ordinarily determined by the law of the transferor forum where individual plaintiffs originally brought their actions could not be circumvented by direct filing. More recent choice-of-law decisions do the same. *See In re Fresenius Granuflo/NaturaLyte Dialysate Products Liability Litigation*, 76 F. Supp. 3d 294, 300-05 & 314 n.11 (D. Mass. 2015).

[25] 2009 WL 577726, at *6-7 (S.D. Fla. Mar. 5, 2009).

[26] In *Trasylol*, the actual holding, as opposed to the *dictum*, was that "leniency must not overreach so as to effect a negation of the policy behind Rule 9." 2009 WL 577726, at *9. Thus, "a broad claim that a Plaintiff or a Plaintiff's physicians relied on fraudulent or misleading statements ... absent some recitation of what oral or written statement a particular drug representative made to a specific physician ..., is an insufficient basis for allowing Plaintiffs to proceed." *Ibid.* Thus, the *Trasylol* MDL judge actually decided the motion to dismiss on its merits. *See also In re Trasylol Products Liability Litigation*, 2011 WL 2784237, at *5 (S.D. Fla. July 13, 2011) (enforcing dismissal order against similarly-pleaded tag-along complaints).

[27] *Moore v. C.R. Bard, Inc.*, 217 F. Supp. 3d 990, 996 (E.D. Tenn. 2016).

[28] Since MDL judges are "charged with the responsibility of 'just and efficient conduct' of the multiplicity of actions in an MDL," *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1231 (9th Cir. 2006), it would be appropriate to apply *TwIqbal* rigorously as an early screening device to weed out meritless cases.

[29] *See*, *e.g.*, *In re Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*, 701 F. Supp. 2d 356, 366 (E.D.N.Y. 2010); *In re Actimmune Marketing Litigation*, 2010 WL 3463491, at *10 (N.D. Cal. Sept. 1, 2010), *aff'd*, 464 F. Appx. 651 (9th Cir. 2011).

[30] "A party's citizenship is determined by her domicile, and the domicile of an individual is his true, fixed and permanent home and place of habitation." *Washington v. Hovensa LLC*, 652 F.3d 340, 344 (3d Cir. 2011) (citation and quotation marks omitted). "[A] party seeking to invoke diversity jurisdiction should be able to allege affirmatively the actual citizenship of the relevant parties." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). Citizenship, like every other basis for jurisdiction, must be affirmatively pleaded under *TwIqbal*. *See, e.g.*, *Antonacci v. City of Chicago*, 640 F. Appx. 553, 556 (7th Cir. 2016); *Young-Gibson v. Patel*, 476 F. Appx. 482, 483 (2d Cir. 2012); *Farmer v. Fisher*, 386 F. Appx. 554, 558 (6th Cir. 2010); *Vis Vires Group, Inc. v. Endonovo Therapeutics, Inc.*, 149 F. Supp. 3d 376, 390 (E.D.N.Y. 2016).

[31] *Patterson v. Novartis Pharmaceuticals Corp.*, 451 F. Appx. 495, 497-98 (6th Cir. 2011); *Moore*, 217 F. Supp. 3d at 996; *Weddle v. Smith & Nephew, Inc.*, 2016 WL 1407634, at *5 (N.D. Ill. April 11, 2016); *Shells v. X-Spine Systems, Inc.*, 2015 WL 736981, at *3 (W.D. Okla. Feb. 20, 2015); *Henderson v. Sun Pharmaceuticals Industries, Ltd.*, 809 F. Supp. 2d 1373, 1378-79 (N.D. Ga. 2011); *Timmons v. Linvatec Corp.*, 263 F.R.D. 582, 584–85 (C.D. Cal. 2010); *Gilmore v. DJO Inc.*, 663 F. Supp. 2d 856, 860-61 (D. Ariz. 2009).

[32] *Rodman v. Stryker Sales Corp.*, 604 F. Appx. 81, 82 (2d Cir. 2015); *Jeffries v. Boston Scientific Corp.*, 2017 WL 2645723, at *4 (D. Md. June 20, 2017); *Lussan v. Merck Sharp & Dohme Corp.*, 2017 WL 2377504, at *2 (E.D. La. June 1, 2017); *House v. Bristol-Myers Squibb Co.*, 2017 WL 55876, at *4 (W.D. Ky. Jan. 4, 2017); *Moore*, 217 F. Supp. 3d at 995; *Scianneaux v. St. Jude Medical S.C., Inc.*, 961 F. Supp.2d 808, 813 (E.D. La. 2013); *Gross v. Stryker Corp.*, 858 F. Supp. 2d 466, 494 (W.D. Pa. 2012); *Moore v. Mylan Inc.*, 840 F. Supp. 2d 1337, 1345 (N.D. Ga. 2012); *Mills v. Bristol-Myers Squibb Co.*, 2011 WL 4708850, at *3 (D. Ariz. Oct. 7, 2011); *Gelber v. Stryker Corp.*, 752 F. Supp. 2d 328, 334 (S.D.N.Y. 2010); *Maness v. Boston Scientific*, 751 F. Supp. 2d 962, 969 (E.D. Tenn. 2010); *Ilarraza v. Medtronic, Inc.*, 677 F. Supp. 2d 582, 589 (E.D.N.Y. 2009).

[33] *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335, 1341 (10th Cir. 2015) (Gorsuch, J.); *Rodriguez v. American Medical Systems, Inc.*, 597 F. Appx. 226, 229 (5th Cir. 2014); *Wolicki-Gables v. Arrow Int'l, Inc.*, 634 F.3d 1296, 1301 (11th Cir. 2011); *Lawrence v. Medtronic*, 2017 WL 826963, at *1 (C.D. Cal. Feb. 27, 2017); *Yosowitz v. Covidien LP*, 182 F. Supp. 3d 683, 691-92 (S.D. Tex. 2016); *Clements v. Sanofi-Aventis, U.S., Inc.*, 111 F. Supp. 3d 586, 598 (D.N.J. June 11, 2015); *Sprint Fidelis Leads*, 592 F. Supp. 2d at 1158.

[34] *Rodriguez*, 597 F. Appx. at 231; *Jeffries*, 2017 WL 2645723, at *5; *Lussan*, 2017 WL 2377504, at *3; *House*, 2017 WL 55876, at *6; *Spier v. Coloplast Corp.*, 121 F. Supp. 3d 809, 818 (E.D. Tenn. 2015); *Clements*, 111 F. Supp. 3d at 602; *Byrnes v. Small*, 60 F. Supp. 3d 1289, 1301 (M.D. Fla. 2015); *Martin v. Medtronic, Inc.*, 63 F. Supp. 3d 1050, 1060-61 (D. Ariz. 2014); *McConologue v. Smith & Nephew, Inc.*, 8 F. Supp. 3d 93, 114-15 (D. Conn. 2014); *Lindler v. Mentor Worldwide LLC*, 2014 WL 6390307, at *2 (D.S.C. Oct. 23, 2014); *Gelber* 752 F. Supp. 2d at 335; *Williams v. Cyberonics, Inc.*, 654 F. Supp. 2d 301, 308 (E.D. Pa. Sept. 10, 2009), *aff'd*, 388 F. Appx. 169 (3d Cir. 2010).

[35] *Rollins v. Wackenhut Services, Inc.*, 703 F.3d 122, 130 (D.C. Cir. 2012); *Funk v. Stryker Corp.*, 631 F.3d 777, 782 (5th Cir. 2011); *Rodman*, 604 F. Appx. at 82; *McElroy v. Amylin Pharmaceuticals, Inc.*, 573 F. Appx. 545, 546 (6th Cir. 2014); *Bailey v. Janssen Pharmaceutica, Inc.*, 288 F. Appx. 597, 608-09 (11th Cir. 2008); *Jeffries*, 2017 WL 2645723, at *3; *Becker v. Smith & Nephew, Inc.*, 2015 WL 268857, at *4 (D.N.J. Jan. 20, 2015); *Kennedy v. Pfizer, Inc.*, 2014 WL 4093065, at *5 (W.D. La. Aug. 15, 2014); *Gonzalez v. Bayer Healthcare Pharmaceuticals, Inc.*, 930 F. Supp. 2d 808, 813-14 (S.D. Tex. 2013); *Bergstresser v. Bristol-Myers Squibb Co.*, 2013 WL 6230489, at *8 (M.D. Pa. Dec. 2, 2013); *Mills*, 2011 WL 4708850, at *3. Most prescription-medical-product liability suits involve warning claims under the learned intermediary rule, so many of these cases require pleading that a different warning would have changed the relevant physician's prescription decision. *E.g.*, *Lussan*, 2017 WL 2377504, at *3 (applying *TwIqbal* to causation in warning context); *Moore*, 217 F. Supp. 3d at 995 (same).

[36] *In re Darvocet, Darvon, & Propoxyphene Products Liability Litigation*, 756 F.3d 917, 931 (6th Cir. 2014); *Aston v. Johnson & Johnson*, 2017 WL 1214399, at *7 (D.D.C. Mar. 31, 2017); *Teixeria v. St. Jude Medical S.C., Inc.*, 193 F. Supp. 3d 218, 225-26 (W.D.N.Y. 2016); *Stephens v. Teva Pharmaceuticals, U.S.A., Inc.*, 70 F. Supp. 3d 1246, 1249 (N.D. Ala. 2014); *Mills*, 2011 WL 4708850, at *2; *Berkowitz v. Metwest Inc.*, 2010 WL 5395777, at *3 n.6 (D. Colo. Dec. 23, 2010); *Funk v. Stryker Corp.*, 673 F. Supp. 2d 522, 525 (S.D. Tex. 2009), *aff'd*, 631 F.3d 777 (5th Cir. 2011).

[37] *See* H.R. 985, the "Fairness in Class Action Litigation & Furthering Asbestos Claim Transparency Act of 2017.

[38] *Id. at* § 105.

[39] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.13, at 42.

[40] TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES, at 4 (J.P.M.D.L. & Fed. Jud. Cntr. 2009).

[41] *Id.* (emphasis added).

[42] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.37, at 376 (transferor courts only hear "dispositive motions" after "the MDL pretrial proceedings are concluded and individual cases are remanded").

[43] *See*, *e.g.*, *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1224-25 (9th Cir. 2006) (describing fact sheet procedure in detail); *In re Guidant Corp. Implantable*

Defibrillators Products Liability Litigation, 496 F.3d 863, 866 (8th Cir. 2007); *In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 576-77 (S.D. Tex. 2005).

[44] *See*, *e.g.*, *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 412 F. Appx. 527, 529 (3d Cir. 2011) (litigation over records production); *In re Accutane Products Liability Litigation*, 2006 WL 1281598, at *1-2 (M.D. Fla. May 9, 2006) (same); *In Re Serzone Products Liability Litigation*, 2003 WL 22319060 (S.D.W. Va. July 11, 2003) (medical records production order); *In re Norplant Contraceptive Products Liability Litigation*, 1997 WL 28427 (E.D. Tex. Jan. 17, 1997) (same).

[45] *See In re Digiteck Product Liability Litigation*, 264 F.R.D. 249 (S.D. W. Va. 2010), in which the Defendants reported to the court that they would soon exceed $100,000 in medical-record-production expenses, and that "[d]efendants are spending money and resources to evaluate these cases, collect records and analyze records which only ultimately serve to prove that these cases should never have been filed." *Id.* at 254.

[46] *Digitek*, 264 F.R.D. at 254.

[47] *In re Digitek Products Liability Litigation*, 821 F. Supp. 2d 822, 836 (S.D. W. Va. 2011) (granting summary judgment because "not a single double-thick Digitek was ever found outside the plant").

[48] *See Gelboim*, 135 S. Ct. at 904 n.3 ("[N]o merger occurs, however, when the master complaint is not meant to be a pleading with legal effect but only an administrative summary.") (citation and quotation marks omitted); *Refrigerant Compressors*, 731 F.3d at 590-91 (holding that MDL master complaint that was an "operative pleading" could "supersede[] any prior individual complaints," but not a mere "administrative summary"); *In re General Motors LLC Ignition Switch Litigation*, 2015 WL 3619584, at *8 (S.D.N.Y. June 10, 2015) ("Whether to treat such a complaint as 'administrative' or 'superseding' will depend on the particulars of a given MDL."); *Fresenius Granuflo/NaturaLyte*, 76 F. Supp. 3d at 314 n.11 ("noting that the previously applicable long form complaint is not necessarily superseded for purposes of motion to dismiss practice" by "administrative" MDL master complaint) .